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 conclusions[1], has already been addressed both by the EU institutions[2] and by academic scholars[3]. 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.

[2] See, *inter alia*, 2005 Hague Programme, point 3.3.1, p.12; COUNCIL OF THE EUROPEAN UNION, EUROPEAN COMMISSION, Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, 12.8.2005, OJ C 198, p.19; 2010 Stockholm Programme, point 3.3.1, p.12; EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme, Brussels, 20.4.2010, COM(2010) 171 final, p. 5,18.

[3] See, in particular, the study on cross-border gathering and use of evidence carried out at Ghent University: G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, Maklu 2010, and: I. ARMADA, *The European Investigation Order and the Lack of European Standards for Gathering Evidence. Is a Fundamental Rights-Based Refusal the Solution?*, New Journal of European Criminal Law, Vol. 6, Issue 1/2015; L. BACHMAIER WINTER, *European investigation order for obtaining evidence in the criminal proceedings. Study of the proposal for a European directive*, Zeitschrift für Internationale Strafrechtsdogmatik, 9/2010; C. CLAVERIE-ROUSSET, *The admissibility of evidence in criminal proceedings between European Union Member States*, European Criminal Law Review 11/2013; S. DEPAUW, *A European Evidence (Air)Space? Taking Cross-Border Legal Admissibility of Forensic Evidence to a Higher Level*, European Criminal Law Review, 1/2016; C. GANE, M. MACKAREL, *The Admissibility of Evidence Obtained from Abroad into Criminal Proceedings – The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained*, European Journal of Crime, Criminal Law and Criminal Justice 1996, Vol. 4, Issue 2; S. GLESS, *Free movement of evidence in Europe*, [in:] *El derecho procesal penal en la Unión Europea. Tendencias actuals y perspectivas de futuro*, T.A. DEU, F.G. INCHAUSTI, M.C. HERNEN, Madrid 2006; C. HEARD, D. MANSELL, *The European Investigation Order. Changing the Face of Evidence- Gathering in EU Cross-Border Cases*, New Journal of European Criminal Law, Vol. 2, Issue 4(2011); C. JOUBERT, *Judicial Control of Foreign Evidence in Comparative Perspective*, Amsterdam 2005; L. KLIMEK, *Free movement of evidence in criminal matters in the EU*, The Lawyer Quarterly 4/2012; H. KUCZYŃSKA, *Wspólny obszar postępowania karnego w prawie Unii Europejskiej*, Warszawa 2008, p. 120-150; H. KUCZYŃSKA, *Zagadnienia dopuszczalności materiału dowodowego w sprawach karnych na obszarze Unii Europejskiej*, Przegląd Prawa Europejskiego i Międzynarodowego, 1 (28) 2012; A. LACH, *Europejska pomoc prawna w sprawach karnych*, Toruń 2008; A. LACH, *Transnational Gathering of Evidence in Criminal Cases in the EU de lege lata and de lege ferenda*, EUCRIM 3/2009; A. MANGIARACINA, *A New Controversial Scenario in the Gathering of Evidence at the European Level. The Proposal for a Directive on the European Investigative Order*, Utrech Law Review, Vol. 10, Issue 1; B. NITA-ŚWIATŁOWSKA, *Wykorzystywanie dowodów pozyskanych za granicą* [in:] *Pozaprocesowe pozyskiwanie dowodów i ich wykorzystanie w procesie karnym*, P. HOFMAŃSKI, P. CZARNECKI, D. SZUMIŁO-KULCZYCKA (eds.), C.H. Beck 2015; S. RUGGERI (ed.), *Transnational Evidence and*

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[4], the EU still lacks rules which directly address admissibility of evidence gathered or transferred in the EU cross-border context[5]. 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[6]. 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[7]. 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'[8] or forum shopping[9] within

Multicultural Inquiries in Europe, Springer 2014; S. PEERS, The proposed European Investigation Order: Assault on human rights and national sovereignty, <www. statewatch.org>; A. RYAN, *Towards a System of European Criminal Justice. The problem of admissibility of evidenc*e, Routledge 2014; J. R. SPENCER, *The Concept of 'European Evidence'*, ERA Forum 2003, Volume 4, Issue 2; J. R. SPENCER, *The Problems of Trans-border Evidence and European Initiatives to Resolve Them*, Cambridge Yearbook of European Legal Studies, 2007/9; G. VERMEULEN, *Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence*, Maklu 2011.

[4] S. GLESS, *Free movement…*, p. 122, L. KLIMEK, *Free movement…*, p. 251.

[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.

[6] See: M. DANIELE, *Evidence Gathering in the Realm of the European Investigation Order. From National Rules to Global Principles*, New Journal of European Criminal Law, Vol. 6, Issue 2, 2015, p. 181-182; S. GLESS, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, Utrecht Law Review, Vol. 9, Issue 4 (2013), p. 95 *et seq*.

[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

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[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[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[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[13].

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of admissibility is lower; see in more detail: C. GANE, M. MACKAREL, *The Admissibility…*, p.113-114.

[9] S. GLESS, *Transnational Cooperation….*, p. 97-98.

[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*

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[14] 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[15].

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

judiciaire pénal européen, G. DE KERCKHOVE, A. WEYEMBERGH, 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.

[15] G. VERMEULEN, *Free gathering…*, p. 42-43; G. VERMEULEN, W. DE BONDT, C. RYCKMAN (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Maklu 2012, p. 446-447.

of evidence[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 *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[17] and in the academic literature[18]. Thus far, progress towards common standards has been made with regard to the following measures: expert evidence[19] and forensic evidence[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

[16] Art. 82.2 TFEU: *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 (…).*

[17] See: EUROPEAN COMMISSION, Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11.11.2009, COM(2009) 624 final, which reads: *There is therefore a risk that the existing rules on obtaining evidence in criminal matters will only function effectively between Member States with similar national standards for gathering evidence (…)* ***The best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters***, p. 5-6; EUROPEAN COMMISSION, Communication from the Commission to the Council and the European Parliament: Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, 19.5.2005,COM (2005) 195 final, point 3.1.1.3, p. 7; EUROPEAN COMMISSION, Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen, Brussels, 10.6.2009, COM (2009) 262 final, point 4.4.2, p.17; EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme, Brussels 20.4.2010, COM(2010) 171 final, p. 18.

[18] See: S. ALLEGREZZA, *Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility*, Zeitschrift für Internationale Strafrechtsdogmatik 9/2010, p. 574; W. DE BONDT, G. VERMEULEN, *First things first. Characterising mutual recognition in criminal matters* [in:] M. COOLS et al., *EU Criminal Justice, Financial and Economic Crime: new perspectives*, Maklu 2011, p. 31; W. DE BONDT, G. VERMEULEN, *Free movement of scientific…*, p. 71-72; G. VERMEULEN, *Free gathering…*, p. 44-45; J.R. SPENCER, *The Problems…*, p. 479-480; J.R. SPENCER, *The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer*, Zeitschrift für internationale Strafrechtsdogmatik 9/2010, p. 605-606; G.VERNIMMEN-VAN TIGGELEN, L. SURANO, *Analysis of the future of mutual recognition in criminal matters in the European Union. Final Report*, Brussels 2008, p. 34.

[19] W. DE BONDT, G. VERMEULEN, *Free movement of scientific….*, p. 69-79.

[20] S. DEPAUW, *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[21]. 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[22]. Otherwise, there would be a frustrating distinction in the admissibility of evidence gathered and transferred in the EU cross-border context.

[21] G. VERMEULEN, *Free gathering…*, p. 45-47.

[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[23]. 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[24] and still carries out other projects in this matter[25]. These initiatives provide for numerous rules on procedure, containing guidelines on how certain acts, parts or phases of criminal proceedings shall be conducted[26]. 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[27].

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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.

[24] EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 26.10.2010, OJ L 280/1; EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, Directive 2012/13/EU on the right to information in criminal proceedings, 1.6.2012,OJ L 142/1; EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 14.11.2012, OJ L 315/1; EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, Directive 2013/48/EU 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, 6.11.2013, OJ L 294/1; EUROPEAN PARLIAMENT, COUNCIL OF THE EUROPEAN UNION, Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, 9.3.2016, OJ L 61/1.

[25] EUROPEAN COMMISSION, Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, 27.11.2013, COM(2013), 822/2; EUROPEAN COMMISSION, Proposal for a Directive on provisional legal aid for suspected or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, 27.11.2013, COM(2013)824; EUROPEAN COMMISSION, Draft Recommendations on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, C(2013) 8178/2.

[26] M. CAIANIELLO, *To Sanction (or not to Sanction) Procedural Flaws at EU Level? A Step forward in the Creation of an EU Criminal Process*, European Journal of Crime, Criminal Law and Criminal Justice, No. 22 (2014), p. 317-318.

[27] G. VERMEULEN, W. DE BONDT, Y. VAN DAMME, *EU cross-border gathering…*, p. 104-105.

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, on-line 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.

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)?

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[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.

[28] With regard to the status of evidence obtained in the EU see: T. HOWSE, *England,* p.173; I. PEÇI, *The Netherlands,* p. 123; A. RYAN, *Ireland,* p. 352-353; J. TRICOT, *France,* p. 225; L. BACHMAIER, *Spain,* p. 710, C. NOWAK, S. STEINBORN, *Poland,* p. 529-530 [all in:] *Toward a Prosecutor for the European Union. Volume 1. A Comparative Analysis*, K. LIGETI (ed.), Hart Publishing 2013.

- *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.