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Edited by

Russell A. Miller
University of Idaho College of Law

and

Peer C. Zumbansen
Osgoode Hall Law School, York University, Toronto

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Obtaining Evidence Abroad: Mutual Assistance and Criminal Procedure in EU Member States at a Crossroads

Sabine Gleß*

A. Introduction

At the conclusion of the EU summit in Tampere (October 1999), the Council proclaimed a "genuine area of justice," including the principle of mutual recognition of pre-trial orders and the free movement of evidence, albeit subject to certain conditions.[1] In so doing, the Council addressed a growing aspiration for criminal justice systems in Europe: due to both (alleged) cross-border crime and (responding) cross-border co-operation of law-enforcement agencies, evidence must be obtained abroad in a growing number of criminal trials. The Tampere aspirations have made way for two different new concepts of evidence transfer:

First, the EU Convention on Mutual Assistance in Criminal Matters (dating from 29 May 2000):[2] according to its provisions, the requested state should no longer blindly follow its own law when executing a letter rogatory, but rather comply with the procedure asked for by the requesting EU state, subject to certain exceptions.[3] This procedure should facilitate the use of information gathered through mutual assistance as formal evidence before the deciding court.[4] In addition, the EU Convention should also simplify the act of information gathering itself, for example, through the use of joint investigation teams[5] or the use of videoconferences for witness hearings[6] (see C below).

Second, the EC Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor of December 2001:[7] according to this Commission proposal, a

* Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg/Br. The author wishes to thank the Institute for Legal Studies, University of Wisconsin, U.S.A., for their support.

1 *See* Presidency Conclusions, Tampere European Council 15/16, October 1999, no. 36.
2 EU Convention on Mutual Assistance in Criminal Matters, May 29, 2000, 2000 O.J. (C 197) 1; *see* Council Framework Decision 2003/577/J5, Aug. 2, 2003, O.J. (L 196) 45.
3 EU Convention on Mutual Assistance in Criminal Matters, May 29, 2000, art. 4, 2000 O.J. (C 197) 1.
4 For further information, *see* Explanatory Report on the EU Convention on Mutual Assistance in Criminal Matters, 2000 O.J. (C 379) 7.
5 *Supra* note 3, at art. 13.
6 *Id.*, at art. 10.
7 EC Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(01)715 final.

concept of "free evidence transfer" shall be implemented. Evidence legally obtained in one Member State is admissible as evidence in court in all other Member States – with the *proviso* that this evidence was obtained according to the deciding court's own rules – "principle of unrestrictedness"[8] (see D below).

These two opposing models not only raise new questions regarding the assistance between authorities of EU states or – in special cases – between national authorities and EU organs, but also touch on very basic aspects of evidence law, for example in regard to requirements for evidence obtained under one jurisdiction for valid fact-finding in a foreign jurisdiction, given that the purpose of evidential procedure in criminal law is to create a reliable decision-making basis in a fair hearing on which the criminal courts can base their judgments (see E below).

B. Traditional Framework for Mutual Assistance in Criminal Matters

Both the EU Convention on Mutual Assistance and the Green Paper proposal are based on the traditional framework of judicial co-operation, which is laid down in "Mother Conventions" such as the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.[9]

Traditionally, prosecutors have two ways of obtaining a statement from a witness who lives in another country: he or she is either interrogated in the adjudicating state (this presupposes that the person is summoned and actually appears at trial)[10] or in the state of residence (in general by a judge of the state of residence).[11] Both traditional ways have been the subject of criticism for various reasons:

I. Length of Procedure

First, the procedure is thought of as being too lengthy. Originally, the international exchange of evidence has relied on the exchange of letters rogatory, sent through ministries or diplomatic channels. According to those rules, a request for evidence – for example, the interview of a person as a witness – must be authenticated by a supervising national court in the requesting state.

8 *Id.*, at para. 6.3.4.

9 *See supra* note 3, at art. 1.

10 Witnesses residing in one country are under no obligation to appear at a hearing in another country. Even in close co-operation, use of compulsory means is forbidden. *See*, Schengen *Acquis*, Schengen Implementing Convention, art. 52(3), 2000 O.J. (L 239) 35 (a witness who has failed to answer a summons shall generally not be subjected to any punishment or measure of restraint).

11 For further information, *see* André Klip, *Obtaining Evidence from Witnesses Abroad, in* PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 453 (Nijboer & Reijutjes eds., 1997).

As a result, this request should be submitted to the Foreign Office, which forwards the request to the embassy of the requested state. This embassy passes the request to its own Foreign Office, which dispatches it to the proper court for approval and order for execution.[12]

In the requested state, the appropriate authority forwards the request to those authorities who ultimately execute the request – that is, the authorities that interview a witness according to the country's national law and forwards the deposition to the superior authority, which sends it to the competent authority of the requesting state.[13] In 1959, however, the procedure was made easier by the European Convention on Mutual Assistance in Criminal Matters,[14] which provides in Art. 15 that letters rogatory shall be exchanged between the Ministries of Justice and, in cases of urgency, may be addressed directly by the judicial authorities of the requesting party to those of the requested party.[15] Courts and law enforcement agencies, however, still complained about lengthy and often useless attempts to make use of mutual assistance.

This was the reason why some EU countries started to co-operate more closely: today, the Schengen countries allow the authorities of all contracting parties to address procedural documents directly by post to persons who are in the territory of another Contracting Party,[16] thus providing for a possibility to summon a witness directly. Whether the witness appears, however, is another matter.[17]

II. Material Objections to Mutual Assistance

A second point of criticism against the traditional setting of mutual assistance is that it may face various material objections, such as,

- the *requirement of double criminality*, according to which no evidence should be procured for the prosecution or investigation of an offence which is not criminal in both the requesting and the requested country[18]
- the *political offence exception*, according to which assistance may not be given nor extradition ordered in relation to an offence that is considered to be political in nature[19]

12 ALUN JONES, ALUN JONES ON EXTRADITION AND MUTUAL ASSISTANCE No. 18–002 (2001).
13 *See, e.g.*, DAVID MCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 242 (1992).
14 European Convention on Mutual Assistance in Criminal Matters, April 20, 1959, ETS/STE no. 30, *available at* http:\\conventions.coe.int\Treaty\en\Treaties\word\030.doc.
15 *See* JEAN PRADEL & GEERT CORSTENS, DROIT PÉNAL EUROPÉEN No. 156 (1999).
16 *Supra note* 10. *See* Wolfgang Schomburg, *Are We on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?*, 8 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 51, 52 (2000).
17 According to art. 52 (3) of the Schengen Implementing Convention, a witness who has failed to answer a summons is generally not subject to any punishment or measure of restraint.
18 *See* Otto Lagodny & Wolfgang Schomburg, 2 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 379, 387 (1994).
19 *Supra note* 15, at No. 100.

- the *specialty principle*, according to which evidence may only be used according to the consent of the requested state.[20]

III. Principle of Locus Regit Actum

A third and major problem of traditional mutual assistance, however, is seen in the *locus regit actum* principle.[21] According to this principle, each state executes a letter rogatory, for example, a request for evidence gathering, following its own procedural rules. The requested state will follow the law of the requesting state (subject to his *ordre public*)[22] only if this circumstance has been expressly provided for in international treaties or by approval on a case-to-case basis.[23] The gathering of evidence abroad thus generally follows the procedure of the requested state. These rules usually do not comply with the procedural rules and requirements of the court, which wants to use the evidence to decide on a criminal charge. The implication of this friction is immense, as is best shown in the following example:

German law enforcement agencies are investigating the alleged racketeering of S, a resident of Passau, Germany. They need testimony from D, a shop owner and alleged victim of the racketeering, who resides in Linz, Austria. The German prosecutor thus sends a letter rogatory to the Austrian authorities requesting an interview with D. The examining judge carries out the interview according to Austrian law.[24] *He informs neither the defendant nor his lawyer of the interview, during which D identifies S as the racketeer.*

If the interview had taken place in Passau, the German judge would have had to inform S (in the example above) or his lawyer by law[25] because their presence and opportunity to confront the witness is seen as an important aspect for the validity of the evidence. Without notification of the defense, the deposition may in principle not be presented in court later.[26]

May the Austrian protocol nevertheless be used as evidence in the German Court as if the requirement of notification of the defense had been met? This seems hardly fair to the accused, who has ultimately lost his right to confront the witness. Or should it be excluded because it violates German procedural rules? This is hardly practical, given that the locus regit actum rule is accepted by the participating states.

20 *See* Lagodny & Schomburg, *supra* note 18, at 389.
21 MCLEAN, *supra* note 13, at 131.
22 Art. 18(17) of the UN Convention, however, allows for an execution of a letter rogatory following the law of the requesting state in cases where such a procedure is specified in the request and is not contrary to the law of the requested state.
23 Several agreements on mutual assistance make provisions for the requesting state to outline any procedure that they require to be followed.
24 *See* § 162(1) StPO (*Strafprozeßordnung*) (Republic of Austria).
25 § 168c(5) StPO (*Strafprozeßordnung*) (F.R.G.).
26 THEODOR KLEINKNECHT & MEYER GOSSNER, STRAFPROZEßORDNUNG, § 168 c no. 6 (2001).

1. Correction During the Assessment of Evidence - The German Approach

A solution presented by civil law tradition countries – such as Germany – is the correction of procedural shortcomings that occurred during the collection of the evidence when assessing it later. Generally speaking, the German approach is as follows: although the collection of evidence and the forms of evidence are strictly regulated in German criminal procedure, the evidence itself can be freely assessed.[27] A German judge receiving a piece of evidence obtained abroad that violates the strict German rules governing the search and/or administration of evidence is allowed to "correct" the damage done when evaluating the evidence: generally he is supposed to assign "less weight" to such evidence.[28] Nevertheless, he may base his conviction of guilt on this evidence.

This rule, however, is subject to certain exceptions. These exceptions (a) include an *ordre public* proviso – that is, basic requirements of due process have to be met[29] – and (b) take discipline aspects into consideration (for example, if a court arbitrarily uses international co-operation to circumvent defense rights, the evidence must be excluded).[30]

In the example given above, the German judge will rely on the deposition of the witness although it was obtained without defense being informed of the interview. The judge, however, will not regard the protocol as a proper deposition, that is, one taken by a judge, but rather as a deposition given to the police or prosecution during the course of investigation.

2. Validity of the Solution?

This approach will most probably not satisfy the accused, who has lost the only opportunity to confront the witness.[31] It should also not satisfy anyone else for two reasons:

First, since no strict rules regarding the assessment of evidence exist, an approach that relies on the fact that a judge will assign less weight to a piece of evidence should not be accepted because one cannot reliably examine the judge's decision. His conviction of someone's guilt may be solely based on a piece of evidence of little value.

Second, the approach appears to be based on the assumption that a violation of procedural rules (for example, the violation of defense rights) may be

27 § 261 StPO (*Strafprozeßordnung*) (F.R.G.). For France, *see* art. 353 *Code de Procédure Pénal* (Republic of France); MICHELE LAURE RASSAT, TRAITÉ DE PROCÉDURE PÉNALE no. 221 (2001).

28 BGHSt 2, 300 (304); Bundesgerichtshof in 123 Goltdammer's Archiv 218, 219 (1976).

29 Bundesgerichtshof in Strafverteidiger 1982, 153 (154); Bundesgerichtshof in Neue Zeitschrift für Strafrecht 1983, 181.

30 Bundesgerichtshof in Neue Zeitschrift für Strafrecht (1988) 563.

31 For further information on the right to confront a witness, *see* ANDREW CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS 186–187 (1996).

outweighed by law enforcement interests if – because of the setting of international co-operation – this is the only way to obtain evidence from abroad. The approach thus relies on a balance of law enforcement interests versus procedural requirements. This appears to be balancing on an "objective level."

The fault and inconsistency of this approach reveals itself when one examines another quite similar example:

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 it clear that he would not testify if S or his lawyer is 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 carries out the interview according to Austrian law. He, however, informs neither the defendant nor his lawyer of the interview, during which M identifies S as the racketeer.

How should a German judge handle this deposition? Here, the prevailing question is: may a state also request assistance from another state for the purpose of carrying out an investigation or, rather, a certain measure that its own law would not permit it to carry out[32] and thus arbitrarily circumvent the requirements of its own national law?

If the defendant objects to the curtailment of his rights, is the court allowed to reject the objection, arguing that, in mutual assistance, the law of the requested state governs the gathering of the evidence? Or is it acceptable to mix a "special cocktail of procedure" – having the best of both procedures, and if so when?

As already indicated, the evidence would – contrary to the general doctrine – be rejected in our example in accordance with German case law because the court *arbitrarily* used international co-operation to circumvent defense rights.

This outcome, however, provokes further questions: if the *locus regit actum* logic is so strong as to nullify certain defense rights (more or less outweighing them on the objective side), why should the law enforcement agency's *motivation* upset this balance?

Hence, the German approach (which is similar to many Continental approaches) is neither consistent in itself nor a fair solution regarding the different interests in criminal procedure. But it appears to be the only feasible way out of the *locus regit actum* principle, which is still the prevailing principle of mutual legal assistance.

32 For further discussion of this question, *see* Christine Van Den Wyngart, *Belgium*, 65 R.I.D.P. 187, 197 (1992).

C. EU Convention on Mutual Assistance in Criminal Matters of 29/05/2000

The EU Convention on Mutual Assistance of May 2000 is a response to the dissatisfaction with traditional mutual assistance. The Convention mainly wants to do away with procedural obstacles.[33] In regard to lengthy procedures, it works with time limits,[34] and in regard to the diversity of criminal procedures, it replaces the traditional *locus regit actum* with a principle of *forum regit actum*, that is the execution of letters rogatory according to the law of the requesting state.[35] It furthermore strives (in different ways) for more efficient evidence gathering abroad;[36] among other instruments, it provides for a witness hearing by video conference.[37]

I. Forum regit actum

The EU Convention on Mutual Assistance seeks to solve the problem of locus regit actum by replacing it with a *forum regit actum* principle: According to art. 4 of the EU Convention of 29 May 2001, requests for mutual assistance shall be carried out in accordance with formalities and procedures expressly indicated by the requesting EU State to the maximum extent possible.[38] This new approach[39] means in practice, that a witness interrogation in Austria – executing a German letter rogatory – shall be conducted according to the rules of German criminal procedure. Austria as requested state may refuse to carry out the formalities and procedures of Germany as the requesting state, but only where they are contrary to its fundamental principles of law. This new arrangement sounds like an easy solution. It will, however, raise a lot of new questions and will confront law enforcement agencies in the Member States with the task of permanently applying foreign law when executing letters rogatory. These difficulties of a procedurally correct collection of evidence in foreign judicial surroundings are not to be underestimated.

33 The Convention does not explicitly address the subject of "material objections." It does have a rule, however, on mutual assistance in proceedings brought by administrative authorities in respect of acts which may in principle be punished under the law of the requested or the requesting state. *See supra* note 3, at art. 3.

34 *See, e.g., id.* at art. 4 (2).

35 *Id.*

36 *See id.* at art. 9 (providing rules for the temporary transfer of persons held in custody to the territory of the Member State, where the investigation takes place); *see also id.* at art. 10 and art. 11 (providing rules for hearings of witnesses abroad by video or telephone conference).

37 For further details, *see id.* at art. 10.

38 *See id.* at art. 4.

39 For further information on the tendency towards an application of the law of the requesting state, *see* Otto Lagodny, *Comparative Overview, in* THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS 728 (Albin Eser et al. eds., 2002).

II. Framework for the "Hearing by Video Conference"

Furthermore, the EU Convention on Mutual Assistance wants to facilitate the gathering of evidence abroad by providing a detailed procedure for hearing a witness by videoconference.[40] Such a hearing shall take place if a person living in the territory of one Party State is to be heard as a witness in proceedings conducted in another Party State and may not appear in person. The requested state may refuse the setup of a live video link to a witness only if it lacks the technical means or if such a procedure would violate its fundamental principles. While the first of these two basic requirements can be helped by a pragmatic solution – the technical means for a video conference may be made available by the requesting state[41] – the second one could develop into a "Pandora's Box" (see C.III.2 below.).

The *judicial authority of the requested state* will summon the person concerned for the hearing and be present during the interview to ensure the identity of the witness and the obedience to the fundamental principles of law of the requested state.[42] If the states agree, the *competent authority of the requesting state* – that is, the deciding judge or court – will conduct the interview directly according to its own laws.[43]

The EU Convention furthermore – differently from other international Conventions[44] – lays down detailed rules about the procedure applying to a hearing by videoconference: It provides, for example, that, if the judicial authority of the requested Member State is of the opinion that the fundamental principles of its law are being infringed during the hearing, it shall immediately take the necessary measures to ensure that the hearing is continued in accordance with these principles.[45] Moreover, the EU Convention rules that the person to be heard may claim his or her due right not to testify under the law of either the requested or the requesting Member State.[46] It thus establishes a "double privilege principle."

III. Validity of the EU Convention's Solution

Does the EU Convention solve the problem of transnational evidence gathering in a solid way, that is, provide a framework for valid fact-finding in criminal proceedings, which, for example, require the testimony of a witness

40 For further information on hearing by videoconference, *see* André Klip, *Interrogation of Witnesses Abroad Through a Live Television Link*, 2 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 244 (1995).
41 *Supra* note 3, at art. 10. This rule bears significance for the sharing of costs.
42 *Id.* at art. 10(4).
43 *Id.* at art. 10(5)(c); *see id.* at art. 10(3) and 10(4).
44 *See, e.g.*, UN-Convention against Transnational Organized Crime, Dec. 15, 2000, art. 18.
45 *Supra* note 3, at art. 10(5)(a).
46 *Id.* at art. 10(5)(e).

living abroad?

1. Rethinking Traditional Principles of Criminal Procedure

At first glance, the new possibility of a video hearing seems to be a positive step forward for mutual assistance: It (a) avoids the trouble evidence obtained abroad by traditional mutual co-operation faces, for example, by getting rid of the *locus regit actum* principle and (b) strengthens the validity of the witness deposition, for example, by securing the traditional "principle of orality" or by allowing – albeit a somewhat limited – cross-examination of a witness.

At a second glance, however, other problems become apparent: a transnational examination of a witness has a different quality from traditional witness interrogation in court. Because the person is located a long distance away, is only visible on a screen in the place of the trial, and must in most cases be assisted by an interpreter, the interrogation has to be channeled through technical – and in most cases translation – devices. The witness abroad does not feel the atmosphere of the criminal trial and hence the weight of the deposition. Bearing this in mind, it appears that traditional principles of criminal procedure, like the French "*principe de l'oralité*" or the German "*Unmittelbarkeitsprinzip*" ("principle of immediacy") have to be rethought to serve their old purpose of guaranteeing the full participation of all parties of a trial under new circumstances.[47]

2. "Fundamental Principles of Law"

Apart from the basic problems of testimony by videoconference, numerous new questions arise when a videoconference – as one form of transnational evidence collection – involves two jurisdictions or a letter rogatory is executed according to a "*forum regit principle*" if – as it is the case in the EU Convention on Mutual Assistance – the contracting parties do not make it to full mutual recognition of their respective law enforcement measures, but still leave the door open for a "public order proviso."

Following the rules of the EU Convention, a request for a video hearing shall be met only if its execution is consistent with *fundamental principles* of domestic law of the requested state. This requirement looks – at first sight – sensible and easy to fulfill in regard to mutual assistance between countries having a common legal tradition, especially in the area of human rights and fair trials,[48] common tradition, which best becomes visible in the guarantees of and the legal binding to the European Convention on Human Rights

47 For further information on the discussion of video conferences in criminal trails in Germany, *see* ULRICH EISENBERG, BEWEISRECHT DER STPO 1328 (2002).

48 *See, e.g.*, Lars Bondo Kroogsgard, *Fundamental Rights in the European Community after Maastricht*, 20 LEGAL ISSUES OF EUROPEAN INTEGRATION 99, 100 (1993).

(ECHR);[49] the EU Charter thus also relies on these guarantees.[50] Such high principles, however, have to prove their power at second sight, that is in daily application. The difficulty to pin down "fundamental principles of law" in the different criminal justice systems of the EU Member States becomes clear in the following example:

B and C are suspected of having smuggled weapons into the EU. Charges have been brought against B in Leicester and against C in Freiburg. In court, B 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.[51] *In so doing in England, he faces charges of obstruction of justice if he lies.*[52] *B chooses not to speak. C, in Freiburg, is also asked whether he wants to give his account of the incidents. According to the German understanding of the privilege against self-incrimination, C may lie in court to protect his own interests.*[53] *According to C, B is the mastermind behind everything; while C himself is a mere accomplice.*

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

Would the conduct of such a hearing already violate fundamental principles of the respective criminal justice systems? Or, rather, how is the situation to be handled so that fundamental principles of the respective criminal justice systems are not violated?

The first question to be decided upon is: are the two defendants to be interrogated as witnesses or as co-accused? The answer will determine the duties and privileges, especially the privilege against self-incrimination, in each jurisdiction: Formally, B and C are not accused in the same trial – thus, they are not co-accused, but witnesses in each other's trials.

In England, however, the rule is that accomplices cannot be forced to testify against each other for the prosecution as long as proceedings are still pending.[54] Would it violate fundamental principles of English law if B and C were compellable witnesses against each other?

In Germany, case law generally allows the deposition of a "co-suspect" speaking as witness, as long as it is in a separate trial.[55] Scholars, however, regard such an approach as unworthy for a fair criminal justice system since

49 Marc Fischbach, *Le Conseil de l'Europe et la Charte des Droits Fomdamentaux de l'Union Européenne*, REVUE UNIVERSELLE DES DROITS DE L'HOMME 7 (2000); Kroogsgard, *supra* note 48, at 107.

50 For further information, *see* Jacqueline Dutheil de LaRochère, *La Charte des Droits Fondamentaux de l'Union Européenne*, REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 674 (2000).

51 JOHN ANDREWS & MICHAEL HIRST, ON CRIMINAL EVIDENCE 8–020 (1997).

52 BLACKSTONE'S CRIMINAL PRACTICE 2000 B.14.1/14.9/14.17 (2000).

53 BGHSt 3, 152.

54 ANDREWS & HIRST, *supra* note 51.

55 BGHSt 34, 44.

it robs the co-defendant of the privilege against self-incrimination.[56]

More questions arise when one goes into the details of such a video conference: How should the "witnesses" be treated? Different from English law, German procedure takes the special situation of a "suspect witness" into account in regard to the oath: a "suspect witness" may not testify under oath.[57] Would it violate a fundamental principle of German law if C were forced to testify under oath and face charges of perjury?

The EU Convention does not answer these questions, but leaves the door open for further decisions on "fundamental principles of law."

D. Green Paper Proposal

The Green Paper proposal[58] – the second proposal for a new concept of evidence transfer in the European Union – proposes a concept of "free-moving evidence", relying on the EC model of "free movement of goods."

Such a concept of "free-moving evidence" was first introduced as part of the Community's rules in the fight against fraud, which are laid out in Regulation 2185/96 concerning on-the-spot checks and inspections carried out by the Commission to protect the European Community's financial interests against fraud and other irregularities (hereinafter: Regulation 2185/96).[59] Art. 8 (3) of Regulation 2185/96 provides that reports submitted by EC agents on their findings during an on-the-spot-check constitute admissible evidence in 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.[60] In fact, this was the first EC rule on "free-moving evidence."[61] However, the background of these provisions was a dispute between the courts of the Member States and the Commission concerning the duty of its inspectors to appear for questioning in these national courts.[62]

With a view to the possible establishment of a European Prosecution Service, the Commission has elaborated the concept further in its Green Paper: according to this proposal, evidence legally obtained in an EC Member State is admissible as evidence in court in all other Member States – with the

56 CLAUS ROXIN, STRAFVERFAHRENSRECHT § 26 no. 5–7 (1995).
57 See § 60 no. 2 StPO (*Strafprozeßordnung*) (F.R.G.).
58 *Supra* note 7.
59 Council Regulation 2185/96 Concerning on-the-spot checks and inspections carried by the Commission to protect the European Community's financial interests against fraud and other irregularities, 1996 O.J. (L 292) 2.
60 *See id.* at art. 7 (2) and 8 (3).
61 For further information on the newly arising problem of "forum shopping," *see* Ursula Nelles, *Europäisierung des Strafverfahrens – Strafprozeßrecht für Europa?*, 109 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 727, 738 (1997).
62 See Case 2/88, Zwartveld & Others v. Commission, 1990 E.C.R. 3365; Case 54/90, Weddel and Co. BV v. Commission, 1992 E.C.R. unpublished.

proviso that this evidence was obtained according to the deciding court's own rules.[63]

As a solution to the problem of evidence unlawfully obtained (in the state where it is gathered), the Commission proposes that the prohibition on admitting evidence unlawfully obtained should be based on the rules of evidence of that state. Before using evidence obtained in another EU country, the national courts must thus apply foreign criminal procedural law to determine whether the evidence has been obtained illegally and whether this illegally obtained evidence should thus be excluded.[64] Clearly the originators of this concept borrowed EC ideology on "free (goods) traffic."

I. Validity of the Solution?

Such a "principle of unrestrictedness" surely facilitates evidence gathering abroad, as does the EU Convention in another form. But does it present a better solution for valid fact-finding in criminal proceedings? The concept provides a clear rule for the collection and exchange of evidence abroad, but does not address the question of assessment: How is a foreign piece of evidence to be used correctly in a foreign, entirely national trial? The concept of "free-moving evidence" thus raises the same problems as traditional mutual assistance (based on the *locus regit actum* approach) and furthermore new special problems. Differently from the traditional framework for the exchange of evidence, in the new framework the court of decision has to accept foreign evidence under the proviso of a "correct collection" according to its own rules. It no longer has the possibility of assessing the usability of evidence obtained under the jurisdiction of another legal system in regard to the special conditions of use of its own legal system. Such an assessment, however, is not only necessary with regard to the procedural requirements when collecting evidence, but also with regard to the use of evidence: An exclusion of the evidence may result both from the situation in which the evidence was obtained as well as from the situation in which it is used.

The evolution of evidence can be illustrated by the following example:

E is under investigation by the English police for fraud against the financial interests of the EC. After a short period of time, the English police make E and his defense counsel a plea bargaining suggestion. E's lawyer advises him to accept the offer since the conditions are good and nothing can happen to E if the deal falls through. An admission of guilt made within the scope of a plea bargaining cannot be used as a confession in any subsequent criminal proceedings. As a result, E declares that he is willing to admit that he embezzled EC subsidies. The proceedings are dismissed before the deal materializes. The European Fraud Office

63 *Supra* note 7, at para. 6.3.4.1.
64 *Id.*

(OLAF) believes that the proceedings have been wrongly dismissed. It sends a copy of the proceedings record to the German prosecuting authority with the request that they open proceedings against E on the basis of the evidence already gathered in England.

In front of the German prosecuting authorities, E categorically denies the charges. For this reason, the German authorities want to put the admission of guilt from the English plea bargaining proceedings before the court as evidence.

If one uses the freedom of movement principle suggested by the EC Commission in this case, the admission of guilt from the English plea bargaining proceedings could be used in Germany without further examination. This is because the Commission's concept of "free-moving evidence" has provided that the *observation of the law of the state obtaining the evidence determines the permissibility of the use of the evidence in the requesting state.*

The German Code of Criminal Procedure does not expressly exclude a guilty plea made within the scope of a plea-bargaining that ultimately did not materialize. Such a deal is still foreign to German criminal proceedings. English criminal proceedings, on the other hand, often end with plea bargaining.[65] The wide acceptance of this way of ending the proceedings is partly based on the rendering of the criminal proceedings into a party proceedings, in which the reconstruction of the true facts of the case and a judgement based on these facts are not the primary objectives, but rather a satisfaction of the law in which both parties have a "fair" opportunity to present their case.

According to German law, special circumstances must be present within the situation surrounding the admission that seem suitable to constrict the free will of the person who has confessed so that illegally obtained evidence can be excluded. Such circumstances are listed in § 136 a StPO (German Code of Criminal Procedure):[66] (a) impairing the accused's freedom of will and action through deception, (b) threatening the accused with a measure prohibited by procedural law, and (c) promising the accused an advantage not provided for by law. None of these circumstances existed at the point of E's admission of guilt. The prosecuting authorities probably also did not foresee that E (in the example above) should have to expect that his admission would have an effect beyond the legal boundaries of his own country.

According to German law, a judge would thus have no reason to exclude this admission because it is – according to the adequacy proviso of the concept of "free-moving evidence" – treated like an admission of guilt reached under German law. That is problematic, particularly from the viewpoint of the party affected.

The objection to the use of the English confession in a German trial, however, is the consideration that the admission of guilt could not have been used in English proceedings under the given circumstances. English law also has no

65 *See* ANDREWS & HIRST, *supra* note 51.
66 *See* BGHSt 21, 287.

explicit rule for the exclusion of such evidence.[67] After a deal has been dismissed, however, admissions of guilt from plea bargains are usually considered to be questionable evidence that is excluded under the rules of PACE, p. 76.[68] If the confession were used in Germany, this objection would remain unconsidered.

If one assumes that a confession may be considered as "free-moving evidence," even the suggestion of the Commission to exclude the evidence does not help. According to this suggestion, evidence that was illegally obtained in one Member State should be excluded according to the rules of the requested state. The confession in this case, however, would have been obtained legally. Only its use would be illegal. When implementing the Commission's suggestion, this result could thus only be corrected in the process of evaluating evidence.[69] The formal rules on evidence admissibility would thus no longer have validity.

This example shows again that the collection or presentation of evidence may lose its significance through the transfer to other types of proceedings. In this case, the suggestion of the Commission for the exclusion of illegally obtained evidence does not result in correction because the evidence was originally obtained legally; the doubts on usability result from the situation surrounding the use in the foreign jurisdiction.

E. Resumée

The problems caused by a transfer of evidence between different Member States are thus not comprehensively solved by either the concept of the EU Convention, relying on a "*forum regit actum* approach" or by the concept of the Green Paper's proposal of "free movement of evidence." This is because only the symptoms, but not the causes of these problems, which lie in the various designs of the national Codes of Criminal Procedure and the respective evidence law are addressed. This focus must shift and further efforts have to concentrate on the formulation of principles which can guarantee that evidence obtained abroad will provide a reliable decision-making basis for the national criminal courts.

67 Different from American law, the deal is unregulated in many areas of English law. This circumstance also explains why, according to common law rules, an admission of guilt made as the basis of a plea bargain could still be used as evidence in a criminal trial under certain conditions. For more details, *see* WOLCHOVER & HEATON-ARMSTRONG, CONFESSION EVIDENCE, 1–070 (1996).

68 On the problem of the instruction of juries in regard to the evidentiary force of such a confession, *see id.*

69 *See* BGHSt 2, 304.