UDK 343.14
340.5
341.176(4)EU
343.359(4)EU
339.923:061.1](4)EU
Received on 19 February 2020
Original scientific paper

Željko Karas*

THE ROLE OF NATIONAL SYSTEMS IN THE ADMISSIBILITY OF EPPO EVIDENCE WITH AN EMPHASIS ON CROATIA**

This paper examines the rules on the admissibility of evidence in the Regulation on establishing the European Public Prosecutor's Office (EPPO). The Regulation has not prescribed rules of its own but has left assessment of the admissibility of improperly obtained evidence to national systems. The paper therefore analyses the possible consequences in the EU Member States through the following characteristics of national systems of excluding improper evidence: the method of exclusion of evidence (automatic or balancing), the scope of the exclusion (rules which may lead to inadmissibility), and the admissibility of derived evidence. Based on the analysis of these characteristics, EU Member States are classified into three groups and their interrelations are analysed in the EPPO procedure.

The results show that great differences can occur in EPPO criminal proceedings using identical evidence in different countries. This is particularly expected in a group of countries that use the automatic exclusionary rule for a wide scope of procedural violations. The Croatian system of inadmissibility of improperly obtained evidence is described in order to show some differences in comparative law.

Keywords: admissibility of evidence, EPPO, exclusionary rule, illegal evidence

1. INTRODUCTION

The rules on the admissibility of improperly obtained evidence constitute an important part of criminal procedure which could have a major impact on the outcome of legal actions initiated by the European Public Prosecutor's

* Professor, Police College, Croatia.

** This paper is a product of work which has been supported by the Croatian Science Foundation under project 8282 "Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future" (CoCoCrim).

Office (EPPO). This paper focuses on materials that have gained the status of evidence, but which could be excluded due to the violation of some procedural rules or other legal provisions (improper or illegal evidence). Many EU Member States differ in the definition of such evidence (unlawful, improper, forbidden, invalid, illegal evidence, etc.), depending on the type of violated regulation and other features. This paper uses the term improper or illegal evidence in the broader sense, whether gathered in violation of constitutional rights, statutory provisions, or by other means.

Models of admissibility of evidence can be analysed through several basic characteristics. The exclusionary method can be applied automatically (absolute, mandatory, mechanical, or categorical exclusion), meaning that it does not take into account any circumstances of the specific case if a violation has occurred. The opposite method is balancing exclusion (relative, proportionate, or discretionary exclusion), meaning that it considers various circumstances of the case such as the seriousness of the offence, the causes of the violation, etc. The next feature is the scope of inadmissibility. It may be narrow (if it applies only to violations of basic constitutional rules, the privilege against self-incrimination, etc.), or it might be wide (if it covers violations of various procedural rules that do not concern fundamental rights). A further dimension is related to evidence that has been discovered on the facts from illegal evidence (derivative evidence). The next feature is the purpose for which inadmissibility is used (protection of rights, credibility of evidence, deterrence of police illegality, etc.).

It is not simple to show the characteristics of an EPPO evidence model because it does not develop its own vertical rules on illegal evidence. The rule on the admissibility of evidence in the EPPO procedure has undergone major changes during the enactment process. The initial idea behind the EPPO Proposal 2013 was to create a single legal space to regulate the rules of evidence at the EU level. A final document in Council Regulation 2017 adopted a completely different approach in which the admissibility of improper evidence depends on national legal orders. The original idea was to avoid cross-border criminal investigations by prescribing acts within the same legal framework. Therefore, there is no other way to evaluate the results of the current EPPO model but to analyse the interrelations of the individual legal systems of the EU Member States.

The development of the model of the admissibility of evidence in the EPPO procedure is covered in the initial parts of this paper. The following sections compare admissibility systems in EU countries, with an attempt to classify national models into three groups. Subsequently, the paper deals with problems that might arise in the EPPO procedure due to differences between these three main models of admissibility of illegal evidence, with particular reference to the Croatian system. The impact of national systems on the interpretation of the European Convention on Human Rights (ECHR) provisions is also analysed.

Theories on the exclusion of illegal evidence are briefly discussed to consider the reasons that may influence the future direction of the EPPO rules. On the basis of the analysis, the conclusion suggests the need to define a basic level of inadmissibility that could represent a common European starting point.

2. THE EPPO REGULATION PROPOSAL 2013

The European Commission presented the Proposal for the establishment of the EPPO in 2013,[1] introducing a rule that evidence should be admissible regardless of different procedural rules in different countries (Article 30(1) of the Proposal). Evidence gathered abroad would be admissible if it did not have an adverse effect on the fairness of the proceedings, or on defence rights under Articles 47 and 48 of the EU Charter of Fundamental Rights (CFR). It is important to emphasise that the principle of fairness was the main rule here, although most European countries do not use such a principle in the admissibility of evidence, and has its origin in the European Convention on Human Rights. It can further be remarked that rights in the CFR are very broad and could be interpreted differently in some EU Member States. It was stipulated that the court could not reject evidence solely because of the different regulation of admissibility in a particular country where the proceedings were initiated. Such a supranational rule had its grounds in Article 86(3) TFEU which provided for the establishment of vertical rules on the admissibility of evidence.

It seems that this type of regulation was intended to enhance prosecution and to reduce the broad exclusion of improperly obtained evidence. One reason for the introduction of the Proposal could be that more than 50% of European Anti-fraud Office (OLAF) criminal charges have not been adjudicated. The issue of the admissibility of evidence has been identified as one of the key issues for the outcome of proceedings and for promoting the European dimension.[2]

Although it was expected that the Proposal would be able to regulate the area of admissibility, a permanent problem which it would face could be inconsistent implementation. Ambiguities would arise because these rules (on fairness) would be interpreted by national courts, and most EU Member States do not have an admissibility system to assess the fairness of proceedings. The assessment of fairness is mainly encountered in supranational models of admissibility of evidence, such as those before the European Court of Human Rights (ECtHR), the ICC, or the ICTY.[3] Furthermore, the concept of fairness

[1] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534.

[2] *Erkelens* (2015) p 19.

[3] *Giannoulopoulos* (2019) p 24.

could be interpreted from many different perspectives which could involve procedural justice, the rule of law, legitimacy and other perspectives.[4] This model of admissibility of evidence was inherited from the earlier Corpus Juris which in Article 33 prescribed restrictions on the use of evidence that "undermine the fairness" or some ECHR rights.[5]

Prescribing investigative measures was not a matter of more detailed regulation of the Proposal, and hence it contained a list of twenty-two investigative measures (Article 26 of the Proposal) and referred to conditions in national law. The general principles are that investigative measures are required to have reasonable grounds, and that the subsidiarity principle is involved. Judicial authorisation is required for intrusive measures. Other minimum standards were left to the EU directives.

The Parliament found that the admissibility of evidence is a key element in criminal procedure.[6] Therefore, it was proposed that the relevant rules should be harmonised, and that conditions for the admissibility of evidence should respect all rights guaranteed by the CFR and the ECHR. This endeavour is positive, but the reference to all rights contained in these documents does not indicate to what extent and which methods of exclusion are appropriate. Automatic exclusion of all evidence for violation of any of these rights would be too broad and could have disproportionate effects.

3. THE REGULATION ON THE ESTABLISHMENT OF EPPO 2017

3.1. General features

The final EPPO Regulation[7] was passed in 2017, four years after the Proposal and almost two decades after the first initiatives in the Corpus Juris. These slow dynamics show that the negotiation process was very complex. This is probably due to the pragmatic influence of some states and the aspirations to preserve sovereignty in legal powers. The most important change that is reflected in the field of admissibility of evidence is the abandonment of a

[4] *McDermott* (2016) p 26.

[5] Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union.

[6] European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013)0534, para. K.5.vi.

[7] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

single legal space as a basis for the unification of legal powers and the admissibility of evidence.

The structure of the EPPO has changed from a centralised and hierarchical model to a decentralised body that has been restored to the national level. This has shifted the focus to the intergovernmental level, and a great deal of normative complexity is possible as all EU national legal systems are involved. A fragmented concept emerged without harmonisation through mutual European rules. The number of investigative measures listed in the Regulation has been reduced to only six common measures, including the search of premises, obtaining objects, obtaining computer data, freezing proceeds of crime, the interception of electronic communications, and the tracing of objects (Article 30 of the Regulation).

General changes were reflected in the new admissibility provision. The new rule in Article 37(1) wholly eliminates the presumption of admissibility of unlawful evidence gathered in another country, quite contrary to Article 30 of the Proposal. The provision in Article 37(1) of the Regulation implies that the admissibility assessment has become a standard procedure, whereas according to the Proposal it was an exception.[8] This means that a country in which the criminal procedure had been initiated can assess the admissibility of foreign evidence using its own rules. A further difference is that the CFR is not mentioned in the text of Article 37, while it is transferred in the Recital where the ECHR is mentioned too. This makes the ECtHR case law very important in the interpretation of the fairness and influence of improper evidence.

3.2. The role of national law

There are two main possibilities with respect to the admissibility of evidence, depending on whether the evidence was collected in the same country or abroad. If evidence is used in the proceedings of the same country, then domestic law applies. In such a situation there should probably be no problem with assessing the admissibility of improper evidence. Such a variant is the simplest solution in relation to legal predictability, but it may have different results compared to some other country which has different national rules. This means that the EPPO procedure could have different outcomes in certain countries because of the absence of uniform evidence rules. This is a consequence of different national systems, and improvements could therefore be made.

A second situation could arise if evidence is gathered in another country. Outcomes then depend on the national models involved and on the possibility

[8] *Allegrezza; Mosna* (2018) p 159.

of compliance among countries. Enforcement requires respect of the legal system of the country in which the evidence is taken. According to Article 32 of the Regulation, the European Delegated Prosecutor may determine the formalities necessary for the admissibility of evidence. The intention of this provision is to deal with the differences in the national systems, but it could be applied only if it has been earlier established that an offence falls under the jurisdiction of the EPPO. A similar solution could apply if a cross-border investigation was conducted using the European Investigation Order (EIO). But problems could arise if investigatory actions are completed before it is even established that the offence could fall under EPPO jurisdiction. If evidence has already been gathered, it is often not possible to repeat the investigatory actions under new conditions in accordance with the prerequisites of EPPO proceedings in another country. If legal rules from the countries involved are incompatible, some evidence could become improper or illegal just because they were gathered according to different rules.

It seems that a more useful approach would be to introduce a single uniform rule with an enumerated basis that may lead to the inadmissibility of evidence in all EPPO proceedings. This would establish a baseline. The role of national law is not diminished by the fact that the Regulation refers to particular sources, such as the ECHR or the CFR. This relates to a large number of rules which depend on interpretation in the national law. A further problem may arise if particular national rules are difficult to interpret or if there are several different viewpoints originating from the national case law, as will be shown later.

4. ADMISSIBILITY OF EVIDENCE IN EU MEMBER STATES

4.1. General information

This description indicates that it is crucial to consider the regulation of inadmissibility of improperly obtained evidence in national legal systems in order to determine possible relations. Differences in enforcement are expected due to the different legal systems.[9] A comparative law analysis is required for more detailed insight. EU Member States differ in a number of elements of admissibility, but they can generally be classified into three groups. One network has previously researched the admissibility of evidence and concluded that in seven EU Member States, unlawful evidence is in principle not excluded (France, Germany, Austria, Sweden, Finland, etc.), while the other group

[9] *Illuminati* (2018) p 194.

includes countries where illegal evidence is in principle excluded (Spain, Greece, Italy, etc.).[10]

In the second group, unlawful evidence is not automatically excluded, but rather some form of assessment of circumstances case-by-case exists (the balancing approach). This division does not take into account all the characteristics, and the conclusion that in the first group of EU countries all illegal evidence is in principle admissible does not correspond to all the facts either. These countries exclude evidence gathered through basic violations, but they use balancing exclusion. The conclusion that in the second group evidence is in principle excluded is also disputable.

Finally, there is a third group of EU Member States which have automatic exclusion and a very wide scope of violations that have the consequence of the exclusion of improper evidence. This third group includes Croatia, as well as other newer EU Member States from Eastern Europe who have as their role model the United States' exclusionary rule. Some viewpoints in these legal systems consider that the admissibility of illegal evidence in the EPPO and in other EU countries is too narrow and that it should have much broader scope to exclude illegal evidence.

4.2. A balancing exclusion and a narrow scope (Group A)

The first group of countries, which mainly use the balancing (discretionary or relative) form of exclusion, include a number of EU Member States such as Germany and France. Their common feature is a narrow scope of exclusion that does not cover a large number of violations. Material evidence is excluded very rarely despite violations, because illegality does not affect the credibility of such a type of evidence. Although these countries primarily use the balancing exclusionary rule, inadmissibility is mandatory in respect of the most serious violations in personal evidence such as extortion of statements, or violations of the self-incrimination clause. Such practice indicates that a basic level of exclusion of improper evidence exists in those countries.

The German system uses the theory of legal circuits (*Rechtskreistheorie*) to divide rights into three areas. The highest protection is afforded in the area of personal life or in the intimate area, which cannot be exposed to investigation measures.[11] The second area includes privacy in which violation requires the determination of proportionality using the theory of weighing (*Abwägungslehre*). The weighing is done by comparing circumstances that support con-

[10] EU Network of Independent Experts on Fundamental Rights (2003) p 7.

[11] *Roxin* (1998), 193; *Köhler* (1995) p 31.

flicting goals of prosecution and the protection of citizens' rights.[12] Prohibitions of evidence are very narrowly applied in searches and similar investigatory measures of gathering real evidence.[13] The Austrian criminal procedure uses a theory similar to the German balancing method.[14]

French inadmissibility (*nullités*) is also not absolute but can be applied only if irregularity has caused a violation of the defendants' interests.[15] The interests of the prosecution are not neglected, and the best possible balance is required.[16] For explicit exclusionary rules (*nullités textuelles*), it is prescribed by statutory provisions that evidence will be nullified. Inadmissibility can be applied if a breach of the rights of the defence is established, and it must be proven to be detrimental to the interests of the defendant. Similar to the French system, the Netherlands also uses discretionary exclusion in order to observe all the circumstances of an infringed provision.[17] Belgium returned to a similar system after the brief use of broad automatic exclusion like that in Group C. In Finland and Sweden, the system is based on the presumption of the admissibility of evidence.[18]

4.3. Automatic exclusion and a narrow scope (Group B)

The second group includes several legal systems which, in theory, accept the automatic method of exclusion of illegal evidence, but they do not have a broad scope of violations, which makes their results very similar to those countries in the first group. These countries do not have many violations of procedural formalities that can lead to the illegality of evidence (Greece, Italy, Spain, etc.). In this group, the minimum levels of inadmissibility for violations in personal evidence are almost identical to those in the previous group.[19] The difference is that these countries have a slightly broader scope which includes some violations in gathering material (real) evidence. In practice, this is often not excluded automatically but a kind of discretionary method of exclusion is used.

Some scholars believe that after abandoning automatic inadmissibility of illegal evidence in New Zealand and after the introduction of numerous exceptions in the United States, the Greek system is the only one which has consist-

[12] *Rogall* (1979) p 11.
[13] *Cramer; Bürgle* (2004) p 118.
[14] *Seiler* (2005) p 115.
[15] *Renucci* (2005) p 1256.
[16] *Guinchard; Buisson* (2002) p 992.
[17] *Thaman* (2012) p 670.
[18] *Helenius* (2015) p 193.
[19] *Soo* (2018).

ently used automatic exclusion.[20] In comparative terms, this does not seem to be the case, since the Greek CPA seeks to exclude only illegal evidence collected by violations that constitute a criminal offence (the violation of mere procedural formalities is not sufficient for evidence to be excluded). Even then, the evidence does not have to be excluded, since the use of evidence could be justified in cases of the most serious crimes. Such results are in general very similar to the balancing approach.

Some Italian authors point out that their system has imported some American rules of inadmissibility and that they do not have a historical root of their own. However, they did move away from the US model, as they took over parts only relating to some covert measures, but not procedural formalities in measures such as search or seizure.[21] For example, seizure undertaken in Italy in the context of an illegal search is not viewed as part of that illegal measure, but as a stand-alone operation that should be assessed separately. It does not even matter if the search was unconstitutional, which makes the situation wholly different from the American model. The Italian system permits investigatory actions which are based on information gathered from previous illegal action,[22] which is contrary to the American theory of poisonous fruit.

Spanish law prescribes the exclusion of unlawful evidence, but in practice it applies only to violations of fundamental constitutional rights, and not to violations of other legal formalities that are prescribed at the statutory level.[23] If fundamental constitutional rights have not been violated, then the principle of substantive truth prevails and evidence is admitted regardless of minor violations during the collection.[24] For example, in cases where investigators violated statutory rules during a home search, records will be extracted, but items found in the search would not be excluded. Such cases justify the argument that, under the Italian, Spanish or Greek systems, the case law has reversed absolute exclusion into relative exclusion.[25]

In some publications it is stated that Hungary accepted the automatic exclusionary rule in 1989, but it seems it uses a mixed model with a balancing method of estimation of material evidence.[26] The Polish law has not aimed to exclude material evidence gathered by minor violations, but imposes disciplinary sanctions on an officer who has made a mistake. The rule refers only to the use of statements collected by a violation of rights during an interroga-

[20] *Giannoulopoulos* (2007) p 191.
[21] *Grande* (2000) p 248.
[22] *Thaman* (2010) p 375.
[23] *Bradley* (2001) p 397.
[24] *Thaman* (2001) p 606.
[25] *Thaman* (2001) p 688.
[26] *Frankowski; Stephan* (1995) p 244.

tion.[27] Ireland uses a discretionary approach if the statutory level is violated, and the automatic rule is used only if the constitutional level is violated.[28] Exclusion does not apply if the officer was not aware of the violation, or generally acted in good faith, which is also not a feature of categorical automatic exclusion in Group C.

4.4. Automatic exclusion and a broad scope (Group C)

The third group of EU Member States are countries that consistently apply an automatic rule of exclusion, covering both personal and material evidence very broadly. This includes not only serious violations of constitutional rights or criminal offences of police officers, but also a number of minor procedural formalities that are defined at the statutory level. For this reason, exclusion of illegal evidence is possible in situations where it does not contribute to fundamental rights or to other purposes of EPPO proceedings at the supranational level. Countries in this group do not take into account any circumstance of the offence, such as the seriousness of the crime, the intent of the officer, the reasons for the violation, or any other issue. Given that the EPPO Regulation does not limit the maximum level of inadmissibility, countries in this group have the widest opportunity to exclude evidence collected by the EPPO in any other country from the previous groups. There may be hypothetical situations where evidence which could be excluded in EPPO proceedings in Group C could be admissible in Group B or Group A.

Countries in Group C are dominantly from the Central and Eastern Europe. They have introduced the exclusion of illegal evidence after rejecting socialist legislation and gaining independence at the beginning of the 1990s. It is interesting to note that many of them turned to the US criminal procedure as a role model in this field. Because of such transposition, American decisions are sometimes called transnational decisions. They represent rules invoked by national jurisprudence.[29] Such a pattern can be observed in Croatian theory, with many scholars citing precedents delivered by the American courts, and using them to explain the exclusionary rule in Croatia. Similar examples can be found in many neighbouring countries. Slovenian theory also cites American criminal procedure law on the exclusionary rule, without describing European approaches.[30] In 1994, the Slovenian legislator in Article 18 CPA intro-

[27] *Weigend* (2004).
[28] *Giannoulopoulos* (2019) p 233.
[29] *Langer* (2004) p 1.
[30] *Zupančič* et al. (1996).

duced the automatic exclusion of unlawful evidence (the so-called strict rule).[31] Rules identical to these exist in many other neighbouring countries, but so far they are not EU Member States (Montenegro, Bosnia and Herzegovina, North Macedonia, Serbia, etc.).

Croatian legislation uses an automatic form of exclusion and it has a very broad scope. In the Draft CPA of 1994, the method of exclusion was wholly different. It was closer to the balancing approach of European systems, which means that the court would "specifically assess the extent between public interests and protection of individual rights, the gravity of the crime, the gravity of the violation of fundamental human rights and the possibility of its removal, the nature of the violation, the consent of the person whose right was violated, as well as other circumstances that may affect the reputation of criminal justice".[32] This Draft provision of the CPA was consistent with earlier recommendations of leading scholars in Croatia that proportionality should be used as a guiding principle to assess the admissibility of illegal evidence.[33]

However, this draft provision of the CPA was rejected. Croatian law has taken a completely different direction, leading to a development that does not have a historical foundation in Croatian criminal procedure law. For this reason, the Croatian system is often described in terms originating from US case law[34] and is also evident in the colourful notions unfamiliar to the Croatian judiciary (e.g. the theory of poisonous fruit, the purged taint doctrine, etc.).[35] The biggest problem is that the American model was created for specific purposes that do not exist in the Croatian system.

The provision of the CPA followed the general provision on illegally obtained evidence in the Constitution (Art. 29). Transcripts from the Constitution Working Group show that the exclusionary rule was not inserted as a consequence of broad argumentation. The first draft was very similar to the Greek model. The inadmissibility of illegal evidence was designed for violations which constitute criminal offences only, without covering merely procedural errors. Opposing this, one influential politician expressed the view that the Constitution should adopt a wider model than other countries, but he did not specify to which countries he was referring. Such an argument should have been discussed in more detail, with precise reference to particular systems in comparative law. Because of his influence, the exclusionary rule became part of the Constitution without limiting it to criminal offences only.

[31] Šugman et al. (2004) p 38.
[32] *Krapac* (1994) p 112.
[33] *Krapac* (1983) p 236.
[34] *Krapac* (2008) p 81.
[35] *Pavišić* (2008) p 62.

The provision of the CPA was discussed in academic circles during the next decades, resulting in a new paragraph which supplemented the balancing model in 2008, but only for irregularities not explicitly prescribed by the CPA or other laws. It is interesting that the new provision has been criticised by some scholars as being too lenient, with the argument that it must be interpreted in a very restrictive way, and that it might have been best to reject such a balancing approach in the CPA.[36] Since the introduction of this provision, this form of a balancing exclusionary rule has not been used for any issue except for situations of secret recordings made by citizens.

A well-known example involving some countries from Group C is the criminal procedure in a narcotic-smuggling case called *Balkan Warrior*. A court trial for the smuggling of 2.5 tons of cocaine was based on evidence and secret surveillance performed in Uruguay, Italy, Serbia and Slovenia. A court with an automatic exclusionary rule (Slovenia) found that there were insufficient grounds for the use of covert measures although they were ordered in foreign countries according to existing law. The Slovenian court considered that surveillance evidence is illegal. This meant that fourteen defendants were acquitted,[37] while defendants in the other involved states were sentenced without a problem. Beside this notorious example of differences between countries, there are numerous grounds that could lead to rejecting various types of improper evidence in Group C.

5. ILLEGAL EVIDENCE IN CROATIAN CRIMINAL PROCEDURE LAW

5.1. General information

In the Croatian criminal procedure, there are possibilities to exclude illegal evidence that is not gathered through the violation of fundamental rights at the constitutional level. The CPA explicitly lists more than forty-five legal rules whose violation can lead to the automatic inadmissibility of evidence. A few of these relate to the usual rules regarding personal evidence, such as the prohibition of coercive interrogation and the violation of the self-incrimination clause. In contrast, many rules refer to various formalities in the procedure of obtaining real evidence. Such rules are not recognised at the European level as standards for the protection of suspects' rights.

For this reason, it is questionable whether such formalities are justified at the transnational level in EPPO proceedings. The model of excluding illegal

[36] *Pavišić* (2008b) p 530.

[37] Ljubljana County Court, III K 44415/10 (III K 200/10) 6 November 2012.

evidence should reflect the aims pursued,[38] which means that the EPPO procedure may have objectives that are not the same as some goals in national law. It is evident that the EPPO procedure has a difficult task to respect not only European law approaches but also to respect the systems of countries that have adopted the US model of the exclusionary rule.

5.2. Interrogation of a suspect

The Croatian system has one peculiarity which could lead to the illegality of confessions or other statements gathered in the interrogation of a suspect. The first interrogation of a suspect has to be videotaped according to statutory provisions. If the interrogation was not videotaped, the statements will be inadmissible even if a lawyer was present, if the suspect received all the warnings, if he did not have any objections, if he voluntarily made all the statements and signed a written record (Article 208a(6) CPA).[39] The automatic exclusionary rule does not consider the reasons why a video recording was not carried out, in other words, whether there was a technical problem or something else that obstructed the recording.

In a hypothetical situation, if the EPPO presents an interrogation record from any country whose authorities did not videotape the first interrogation, but they fulfilled all other procedural forms, the statements could be illegal in the Croatian criminal procedure. Besides that, all other derivative evidence that is revealed using the excluded statements is also excluded as unlawful evidence. The video recording of an interrogation is not prescribed as a constitutional obligation in Croatia, and it is not considered as a standard defendant's right or guarantee at the EU level. Some EU Member States use video recording, but they do not impose automatic exclusion of evidence if the interrogation was not recorded. The EPPO should ask the authorities in other countries to video record interrogation, but problems may arise if they do not have appropriate resources or if their law is incompatible.

Among other issues, we could emphasise a problem with the definition of a suspect. The admissibility of statements could depend on the court's interpretation of the moment when a person becomes a suspect, or when the interrogation starts. For example, spontaneous statements of the suspect (or the self-report) are differently interpreted in practice. The case law of the highest courts in Croatia is not consistent on this issue. There was a notorious example of a perpetrator who[40] voluntarily came to the police under the burden of con-

[38] *Turner; Weigend* (2019) p 255.

[39] The Criminal Procedure Act (CPA), Official Gazette No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19.

[40] Supreme Court of the Republic of Croatia, VSRH, I Kž 612/05.

science, and made a confession about the murder of a young girl. The police did not know at the time whether such a crime had even been committed. None of the officers had the opportunity to give him the statutory warnings or to suggest the presence of a lawyer before he started to confess. However, the court ruled that the confession was illegal as a whole, regardless of the fact that the first part of the statement was his spontaneous speech. Such confessions would be admissible in almost every EU country, based on the interpretation that the interrogation had not started until the officer began to ask questions, and that it was impossible to give warnings when the status of the suspect had not been determined. In the hypothetical situation where such a statement was collected in another European country from Group A or B and was presented in a criminal procedure in Croatia, it would be considered illegal.

5.3. Questioning of a witness

The most important impact on the admissibility of witness statements is the rule that statements given by a witness to the police cannot be used as evidence without the prior order of the state attorney. A police interview with a witness which is carried out without an order is called an informal interview (or just information gathering). In a hypothetical situation, if the EPPO introduces witness statements in Croatia, but if these statements were gathered by the police in another European country without an order of the state attorney, they could be unlawful evidence (Article 86(3) CPA).

According to such a regulation, if the police question a witness at the crime scene or if a witness voluntarily approaches a police officer to make a statement about the event he has just observed, such statements cannot be used as evidence. The police may detain witnesses until the state attorney arrives, or may interrogate a witness only after receiving a written order (Article 213(1) and Article 214(1) CPA). Problems may arise when the order arrives after the first interview, so witnesses have a chance to change their statements, or to claim they have forgotten what happened, or that they did not see the event very well.

According to the Croatian system of inadmissibility of unlawful evidence, such witness statements cannot be used, irrespective of the seriousness of the crime. Statements would be unlawful even if they contained some facts that could be used in favour of the defendant. In Croatian proceedings, there have been cases where defendants considered that some illegal materials were supporting their defence and they asked for their use, but the court maintained the view that the exclusion of materials has an absolute effect.[41] Such a conclusion is contrary to the purpose of the inadmissibility of evidence, and could even harm innocent citizens. It is not known that any country in the EU applies such

[41] Supreme Court of the Republic of Croatia, VSRH, I Kž-595/02.

an interpretation. It is much broader than the ECtHR rules on witness statements in pre-trial phases. The ECtHR reviews the opportunity to cross-examine witnesses, but this does not affect the admissibility of witness statements given to police officers in the pre-trial phase.[42]

Concerning the situation where testimony has met the legal requirements and received the status of evidence, the limitations of evidentiary use are mainly in the area of defining the persons who cannot testify (e.g. a priest confessor) or who have the privilege of refusing to testify (e.g. a spouse). Concerning other formalities, if a written record does not contain a warning on the possibility of withholding certain statements, such a record cannot be used in the proceedings (Article 300(1)(3) CPA), irrespective of whether verbal warnings were in fact given and if there were no consequences for the defendant.

5.4. Home search

Most EU countries have not prescribed violations which could lead to the illegality of real evidence. Evidential restrictions in investigative actions such as search and seizure are most often connected to the specific conditions of certain premises or papers that are protected by particular privileges or relationships (e.g. bank premises, medical files, etc.). An example of a peculiar formality in Croatian law that is unfamiliar to EU countries is the rule on the obligatory presence of two attesting witnesses during a home search (Article 254(2) CPA). The presence of two witnesses is mandatory even if the suspect explicitly demands that only his lawyer should be present. In EPPO proceedings, foreign authorities must secure the attendance of two witnesses, but problems may arise if they have rules that forbid the presence of other persons apart from the suspect or his attorney.

If two witnesses were not present while the police were searching a home, for example, if one witness unexpectedly left the premises for some founded reason (an urgent phone call, an allergy to pets, health problems, etc.), any evidence found after that departure would be unlawful. The automatic exclusionary rule does not consider the reason for the violation, or whether it affected the credibility of the real evidence (e.g. an old video tape is found). Automatic exclusion does not consider the intent of police officers, the seriousness of the crime, the importance of evidence, or any other circumstance. For example, if evidence is gathered in a home search during the investigation of another offence in another EU Member State, and the EPPO later introduces that evidence in the Croatian criminal procedure, it could be automatically illegal if two attesting witnesses were not present.

[42] *Murtazaliyeva v. Russia*, 18 December 2018, No. 36658/05, para. 127.

Another example of automatic inadmissibility is related to the entry into premises during the chase of a perpetrator caught *in flagranti*. An entry into premises can be carried out only if at least three years' imprisonment is prescribed for the particular offence (Article 246(2) CPA), unlike in many EU countries. Such an arrangement means that it is not possible to enter premises without a court order if the perpetrator of crimes like theft, robbery, domestic violence and numerous other crimes has hidden during the pursuit. These crimes do not have the penalty of imprisonment of a minimum of three years in Croatian criminal law. Such a punishment is prescribed only for serious crimes in Croatian law. In a hypothetical situation where a police officer entered a perpetrator's premises in another country after a chase in order to collect evidence for the EPPO proceedings, and if the crime is not punishable with at least three years of imprisonment, the evidence would be inadmissible in the EPPO procedure in Croatia.

There are many other formalities whose violation could make real evidence illegal. One possibility is omitting to write reasons why the search of a person was not carried out by an officer of the same sex, or if the public prosecutor did not submit his or her order and record to the investigating judge within a specified timeframe (Article 250 CPA). As a consequence of such violations, evidence is automatically excluded no matter if there were objective reasons for the breach and if there were no negative effects on fundamental rights.

5.5. Covert measures

In cases of covert measures, exclusion of evidence is prescribed for any violation in the process of determining actions, regardless if it is a formal or substantive omission. The basic conditions for determining covert measures are the seriousness of the crime, the inability to use other less intrusive measures (subsidiarity), and reasonable suspicion. The court can then deliver an order. Evidence will be illegal not only if the court did not issue an order, but also if the explanation in the order was not very long, even though all substantive and formal prerequisites were fulfilled. Deficiencies in the court order might have been corrected using legal remedies, but automatic exclusion does not observe such a possibility. Conducting secret surveillance for serious crimes requires a great deal of police resources and it takes a long time to gather evidence, so it is open to question whether all evidence should be rejected because of a minor failure. A similar correction could be used in other legal systems for many kinds of procedural breaches.[43] This problem will be further described in one of the following sections.

[43] *Helenius* (2015) p 203.

There is often a problem in determining when covert activities begin. The reason for this is because there are milder covert measures prescribed in police legislation, but these actions are of shorter duration and they do not need to have a court order (Article 80 of the Police Powers Act).[44] Due to the lack of definition, there have been several cases where the police considered they were conducting short infiltration only,[45] but the court later found that the action in fact constituted a covert investigation under the CPA without a proper court order.[46] This is different from the arrangements in many EU Member States where short or one-time undercover measures do not fall under the strict regime of a court order.

6. DERIVATIVE EVIDENCE

The EPPO rules do not take a stand on evidence which is revealed from illegal evidence. It is not prescribed how this should be assessed, which means that the national law applies here, too. This can also lead to considerable differences in the outcomes of criminal proceedings. Excluding all other evidence discovered from the initial illegal evidence is very rare in the EU. It is very hard for EU Member States to accept the American theory of the fruit of the poisonous tree. *Damaška* has long emphasised that these features are unknown to continental law, sounding as though they belong to the realm of fantasy.[47] Such a conclusion has not changed in recent periods.

In German law, evidence deriving from illegally obtained evidence can generally be used (*Fernwirkung*).[48] For example, material evidence discovered on the basis of facts gathered from unlawful covert surveillance has been admissible in a criminal trial.[49] Countries in Group B which have some forms of automatic exclusion do not use the theory of the poisonous fruit. Spanish constitutional case law has radically moved away from the prohibition of derivative evidence. Under the influence of the ECtHR case law (the Spanish court cites the *Schenk* decision), the court found in 1998 that derived evidence should be weighed and that the intensity of the violation and the correlation with the effects on justice must be observed. The court found that the injury was not intentional and not grave, so the evidence found from the unlawful recording could be used in the proceedings. Such a decision would not be possible in the Croatian criminal procedure which prescribes the exclusion of all derivative

[44] The Police Powers and Authorities Act, Official Gazette No. 76/09, 92/14, 70/19.
[45] Supreme Court of the Republic of Croatia, VSRH, I Kž-874/09.
[46] *Karas* (2006) p 151.
[47] *Damaška* (1972) p 522.
[48] *Jäger* (2003) p 112.
[49] *Roxin* (1998) p 193.

evidence. The Italian system refused to use the theory of the poisonous fruit. If a certain object is discovered by means of illegal covert surveillance, it can be used in the criminal procedure.[50]

7. THE RELATION BETWEEN THE EPPO REGULATION AND ECTHR PRINCIPLES

7.1. The role of supranational courts

The Regulation refers to Convention rights,[51] but the ECHR does not regulate the area of admissibility of evidence in a detailed manner. The impact of evidence is viewed by the ECtHR within the principle of fairness of the whole procedure.[52] Violation of the prohibition of torture always undermines the fairness of the proceedings,[53] as does instigation by an *agent provocateur*.[54] Such violations most probably result in the inadmissibility of evidence in almost any EU Member State and could represent a part of the baseline level of inadmissibility in the EPPO procedure which could be listed in the Regulation. The use of evidence gathered by a breach of less important domestic rules for obtaining material evidence does not impair the fairness of the proceedings.[55] Failures in actions such as a home search or secret surveillance are individually assessed and, as a rule, do not undermine fairness unless the credibility of evidence is impaired. It could be easier to enumerate basic violations in the Regulation than to generally point to the ECHR or the CFR.

The ECtHR considers all circumstances of a case and determines whether the credibility of the evidence is violated.[56] The ECtHR does not use an absolute approach in assessing the impact of certain evidence on the fairness of the proceedings. The first decision to address the impact of illegally obtained evidence was *Schenk v. Switzerland* (a case of the unlawful recording of a conversation about murder). In that decision, the ECtHR emphasised that it did not prohibit, as a principle, the possibility of the judicial use of evidence obtained by unlawful conduct.[57] The same viewpoint has been consistently repeated in a number of other decisions.

[50] *Grande* (2000) p 249.

[51] Recital, para. 80.

[52] *Clements* et al. (1999) p 166.

[53] *Göcmen v Turkey*, 17 October 2006, No. 72000/01.

[54] *Teixeira De Castro v. Portugal*, 9 June 1998, No. 25829/94.

[55] *Stone* (2012) p 175.

[56] *Jackson; Summers* (2012) p 149.

[57] "The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible", *Schenk v. Switzerland*, 12 July 1988, No. 10862/84.

The impact of the ECtHR is also reflected in other international courts and national systems.[58] One example is the evidence system of the ICC, which also did not use wide automatic exclusion, but rather a discretionary assessment of fairness. The ECtHR case law is often invoked by the ICC, although some scholars consider it uses rules such as those of Canadian or English criminal procedure law.[59] In the case of *Lubanga* (an illegal home search), the ICC referred to the ECtHR jurisprudence in order to sustain the admissibility of illegal evidence.[60] The ICTY has also concluded in a number of cases[61] of illegal secret surveillance that it would be an obstacle for the judiciary if credible evidence were automatically excluded due to procedural violations.[62] The ECtHR case law was also cited as a reference in those cases.[63] The ICTY has accepted the different impacts of illegality on material or personal evidence, as explained by *Spencer*[64] and *Triffterer*.[65]

7.2. Impact of national law on the interpretation of the ECtHR rules

It is very difficult to determine what impact the ECtHR rules will have on the admissibility of evidence in the frame of the EPPO Regulation. The Convention contains a number of fundamental rights, some of which have been interpreted in the extensive case law of the ECtHR, but the question remains how the same principles will be applied by national courts that have different models of admissibility of illegal evidence. A further difference is that a case assessment before the ECtHR is carried out taking into account all the circumstances of the case, once the procedure is completed.

There are several examples in Croatia in which courts interpreted ECtHR decisions in a way that is wholly different from other EU countries. The most famous example is the impact of the case *Dragojević v. Croatia* concerning an incomplete court order for secret phone surveillance.[66] It was established that

[58] *Viebig* (2016) p 58.

[59] *Giannoulopoulos* (2019), 245; *Viebig* (2016) p 91.

[60] The International Criminal Court (1999) p 246.

[61] "[A]dmitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings", *The Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence (3 October 2003) para. 61

[62] *Choo* (2012) p 186.

[63] "Jurisprudence regarding Article 8 of the ECHR does not support the contention that illegally intercepted evidence must be excluded", para. 25; see also *The Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, 13694.

[64] *Delmas-Marty; Spencer* (2004).

[65] *Triffterer* (1999) p 1334.

[66] *Dragojević v. Croatia*, 15 January 2015, No. 68955/11.

the competent court failed to give an extensive explanation of the grounds for suspicion and subsidiarity. The ECtHR found a violation of privacy rights (Article 8). The ECtHR did not conclude that such a court order undermined the fairness of the entire proceedings. The presence of gathered evidence in the file does not impair the fairness of the whole proceedings. The same legal issue occurred in the case *Matanović v. Croatia*, where the same violation was also established, and the ECtHR did not find a violation of the fairness of the whole proceedings either.[67] In these two cases, the material prerequisites for secret surveillance were met, but the court wrote many orders at the same time, and in some of them copied an identical explanation.

The highest courts in Croatia at first delivered the opinion that the results of secret measures carried out under an incomplete court order should not be considered inadmissible evidence. In several cases, the Constitutional Court found that rights had been violated, but that the explanation in the court order could be subsequently supplemented during appeal proceedings.[68] The Supreme Court has also concluded in a number of decisions that evidence obtained using an incomplete court order should not be excluded if the material conditions for ordering covert actions were met.[69] Quite to the contrary, in one decision in 2017, the Supreme Court reversed its position on the same legal issue, and subsequently in a number of decisions delivered an opinion that such evidence is inadmissible.[70]

The Supreme Court stated that the violation of privacy under Article 8 ECHR presents the obligation to exclude evidence under Croatian law. From this interpretation, it is evident that the automatic model of inadmissibility in the Croatian system can apply ECtHR rules in a way that has not been shown in the jurisprudence of that court or in EU comparative law.

There are more examples of the admissibility interpretation in the Croatian criminal procedure system, which are wholly different from original viewpoints in ECtHR jurisprudence. One example is the covert recording of a conversation. In ECtHR jurisprudence, the *Schenk v. Switzerland* case assessed the secret recording made by a citizen and concluded that it did not affect the fairness of the whole proceedings. In Croatian case law, there have been a few cases in which citizens recorded a conversation with state or local government

[67] *Matanović v. Croatia*, 4 July 2017, No. 2742/12.

[68] Constitutional Court of the Republic of Croatia, USRH, U-III-857/2008, U-III-2781/2010, USRH, U-III-581/2015.

[69] Supreme Court of the Republic of Croatia, VSRH, I Kž 61/09; VSRH, I Kž Us 30/09; VSRH, I Kž 616/09; VSRH, I Kž 29/14; VSRH, I Kž-Us 84/16; VSRH, I Kž Us 88/16; VSRH, I Kž Us 131/17, etc.

[70] Supreme Court of the Republic of Croatia, VSRH, I Kž-Us 116/2017; VSRH, I Kž 373/17, etc.

officials. Citizens made recordings to substantiate their allegations of officials asking for a bribe. Citizens feared that no one would believe them, and that they would be accused of damaging the officials' reputation. Credible evidence is extremely rare in corruption cases and the authorities otherwise spend huge resources to gather it. Given that the audio recording was not made by the authorities, the court assessed whether a serious form of crime was involved (Article 10(3) CPA). The Supreme Court in all cases (except in one case of political corruption,[71] and in one case of rape[72]) concluded that the crime was not so serious to make the citizens' recording admissible in criminal procedure. One case of covert audio recording concerned a crime that resulted in a pecuniary gain of EUR 500,000,[73] which is much higher than the amounts that could invoke EPPO competence. Identical covert audio recording would be permissible in the majority of countries in Group A or Group B. This case shows that the ECtHR rules are not able to limit the excessive exclusion of illegal evidence in EPPO proceedings.

This interpretation of ECtHR case law in EPPO proceedings further shows that it cannot be guaranteed that the application will be uniform in all EU members. The interpretation could reflect the particularities of national legal systems. Instead of presenting the automatic exclusion of evidence as a basic tool for the protection citizens' rights, it would be more useful to use other appropriate remedies that would enhance the uniform protection of all citizens.[74]

8. DISCUSSING THE SCOPE OF INADMISSIBILITY IN EPPO PROCEEDINGS

8.1. Automatic exclusion cannot be the main tool for rights protection

It cannot be concluded that EU countries with a balancing exclusionary rule do not take care of the protection of fundamental rights. Nonetheless, from the standpoint of countries belonging to Group C, the EPPO rules on illegal evidence seem to be too lenient. However, it is not justified to claim that the inadmissibility of evidence is a basic measure of rights protection in the EPPO procedure, or in individual national systems.[75] If the EPPO Proposal had been accepted, it would have imposed limits on the scope of the automatic inadmissibility of unlawful evidence in Group C. The OLAF and European Commis-

[71] Supreme Court of the Republic of Croatia, VSRH, I Kž-Us 6/14.
[72] Supreme Court of the Republic of Croatia, VSRH, I Kž 278/14.
[73] Supreme Court of the Republic of Croatia, VSRH, I Kž-Us 31/12.
[74] *Turner; Weigend* (2019) p 88.
[75] *Giannoulopoulos* (2019) p 250.

sion documents have stated that the admissibility of evidence is fundamental to the successful processing of cases.[76] The wide scope of inadmissibility of evidence is seen as neglect of the European dimension of EPPO proceedings. Discussion on this issue should consider the uneven distribution of OLAF indictments in different European countries. Data show that certain countries from Eastern Europe have had ten times more OLAF investigations than older EU Member States.[77]

The inadmissibility of evidence is described by a variety of theories: the credibility theory, the rights theory, the illegality prevention (deterrence) theory, and the legitimacy (integrity or fairness) theory. In addition, there are a number of theoretical approaches in almost every EU Member State. The objection to the rights theory is that the exclusion of evidence only benefits the perpetrators, since it is not possible to exclude evidence on innocent persons who were victims of the same violation.[78]

In relation to the theory of the prevention of police illegality,[79] the objection is that the rule does not punish the subject that committed the violation. The exclusion of evidence imposes a sanction on a community in which both the perpetrator and the responsible authority have committed violations.[80] All subjects that have committed violations should bear the consequences of their actions. A further objection is that a criminal offence cannot be nullified by the fact that some procedural error has occurred in the investigation process.[81] Although the exclusionary rule gives the impression of a resolute approach, extending its scope to petty violations can lead to objections that they are unimportant technicalities focused on an isolated aspect of the criminal proceedings.[82]

8.2. Automatic exclusion and types of criminal procedure

An automatic exclusionary rule has a number of negative consequences that have made it undesirable in both national systems and in international evidence models. There are a variety of approaches in comparative law that explain the differences based on the accusatorial inquisitorial relation, the hierarchical or coordinative models, and the adversarial or non-adversarial procedure type.[83] Modern evidence law shows there are a number of legal borrowings and trans-

[76] *Erkelens* (2015) p 19.
[77] *Nowak* (2016) p 4.
[78] *Amar* (1996) p 704.
[79] *Jackson; Summers* (2012) p 154.
[80] *Steiker* (1994) p 852.
[81] *Delmas-Marty; Spencer* (2004) p 603.
[82] *Damaška* (2011) p 386.
[83] *Damaška* (1975).

positions worldwide.[84] Automatic exclusion originates from the US criminal procedure. Other common-law countries do not use such a model. Countries like England, Canada, Australia and New Zealand use discretionary exclusion (except Ireland) which does not have a broad scope.[85] This makes the American model interesting to analyse. It is even curious that the European legal tradition has been a role model for some common-law systems. A well-known example is the criminal procedure in New Zealand. After accepting the American-style strict exclusionary rule in 1992, it rejected such a model within a decade and returned to balancing exclusion. New Zealand found arguments for rejecting the US system in the case law of EU countries and particularly in ECtHR jurisprudence.[86] This example clearly shows that comparative and supranational law could have an influence on national legislation.

It is not surprising that the enactment of the EPPO Regulation was so difficult, because it had to take into account all European systems, and, besides that, it had to reconcile imitations of the American model. Belgium is the only older EU Member State that attempted to use the absolute exclusion of material evidence similar to the US system. In 2003, the Constitutional Court abolished such a method, holding that absolute exclusion produces disproportionate results. The decision was made with reference to the ECtHR judiciary in the *Schenk* and *Khan* cases, with the corroboration of French and Dutch case law, and the ICC Statute. In this example, we can see a variety of sources and systems that could influence national law, too. In contrast, some scholars in Croatia consider that it is not correct to look at the ECtHR case law or other supranational systems, but at the same time they cannot explain the reasons for accepting the American model.

The American model has specific goals that do not make it applicable in other countries or in supranational evidentiary systems.[87] The main reason is that the American police are an uncoordinated and decentralised organisation with more than 50,000 independent police organisations affiliated to local political units (cities, municipalities, etc.). Police violence has been directed at minorities which did not have the protection of the courts because of majority election, and the main purpose of exclusionary rules was to make a federal tool that could prevent police misconduct. In European countries, the police have a different hierarchy, and it is not necessary to maintain discipline by rejecting police evidence.[88] The automatic exclusion of unlawful evidence is used only when other appropriate means are not available.[89] Numerous empirical studies

[84] *Ryan* (2014).
[85] *Perrin* et al. (1999) p 792.
[86] *Mount* (2003) p 49.
[87] *LaFave* (1996) p 2561.
[88] *Herrmann* (1996) p 146.
[89] *Amar* (1994) p 785.

do not favour the theory of deterrence, with the conclusion that the exclusion of illegal evidence cannot prevent police irregularities.[90] The exclusionary rule is the most criticised legal rule (beside the death penalty) in the United States. Concerning EPPO proceedings, it should be emphasised that the US exclusionary rule is not used in proceedings for serious federal offences (grand jury proceedings) such as corruption, or similar offences such as those under the competence of the EPPO.

9. CONCLUSION

The provision on the admissibility of evidence in the EPPO procedure does not introduce its own model of assessment, but rather transfers jurisdiction to the level of the Member States. This can lead to different results depending on the group of countries in which the evidence will be used, from which group of countries the evidence originates, and if there was an opportunity to apply the necessary formalities. Some rules of the Regulation facilitate the enforcement of a foreign law provision, but a problem arises if evidence is gathered prior to the establishment of EPPO jurisdiction, or before a cross-border dimension has been determined. Therefore, evidence could become illegal or unlawful just on account of different law systems.

From this point of view, it can be concluded that the Regulation does not solve key problems that could occur as a consequence of different national legal regulations. It will have predictable results only on the most convenient and simplest path, attained when all foreign rules are fully respected or if the rules are fully compatible. The Regulation does not address complex situations which could emerge if there is no opportunity to coordinate one or more incompatible foreign systems. The findings of this paper and a few examples from the Croatian system show that there could be some incompatibilities between groups A, B, and C that could be reflected in EPPO proceedings.

This does not improve the legal certainty or predictability of EPPO proceedings. Unclear situations open the way for objections that the Regulation does not specify a minimum level of inadmissibility of evidence. Besides, objections can be made that the Regulation does not limit excessive inadmissibility based on less important national formalities which are not required in the European context.

The comparative analysis indicates that almost all EU Member States have some form of inadmissibility of evidence. Illegal evidence collected by some means of serious violations (e.g. torture or inhuman treatment, violation of the privilege against self-incrimination, etc.) would be inadmissible in almost

[90] *Alschuler* (2008).

every law system. Therefore, it could be possible to agree on a basic level of inadmissibility which would not be perceived as a restraint of national sovereignty. This could be used as a starting point for developing a model in the EPPO procedure which could introduce a uniform pattern for the EU level. The Regulation points to the ECHR and CFR rules, but interpretation is left to national courts, which makes different outcomes possible. Such a general provision does not make things clear.

Systems that use a balancing type of exclusionary rule have a higher capacity to adapt to individual circumstances and may have more suitable effects on criminal proceedings. A large number of arguments support the view that a broad exclusionary rule as used in some European countries does not produce optimal results in the European context. It would be appropriate to develop an approach to facilitate harmonisation based on the European tradition.

REFERENCES

1. *Allegrezza, S., Mosna, A.* (2018). Cross-Border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition? in: *Bachmaier Winter, L.* (ed.), The European Public Prosecutor's Office: The Challenges Ahead. Springer, 141-165.
2. *Alschuler, A.* (2008). Studying the Exclusionary Rule - An Empirical Classic. The University of Chicago Law Review, 75, 365-1383.
3. *Amar, A.* (1994). Fourth Amendment First Principles. Harvard Law Review, 107(4), 757-819.
4. *Amar, A.* (1996). Sixth Amendment First Principles. Georgetown Law Journal, 84, 641-690.
5. *Bradley, C.* (2001). Mapp Goes Abroad. Case Western Reserve Law Review, 52, 375-397.
6. *Choo, A.* (2012). Evidence. Oxford, Oxford University Press.
7. *Clements, L.* et al. (1999). European Human Rights: Taking a Case Under the Convention. London, Sweet and Maxwell.
8. *Cramer, S., Bürgle, M.* (2004). Die Strafprozessualen Beweisverwertungsverbote. Stuttgart, Boorberg.
9. *Damaška, M.* (1972). Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study. University of Pennsylvania Law Review, 121, 506.
10. *Damaška, M.* (1975). Structures of Authority and Comparative Criminal Procedure. The Yale Law Journal, 84(3), 480-544.
11. *Damaška, M.* (2011). The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals. North Carolina Journal of International Law and Commercial Regulation, 36
12. *Delmas-Marty, M., Spencer, J.* (eds.) (2004). European Criminal Procedures. Cambridge, Cambridge University Press.
13. *Erkelens, L.* et al. (2015). The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon? Hague, Asser Press.
14. *Frankowski, S., Stephan P.* (1995). Legal Reform in Post-Communist Europe: The View from Within. Martinus Nijhoff Publishers.
15. *Giannoulopoulos, D.* (2007). The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First. The International Journal of Evidence and Proof, 11(3) 181-212.

16. *Giannoulopoulos, D.* (2019). Improperly Obtained Evidence in Anglo-American and Continental Law. Oxford, Hart.
17. *Grande, E.* (2000). Italian Criminal Justice: Borrowing and Resistance. The American Journal of Comparative Law, 48, 227-248.
18. *Guinchard, S., Buisson, J.* (2002). Procédure Pénale. Paris, Litec.
19. *Helenius, D.* (2015). Admissibility of Evidence and the European Public Prosecutor's Office, in *Asp, P.* (ed.), The European Public Prosecutor's Office: Legal and Criminal Policy Perspectives. Stockholm, Stiftelsen Skrifter Stockholms.
20. *Herrmann, J.* (1996). Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective. Saint Louis-Warsaw Transatlantic Law Journal, 127.
21. *Illuminati, G.* (2018). Protection of Fundamental Rights of the Suspect or Accused in Transnational Proceedings Under the EPPO, in: *Bachmaier Winter, L.* (ed.), The European Public Prosecutor's Office: The Challenges Ahead. Springer, 179-201.
22. *Jackson, J., Summers, J.* (2012). The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions. Cambridge, Cambridge University Press.
23. *Jäger, C.* (2003). Beweisverwertung und Beweisverwertungsverbote im Strafprozess. München, Beck.
24. *Karas, Ž.* (2006). Illegal Evidence [in Croatian: Nezakoniti dokazi]. Laser plus, Zagreb.
25. *Karas, Ž.* (2014). Inconsistent Case Law in Criminal Procedure as a Violation of the European Convention on Human Rights [in Croatian: Neujednačena sudska praksa u kaznenom postupku kao povreda Europske konvencije za zaštitu ljudskih prava]. Zbornik Pravnog fakulteta u Zagrebu, 64(1), 111-131.
26. *Köhler, M.* (1995). Prozeßrechtsverhältnis und Ermittlungseingriffe. Zeitschrift für die gesamte Strafrechtswissenschaften, 101(1), 15-41.
27. *Krapac, D.* (1983). Opći prikaz primjene nekih propisa ZKP o pravnom režimu nevaljanih dokaza i neformalnih izvora saznanja koje su prikupili OUP te nekih propisa o utvrđivanju činjeničnog stanja. Naša zakonitost, 37(7-10), 229-243.
28. *Krapac, D.* (1994). Reforma kaznenog postupka i zaštita ljudskih prava. Hrvatski ljetopis za kazneno pravo i praksu, 1(1), 81-121.
29. *Krapac, D.* (2008). Zakon o kaznenom postupku i drugi izvori hrvatskog kaznenog postupovnog prava. Narodne novine, Zagreb.
30. *LaFave, W.* (1996). Computers, Urinals and the Fourth Amendment: Confessions of a Patron Saint. Michigan Law Review, 94(8), 2553-2589.
31. *Langer, M.* (2004). From Legal Transplants to Legal Translations. Harvard International Law Journal, 45(1), 1
32. *McDermott, Y.* (2016). Fairness in International Criminal Trials. Oxford, Oxford University Press.
33. *Mount, S.* (2003). R v Shaheed: The Prima Facie Exclusion Rule Re-examined. New Zealand Law Review, 49.
34. *Nowak, C.* (2016). The European Public Prosecutor's Office and National Authorities. San Giuliano, Wolters Kluwer.
35. *Pavišić, B.* (2008). Criminal Procedure Law [in Croatian: Kazneno postupovno pravo]. Pravni fakultet, Rijeka.
36. *Pavišić, B.* (2008b). Novi hrvatski Zakon o kaznenom postupku. Hrvatski ljetopis za kazneno pravo i praksu], 15(2), 489-602.
37. *Perrin, T.* et al. (1999). An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule. Pepperdine Law Review, 26, 789-804.
38. *Renucci, J.* (2005). Code de Procédure Pénale. Dalloz, Paris.
39. *Rogall, K.* (1979). Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten. Zeitschrift für die gesamte Strafrechtswissenschaften 91(1).

40. *Roxin, C*. (1998). Strafverfahrensrecht. Beck, München
41. *Ryan, A*. (2014). Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence. London, Routledge.
42. *Seiler, S*. (2005). Strafprozessreform 2004. Wien, Universitätsverlag.
43. *Sharpe, S*. (1993). Judicial Discretion and the Exclusion of Evidence Under Sections 76 and 78 of the Police and Criminal Evidence Act 1984. University of Warwick.
44. *Soo, A*. (2018). (Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study. Utrecht Law Review, 14(1), 18-60.
45. *Steiker, C*. (1994). Second Thoughts About First Principles. Harvard Law Review, 107, 820-857.
46. *Stone, R*. (2012). Civil Liberties and Human Rights. Oxford, Oxford University Press.
47. Šugman, *K*. et al. (1996). Slovenia. The European Institute for Crime Prevention and Control, Helsinki.
48. *Thaman, S*. (2001). Miranda in Comparative Law. Saint Louis University Law Journal 45, 581-688.
49. *Thaman, S*. (2010). Fruits of the Poisonous Tree in Comparative Law. Southwestern Journal of International Law, 16, 333-375.
50. *Thaman, S*. (2012). The Exclusionary Rule, in: *Brown, K., Snyder, D*. (eds.), General Reports of the XVIIIth Congress of the International Academy of Comparative Law. Springer.
51. *The International Criminal Court* (1999). The Making of the Rome Statute. Hague, Kluwer Law International.
52. *Triffterer, O*. (1999). Commentary on the Rome Statute. Baden, Nomos.
53. *Turner, J., Weigend, T*. (2019). The Purpose and Function of Exclusionary Rules, in: *Gless, S., Richter, T*. (eds.), Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules. Springer.
54. *Viebig, P*. (2016). Illicitly Obtained Evidence at the International Criminal Court. Hague, Asser Press.
55. *Weigend, E*. (2004). Die polnische Strafprozessordnung. Freiburg, Max-Planck Institute.
56. *Weigend, T*. (2019). The Potential to Secure a Fair Trial Through Evidence Exclusion: A German Perspective, in *Gless, S. Richter, T*. (eds.), Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules. Springer, 61-92.
57. *Zong, Y*. (2018). Beweisverwertungsverbote im Strafverfahren: rechtsvergleichende Untersuchung zum deutschen, US-amerikanischen und chinesichen Recht. Berlin, Duncker und Humblot.
58. *Zupančič, B*. et al. (1996). Constitutional Criminal Procedure Law [in Slovenian: Ustavno kazensko procesno pravo]. Ljubljana.

CASE LAW

1. Constitutional Court of the Republic of Croatia, USRH, U-III-857/2008, U-III-2781/2010, USRH, U-III-581/2015
2. ECtHR, Dragojević v. Croatia, ECtHR Judgment (15 January 2015) Appl. No. 68955/11
3. ECtHR, Göcmen v Turkey, ECtHR Judgment (17 October 2006) Appl. No. 72000/01.
4. ECtHR, Matanović v. Croatia, ECtHR Judgment (4 July 2017) Appl. No. 2742/12
5. ECtHR, Murtazaliyeva v. Russia, ECtHR Judgment (18 December 2018) Appl. No. 36658/05
6. ECtHR, Schenk v. Switzerland, ECtHR (12 July 1988) Appl. No. 10862/84
7. ECtHR, Teixeira De Castro v. Portugal, ECtHR Judgment (9 June 1998) Appl. No. 25829/94.

8. ICTY, The Prosecutor v. Kordić and Čerkez, IT-95-14/2-T
9. ICTY, The Prosecutor v. Radoslav Brđanin, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence (3 October 2003)
10. Ljubljana County Court, III K 44415/10 (III K 200/10) 6 November 2012
11. Supreme Court of the Republic of Croatia, VSRH, I Kž 278/14; VSRH, I Kž 61/09; VSRH, I Kž Us 30/09; VSRH, I Kž 616/09; VSRH, I Kž 29/14; VSRH, I Kž-Us 84/16; VSRH, I Kž Us 88/16; VSRH, I Kž Us 131/17; VSRH, I Kž 612/05; VSRH, I Kž-595/02; VSRH, I Kž-874/09; VSRH, I Kž-Us 116/2017; VSRH, I Kž 373/17; VSRH, I Kž-Us 31/12; VSRH, I Kž-Us 6/14.

DOCUMENTS

1. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013).
2. European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM(2013)0534.
3. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.
4. EU Network of Independent Experts on Fundamental Rights (2003). Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union. CFR-CDF.

Sažetak

ULOGA NACIONALNIH SUSTAVA U OCJENI ZAKONITOSTI DOKAZA EUROPSKOG JAVNOG TUŽITELJA S NAGLASKOM NA HRVATSKOM SUSTAVU

Autor analizira pravila o dopustivosti dokaza iz Uredbe Vijeća o osnivanju Ureda europskog javnog tužitelja (EJT). U odredbama o osnivanju Ureda EJT-a nisu postavljena samostalna pravila o procjeni dopustivosti dokaza koji su prikupljeni povredom nekih odredaba, već je procjena prebačena na nacionalne sustave. Autor analizira nacionalne sustave članica EU-a po sljedećim obilježjima sustava nezakonitih dokaza: način izdvajanja dokaza (automatski ili relativni), opseg povreda (pravila koja mogu dovoditi do nedopustivosti dokaza) i odnos prema dokazima proizašlima iz nedopustivog dokaza. Temeljem tih karakteristika autor je u radu grupirao članice EU-a u tri skupine i potom analizirao njihove moguće međuodnose u kaznenom postupku u kojem je tužitelj EJT.

Rezultati analize pokazuju da u raznim članicama EU-a mogu nastati velike razlike u kaznenim postupcima pred EJT-om uz korištenje istih dokaza. Velike razlike u dopustivosti osobito su moguće u skupini država koje koriste automatski način izdvajanja uz široki opseg proceduralnih pravila. Autor u radu opisuje i hrvatski sustav nezakonitih dokaza te specifičnosti u odnosu na komparativno pravo.