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THE NOTION OF 'EFFECTIVE REMEDY' AND 'EFFECTIVE LEGAL REMEDY' IN EU LAW CONCERNING THE GATHERING OF EVIDENCE IN CRIMINAL PROCEEDINGS*

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Abstract
The article analyses the case law of the Court of Justice of the European Union concerning 'effective legal remedies' under Article 14 of the Directive on the European Investigation Order (EIO) and 'effective remedies' provided for in EU directives regulating the rights of defendants in criminal proceedings. An analysis of this case law leads to the conclusion that the CJEU has established a more specific and higher standard of protection through effective remedies in the first of the aforementioned areas when interpreting Article 14 of the EIO Directive. By contrast, the case law on 'effective remedies' provided for in directives regulating the rights of defendants is based on the general assumption that EU law does not govern the admissibility of evidence, which means that it may sometimes be regarded as inconsistent with the standard established in this area by the European Court of Human Rights. The article also argues that the right to an effective remedy does not imply an obligation to create a separate legal measure in the form of a 'complaint' or 'appeal' within the national legal system.

Keywords: Court of Justice, EU directives, admissibility of evidence in criminal proceedings, effective remedy, effective redress

* In the Polish versions of EU directives, the EU legislator uses various terms to denote 'effective remedies'. While in the set of directives concerning the rights of the accused (the so-called 'defence directives') the term środki naprawcze is used, in Article 14 of the EIO Directive the term środki odwoławcze appears. At the same time, there is no such difference in wording in the English versions of the two sets of directives, which use the general terms 'remedies' or 'legal remedies'. The title of this article reflects the difference in wording found in the Polish versions of the directives.

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INTRODUCTION

The European Union law affects criminal proceedings in Member States in two ways. Chronologically, the first impact occurred, and continues to occur, through the transposition into national legal systems of successive EU legal acts (previously framework decisions, now directives) regulating the mutual recognition of decisions in criminal matters. With regard to the gathering of evidence in another Member State for criminal proceedings conducted in Poland, a key role is played by the Directive on the European Investigation Order (EIO).[1] Although this Directive concerns the specific issue of obtaining evidence from another Member State, its implementation process may significantly affect the general procedural rules of Member States. A particularly important role in this process is played by the case law of the Court of Justice of the European Union (CJEU), which interprets the provisions of EU legal acts, conferring on them normative value that is often autonomous in relation to that established within a given legal system. The CJEU's case law also concerns the remedies that should be available to persons against whom evidence obtained through the execution of an EIO is to be used, as well as to those whose rights may be infringed as a result of gathering such evidence. On the basis of this case law, a key question arises as to whether the effectiveness of the 'remedy' that should be guaranteed in situations where evidence has been obtained in breach of the law requires the exclusion of such evidence from criminal proceedings, or whether such violations may instead be addressed through other procedural means.

The legal systems of EU Member States are also affected by EU legal acts aimed at harmonising national legislation to facilitate the mutual recognition of decisions in criminal matters. However, in this case the impact is direct, since proper implementation of such legal acts should result in the introduction into national law of rights for defendants or victims that ensure the same standard of protection as that provided for in the relevant EU directive. All EU directives regulating the rights of defendants in criminal proceedings contain provisions on 'effective remedies', albeit to varying degrees of generality. The concept of an 'effective remedy' used in these directives, in the context of the general right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights (the Charter), has already been interpreted by the CJEU in several judgments delivered upon requests for preliminary rulings.

The purpose of this article is to analyse the case law of the CJEU concerning effective remedies/legal remedies in both of the aforementioned areas (i.e. the mutual recognition of judgments in criminal matters and the remedies provided in directives regulating the rights of the accused in criminal proceedings) that the accused should have at their disposal in connection with the process of gathering evidence. It is our preliminary assessment that the case law on this issue is not uniform and that the Court of Justice has established a more specific and higher

[1] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1); hereinafter referred to as 'the EIO Directive'.

standard of protection through 'effective legal remedies' in the first of the above-mentioned areas. By contrast, the case law on 'effective remedies' contained in the directives regulating the rights of defendants is based on the general assumption that EU law does not govern the admissibility of evidence. This means that the standard established by the CJEU can sometimes be regarded as inconsistent with that applied in this area by the European Court of Human Rights (ECtHR).

THE RIGHT TO AN EFFECTIVE LEGAL REMEDY IN THE EIO PROCEDURE

The currently applicable EU legal acts do not regulate the issue of the admissibility of evidence obtained in another Member State.[2] This issue is addressed only partially and to a limited extent in relation to proceedings conducted by the European Public Prosecutor's Office, in recital 80 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.[3] The recital states that

> 'The evidence presented by the EPPO in court should not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence under the Charter.'

The issue of the inadmissibility of evidence obtained in breach of the law as a result of the execution of an EIO is not regulated in the EIO Directive either.[4] However, importantly, this Directive contains a general provision on 'legal remedies'. Article 14 of the EIO Directive, as relevant, reads as follows:

> '1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO.
> 2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.
> […]

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[2] However, some conceptual works are conducted on this topic. See K. Ligeti, B. Garamvölgyi, A. Ondrejová, M. von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU', *Eucrim*, 2020, No. 3, pp. 201–208; see also the publication of the European Law Institute (2023) finalising the project led by L. Bachmaier Winter and F. Salimi, *ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. Draft Legislative Proposal of the European Law Institute*; https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-publishes-a-legislative-proposal-on-mutual-admissibility-of-evidence-and-electroniC-evidence-in/ [accessed on 27 September 2025].

[3] OJ L 283, 31.10.2017, p. 1.

[4] For more information, see S. Steinborn, D. Świeczkowski, 'Verification in the Issuing State of Evidence Obtained on the Basis of the European Investigation Order', *Review of European and Comparative Law*, 2023, No. 3, pp. 172 et seq.

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

Despite the general wording of the quoted provision, it contains an important reference to the obligation to ensure 'the rights of the defence and the fairness of the proceedings'. However, it does not specify whether a violation of this obligation should lead to the inadmissibility of evidence obtained through the execution of an EIO. A similar reference to the general standard of fairness in criminal proceedings, in provisions concerning 'effective remedies', can also be found in other EU directives, which will be discussed in greater detail in the subsequent section of this paper.

In the case of cooperation based on the mechanism of mutual recognition of decisions, procedural steps are taken in two or more Member States, which undoubtedly complicates the drafting of procedural regulations aimed at ensuring that individuals have access to an appropriate remedy (legal remedy). This is particularly evident in the case of cross-border evidence gathering, where criminal proceedings are conducted in one Member State while part of the evidence is collected in one or more Member States. The extent of this difficulty is illustrated by the case law of the Court of Justice concerning the European Investigation Order.

In its judgment in *Gavanozov II*,[5] the Court of Justice examined whether the law of the issuing Member State must provide for a remedy against the issuance of an EIO for a search and the hearing of a witness by videoconference. The Court noted that the EIO Directive requires only that remedies equivalent to those available in a similar domestic case, i.e. concerning the investigative measure in question, be made available against an EIO. However, irrespective of this, Member States are obliged to ensure respect for the right to an effective remedy provided for in the first paragraph of Article 47 of the Charter of Fundamental Rights of the EU. Therefore, where a specific investigative measure interferes with rights and freedoms guaranteed by EU law, an appropriate remedy must be provided. The Court did not elaborate on the nature or characteristics of such a remedy. However, referring to Article 47 of the Charter, the CJEU identified two essential features of an effective remedy. First, it should allow for the contestation of the lawfulness (*régularité*) and necessity of investigative measures. Second, the remedy should make it possible to obtain appropriate redress (*redressement*)[6] if those measures have been unlawfully ordered or carried out. At the same time, the Court pointed out that it is for the Member States to provide in their national legal systems the legal remedies necessary

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[5] Judgment of the Court of Justice of 11 November 2021, *Ivan Gavanozov*, C-852/19, ECLI:EU:C:2021:902 (hereinafter referred to as the 'judgment in Case C-852/19'); see also S. Steinborn, 'Środek odwoławczy od wydania europejskiego nakazu dochodzeniowego dotyczącego wideokonferencji. Wyrok Trybunału Sprawiedliwości z dnia 11 listopada 2021 r., C-852/19, postępowanie karne przeciwko Ivanowi Gavanozovowi', *Gdańskie Studia Prawnicze*, 2024, No. 2, pp. 134–146.

[6] In the Polish version of the judgment in Case C-852/19, the word 'change' (*zmiana*) was used, whereas the English version uses 'redress'.

to achieve these purposes.[7] Furthermore, in view of the wording of Article 14(2) of the EIO Directive, which states that the substantive grounds for issuing an EIO may be challenged only in an action brought in the issuing State, the CJEU held that such an 'action' or remedy should enable challenges to the necessity and lawfulness of an EIO, at least with regard to the substantive reasons for its issuance.[8] Importantly, the Court appears to treat the right to an effective remedy under Article 47 of the Charter as a prerequisite for the application of instruments based on the principle of mutual recognition of judicial decisions between Member States.[9]

It follows from the above that the CJEU does not set out specific requirements regarding the type of remedy that should be provided when an EIO is issued for the purpose of conducting investigative measures in another Member State. It appears that the Court places greater emphasis on the *effectiveness* of the remedy. Since it is intended to allow for the challenge to the correctness of the measure, it must be assumed that it should give the entitled person the opportunity to present arguments contesting not only the lawfulness of the investigative measure but also its factual basis.

Because the remedy in question must meet the requirements of Article 47 of the Charter, it should be assumed that it ought to be available to any person whose rights and freedoms are affected by a given investigative measure. The category of eligible persons should therefore not be limited solely to suspects and defendants in criminal proceedings. Investigative measures may interfere with the rights and freedoms of other individuals, who should likewise be able to avail themselves of such a remedy.[10] It seems, however, that access to an effective remedy within the meaning of Article 47 of the Charter does not have to be provided to suspects and accused persons in every case. If a particular investigative measure does not directly interfere with their rights and freedoms, Article 47 of the Charter does not, in itself, imply that such a remedy must be available. It should be emphasised that in the *Gavanozov II* case, the CJEU did not rule on whether the effectiveness of the remedy requires that evidence obtained in violation of the law be deemed inadmissible.

For the first time, this issue arose in the *EncroChat* judgment.[11] One of the matters examined in that case concerned the admissibility of evidence obtained on the basis of an EIO issued by a public prosecutor, where that evidence was already in the possession of the competent authorities of the Member State executing the EIO. The issue of ensuring access to a remedy arose in this context with regard

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[7] Judgment in Case C-852/19, paragraph 33. On the concept of an effective legal remedy in Article 47 of the Charter, see S. Steinborn, 'The Concept of an Effective Remedy Under Article 47 of the Charter in the Context of the European Investigation Order', *European Criminal Law Review*, 2024, Vol. 14, No. 2, pp. 135–147. On the genesis and meaning of the notion of 'effective remedy', see P. Wiliński, 'Introducing effective remedies', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2023, pp. 13–29.

[8] Judgment in Case C-852/19, paragraphs 41 and 49.

[9] Ibidem, paragraph 56.

[10] See also ibidem, paragraph 46.

[11] Judgment of the Court of Justice of 30 April 2024, *M.N. (EncroChat)*, C-670/22, ECLI:EU:C:2024:372 (hereinafter referred to as the 'judgment in Case C-670/22' or 'the *EncroChat* judgement').

to the guarantees that should be provided in the Member State issuing the EIO. The Court essentially held that the issuing authority is not competent to review the lawfulness of the separate procedure by which the executing Member State obtained the evidence sought to be transmitted under an EIO.[12] However, it follows from the Court's reasoning that such verification may nevertheless take place indirectly through an examination of the proportionality and necessity of issuing the EIO, based on a remedy lodged pursuant to Article 14(1) of the EIO Directive. This is because that provision imposes an obligation to ensure equivalent remedies in the EIO procedure to those available in a domestic case concerning the same investigative measure.[13] Although the CJEU referred to the transmission of evidence that would be disproportionate to the objectives of the criminal proceedings in the issuing State, it is impossible to assess the proportionality of the transmission of evidence without a closer examination of the manner in which it was obtained. The Court then referred to Article 14(7) of the EIO Directive and held that if a party to the criminal proceedings is unable to comment effectively on a piece of evidence likely to have a preponderant influence on the findings of fact, such evidence should be excluded from the case, as its admission would risk violating the right to a fair trial.[14] Even though the Court emphasised that the admissibility of evidence in criminal proceedings is generally a matter for national law, it derived an exception to this rule from Article 14(7) of the EIO Directive and expressly required the exclusion of evidence on the grounds of the right of defence and the right to a fair trial.[15]

Although the CJEU's position lacks the precision desirable in such situations, it seems that reasonably clear conclusions can be drawn from it. In paragraph 105 of the *EncroChat* judgment, the Court states:

> 'If a court takes the view that a party is not in a position to comment effectively on a piece of evidence that is likely to have a preponderant influence on the findings of fact, that court must find an infringement of the right to a fair trial and exclude that evidence in order to avoid such an infringement.'

At first glance, this statement could be understood to mean that the sanction of excluding evidence should apply only in situations where a party is unable to challenge the evidence and that the evidence is relevant to the case.[16] However,

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[12] Ibidem, paragraph 100.

[13] Ibidem, paragraphs 102–103.

[14] Ibidem, paragraphs 105 and 130.

[15] The Court of Justice does not use the term 'inadmissibility' of evidence but rather refers to the 'rejection' or 'exclusion' of evidence. The German version of the judgment refers to 'ignoring' evidence (*unberücksichtigt zu lassen*), as does the English version ('courts are required to disregard'). It should therefore be assumed that by using the term 'exclusion', the Court of Justice meant treating the evidence as inadmissible, since case law distinguishes between the inadmissibility of evidence and the assessment of the value of a given piece of evidence. See, *inter alia*, judgment of the Court of Justice of 2 March 2021, *Criminal Proceedings against H.K.*, C-746/18, ECLI:EU:C:2021:152, paragraphs 43–44 (hereinafter referred to as the 'judgment in Case C-746/18').

[16] Two conditions for the admissibility of evidence obtained from EncroChat are derived in the literature from this judgment of the Court of Justice: (1) the defence must be given the opportunity to comment effectively on every piece of such evidence; and (2) the evidence must

limiting the possibility of excluding evidence to this situation alone would be entirely incomprehensible.

From the *EncroChat* case, one may infer that the CJEU treats the mechanism of excluding evidence as a specific sanction aimed at ensuring that defendants are afforded an adequate opportunity in criminal proceedings to challenge evidence obtained on the basis of the principle of mutual recognition. It should be noted that, in the case of the transfer of evidence on the basis of an EIO, there will most often be no remedy against the issuance of the EIO in the issuing Member State, since, under Article 14(1) of the EIO Directive, there is an obligation to provide a remedy equivalent to that available in a similar domestic case. In the national procedural systems, the mere transfer of evidence from one criminal proceeding to another does not usually amount to an act against which an appeal or formal complaint can be lodged. Moreover, it is not an act that, in itself, interferes with the rights and freedoms of the individual, and therefore there are no grounds for deriving an obligation to provide such a remedy directly from Article 47 of the Charter. Consequently, the CJEU resorts to the mechanism of verifying evidence at the stage of proceedings on the merits in the State issuing the EIO.

Member States are obliged to ensure that a person against whom criminal proceedings are conducted is afforded the right of defence and the right to a fair trial. It may be assumed that, on the one hand, these requirements mandate the provision of an adequate opportunity to challenge evidence and, on the other, are a fundamental criterion to be applied when assessing the admissibility of evidence. The issue is not limited to formally guaranteeing a party the possibility to contest evidence obtained from another Member State, but rather ensuring that the party is able to 'comment effectively' on such evidence. The Court therefore requires that national law provide an effective mechanism for verifying evidence obtained from another Member State. This does not entail a direct examination of the procedure by which such evidence was obtained in the State executing the EIO, but rather an assessment of whether the use of that evidence in the criminal proceedings in the country issuing the EIO would render those proceedings unfair. It is evident that such an assessment cannot be carried out entirely independently of the manner in which the evidence in question was obtained in the country executing the EIO.

It is important to note that the Court of Justice places emphasis on the effectiveness of the mechanism that should be provided for in national law, rather than on any specific procedural solution. It therefore appears that it is not necessary to introduce a particular procedural instrument, such as a remedy of appeal or a formalised complaint. Objections to evidence obtained under the EIO procedure may also be raised in the ordinary course of proceedings before the court. In this respect, the standard indicated in the *EncroChat* judgment seems to correspond to the features of a legal remedy outlined in *Gavanozov II*, where the Court did not, after all, require the provision of a measure enabling *ex ante* review of an EIO. It

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not have a significant (decisive) impact on the findings of fact in the case. See V. Bajović, 'Encro-Chat and Sky ECC Data as Evidence in Criminal Proceedings in Light of the Court of Justice Decision', *European Journal of Crime, Criminal Law and Criminal Justice*, 2025, Vol. 33, No. 2, p. 255.

instead pointed to the requirement to ensure the possibility of redress in the event that an investigative measure is unlawful, which must be understood as including the subsequent elimination of the consequences of a breach of the law committed when carrying out the investigative measure. In this sense, the possibility for a party to trigger verification of the evidence, which may result in its exclusion, constitutes such a form of *ex post* review. Importantly, through this mechanism it will generally remain possible to fully remove the negative consequences of obtaining defective evidence for the fairness of the proceedings in the Member State issuing the EIO.

To recapitulate, it is worth emphasising that the *EncroChat* judgment is not the first case in which the Court of Justice has ruled on the effects of obtaining evidence in violation of the guarantees of a fair trial. However, in this judgment, the CJEU did so for the first time on the basis of Directive 2014/41, whereas previous judgments indicating a similar effect (i.e. the possibility of disregarding evidence or information in criminal proceedings)[17] concerned the interpretation of Directive 2002/58/EC.[18]

It is important to note that, despite emphasising the procedural autonomy of Member States in regulating the admissibility of evidence and the absence of regulation of this issue at the EU level,[19] the CJEU in the *EncroChat* case clearly recognised that the need to ensure the fairness of proceedings and the right of defence may, in some cases, require the exclusion of evidence obtained through the EIO procedure.[20] With regard to this issue, the CJEU did not refer in any way to the extensive case law of the European Court of Human Rights on the admissibility of evidence. However, the Strasbourg Court did address this matter when examining complaints against France concerning the execution by the French authorities of EIOs requesting the transfer of evidence obtained from *EncroChat*. The ECtHR had no doubt that the remedy available to the applicants in France, as the State executing the EIOs, which could have led to the exclusion of this evidence as inadmissible, constituted an 'effective remedy' within the meaning of Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, it dismissed the complaints as inadmissible on the grounds that this domestic remedy had not been exhausted.[21]

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[17] Judgment of the Court of Justice of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, paragraphs 226–227; judgment in Case C-746/18, paragraph 44.

[18] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, 18.12.2009, p. 11).

[19] Judgment in Case C-670/22, paragraphs 128–129.

[20] Despite this, some authors criticise the Court of Justice's ruling in this regard. See, in particular, A. Hoxhaj, 'The Court of Justice Ruled that the EncroChat Data Can Be Admissible Evidence in the EU', *European Journal of Risk Regulation*, 2025, Nos 1–13, pp. 9–12; https://www.researchgate.net/publication/395161249_The_Court_of_Justice_Ruled_that_the_EncroChat_Data_can_be_Admissible_Evidence_in_the_EU#fullTextFileContent [accessed on 15 September 2025].

[21] ECtHR decision of 24 September 2024, *A.L. and E.J. v. France*, Applications Nos 44715/20 and 47930/21.

THE RIGHT TO AN 'EFFECTIVE REMEDY' IN THE 'DEFENCE DIRECTIVES'

Currently, in European Union law, the rights of defendants (a term which also includes suspects) in criminal proceedings are regulated by six EU directives. These are, in chronological order: the Directive on access to interpretation and translation;[22] the Directive on the right to information in criminal proceedings;[23] the Directive on access to a lawyer;[24] the Directive on the presumption of innocence;[25] the Directive on child defendants;[26] and the Directive on access to legal aid.[27]

Each of the above-mentioned legal acts contains a provision or provisions regulating the right to 'remedies'. In the Directive on interpretation and translation, the issue of access to remedies is regulated by Article 2(5) with regard to interpretation and by Article 3(5) with regard to the translation of documents. Both provisions are similar in content and provide for the possibility of challenging two circumstances: a decision stating that there are no grounds for providing interpretation or translation, respectively, and the quality of that interpretation or translation. However, both provisions include a reservation that Member States are to ensure access to remedies 'in accordance with procedures in national law'. At the same time, the preamble to this Directive states that 'that right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such a finding may be challenged' (recital 25 of the Preamble). As a result, it should be assumed that the minimum implementation of this right is the obligation of the procedural authorities conducting a given stage of the proceedings to check and verify the quality of the translation. In the only ruling to date concerning the judicial interpretation of Article 2(5) of this Directive, the CJEU held that it is not permissible

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[22] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1); hereinafter referred to as 'the Directive on interpretation and translation'.

[23] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1); hereinafter referred to as 'the Directive on information'.

[24] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; (OJ L 294, 6.11.2013, p. 1); hereinafter referred to as 'the Directive on access to a lawyer' or 'Directive 2013/48.'

[25] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1); hereinafter referred to as 'the Directive on the presumption of innocence' or 'the Directive 2016/343'.

[26] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1); hereinafter referred to as 'the Directive on minor defendants'.

[27] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1); hereinafter referred to as 'the Directive on legal aid'.

to try a person *in absentia* if, due to inadequate interpretation, that person was not informed of the charges in a language which he or she understands, or if it is impossible to determine the quality of the interpretation provided and, therefore, to establish that the person was informed of the charges in a language which he or she understands.[28]

A similar, very general wording and reference to national procedures is found in the provision granting the right to a remedy in the Directive on information. Article 8(2) of that Directive simply refers to the right to challenge the possible failure or refusal of the competent authorities to provide information.[29] The two most recent directives – the Directive on child defendants and the Directive on legal aid – also provide, in similarly general terms, that defendants should be entitled to 'an effective remedy under national law in the event of a breach of their rights under this Directive'.

More detailed regulation of the right to an effective remedy is provided only in the Directive on access to a lawyer and the Directive on the presumption of innocence.[30] Both directives specify that Member States shall ensure that, in criminal proceedings, when assessing statements made by suspects or accused persons or evidence obtained in breach of the rights guaranteed in those directives, the rights of the defence and the fairness of the proceedings are respected (Article 10 of Directive 2016/343; Article 12 of Directive 2013/48).[31] At the same time, as in the other directives, the reference clause to national law is repeated here, supplemented by the statement that an effective remedy shall be provided without prejudice to national rules on the admissibility of evidence.[32]

It is precisely the CJEU's interpretation of Article 12 of Directive 2013/48, linked to its interpretation of the provisions on effective remedies contained in other directives, that allows for the reconstruction of the standard of an 'effective remedy' in the area of obtaining evidence in violation of the rights of the accused guaranteed in the 'defence directives'. The judgments of the CJEU in the following cases appear to

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[28] Judgment of the Court of Justice of 23 November 2021, *IS*, C-564/19, ECLI:EU:C:2021:949.

[29] A more specific remedy, requiring either a court decision or the possibility of appeal to a court, is provided only in Article 7(4) of that directive, in relation to the refusal of access to the investigation file to a person who has been arrested or detained.

[30] This directive also refers to the reopening of proceedings as an effective remedy in cases of criminal proceedings conducted *in absentia*, which, however, lies beyond the scope of this study.

[31] The high degree of generality of the provisions regulating the right to a remedy is highlighted in the literature. See, *inter alia*, critical comments: K. Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego w postępowaniu dowodowym*, Warszawa, 2023, pp. 89–92; Z. Branicka, 'Implementation of the right to effective legal remedies in European Parliament Directives', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2024, p. 137.

[32] 'Without prejudice to national rules and systems on the admissibility of evidence' (Article 12(2) of the Directive on access to a lawyer). On the evolution of this provision in the process of drafting the Directive, see P. Wiliński, K. Kiejnich-Kruk, 'Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards', *Review of European and Comparative Law*, 2023, Vol. 54, No. 3, pp. 155–159.

be of particular importance in this regard: C-209/22,[33] C-603/22,[34] C-15/24 PPU,[35] and C-530/23.[36] The conclusions drawn from them are as follows.

The right to an effective remedy does not imply an obligation to provide for a separate legal remedy in national law in the form of an appeal or other type of 'complaint' aimed at ensuring compliance with the rights provided for in the directives.[37] This follows directly from the preambles of certain directives (see, e.g. recital 36 of the Directive on the right to information in criminal proceedings and recital 25 of the Directive on interpretation and translation) and has been confirmed in the case law of the CJEU. The Court has consistently emphasised that Articles 47 and 48 of the Charter of Fundamental Rights do not require Member States to establish independent actions that suspects or accused persons could bring in order to defend the rights conferred on them by directives establishing the so-called minimum standard of protection of the rights of the accused. As indicated in the first of the above-mentioned judgments, delivered in Case C-209/22,

> 'According to settled case-law, EU law, including the provisions of the Charter, does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law.'[38]

Therefore, the possibility of effectively raising the objection of an infringement of the directive before the court hearing the case on its merits, i.e. in the main proceedings, is regarded as a sufficient 'remedy'. In the aforementioned Case C-209/22, the CJEU ruled that the provisions regulating remedies in the Directive on the right to information and in the Directive on access to a lawyer, interpreted in conjunction with Articles 47 and 48 of the Charter, do not preclude national case law according to which a court competent under applicable national law to examine an application for retrospective authorisation of a personal search and the subsequent seizure of illegal substances carried out during the preliminary stage of criminal proceedings does not have jurisdiction to examine whether the rights of the suspect or accused person guaranteed by those directives were respected on that occasion. However, the CJEU added two conditions to this assessment:

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[33] Judgment of the Court of Justice of 7 September 2023, *AB,* C-209/22, ECLI:EU:C:2023:634 (hereinafter referred to as the 'judgment in Case C-209/22').

[34] Judgment of the Court of Justice of 5 September 2024, *M.S. and Others*, C-603/22, ECLI:EU:C:2024:685 (hereinafter referred to as the 'judgment in Case C-603/22').

[35] Judgment of the Court of Justice of 14 May 2024, *Stachev*, C-15/24 PPU, ECLI:EU:C:2024:399 (hereinafter referred to as the 'judgment in Case C-15/24').

[36] Judgment of the Court of Justice of 8 May 2025, *Barało,* C-530/23, ECLI:EU:C:2025:322 (hereinafter referred to as the 'judgment in Case C-530/23').

[37] See P. Wiliński, 'Closing remarks', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2023, p. 203.

[38] Judgment in Case C-209/22, paragraph 54; almost identical: judgment in Case C-530/23, paragraph 99.

> 'first, that that person is able subsequently to establish, before the court hearing the substance of the case, any infringement of the rights arising from those directives, and, secondly, that that court is then required to draw conclusions from such an infringement, in particular as regards the inadmissibility or the probative value of the evidence obtained in those circumstances.'[39]

Thus, the CJEU clearly indicated two ways in which a national court may address a finding of an infringement of the rights provided for in the directives when gathering evidence: by considering the issue of inadmissibility or by assessing the probative value of such evidence. However, it did not rule that evidence obtained in breach of the rights provided for in the above-mentioned directives must be declared inadmissible. This was not necessary in this case, as the CJEU also stated that stopping a person and carrying out a personal search during a roadside check, which gave rise to self-incriminating statements, does not amount to such a significant restriction on the freedom of action of the person concerned as to make legal assistance mandatory at that stage of the proceedings. The final assessment of the circumstances of such a case, however, is left to the national courts.[40]

In two judgments issued upon the preliminary questions from two Polish courts, the CJEU was more precise and clearer in determining the consequences of obtaining evidence in violation of the requirements set out in EU directives. It stated that the required response of the court to the gathering of evidence in violation of the rights provided for in the directives (in both cases these were statements given by the suspect) is not to consider that evidence inadmissible but to draw 'all the consequences' of that violation, in particular with regard to the probative value of the evidence obtained in those circumstances.

In Case C-603/22, the CJEU had the opportunity to rule on the legal consequences of violating the requirement to provide access to a lawyer for suspects who were under 18 years of age at the time of the criminal proceedings. Three minors were interrogated during the preliminary investigation by police officers without being guaranteed prior access to a lawyer, despite the fact that Directive 2016/800, as a rule, provides for the obligation to ensure that such suspects have access to a lawyer, if necessary appointed *ex officio*, before the first interrogation.[41] Their parents were also

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[39] Judgment in Case C-209/22, paragraph 61.

[40] Paragraph 74 of the judgment. In this regard, the Court of Justice has almost replicated the standard set by the European Court of Human Rights in the case *Zaichenko v. Russia* (judgment of 18 February 2010, Application No. 39660/02). For more on the standard of access to a defence lawyer at an early stage of criminal proceedings established by the Strasbourg Court, see S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej', in: Rogacka-Rzewnicka M., Gajewska-Kraczkowska H., Bieńkowska B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa, 2015, pp. 436–442.

[41] See Article 6(2) and (3) of Directive 2016/800 (with the exceptions provided for in Article 3(6) thereof). It is rightly assumed in the literature that Article 6(6) of Directive 2016/800 imposes an obligation to provide mandatory defence for a child before their first interrogation in the pre-trial proceedings. The provision clearly refers not only to access to a defence lawyer but also to ensuring that children are assisted by a lawyer, which implies an active role for the procedural authorities (see also recital 25 of the preamble to the Directive). It is therefore considered that children accused of a crime are not in a position to waive their right of access to a defence lawyer. See S. Cras,

not allowed to attend the interrogation, and the minors were simply given standard instructions on their rights and obligations. In this situation, the District Court in Słupsk, which heard the case, sought first to determine whether Article 168a of the Code of Criminal Procedure, which prohibits the court from considering the statements of minors as inadmissible evidence in such circumstances, is contrary to EU law. The CJEU's answer was unequivocally negative. It found that the provisions of Directive 2016/800 do not preclude national legislation that does not allow a court to consider as inadmissible incriminating statements made by a child during police questioning in breach of the right of access to a lawyer provided for in Article 6 of Directive 2016/800. However, at the same time, the CJEU emphasised that acceptance of this regulation must be linked to the power of the national court hearing the case to verify whether that right, interpreted in the light of Articles 47 and 48(2) of the Charter, has been respected and, secondly, to draw all the inferences from that infringement, in particular as regards the probative value of the evidence obtained in those circumstances. The Court did refer to the possibility of drawing 'all the inferences' from such a breach, yet at the same time it had previously ruled out the inadmissibility of such evidence as a possible reaction to the breach of the right of access to a lawyer, since it had found that Article 168a of the Code of Criminal Procedure was not contrary to EU law. It thus ruled out the competence of a national court to disapply this provision on the basis of the principle of the supremacy of EU law. Moreover, the CJEU recalled that the provisions governing 'remedies' in the directives are not intended to regulate national systems concerning the admissibility of evidence, since they are to apply 'without prejudice' to those national provisions. The Court clearly stated that, in the current legal situation, the issue of the admissibility of evidence belongs exclusively to national law.[42]

An almost identical position was expressed in another, more recent judgment of the CJEU delivered in the framework of the preliminary ruling procedure initiated by the District Court in Włocławek. Importantly, in this case as well, the suspect was a person who, in the light of Strasbourg case law, should be considered a 'vulnerable person'. The CJEU had no doubt that persons with mental disorders belong to the category of 'vulnerable suspects' covered by Article 9 of Directive 2016/1919, for whom Member States are required to take their special needs into account when implementing this Directive. In view of this circumstance, the Court ruled that an essential element of the effective protection granted by Article 12 of

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'The Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings: Genesis and Descriptive Comments Relating to Selected Articles', *Eucrim*, 2016, No. 2, p. 114; similarly, on the inadmissibility of waiving this right: Opinion of Advocate General Tamara Ćapeta of 22 February 2024 in Case C-603/22, paragraph 70; contrary opinion: S.E. Rap, D. Zlotnik, 'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused: Reflections on the Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings', *European Journal of Crime, Criminal Law and Criminal Justice*, 2018, Vol. 26, No. 2, pp. 121–122.

[42] Judgment in Case C-603/22, paragraphs 168–169. For more on the implications of this ruling from the perspective of the *nemo se ipsum accusare tenetur* principle, see M. Wąsek-Wiaderek, 'Vulnerable Suspects and the *Nemo Tenetur* Principle in Poland – A Few Remarks on the Judgment of the Court of Justice in Case C-603/22', in: *Nemo tenetur: The Many Faces of a Fundamental Principle*, forthcoming, planned publication: December 2025.

Directive 2013/48 and Article 8 of Directive 2016/1919 is that decisions concerning the examination of a suspect's potentially particularly difficult situation and the refusal to grant legal aid to such a person, as well as whether to interrogate such a person in the absence of a lawyer, must be reasoned and subject to an effective remedy. At the same time, however, the Court stated that these provisions:

> 'do not preclude national legislation which, in criminal proceedings, does not allow a court to declare inadmissible incriminating evidence contained in statements made by a vulnerable person during questioning by the police, by another law enforcement authority or by a judicial authority in breach of the rights laid down by Directive 2013/48 or 2016/1919, provided, however, that, in criminal proceedings, that court is in a position, first, to verify that those rights, read in the light of Article 47 and Article 48(2) of the Charter […], have been respected and, second, to draw all the inferences from that breach, in particular as regards the probative value of the evidence obtained in those circumstances.'[43]

Thus, the CJEU again emphasised the need to take into account violations of the law in the process of obtaining evidence (statements) when assessing them, clearly stating that the directives do not require automatic exclusion of all evidence obtained in violation of the rights granted therein.[44]

Slightly different conclusions may be drawn from the analysis of the *Stanchev* case,[45] in which the CJEU responded to preliminary questions from a Bulgarian court concerning the consequences of questioning an illiterate suspect after he had waived his right of access to a lawyer. The preliminary questions were referred by the court ruling on the application of pre-trial detention. The CJEU had no doubt that Article 12 of Directive 2013/48 and Article 47 of the Charter preclude national case law which implies that a court deciding on the application of this preventive measure is deprived of the possibility of assessing whether evidence presented in support of the accusation and the application of pre-trial detention has been obtained in breach of the requirements of that directive and, where appropriate, of disregarding such evidence. This judgment explicitly refers to 'disregarding' evidence obtained in breach of the directive. In paragraph 98 of that judgment, the CJEU stated that:

> 'the obligation, arising from Article 12(2) of Directive 2013/48, to ensure that the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained in breach of the right to a lawyer, means that evidence on which a party is not in a position to comment effectively must be excluded from the criminal proceedings.'

Having said that, the CJEU referred to the content of Article 14(7) of the EIO Directive and to its own judgment in the *EncroChat* case.[46]

The analysis of the above-mentioned judgments leads to the conclusion that the CJEU's case law on effective remedies is inconsistent. Moreover, despite repeated declarations in successive judgments that the Court takes into account the standard established by the ECtHR, treating it as a minimum, it should be noted that with

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43 Judgment in Case C-530/23, paragraph 108.
44 Ibidem, paragraph 102.
45 Judgment in Case C-15/24.
46 Judgment in Case C-670/22, paragraph 130.

regard to suspects with special needs, i.e. vulnerable suspects such as children or persons suffering from mental disorders, the standard set out the CJEU's case law appears to be lower than that which can still be derived from the ECtHR's judgments. Although the *Salduz*[47] doctrine has been significantly 'blurred' in subsequent case law,[48] establishing facts unfavourable to the accused on the basis of self-incriminating statements obtained in violation of the right of access to a lawyer may still directly lead to a finding that the entire proceedings were unfair. In one of its most recent rulings concerning the use as evidence of incriminating statements made by a suspect with a significantly limited intellectual capacity, the Court found that he was not capable of effectively waiving his right to defence counsel. Therefore, any subsequent measures taken to remedy this violation, including confirmation of those statements in the presence of a defence lawyer during the remand hearing, did not alter the assessment that the use of these statements as evidence rendered the entire trial unfair. This is an important judgment because, despite formally applying the new approach developed in *Ibrahim and Others v. the United Kingdom*,[49] the ECtHR clearly stated that in the case of a suspect with special needs (a vulnerable suspect), when there was no justification for restricting his right of access to a lawyer before the first interrogation, the use as evidence of his self-incriminating statements, which constituted key evidence in the case, resulted in a finding that the proceedings as a whole were unfair.[50] The concept of a 'fair trial' used in Article 12(2) of Directive 2013/48 should be interpreted by the CJEU in accordance with the case law of the Strasbourg Court, and this sometimes requires the Court to apply a 'sanction' in the form of declaring evidence inadmissible in order to maintain the standard of a fair trial.

In two cases initiated by preliminary questions from Polish courts (C-603/22 and C-530/23), Advocate General Tamara Ćapeta submitted her opinions, proposing an interpretation of an effective remedy that should be available to the accused in the event of a violation of their right of access to a lawyer, which differed from that ultimately adopted by the CJEU. In her opinion, she clearly indicated that in such situations, the national court should be entitled to consider such evidence

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[47] Initiated by the judgment of the ECtHR of 27 November 2008, *Salduz v. Turkey*, Application No. 36391/02, according to which 'the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction' (paragraph 55 *in fine*, in conjunction with paragraphs 60–63). Similarly, with regard to a suspect suffering from alcoholism and therefore classified as a 'vulnerable suspect': see ECtHR judgment of 31 March 2009, *Płonka v. Poland*, Application No. 20310/02.

[48] See, on this issue, W. Jasiński, 'Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski', *Europejski Przegląd Sądowy*, 2019, No. 1, pp. 24–30; A. Sakowicz, 'Suspect's Access to a Lawyer at an Early Stage of Criminal Proceedings in View of the Case-Law of the European Court of Human Rights', *Revista Brasileira de Direito Processual Penal*, 2021, Vol. 7, No. 3, pp. 2000–2009; R. Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze', *Human Rights Law Review*, forthcoming (20 August 2023), ANU College of Law Research Paper No. 23.6; http://dx.doi.org/10.2139/ssrn.4541954 [accessed on 27 September 2025].

[49] ECtHR judgment of 13 September 2016, *Ibrahim and Others v. the United Kingdom*, Applications Nos 50541/08, 50571/08, 50573/08 and 40351/09.

[50] ECtHR judgment of 12 June 2025, *Krpelík v. the Czech Republic*, Application no 23963/21, in particular paragraphs 94–99.

inadmissible. In Case C-603/22, she stated that it is for the referring court to ensure the full effectiveness of the rights established in the cited directives, in accordance with their interpretation by the Court. This could be achieved by excluding evidence gathered in breach of those legal acts, if the referring court considers that otherwise the rights guaranteed in Articles 24(2), 47 and 48 of the Charter would be infringed. This approach differs from that taken by the CJEU, which held that neither the provisions of the Charter nor the right to a remedy regulated in the 'defence directives' preclude the application of Article 168a of the Code of Criminal Procedure, which was understood by the referring court as prohibiting the exclusion of evidence obtained in breach of the law on the grounds of inadmissibility.

CONCLUSIONS

It can be concluded from the CJEU's jurisprudence that the 'common denominator' of an effective remedy under the EIO Directive and an effective legal remedy required by the so-called 'defence directives' is the reference to the general standard of a fair trial and the right of defence. This is intended to set the standard for an effective remedy and determine its consequences. Certainly, it cannot be inferred from the judgments discussed that the CJEU advocates a straightforward concept whereby a violation of the law in obtaining evidence automatically renders that evidence inadmissible.

However, this does not mean that the current case law of the CJEU concerning this issue is consistent and clear. With reference to evidence gathered by means of an EIO, the CJEU explicitly allows for the sanction of inadmissibility of such evidence as a component of an effective remedy, as it did, for example, in the *EncroChat* case, if the defence was not given the opportunity to effectively challenge such evidence and that evidence would have a significant, indeed decisive, impact on the findings of fact in the case. Moreover, the CJEU's position in this regard corresponds to the case law of the ECtHR, although the Luxembourg Court did not refer to the ECtHR's case law when interpreting Article 14 of the EIO Directive in that judgment.

The position of the CJEU on the consequences of violating the right of access to a lawyer for suspects, particularly those requiring special support (such as children or persons suffering from mental disorders), is both distinct and, in some respects, surprising. Despite the clear reference in Article 12 of Directive 2013/48 to the obligation to respect the right of defence and the right to a fair trial, in two judgments delivered in response to preliminary questions from Polish courts, the CJEU clearly distanced itself from the possibility of treating as inadmissible statements made by such suspects, if such self-incriminating statements were obtained in violation of the rights guaranteed in that directive. One of the findings of the judgment in Case C-603/22 should even be read as limiting the possibility of declaring such statements inadmissible, since it explicitly states that Article 168a of the Code of Criminal Procedure is not contrary to European Union law. Furthermore, as demonstrated in the second part of this study, such an interpretation of the right to an effective remedy may raise significant concerns regarding its compliance with

the standard set out in the case law of the European Court of Human Rights. Only in the *Stanchev* case does the CJEU seem to recognise the aforementioned 'common denominator' between the right to an effective remedy under Article 14 of the EIO Directive and the right to an effective remedy under the 'defence directives'.

In its case law on directives concerning the procedural rights of defendants, the CJEU clearly limits the consequences of violating the rights guaranteed by these directives, shifting the examination of this issue to the stage of assessing the evidence. A much more far-reaching sanction would be to declare such evidence inadmissible in such situations. However, at the stage of assessing the evidence, the evaluation of the violation in terms of the right of defence and the fairness of the proceedings will, as a rule, be only one aspect of the analysis carried out by the court adjudicating the case. In judicial practice, it will inevitably be necessary to take into account other circumstances as well, such as the type and nature of the evidence and its significance for the outcome of the case. As a result, the effects of the infringement may be 'blurred' and the effectiveness of the remedy that should be provided under EU law may consequently be significantly weakened.

However, there should be no doubt that the obligation to provide for both 'effective remedies' and 'effective legal remedies' does not entail the obligation to create a separate legal remedy in the form of a 'complaint' or 'appeal' in the national legal system.[51] In both areas described in this article, the objective is to ensure an effective mechanism of legal protection, which may equally be implemented during the court's examination of the merits of the case – for example, through objections raised at the hearing or grounds of appeal advanced by a party to the criminal proceedings.

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[51] See also S. Steinborn, 'Środek odwoławczy…', op. cit., pp. 143–144; S. Steinborn, 'The Concept…', op. cit., p. 141.

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