The Vision of Romanian Legislation Regarding the Admissibility of Evidence, in general, and Electronic Evidence, in particular, in Cross-border Criminal Proceedings within the European Union

Given the increasingly frequent situations in which criminal activity exceeds the borders of a single Member State of the European Union, extending its impact to others as well, it is necessary for each of these states, as well as at the European level, to have a cohesive legislative system regarding the admissibility of evidence, one capable of demonstrating its effectiveness in combating criminal phenomena. The need for stringent provisions in this direction also stems from the way society is evolving—particularly in the digital sphere—since many crimes now occur in the digital environment or are connected to it. Judicial cooperation in criminal matters plays a central role in this framework, and judicial authorities in each Member State must work together alongside the European institutions responsible in this field. The purpose of this collaboration is not limited only to determining the admissibility, within criminal proceedings, of the cross-border evidence obtained, but also includes ensuring respect for the right to a fair trial for the individuals subject to criminal proceedings, as well as other fundamental rights. These goals have often been emphasized in the case law of the European Court of Human Rights and of the Court of Justice of the European Union. This study aims to present the Romanian legislator's perspective on the admissibility of evidence in criminal proceedings while also analyzing the impact of the new provisions regarding electronic evidence. Additionally, the analysis highlights the admissibility of cross-border evidence obtained through the judicial cooperation instruments in criminal matters that Romania has adopted. The research objective is to underline the importance of creating a common legal framework at the European level regarding the admissibility of evidence—one that allows states to hold offenders criminally accountable as quickly and efficiently as possible, in compliance with the law and with their rights, especially the right to a fair trial.

Keywords: *admissibility of evidence, judicial cooperation, electronic evidence, criminal proceedings*

Introduction

Each Member State of the European Union has its own system of rules governing the admissibility of evidence in criminal proceedings, as well as specific principles applied in holding offenders criminally liable. Since criminality has gradually acquired a transnational dimension, the gathering of evidence and its use in criminal procedures involving the jurisdictions of several states creates practical difficulties, especially regarding the admissibility of such evidence before the judicial authorities of a state other than the one in which it was collected.

These impediments have been partially addressed through the use of mechanisms of international judicial cooperation in criminal matters, namely through the execution of requests for mutual legal assistance exchanged between states. Although these mechanisms - grounded in the principles of mutual trust and mutual recognition - have significantly facilitated the possibility of using evidence from one state to another, they have also generated additional challenges concerning the assurance of minimum guarantees for the protection of fundamental rights of people involved in criminal proceedings. Also, „in order to attain successful regional cohesion, the states have to overcome collective action problems that are endemic to international cooperation”[1].

It should also be emphasized that the approaches of the European Court of Human Rights and the Court of Justice of the European Union are not uniform in terms of the admissibility of transnational evidence. While the Strasbourg Court has left greater discretion to the states regarding how issues related to the obtaining and use of evidence in a transnational context are managed, the Luxembourg Court has taken an active role in solving situations in which evidence is or is not lawfully obtained and in determining the level of interference with fundamental rights, including whether Member States retain exclusive competence to regulate the way in which evidence is used in judicial proceedings[2].

In terms of electronic evidence, a set of European norms have been adopted to regulate the way in which this category of evidence may be obtained - namely the E evidence Package, consisting of Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 on harmonized rules for the designation of designated establishments and the appointment of legal representatives for the purpose of obtaining electronic evidence in criminal proceedings[3] and Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings[4] which will apply from August 2026. The instruments established by the E-evidence Package enable direct cooperation between the judicial authorities of a Member State and service providers located in another Member State, allowing for the swift obtaining of existing electronic evidence. However, they do not regulate the admissibility of such evidence.

Under the Romanian law, the provisions concerning evidence, means of evidence, and evidentiary procedures are found in Title IV of the Code of Criminal Procedure[5], Articles 97–201. These provisions regulate the conditions that evidence must meet in order to be admissible, as well as the way in which evidence is administered and interpreted throughout the stages of a criminal trial.

Regarding the possibility of administering and using evidence obtained at the transnational level, Law No. 302/2004 on international judicial cooperation in criminal matters, republished and subsequently amended[6] regulates in Title VIII, Chapters I and II the forms through which mutual legal assistance is

[1]Abegunde (2021), p.169.
[2]Bachmaier Winter (2024), p.19.
[3]Published in OJ L of 28.07.2023.
[4]Published in OJ L of 28.07.2023.
[5]Published in Official Monitor no. 486 of 11.07.2010.
[6]Published in Official Monitor no 411 of 27.05.2019.

ensured (international letters rogatory, hearings by videoconference, appearance of witnesses, experts, and wanted persons in the requesting state, service of procedural documents drafted or filed in a criminal case, etc.), as well as the provisions applicable in relation to Member States.

With regard to electronic evidence, Romania has only recently adopted the legislative package governing this category of evidence, which means that case law dealing exclusively with this subject has not yet emerged. Even in this context, however, Romanian judicial authorities have relied on the provisions of the Code of Criminal Procedure and on those of Law No. 302/2004 on international judicial cooperation in criminal matters, republished, with subsequent amendments and completions, in order to ensure the admissibility of electronic evidence.

The study aims to examine whether, at this point, a uniform legislative framework at the European level is necessary - one that would allow Member States, both in their relations with one another and in their interactions with third countries, to make use in judicial proceedings of evidence obtained on the territory of other states, including electronic evidence. Practically, the law must respond to the requirements imposed by technology and by the changes brought about by it.[7] Such a framework would need to ensure compliance with legality requirements and, implicitly, with the protection of fundamental rights, so that the cross-border use of evidence does not give rise to procedural inconsistencies or risks concerning fundamental rights.

Literature Review

The issue of the admissibility of evidence at the transnational level is a recurring topic in European legal doctrine[8], as well as in European legislation, having been discussed even at the Tampere Council in 1999[9] where the importance of the principle of mutual recognition among Member States was acknowledged.

The main difficulty concerning the admissibility of cross-border evidence lies in determining the applicable law at the moment of its collection: *lex fori* or *lex loci.* In practice, differences between legislative systems lead to divergent interpretations of whether a piece of evidence may or may not be admissible. While some states apply a stricter system of verification for evidence collected abroad, others use evidence gathered in other jurisdictions in their own judicial procedures without conducting a very detailed assessment, relying instead on the mutual recognition principle and the non-inquiry principle. *Lex loci* is primarily centered around these

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[7]Boura (2024).

[8]Vermeulen, De Bondt and Van Damme (2010); Garamvölgyi, Ligeti, Ondrejová and von Galen (2020).

[9]Point 36 of the Presidency conclusions stated that "*The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there*".

two principles and is grounded in Article 3 of the *European Convention on Mutual Assistance in Criminal Matters*[10]. The concept is based on the idea that evidence is obtained by national judicial authorities in an identical way regardless of whether the request originates from another state, meaning that the way in which such evidence is obtained should not be questioned. It may also be argued that, in the absence of provisions regulating the admissibility of transnational evidence, the state attributes the same evidentiary value to evidence regardless of whether it was obtained with the assistance of international mutual legal assistance mechanisms. Nevertheless, lex loci generates several inconsistencies.

First, there is the possibility that the evidence collected by the requested state does not conform to the procedural requirements of the state that requested it[11].

Secondly, case law has shown that the exclusive use of *lex loci* prevents the effective exercise of the right to defense during criminal proceedings, as it becomes impossible to verify the legality and integrity of the way in which the evidence was obtained. The European legislator has recognized that derogations from the protection of fundamental rights of persons involved in criminal proceedings are not permissible; accordingly, many cooperation instruments - such as the European Arrest Warrant or the European Investigation Order - have been supplemented with control mechanisms designed to prevent violations of those rights[12].

In this respect, the Court of Justice of the European Union[13], as well as a significant part of international legal doctrine[14] have also held that *lex loci* cannot be applied without a certain set of exclusionary rules.

Subsequently, Article 4 of the Convention on mutual assistance in criminal matters between the Member States of the European Union of 29 May 2000[15] (partially replaced and restructured by Directive 2014/41/EU on the European Investigation Order) specifies that, in assessing the admissibility of evidence, the application of *lex fori* is more appropriate, with the rules and formalities indicated by the requesting state. Nevertheless, legal doctrine[16] has identified numerous problems in the exclusive application of this principle.

Thus, *lex fori* does not automatically entail an obligation for the requesting state to accept the evidence; such evidence cannot be deemed admissible per se merely because it was collected in accordance with the rules of the state that issued the request. Moreover, the principle is applicable only bilaterally and cannot have general applicability across all European states. Furthermore, *lex fori* may be applied only in the case of gathered evidence, not to evidence that already exists[17], which creates a significant gap in the evidentiary system.

Equally, *lex fori* is difficult to apply with respect to the collection of electronic

[10]Published in the European Treaty Series No. 30 of 20.04.1959.
[11]Vermeulen (2011).
[12]Klip (2022).
[13]Judgment of the Court of Justice of the European Union of 17 January 2019 in case C-310/16 Dzivev and Others, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0310, accessed on 10.07.2026.
[14]Bachmaier Winter (2024), p.9; Vermeulen, de Bondt, Van Damme (2010) pp.127-128.
[15]Published in O.J. C 197, 12.07.2000.
[16]Kusak (2019), p.394.
[17]Vermeulen, de Bondt, Van Damme (2010), pp. 42–43.

evidence, since the data accessed must be filtered and the volume of such data is immense. Given that the rules of each country differ in this regard, situations may arise in which the application of the principle becomes impossible.

In solving this issue, the Treaty on the Functioning of the European Union[18] provides in Article 82(2) a minimum level of admissibility of evidence based on mutual recognition[19]. Several references to this minimum set of rules that Member States should comply with have also been made in the Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility[20], but also through the Communication from the Commission to the Council and the European Parliament Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States[21], as well as in other communications of the European Commission.

With regard to electronic evidence, as mentioned earlier, Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings does not contain provisions on the admissibility of these categories of evidence, but only a single reference to the situation in which such evidence may not be considered inadmissible. Specifically, Article 20 of the Regulation states that: "*Documents transmitted in the context of electronic communication shall not be deprived of legal effect or considered inadmissible in the context of cross border judicial proceedings conducted under this Regulation solely on the ground that they are in electronic form*".

Interpreting, however, paragraph 5 of Article 18 of the Regulation, which states that "*Without prejudice to domestic procedural rules, the issuing State and any other Member State to which electronic evidence has been transmitted under this Regulation shall ensure that the right of defense and the fairness of proceedings are respected when assessing evidence obtained through the European Production*

[18]Consolidated version of the Treaty on the Functioning of the European Union, 26.10.2012, OJ C 326/1.

[19]Article 81 para. (2) Insofar as is necessary to facilitate the mutual recognition of judicial decisions and judgments, as well as police and judicial cooperation in criminal matters with a cross-border dimension, the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules. These minimum rules shall take into account the differences between the legal traditions and systems of the Member States.

They concern the following:

(a) the mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal proceedings;

(c) the rights of victims of crime;

(d) other specific aspects of criminal procedure which the Council has previously identified by means of a decision; for the adoption of this decision, the Council shall act unanimously, after obtaining the approval of the European Parliament.

The adoption of the minimum rules provided for in this paragraph shall not prevent Member States from maintaining or adopting a higher level of protection for individuals.

[20]Brussels, 11.11.2009, COM(2009) 624 final, document available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0624, accessed on 11.10.2026.

[21]Brussels, 19.5.2005, COM(2005) 195 final, document available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0195:FIN:EN:PDF, accessed on 11.10.2026.

Order for electronic evidence", it means that each Member State will also decide on the admissibility of evidence obtained through a European Production Order. In practice, the Member State will need to examine, for example, whether electronic evidence obtained following the issuance of a European Production Order by an unqualified authority may be used in a criminal trial[22].

In principle, legal doctrine has assessed[23] that the optimal solution for the administration of evidence is the application of lex loci, supplemented - where adjustments are necessary - by *lex fori*, precisely so that the purpose of administering the evidence may be achieved and fundamental rights may be respected.

In terms of Romanian legislation, an interpretation of the provisions of Law No. 302/2004 on international judicial cooperation in criminal matters, republished and subsequently amended, shows that the Romanian system is guided primarily, in analyzing the admissibility of evidence, by the Code of Criminal Procedure, by the provisions of the aforementioned law concerning judicial cooperation, and by other conventions concluded between Romania and the state with which it cooperates for the purpose of collecting evidence. Likewise, Romania collects evidence at the request of other states in accordance with Romanian criminal procedural law, while also taking into account the way in which the request for assistance was formulated, precisely in order to provide support in the form expected.

Methodology

In this study several scientific research methods were employed: analytical, logical, quantitative, and comparative, precisely to highlight the topic under examination from different perspectives.

Through the use of the analytical method, doctrinal opinions, case law, and recent studies that have addressed the subject either tangentially or comprehensively were identified, thereby bringing to light the most important elements of this study.

By applying the logical method, coherence was ensured, organizing the results of the analysis into an intelligible structure that naturally leads to the proposals and conclusions formulated at the end.

The quantitative method was used to organize legislation and judicial practice.

Through the comparative method, the study gains consistency. The research was conducted from the standpoint of both national and European legislation, including references to electronic evidence as well as traditional evidence, precisely to capture rules, exceptions, and legislative gaps more easily.

Discussion

The admissibility of evidence in Romanian criminal proceedings is based,

[22]Tosza (2024), p.252.
[23]Bachmaier Winter (2024), p.12.

among other things, on compliance with the principles of loyalty in the administration of evidence and the principle of legality in obtaining it. Article 101(1) of the Romanian Code of Criminal Procedure prohibits the use of “violence, threats or other coercive means, as well as promises or inducements for the purpose of obtaining evidence”. Likewise, the subsequent paragraphs specify that interrogation techniques that may influence a person’s ability to recall or present facts that constitute the object of the evidence are prohibited, and that provoking a person to commit or continue committing an offence for the sole purpose of obtaining evidence is not admissible.

Article 102 of the Romanian Code of Criminal Procedure provides that evidence obtained through torture, including evidence derived from such acts, must be excluded from criminal proceedings.

The Romanian legislator emphasizes that evidence obtained unlawfully cannot be used in criminal proceedings; the act by which the administration of the evidence was ordered or authorized is null, and the evidence must be excluded, with the means of evidence being removed from the case file.

These provisions are consistent with Articles 3 and 6 of the European Convention on Human Rights

The European Court of Human Rights has also ruled on these exclusionary rules. Specifically, the Strasbourg Court has held that evidence obtained in violation of Article 3 of the Convention cannot be taken into account in criminal proceedings, even where such evidence was not decisive in establishing guilt[24], and regardless of the category of offence committed[25].

Similarly, the Court has considered that evidence obtained through inducements or other coercive means used by police authorities must be excluded from criminal proceedings, in order to comply with Article 6 of the Convention[26]. In this context, the Court has rejected, for example, the reasoning used by certain European states that evidence obtained through pressure exerted by judicial authorities should not be excluded but should merely serve as grounds for reducing the sentence imposed on the offender[27].

Furthermore, the Court of Justice of the European Union has held in its case

[24]Judgment of the European Court of Human Rights of 9 January 2003 in the case of İçöz v. Turkey, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2254919/00%22],%22itemid%22:[%22001-22982%22]}, accessed on 11.07.2026; Judgment of the European Court of Human Rights of 1 June 2010 in the case of Gäfgen v. Germany, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-123256%22]}, accessed on 11.07.2026.

[25] Judgment of 28 September 2015 of the European Court of Human Rights in the case of Bouyid v. Belgium, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-157670%22]}, accessed on 11.07.2026.

[26]udgment of 23 February 2018 of the European Court of Human Rights in the case of Grba v. Croatia, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-178699%22]}, accessed on 11.07.2026.

[27]Judgment of the European Court of Human Rights of 23 January 2015 in the case of Furcht v. Germany, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-147329%22]}, accessed on 11.07.2026; Judgment of the European Court of Human Rights of 15 January 2021 in the case of Akbay and Others v. Germany, available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-204996%22]}, accessed on 11.07.2026.

law[28] that national courts must consider, when assessing evidence, the principle of legality, which forms part of the Union's primary law and is enshrined in Article 2 of the Treaty on European Union.

Thus, it may be concluded that the Romanian legislator aligns itself with European standards, as the provisions of the Code of Criminal Procedure are consistent with the jurisprudential views expressed by the two European judicial bodies.

Continuing the analysis of the subject, it must be noted that the structure of criminal proceedings under Romanian law has a significant impact on evidence. The four phases of the criminal process are: the criminal investigation, the preliminary chamber stage, the trial (both at first instance and, where applicable, on appeal), and the stage of enforcing final convictions. During the criminal investigation, the criminal investigation bodies or the prosecutor gathers and administer evidence both in favor of and against the person who committed the offence, either ex officio or upon request[29].

In the preliminary chamber stage, among other tasks, the judge verifies whether the indictment issued by the prosecutor is lawful and examines the legality of the administration of evidence and the performance of procedural acts by the criminal investigation bodies[30].

Likewise, during the trial, the court administers evidence at the request of the prosecutor, the injured party, or the parties, and subsidiarily ex officio when it considers such administration necessary for forming its conviction[31].

It should also be added that judicial authorities - including the judge who adjudicates the case - may reject requests for the administration of evidence if the administration of that evidence would be contrary to the law[32].

With regard to transnational evidence, these provisions are supplemented by those of Law No. 302/2004 on international judicial cooperation in criminal matters, republished and subsequently amended, depending on the form of mutual legal assistance used, in accordance with Article 228.

Similarly, the provisions must also comply with the principles of international judicial cooperation in criminal matters regulated in the same act, set out in Articles 3-9.

In terms of electronic evidence, the Code of Criminal Procedure contains provisions relating to these types of evidence or that interact with this category. Article 138 regulates special methods of surveillance or criminal investigation such as: access to an information system, obtaining data regarding a person's financial transactions, interception of communications or any type of remote communication. Articles 139 - 153 of the Code of Criminal Procedure set out the conditions under which such evidence is administered.

Furthermore, Article 154 of the Code of Criminal Procedure sets out the

[28]Judgment of 17 January 2019 of the Court of Justice of the European Union in case C-310/16, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0310, accessed on 11.07.2026.

[29]Article 11 paragraph (1) of the Code of Criminal Procedure.

[30]Article 54 of the Code of Criminal Procedure.

[31]Article 100 paragraph (2) of the Code of Criminal Procedure.

[32]Article 100 paragraph (4) letter f) of the Code of Criminal Procedure.

way in which computer data may be preserved - an aspect of particular relevance in judicial proceedings where such data are required.

Romania has also incorporated the provisions of the E-evidence Package and has drafted both a Bill on the designation of designated establishments and the appointment of legal representatives for the purpose of obtaining electronic evidence in criminal proceedings, and a Bill establishing measures for the implementation of Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings. However, these legislative instruments have not yet entered into force.

Conclusion

Considering all the aspects analyzed regarding the admissibility of evidence, including electronic evidence, we believe that it is necessary to adopt a set of rules applicable at the European level governing the way in which evidence is collected internationally, precisely in order to avoid interpretative discrepancies.

Indeed, the European Law Institute proposed such an instrument - the Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings - as early as 2023, but this proposal has not yet been formalized by the competent institutions.

The need for such a normative framework is even more evident when discussing electronic evidence, which plays an increasingly important role in contemporary judicial proceedings and in relation to which procedural guarantees can no longer be assessed solely at the national level, given that their very nature often entails use in another jurisdiction.

Furthermore, the existence of a set of rules in this area would help prevent situations in which fundamental rights might be infringed.

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