

FREE MOVEMENT OF EVIDENCE IN EUROPE

Por

Sabine Gless

Prof. Dr. iur. Catedrática de la Universidad de Basilea

1. THE THEME OF «EUROPE» AND «EVIDENCE OF GUILT»: SOME PRELIMINARY WORDS ABOUT SIEGFRIED AND THE NIBELUNGEN STORY. 2. THE CONCEPT OF «FREE MOVEMENT OF EVIDENCE». 3. WHAT DOES OR RATHER WHAT COULD «FREE MOVEMENT OF EVIDENCE» MEAN? 4. WHERE DOES IT COME FROM? 5. WHY IS THE IDEA OF «FREE MOVEMENT OF EVIDENCE» SO PROBLEMATIC, EVEN IF ONE AGREES WITH THE ADVANTAGES A MUTUAL RECOGNITION APPROACH COULD BRING IN GENERAL?: 5.1. Specific doubt, because evidence is different from a final decision in a penal proceeding. 5.2. General doubts, because mutual recognition needs mutual trust. 6. CONCLUSION.

1. THE THEME OF «EUROPE» AND «EVIDENCE OF GUILT»: SOME PRELIMINARY WORDS ABOUT SIEGFRIED AND THE NIBELUNGEN STORY

Letting my thoughts float like that and pondering about the subject as a whole, an old story came to my mind, a part of the saga of Siegfried, especially the piece which ends this Nibelungen story.

Kriemhild, Siegfried's widow, has invited her brothers and their men after her «marriage of state» to King Etzel in Burgundy. She had planned to use the event for taking revenge from the beginning, but has sent for her guests in kind words.

I assume that most of the readers are familiar with the old Teutonic story of Siegfried:

Siegfried, the central character, is physically strong, but mentally weak. A fellow knight, Hagen von Tronje, decides –for various reasons– that Siegfried

has to be killed in order to prevent further damage. The problem however is, Siegfried is invincible. He cannot be wounded –except for an unknown spot on his back. Hagen wins the trust of Kriemhild, Siegfried’s wife. She marks the vulnerable spot for Hagen on Siegfried’s shirt, believing that Hagen wants to protect Siegfried. But Hagen stabs Siegfried in the back, while the latter drinks water from a river. Afterwards Hagen puts Siegfried’s body in front of Kriemhild’s rooms, where she finds him dying the next morning. Although Kriemhild is told that robbers have slain her husband, she suspects Hagen right away –and proves his guilt later [a detail we will come back to].

Kriemhild’s desire for revenge grows. But she does not show it until her brother Gunther is lulled into security and accepts an invitation and visits her with his court, including Hagen. Then Kriemhild takes hostages, promising to free them if Hagen is killed. Their refusal leads to a bloodfest.

What does this story have to do with the topic of our conference, apart from the fact that it came to my German mind – (totally unfounded however)?

The detail, which connects the story to our conference, is that Kriemhild proves Hagen von Tronje’s guilt before taking revenge.

Even in those days, guilt had to be established by evidence. Or rather guilt could only be established by evidence, which was accepted as a proof that the alleged wrongdoer was in fact a perpetrator against the law.

How did Kriemhild do it?

She forced her brother Gunther, who was also Hagen’s king, to let all his men march past Siegfried’s dead body during the wake.

I now cite from an old translation:

»When Hagen approached the body of Siegfried the spear wound bled afresh. Thus was it proved to all who were there he was indeed the murderer.»

2. THE CONCEPT OF «FREE MOVEMENT OF EVIDENCE»

«Free movement of evidence» is one of the most recent demands coming «from Brussels».

Basically it is the idea that a piece of evidence –like a witness testimony–, which is written down in a protocol in –let’s say Sweden– can be introduced as witness testimony in criminal trial in any other country –for example Spain–; or that an incriminating knife, spotted with blood, which is produced during the search of the suspect’s home in –let’s say Poland– can be presented without any further restriction as evidence in a trial, which happens to take place in Germany.

The basic question of these pages is to analyze if this is a valid concept, focusing on three questions: 1) What does or rather what could «free movement of evidence» mean? 2) Where does the idea of «free movement of evidence» come from? 3) Why is this concept so problematic?, even if one agrees that a mutual recognition approach does have advantages in principle, as I do.

3. WHAT DOES OR RATHER WHAT COULD «FREE MOVEMENT OF EVIDENCE» MEAN?

For the purpose of these pages, «free movement of evidence» describes a certain form of mutual recognition, during which the competent authorities of one Member State do feed a piece of evidence into the system of «free movement» and all competent authorities in another Member State can or rather must use it in criminal proceedings.

This is –I must admit– quite a daring interpretation of the idea of mutual recognition of evidence. But it is a helpful one, in order to show the weak points of the basic concept.

Even talking about the concept of «free movement of evidence» may look to some people as 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. As we have already learned from the presentation of Professor Ormazábal, the «free movement» terminology nicely reveals the origins of the idea set out in the Tampere Conclusions in 1999. And I would like to take us even a step further back in the history of the idea about «mutual recognition»:

4. WHERE DOES IT COME FROM?

Even before Tampere, 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.¹

This extension of a principle well-established in the internal market of the Community and practised in regard to civil and commercial judgements was well received (because almost everybody is afraid of harmonisation of Criminal Law and Criminal Procedure at this time). The Council –and other European institu-

¹ See: PEERS, «Mutual Recognition and Criminal Law», in: *Common Market Law Review* 2004, 5 and 9.

tions— later translated this idea of «mutual recognition» into a programme of various measures handed out in 2001.² Since then, the principle of mutual recognition has been a cornerstone in the area of freedom, justice and security, and we shall live with the consequences.

But what are the consequences?

5. WHY IS THE IDEA OF «FREE MOVEMENT OF EVIDENCE» SO PROBLEMATIC, EVEN IF ONE AGREES WITH THE ADVANTAGES A MUTUAL RECOGNITION APPROACH COULD BRING IN GENERAL?

5.1. SPECIFIC DOUBT, BECAUSE EVIDENCE IS DIFFERENT FROM A FINAL DECISION IN A PENAL PROCEEDING

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

I do agree with this reasoning in certain respects: For example as far as the idea of a transnational «ne bis in idem» is concerned. The argument has been made by the Advocate General Colomer (of the ECJ) in the the Gözutok–decision:

In an integrated Europe «it would be unacceptable if a person could be troubled [with prosecution] for a second time».³ The establishing of an area of freedom, security and justice «requires that the effectiveness of foreign decisions is guaranteed as between the Member States.»⁴

I do however think, that the free movement approach sketched in the conclusions of the Tampere Council as a «mutual admissibility concept»⁵ will not work as well in regard to the «transfer of evidence.»

The main source for my doubts⁶ 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.

² Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12 of 15.1.2001, 10.

³ ECJ Rs. C-187/01, C-385/01 *Gözütok/Brügge*, no. 121.

⁴ ECJ Rs. C-187/01, C-385/01 *Gözütok/Brügge*, no. 122.

⁵ See Conclusions of the Tampere Council, no. 36.

⁶ Many people share these doubts, see e.g.: PEERS, «Mutual Recognition and Criminal Law», in: *Common Market Law Review* 2004, 5ff.

This argument becomes quite clear, if we return to Kriemhild:

Even, if the Nibelungen people would meet all criteria to join the European Union and would do so – would we accept their way of proofing guilt for murder?

«When Hagen approached the body of Siegfried the spear wound bled afresh. Thus was it proved to all who were there he was indeed the murderer.»

Certainly not.

There would be no space for such an evidence to be accepted in a criminal trial taking place in the European Union.

You may think, there is an easy objection to that argument: The law of evidence is not as different between the Member States of the European Union as it is between EU-Member States and the Nibelungen people. This is true. However there are many differences in the law on evidence throughout the European Union. And we know about these differences, because of the problems courts confront when evidence is to be gathered abroad.

For example:

In one case German law enforcement agencies were investigating the alleged racketeering of S, a resident in Passau, Germany. They needed testimony from D, a shop owner and alleged victim to the racketeering, who resides in Linz, Austria. The German prosecutor thus sent a letter rogatory to the Austrian authorities requesting an interview with D. The examining judge executed the interview according to Austrian law.⁷ Thus, he neither informed the defendant nor his lawyer of the interview, during which D identified S as the racketeer.

If the interview had taken place in Passau, the German judge would have had to inform B or his lawyer by law.⁸ Without notification of the defence, the deposition may in principle not be presented in court later on.⁹

May the Austrian protocol nevertheless be used as evidence in the German Court as if nothing had happened?

This seems hardly fair to the accused, who ultimately lost his right to confront the witness and ask him questions. Or should it be excluded, because it violates German procedural rules?

This is the very problem mutual recognition of evidence is to solve. If it does so, we can learn from Professor Bachmaier's presentation coming up soon.

⁷ See § 162 (1) Austrian Criminal Procedure Code (*Strafprozeßordnung*).

⁸ See § 168 c (5) German Criminal Procedure Code (*Strafprozeßordnung*).

⁹ KLEINKNECHT/MEYER-GÖBNER, *Strafprozeßordnung*, 45ed. (München 2001) § 168 c no. 6.

Even the short example given shows the dangers of abuse of «mutual recognition». Just imagine:

German law enforcement agencies are still investigating the alleged racketeering of S. Now they need testimony from M, another shop owner and alleged victim of the racketeering, who lives in both Linz and Passau. On the first meeting of M with German law enforcement authorities he made clear that he would not testify if B or his lawyer are present. To make such an interview with M possible, the German prosecutor sends a letter rogatory to the Austrian authorities requesting an interview with M in Linz. Again, the examining judge executes the interview according to Austrian law. He thus informs neither the defendant nor his lawyer of the interview, during which M identifies S as the racketeer.

Thus, 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.¹⁰

That is one of the reasons why, within the framework of mutual assistance today, only the trial court decides on the *admission* and subsequently on the value of evidence.

This is not only true in the framework of traditional mutual assistance between the Member States; it should also be the fact even in regard to reports drafted during an investigation of the European Fraud Office, OLAF, the only real European law enforcement authority up to now: The value of final reports drafted by OLAF in the fact-finding process of a criminal trial must depend on national law.¹¹

[*Due process*] That «evidence in criminal trials» is a «legal construct» does not only show in the fact that the law defines which evidence we find convincing as a proof of guilt, –but also– and perhaps even more important –because the law on evidence also defines a «fair trial»–, by striking a careful balance between civil liberties (such as privacy of the individual being protected from searches) or privileges of the accused (such as the right of silence) on the one hand, and the need to ensure effective prosecutions and investigations on the other.¹²

¹⁰ For detailed information see: SPENCER, «Evidence» in: DELMAS-MARTY/SPENCER (eds.) *European Criminal Procedures* (Cambridge 2002), pp. 594 ff.

¹¹ 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...*»

¹² 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.

The difficulty of defining a «fair trial» in the different legal jurisdictions of the European Union is illustrated by the following example:

Two people are suspected of having smuggled weapons into the EU. Charges have been brought against one in London and against the other in Berlin. In the English court, the defendant is asked whether he wants to give testimony, thus waiving the shield of the privilege against self-incrimination provided by English law and be a witness in his own trial.¹³ In so doing in England, he faces charges for obstruction of justice if he lies.¹⁴ The person therefore chooses not to speak. The defendant in the German court is also asked whether he wants to give his account of the incidents. According to the German understanding of the privilege against self-incrimination, he is even allowed to lie in court.¹⁵ The German defendant puts all the blame on the English one.

While both proceedings are still pending, the two respective defendants shall be interviewed by video link to gain information for the respective other trial.

Would the conduction of such a hearing violate the suspects' right for a fair trial? Should the English one be allowed to lie or the German one be forced to say the truth?

Some people do claim that the question of guaranteeing a «fair trial» across Europe is solved. They think that we do have a European framework for «procedural safeguards.»

It is true, that 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 –however rejected– Constitutional Treaty.¹⁶

Even before the EU –and for the substance of due process a lot more important–, the European Court of Human Rights has 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 so in the core of evidence law.

However, «fair trial» in 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.

¹³ ANDREWS & HIRST, *On Criminal Evidence*, 3ed. (London 1997), no. 8-020.

¹⁴ *Blackstone's Criminal Practice* 2000 (10ed. London 2000), B.14.1/14.9/14.17.

¹⁵ *Entscheidungen des Bundesgerichtshofes in Strafsachen* vol. 3, 152 and vol. 27, 379; KLEINKNECHT/MEYER-GÖBNER, *Strafprozeßordnung*, 45ed. (München 2001), § 136 no. 18.

¹⁶ See Art. 47 ff. of the Treaty for a European Constitution.

The common presumption in the discussion of «due process» and the «principle of mutual recognition», however, is that there will be no severe 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 evidence transfer:

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.

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.¹⁷

Even with regard to these relevant guarantees of 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 lot of case law, it therefore often remains difficult to conclude from the ECHR's jurisprudence 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*»): May all members of the defendant's family claim privilege, as well as his priest and the local newspaper journalist? This is the case according to the German law.¹⁸ It is not the case in the United Kingdom.¹⁹

¹⁷ JUNG, *Goldammer'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.

¹⁸ See §§ 52, 53 of the German Criminal Procedure Code («*Strafprozessordnung*»).

¹⁹ See HONEYGHON and SAYLES [1999] *CrimLR* 221; THOMPSON (1976) 64 *CrAppR* 96; *Attorney General v Clough* [1963] 1 *QB* 773.

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

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.

[*Conclusion*] If «free movement of evidence» implies that the competent authorities of one Member State will feed evidence into a system of «free movement» and all competent authorities in another Member State can or rather must use it in criminal proceedings, there is 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.

5.2. GENERAL DOUBTS, BECAUSE MUTUAL RECOGNITION NEEDS MUTUAL TRUST

But even apart from the specific doubts about «pieces of evidence» being a suitable object of «free movement», I also share some of the basic doubts about the feasibility of a «mutual recognition approach» *at the moment*.

[Still, I do believe that mutual recognition can serve a good cause –for example mutual recognition of final judgements, which trigger a transnational «ne bis in idem».]

The reason therefore is that mutual recognition necessarily needs mutual trust.

«Mutual recognition» has to build on «mutual trust».

We know that from every day life:

We «recognise», that is we acknowledge and accept somebody's judgement about –let's say the quality of a performance of Wagner's Nibelungenring– if we have had enough experience to know, that we can trust his taste and knowledge, and then we do not have to, and do not check further.

In current European Law, the correlation between mutual recognition and mutual trust is most visible in judgements regarding transnational «ne bis in idem»: When must one EU-Member State accept a judgement handed out in another EU-Member State as the final end of law enforcement?

Again Advocate General Colomer (of the ECJ) gave an answer in the the Gözutok-decision:

The goal of «facilitating and accelerating cooperation between competent ministries and judicial... authorities of the Member States in relation to proceedings and the enforcement of decisions... cannot be achieved without the mutual

trust of the Member States in their Criminal Justice systems and without the mutual recognition of their respective judgements adopted in a true 'common market of fundamental rights'. Indeed, recognition is based on the thought while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted as equivalent to a decision by one's own State, because it reflects the same principles and values. Mutual trust is an essential element in the development of the European Union: trust in the adequacy of one's partner's rules and also trust that these rules are correctly applied.»²⁰

The very basic wisdom, that Mutual Trust is a prerequisite and the key for Mutual Recognition, has –most probably– been present during the «Tampere Council» of 1999, when the governments of the EU-Member States introduced «mutual recognition» as the cornerstone of mutual trust.

However, «Mutual Trust» as a prerequisite is not mentioned in the Tampere Conclusions. Perhaps the Council thought it natural, that the Member States trusted each others criminal justice system, at that time.

In the years following the Tampere Conclusions, the European Union adopted a «Mutual Recognition programme» to give effect to the conclusions of the Tampere European Council, but it has not put special emphasis on the building of trust among the Member States, or rather the citizens of the various Member States.

Only this year, it appears the European institutions have finally acknowledged this fact: Following the Hague Program, the EC-Commission has adopted a special communication dedicated to *the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*.²¹

6. CONCLUSION

Concluding, I would like to simply look once more back to the lesson Kriemhild taught us:

Punishment is only justified, if guilt is proved.

The proof of guilt must rest on evidence which is reliable and fair from the point of view of the people who bring charges against the alleged perpetrator.

If one violates this simple [reasoning] –by introducing a concept of free movement of evidence or otherwise– a criminal justice system will loose its ground.

²⁰ ECJ Rs. C-187/01, C-385/01 *Gözütok/Brügge*, no. 124 with reference to a Communication of the EC Commission.

²¹ COM(2005) 195 final (Brussels, 19.5.2005).