Is a new constitutive rule born or rather brought to life? *Interpreting admissibility of evidence based on the judgment of the CJEU in the EncroChat case*

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ABSTRACT
The article analyzes the admissibility of evidence under Directive 2014/41/EU, focusing on a new constitutive rule for evidentiary action recognized by the Court of Justice of the European Union in the EncroChat case (C-670/22) on April 30, 2024. It begins by introducing the concept of constitutive rules, particularly from the Polish Poznan School of General Theory of Law. The article then summarizes the ruling in the EncroChat case and examines its implications as a source for the new evidentiary rule within the European Investigation Order (EIO). Finally, it discusses the benefits of incorporating constitutive rules into the practical discourse on evidence admissibility, contributing to broader reflections on legitimate sources of such rules in legal systems.

KEYWORDS
Constitutive rule; EncroChat; European Investigation Order; Admissibility; Electronic evidence; Digital justice

1. General Remarks

The issues addressed in this article can be analyzed from several perspectives. The broadest context pertains to the admissibility of evidence under Directive 2014/41/EU from the European Parliament and the Council, dated April 3, 2014, concerning the European Investigation Order (EIO) in criminal matters. However, the primary focus of this analysis is the identification and validation of a new constitutive rule for evidentiary action. This rule has been established or recognized by the Court of Justice of the European Union (Grand Chamber) in its judgment

of April 30, 2024 (C-670/22), commonly referred to as the EncroChat case or MN case[1].

To enhance the clarity of our argumentation, we have adopted the following structure for the study. First, we will introduce the concept of constitutive rules, focusing on the applicative variant that arises from the Polish school of jurisprudence, specifically the Poznan School of General Theory of Law (Kwiatkowski & Smolak, 2021). Next, we will provide a summary of the ruling in the EncroChat case, which will serve as the main reference point for our theoretical discussion.

In the following section, we will examine whether the judgment in EncroChat can be regarded as a direct source for the new constitutive rule regarding evidentiary actions in criminal proceedings within the framework of the European Investigation Order (EIO). Finally, we will discuss the benefits of integrating the concept of constitutive rules into practical discussions about the admissibility of evidence. Overall, this examination will be part of broader theoretical reflections on the legitimate sources of constitutive rules within legal systems.

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Before we focus on the theoretical assumption for this work, it shall be mentioned that the first attempt in legal sciences to use the concept of constitutive rules for interpreting action in criminal procedural law was made based on the judgment of the ECtHR in case Gäfgen v. Germany (no. 22978/05/ 1 June 2010). This interpretation was delivered by M. Mittag, who operated on the initial version of the constitutive rules by J. Searle (Mittag, 2006, 637-645; Janusz-Pohl, 2024a, 101–118; Janusz-Pohl, 2024b, 754-765).

Mittag's conclusions have shown the potential of the indicated theoretical framework but also its certain shortcomings. Meanwhile, in the last 30. years, especially from 1996 onwards, the idea of constitutive rules has been interpreted by Polish scholars. Hence, the purpose of this interpretation was to adapt the idea of constitutive rules to the demands of legal thinking. Thus, S. Czepita- a Polish legal philosopher, formulated additional assumptions that enabled its application to private law considerations

[1] ECLI:EU:C:2024:372.

(Czepita, 2016, 138-139; Czepita, 1996, 146 et seq.). In turn, B. Janusz-Pohl has used this transformed concept with some additional assumptions for the interpretation of legal actions in criminal proceedings (Janusz-Pohl, 2017a; Janusz-Pohl 2017b, 24-28). The proposed versions of the concept of constitutive rules focus on the legal consequences of violating these rules and, thus, on issues relevant to lawyers, for whom the legal status of the rule for performing actions takes on significance from the perspective of its possible legal consequences.

2. Foundations of the Constitutive Rules Concept

For further consideration, it is necessary to bring the foundations of the constitutive rules concept, briefly reporting on its evolution. What must be emphasised at this point is a core assumption, which states that legal action is a pure example of conventional legal acts (actions). At the same time, criminal procedure shall be perceived as a sequence of legal actions. Consequently, the constitutive rules shall be attributed to each legal action in this sequence (Janusz-Pohl, 2017b).

It is said that the most significant contribution to conceptualising the idea of constitutive rules was made by the language philosopher J. Searle. However, it should not be forgotten that the idea of constitutive rules originally referred to the interpretations of speech acts, but the thought that the 'legal universe' is based on certain artificial and formalised rules, 'conventions' - and that it is a realm of conventional concepts that is materialised within the framework of concrete social relations - cannot be attributed to a single author. Thus, supposedly, the inquiries on the concept of constitutive rules have started with the works that characterise in more detail the actions of participants in conventional discourse, including the processes of social communication and the application of law. From this perspective, the works of Austin and especially Searle are worth noting. So let us remember that in formulating the concept of constitutive rules, Searle refers to the conception of performative utterances developed initially by Austin, specifically to locutionary, illocutionary and perlocutionary acts (Austin, 1962, 311-320). As well known, these categories were referred to as 'speech acts', which are much simpler conventional creations compared to legal acts. At the same time, the regularities observed in the framework

of their study have implications for the study of law. Just drafting these assumptions let us emphasise that an illocutionary act is an intentional act performed by an individual uttering a performative sentence (locutionary act), the purpose of which is to create a new state of affairs unattainable in any other way (Janusz-Pohl, 2017b, 25-30; Searle, 1967, 1987).

In this definition, several elements such as "intentionality of action", "purpose of", and "create a new state of affairs" attract attention. All these elements are essential, as legal actions are an example of illocutionary acts. Thus, the essence of Searle's achievements was to display the rules for the performance of illocutionary acts and to clarify the nature of these rules. The assumption was taken into account that these actions have a rational character, the subject of the action pursues certain goals, and one such goal (primary goal) is the valid and effective performance of such an action. From the beginning, the assumption was included that the rules for the performance of illocutionary acts - later viewed rather as formalised conventional acts are connected with a set of specific rules attached to the given type of action (Janusz-Pohl, 2017a, 31-37).

In Searle's conception, the distinction is made between speech acts as uttering (muscle movements), propositional, and illocutionary acts. Its crux is an elaboration of the so-called elementary illocutionary act (Searle, 1967, 1987). Consequently, Searle stressed that: 'In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by means of getting the hearer to recognise his intention to produce that effect' (Searle, 1967, 45). Furthermore, component acts can be distinguished in any act, not only intentional. A component of a given act is held to mean an act, the performance of which is a necessary albeit insufficient condition of performing a given act.

Anticipating further discussion, let us observe that a component of a given act is renowned based on another theoretical conception by Czepita and the Poznan School of General Theory of Law (Kwiatkowski & Smolak 2021) as the material substrate of a conventional act. In Searle's conception, it is pivotal to observe that illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules. As the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, constitutive rules not merely regulate but,

above all, create or define new forms of actions (we could say conventional forms); they thus create new beings. Searle introduced a pattern of the constitutive rule. The pattern ran as follows: X counts as Y in context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules, such as the rules of etiquette, finding that their observation did not undermine the existence of specific acts but determined their form (Searle, 1967, 36; Janusz-Pohl 2017b)[2].

It could be observed that Searle's concept was quite intuitive and transparent, but at the same time – one shall say "not ready" for application into dogmatics, as based on this conception, the consequences of the breach of two types of rules were not discussed. As it was mentioned before, the concept of constitutive rules was addressed by many scholars, and displayed in many scientific disciplines. However, there are only a few approaches that developed the initial idea further when it comes to a practical application of the idea of the constitutive rule, specifically to discuss problems of particular legal sciences.

A complex and insightful proposition on constitutive rules with a focus on the consequences of their infringement was delivered by Polish legal philosopher Stanisław Czepita. This Author has developed Searle's concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules (Czepita, 2016, 138-139; Czepita, 1996). The essential was that both types of rules have been divided into two others: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules) and effectively (formalisation rules). On the contrary, consequential rules indicated legal consequences of infringements of construction rules.

Through this approach, B. Janusz-Pohl has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc*

[2] It appears that disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary acts. It inspired scholars to search for such conventional act rules whose breaking would not undermine the validity (existence) of a given act. In this sense, it appears that regulative rules inspired Czepita to distinguish the formalisation rules of conventional acts and devise a related mechanism of formalisation.

and the non-futility -in case of breach of formalisation rules (Janusz-Pohl 2017a, 2017b). Besides, it is to be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, the so-called *lex imperfecta*. It means that any legal consequence is not connected with the breach of formalisation rules of this type. The indicated forms of defects apply to all types of procedural actions, but they are most fully exemplified by defects in evidentiary actions. Specifically, if the product of evidentiary action emerges the factual foundations of the court's decisions.

Therefore, abruptly, one could ask, what is the main contribution of this concept to legal sciences? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes – does not cause any negative legal consequences. The concept also has two other important features relevant to the interpretation of legal actions; namely, it allows for imposing the sanction of nullity and non-existence (in the legal sense) /*negotia nulla, nogotia non existens*/ in systems that do not provide statutory sanction of nullity. It is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity (*nullity ex tunc*) of an act performed in violation of a given constitutive rule, even when at the level of statutory regulation, such a sanction does not exist. An example of the lack of nullity sanction in reference to the mechanism of the European Investigation Order (EIO) is also present in the case of the CJEU analyzed in this article.

Naturally, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope of this discussion (Janusz-Pohl, 2024b, 754-765). At this point, we can point out that constitutive rules, as rules of validity, refer to what, on the background of the concept at hand, is called the material substrate for a given conventional action (legal action), so-called primary constitutive rules. In addition, constitutive rules concern the existence of competence in the legal system to perform an action of a given type; in some cases, these rules may have the status of temporal rules or rules of other modalities of the given action – so-called secondary constitutive rules (Janusz-Pohl, 2024c, 97-128; Janusz-Pohl, 2023, 9-50).

The question of the sources of constitutive rules is particularly intriguing. Currently, it seems that the understanding is that, depending on the type of legal system, these sources must be legitimized within that system. However, due to the unique nature of constitutive rules, their existence often requires a detailed interpretative process. For legal systems based on statutory law, a constitutive rule must be grounded in statutory law, although its existence can be inferred from the broader set of norms. An example of the establishment of a constitutive rule can, therefore, be the interpretation of a court, especially a court that is the guardian of rights and values. The institutional position of the CJEU as a court of a higher order, whose task is to ensure the axiological coherence of the legal systems of the EU Member States with the treaties, allows it to be considered competent to create constitutive rules. The current discussion will not focus on determining the competence of the Court of Justice of the European Union (CJEU) regarding such creations. It will also not address whether referring to a rule derived from the legal system as a "constitutive rule" implies its establishment—akin to exercising law-making authority—or if it simply represents a form of functional interpretation that suggests bringing the rule to life. Determining the latter issue is indeed very complex, as it is a question of the admissible limits of legal interpretation in the judicial application of the law, an issue that obviously goes beyond the scope of this study.

In our reasoning, however, we will focus on the constitutive rule interpreted by the CJEU and the related sanction of nullity, also referred to in legal literature as the exclusionary rule. In the case we are analyzing, the interpreted constitutive rule will concern the modality, i.e. the manner of performing the procedural action consisting of the transmission of evidence in a special procedure related to the execution of an EIO. In the ruling, which we will analyze further, after careful consideration, the CJEU not only clarified the modalities of the issuance and execution of an EIO, underscoring its commitment to ensuring the efficacy of judicial cooperation tools but also focused on guaranteeing fair trial, particularly rights of the defendant. It ruled that evidence acquired in violation of these rights must be excluded from criminal proceedings. With this judgment, the CJEU has established a new approach to evidence admissibility but also recognized its power to create a new state of affairs.

3. Interpretation of Evidentiary Actions – Jurisprudential Example

The entire theoretical framework will be compared with the example of evidentiary actions, specifically the modalities of these actions and their outcomes as elaborated by the Grand Chamber of the CJEU in the EncroChat case, also known as the MN case (C-670/22). It is essential to consider the context surrounding this ruling, as it stems from a previous legal conflict among German courts regarding the admissibility of using EncroChat data as evidence in criminal cases.

To summarize the factual background of this case, it is important to mention that it involved EncroChat, a French service provider that facilitated end-to-end encrypted communication through specially modified smartphones. During an investigation conducted by French authorities, it was discovered that the individuals were utilizing encrypted mobile phones operating under an 'EncroChat' license to engage in activities primarily associated with drug trafficking. These mobile devices were equipped with unique software and modified hardware that allowed for end-to-end encrypted communication through a server located in Roubaix (France), which could not be accessed through traditional investigative methods.

With the authorization of a judge, the French police were able to secure data from that server in 2018 and 2019. Those data enabled a joint investigation team, which included experts from the Netherlands, to develop a piece of Trojan software. With the authorization of the tribunal correctionnel de Lille that software was uploaded to the server in the spring of 2020 and, from there, was installed on those mobile phones via a simulated update. It was said that, of a total of 66 134 subscribed users, 32 477 users in 122 countries have been affected by that software, including approximately 4 600 users in Germany. In March 2020, police officers from various European countries were informed about EncoChat discoveries during a videoconference organized by the European Union Agency for Criminal Justice Cooperation (Eurojust). As a consequence many investigations have been opened across all of Europe, importantly for the case under discussion, on 2 June 2020 the Frankfurt Public Prosecutor's Office (having the status of issuing authority) requested authorization from the French authorities (here executing authority), by way of an initial European Investigation Order EIO, to use the data from the EncroChat

service without restriction in criminal proceedings. The tribunal correctionnel de Lille executed the EIO and authorized the transmission and use of the requested data. Further data were transmitted subsequently on the basis of two supplementary EIOs dated 9 September 2020 and 2 July 2021. This evidence was then used in proceedings against *MN*. During these proceedings, the lawfulness of the procedure of the EIOs was contested by German courts. As a consequence the Landgericht Berlin (Regional Court, Berlin) decided to stay the proceedings and to refer the questions to the Court of Justice for a preliminary ruling.

The request concerned 5 areas including the interpretation of the provisions of the Directive 2014/41 (see Bernardini, 2024; Merkevičius, 2024, 20-36):

1) The interpretation of the concept of "issuing authority" under Article 6(1) in conjunction with Article 2(c);
2) The interpretation of Article 6(1)(a) in respect to precluding an EIO for the transmission of data already available in the executing State: a) when the EIO seeks the transmission of the data of all terminal devices used on the territory of the issuing State, and there was no concrete evidence of the commission of serious criminal offences by those individual users either when the interception measure was ordered and carried out or when the EIO was issued; b) when the integrity of the data gathered by the interception measure cannot be verified by the authorities in the executing State by reason of blanket secrecy;
3) The interpretation of Article 6(1)(b) regarding the inadmissibility of an EIO for the transmission of telecommunications data already available in the executing State (here France) where the executing State's interception measure underlying the gathering of data would have been inadmissible under the law of the issuing State (here Germany) in a similar domestic case (equivalence principle);
4) The interpretation of the meaning of "interception of telecommunications" based on Article 31(1) and (3), specifically whether this notion includes a measure entailing the infiltration of terminal devices for the purpose of gathering traffic, location and communication data of an internet-based communication service. Additionally, this question covers the issue of whether Article 31 also assumes

compliance with the administrative national rules for individual telecommunications users concerned.

5) In our discussion on the emergence of a new constitutive rule, the most critical aspect was the final question concerning the legal ramifications of acquiring evidence in contravention of EU law. This encompasses not only the regulations outlined in the Directive but also insights from Trites and, particularly, the Charter of Fundamental Rights.

That is strictly connected with the principle of effectiveness of EU Law before national courts, according to which any national regulation or any legal interpretation shall not make impossible in practice or excessively difficult the exercise of rights conferred by EU law, As Elvira Mendez-Pinedo observes, this concept is grounded on the "effet utile" of international treaties and the unique supranational nature of EU law. The Luxembourg court developed this concept through judicial interpretation -or even functional and creative law-making (Mendez-Pinedo, 2021). Based on this principle, the Court established a framework that combines it with other key principles. These include the primacy of EU law over national law, the direct effect of EU law for private individuals and economic operators—subject to certain conditions (especially limited in the case of Directives and horizontal situations)—the indirect effect requiring consistent interpretation, and, most importantly, the liability of Member States for breaches of the EU law (Rott, 2013). The principle of the effectiveness of the EU Law is based on Article 47 (1) CFR and art. 19 TUE. What is more, the principle of effectiveness now written into Article 47(1) of the Charter, which reads: Article 19(1) TEU puts the responsibility for "providing remedies sufficient to ensure effective legal protection in the fields covered by Union law" on Member States through the status of their courts of law as "Union courts". As it is scholarly argued, a similar provision was contained in Article I-29(1) of the Draft EU Constitution, but later formed the basis of the TEU (Reich, 2013, 89-130). As a side note, one shall emphasize that the principle of effectiveness shall be discussed in the triple formula proposed by Norbert Reich, including a) its traditional reading as an "*elimination rule*" or as 2) a "*hermeneutical*", *"the interpretative"* principle, 3) with an emphasis on its "*remedial*" *function* (Reich ,2013).

Regarding the admissibility of using evidence the following sub-questions were formulated in a request for a preliminary ruling:

(a) In the case where evidence is obtained by means of an EIO which is contrary to EU law, can a prohibition on the use of evidence arise directly from the principle of effectiveness under EU law?
(b) In the case where evidence is obtained by means of an EIO which is contrary to EU law, does the principle of equivalence under EU law lead to a prohibition on the use of evidence where the measure underlying the gathering of evidence in the executing State should not have been ordered in a similar domestic case in the issuing State and the evidence obtained by means of such an unlawful domestic measure could not be used under the law of the issuing State?
(c) Is it contrary to EU law, in particular the principle of effectiveness, if the use in criminal proceedings of evidence, the obtaining of which was contrary to EU law precisely because there was no suspicion of an offence, is justified in a balancing of interests by the seriousness of the offences which first became known through the analysis of the evidence?
(d) In the alternative: does it follow from EU law, in particular the principle of effectiveness, that infringements of EU law in the obtaining of evidence in national criminal proceedings cannot remain completely without consequence, even in the case of serious criminal offences, and must therefore be taken into account in favour of the accused person at least when assessing evidence or determining the sentence?

In examining the questions posed by the German court, it becomes evident that the court aimed to ascertain whether the rule prohibiting the use of evidence collected in violation of EU law can be directly connected to the principle of effectiveness, rather than being derived from national regulations. What role does the principle of equivalence play in this context? Does it allow for the exclusion of evidence obtained under the European Investigation Order (EIO)? Furthermore, should the application of evidence gathered in accordance with EU law depend on the severity of the crime, or can potentially invalid evidence be utilized to the advantage of the accused?

In our analysis, we will specifically examine the CJEU's position, focusing on the elements that will help us ascertain whether this ruling establishes a foundation for a new constitutive rule. As previously outlined in our preliminary assumptions regarding constitutive rules, acknowledging certain rules as constitutive implies that if an activity is

conducted in violation of such a rule, the sanction of nullity *ex tunc* will apply, irrespective of whether this sanction is explicitly articulated in the pertinent legal framework.

4. Legal Grounds for the Conceptualization: the EIO

Nonetheless, before the statement of the CJEU will be closely examined, it's important to refer to a regulatory background. Specifically having regard to an interdisciplinary prism of this study. As we pointed out, the legal foundations for this instrument are established in the Directive under the section titled 'The European Investigation Order and the duty to enforce it,' Article 1 of that directive specifies:

> 1. A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive.
> The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
> 2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive.

Interpreting this provision, one shall observe that EIO concerns investigative measures to obtain evidence, that is, evidentiary action with the aim of obtaining evidence, but it can also take the form of requesting evidence that is already gathered. In the case of EncroChat, the second option is discussed (Biasiotti & Turchi, 2023). Due to the necessity of selecting materials for analysis, we will only indicate here the normative aspects concerning EIO that were crucial to the CJEU's reference ruling of April 30, 2024. The directive contains extensive regulations on various procedural aspects of issuing and executing an EIO. It also clarifies legal definitions. In addition to the aforementioned *in extenso* definition of the EIO itself, Article 2c also specifies the terms "issuing" and "executing authority." To keep the following discussion organized, let us therefore point out that:

Article 2 of that directive, headed, 'Definitions', provides:

'For the purposes of this Directive the following definitions apply:

…

(c) "issuing authority" means:

(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO;

(d) "executing authority" means an authority having competence to recognize an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorization in the executing State where provided by its national law.'

In addition, for further analysis, the regulations contained in Article 6 of the Directive should be indicated headed 'Conditions for issuing and transmitting an EIO', which provides:

1. The issuing authority may only issue an EIO where the following conditions have been met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

(b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

2. The conditions referred to in paragraph 1 shall be assessed by ***the issuing authority in each case.***

> *3. Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO.*

It must be mentioned that Article 31 of the Directive concerns the issue of notification of the Member State where the subject of the interception is located from which no technical assistance is needed. Additionally, we must refer to Article 14 of the Directive, headed „Legal remedies", which expresses the principle of equivalence. Based on this regulation:

> '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.
> (…)
> 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'.

Upon examining this regulation briefly, it becomes evident that Article 6 does not offer a clear interpretation regarding the consequences of breaching the conditions for issuing a European Investigation Order (EIO). The EIO mechanism involves two collaborating authorities from different member states: the "issuing State" and the "executing State," both of which are defined in the legal definitions provided in Article 2. The collaboration between these two authorities relies on the rebuttable presumption of mutual trust. While Directive 2014/41 outlines the rules for this collaboration, the principle of mutual recognition serves as the foundational rule for this specific form of legal assistance. This principle ensures that each state applies its national law to actions carried out within its territory (Mitsilegas, 2019, 566-578; Belfiore, 2014, 91-105; Illuminati,

2013; Allegrezza, 2014; Volger, 2014). Consequently, there is a marge of discretional power for the executing authority to apply national law for investigative measures realized with the purpose of obtaining pieces of evidence. On the other hand, Article 6 sets the premises for the decision of issuing authority to serve an EIO. So, it is the "issuing authority" who has the power to assess if in the given case the EIO is proportionate and effective regarding the protection of the defendant's rights and at the same time the principle of equivalence is realized so, the EIO concerns the investigative measure(s) that could have been ordered under the same conditions in a similar domestic case, so conditions appropriate in issuing authority (Tudorica & Bonnici, 2023).

5. Between Exclusionary Rule and Constitutive Rule: Examination of the EnchroChat Case by CJEU

In the EncroChat ruling, responding to 5 main questions, the CJEU stated that Article 6(1) of Directive 2014/41 does not determine the nature of the authority that may issue the EIO. Additionally, an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State need not necessarily be issued by a judge where, under the law of the issuing State, in a purely domestic case in that State, the initial gathering of that evidence would have had to be ordered by a judge, but a public prosecutor is competent to order the transmission of that evidence. Additionally, Article 6(1) of Directive 2014/41 must be interpreted as not precluding a public prosecutor from issuing an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State where that evidence has been acquired following the interception, by those authorities, on the territory of the issuing State, of telecommunications of all the users of mobile phones which, through special software and modified hardware, enable end-to-end encrypted communication, provided that the EIO satisfies all the conditions that may be laid down by the national law of the issuing State for the transmission of such evidence in a purely domestic situation in that State. As a side note, it shall be added that the CJEU stated that Article 31 of Directive must be interpreted as being intended also to protect the rights of those users affected by a measure for the 'interception of

telecommunications' within the meaning of that article (Bernardini, 2024; Merkevičius, 2024).

In the last point refers to the question of whether the principle of effectiveness requires national criminal courts to disregard information and evidence obtained in breach of the requirements of EU law. When "translating" this question into the language of the constitutive rules concept, one shall ask if the principle of effectiveness itself could be observed by the national criminal court as a source for the constitutive rule for excluding products of evidentiary actions. What is noticeable is that the Luxembourg Court remarked first that there is no need for this question to be answered unless the referring court comes to a conclusion, on the basis of the replies to previous points (1 to 4), that the EIOs were made unlawfully.

Additionally, the CJEU remained that EU law currently stands on the principle of procedural autonomy of states, that it is for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law[3]. Consequently, the Court has consistently with the previous line of adjudication, held that, in the absence of EU rules on the matter, the rule that would have operated with the sanction of nullity, is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law, provided, however, that those rules are no less favorable than the rules governing similar domestic actions (the principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness)[4]**.** However, Article 14(7) of Directive 2014/41 expressly requires Member States to ensure, without prejudice to the application of national procedural rules, 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. It means that evidence on which a defendant is not in a position

[3] See judgment of 6 October 2020, *La Quadrature du Net and Others*, C511/18, C512/18 and C520/18, EU:C:2020:791.

[4] In light of the principle of procedural autonomy, Member States are entrusted with the competence to establish procedural rules for actions aiming at safeguarding rights deriving from EU law, on condition that they conform with the principles of equivalence and effectiveness. see judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188 and of 6 October 2020, *La Quadrature du Net and Others*, C511/18, C512/18 and C520/18, EU:C:2020:791.

to comment effectively must be excluded from the criminal proceedings. Consequently, addressing question no 5 the CJEU stated that Article 14(7) of Directive 2014/41 must be interpreted as meaning that, in criminal proceedings, national criminal courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

Regarding the substantive requirements for issuing a European Investigation Order (EIO), the Court emphasized that any assessment of proportionality and necessity must derive from national law and should be conducted specifically by the competent national authorities. According to the principle of mutual recognition, issuing authorities cannot apply their domestic standards of proportionality and necessity to investigative measures that have already been conducted, nor can they reevaluate their legality. In this case, the German authorities could only assess the proportionality and necessity of the transmission itself, rather than the methods used by the French authorities to gather the evidence. Additionally, the right to seek reassessment is ensured both during the issuance and execution of the European Investigation Order (EIO), as outlined in Article 14 of the Directive. Challenges regarding the legality, proportionality, and necessity of an EIO's issuance can be raised in the courts of the issuing State. Conversely, any legal remedies related to its recognition and execution should be addressed by the judicial authorities in the executing State (as referenced in Article 14). Therefore, the principle of mutual recognition, founded on mutual trust, facilitates the sequential application of national laws and the available systems of remedies. The MN ruling highlights a significant shift toward concrete minimum standards for evidence admissibility, while the essence of mutual recognition remains intact (Bernardini, 2024; Merkevičius, 2024).Yet, the MN case serves as definitive evidence of the Court's commitment to establishing a heightened level of protection for the defendant, which is in accordance with the overarching objectives of the Union's legislation **(Kanakakis, 2024).**

As we have indicated earlier, the issue of constitutive rules was previously referred to by researchers to ECtHR rulings (Mittag, 2006, 637-645; Janusz-Pohl, 2024a, 101-118; Janusz-Pohl, 2024b, 754-765). It is noticeable, though, that the CJEU, in the case at hand, consciously differentiates itself from the reserved approach adopted by the European Court of Human Rights (ECtHR) with regard to fair trial and defence rights. In exploring the origin

of the constitutive rule, it is worth considering whether this rule emerged as a result of the EncroChat ruling or if the court merely revived it by adding a layer of axiology. It is important to note that in the NM case, the Court of Justice of the European Union (CJEU) explicitly authorized national courts to impose sanctions of nullity. Moreover, the Court does not confine itself to formulating interpretative guidelines or identifying infringements, but instead has autonomously ruled the inadmissibility of evidence as a direct consequence of the infringements of the UE law. In doing so, the Court did not hesitate to take a step further, differentiating itself from the opinion of the Advocate General and boldly shaping a novel exclusionary rule[5]. Based on the principle of effectiveness, the Court has brought to life the constitutive rule for the legal action of the transmission of evidence (products of evidentiary actions) that was "hidden" in Article 14 (7) of the Directive. Shortly, the Court, in the judgment at hand, recognized the status of the given rule as constitutive. Consequently, this allows for the implication of nullity by national courts in domestic proceedings if the defendant is not in a position to comment effectively on the way it was collected. Once again, this rule imposed on national courts to 'disregard' evidence obtained in breach of EU law, and stems directly from the duty to safeguard the rights of the defence and the fairness of the proceedings as enshrined in Article 47 of the EU Charter of Fundamental Rights. One shall say that such interpretation counterbalances the flexibility of the issuance and execution of an EIO under national laws. The duty to apply the effectiveness principle affects all the authorities intervening in these proceedings, either in the issuing or in the executing state[6].

6. Is There Something More Practical Than a Well-Founded Theory?

To sum up, it should be noted that the argumentation concerning the concept of constitutive rules has not yet appeared in the discourse concerning

[5] See opinion of the AG Ćapeta, points 116-131.

[6] Let us add that the perspective related to the application of the effectiveness principle also concerns the initial issues, thus Grounds for non-recognition or non-execution regulated in Article 11 of the Directive, as one of the premises for refusal refers to substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

a sort of legal interpretation whereby the application of a rule concerning the manner of performing a given act is used to deduce sanctions for its violation. As we have already mentioned, the performance of a procedural act is governed by a whole set of directives. As researchers have previously noted, these rules have different statuses, and for the violation of some of them, there is no explicit sanction (*leges impertecta*). Simultaneously, for each procedural action, we can designate a set of constitutive rules, even if they are minimal. Their existence automatically legitimizes the hypothetical existence of a sanction of invalidity, which is activated in the event of a violation of a constitutive rule. Until now, doubts in scholarly literature have concerned the criteria that are to decide whether a given rule can be considered constitutive.

This is controversial, especially when we have no systemic hint, i.e. the system does not operate a sanction for its violation. Analyzing the rulings of the European courts, the ECtHR, and especially the ruling in the EncroChat case by the CJEU, having exemplary status for our analysis, we can conclude that these entities have the legitimacy to authoritatively recognize a rule as constitutive. Naturally, the question arises as to what conditions such a ruling must meet, whether it is necessary to uphold a relevant line of interpretation, etc.

Overall, the Grand Chamber ruling in the case at hand certainly confirms this hypothesis. Finally, one may ask what would be the benefits of an explicit reference by the European Court to the concept of constitutive rules. It seems that, apart from methodological consistency, a full legitimization of nullity sanctions is an apparent gain, not to mention that it is difficult to achieve this kind of legitimization in statutory law systems, but fortunately, the concept of constitutive rules is recognized.

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