

# Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility

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*Facilitating the exchange of evidence is at present one of the priorities of the EU action in criminal matters. Less than one year after the adoption of the Framework decision on the EEW, the Commission presents a new Green Paper proposing a general instrument based on mutual recognition available for all means of evidence. This essay discusses the pros and cons of the green paper suggestions. It first criticizes the method employed by the Commission to submit a proposal without having conducted an accurate reflection and without relying on empirical studies. A second reason of criticism concerns the Commission's attempt to transplant in criminal matters the principles and the techniques which developed in the (former) first pillar of the EU without taking into account the peculiar sensitivity of criminal law. In this respect the proposal of the Commission hides behind some "false myths" such as the "healing" work of the ECtHR and it does not adequately consider the problems that lurk under the differences in the rules between national legal systems. No consideration is given to safeguards and to the need of protecting human rights within criminal proceedings.*

*After showing all the weaknesses of a purely efficient and punitive approach this article aims at redressing such imbalance by suggesting to provide for adequate safeguards and by proposing to start discussing of a possible harmonization.*

*The essay maintains also that the present European trend implicitly favors those systems rooted in an inquisitorial/continental traditional procedure to become the "common standard" for a future model of European criminal justice. And it suggests that before advancing proposals it would be sensible to discuss openly the concrete perspectives of harmonization.*

## **I. Light and shade of the Commission's Green Paper on obtaining evidence in criminal matters**

Shortly after the adoption of the Framework decision on the European Evidence Warrant (EEW) in 2008, the European Union brings up again the topic of evidence in criminal justice with the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility.<sup>1</sup>

The EU Commission intends to stimulate the debate on what it considers the next step in the improvement of judicial cooperation: the adoption of an "instrument based on the principle of mutual recognition applied to all means of evidence". The Commission proposes to overcome the logic that lies under the traditional forms of judicial assistance in favour of instruments directly based on the principle of mutual recognition, cornerstone of the area of freedom, security and justice since the European Councils of Cardiff and Tampere.<sup>2</sup>

<sup>1</sup> Bruxelles, 11 November 2009, COM (2009) 624 final.

<sup>2</sup> According to the Tampere Conclusions, "evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking account

The idea is in particular to substitute all legal texts in force, conventions and legal sources of the EU, with a single "European evidence warrant" applicable to all types of evidence, thus not only to the means of evidence already included in the European evidence warrant adopted in 2008, but also to those forms of evidence "that – although directly available – does not already exist, such as statements from suspects or witnesses or information obtained in real time, such as interception of communications or monitoring of bank accounts" and even "evidence that – although already existing – is not directly available without further investigation or examination, such as analyses of existing objects documents or data or obtaining bodily material, such as DNA samples or fingerprints".

Admissibility in trial should thus be granted to such evidence in all countries, in the sense that evidence should not be considered "inadmissible or of a reduced probative value in the criminal proceedings in one Member State because of the manner in which it has been gathered in another Member State".

The Commission's idea deserves credits in that it aims at simplifying the legal context, bringing together in one single text what the Commission correctly defines as a "50-year-old patchwork of rules"<sup>3</sup> referring to the rich and sometimes contradictory variety of instruments presently dedicated to the gathering of evidence between two or more countries: the several Conventions of the Council of Europe, the conventions and framework decisions adopted within the old third pillar of the European Union.<sup>4</sup>

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of the standards that apply there" (Tampere European Council 15 and 16 October 1999, Conclusions of the Presidency, para. 36).

<sup>3</sup> Cross-border crime: Commission issues opinion on Member States' evidence sharing proposals, IP/10/1067, 24 August 2010, IP/10/1067.

<sup>4</sup> The system of gathering evidence among EU Member States is still based on the Council of Europe Convention on mutual assistance in criminal matters of 1959, supplemented by its additional protocol from 1978, the Benelux Treaty of 1962, the Schengen Implementing Convention of 1990, and the Convention on mutual assistance between the Member States of EU from 29 May 2000, with its additional protocol from 2001. Some bilateral treaties exist as well. The Nordic agreements should also not be taken into consideration, see *Sieber*, ZStW 121 (2009), 19. Within the EU, some limited amendments to the Council of Europe rules were made by Art. 48-53 of the Schengen Convention. Many of the framework decisions adopted by the EU deal with evidence in criminal matters. The most significant ones were: the Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; the Council framework decision 2009/315/JHA of 26 February 2009 on the organisation and content of the ex-

The practitioners would gain immediate advantage out of this simplification since it is often difficult even for the most expert jurist to find a way into the labyrinth of the European texts, to know exactly which is the law applicable in which country and whether it applies to all means of evidence or to some only, to identify the authority in charge for each activity.

Indeed it is better to have a single text that regulates the matter in a comprehensive and coherent form.

From this point of view the “bitterest enemy” to face are the so called informal (or deformed) procedures, which we could also call “underground cooperation”. These are very common and consist in the spontaneous transmission of evidence, in the free exchange of the results of intelligence activities to be used within criminal trials or investigations, in line with the philosophy of the “security-oriented criminal law”<sup>5</sup>. Similar procedures bypass all formal steps and are simply based on an agreement between the proceeding authorities of different countries. But these procedures do not seem to worry the Commission exceedingly, since they are not even mentioned in the Green Paper.

The Commission’s initiative aims at testing the reactions of the Member states and of the public opinion on the opportunity to draft a complete regulation of the exchange of criminal evidence, based on the principle of mutual recognition. The Commission is well aware of the sensitivity of the issue and is conscious that many countries might be fearful of allowing greater room to the EU action in criminal cooperation. It is for these reasons that the Commission submits a basic, skeletal text, partly confused, which treats roughly subtle issues that would deserve much greater attention and evaluation.

The timing of the Commission’s proposal is not appropriate either. As many have observed in the reactions to the Green Paper, it would have been preferable to postpone the initiative. The Brussels Convention on judicial assistance (2000) has not been transposed in several countries yet, Italy among them, albeit being already in force; there are no data yet on the practical achievements and shortcomings of the

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change of criminal record information; the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, which entered into force on 19 January 2009 and is to be implemented by 19 January 2011. It is relevant the Council framework decision 2002/465/JHA of 13 June 2002 on joint investigation teams; on that topic, we have to remember also the Art. 13 of the 2000 EU Convention.

<sup>5</sup> See *Vervale*, *Utrecht Law Review* 2005, 1. We must mention the Council framework Decision 2006/960/JHA of the Council of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. It provides that “Member States’ law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations”.

European evidence warrant, neither the framework decision has been enacted in all Member States, once again being Italy one of those.

One could rebut that the Green Paper is merely a consultation paper. But the previous experiences have shown that the Green Paper is often the anticipation of a draft proposal. And it is unclear what is the relationship between the Green Book and the proposals presented shortly after by a group of Member States.<sup>6</sup>

In any case there is a significant difference in quality between this Green Paper and the others previously issued by the Commission in criminal matters. For example in 2001 the Commission delivered the Green Paper on the establishment of a European public prosecutor. Albeit not being followed by a legislative proposal, that Green Paper was grounded on several scholarly studies and on the (sometimes very harsh) doctrinal debates that had taken place since then and it was an analytical and well-thought-out text which later served as a cultural milestone for all discussions on the development of the area of freedom, security and justice. And the follow-up of that Green Paper can easily be found in Art. 82 of the Treaty on the functioning of the Union, as amended in December 2007 in Lisbon.

Again one could counter argue that up to now there has been no profound academic debate on a truly European basis on the future perspectives of European criminal evidence comparable to the well-known *Corpus juris* which back then stimulated the idea of a European public prosecutor. Nonetheless many are the studies that have investigated the subject,<sup>7</sup> raising doubts and criticism and pointing out the risks lurking under an uncritical generalization of the principle of mutual recognition to the field of criminal evidence. None of these remarks finds an echo in the few pages of the Green Paper. The Green Paper simply puts forward the same old arguments recurrently used to sterilize any debate on European criminal justice: the need for simplification, the urge of efficiency “at all costs” and the exaltation of the principle of mutual recog-

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<sup>6</sup> To be considered for our purposes the Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (29 April 2010, 2010/0817 COD. The Commission observed that “In order to achieve the objectives of the proposal, a Regulation seems to be a more appropriate legal instrument than a Directive, which is not directly applicable and needs to be transposed into national law” (JUST/B/1/AA-et D[2010] 6815).

<sup>7</sup> See the Report for the European Commission elaborated by Vermeulen/De Bondt/Van Damme (eds.), *EU cross-border gathering and use of evidence in criminal matters, Towards mutual recognition of investigative measures and free movement of evidence*, available at [http://www.ecba.org/cms/index.php?option=com\\_content&task=view&id=335&Itemid=73](http://www.ecba.org/cms/index.php?option=com_content&task=view&id=335&Itemid=73); see also the Final Report written by *Vernimmen-Van Tiggelen/Surano*, *Analysis of the future of mutual recognition in criminal matters in the European Union, 2009*. In the Italian Context, see *Illuminati* (eds.), *Prova penale e Unione europea*, 2009.

dition as a solution against all difficulties and hindrances. But the essence and the concrete features of mutual recognition are not clearly explained, they remain unclear while safeguards pale into insignificance.

## II. Which are the real problems of judicial cooperation in criminal matters in the EU?

Before focusing on the contents and suggestions of the Green Paper it is essential to have clear the present state of affairs with regards to the exchange of evidence within judicial cooperation in criminal matters and the difficulties that the Commission aims at overcoming. It is only when problems are clearly sketched that a plausible and proficient solution can be advanced.

From this point of view the Green Paper leaves the impression that some of the criticisms raised by the Commission on the range of instruments that compose the so-called “system of mutual legal assistance” (MLA) fall short. There are at present no accurate studies on the real and practical problems that are daily to be faced in judicial criminal cooperation.<sup>8</sup> As a consequence there is not a unanimous approach on the real flaws of the MLA.

According to the Green Paper some of the MLA instruments:

- are slow and largely inefficient;
- do not impose any standard forms to be used when issuing a request for obtaining evidence located in another Member State;
- do not provide for any deadlines for executing the request.

Even the new instrument based on the principle of mutual recognition (the European evidence warrant issued in 2008) is not considered to be fully satisfactory, since:

- it concerns only some specific means of evidence;
- it provides several refusal grounds.

Some practical problems are indeed undeniable and simplification could serve as a remedy. For example, the adoption of

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<sup>8</sup> Many projects in progress are focused on this topic. We are especially waiting for the final results of the research called “Euroneeds”, financed by the European Union and coordinated by the Max Planck-Institut für Internationales und Ausländisches Strafrecht (Freiburg im Breisgau, Germany) in cooperation with scholars all over Europe. The study is based on interviews to prosecutors and lawyers involved in mutual legal assistance in their own countries; this project aims “to establish the factual needs of practitioners in investigating and prosecuting crimes against the EU’s interests and transnational crime facilitated by the EU. To this end the study examines these in 18 EU member states and candidate countries. The research furthermore seeks to establish in how far the (usually third pillar) mechanisms currently available are suitable in countering the problems faced in prosecution and defence and to identify which further steps may be necessary to verify what every day judicial life requires as specific tools in the European context”.

a standard form for requesting assistance or the provision of fixed deadlines for the execution of the requests could be a proper solution. Though if these remedies were enough to make cooperation function at its best it would be difficult to justify the emphasis put on the topic and even to catch its complexity.

Some delays in the execution of rogatory letters may be due to the inefficiency of certain judicial systems – Italy could be a good example of this – but other troublesome situations may hide different types of hindrances.

It is not uncommon that requests remain unanswered for months and sometimes years or that they even “disappear”<sup>9</sup>. The substantial reasons for such a mispractice may be various: the requested authority may deem the crime not to be sufficiently serious or may not have human or monetary resources to comply with the request, the object of the request may be particularly burdensome for the requested authority, there may be proceedings underway in the requested State for the same facts, etc.

The Green Paper inquiry is from this standpoint myopic. It lists all the negative effects of the practical problems but it does not go deep into the real and true causes of the difficulties that characterize judicial cooperation in criminal matters.

Practical complications often represent only a part – in most cases the surface – of a larger problem. The greatest hindrances to cooperation derive from the differences in the legal rules between countries. The difficulties experimented in admitting and using in one country the evidence collected abroad are a consequence of this. It is easy to bring examples: the different regulation of the right to silence, of testimony incompatibility, of immunities, of testimonial privileges, the dissimilar rules for conducting a search or for performing a seizure or for wiretapping (intercepting), etc.

Here lies the error in the Commission’s perspective: trying to force the MLA traditional system and to overcome national legal specificities, by imposing the countries to recognize and make full use of the evidence gathered abroad, without addressing the heart of the problem.<sup>10</sup>

To be sure the adoption of a single instrument of cooperation for all sorts of evidence, characterized by a unique request form and by fixed and mandatory deadlines could solve many practical problems. If the problem is slowness procedures can be accelerated; if the problem is bureaucracy procedures can be thinned out and be simplified in their forms. But things get much more complicated when the problem is structural being related to the differences in the legal rules. The Commission itself admits that when mutual recognition is at stake the problem turns to the numerous grounds for refusal that Member States push for (and succeed in) intro-

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<sup>9</sup> “It still happens that the execution of requests takes several months or even longer or that a request ‘disappears’ without any answer from the requested state for months or even permanently”; cfr. *Lach*, eucrim 3 (2009), 107.

<sup>10</sup> The delays in executions of rogatory letters are considered the main problem in everyday cooperation, even more pressing than existing legal differences and obstacles, *Lach*, eucrim 3 (2009), 108.

ducing. They represent in fact the latent conflict between different legal systems, each one striking a different balance between the needs of fighting crimes and human rights. Refusal grounds cannot just be seen as mere barriers, neither can they be simply eliminated by imposing coercively mutual recognition without a previous harmonization.

### III. Some Critical Remarks to the Mutual Recognition as a Method of Cooperation.

So often mentioned in official European documents mutual recognition is never elucidated nor described. It is treated as a self-evident concept, so obvious that it need not further explanations, its functioning and impact should be easily understood.

Such a picture is misleading. Prior to any discussion on the opportunity of its adoption (or extension) one must comprehend what mutual recognition is about.

Mutual recognition is just a method used for exchanging items (goods, judicial decisions, evidence, etc.). As a method it consists in asserting the formal lawfulness of the item at the origin and consequently in permitting it to move freely from one country to another in a certain region, avoiding national authorities from raising barriers due to its "foreignity". In other words, mutual recognition fights against the "foreignity argument", it avoids an object (goods, judicial decisions, evidence) to be rejected in another country simply because of its alien origin.

As any method mutual recognition in itself is neutral, it is neither good nor bad. It all depends on the context in which the method is employed and on the consequences that it generates. Its large success is strictly related to its application in European community law within the field of goods, to permit the free exchange of goods.

Free movement and mutual recognition<sup>11</sup> have in fact been conceived in relation to commercial exchanges and still retain features of their mercantile foundation. The same idea of a community of European States was born around the free exchange of goods and only later it extended to people, services, capital. Mutual recognition first served to assure the highest exchangeability of goods and since then it is a technique largely employed at a European level because it has "few scruples", it is very much concerned with efficiency and with little interest to the peculiarity of the different branches of the law.

Importing the labels of the former EU first pillar within judicial cooperation in criminal matters, the Commission's auspice is now the free movement of criminal evidence.<sup>12</sup> It is

of minimal importance whether the evidence is or not collected under the request of another Member State. Free movement of evidence is unrelated to the State requesting assistance. It is sufficient that evidence is formed or collected lawfully according to the rules of one of Member States.<sup>13</sup>

Whichever its object, free movement describes the material activity of moving an item from one place to another without any borders barring such geographical movement. When transposed into criminal justice, free movement implies that a certain procedural result, a certain piece of evidence, the object of a freezing order or the person accused or condemned of a crime are transferred from one Member State to another.

But since the item to be exchanged is not a good but a judicial or procedural outcome, such as a decision or a piece of evidence, it does not merely suffice that the item is taken cross border but it is first essential to analyze the "legal structure" of the item so to give execution to it (in the case of judicial decisions) or to allow its reception within the national proceedings (in the case of evidence). It is for these reasons that for free movement to be effective it requires mutual recognition: if the procedural item coming from another Member State is not recognized as compatible to equivalent national items, the mere geographical movement remains irrelevant for the law.

Thus mutual recognition<sup>14</sup> serves to assure the result of free circulation. It is only when the requesting or receiving State accords legal recognition to the foreign item, in a manner equivalent to a national one, that geographic transfer gives the expected results for judicial cooperation.

The parallel between goods and criminal evidence is suggestive and allows us to penetrate the heart of the matter.

Free circulation of goods has been preceded and accompanied by the imposition to Member states of strict standards of quality to safeguards European consumers.<sup>15</sup>

The same has not happened with evidence yet. Nobody has advanced a proposal or a suggestion to introduce high quality standards of evidence, neither minimum levels of safeguards to validate judicial items in their transfer from one country to another. To put it in plain terms, uncontrolled free circulation could permit the exchange of potential unsafe judicial products for the "criminal justice consumers" (i.e., judicial authorities, defendants, victims).<sup>16</sup>

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the principle of mutual recognition must apply at all stages of the procedure".

<sup>13</sup> See *Spencer*, *The Cambridge Yearbook of European Legal Studies* 9 (2006/2007), 474.

<sup>14</sup> See *Galantini*, *Cassazione penale* 2004, 3474; *Manacorda*, *Rivista italiana di diritto e procedura penale* 2004, 789; *De Leo*, *Diritto penale e processo* 2003, 377; *Baratta*, *Rivista di diritto europeo* 1993, 727.

<sup>15</sup> *Gless*, in: *Illuminati* (supra note 7), p. 151; the author draws a distinction between the concreteness of the consumers needs and the abstractness of legal world.

<sup>16</sup> See *Mazza*, *Rivista di diritto processuale* 2009, 398.

Looking deeply into it the analogy between free circulation of goods and free circulation of evidence is intriguing only on the surface.<sup>17</sup>

Having this in mind the most useful and proficient step to take would be that of bringing forward the effort of harmonizing national legal rules, focusing on the fundamental rights of the defendant. Prior to any free exchange of evidence it should be essential to introduce at European level “minimum rules” so to ensure “compatibility in rules applicable in the Member States, as may be necessary to improve [...] co-operation”<sup>18</sup>.

In other words the principle of mutual recognition entails a conception of cooperation that cannot fully take place without – at least – a minimum of assimilation of the laws of the Member States.<sup>19</sup>

The risk is otherwise to uphold a static concept of evidence,<sup>20</sup> where a piece of evidence comes down only to the information that it conveys and is indifferent to the manner in which it was collected and to the proceedings in which it will be used. Evidentiary outcomes are a matter of law (and of logic): evidence is always the result of a procedural activity and the probative value of a piece of evidence always depends on the method followed to produce it or to collect it. The method employed affects the result.

Criminal evidence differs from goods and services.<sup>21</sup> Evidence<sup>22</sup> is a legal construct that is abstract in itself<sup>23</sup> and evidentiary outcomes are the results of a procedure.

The procedural provisions concerning evidence not only tend to assure safeguards to protect the human rights of people but they also are the expression of a specific philosophy of knowledge (epistemology) where the quality of the information depends on the compliance with those rules.

It is to be hoped that the criminal field will follow what already occurred in other fields of the law. Free circulation of goods, for example, has moved from a process of “negative integration”, i.e. the duty for Member States to eliminate all barriers to commercial trades “no matter which the nature or the aim of the barrier”<sup>24</sup>, to a process of “positive integration”, whose goal was to harmonize national legislations by imposing the Member States to comply with the many rules set out by the European Community. In all the cases in which harmonization had not been fully achieved then European law resorted to mutual recognition.<sup>25</sup>

This helps understand the dual dimension of the principle of mutual recognition.

One profile of mutual recognition consists in a method useful “for the drive to complete an internal market free from barriers to trade arising from the exercise of MS regulatory power”, imposing mandatory limits to the Member States’ action. The second profile of mutual recognition “becomes closely associated with the placing of normative restrictions on community action”<sup>26</sup>. The latter is the profile emphasized by the Lisbon Treaty: it favours mutual recognition as the

<sup>17</sup> The same risk is underlined by *Spencer*, *The Cambridge Yearbook of European Legal Studies* 9 (2006/2007), 474 (475 ff.).

<sup>18</sup> It was provided by Art. 31 § 1 lit. c of the European Union Treaty before the amendments of the Lisbon Treaty.

<sup>19</sup> See *Perron*, in: Husabø/Strandbakken (eds.), *Harmonization of Criminal Law in Europe*, 2005, p. 17-18; *Delmas-Marty*, in: Bernardi (ed.), *Multiculturalismo, diritti umani, pena*, 2006, p. 1.

<sup>20</sup> *Ubertis*, *La prova penale, Profili giuridici ed epistemologici*, 1995, p. 13: according to the Author, in criminal matters “il fatto non viene mai direttamente affermato nella sua ‘datità’. Di esso, piuttosto, viene ottenuta una definitiva ricostruzione”.

<sup>21</sup> On problems bound to the difficulty to combine the mercantile logic with the growth of an harmonic criminal systems, see *Delmas-Marty*, in: Fronza/Manacorda (eds.), *La justice pénale internationale dans les décisions des tribunaux ad hoc*, 2003, p. 269. The Author affirms that la symétrie n’est qu’apparente entre le marché et les droits de l’homme et la relation entre globalisation économique et universalisme éthique reste ambiguë. D’une part, l’apparition d’un “droits de la mondialisation” è vocation économique est beaucoup plus rapide et plus efficace que la “mondialisation du droit” qui permettrait le rapprochement des droits nationaux sous l’influence des droits de l’homme. D’autre part, il existe une contradiction entre le principe de solidarité et l’esprit de partage, inhérents à l’idée même d’universalisme, et un marché mondial fondé sur le principe de concurrence et l’esprit de

compétition”. Similar remarks perfectly apply to what is happening today at European level.

<sup>22</sup> On the concepts of “evidence” and “proof” and on the procedural rules to gather evidence, between the Italian scholars; see *Cordero*, *Tre studi sulle prove penali*, 1963, p. 52; *Ubertis* (supra note 20), p. 52 ff. and 125 ff.; *Nobili*, in: Chiavario (ed.), *Commento al nuovo codice di procedura penale*, vol. 2, 1990, p. 384 ff.

<sup>23</sup> Defines evidence as a “legal construct” *Gless*, in: Vervaele (ed.), *European Arrest Warrant, Transnational Judicial Inquiries in the EU*, 2005, p. 123: “the free movement approach sketched in the conclusions of the Tampere Council as a ‘mutual admissibility concept’ will not work as well with regard to the ‘transfer of evidence’”. See also *Gless*, *ZStW* 116 (2004), 353; *Melillo*, *Cassazione penale* 2006, 268; *Nuotio*, in: Nuotio (ed.), *Europe in Search of Meaning and Purpose*, 2004, p. 205; *De Kerchove/Weyembergh* (eds.), *La confiance mutuelle dans l’espace pénal européen*, 2005.

<sup>24</sup> See *Tesauro*, *Diritto comunitario*, 2008, p. 394.

<sup>25</sup> See *Tesauro* (supra note 24), p. 395; according to the Author, the European integration process brought the Court of justice to invert the traditional criterion that usually inspired the interpretation of international conventional provisions: “non più il favor per la libertà degli Stati contraenti, ma al contrario un favor per le limitazioni a tale libertà, purché preordinate al perseguimento dell’obiettivo dell’integrazione”.

<sup>26</sup> See *Armstrong*, in: Barnard/Scott (eds.), *The law of the single European market: unpacking the premises*, 2002, p. 227.

goal of any policy of harmonization, imposing restrictions to the same action of the EU.<sup>27</sup>

#### IV. A possible antidote: the preventive harmonization

Venturing a definition of harmonization is extremely arduous. The term first identifies the “process that leads to establish a functional relationship between systems [...] so that as a result of the process the systems will be harmonious, compatible one with the other and coherent within the context”<sup>28</sup>.

In law harmonization is a normative technique that pursues the approximation of the rules of different legal systems within a particular field.

If the goal of harmonization is always one nonetheless harmonization policies may assume different facets.

Approximation can be spontaneous when legal systems with common roots tend to naturally converge and to adopt similar rules.

Harmonization can in second place be induced, i.e. imposed by national authorities in order to comply with international obligations. In other words there exists a supranational text that forces the States to reach a particular goal or to protect specific rights. States remain free to adopt the provisions they think best to reach the set goal. But it is clear that national rules even if partially different in content will tend to converge and thus will approximate. In this case national legislation derives from European legislation and thus it exists a term of comparison for assessing compliance with European obligations and to evaluate whether compatibility between legal systems has occurred. In such a case harmonization implies a hierarchy between legal orders: “it is no more a matter of coordinating national rules but of subordinating national rules to a European provision”<sup>29</sup> although national Parliaments still retain some forms of discretion as to the way in which the goal set by European authorities is to be achieved.

In third instance approximation can be the consequence of the legal “unification” of a particular field, i.e. the adoption at supranational level of common rules for a specific sector. The difference between unification and induced harmonization is not a nuance: it mainly relies on how complete and how detailed the supranational law is. How exhaustive is the supranational law? Does it need implementation leaving the States free to adopt their own rules or is it a self executing law provision? That is the difference.

When a certain criminal sector is unified, it happens that the impulse to unification tends to expand outside its natural thematic borders and to involve other fields of the law too. It

is a sort of contagion, a phenomenon of propagation that pushes towards the creation of common standards.<sup>30</sup>

However, the Green Paper does not completely shelve the project of harmonization: in fact it reiterates the assertion already formulated in the communication titled “An area of freedom, security and justice”<sup>31</sup> that “the best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters”.

It is not a choice of method but it is at least a cautious message of possible future interventions from the European institutions. But in the Commission’s view the perspective of harmonization still needs to reach a wider consensus.

#### V. Some false myths

Mutual recognition and free circulation of judicial decisions and evidence are the mainstay of the action of the European Union at present. They both require mutual trust between Member States to become effective and mutual trust should be based on the harmonization of national legal systems. The error of the Union lies in taking harmonization as given. The Commission presumes national legal systems to be already approximated so that they could accept without resistance the results of foreign procedural activities. On another side the Commission treats harmonization as a phenomenon that is smoothed (and to a certain extent generated) by the free circulation of judicial items. From this point of view harmonization is seen as the fruit of simplified international practices of exchange of judicial elements.

Two reasons of criticisms can be raised against the Commission’s approach. First of all the absence of any preventive harmonization may cause forms of rejections of the foreign judicial item on the part of the Member States. National systems could refuse to recognize in their legal order a piece of evidence or a judicial decision coming from another European country not simply because of its foreignity but because the receiving State does not consent with the way in which the evidence or the decision was formed. Similar rejects

<sup>27</sup> See *Allegrezza*, in: *Illuminati* (supra note 7), p. 166.

<sup>28</sup> See *Manacorda*, in: *La giustizia penale italiana nella prospettiva internazionale*, 2000, p. 35; this article follows the classification elaborated in that essay. As far as harmonization of substantive criminal law is concerned, see *Bernardi*, in: *Grasso/Sicurella* (ed.), *Per un rilancio del progetto europeo*, 2008, p. 381.

<sup>29</sup> *Delmas-Marty* (supra note 19), 1.

<sup>30</sup> *Manacorda* (supra note 28), 48: this kind of harmonization is “il frutto della creazione di micro-sistemi normativi o istituti penalistici totalmente unificati su scala universale o regionale che recano, per propagazione, esigenze di ulteriori ravvicinamenti normativi. Se armonizzazione e unificazione presentano, sia sul piano semantico che sul piano delle logiche politico-giuridiche, una profonda divergenza, ascrivibile rispettivamente all’esistenza o al difetto di un ‘margine nazionale di adattamento’, vengono comunque a crearsi profonde intersezioni tra l’una e l’altra. In particolare, regole unitarie sovraordinate al diritto interno vengono a costituire, su un piano propriamente normativo o in un’ottica di tipo culturale, punti di riferimento indefettibili per i legislatori nazionali che devono quindi convergere verso *standards comuni*”.

<sup>31</sup> Communication from the Commission to the European Parliament and the Council of the 10 June 2010 – An area of freedom, security and justice serving the citizen, COM (2009) 262 def.

stimulate distrust and thus move in counter direction with the final goal set by the Union.

The risk of rejects cannot be overcome by asserting that Member States have an obligation to accept the foreign judicial item no matter what and even if the foreign item was formed without the safeguards requested by the receiving Member State for analogous cases. The consequence of this would be to lower down European and national standards of procedural safeguards and thus to reduce the protection of human rights. In fact even judicial items coming from the least guaranteed State would have the right to circulate freely through the Union. The level of safeguards for each procedural activity would thus be in line in each case with the level set by the State with fewer safeguards. A strictly mandatory application of the rules of mutual recognition may then cause procedural safeguards to drop endangering human rights. And when talking of evidence another collateral risk is to make judicial decisions less safe since they could be affected by evidence of poor quality.<sup>32</sup>

The second reason of criticisms against the Commission's approach concerns the belief that no harmonization of national legal rules is needed since harmonization has already taken place under the impulse of the decisions of the European Court of Human Rights.<sup>33</sup>

To be sure the European Convention on Human Rights and the rich case law of the Strasbourg Court have strongly contributed to the creation of common legal paradigms and to the development of shared legal principles and safeguards throughout Europe.<sup>34</sup> But we are still far from harmonization and there remain many asymmetries between the rules of European national systems. The belief that the decisions of the ECtHR have established (or could establish) a European frame of basic principles of criminal procedures also forgets that decisions of the ECtHR are taken with specific reference to the single case decided by the Court and are not intended to

construe general binding principles for all European States. Harmonization could at best be an indirect effect of the ECtHR judgments. The harmonization needed in the field of judicial cooperation in criminal matters is very different. Judicial cooperation requires clearly-defined rules (and not just a set of very general and unspecific principles) so as to provide the Member States requesting assistance with a prompt answer from the requested States.

The ECtHR takes up a case only after all domestic remedies have been exhausted and it gives a judgment on the overall fairness of the procedure taking into account all parts of the national proceedings.<sup>35</sup>

With specific regard to evidence law the ECtHR has made clear that when Article 6 of the Convention assures the right to a fair trial it does not stringently regulate the admissibility of evidence since the matter is of national responsibility only<sup>36</sup>. It is not for the Strasbourg Court to determine whether a specific piece of evidence has or not been properly admitted at trial or correctly evaluated<sup>37</sup> since each country retains a certain degree of discretion<sup>38</sup> to regulate the subject. The mission of the Strasbourg Court is only to determine whether the procedure followed in the contracting State is fair as a whole. Even when the Court finds that a piece of evidence is collected in breach of conventional rights, it declares a violation of Article 6 only if the decision is based exclusively or essentially on that piece of evidence.<sup>39</sup>

The ECtHR case law is indifferent to the quality of the fact finding process except when the evidence collected in breach of the Convention has directly affected the decision being the only piece of information employed in the decision or the determinant one.<sup>40</sup>

It is dangerous to rely only on the Strasbourg case law also because the solutions offered by the ECtHR not always offer the best protection to human rights. For example, with regard to the interferences between intelligence activities and criminal trial, "the ECtHR not only accepts that information from intelligence services may be used as a secret lead for

<sup>32</sup> See what happened in Italy with the implementation of the European Arrest Warrant (implemented, with a strong delay, by the Italian Law of 22 April 2005 n. 69): one of the first decisions of the Italian Supreme Court (Corte di Cassazione; Cass., sez. VI, 23 settembre 2005, Ilie) rejected the request of the defence not to execute the EAW because of a lack of evidence against the defendant. See the remarks of *De Amicis*, *Diritto e giustizia* 37 (2005), 38-39.

<sup>33</sup> See the remarks of the Commission in the preamble of the Proposal for a Council Framework Decision of 28 April 2004 on certain procedural rights in criminal proceedings throughout the European Union (COM [2004] 328 final, § 16 ff.) and the consideranda from 10 to 12 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

<sup>34</sup> *Delmas-Marty*, *Raisonnement la raison d'Etat, Vers une Europe des droits de l'homme*, 1989, passim; *Vervaele*, in: *Canestrari-Foffani* (ed.), *Il diritto penale nella prospettiva europea: quali politiche criminali per quale Europa?*, 2005, p. 529; *Ubertis*, *Principi di procedura penale europea*, 2000, p. XI.

<sup>35</sup> It is a "usual methodological forward", as underlined by *Cesari*, *Rivista italiana di diritto e procedura penale* 2003, 1447.

<sup>36</sup> This principle, steadily repeated in every decision concerning evidence in criminal matters, has been established for the first time in the decision of the ECHR, judgment of 12 July 1988 (*Schenk v. Switzerland*), para. 45-46.

<sup>37</sup> See ECtHR, judgment of 27 February 2001 (*Lucà v. Italy*), para. 38; ECtHR, judgment of 12 May 2001 (*Khan v. United Kingdom*), para. 34.

<sup>38</sup> According to the art. 53 of the European Convention for Human Rights and the Protection of Fundamental Freedoms, "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party".

<sup>39</sup> See ECtHR, judgment of 25 September 2001 (*P.G. et J.H. v. United Kingdom*).

<sup>40</sup> See *Vogliotti*, *Giurisprudenza italiana* 1998, 851.

criminal investigations, but also that this intelligence is able to produce a reasonable suspicion of guilt”<sup>41</sup>.

Attempting to detect in the ECtHR case law minimum rules governing the admissibility of evidence in criminal trials is not easy at all.<sup>42</sup> The approach followed by the Strasbourg judges does not always permit to identify minimum rules whose respect is mandatory for all contracting States. For example: Article 6 section 3 (d) of the Convention grants the accused the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. But the breach of this right not always brings to a violation of art. 6 ECHR.<sup>43</sup>

The mechanisms of judicial cooperation come into play in the context of decision (i.e. when a court is in the process of assessing guilt) while the decisions of the ECtHR belong to a context of justification since the Strasbourg Court is called to evaluate the legal system and the national judges’ work.

The ECHR and its case law could be a good basis but still insufficient for all human rights clauses, i.e. those clauses which serve to protect the person’s fundamental rights in all cases of judicial cooperation. To that extent it is necessary to go beyond the ECtHR work and to engage in an effort to create common standards.

A further remark. After the Lisbon Treaty, with the expansion of the powers of the ECJ to the former third pillar topics combined with the binding force of the Nice Charter of Fundamental Rights and with the possibility for the Union to join the European Convention on human rights, it is not to be excluded that in few years<sup>44</sup> the two European Courts (ECtHR and ECJ) will deal with the same topics, with the risk of over-

lapping or collision; they may start competing for the judicial leadership within the European area. It is too early to hazard any conjecture on the consequences of a similar interaction. But one of the hypotheses is that a part of the ECtHR case law may be called into question by the decisions of the ECJ.

In any case history tells us that the impulse toward a growing expansion of the European criminal system has been carried forward by the ECJ while the Council often lived stalemates due to political disagreement between the member States.<sup>45</sup> It would be though a display of great weakness from the European institutions to leave to the judges the effort of building an area of freedom, security and justice.

## VI. No active role for the defence

Looking closely at the text proposed by the Green Paper a macroscopic deficiency concerns the absence of any reference to the rights of the accused and to procedural safeguards.

The chronic indifference of the Union for defence rights and procedural safeguards<sup>46</sup> is nowhere new. But it disquiets even more to find such indifference in a text that concerns evidence law since evidence affects directly the just outcome of judicial decisions and thus the lawful restriction of personal liberty.

The greatest problem with evidence is that in most cases it requires at least a participation of the defence. But in the Commission’s text the room for defence participation is unclear the issue being not even addressed. Neither it is clear whether the defence could have a right to have evidence collected abroad. The latter is not a secondary profile.

The idea sponsored by the Green Paper of a unique EU instrument concerning all means of evidence implies a “positive” (“proactive”) role of the defence, not only a “negative” (“passive”) one as the opponent of the prosecutor. The defence could in fact have interest not only to participate effectively to the activities carried out by the authorities of the foreign State – this problem itself could be solved by providing for the right of the defence to participate to the gathering

<sup>41</sup> See *Vervale*, *Utrecht Law Review* 2005, 24. See the comparative study of *Coster van Voorhout*, *Utrecht Law Review*, 2006, 119.

<sup>42</sup> Shares this opinion, *Gless* (supra note 23), p. 124: “The ECHR does not provide a minimum standard in this area”.

<sup>43</sup> ECtHR, judgment of 13 October 2005 (*Bracci v. Italy*), § 51 f.; in two similar situations (main evidence for the conviction was the statement of a prostitute, absent in trial), the ECtHR stated that only in one case the use of pre-trial statements without any chance for the defence to cross-examine the witness had led to a breach of the right to a fair trial. Italian rules on the use in trial of the statements made during the preliminary investigation as the only or fundamental evidence (art. 512 of the Italian Code of Criminal Procedure) are still in contrast with art. 6 § 3 (d) of the ECHR; see *Tamiotti*, *Diritto penale e processo* 2001, 509; *Selvaggi*, in: *Balsamo-Kostoris* (eds.), *Giurisprudenza europea e processo penale italiano*, 2008, p. 378.

<sup>44</sup> According to Art. 10 of Protocol No 36 on transitional provisions. It is provided that, as a transitional measure, the powers of the Court of Justice are to remain the same with respect to acts in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon. This transitional measure is to cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

<sup>45</sup> See especially the two leading cases of 2005: ECJ (Grand Chamber), judgment of 16 June 2005 – Case C-105/03 (Reference for a preliminary ruling from the Tribunale di Firenze [Italy], in criminal proceedings against Maria Pupino); ECJ (Grand Chamber), judgment of 13 September 2005 – Case C-176/03 (Commission of the European Communities v. Council of the European Union).

<sup>46</sup> Member States were unable to find an agreement on the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (cited above). Recently a political agreement was found on the Initiative for a Directive of the European Parliament and of the Council of 9 March 2010 on the rights to interpretation and to translation in criminal proceedings, COM (2010) 82 def. 2010/0050 (COD). On this topic, see *Spronken/Vermeulen/et al.*, *EU Procedural Rights in Criminal Proceedings*, 2009; *Capel/Namoradz/et al.*, *Effective Criminal Defence in Europe*, 2010.



of evidence – but also to play a proactive role by submitting requests of evidence in favour of the accused.<sup>47</sup>

Not differently from the framework decision on the European evidence warrant<sup>48</sup> the Green Paper does not address such issue. Judicial cooperation is conceived in the light of the prosecution.

It would be sensible to provide a mechanism so to give the defence the possibility to request to a foreign judicial authority the collection of a piece of evidence. The risk is otherwise that only the wealthiest people defendants could have the possibility to collect evidence abroad by hiring counsels in several different countries.

Not all difficulties would be overcome by providing the defence with the above mentioned possibilities to request evidence abroad and to assist to its collection. The main problems would concern language and costs. Lawyers would also need specific training in the field of transnational judicial cooperation and on the main traits of foreign criminal procedures. The European bar associations are engaging in many initiatives to develop greater awareness in this field.

Had the Commission taken these issues into account the proposal would have proved to be better balanced.

## VII. From politics to the judiciary: consequences on the proportionality principle

Between the consequences of mutual recognition there is indeed “a displacement of the responsibility of judicial cooperation from political bodies to judicial authorities”<sup>49</sup>. After all the primary goal was to abolish any political control in favour of a direct contact between judicial authorities. This simplification in the procedures has though not implied the abolition of all controls, neither of those controls that were before made by political bodies. The decisions issued on European arrest warrants demonstrate that judges have partly taken over the role that used to be of politicians and exercise in their scrutiny forms of discretion that before belonged to the Ministers. This is particularly true when looking at the issue of the principle of proportionality between the alleged crime and the sanction provided for by the law or determined by the judge or in order to comply with humanitarian concerns.<sup>50</sup>

Judges in fact sometimes deplore the recourse to European arrest warrant mechanisms even for petty offences whose gravity is estimated as extremely modest by the judge, for example when the warrant is filed for rustling or for stealing of energy, etc. The framework decision on the EAW and the implementation laws do not provide for a refusal ground based on the minor gravity of the crime as long as the request

falls within the boundaries of sanctions provided for by the European decision.

Though judges perceive as unfair that a person is deprived of personal liberty and handed over to another country for similar negligible crimes. Some recent decisions issued in Germany,<sup>51</sup> for example, circumvented the absence of a refusal ground based on disproportionality and denied judicial assistance relying on article 6 TFUE (where the text recalls the European Convention on Human Rights) and on the Charter of Nice (which binds almost all Member States<sup>52</sup>) whose article 49 section 3 prescribes that “The severity of penalties must not be disproportionate to the criminal offence”. The reasoning opens up the way for a scrutiny on proportionality (between the needs of criminal justice, the liberties restricted and the costs of enforcement) which seemed abolished together with the abolition of political controls. The scrutiny though changes features depending on the subject that conducts it: a political body can decline assistance due to an assessment of disproportionality without having to give reasons; the judge must instead explain the technical reasons that justify the denial of assistance. In consequence of this a political decision of denial is perceived as concerning that particular case only whereas a judicial denial may be more easily taken as a critical judgment on the foreign national legal order and on its choices of criminal policy (such as is the choice of punishing a certain crime with a severe sanction rather than a lighter one). Though in principle judges should not interfere with the criminal policies set out by Parliaments as this is the core of the legality principle.

Nonetheless the road toward European integration in criminal justice cannot avoid similar clashes. It is inevitable to have moments of confrontation and even of harsh confrontation when building an integrated system of justice which concerns directly fundamental liberties.

The problem turns then to the question whether a similar case law may develop outside the field of arrest warrant in the

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<sup>47</sup> See *Mangiaracina*, *Giustizia penale* 2010, 446.

<sup>48</sup> *Peers*, Statewatch briefing on the European Evidence Warrant to the European Parliament, p. 4: “in principle the collection and transfer of evidence could work for the defence as well as the prosecution in criminal cases”.

<sup>49</sup> *Mazza*, *Rivista di diritto processuale* 2009, 398.

<sup>50</sup> See *Panzavolta*, in: *Kejzer/Van Sliedregt* (ed.), *The European Arrest Warrant in Practice*, 2009, p. 203.

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<sup>51</sup> See the German decisions cited in *Vogell/Spencer*, *Criminal Law Review* 6 (2010), 474, commentary to Higher Regional Court Stuttgart, Decision of 25 February 2010 – 1 Ausl. (24) 1246/09.

<sup>52</sup> We have to remind the opting out clauses provided by Protocol n. 30 to the Lisbon Treaty on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

The growing importance and the chances of the Charter to become the key point for the EU action in the criminal justice can be seen from the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings (COM [2010] 392/3 – 2010/xxxx [COD]). It affirms that “Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) provides for the right to a fair trial; Article 48 guarantees the rights of the defence and has the same meaning and scope as the rights guaranteed by Article 6 (3) of the ECHR”. Starting from the ECHR, it will represent the legal basis for an autonomous EU developing of these rights.

area of evidence too. Can the principle of proportionality become a barrier to European evidence warrants?<sup>53</sup>

Some evidence requires for its collection the restriction of fundamental rights and many States provide in their legislation that certain coercive activities to collect evidence can be legitimate only when prosecuting serious crimes. Thus the claim of proportionality could be raised for evidence as well.

On this issue the Green Paper states that: “The authorities of the issuing State must find that the evidence could also be obtained under national law in a similar case and that the evidence sought is necessary and proportionate for the proceedings in question”. This repeats a provision of the framework decision on the European evidence warrant according to which: “An EEW should be issued only where obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the criminal or other proceedings concerned. In addition, an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case”<sup>54</sup>.

There is a clear difference in philosophy between the aforementioned European texts and the cited German decisions on the EAW. In the latter the scrutiny on proportionality is conducted by the judge of the executing State while both the Green Paper and the Framework decision on the EEW assign a similar power to the judge of the issuing State only. The executing State is given no discretion on the matter and in fact the FWD EEW provides: “The responsibility for ensuring compliance with these conditions should lie with the issuing authority. The grounds for non-recognition or non-execution should therefore not cover these matters”<sup>55</sup>.

### VIII. Admissibility of evidence gathered abroad: a pure national issue

The Green Paper addresses the issues of admissibility by stating (quoting the Tampere conclusions) that “evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there”. If evidence is not admitted exclusively because of its foreignity, all European efforts would be vane. And actually it is now “100% unclear what will happen with the evidence, gathered or obtained on the basis of cross-border cooperation”<sup>56</sup>.

Some preliminary remarks are necessary. To be sure the issue of evidence admissibility is traditionally a national matter<sup>57</sup> (and we have seen that the same is recognized by the ECtHR).

The Union should then restrain from advancing proposals in this field. After all every national system balances the need to fight crime efficiently with individual safeguards in a different manner and according to the particular stage of the proceedings. The rules that govern evidence take into account the different dynamics that characterize each of the stage of the internal proceedings. And in this field so many are the differences between the Member States that it is impossible to come up with a synthesis of all national peculiarities.

Secondly the issue of evidence admissibility comes at stake only in the issuing State (i.e. the States that has requested judicial assistance by asking another State to collect evidence on its behalf or to transmit evidence already gathered). While we have discussed above the problems that concern judicial cooperation from the point of view of the requested/executing State (all of which are related to the different national rules that govern evidence law and fundamental rights), here we turn to the problems that arise in the issuing State.

Following other previous texts,<sup>58</sup> the Green Paper provides that “In order to ensure the admissibility of the evidence obtained, the authorities of the requested State shall comply with the formalities and procedures indicated by the authorities of the requesting State provided that they are not contrary to fundamental principles of law in the requested State”.

The principle *locus regit actum* (i.e. evidence should be gathered according to the rules of the country in which it is collected) is abandoned in favour of the opposite principle of the *forum regit actum*<sup>59</sup> (i.e. evidence is collected according to the rules that apply in the country that is seeking the evidence to use it in trial).

It might be a good and effective strategy but it will hardly solve all problems. Imagine, for example, a joint investigation team that gets into action before any decision is taken on the State where trial will be celebrated: which rules ought to be followed in such a case?

<sup>53</sup> Strongly against the introduction of a proportionality screening in this field, *De Amicis*, *Cooperazione giudiziaria e corruzione internazionale*, 2007, p. 161.

<sup>54</sup> See n. 11 of the Preamble and Art. 7 a of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

<sup>55</sup> See n. 11, second part of the Preamble to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

<sup>56</sup> See the Report for the European Commission elaborated by Vermeulen/De Bondt/Van Damme (supra note 7).

<sup>57</sup> Reactions to the Green Paper by Prof. *John Spencer*: “Broadly speaking, it seems to me that it is up to each Member State to frame its own rules as to the admissibility of evidence in criminal cases; and it is not the business of the EU to tell Member States what types of evidence should or should not be admissible in their criminal courts, unless there is some practical reason to require this” in [http://ec.europa.eu/justice\\_home/news\\_consulting\\_public/news\\_consulting\\_004\\_en.htm](http://ec.europa.eu/justice_home/news_consulting_public/news_consulting_004_en.htm).

<sup>58</sup> See art. 4 of the Convention on Mutual Legal Assistance of 2000; art. 12 of the Framework Decision on the EEW of 2008. On this topic, see *Belfiore*, *European Journal of Crime, Criminal Law and Criminal Justice* 2009, 1.

<sup>59</sup> This is the so-called “Schweizer Modell”, *Schünemann*, *StV* 2003, 116 (119); *Schünemann*, *ZIS* 2007, 528 (533); *Gleiß*, *ZStW* 116 (2004), 353 (365 f.); *Ambos*, *Internationales Strafrecht*, 2. ed. 2008, § 12 marginal n° 57a.

Furthermore what would happen if the rules for collecting evidence of the State where the evidence is to be employed collide with fundamental rules or principles of the State in which the evidence is collected?<sup>60</sup>

### IX. Foreseeable scenarios

What will happen in the next years? As far as evidence is concerned, the balance between mutual recognition and harmonization depends basically on two different political choices: first, the adoption of the European Investigation Order proposed in April 2010, combined with the adoption of sectorial directives on procedural rights (according to the “Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings” adopted in July 2009 and confirmed by the Stockholm Program). Secondly, the creation of the EPP. In the latter case the European Union will be forced to introduce a “microcodification” concerning crimes affecting financial interests of the EU.<sup>61</sup>

It is hard to say which of these two scenarios has more chances to be successful or what will be the result of a combined implementation of different instruments. However, it is important to underline how appreciable is this shy *ouverture* introduced in the last year with the mentioned Roadmap and the two proposals of directives on the rights of translation and information for the defendant.

Independently to the rules followed for gathering evidence (whether those of the issuing State or those of the requested State where the information is to be collected) a general admissibility of foreign evidence raises one further and more general problem.

There are criminal justice systems (for example, England and Italy) generally defined as “adversarial” which adopt a strict separation between investigative phase and trial stage.<sup>62</sup> Investigative elements should not be used in trial save for few exceptions. These systems hardly accept that evidence collected out of court could be used in trial for the decision. The coherence of these systems would suffer severely if they were obliged to recognize and use evidence collected abroad (i.e. not in trial) outside of the few exceptions provided for by their national laws.

In the end the Commission’s proposal to impose Member States to admit certain evidence proves to be more in line with those national criminal justice systems that do not provide for a rigid separation between investigations and trial.

Many European countries have systems based on the “instructing judge” and the majority of them allows the use in trial of evidence collected during the investigations save for the parties’ right to confront directly with the witnesses.

From this standpoint the Commission appears to prefer more certain criminal justice systems than others. It is an inclination that can be observed even in the ECtHR case law. The impulse coming both from the EU and from the Council of Europe is in favour of those systems which do not preclude the use in trial of investigative evidence (systems that some scholars define as “inquisitorial with guarantees”). There are clear signs of such a trend. On the part of the ECtHR, for example, the tendency to consider a person accused since the first steps of the investigations, the quest for greater safeguards in the investigative phase (which precludes to a possible use of investigative elements at trial), the equivalence asserted between the evidence collected in trial and the evidence collected outside of trial with some participation of the defence. On the part of the European Union the signs are even clearer. In the FWD EEW and in the Green Paper on obtaining evidence there is an explicit impulse to assure admissibility of evidence even if it is collected during the investigations and no ground for refusal on this basis is provided. And the same idea that lies at the basis of the European Public Prosecutor is after all inspired to the same belief. The European prosecutor should only conduct the investigations and trial should take place in one of the member States according to national procedures. But it would then be difficult to imagine all the elements collected by the European prosecutor to be banned for use at trial.

The general trend in Europe is thus for a criminal justice system that recognizes probative value to investigative elements. After all if the majority of countries adopts similar models it is easier to think of a *métissage* realized with the rules of those systems.

If this is the idea of harmonization that is creeping under the Commission’s recent initiatives it would have been far better to state it in clear terms and to stimulate reactions on this specific point. Here lies the future of European criminal justice.

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<sup>60</sup> See *Perron* (supra note 19), p. 17 (p. 18); *Klip*, *European Criminal Law*, 2009, 423.

<sup>61</sup> For some critical remarks on this “spreading attitude” of harmonization through partial unification of criminal law on crimes affecting EU financial interests, see *Sotis*, in: Giudicelli-Délage/Manacorda (eds.), *Intégration pénale indirecte*, 2006, p. 263; *Allegrezza*, in: Coppetta (ed.), *Profili del processo penale nella Costituzione europea*, 2005, p. 231.

<sup>62</sup> On the Italian criminal procedure code adopted in 1988, see *Freccero*, *AmJCrImLaw* 21 (1994), 345; *Amodio*, *AmJCompLaw* 52 (2004), 489; *Illuminati*, *WashUnGlobalSt-LawRev* 4 (2005), 567; *Panzavolta*, *NorthCarJInt’lLaw* 30 (2005), 577; *PizzilMontagna*, *MichJInt’lLaw* 25 (2004), 429.

@inproceedings{Allegrezza2014CollectingCE, title={Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality}, author={Silvia Allegrezza}, year={2014} }. Silvia Allegrezza. Published 2014. Political Science. As always, the aim of theoretical analysis is to bring to light the many obstacles piled on the road of the European criminal law enforcement. One's confidence in European criminal law turns on how well it is perceived. Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility. Silvia Allegrezza. Political Science. Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union. 30 novembre 2003 Reference: CFR-CDF.opinion3-2003. Le Réseau U.E. d'experts indépendants en matière de droits fondamentaux a été créé par la Commission européenne à la demande du Parlement européen. Securing its admissibility. En en. Green paper. on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. 1. INTRODUCTION. As mentioned above, the existing instruments on obtaining evidence in criminal matters already contain rules aimed at ensuring the admissibility of evidence obtained in another Member State, i.e. to avoid evidence being considered inadmissible or of a reduced probative value in the criminal proceedings in one Member State because of the manner in which it has been gathered in another Member State. However, these rules only approach the issue of admissibility of evidence in an indirect manner as they do not set any common standards for gathering evidence.