MUTUAL RECOGNITION, JUDICIAL INQUIRIES, DUE PROCESS AND FUNDAMENTAL RIGHTS

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1. The European Evidence Warrant, Free Movement of Evidence, and Due Process

The title of my article tends to appear and read like a triangle:

1. The 'European Evidence Warrant,' proposed by the European Commission just over a year ago[1]
2. 'Free movement of evidence,' expounded at the Tampere Council in 1999 and affirmed as an important goal in the Hague Programme of 5th November 2004[2] (often referred to as 'Tampere II')[3]
3. 'Due process,'[4] which is not defined as such by any EU document, but has its substance in the case law of the ECHR. In the EU framework, the principles of 'due process' were first outlined in a Green Paper, which forms the basis for a recently sketched minimum standard laid down in a new EU proposal for a framework decision on certain procedural rights in criminal proceedings throughout the EU.[5] Also important in this respect are the basic 'Justice rights' laid down in Arts. 47 ff. of the Treaty for a European Constitution.[6]

This triangle may appear to many people to be very similar to the famous Bermuda one, and thus they fear that everything might become lost. But my goal is rather to map the triangle as an area of an European judicial landscape. In doing so, my article will hopefully serve as one starting point for further discus-

1 COM(2003) 688 final, Brussels, 14.11.2003 and Mr. Williams' contribution (p. 69)..

2 Presidency Conclusions, Brussels, 5. 11. 2004 (14292/04), no. 3.3.1.

3 See Mr. A. IJzerman's contribution (p. 5)..

4 See for detailed information the contribution of Ch. Brants (p. 103).

5 COM(2004) 328 final, Brussels, 28.4.2004.

6 For further information see: Dutheil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty', *Common Market Law Review* 2004. 345ff.

sion on the detailed shaping of an area of freedom, security, and justice with the objective of balancing interests which are not always compatible.

In spite of all the new promising proposals, my position in this session on 'Mutual recognition, judicial inquiries, due process and fundamental rights' will be very critical, and in some respects I will even act as a sort of 'devil's advocate.'

In my presentation I want to follow a three-step approach: (1) Mark each corner point of the triangle with a statement; (2) argue the case very briefly, and (3) try to connect these points and fill in the blanks.

In doing so, I will rearrange the points: I will start out with the idea of the 'free movement of evidence' or, rather, the 'mutual recognition of evidence'– the two terms describe the same basic principle. Subsequently, I will briefly explain the idea of 'due process' (or 'fair trial') in national criminal trials. In a final step, I will explain the relevant features of the proposal for a European Evidence Warrant, namely the expected impact on the evolution of a 'free movement of evidence' and will sketch the consequences of the European Evidence Warrant for 'due process.'

2. Free movement of evidence

Talking about the concept of free movement of evidence is something of a provocation in itself. As far as I am aware, the expression is not used in any official EU document.

The official language refers to the 'principle of mutual recognition' of evidence, while the term describes the same ambition from a different angle. The 'free movement' terminology, however, effectively reveals the origins of the idea as set out in the Tampere conclusions in 1999.

Earlier, during the Council of Cardiff, British officials had proposed this scheme as a concept for the emerging framework of Justice and Home Affairs – as an alternative model to the idea of harmonisation.[7] This extension of a principle which was well established in the internal market of the Community and which was practised with regard to civil and commercial judgements was well received. The Council – and other European institutions – later translated this idea of 'mutual recognition' into a programme of various measures handed out in 2001.[8] Since then, the principle of mutual recognition has been a cornerstone in the area of freedom, justice, and security, and we will have to live with the consequences. But what are the consequences?

Free movement worked very well in the EC framework of a Common Market, transporting goods, persons, services, and capital across borders. The reasoning

7 See: Peers, 'Mutual Recognition and Criminal Law', in: *Common Market Law Review* 2004, 5 and 9.

8 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ* C 12 of 15.1.2001, 10.

must therefore have been that it could solve the problems of criminal law enforcement across borders in an area of security, freedom, and justice, as well.

My first thesis however is:
The free movement approach sketched in the conclusions of the Tampere Council as a 'mutual admissibility concept'[9] will not work as well with regard to the 'transfer of evidence.'

The main source for my doubts[10] is the fact that the object of intended transfer is not a real thing, but a legal construct, which serves certain legal, i.e. abstract needs, and not basic needs like those of consumers. As we all know, the prerequisites for admissible evidence and the conditions for its gathering are a specific consequence of the characteristics of a certain legal system and are thus quite different across Europe.[11] That is one of the reasons why, within the framework of mutual assistance, only the trial court decides on the admission and value of certain evidence.

This is not only true within the framework of mutual assistance between the Member States; it is also a fact with regard to OLAF investigations, as Mr. Perduca's article shows:[12] The value of final reports drafted by OLAF in the fact-finding process of a criminal trial depends on national law.[13] They may also be 'information only.'

Unlike consumer needs, which are the ultimate force behind the common market and its concept of free movement of goods, services, persons and capital, evidence must also serve a legal purpose within the framework of a national legal system mainly shaped by a certain tradition, which provides - among other things - for trust in a certain fact-finding procedure.

There is thus a danger that the free movement of evidence approach could lead to the admission of evidence in criminal trials which is of inherently poor quality, because it cannot serve a court in a certain system.

9 See the Conclusions of the Tampere Council, No. 36.

10 Many people share these doubts, see e.g.: Peers, 'Mutual Recognition and Criminal Law', in: *Common Market Law Review* 2004, 5ff.

11 For detailed information see: Spencer, 'Evidence' in: Delmas-Marty/Spencer (eds.) *European Criminal Procedures* (Cambridge 2002), pp. 594 ff.

12 See the contribution of S. de Moor (p. 47).

13 Art. 8 (3) of Regulation No. 2185/96 of 11 November 1996 concerning on the spot checks and inspections: '... The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and *under the same conditions as administrative reports drawn up by national administrative inspectors* ...'

3. Due process

'Due process' is a legal construct, too. Each Member State has formed its own idea of 'due process' by striking a careful balance between civil liberties (such as the privacy of the individual) and the privileges of the accused (such as the right to silence) on the one hand, and the need to ensure effective prosecutions and investigations on the other.[14]

Today, however, there is a European framework for 'procedural safeguards.' The rights of defendants in criminal trials are not only mentioned in various EU documents and are drafted in the EU Charter of Fundamental Rights, but will be integrated in the Constitutional Treaty.[15]

A long time ago and, for the substance of due process, much more importantly, the European Court of Human Rights set up a common and binding standard for 'due process' on the basis of the European Convention on Human Rights.

The Court's case law, however, can only serve as a European 'reference system' if and insofar as the European Convention on Human Rights lays down a minimum standard. It does not do so at the core of evidence law.

My second thesis is thus:
'Due process' with regard to the *rules of evidence* describes a specific balance in national legal systems. The ECHR does not provide a minimum standard in this area.

The common presumption in the discussion on 'due process' and the 'principle of mutual recognition,' however, is that there will be no serious conflict, because all Member States are bound by the ECHR and thus are supposed to provide comparable protection of individual rights. While the premise is correct – all EU Member States are bound by the ECHR – the conclusion is not, I fear. This becomes clear especially in the area of the transfer of evidence:

All EU Member States have their own rules of evidence, governing fact-finding in criminal trials. The ECHR does not contain any *explicit imperative* on the 'rules of evidence.'

In accordance with its status as a *subsidiary* relief institution, the European Court of Human Rights thus takes the position that the admissibility of evidence is primarily governed by the rules of domestic law – provided that they respect the rights and freedoms guaranteed by the Convention.

14 See McBride, 22 *European Law Review* (1997), pp. 1 ff.; Ormerod/Roberts, *The International Journal of Evidence & Proof*, pp. 38ff.; Sanders, in: Eser/Rabenstein (Hrsg.), *Strafjustiz im Spannungsfeld* (Freiburg 2004); Sharpe, *Criminal Law Review* [1997], pp. 848ff.; de Smet, *RIDP* 1999, pp. 761ff.

15 See Arts. 47 ff. of the Treaty for a European Constitution.

As a general rule, only the procedure of collecting evidence is of relevance to the Convention's guarantees, for example, whether or not the rights of the accused to a fair trial (overall) have been respected. In this area, the ECHR has had an immense effect on criminal procedure in European countries.[16]

Even with regard to these relevant guarantees contained in the ECHR, however, important variations in the implementation of these articles still exist between Member States. This is primarily a consequence of the different legal traditions and is possible because of the 'margin of appreciation doctrine' applied by the ECHR to accommodate the national differences.

Although there is a great deal of case law, it often remains difficult to conclude from the ECHR's decisions whether – or rather – to what extent the use of illegally or unfairly obtained evidence constitutes such a violation.

Hence, the ECHR very often lacks an answer as to whether a certain piece of evidence – collected legally or illegally in one country – may be admitted in a court in another country.

One blind spot, for example, is the ambit of the right to refrain from giving evidence ('Zeugnisverweigerungsrechte'): Can all the members of the defendant's family claim this privilege, as well as his priest and the local newspaper journalist? This is the case according to German law.[17] It is not the case in the United Kingdom.[18]

Looking only at this example, there appears to be no ground for the presumption of comparable standards in the area of the rules of evidence.

European institutions, however, have realized the non-existence inside the triangle of 'safeguards for civil liberties and defendants' rights' and have started to devote attention to this subject.[19] The EU Charter of Fundamental Rights, which will be part of the Constitutional Treaty, is the most prominent example.

With regard to the question of equivalent standards for procedural rights in criminal proceedings, the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings was presented in April 2004.

These acts, however, are not yet legally binding. Many of the NGOs therefore claim that cross-border evidence gathering within the EU framework entails a risk for the rights of defendants.[20]

16 Jung, *Goltdammer's Archiv 2003*, p. 198; Persaud, in: Gearty (ed.) *European Civil Liberties and the European Convention on Human Rights* (1997), pp. 356ff.; Sieber, *Juristenzeitung* 1997, p. 375.

17 See §§ 52, 53 of the German Criminal Procedure Code ('Strafprozessordnung').

18 See Honeyghon and Sayles [1999] *CrimLR* 221; Thompson (1976) 64 *CrAppR* 96; *Attorney General* v. *Clough* [1963] 1 QB 773.

19 Persaud, in: Gearty (ed.) *European Civil Liberties and the European Convention on Human Rights* (1997), pp. 347ff.; Whelan, in: Barrett (ed.), *Justice Cooperation in the European Union* (1997), pp. 212ff.

20 See e.g. http://www.statewatch.org/news/2004/mar/22eu-evid-warrant.htm; Justice response to the European Commission Consultation Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings (April 2002).

4. The Impact of the *Proposed* European Evidence Warrant on 'Due Process'

The proposal for a European Evidence Warrant[21] implements the 'principle of mutual recognition.' It has the aim of simplifying and accelerating the gathering and transfer of evidence in criminal proceedings with a cross-border element.[22] It is mainly intended to replace the 19th century mutual assistance approach with a modern procedure,[23] which is a worthy notion:

A simple form would be sent between Member States' authorities, including an order from the 'Issuing State' for the 'Executing State' to carry out certain activities. The 'Executing State' would have to comply with the order of the 'Issuing State,' unless limited grounds for refusing to comply with the order could be invoked. The proposal wishes to abolish – among other things – the possibility of refusing to comply because of differences in the law or practice of the two States.

The proposal, however, is silent with regard to the question of *the admissibility* of evidence, which means: It does not address the subject directly – but even if the issue is not dealt with directly the proposal still does intend to facilitate the admissibility of evidence obtained from the territory of another Member State[24] using several tools. I will point out three, which touch upon the topic of 'due process'.

First, the proposal hopes to facilitate admissibility by including the safeguards in the EEW procedure, using four different instruments: .(1) Only judicial authorities may issue such a warrant.[25] (2) Several conditions must be met before a warrant is issued.[26] (3) The executing state has procedural safeguards in place.[27] (4) Certain grounds of refusal may be claimed by-the executing state.[28]

Apart from this instruments the proposal secondly wants to facilitate the admissibility of evidence through the enforcement of the '*forum regit actum* principle': that is, according to the general principle[29] laid down in the proposal, the executing state cannot refuse to comply with the requirements requested by the issuing state when carrying out a warrant, except if the formalities and

21 COM(2003) 688 final, Brussels, 14.11.2003.

22 Explanatory Memorandum Nos. 28 ff., Proposal for a European Evidence Warrant.

23 Explanatory MemorandumNnos. 38 f., Proposal for a European Evidence Warrant.

24 See also: Explanatory Memorandum Nos. 56 ff., Proposal for a European Evidence Warrant.

25 See Art. 1 (1) of the Proposal for a European Evidence Warrant.

26 See Art. 6 of the Proposal for a European Evidence Warrant.

27 See Art. 12 and Art. 13 of the Proposal for a European Evidence Warrant.

28 See Art. 15 of the Proposal for a European Evidence Warrant.

29 See Art. 15 of the Proposal for a European Evidence Warrant.

procedures indicated by the requesting state would be contrary to its fundamental principles.[30]

Thirdly, it has been proposed that the EEW should be issued only when the issuing authority is satisfied that its own law would also allow the evidence to be obtained if it were on its own territory. Thus, the national authorities cannot shortcut legal privileges[31] and – as a general rule – the evidence gathered abroad can be used in the trial.

> Weighing these safeguards my third thesis is the following:
> The current proposal for a European Evidence Warrant may still endanger 'due process' on the national level in some respects because the safeguards provided are not sufficient.

I cannot discuss this thoroughly now. I only want to draw attention to three issues:

1. The EEW lacks the provision laid down in Art. 1 (3) of the European Arrest Warrant, namely that the Member States must respect fundamental rights and basic principles laid down in Art. 6 TEU.
2. The EEW would, as a general rule, eliminate the 'dual criminality' restriction of traditional mutual assistance.[32] Thus, an order would have to be executed for searching of evidence to prove an alleged crime, which is not a crime in the country of execution.
   In other words: An Irish authority could issue a European Evidence order to obtain documents held in a clinic which carried out abortions in Amsterdam. We are familiar with the arguments made concerning sovereignty from the discussion about the European Arrest Warrant.
3. Furthermore, the current proposal for the EEW does not fully ensure the rights of individuals (third persons, criminal suspects, and defendants alike) when such proceedings are underway.[33]

For example:
The substantive reasons for issuing an EEW can only be challenged in the issuing state; not in the executing state.[34] This provision does not take adequate

30 See Art. 13 (e) of the Proposal for a European Evidence Warrant.

31 For further information on the problem of 'forum shopping' by law enforcement agencies, see: Nelles, 'Europäisierung des Strafverfahrens', 109 (1997) *Zeitschrift für die gesamte Strafrechtswissenschaft*, 738.

32 See Art. 16 (e) of the Proposal for a European Evidence Warrant, which eliminates the requirement (a) in cases in which 'it is not necessary to carry out a search of private premises for the execution of the warrant as well as (b) for 39 areas of criminality.

33 There are, however, always two sides: The proposed framework decision could be used to gather and transmit evidence of potential use not only to the prosecution, but also to the defence. This is true especially in civil law jurisdictions ('Instruktionsprinzip').

34 See Art. 19 of the Proposal for a European Evidence Warrant.

account of the linguistic, financial, and technical barriers faced by individuals when bringing legal challenges abroad.

Concluding this part of the analysis, one has to state that even if the EEW would solve the problems of a lengthy mutual assistance procedure, the proposal definitely raises new problems of 'due process' on the national level.

5. Conclusion

Mutual recognition of judicial decisions is a good concept with regard to *final* decisions,[35] such as judgements (acquittals and convictions alike), which may trigger the '*ne bis in idem*' effect.

Decisions concerning evidence, however, are only part of a criminal trial, part of an ongoing proceeding regulated by a complex and delicate system of procedural 'checks and balances.' The validity of a criminal trial can only be judged when taking the whole process into account. One cannot look at bits and pieces. As long as the respective procedures vary from state to state, the automatic mutual recognition of 'evidence' would disturb all kinds of delicate balances in this system, for example the prerequisites of the free assessment of evidence or the balance between civil liberties and the privileges of the accused. Such a disturbance would not add any value to the existing criminal justice systems, but would rather endanger them.

This would be different if criminal procedure were harmonized across Europe. Thus, the approach of 'mutual recognition' resurrects the harmonisation issue, which it was supposed to keep out to begin with. One example for this connection is the relevant provision in the Constitution: 'The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime ... through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws.'[36] In other words: The draft EU Constitution does make the concept of mutual recognition formally the core of criminal law cooperation in the EU, accompanying it with EU powers to harmonize substantive criminal law and domestic criminal procedure in certain areas.[37]

35 See: Gless, 'Zum Prinzip der gegenseitigen Anerkennung', 116 (2004) *Zeitschrift für die gesamte Strafrechtswissenschaft*, 353; for a detailed analysis see: Weyembergh/Gilles de Kerchove (eds.) *La reconnaissance mutuelle des décisions judiciaires en matière pénale dans l'Union européenne* (2001).

36 Art. III-257 (3) of the Treaty for a European Constitution.

37 See Arts. III-166 and 167 of the Treaty for a European Constitution.

Thus the question again arises: Will it be possible to construct a European law of evidence? Or are the various rules of procedure too diverse?[38] This question has yet not been answered in a satisfactory way, even though valid models for rules of a common European evidence procedure have been presented.[39]

The triangle demarcating the area of the transfer of evidence between (a) the principle of mutual recognition or, in our case, the 'free movement of evidence', (b) the 'European Evidence Warrant, and (c) 'due process' still remains something of a no man's land.

If one takes a pessimistic approach, one must fear that not only the practitioners having to deal with another set of rules in cross-border evidence gathering, but also the citizens, might become lost.

If one takes an optimistic stand, then completely new possibilities open up.[40]

38 See e.g. Den Boer, 'Crime and the Constitution', *MJ* 2004, 145; Hetzer, 'National Criminal Prosecution and European Tendering of Evidence', in: 12 *European Journal of Crime, Criminal Law and Criminal Justice* (2004), p. 166 ff.

39 One approach was taken by the Corpus Juris team in Arts. 31 ff. (published by Economica Paris 1997). For further information see: Delmas-Marty/Vervaele (eds.), *The implementation of the Corpus Juris in the Member States*, Vol. IV (2001), pp. 233ff. and 271ff.

40 For further information on mutual recognition as a principal basis for judicial cooperation in criminal matters: Den Boer, 'Crime and the Constitution', *MJ* 2004, 145f.