Mutual Admissibility of Evidence and Electronic Evidence in the EU

A New Try for European Minimum Rules in Criminal Proceedings?

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Article

ABSTRACT

This article seeks to provide arguments in support of legislative action on mutual admissibility of evidence and electronic evidence in criminal proceedings at the EU level. To this end, it will first describe the status quo and then the main features of a corresponding proposal recently tabled by the European Law Institute. In the light of this proposal, the author explains why Member States should reconsider their traditional stance against any EU initiative on evidentiary rules in criminal proceedings. Ultimately, especially in this new digital era, the best solution to prevent the inadmissibility of cross-border evidence is to adopt a set of minimum rules.

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I. Introduction

Judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition. To this end, Art. 82 (1) and (2) of the Treaty on the Functioning of the EU (TFEU) establishes the competence of the EU to adopt measures and minimum rules in order to implement this principle, while respecting the possibility for Member States to maintain a higher level of protection of fundamental rights. On the basis of this legislative power, the EU has already adopted numerous directives and regulations to facilitate the principle of mutual recognition, e.g. on procedural rights, conflicts of jurisdiction, or victims' rights, to name but a few. Although Art. 82 (2) lit a) TFEU expressly mentions the possibility to adopt by means of directives rules on "mutual admissibility of evidence between Member States" to the extent "necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension", the EU has not yet adopted any legislative instrument in this regard.

Law enforcement authorities, public prosecutors, defence lawyers, and legal scholars have consistently argued that it is necessary to provide legal certainty in this area, not only to ensure the admissibility of cross-border evidence but also to provide for an adequate protection of the defendants' rights when faced with incriminating evidence obtained abroad.[1] The EU institutions have also acknowledged the need for such a legal framework,[2] but have so far failed to put forward a proposal on rules on the admissibility of evidence in criminal proceedings.[3] This does not mean that efforts to move forward in this field since the Tampere Council[4] have been lacking,[5] but it seems that the EU has not managed to gain enough support from Member States to put this topic on the agenda.

On 5 May 2023, the European Law Institute (ELI) adopted a Proposal for a Directive of the European Parliament and of the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings (hereinafter the ELI Proposal), which is the result of a two-year project.[6] It is a draft that is intended to serve as a blueprint for a future Directive on the admissibility of evidence in criminal proceedings. It has been discussed with all the main stakeholders involved in cross-border criminal proceedings in the EU, who have worked together to address and balance the needs and interests of all parties. It would be welcome if the EU Commission would use it as a starting point to move towards rules on the admissibility of evidence in transnational criminal proceedings.

But is there really a chance for a future Directive on admissibility of evidence? Do the differences in the legal traditions and in the national criminal justice systems prevent the adoption of certain minimum rules on admissibility of evidence?

This article seeks to address these questions and put forth arguments in favour of a legislative action at the EU level. I am convinced that the best way to prevent the inadmissibility of cross-border evidence lies in the adoption of a set of minimum rules, especially with regard to the new digital era in which we live. In the light of the ELI Proposal on the admissibility of evidence, I will outline why Member States should reconsider their traditional negative stance against any EU initiative on evidentiary rules in criminal proceedings.

II. The Main Features of the European Law Institute Proposal

Clear progress has been made in European judicial cooperation in criminal matters, which has mainly focused on simplifying procedures based on the principle of mutual recognition, restricting refusal grounds, establishing time frames for the execution of requests providing standardised forms, setting up swift

communication among judicial authorities, etc. However, no parallel effort has been made to adopt general rules setting out the main principles on the admissibility of cross-border criminal evidence.[7] Said ELI Proposal seeks not only to fill this gap but also to provide certain standards for harmonising the gathering of electronic evidence. Keeping these two goals in mind, the ELI Proposal is divided into two parts.

The first part (Chapter 2) contains a set of rules aimed at clarifying which standards need to be respected in criminal proceedings when evidence has been gathered in another Member State under rules that are likely to be different from those applicable in the forum State. The ELI Proposal neither imposes rules on how the evidence should be gathered in each Member State nor stipulates how Member States are to regulate any of the criminal investigative measures (except certain rules regarding electronic evidence). It also does not affect the free assessment of evidence that lies with the national courts.

The principles set out in the first part try to balance the two main interests at stake: enhancing respect for defendants' rights, on the one hand, and enhancing the free circulation of evidence and therefore the effective prosecution of cross-border crimes, on the other. To this end. the Proposal establishes compliance with *lex loci regit actum* as the main principle (Art. 4 ELI Proposal); it is up to the executing authorities and for the trial court in the forum state to verify that these rules have been complied with. In addition, the defence shall have access to the necessary means to be able to verify whether the evidence gathered abroad has in fact been obtained in accordance with the *lex loci.* This principle is not new, since it is already set out in most MLA conventions.

What the ELI Proposal requires is that the *lex loci regit actum* principle is effectively complied with: the trial court, together with the executing authorities and the defence, has the duty to make certain that the evidence has been obtained in conformity with the *lex loci.* Ensuring adherence to the *lex loci* serves two goals*:* first, it is a requirement for the admissibility of evidence providing for lawfulness in the gathering of the evidence; second, it ensures that the diverse legal frameworks do not represent an obstacle to the admissibility (use) of the evidence obtained abroad. The only exception to this general principle is for cases in which the use of such evidence would infringe fundamental constitutional principles of the forum State (Art. 4 (1) ELI Proposal).

In this way, the ELI Proposal underlines that mutual recognition is not equivalent to applying the principle of non-inquiry. It aims at strengthening the principle of mutual recognition but only when the evidence has been lawfully obtained according to the *lex loci.* And this principle also applies to evidence obtained in administrative proceedings. It provides for some flexibility, however, allowing the forum State to activate a kind of emergency break and refuse the cross-border evidence if, despite complying with the *lex loci*, a fundamental principle of its constitution is violated.

Although this approach may not be ideal purely from the perspective of the principle of mutual recognition, it seems to be the most reasonable approach in order to help reduce Member States' resistance towards the adoption of a Directive on the admissibility of evidence. Knowing that there is still a possibility to invoke fundamental principles of the national justice system against the evidence obtained abroad should calm the existing concerns expressed by several national authorities.

In this realm, the problem of identifying the *lex loci* with regard to electronic evidence arises, as the location of the items of evidence is unknown in many cases. Art. 2 ELI Proposal clarifies this issue by defining the *lex loci* as the "place where the access to evidence was granted".

Evidence obtained by means of torture or ill-treatment, in violation of the right against self-incrimination, and by deception are considered grounds for the absolute inadmissibility of evidence (Art. 5 ELI Proposal). This neither represents an innovation nor an intrusion into the national criminal justice systems but simply a way

of ensuring an effective respect for the fundamental rights standards in the Charter of Fundamental Rights of the European Union and in the European Convention on Human Rights (ECHR), as defined in the respective European courts' case law. Some argue that such an inadmissibility ground does not provide any added value, since such obligations already exist under the EU Charter and the CoE Convention. However, practice shows that the implementation of these standards is still far from being a reality in all Member States.

Art. 6 ELI Proposal provides for a set of non-absolute rules on the admissibility of evidence, whereby the Member States "shall ensure" that certain evidence is not admitted. This provision seeks to strengthen compliance with safeguards that are already included in most – if not all – national codes of criminal procedure such as the protection of the lawyer-client privilege.[8]

The second part of the ELI Proposal aims at providing precise rules on the gathering of electronic evidence.[9] These rules are mainly based on the already adopted international forensic standards as accepted in judicial practice.[10] This part includes safeguards to ensure the integrity, authenticity, and completeness of the electronic evidence, the possibility to challenge such evidence, and access to the IT expertise and other machine-learning devices – also for the defence (Art. 7 (5) ELI Proposal). Although no harmonising rules have been established for other types of evidence, there were two reasons for including very precise rules on the gathering of electronic evidence: first, the rules on gathering electronic evidence in criminal proceedings are at an incipient stage; second, such rules have not always been sufficiently developed in national legal frameworks.[11]

Lastly, the ELI Proposal establishes the need to provide for effective judicial remedies against the use of evidence obtained in breach of the rules set out in the proposed Directive (Art. 10). It also clarifies what the consequences of finding cross-border evidence inadmissible should be (Art. 11).

Having summarised the main features of the ELI Proposal for a Directive on mutual admissibility of evidence and electronic evidence in criminal proceedings, I will now put forth arguments as to why the Member States and the EU should favour the advancement of regulating admissibility of criminal evidence by way of a Directive.

III. A Move towards a Directive on Admissibility of Cross-Border Evidence

For a long time, the EU has been aware of the need to set common rules or principles on the admissibility of criminal evidence. This is the reason why this topic is expressly mentioned in Art. 82 (2) lit. a) TFEU and why there have been continuous efforts to bring it to the attention of the Member States. Thus, it is out of the question that rules on the admissibility of cross-border evidence are needed.

The increased relevance of cross-border electronic evidence in practice underpins this need. More certainty is necessary to define in which cases and under which conditions electronic evidence obtained/accessed in another country will ultimately be admitted or refused as evidence in the forum State. The defence counsel faces the same uncertainty as the prosecution in many cases, since it is impossible to check how the electronic evidence was extracted from a device, how it was stored, which keywords or selectors were used during the search of a computer, or what the means were to transfer such data from one country to the forum State.

The present situation is clearly not compatible with a common Area of Freedom, Security and Justice (AFSJ): it neither provides for the free circulation of evidence nor does it promote security, as it poses obstacles to the effective prosecution of cross-border crime. In the end, it does not serve justice, as the

defendant is confronted with evidence which he/she cannot challenge because either the principle of non-inquiry is applied or because he/she does not have means to find out how the evidence was obtained abroad. The need for European rules on the admissibility of criminal evidence should therefore no longer be debated: it should be agreed that it is necessary.

Considering the agreement on the need for a Directive on admissibility of evidence, why has there been so little progress in this regard? Of course, it is known that the EU's legislative processes are complex and that finding consensus on certain topics can be quite a challenge. The rules on admissibility of criminal evidence are not an exception. This is also true, however, for many other topics and issues, which have nevertheless gone through the EU legislative process and eventually become EU law. There must be other reasons to explain the lack of advancement in the area of admissibility of evidence.

At present, the European Commission claims that the war scenario in Ukraine and the need to protect victims as well as secure evidence of war crimes related to the Russian invasion are to be the absolute priority in the field of justice and home affairs. On the one hand, this is completely justified because there is no question that discussing the rules on admissibility of criminal evidence is clearly not a priority compared to the challenges arising from the war. On the other hand, this is not convincing, since the EU has always been able to work on several fronts and make progress in areas seen as necessary, albeit not as a high priority on the agenda.

This being said, it appears that the Member States – convening in the Council – are not motivated to tackle the issue of admissibility of evidence, considering that any EU law in this area would cause unwelcome meddling in the respective national criminal justice system and its own internal balances. The traditional resistance of the Member States to EU law in the area of criminal law –still considered one of the areas most closely linked to their sovereignty – also plays a role in this context.

This resistance would be understandable if the premise were correct, if there were rules that would interfere with the sovereignty of the Member States, if the EU law intended to stipulate how national judges should decide on the admissibility of evidence or which exclusionary rules of evidence should be applied. The opposition would also be justified if the interference in the national criminal justice systems was illegitimate. However, a closer look at the ELI Proposal shows that this is not the case: the ELI Proposal neither imposes additional exclusionary rules nor does it add new principles to the admissibility of evidence. Rather, it tries to balance the interests at stake by seeking a better implementation of the existing rules and international standards.

In this context, it must be called to mind that the ELI Proposal is not a merely theoretical academic exercise but instead the result of numerous discussions and compromises among all the stakeholders, as practitioners have been as involved in its drafting as scholars. The ELI Proposal therefore does not take a unilateral stance in favour of the prosecution or the defence, and perhaps this balanced approach is the reason why no one is completely satisfied with the result, even though all stakeholders tend to agree that it improves the present uncertain situation.

The task of the drafters has been to find solutions that promote the effective prosecution of crime by facilitating not only the access to cross-border evidence but also the possibility to use it later at trial. At the same time, the drafters aimed to avoid the cross-border element of the evidence from ending up lowering the safeguards of the defence rights. Preventing the defence from challenging the lawfulness of the evidence gathered abroad – by way of procedural rules or by way of practical impossibility or lack of resources – is not an adequate way to move towards a more effective prosecution at the cross-border level in the AFSJ.

Moreover, the standards on the admissibility of evidence reflected in the ELI Proposal have already been defined in the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). No additional exclusionary rules that would interfere with the general structure and principles of national criminal proceedings were introduced; thus, it would be most awkward for anyone to oppose the implementation of rights already defined for which compliance is already an obligation. In other words, opposing an EU legislative instrument on admissibility of criminal evidence like the ELI Proposal would run counter to strengthening the rule of law in the EU.

All these reasons should not only help allay the Member States' fear of EU law being adopted in the field of admissibility of criminal evidence but also encourage them to support a reasonable legislative initiative in this area.

IV. Time to Ban the Principle of Non-Inquiry in Cross-Border Evidence

It is conventionally put forward that it is not feasible to control respect for the *lex loci* (before transferring evidence and admitting it as incriminating evidence at trial in the forum State), as proposed by ELI. It is argued that it is not possible for the trial court to verify whether the gathering of evidence in a foreign country was carried out with respect for the law applicable in that country, given that the court does even not know which law is to be applied. Even though such an argument might be justified because the maxim *iura novit curia* does not apply to foreign law, it is not an indisputable one. There are many ways to ensure that evidence obtained abroad is compliant with the *lex loci,* which do not necessarily require the forum judge to become an expert in foreign law, e.g. calling in a foreign lawyer to give an expert opinion, allowing the defence to hire a lawyer in the foreign country where the evidence was obtained, requiring the law enforcement authorities to describe in detail how the piece of evidence was gathered –as it is done in practice in EPPO proceedings when cross-border evidence is gathered by the assigned European Delegated Prosecutor–. In sum, while the argument based on the principle of non-inquiry may have been justified in the pre-digital area, in today's world of fluid communications and easy access to legal information from a foreign country, it is high time to adapt the standards on admissibility of cross-border evidence to this new global scenario. As a consequence, sticking to the principle of non-inquiry is simply not acceptable within the EU's AFSJ. In addition to the lack of logic as to the principle of non-inquiry in a digital global society, a ban on this principle is also called for because it lowers the rights of the defendant, who would be deprived of the possibility to challenge the lawfulness of the cross-border evidence.

It could be argued that the principle of non-inquiry is the expression of the mutual recognition principle, given that it is based on the premise that all national authorities comply with the law, also when gathering evidence. I do not aim here to put into question the professionalism and trustworthiness of the public authorities carrying out a criminal investigation and conducting investigative measures. However, the core issue remains that, despite the mutual trust between public authorities, the defence has still the right to check how the evidence has been gathered abroad, and it is the duty of any defence lawyer to ensure that this has been done in compliance with the procedural rules. This is how the adversarial procedure works, and this principle is to be respected regardless of whether the defence is confronted with evidence obtained in the forum State or in another EU Member State.

One primary rule for the fairness of the proceedings (Art. 6 ECHR) is that the evidence must have been lawfully obtained. The consequences of an infringement of these rules might diverge – strict exclusionary rule or balancing test –,[12] but it cannot be denied that lawfulness is a principle to be followed in the obtaining of criminal evidence. Thus, it seems only logical that it should be controlled by the trial court and that the

defence should be allowed to control it as well. Once there is agreement on this main condition, it can be discussed how this control should be carried out, and what the consequences of a violation of the *lex loci* principle should be.

At this point, the ELI Proposal does not aim for a drastic solution, such as excluding any evidence that does not adhere completely to the *lex loci.* It only provides for the absolute exclusion of evidence in the same cases in which the ECtHR has already determined that such methods of obtaining evidence are contrary to the ECHR (torture, ill-treatment, deception, disproportionate coercion, and violation of the right against self-incrimination). For other breaches of the law and violations of so-called "derogable" fundamental rights, the ELI Proposal seeks in its Art. 6 to enhance the level of safeguards by which Member States "shall ensure that such evidence is not admitted". This means that the national procedural rules must foresee ways of checking the legality of such evidence, including for the defence.

However, this provision does not create new exclusionary rules or requirements for the admissibility of evidence that are not already envisaged at the national level. For example, the protection of immunities, which has been included in Art. 6 ELI Proposal, merely reflects what has already been foreseen in all national codes of procedure of the Member States. Including these immunities in an EU Directive will only grant them an enhanced protection by stipulating that such cross-border evidence should not be admitted. In sum, the model proposed by the ELI would also stand against arguments that it would alter the procedural models of a country or against objections raised on the basis of the inquisitorial nature or other features of a national criminal procedure.

V. Common Standards on the Gathering of Electronic Evidence

Ultimately, Member States often argue against the harmonisation of the rules on investigative measures and evidence gathering by asserting that the investigative measures, especially those that are coercive or restrictive to fundamental rights, are closely linked to the national understanding of the principle of proportionality and national values.

However, this argument is not strictly applicable when it comes to electronic evidence. Most countries do not have a precise regulation on the gathering of this type of evidence. In fact, as the drafters of the ELI proposal explain,[13] the complete absence of rules at the national level is both a shortcoming and an advantage: a shortcoming, as it does not provide legal certainty at the national level but an advantage because the lack of existing rules facilitates the adoption of international standards and therefore the rules contained in a (future) EU Directive, as they would not generally conflict with any national rules or principles.

In view of a future EU legal framework, it should also be borne in mind that, in the area of electronic evidence, IT experts and lawyers have been developing detailed international forensic standards precisely to fill the legal gap.[14] Since electronic evidence has a cross-border dimension in a vast number of cases, the need to harmonise the rules for its gathering is even greater than for physical evidence. The volatile nature of electronic data requires a series of safeguards to be adopted from the very beginning of the procedure involving access to them, in order to ensure that the electronic evidence will not be subject to manipulation and to establish that it is authentic.

For these reasons, action at the EU level ensuring admissibility of electronic evidence is more necessary than ever. The setting of these common rules would not only enhance the rights of the defence but also the effectiveness of the prosecution, avoiding the risk that electronic evidence is ultimately not admissible, for example because the chain of custody has been broken. Again, I do not see why Member States would seek

to oppose what would entail an advantage for the effective prosecution of crime, while ensuring compliance with fundamental rights.

VI. Conclusion

The analyses in this article have demonstrated that there is a need to convey the message that defining a clearer legal EU framework on admissibility of evidence will benefit all parties involved in criminal proceedings: the prosecution, victims, and the defence. More legal certainty and a uniform approach towards the principles on admissibility of cross-border evidence in a common Area of Freedom, Security and Justice are not only requirements for an efficient cross-border prosecution of crime but also signify the commitment of all EU Member States to the fairness of criminal proceedings.

Agreeing on common minimum standards for the gathering and transmission of evidence, including a set of minimal conditions for the admissibility of evidence, while taking into account the differences between the legal traditions and systems of the Member States is vital in order to safeguard fundamental rights and facilitate judicial cooperation at the EU level. And the digital revolution has definitely increased the need for such common minimum rules.

The ELI Proposal on mutual admissibility of evidence and electronic evidence in criminal proceedings outlined here has not only been designed to raise awareness on this issue but could also be taken as a launchpad for further developing EU law on admissibility of criminal evidence. This has been demanded by practitioners for a long time. The intensive supranational work by the European Public Prosecutor's Office also speaks for immediate legislative action in this area.

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1. Another issue that should be addressed in the future is whether the proposed rules on the admissibility of evidence should cover only cross-border evidence or also apply to purely domestic cases, avoiding thus unequal treatment between the level of protection of the rights of defendants when facing a cross-border case or a domestic one. See J. A. E. Vervaele, "Lawful and fair use of evidence from a European human rights perspective", in F. Giuffrida and K. Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, 2019, p. 56.↩
2. See, *inter alia*, Commission of the European Communities, "Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen", COM(2009) 262 final.↩
3. Although Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters and Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office mention the issue on admissibility of evidence and include provisions to facilitate it, they do not provide rules.↩
4. See, among others, European Council of 15-16 October 1999, "Conclusions of the Presidency", SN 200/1/99 REV 1; the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *O.J.* C 12, 15.1.2001, 10; Commission of the European Communities, "Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility", COM(2009) 624 final.↩
5. Cf, for instance, Milieu, *Study on Cross-Border Use of Evidence in Criminal Proceedings. Final Report*, March 2023, study upon the request of the Directorate-General Justice and Consumers, available at: <https://op.europa.eu/en/publication-detail/-/publication/2815b94e-9165-11ed-b508-01aa75ed71a1/language-en/format-PDF/source-291553958> accessed 2.11.2023.↩
6. The text of the ELI Proposal is available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Proposal_for_a_Directive_on_Mutual_Admissibility_of_Evidence_and_Electronic_Evidence_in_Criminal_Proceedings_in_the_EU.pdf> accessed 2.11.2023.↩
7. On transnational evidence in the EU, see, *inter alia*, A. van Hoek and M. Luchtman, "Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights", (2005) 1 (2) *Utrecht Law Review* 1-39, 15; S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility", (2010) 9 *ZStW*, 573; S. Ruggeri, "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues", in S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe,* 2014, 29-35; L. Bachmaier Winter, "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law", (2013) 9 *Utrecht Law Review*, 126-148; L. Bachmaier Winter, "Transnational Evidence: Towards the Transposition of the Directive 2014/41 Regarding the European Investigation Order in Criminal Matters", (2015) *eucrim* , 47-59; C. Claverie-Rousset, "The admissibility of evidence in criminal proceedings between European Union Member States", (2013) *EuCLR*, 152-169; K. Ligeti, B. Garamvölgyi, A. Ondrejova, and M. Gräfin Von Galen, "Admissibility of evidence in criminal proceedings in the EU", (2020) *eucrim*, 201-208.↩
8. Art. 6 of the ELI Proposal is entitled "*Non-absolute inadmissibility of evidence"* and reads as follows:
(1) Member States shall ensure that self-incriminating statements by the suspect during police interrogations in the absence of a defence lawyer are not admitted as evidence unless the defendant confirms them at trial.
(2) Member States shall ensure that evidence obtained in breach of the right to confidentiality of communications with the defence counsel is not admissible in criminal proceedings.

(3) Member States shall ensure that evidence concerning communication with clergymen obtained in violation of the seal of secrecy is not admissible in criminal proceedings.
(4) The obligations under paragraphs 2 and 3 shall not apply if the person to whom the confidential information is communicated is suspected of being involved in the criminal offence which is the subject of the proceedings.
(5) The obligations under paragraphs 1 to 4 shall also apply with respect to the evidence obtained in administrative proceedings.↩

9. For details, see Explanatory Memorandum of the ELI Proposal, p.16.↩
10. In the Explanatory Memorandum of the ELI Proposal, the forensic standards which are mentioned as generally accepted are: The 2019 Interpol "Global Guidelines for Digital Forensics Laboratories" (<https://www.interpol.int/en/content/download/13501/file/INTERPOL_DFL_GlobalGuidelinesDigitalForensicsLaboratory.pdf>); ENFSI, "Best Practice Manual for the Forensic Examination of Digital Technology" of 2015 (<https://enfsi.eu/wp-content/uploads/2016/09/1._forensic_examination_of_digital_technology_0.pdf>); and International Organization for Standardization (ISO), "SO/IEC 27037:2012, Information technology — Security techniques — Guidelines for identification, collection, acquisition and preservation of digital evidence" (<https://www.iso.org/standard/44381.html#:~:text=ISO%2FIEC%2027037%3A2012%20provides,can%20be%20of%20evidential%20value>). All accessed 2.11.2023.↩
11. See Explanatory Memorandum of the ELI Proposal, p. 17.↩
12. See S. C. Thaman, "Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules", in S. C. Thaman (ed), *Exclusionary Rules in Comparative Law,* 2013, 403-446. On the aims of the exclusionary rules see also the comparative study of S. Gless and T. Richter (eds.), *Do exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules,* 2019.↩
13. See Explanatory Memorandum of the ELI Proposal, p. 17.↩
14. See M. Caianiello and A. Camon (eds.), *Digital Forensic Evidence. Towards Common European Standards in Antifraud Administrative and Criminal Investigations*, 2021; S. Mason and D. Seng (eds.), *Electronic Evidence and Electronic Signatures*, 2021, available at: <https://humanities-digital-library.org/index.php/hdl/catalog/view/electronic-evidence-and-electronic-signatures/214/408> accessed 2.11.2023.↩

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