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In search of a free movement of forensic evidence: Towards minimum standards to determine evidence admissibility?

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ABSTRACT

In coming to a European Forensic Evidence Area, an European Union ambition to be reached by 2020, judicial cooperation in criminal matters should be levelled-up. Grounded on the legal basis provided by the Lisbon Treaty, this research identifies the minimum standards to be developed by looking into the actions taken both from a legal and from a forensic-scientific perspective to standardise the collection, storage and use of forensic expert evidence. In examining the feasibility of such standards, primary sources of legislation, policy documents and case-law on a European level are compared with a comparative study of domestic norms in six jurisdictions. Depending on the phase in the chain of custody and fundamental principle involved, but also on the level of cooperation between the forensic and legal actors, it was noticeable that the comparison led to different conclusions, depending on the refusal grounds provided by the member states and the necessity of intervention at the European level to safeguard the underlying fundamental values.

1. Setting the scene: evidence admissibility today: a diverse landscape with bumpy roads

Ever since evidence has been crossing borders, law enforcement authorities have been searching for a way to ensure the cross-border acceptance of evidence gathered in another Member State. Amongst others due to the many downsides of mutual legal assistance, a mostly voluntary type of interstate assistance in investigating or prosecuting a criminal offence between national authorities, the new principle of mutual recognition (MR, *i.e.* a horizontalization of cooperation with limited refusal grounds and more stringent deadlines), did not appear out of thin air. This MR principle, which was first mentioned in the 1999 Tampere Conclusions,[6] led to new legal instruments in the context of cross-border evidence gathering, namely the 2003 European Freezing Order (EFO),[9] the 2008 European Evidence Warrant (EEW)[11] and the 2014 European Investigation Order (EIO).[21]

Though these instruments provided for a MR-based legal framework for evidence, their scope of application was limited, both in terms of types of evidence these covered, and the effect these instruments had on smoothing the path towards evidence admissibility. First of all, all three of the instruments failed to cover all types of evidence in their field of application. The EFO had a limited scope, only foreseeing the conditions under which a Member State would recognise and execute in its territory a freezing order for certain types of property issued by a judicial authority of another Member State in the framework of criminal proceedings.[9(art.1)] The EEW was different, as its field of application was extended to other types of evidence, both in range (by relating to a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State)[11(art.1.1)] as in time (by relating not only to evidence already gathered, but also to some evidence to be gathered). However, it was not until the EIO, which intended to function as single instrument for all types of evidence,[12(4.1)] that both the category of 'already gathered' evidence and of evidence 'to be gathered' were included entirely (contrary to what was the case with the EEW).[9(art.7),11(art.13),21(art.11)] However, not all investigative measures are regulated in this instrument, as the set-up of a joint investigation team and the gathering of evidence within such team is explicitly excluded.[21(art.3)]

Besides that the scope of application of the three instruments based on MR did not cover all types of evidence, they also do not regulate the full chain of coming to evidence admissibility. In fact, though the Stockholm Action Programme put forward that both gathering and admissibility of evidence would be addressed by adopting two legislative proposals in 2011, namely one on a comprehensive regime on obtaining evidence in criminal matters based on the principle of MR and covering all types of evidence, and one to introduce common standards for gathering evidence in criminal matters in order to ensure its admissibility, only the first one actually came into being.[17] In that

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respect, in determining which (domestic) legal rules apply in determining admissibility of evidence gathered in a cross-border context, recourse was taken to two already existing approaches, which were named 'locus regit actum' (LRA) and 'forum regit actum' (FRA). The LRA approach can be found in the 1959 European Convention on mutual assistance in criminal matters,[1](art.3.1) and stipulates that the 'certain conditions' to which the evidence has to correspond are the conditions prescribed by the law of the Member State in which the investigative measure is executed. In this respect, evidence admissibility was not a point of concern, even though the gathering of evidence in accordance with the legislation of the executing state could imply that this evidence would end up being inadmissible because of non-compliance with the domestic procedural requirements (or might violate their fundamental principles of law). In the FRA system, instead of referring to executing solely on the basis of the legislation of the locus state, the issuing state can also describe a list of provisions that should be respected. Several policy instruments,[1,7] have incorporated the FRA principle (even though some of these also somewhat preserve LRA).[2] Even though the FRA to some extent responds to the LRA's problem, as the procedural rules by which the evidence is gathered can also incorporate those of the country of the criminal prosecution, there are some clear disadvantages as well. The most oblivious one in this context would be that there is no clear enforcement mechanism: even if the executing country acts in full accordance with the rules of the prosecuting country, there is no obligation for this country to accept the evidence as admissible, which was exactly the downside of LRA. In other words, none of these two approaches solve the evidence admissibility problem.

Over the years, the idea of the 'free movement of evidence' has emerged in the context of cooperation in criminal matters, which is a concept mirroring the traditional 'free movement' concept as has been developed for goods, persons, services and capital in the context of economic cooperation in the European Union (EU).[2](art.13) A 'free movement of evidence', *i.e.* the automatic acceptance (admissibility) of evidence gathered in accordance with certain conditions by EU Member States in reliance on the results of investigative measures executed in another Member State, has been adverted to by both scholars[33–35] and European institutions.[16](art.3.3),[17] It is in that context that the possibility offered by the Lisbon Treaty to adopt minimum standards concerning, amongst others, the mutual admissibility of evidence, should be situated.[3] The concept of minimum standards is far from new on an EU level, considering the Directives on several procedural rights for suspected or accused persons and in the context of detention which have already been adopted on an EU level.[18–20,24,26,27] In the field of evidence admissibility, the creation of minimum standards would imply overcoming the FRA's lack of enforcement mechanism, as the gathering of evidence in accordance with the commonly agreed on minimum standards would lead to automatic evidence admissibility. Despite providing the legal basis therefore in Article 82.2 Lisbon Treaty, the idea of actually developing minimum standards to ensure evidence admissibility has not been considered on an EU policy level.[8](2.1.3),[15](4.2),[16](3.1.1 and 3.3)

Given the growing interest in the development of standards and the availability of a legal basis, research into the willingness of the member standards for such standards, as well as the content of such minimum standards, constituted logical next steps. In this respect, a study on EU cross border gathering and use of evidence was carried out at Ghent University in 2010.[36] Through the use of questionnaires looking at national legal regimes on the gathering and handling of evidence, the prospect for future criminal cooperation in this area, and a free movement of evidence, was investigated. In order to come to a consensus on mutual *per se* admissibility of evidence, it was considered necessary that Member States would still be entitled to refuse the admissibility of evidence lawfully obtained abroad if the gathering of such evidence had taken place contrary to their fundamental principles of law. These fundamental principles or values should be integrated into a framework of evidence-gathering principles that, if complied with, would lead to evidence admissibility in every other Member State. In a first follow-up research conducted by Kusak, the feasibility of EU minimum standards for evidence gathered from telephone tapping and house search was examined and concluded to be feasible, though the need for research on other investigative measures was highlighted as well.[37]

2. Study on minimum standards for mutual admissibility of forensic evidence in criminal matters in the EU

In 2019, a study on common EU minimum standards for mutual admissibility of forensic evidence in criminal matters was concluded at Ghent University. In its aim to research the feasibility of developing minimum standards for investigative measures to come to mutual evidence admissibility, this study was focused on three particular forensic investigative measures of DNA, fingerprint and electronic evidence. This selection was based not only on the crucial importance of these measures today, which was illustrated by the continuous legislative attention for these measures throughout the years,[4] but also on the high level of intrusiveness of these measures, which asks for a more detailed examination of the fair balance requirement (see *infra*), and makes it easier to draw conclusions on the 'less intrusive' forensic investigative measures as well. In this respect, any consideration of electronic evidence is based on the diverse nature of this forensic discipline compared to the 'more traditional' DNA and fingerprint domains, therefore leading to other potential violations of human rights or legislative differences to be addressed when considering the fundamental principles of law on the basis of which the minimum standards for evidence admissibility are created.

In order to assess the feasibility of minimum standards of EU minimum standards for the selected forensic disciplines, three methodological techniques of nonreactive research were combined. More specifically, this research was conducted by examining not only the

[1] Article 4.1 stipulates that 'Where mutual assistance is afforded, the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State'. Article 12 EEW states that 'the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing state'. Even the EIO applies the FRA principle in Article 9.2: 'The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State'.

[2] See for instance the Council Act of 29 May 2000, in which controlled deliveries (art 12.3), joint investigation teams (art 13.3 b)) and covert investigations (art 14.2) take place in accordance with the procedures of the requested Member State (*i.e. locus* law).

[3] Article 82.2 stated that 'For the extent necessary to facilitate **mutual recognition** of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may (…) establish minimum rules. (…) They shall concern: (a) mutual admissibility of evidence between Member States (…)'.

[4] In the 2011 Conclusions, the Council of the EU therefore emphasised 'the need to define commonly accepted minimum forensic science standards for the collection, processing, use and delivery of forensic data relating inter alia to data concerning DNA profiles, as well as dactyloscopic and other biometric data, and to equip the Union to meet the new challenges that it is facing in the field of high tech and cybercrime'. See Council of the EU. Conclusions and Action Plan on the way forward in view of the creation of an European Forensic Science Area' (draft). 2016. http://data.consilium.europa.eu/doc/document/ST-10128-2016-INIT/en/pdf. Accessed January 3, 2019.

legislation and policy documents of the EU and Council of Europe (CoE), but also the jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU), in combination with a comparative study of the domestic norms on DNA expert evidence, fingerprint expert evidence and electronic evidence in a number of EU member states. In this respect, Belgium, the Netherlands, France, Luxembourg, England and Wales and Germany were selected based on a preliminary assessment of the exiting comparative studies in the field, as to constitute a well-balanced overview, as well as the language and geographical proximity of the Member States, given that primary sources of legislation were accessed. This combination of a European level analysis and member state analysis was considered necessary to get a full insight into the feasibility of standards. More specifically, whereas the overview of the European level gives insight with regard to the current level of standard-setting, the analysis of the domestic legal systems indicates whether Member States comply with these standards and, when the standard is vague or even non-existent, to what extent the current state of play differs and hampers the creation of the free movement of forensic evidence.

When considering the feasibility, the different stages in the evidence-gathering process, *i.e.* from the moment of deciding that the evidence should be obtained to actually using it in the courtroom, or the entire 'chain of custody', should be addressed. In this respect, the broader levels of (1) collection, (2) storage and (3) use are discussed, as they allow for the best comparison between the legal instruments and the forensic workflow. First, the collection or gathering of the forensic evidence refers to the first stage in which it is decided to execute the investigative measure and the measure is completed. This not only implies that the evidence can be collected from a legal point of view, but also that the necessary steps are taken in order to arrive at expert evidence from a forensic-scientific point of view, *i.e.* that several accuracy and proficiency conditions are respected. Second, after collecting the forensic evidence and safely transferring it to either the database or another place where it is stored, minimum standards should also tackle under which conditions the evidence can be retained and how the safeguards protecting the individual involved are given form. Moreover, when the evidence is stored, the minimum standards should safeguard that this is done in an accurate manner. Third, at the end of the forensic process, the forensic science findings are presented in the courtroom. In order to safeguard the right to a fair trial at this stage, some of the elements that might hamper the fairness of proceedings are discussed. Minimum standards in this context should consider the way in which the results can be reported, as well as the possibility to contest the (reliability of the) findings.

In the previous research of Kusak, the main results of the study were outlined by referring to the rules governing the investigative measures resulting in evidence, and the procedural rights associated with those measures. Based on the interests at stake during the execution of the investigative measures—namely the interests of the state and the individual—it seems that the fundamental principles of law, on the basis of which the results of all types of investigative measures may be refused, are indeed twofold.[38–41] A fair balance should be established between flexibility (during the execution of the investigative measures by the state) and protection (whenever the investigative measures are executed). The first two categories both contain principles regarding fairness.[42]

Besides the fair balance requirement, to determine the fundamental principles of law that might hamper the mutual admissibility of forensic evidence, not only traditional principles relating to the requirement for fair balance should be discussed, but also those following from the specificity of forensic evidence. In that respect, the ability to come to minimum standards when more fundamental principles of law are endangering mutual admissibility improves the chances of a general 'free movement of evidence'. The current area of forensic research requires the meeting of a quality assurance standard to ensure admissibility,[43] which can be threatened in two ways. On the one hand, several criteria are put into place to ensure the adequacy and reliability of the treatment of forensic evidence (achieving the greatest 'objectivity' possible), precluding factors such as out-dated examination methods, ambiguous evidence or storage conditions being invoked to prevent its ultimate use in court.[5] On the other hand, however, adequate and reliable treatment of evidence will not always lead to qualitative evidence, as some results, for instance, are rather open to interpretation.[44] To reach the desired goal, it is also necessary to ensure the competence of the actors involved in the investigative process. Not only does this refer to the persons performing the analysis, but also to the 'bigger picture' (laboratories, organisation structures) in which they are situated. Moreover, different from the 'traditional' disciplines, the manner in which forensic evidence is retained, also constitutes a crucial factor in determining evidence admissibility. In this respect, the criteria used to 'legalise' the use of forensic evidence in the courtroom, or to determine whether the forensic evidence could be rendered admissible developed in American case-law (the so-called *Daubert* criteria), were developed.

3. Minimum standards with regard to DNA, fingerprint and electronic expert evidence: balancing between inessential interference and inevitable intervention

In order to give a comprehensive answer to the research question whether it is feasible to create minimum standards for mutual admissibility of forensic expert evidence at EU level, recourse was taken both to more general, *i.e.* not forensic-specific, instruments, such as the Law Enforcement Directive and the Information Directive,[19] and forensic-specific sources of information. For the latter, with regard to DNA profiles, the 2008 EU Prüm Decision,[10(art.26,1)] which provides a legal framework to allow for automatic searches of DNA based on a hit/no hit system (direct access to the databases, but not to the data) for example served as a source of information.

Several distinctions were made, depending on whether or not essential fundamental principles of law from both a legal perspective and from a forensic-scientific perspective were at stake. In this respect, depending on the forensic discipline and the broader level in the chain of custody, the need for translation of the fair balance requirement and the quality requirement was perceived differently.

4. Minimum standards in order to translate fundamental rights

When developing minimum standards at EU level, it can be noticed that several specific (forensic-) specific standards have already been set where specific action is required to translate fundamental rights.

In the collection phase, the role played by the fundamental principles that can hamper mutual evidence admissibility (*i.e.* the right to privacy and the right to information) can differ. For example, when it comes to the right to privacy, in the context of electronic evidence, reference can be made to the strong stance against decryption[4(art.V.14),22(6.3),23(19.1)] as an element to include into the minimum standards. As the current European framework does not allow for a way to overcome the technical capability for the provider to help out law enforcement actors, even if this incapability is due to the own settings, forcing providers to foresee such backdoor cannot be a requirement in the minimum standards, even though some Member States foresee such requirement in their national legislations. This however seems to contradict the non-applicability of the privilege against self-incrimination in the context of DNA and

[5] In this respect, previous research about transnational exchange of forensic evidence provides perspectives on 1) reliability and quality of the evidence, 2) value of the evidence, 3) expertise of scientists and organisations and 4) maintenance of fairness and impartiality. See C McCartney and R Graham (2018) 'All we need to know'? Questioning transnational scientific evidence. In P Roberts and M. Stockdale (eds), Forensic Science Evidence and Expert Witness Testimony. Edward Elgar Publishing Ltd, Cheltenham.

fingerprint collection. The latter disciplines however also necessitate specific action in order to safeguard this fundamental right. For example, elements such as limitations to the restriction of DNA profiles on the non-coding segments of DNA data[5(art.I.2)] and the requirement not to disclose the identity of the data subject to the expert drawing up the profile[30(paras 45–47)] are necessary to safeguard the right to privacy and protect the individual from abuse and arbitrariness and should therefore be included in the minimum standards. In the context of fingerprint evidence, the provision of a legal basis for fingerprint collection as demanded by the Law Enforcement Directive should be required.[25(art.4, 1a)]

On the other hand, the right to information impacts the circumstances in which persons up to eighteen years old are protected when samples or fingerprints are to be collected, whereas in the context of electronic evidence, the right to information impacts the circumstances under which the person involved, as well as (possibly) affected States are informed of the relevant aspects of the investigative measure, regardless of their age. For DNA and fingerprints, the more general Information Directive and Law Enforcement Directive implicate that the right to information should be provided in a child-friendly manner, and also the parents should be informed. Though during the actual collection, there is no talk of proceedings that necessitate a right to be accompanied, this is the case when the minor consents to the collection, which requires that the child is accompanied when doing so in order to safeguard all fundamental rights. In the context of electronic evidence, the translation of the right to information gives rise to other actions to be taken. For example, the user should also be notified in accordance with the data protection instruments if the data subject is located in another Member State. Considering the notification of other Member States, such notification should at least be integrated for the Member State in which the data subject is located when the investigative measure occurs in a covert manner, in order to enable these states to object before the investigative measure has been conducted. Moreover, the minimum standards for electronic evidence should also translate the principle of sovereignty, by complementing the current use of the data location criterion with a subjective criterion referring to the 'power of disposal' or the location of the data subject involved.

In the storage phase, it was perceived that for all three of the disciplines, the right to privacy does not always require very detailed standards. For identified DNA profiles, the right to privacy implies that the DNA profiles of suspects can only be retained until (a limited period after) the final judicial decision. Though the ECtHR has mentioned that particular attention should be paid to the situation of minors,[6],[31(9)] this does not imply that the minimum standards should comprise different retention periods for the DNA profiles of minors, even though some Member States such as the Netherlands and England and Wales do foresee this.[49(section 14),48(art.18a)] When the right to privacy is not at stake, for example because the profiles have not been identified, the legality principle however also requires an explicit retention period, or at least the explicit occurrence of a periodic review of the further need for retention of these profiles. For fingerprints, the speciality principle should be especially prominent, given the particular importance of the principle in light of the various purposes for which fingerprints can be collected. In the Prüm instruments, some sort of double locus was built in for fingerprint retention, as there should be *a priori* authorisation of the Member State that controls the file and it should be required that the national law of the receiving Member State so allows (Article 26,1). In protecting the individual concerned as much as possible, this protection mechanism safeguarding maximum protection should also be integrated in the minimum standards. Though for electronic evidence, few member states have introduced an explicit retention period for data retention by law enforcement authorities, the minimum standards should, similar to the situation of DNA evidence, stipulate that the evidence can only be retained until (a limited period after) the final judicial decision at the latest. Moreover, the data subject should always be able to challenge the necessity of further retention.

For the right to information in the storage phase, respect for principles such as the equality of arms requires that the minimum standard for personal data protection should extend the protection to the collection and retention of cellular samples and fingerprints, and the information provided to the data subject (*i.e.* amongst others the accusation, legal classification of the allegedly committed offence, facts of the case and results of the DNA analysis) irrespective of the particular situation. When it comes to electronic evidence retention, the EU level requirement to notify the data subject 'as soon as possible' implies that this person should be informed at least at the moment of official charges in order to safeguard the equality of arms.[28(para 121),29(para 291),3(art.2.2)]

Contrary to the need for specific minimum standards, the creation of such standards can be considered an unnecessary delimitation of the law enforcement authorities' competences when no fundamental right is endangered. This is the case, for example, for the non-applicability of the privilege not to incriminate oneself in the context of DNA and fingerprint evidence, which has been confirmed by both the European legislator and the ECtHR,[24],[32(para 69)] where the standard has been questioned and validated. Though this safeguard should not be included in the minimum standards based on the lack of relevance of the will of the suspect in this respect, the right to physical integrity should always be taken into account. Secondly, the inclusion of a right for the minor to be accompanied during the sample taking would be an unnecessary limitation of law enforcement authorities' competences, given that this does not fall under the scope of the proceedings. In this respect, despite the consideration that has been given to the age of the person involved in the context of migration, and the scientific research into the scientific reliability of fingerprints given by children, Member States' differences in the age of criminal responsibility will make it difficult to include an exact limitation of the age from which fingerprints can be taken in criminal matters as well. In this respect, the age as from which a person can be considered capable to give consent, and whether or not this age should be linked to the age of criminal responsibility (as is the case in Belgium), or be placed sooner in time, should be the subject of additional research. In the context of electronic evidence, despite the national regulation in some Member States (e.g. Belgium), extending this procedural right to the closest relatives of the suspect cannot be considered a necessary additional protection.

5. Minimum standards as a translation of scientific knowledge

In addition to the integration of the traditional 'fair balance' requirement in the minimum standards, if fundamental rights are endangered, these standards should also integrate the forensic-scientific principles governing forensic evidence collection if there is a chance that the quality requirement would be endangered.

For example, accuracy in the laboratory environment falls under this scope. In this respect, the European resolutions on drawing up the DNA profile have set the binding standard of 12 *loci*,[13(art.II,2)] which should be included in the minimum standards. For electronic evidence, given that the conditions for electronic evidence admissibility will differ from the more traditional Daubert criteria, the minimum standards should safeguard that the elements that are inherent to the nature of electronic evidence, such as the confidentiality of the forensic analysis tools, are integrated in the standards as a discrepancy of the traditional Daubert criteria. The other way around, the electronic practices that do not meet the traditional Daubert criteria, such as not mentioning the error rate, should be required through these minimum standards. In addition, the competence of the forensic-scientific actors can be put in this category.

[6] In this respect, the Court judged that the limitations in time and scope that were already in place contain appropriate safeguards against blanket and indiscriminate states' competences. The question could rise whether this is in accordance with the Procedural Rights Roadmap, which stresses the need for additional safeguards for vulnerable persons, for example because of their age.

Whereas the quality of the laboratories is well standardised by referring to the ISO 17025 standard, which the EU legislator links to reliability for both DNA and fingerprints,[14](art.1) the forensic experts as individuals should also be addressed in the standards. In this respect, a system such as the one in the Netherlands, which works with a register of experts in a periodic repeat registration, can improve the continuous quality assurance of the experts involved in arriving at DNA expert evidence. However, judicial actors should retain the final say in the competence of the experts, *i.e.* retain the possibility to consider an expert on the list incompetent or consider an expert competent that is not on the register. In addressing the proficiency of both law enforcement actors in the context of electronic evidence collection, the proficiency standards imposed on the national level should be made explicit, while awaiting the development of a European training programme and/or competency standard. In that respect, England and Wales serve as an example.[50]

Contrary to the previous factors that should be included in the minimum standards in order to safeguard the quality of the evidence, some of the elements that come into play in this process cannot be considered a threat to mutual *per se* evidence admissibility. Concerning the proficiency of the actors when collecting samples, the intervention of a doctor for all types of DNA sample collection for example does not seem necessary in light of the proportionality principle. However, a fair balance does require that all circumstances, *i.e.* the type of sample taken, the offence involved and the consent of the suspect, are taken into account in this regard. Though there might be differences in the national requirements for the competence of these actors, no forensic-scientific perspective has been given in this regard. Secondly, though from a legal point of view, little to no attention has been paid to developing standards with regard to the comparison of DNA profiles, it could be said that the *Daubert* principles correspond to the main criteria of the European Network of Forensic Science Institutes (ENFSI) Best Practice Manual and Recommendations and incorporate the main requirements from both the legal and the forensic-scientific perspective. In this respect, though the judicial actors will remain free to assess the reliability of the evidence, these can at least serve as a standard for the admissibility of the comparison from a forensic-scientific perspective.

6. Differences in member states' approaches: Free movement by taking two steps forward or one step back?

Though a primary distinction can be made between the need for minimum standards for certain aspects of obtaining expert evidence (two steps forward) and the elements for which this is not necessary (taking one step back), there are certain elements for which the necessity of minimum standards can be discussed, as not the protection of fundamental principles of law, but avoiding the risk of inadmissibility of the forensic evidence. In this respect, the EU could choose to leave the situation as is, taking a step back, which would imply that the national differences can remain, or clear the fog and set the standard itself with a view to preventing admissibility problems. Three examples in the context of DNA expert evidence can illustrate this delicate balancing exercise.

Firstly, for some of the aspects of arriving at forensic evidence, the Member States' differences cannot be considered problematic for evidence exchange across the EU. In this respect, the qualitative standard of the ECtHR regarding the grounds for **sample collection**, only referring to a certain level of gravity,[30](paras 37 and subs.) can be mentioned, which draws a line to the extent that minor offences are excluded. Given that the more general solution in the context of cross-border judicial cooperation, being the combination of a list of MR offences and an imprisonment threshold of three years does not necessarily work for the specific situation of DNA evidence, more research should be done into the domestic approaches with regard to the thresholds for DNA evidence collection. In adopting the approach that national differences can remain, the current regulation of some of the aspects of arriving at DNA expert evidence should however be addressed with caution. More specifically, an assessment of whether there is a difference between the Member States' approaches by the trial judge, requires that these approaches are grounded on a **legal basis**, which can not only be considered crucial to protect the person involved against arbitrariness, but can also be regarded as necessary in order to fully evaluate the consideration of the proportionality principle.

Secondly, for some of these aspects, the situation can be nuanced, which implies that some additional guidance should be given by the EU, without depriving Member States of all margin of appreciation. Regarding **sample taking with consent**, the differentiation based on the way in which the samples are taken is already the case in Belgium, Luxembourg and England and Wales.[45](section 62),[46](art.90undecies,§2, last para),[47](art.48−5(3)) This can be considered a best practice that takes due account of the additional proportionality requirement in the 1992 Recommendation and the interests of the data subject, without eliminating Member States' margin of appreciation. In other words, whereas the collection of 'non-intimate samples' such as (non-pubic) hair or mouth swab could occur either with or without consent, the gathering of blood samples could never be done without consent. Apart from the elements that have been discussed before, this research more specifically showed that for certain elements at stake, the question on the necessity of minimum standards cannot be answered in a straightforward manner, but instead is linked to other elements, which makes these interdependent. Though it would be hard to draw an exact line in this respect, regarding the authorities involved in the collection phase, the variation in the domestic regulations can be overcome by combining the determination of the actor involved with additional safeguards relating to either the judicial authorisation/validation (which excludes the need for consent), or the requirement of consent of the person involved (in the case that other actors order the collection and there is no judicial validation).

Thirdly, an EU minimum standard is considered necessary when, even though the protection of fundamental rights is not endangered, the Member States' practices are based on conflicting fundamental principles of law that endanger evidence admissibility. In the retention phase, the differences in views on the **duration** of **personal sample retention** hamper the development of minimum standards in this regard. The lack of European guidance leads to different national approaches, leaving Member States to base the duration either on the final judicial decision, a certain time period, or the creation of the DNA profile, this can hamper *per se* mutual admissibility of DNA evidence. In order for the minimum standard to take into account both the rights of the defence (the right to counter-expertise) and the right to respect for private life, it is deemed best to limit the retention period of personal samples to a certain period after the creation of the DNA profile (and communication thereof to the data subject). In this respect, elements such as the severity of the offence, which is taken into account in the Dutch legislation,[48](art.186 para 3) can influence the decision on a proportionate retention period. In any event, the right to privacy, in the opinion of the author, prevents drawing a parallel between the retention period of cellular samples and DNA profiles.

7. In search of a free movement of forensic evidence: destination unknown?

The study on forensic evidence has proved the feasibility of developing minimum standards for different types of forensic evidence gathering. Building upon the factors that were identified in previous research as hampering admissibility of evidence in another member state, as well as extending these factors to the forensic-scientific context, the idea of minimum standards for mutual admissibility of evidence can accommodate the problems with use of forensic evidence in a cross-border context today.

The research has detected several factors that may hamper mutual recognition of forensic evidence and derived minimum standards that can, if used, make it easier for the issuing state to accept evidence that

was gathered in another member state in case the incompatibility between both countries is of the level to hamper mutual trust. For all three forensic investigative measures that were the subject of this study, the elements at stake sometimes coincided, but this study has revealed that each of the forensic investigative measures also give rise to particular sensitivities for which more specific guidance is necessary.

This research gives rise to some questions that could be relevant for further policy-making and research. First of all, the decision on the extent to which the EU can limit Member States' margin of appreciation in determining the conditions for evidence admissibility can be objectified to some extent; more specifically, if it could be mapped for all Member States on what basis forensic evidence is excluded. Especially when a qualitative standard is in place, this would provide more insight as to the level of detail that can be considered sufficient for evidence admissibility. In this way, this theory-oriented policy research could be complemented with more practical data that can paint the bigger picture. Secondly, more forensic-scientific disciplines should be researched in order to assess to what extent the forensic nature of the investigative measure can set aside the margin of appreciation of Member States in favour of EU action on the basis of the quality requirement. Only in this way, can more insight be given, not only with regard to the feasibility, but also when it comes to the necessity of minimum standards with a view to mutual *per se* admissibility of forensic evidence in criminal matters throughout the EU.

Declaration of competing interest

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