EVOLUTION OF THE EVIDENCE SYSTEM IN CRIMINAL PROCEEDINGS – FROM NATIONAL TO EUROPEAN LEVEL

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Abstract

Using scientific research methods, the study aims to determine the substance and scope of the autonomous notion of „evidence system", as well as the form of adaptation of the criminal procedure according to this system.

With novelty value in the specialized legal literature, the study captures the „hard core" of the criminal process represented by the evidence system.

In carrying out the demonstration, the author presents an extensive analysis of the main evidentiary systems, from a historical and epistemological perspective, systems that have generated and oriented judicial procedures and even particularized legal systems, differentiating the Anglo-American procedural system from the European/continental procedural system.

By analyzing the elements of the systemic construction, the author identifies the connecting points and common levers of the mixed national evidentiary systems, intuiting the ways in which they work together in a European legal framework that is in continuous construction and adaptation.

Keywords*: evidentiary system, evidence, proportionality, legality, investigation, transnational, procedural systemic evolution.*

1. Introduction

Thinking has a natural inclination to understand and explain the nature and essence of systems. In all fields of research, scientific results are conceptualized and implemented within systems, in order to fix and use them more effectively.

Systems assume a predictable order, impose a certain level of rigor and stability, essential functional components in achieving a result. The systemic vision involves the standardization of activities and the superior quality of results, which, in the field of research and investigations, facilitates finding the truth.

Starting from these premises, the evidence system in criminal matters represents that methodical circuit, with a well-defined purpose, carried out within the criminal process, in which the obtaining, collection and administration of evidence is carried out scientifically by applying standardized evidentiary procedures and according to pre-established procedural rules, activities and rules synthesized in the content of procedural acts.

The evidence system, its rationale, the importance of its evolution, and its influence on the judicial process and criminal procedure as a whole have not yet been the subject of any in-depth research in our recent criminal doctrine.

The role of evidence, the systemic organization of its administration within criminal justice, led professors G. Levasseur and A. Chavenne[1] to argue that the entire criminal process (initiation, evolution and resolution) is influenced by the consistency and rigor of the evidence system.

Professor I. Neagu[2] also agreed with this conclusion, emphasizing the correctness of this doctrinal orientation, considering that the very initiation of the criminal trial, then the setting in motion of the judicial mechanisms aimed at holding the author/co-authors and the participants involved in the commission of the crime to criminal liability, are based on the probative value deduced following the analysis of the evidence highlighted, collected and presented to the judge within an evidentiary system.

Indeed, in criminal procedural matters, at the level of each state, the evidence system is a fundamental component of the criminal process, applicable in all procedural phases, having a dichotomous content. Thus, in a first sense, technical-legal and formal, the notion of system in the matter of evidence signifies a set of legal

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[1] In this sense, see G. Levasseur, A. Chavanne, in G. Levasseur, A. Chavanne, B. Bouloc, J. Montreuil, *Droit pénal et procédure pénale - Cours élémentaire du droit*, 13th ed., Sirey, Paris, 1999, pp. 102-103.

[2] I. Neagu, M. Damaschin, *Criminal Procedure Treaty - General Part*, 4th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2022, pp. 467-468.

norms, systematically organized, by which the means of evidence and evidentiary procedures are regulated, as well as the possible procedural guarantees that those concerned benefit from, and, in a second, positivist sense, the evidence system signifies the concrete mode of action by which the judicial bodies, the parties and other entitled procedural subjects obtain evidence, by carrying out evidentiary procedures specific to certain means of evidence or by requesting the administration in question of certain means of evidence.

The evidentiary value that contributes to establishing the truth regarding the facts and the persons involved is extracted by applying the deductive method in relation to personal actions or inactions, the consequences consisting in a state of danger in relation to previously recognized social values and their legal qualification being a product of the intellect of the judicial body. The establishment of the proxiological component involving the purpose and object of the action is obtained by reconstructing the behavior of the agent prior to the act – in which we can find preparatory activities for the intended act, concurrently with the act – in which the intentional side of the action and the motivation of the agent appear, as well as after the act – in which the purpose of the action appears, the materialization of the initial intellectual representation.

According to the adversarial model and the level of transparency, evidentiary systems can be divided into accusatory[3] and inquisitorial[4], these being pure systemic models.

Thus, the accusatory system, also called empirical, is based on the direct and free way of making the accusation, anyone being able to address and support an accusation. Concurrently with the accusation, the defense was also exercised in a free manner, the accused having the right to combat the evidence of the accusation and to administer evidence that would prove his innocence. The debates regarding the facts and the probative value of the evidence administered by each of the parties involved were carried out orally, adversarially and publicly, before judges appointed from among the citizens who enjoyed a good moral reputation whom the accused could choose or reject. The judges were recognized as having complete freedom in forming the opinions that built the solution, they deliberating and deciding based on their intimate convictions.

The inquisitorial system, conceived in canon law and applied within ecclesiastical tribunals[5], therefore based on religious thinking, based its evidentiary value on „divine messages" which were claimed to be transmitted following the application of prescribed methods and procedures involving various physical aggressions (putting one's hand in fire, walking on hot coals, etc.) on the parties involved in the legal conflict, justice being recognized to the one who resisted all those tortures the most[6]. The inquisitorial-based evidence system implied and promoted torture, violence exercised prior to conviction being considered a preparatory matter in order to obtain confessions from the accused, while violence exercised on the convicted person found guilty was considered preliminary matters with the role of determining the convicted person to denounce the participants in that act or any possible enablers or concealers[7].

Due to the cruelty of the evidentiary procedures applied to the accused and convicted, the entire procedure was carried out in secret, being eminently written and non-adversarial.

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[3] The accusatory system is the oldest of all the systems attested to date, the first indications of this system being found in the Code of Hammurabi. Within this system, evidence was administered directly during the trial phase. It was taken over and improved by Roman law, within the judicial system called *ordo iudiciorum publicorum* exercised throughout the existence of the Roman Empire (starting with the 2nd century BC until 476 AD). The trial of Jesus Christ itself took place according to the rules of the accusatory system, the lack of any evidence from the members of the Sanhedrin in the accusation of Jesus, causing Pontius Pilate to wash his hands and pre-pronounce in the sense of the absence of any guilt of the accused, in this sense, see, M. Duțu, *Procesul lui Iisus*, Neverland Publishing House, Bucharest, 2017, p. 17; I. Fuma, *The Trial of Jesus - in the Light of New Documents and Archaeological Discoveries*, Roza Vânturilor Publishing House, Bucharest, 2000, pp. 268 *et seq.*

[4] The inquisitorial system appeared in the 13th century but was perfected and taken over by secular justice in the 14th-17th centuries. The name is taken after the canonical system of the Inquisition regulated by Pope Innocent III, through the Lateran Council of 1215, and perfected by Pope Gregory IX, then being taken over and imposed on the secular judicial system by the political power that had consolidated its status by controlling all the levers of social influence, first in Spain, by Torquemada, then extended to Portugal, France, Italy, especially through the Catholic religion.

[5] See, I. Ionescu-Dolj, *Romanian Criminal Procedure Course*, Socec & Co. S.A. Publishing House, Bucharest, 1937, pp. 32-33.

[6] See, T. Green, *The Inquisition - a history of terror in the 15th and 18th centuries*, version translated from English by G. Stoian, Litera Publishing House, Bucharest, 2019, p. 127.

[7] In Romanian criminal procedure literature, for the first time, the reasons for torturing the accused and the convicted are debated by Prof. Vintilă Dongoroz (p. 73), in *Treatise on Law and Criminal Procedure*, vol. IV, „Criminal Procedure", part I, 2nd ed., *Course on Law and Criminal Procedure* by I. Tanoviceanu, revised and completed by V. Dongoroz, C. Chiseliță, Șt. Laday, with jurisprudence by E.C. Decuseară, Curierul Judiciar Publishing House, Bucharest, 1927.

The evidentiary procedures that could be applied were only those provided for by law, their evidentiary value being ranked, prescribed, thus having to do with an axiology of evidentiary value (the system of legal evidence).

Each of these systemic models had its advantages and disadvantages.

Thus, while the accusatory system allowed the jury and the public to directly observe the behavior and reactions of those involved, justice being directly and freely attributed to one or the other of the parties, it nevertheless allowed the most skilled or experienced in the judicial field to escape the accusation of the uninitiated, thus managing to evade any responsibility, a fact that generated a weakening of the authority of the law, generating a state of dissatisfaction within society and distrust in the justice mechanism.

The inquisitorial system was criticized because it allowed the use of justice as a „political weapon", helping to establish and maintain tyranny, stifling any freedom of expression, generating outrageous judicial errors, activities doubled by the incrimination of „crimes of public opinion", if these were contrary to the vision of the ruling class, or the incrimination of „crimes that contravened the religious order", of which the most widespread were „witchcraft", „heresy", „adultery" committed by women or „homosexuality" committed by men.

None of these authentic systems, taken individually, satisfied the spirit of justice, which is why, starting with the end of the 18th century, after the French Revolution of 1789, most of the classical evidentiary systems in criminal matters conceived and adopted the eclectic (mixed)[8], system, adopting from the authentic systems the methods of obtaining and administering evidence that proved more humane and more efficient in achieving generally recognized justice. Thus, from the inquisitorial system, the active role of the judge in finding out the factual reality, the public presentation of the content of the accusation were taken over, while the phase of administering the evidence became non-public, but the trial was taken over from the accusatory model, taking place in an adversarial, public and predominantly oral manner, the defense having full freedom in exercising its abilities in order to prove the innocence or to justify the behavior of the accused it defends.

In the matter of evidence, the accusatory system was maintained in the British Empire (Great Britain) and in the North American states, considering that this system better corresponds to the liberalism and democracy maintained in both the philosophical current and the religious doctrine[9].

Regarding the probative value, within the eclectic system, judges were recognized as having the right to exercise an active role in finding the factual truth and in establishing the guilt of the accused, as well as the right to rule freely on the basis of their inner convictions deduced from the evidence presented, but having the obligation to explain the reasoning taken into account in making decisions in the content of the written reasoning in the judgments rendered.

2. The current system of evidence

In modern criminal proceedings, the evidentiary system cannot be confused with either evidentiary procedures or evidence. While the evidentiary system represents a specific, regulated and functional framework that acts in a coordinated manner, after the initiation of the criminal proceedings, in order to obtain evidence, evidence represents the result/product of the judicial activity carried out within the evidentiary system.

In the view of our legislator, in the content of art. 97 para. (1) CPP[10], evidence is seen as a deduction of the judicial body that presents or reconstructs an element of fact which, through the information provided, helps, either directly or indirectly, to establish or refute the existence of a specific crime, to identify the perpetrator or participants in that/those acts and to find out all the circumstances necessary to know the truth and the fair settlement of the case within the criminal process.

Considering the decisive procedural role of the evidence system in the criminal trial, Professor I. Neagu[11], in our specialized doctrine, emphasized that „the administration of criminal justice depends mainly on the

[8] The eclectic (mixed) system of evidence administration and trial procedure for criminal cases was adopted by most European states, starting with 1791, as a result of the abuses committed by the judiciary before and after the French Revolution of 1789, and improved by the French Penal Code of 1808, of modern inspiration.

[9] In this sense, it should be noted that Protestantism was a movement that emerged in the territory of the British Empire, then taken over by the North American states.

[10] We are considering the Romanian Criminal Procedure Code adopted by Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 486/15.07.2010.

[11] I. Neagu, M. Damaschin, *op. cit.*, p. 468.

evidence system", the importance of evidence being the reason „for which, over time, there has been an intense concern for improving evidence systems".

Part of the Romanian criminal doctrine[12] substitutes the evidence system in favor of criminal procedure acts, concluding that „the succession of procedural acts aims to confirm or refute the existence of an offense". However, in our opinion, procedural acts represent only the procedural form of materialization of a judicial activity, while the confirmation or refutation of an offense can only be achieved through evidence, a factual situation, being an objective reality, can only be proven through means of evidence obtained in compliance with the applicable legal provisions. From the point of view of its content, as we have stated above, evidence represents a logical deduction that incorporates/includes an element of fact (*quod petitur probandi*), obtained following the application of evidentiary procedures (*modus probandi*), materialized in the content of the means of evidence (*media propandi*).

From this perspective, according to the judicial principle *quod probandi non potest, non est* (what could not be proven, does not exist), evidence represents the key point of the criminal process, the method of obtaining it being regulated within the evidentiary procedure, in the case of the Romanian Criminal Procedure Code the operating rules being grouped in the content of Chapter I called „General Rules", within Title IV entitled „Evidence, means of evidence and evidentiary procedures", from art. 97 to art. 103 CPP.

In a synthetic way, by „system of evidence" we mean the set of normative rules based on which the factual elements that serve to find out the truth regarding the commission of a criminal act, identify the perpetrator and/or participants or that help prove secondary circumstances, but useful for the proper administration of justice, are administered before the judicial authority of the state.

As has been observed in the criminal procedure legal literature[13], by establishing the rules for the functioning of the evidence system in the content of the Criminal Procedure Code, a substantial change in conception was achieved regarding the burden of proof and the assessment of their probative value, operating an expansion of the scope of the adversarial concept and on criminal prosecution. The consequence of expanding the scope of incidence of the adversarial concept brings with it a series of specific criminal procedure sanctions, the most important of which is the exclusion of evidence obtained illegally, which includes both evidence obtained in violation of the law and that obtained by violating the principle of loyalty in obtaining evidence[14].

Even if, at first glance, starting from the principle of the burden of proof, according to which „in criminal proceedings the burden of proof belongs, in principle, to the prosecutor"[15], we might believe that the system of evidence represents the prerogative of the prosecution, however, even in supporting the criminal proceedings, the injured person plays a decisive role in proving the existence of the criminal act and the guilt of the accused, the right to contribute to proving the factual reality being recognized both during the criminal investigation and during the trial[16]. Of course, requests for evidence in the exercise of this procedural right, in the manner provided by law, are subject to approval by the prosecutor, during the criminal investigation, or by the judge, during the trial phase, based on the criteria of conclusiveness, utility and relevance in relation to the object of the evidence.

Consequently, given the importance of evidence, the system of collecting and administering it has not been and cannot be linear or immutable, but is dynamic and ascending, progressing with the science of law in general and with technical science in particular.

3. Systemic approaches

Investigation, evidentiary procedures and means of proof are essential components of any evidentiary system.

In developing the concept of a system of evidence, which, at the European level, tends to become an autonomous concept, scientific thinking takes into account several moments that transform a determined

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[12] See Gh. Mateuț, *Criminal Procedure. General Part*, Universul Juridic Publishing House, Bucharest, 2019, p. 443.

[13] In this regard, see N. Volonciu (scientific coord.), A.S. Uzlău, C. Voicu and others, *New Code of Criminal Procedure – commented*, Hamangiu Publishing House, Bucharest, 2014, p. 231.

[14] *Idem*, p. 231.

[15] In the Criminal Procedure Code, the burden of proof has acquired its own regulation, within art. 99, marginally called „Burden of proof".

[16] In this regard, in art. 100 para. (2) CPP, it is provided that: „during the trial, the court administers evidence at the request of the prosecutor, the injured person or the parties".

relational mechanism into a specialized system, having a distinct qualitative content, starting from relational observation and reaching the principles that underpin the systemic theory of evidence, even if these principles cannot be highlighted, at first analysis, in their pure form.

In this context, the research into the methods and principles specific to the evidence system must constitute a dynamic study, taking into account the fundamental relationship between normative prescriptions and the requirements of judicial practice, taking into account scientific progress and the increasingly ingenious way of committing crimes that criminals perfect in practice.

Criminal activity, taking on a cross-border character, has caused the „traces" and „products" of crimes to be found on the territories of different states, a situation that has forced the affected states to adapt their evidentiary systems and to work together within the framework of the international criminal cooperation mechanism, in order to carry out criminal justice.

At the national level, evidentiary activities, the documents establishing these activities and the procedural guarantees conferred on the parties and procedural subjects involved are regulated by domestic criminal procedure rules.

Although, from a forensic perspective, adapting and making national evidentiary systems compatible seems to be a simple process, from a criminal procedural perspective, the implications of the way evidence is obtained and administered are major.

Thus, in the matter of evidence, European decision-makers have raised the question of whether the adoption of a specific cooperation system is required to achieve the transfer of evidence or whether the formula of international legal assistance in criminal matters is sufficient.

The limited nature of the evidentiary procedures that can be accessed within the international legal assistance system in criminal matters, as well as the bureaucratic way of functioning, have determined a paradigm shift in the field of evidence, with the European orientation seeking a dynamic, flexible and predictable system in the field of collection and management of evidence in criminal matters.

From a systemic point of view, the transnational circuit of evidence can be analyzed from a dual perspective.

In a first vision, the interstate transfer of evidence may appear in the form of a „material circuit of existing evidence", in which the recognition and validation of transfers of evidence in the possession of states would be left to the judicial bodies of the states involved.

The disadvantages of this mechanism are represented, first of all, by the limits of the object of the transfer, which is constituted only by the evidence already in the possession of the requested state and, on the other hand, by the lack of effective control over the manner of obtaining the evidence, namely whether or not it was obtained in compliance with procedural guarantees.

In the second vision, evidence can only be obtained, transferred and used within a „well-articulated and systematically organized system", unique at European level, which operates horizontally and includes the widest possible range of evidentiary procedures and means of proof.

Given the advantages of the systemic nature of the evidence collection and transfer mechanism, its adoption is, by far, a rational choice.

4. Problematizing systemic criteria

Any legal system must ensure a balance between efficiency and the fundamental principles that guide that system, which are found in the normative content.

Regarding evidence, the standards of the act of justice in criminal matters consider two essential aspects: the quality of the evidence and the method of obtaining it, both components implying compliance with the procedural guarantees attributed to the parties and procedural subjects involved in evidentiary proceedings or affected by the withheld evidentiary content.

At the European level, the differences between „own/national systems for obtaining evidence" and „levels of procedural guarantees" in criminal matters are best highlighted in the case of transnational procedures, given precisely the different degrees of protection of the rights of affected persons between Western and Eastern states.

The „cross-border circuit of evidence", which seems to be a result of an interstate evidence system, cannot be seen as a simple "export" of evidence, but the means of evidence must meet the criteria of admissibility and

legality of the method of obtaining both in relation to the criminal procedural legislation of the state on whose territory they were obtained, and in relation to the criminal procedural legislation of the state on whose territory the evidentiary content is used. Consequently, the obtaining of evidence and its recognition are done according to different national systems, raising the issue of compatibility between lex loci probandi and *lex fori*.

Against the background of differences in the recognition and protection of procedural rights, compliance with the procedural guarantees granted to the parties when obtaining evidence on the territory and by the judicial bodies of a third country seems to be the flawed element of the evidentiary system at European level.

The problematization of the procedural guarantees brought into discussion, and especially the resolution of this problem at a systemic European level, can be reduced to two types of solution, namely:

- The adoption, at national level, of procedural rules that would ensure identical protection standards at the level of all Member States of the Union, incident to the matter of obtaining and valorizing evidence, which would require a real reform at the level of domestic criminal procedures. Of course, in this situation the standards will be those already imposed/regulated in advanced states, none of these states wishing to register a regression to the detriment of the quality of their own act of justice;
- The establishment of formal criteria based on procedural presumptions that operate in the matter of obtaining evidence, therefore the creation and imposition of a normative construct;
- In the case of this last option, the reasons for non-recognition of evidence existing on the territory of another state or obtained by a third state are minimal.

Although, at first analysis, the desirable solution seems to be the one in letter a), several factors must be taken into account when choosing and following one of the two options, among which the most important seem to be legislative sovereignty, by virtue of which, often at the national level, evidentiary systems not adapted to European procedural standards are maintained, and the time required to implement a reform in national judicial systems.

In this context, in adopting a single evidentiary system at European level, the European legislator is left with only an eclectic/mixed approach, by choosing a strategy that satisfies both the judicial interest and also respects procedural guarantees.

Thus, the regulation and extent of procedural guarantees in relation to the obtaining and use of evidence are left to national legislators, while the evidentiary procedures and means of proof are the responsibility of the beneficiary. The gap between the two lines is filled by the principles of mutual trust and the presumption of procedural good faith.

Following this line of thought, interstate attributes and responsibilities were divided between the participating states, with procedural guarantees being the responsibility of the executing state (*lex loci probandi*), while the procedural criteria on the basis of which certain evidentiary procedures were requested and evidence is valued are carried out according to the criminal procedural legislation of the requesting state (*lex fori*).

At the European regulatory level, the content of such a system has a dual structure, on the one hand, there would be regulations regarding the subjects involved and their material and functional competences, as well as the methods of exercising evidentiary procedures in order to obtain evidence and transfer it, and, on the other hand, there would be regulations regarding the procedural guarantees that the parties and persons involved must benefit from.

However, within the formal system, neither the procedural guarantees nor the methods of validating and valorizing evidence benefit from any extensive regulation nor are they made explicit, there being only rules of reference to the regulatory procedures in force in the legislations of the states involved. This regulatory model places the responsibilities deriving from the manner of compliance with the two procedural institutions in the exclusive charge of the states involved in accessing the evidentiary system.

At the European level, the single evidence system focuses on the types of investigations, while the quality of the evidence and the probative value are left to the background, the European legislator being more interested in the rules for carrying out these investigative activities that are requested by the authorities of one state but are executed on the territory and by the judicial authorities of another state than in the actual content of the evidence.

The preponderance of interest in investigative measures proves the European legislator's concern for establishing a bilateral legality regime by referring to the criminal procedural legislation of the states involved.

Also in view of defending legality, the necessity of the investigation and the opportunity to initiate it are analyzed from the perspective of the requesting state, on the principle of *lex fori*, while the criterion of proportionality of the level of intrusion related to the nature of the evidentiary procedures applied and the legality of the method of obtaining the evidence is carried out in compliance with the legislation of the executing state, on the principle of *lex loci probationes*.

By virtue of this systemic rule, if the judicial authority in the executing State finds, upon recognizing an investigative measure, that it is much too intrusive in relation to the judicial purpose pursued, noting that it has other less intrusive investigative tools at hand that ensure the same evidentiary purpose, in exercising the principle of flexibility, it will propose to the judicial authority in the requesting State the replacement or adaptation of the evidentiary procedures so as to maintain the right balance between the judicial purpose and the level of intrusion.

5. The EU regulatory framework

The choice of one or another of these directions implies a great institutional responsibility, which is why, at the EU level, through the Treaty of Lisbon[17], the powers of legal regulation were extended by establishing a new general conventional normative framework that would facilitate the regulation of the special normative framework incident to the matter of admissibility and the collection of evidence at a cross-border level.

In this sense, following the line of the Joint Action Plan developed through the 2001 Green Paper and the 2009 Green Paper, within which the issue of the systemic circuit of evidence at European level was placed in a broader framework, of interstate judicial cooperation at the level of the entire Union, art. 82 para. (2) letter a) TFEU was adopted, but not through an explicit reference to the single system of evidence at European level, but by invoking the reasons for better judicial cooperation in criminal matters, within which the facilitation of mutual recognition of court judgments and judicial decisions are of major importance in order to achieve and strengthen judicial cooperation in criminal matters with a cross-border dimension, for the purpose of „mutual admissibility of evidence between Member States".

The regulation at the Treaty level of the attributes of the evidentiary system in the component of „mutual recognition of both court judgments and judicial decisions" and even their positioning on the same level of European judicial priority, proves the importance that the Union attaches to the procedure for obtaining evidence, assigning to the competence of the European Parliament and the Council the regulation of a minimal legislative framework regarding the standards and functionality of the system for obtaining and administering evidence at the level of the entire Union.

The functional purpose of recognition and the foundation of the police and judicial cooperation mechanism, however, betray the systemic content of the transnational evidentiary mechanism. In fact, the scope of the notion of mutual admissibility of evidence between interstate judicial partners, from the conventional content, should not be restricted to the proper meaning of the term admissibility, namely that of bilaterally providing for it in the normative content belonging to the states involved, but should be extended to the meaning of mutual reception and recognition of evidence, the latter being the expression of the mechanism of international judicial cooperation in criminal matters.

Benefiting from a statutory conventional regulatory framework, the issue of the single evidence system intended to operate at European level was reiterated on the occasion of the Programme adopted by the European Council on 10-11 December held in Stockholm, the discussions not being limited only to the concept of a systemic circuit of evidence between judicial authorities belonging to different states, but also referred to the material competences of judicial bodies, the horizontal systemic functioning (in a homologous system) of the mechanism based on the judicial decision expressed and transmitted by a request from a competent judicial authority to order that type of judicial decision belonging to a state called the applicant, then the collection and transmission of evidence by a competent judicial authority in the executing state to obtain and transfer that evidence. Regarding the scope of evidence that can be obtained and transferred within this mechanism, it must be as extensive as possible, the delimitation being given by the limit of the internal admissibility of obtaining it.

[17] The text of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community was approved at the meeting of Heads of State held in Lisbon on 18-19 October 2007 and the Treaty was signed on 13 December 2007, the Treaty being ratified by Romania, the amendments brought by this Treaty being published in the Official Gazette of Romania, Part I, no. 107/12.02.2008. At the European level, the consolidated version of TFEU was published in OJ C326/47-390/26.10.2012.

The positioning of the evidence gathering and management system could not be achieved in a vacuum, given the anticipatory regulations of the system that we find in the Council Framework Decision 2003/577/JHA/22.07.2003 on the execution in the European Union of orders freezing property or evidence[18] and the Council Framework Decision 2008/978/JHA/18.12.2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings[19]. However, within the new legislative action, the European legislator analyses the normative content of these Framework Decisions as a „matter of fact", its scope also including the positive results or malfunctions of the evidentiary instruments regulated by these European normative acts.

In this regard, Framework Decision 2003/577/JHA is notable for the speed and efficiency of the order model, the freezing/blocking of certain evidence by the executing State being immediately applicable, while Framework Decision 2008/978/JHA is notable for the relational flexibility between the judicial authorities involved and the adaptability of judicial procedures on the criteria of proportionality between the judicial purpose/interest, the impact on the rights and freedoms of the data subject and the minimum interference in their private life.

Within the single European system of transnational collection and management of evidence, the emphasis is on the „effective execution" of the judicial decision to obtain evidence received from the requesting state, meaning that the grounds for refusal of recognition or non-execution are limitedly provided for by law, while the object of evidence collection includes all types of evidence. The drastic restriction of the grounds for non-recognition of the judicial decision on the basis of which the obtaining of certain evidence is requested excluded from these the failure to comply with procedural guarantees or the lack of appeals on the territory of the executing state, considering that these grounds would not be of public order. Now, under these conditions, we wonder whether, by virtue of the right to a fair trial, the requesting state could not invalidate the means of evidence and remove their probative value in cases where it would find that the procedural guarantees of those concerned, especially in the case of the accused, are affected, thereby ensuring a concrete balance between the judicial interest and procedural legality.

The „investigative measure" is the subject of the request, consisting of the evidentiary procedures to be applied in a specific case in order to obtain evidence. The nature and manner of execution of the evidentiary procedures, in certain justified situations, may be replaced by the judicial bodies at the request of the executing authority, in accordance with art. 9 and 13 of Framework Decision 2009/829/JHA on the application, between the EU Member States, of the principle of mutual recognition to decisions on judicial supervision measures as an alternative to preventive detention[20].

6. Conclusions

The evidentiary system, which is intended to be unique at the European level, is under construction, it is guided by certain operating rules and takes into account certain legal standards.

Its operating mechanism is given by the level of mutual trust that international judicial partners attribute to each other, and the procedural standards depend on the normative content in force specific to each of the states involved.

Finding objective criteria for distributing responsibilities and strengthening procedural guarantees is a concern for EU legal thinking, with computer evidence and evidence obtained through surveillance and monitoring systems representing real challenges to the evidence system.

[18] Council Framework Decision 2003/577/JHA/22.07.2003 on the execution in the European Union of orders freezing property or evidence, was published in OJ L 196/45/02.08.2003, p. 45. With regard to the mutual recognition of freezing and confiscation orders, as of 19.12.2020, Framework Decision 2003/577/JHA was replaced by Regulation (EU) 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders, published in OJ L 303/1-38/28.11.2018.

[19] Council Framework Decision 2008/978/JHA/18.12.2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, was published in OJ L 350/30.12.2008, pp. 72-92.

[20] Framework Decision 2009/829/JHA on the application, between the Member States of the European Union, of the principle of mutual recognition to decisions on judicial supervision measures as an alternative to preventive detention, was published in OJ L 294/11.11.2009.

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