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Prohibition of the use of evidence in the case of unlawfully obtained evidence?**

ABSTRACT: The question of whether evidence that was obtained unlawfully can be admitted as evidence is discussed in any criminal justice system. This paper examines the solutions that can be found in EU secondary and primary law and in the case-law of the Court of Justice of the European Union. It reveals that different area of EU law use different approaches, which can be explained by the underlying rationales.

KEYWORDS: nemo tenetur, European Court of Justice, Charter of Fundamental Rights of the European Union, European evidence law.

1. Introduction

A classical question of criminal procedure law is what happens when evidence has been obtained by breaching the law. The transnational dimension of EU criminal law brings a new dynamic to this question: evidence can more easily be collected abroad and used in the forum state than under the classical regime of mutual legal assistance. The founding of the European Public Prosecutor`s Office has increased the possibilities for transferring evidence even further.[1] Although the problem of whether to exclude evidence that was obtained unlawfully applies to all types of criminal procedures, the level of protection of companies and other legal entities in criminal investigations differs more between the Member States. Even in EU law, there are different standards of the privilege against self-incrimination for legal entities and natural persons.[2]

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[1] See Art. 31. of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').
[2] *Orkem v Commission of the European Communities* – Case 374/87 - 18 October 1989 and *DB v. Consob* - Case C-481/19 - 2 February 2021.

This paper addresses the question of how to deal with evidence that has been obtained unlawfully, i.e. the violation of applicable law from the perspective of EU law. In doing so, it is first important to recognize that there are two different methods of unlawfully obtaining evidence: either the evidence may have been obtained by the investigating authorities themselves in violation of criminal procedural rules, or private individuals may have obtained the evidence in an illegal manner before it was lawfully collected from the private individual by the investigating authorities.

Both constellations are relevant in the context of criminal liability of and in companies. A case of unlawful collection of evidence by the investigating authorities exists, for example, if the authorities access documents that are subject to attorney-client privilege.[3] An unlawful collection of evidence by private parties can occur in particular if the company conducts internal investigations and, in doing so, fundamental rights of employees such as the right to protection of the core area of private life or the nemo tenetur principle are not sufficiently observed.[4]

The following paper will only address the first case constellation and will also only deal with the question of whether illegally collected evidence can be used as evidence in criminal proceedings. The extent to which it can also be used as starting point for other investigative measures will not be discussed. Nor will the paper cover the use as evidence in punitive administrative proceedings.[5]

2. The rationales of exclusionary rules

The rules on the admissibility of illegally obtained evidence vary widely among the Member States.[6] Which approach a Member State follows depends, among other things, on the design of the criminal procedure system and its objectives.[7] In adversarial systems of criminal procedure, the collection of evidence typically falls within the responsibility of one of the parties. According to this rationale, if the evidence was unlawfully obtained,

[3] See, for instance, *AM & S Europe Limited v Commission of the European Communities* - Case 155/79 – 18 May 1982.
[4] On the seizure of documents collected in internal investigations, see *Akzo/Akcros v. Commission* - Case C-550/07– 14 September 2010, para 125 ff.
[5] On the use of evidence in these kinds of proceedings, see Giuffrida and Ligeti, 2019.
[6] See, in more detail, the comparative studies by Thaman, 2013; Gless and Richter, 2019, although both cover non-Member States, too, as well as Giuffrida and Ligeti, 2019.
[7] Turner and Weigend, 2019, pp. 255 ff.

the party responsible should not benefit from the breach of law.[8] In inquisitorial systems, it is more complicated to find the reasons behind exclusionary rules or the lack of such rules.

Turner and Weigend have identified four common rationales of exclusionary rules on the basis of a comparative analysis of criminal procedure law in both common law and civil law countries: finding the truth, upholding judicial integrity, deterring police misconduct and human rights considerations.[9]

2.1. Finding the truth

A criminal procedure system must at least aim at convicting the true perpetrator of the crime. Therefore, finding out what has actually happened is a classic objective of criminal proceedings.[10] With regard to exclusionary rules, this approach leads to limited exclusion of evidence. Basically, evidence is only excluded when it is deemed to be unreliable.[11] In case of unlawfully obtained evidence, the breach of law must be of such a nature that the evidence gathered in this manner cannot be considered to be reliable. The classic example concerns verbal statements obtained under duress or torture. However, other types of evidence are sometimes considered less reliable than others. In Germany, this is discussed for evidence obtained by polygraph[12] and verbal statements by the defendant's family.[13]

2.2. Upholding judicial integrity

A criminal procedure system having the objective to uphold judicial integrity operates on the idea that the criminal justice system and in particular the judiciary must not allow tainted evidence to form the basis of judicial decisions.[14] The integer state shall not profit from the misconduct of its agents. However, the system might also be compromised if crimes are not prosecuted because people might lose confidence in the judicial system.

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[8] Turner and Weigend, 2019, p. 256.
[9] Turner and Weigend, 2019, pp. 257 ff.
[10] Turner and Weigend, 2019, p. 257.
[11] Schneider, 2021, pp. 337 ff.
[12] Bundesgerichtshof (1998) *Ständige Sammlung der Rechtsprechung des Bundesgerichtshofs* (collection of case-law by the Federal Court of Justice) vol. 44, pp. 308 (319); Bundesgerichtshof (2011) *Neue Zeitschrift für Strafrecht*, pp. 474 (475).
[13] See, e.g., Eckstein, 2013, pp. 389 ff.
[14] Turner and Weigend, 2019, p. 258.

Accordingly, this approach requires a balancing test:[15] It must be weighed whether the illegal collection of evidence or the failure to use the evidence is more detrimental to the integrity of the system, taking into account that any withdrawal of evidence makes it more difficult to establish the truth.

2.3. Deterring police misconduct

The rationale of deterring police misconduct also aims at establishing and upholding trust in the judicial system. However, in contrast to the general approach of upholding judicial integrity, this is achieved by excluding evidence that was collected in breach of the law.[16] The idea behind this is to make police officers, who are usually tasked with collecting evidence, aware that any breach of law in order to obtain evidence leads to its exclusion and thus threatens the case. Deterrence is achieved not by individual liability, but by the collective responsibility of the police authorities for having failed to obtain a conviction. This dissuasive effect would be the strongest if all evidence that was gathered illegally were to be excluded.

2.4. Human rights considerations

If a criminal procedure system is predominantly based on human rights considerations, the exclusion of evidence is seen as an effective remedy for human rights violations.[17] It serves as compensation for a violation of human rights suffered during the investigation when evidence was collected illegally. This approach calls for less flexibility of exclusionary rules because any violation of human rights should then lead to the exclusion of evidence.[18]

Most existing legal systems do not follow one approach exclusively. Nonetheless, this categorization shows which elements might play a role in designing exclusionary rules in a legal system.

3. Exclusionary rules in the European Union

Having established possible rationales for exclusionary rules, the focus of this paper turns to EU law and raises the question of which exclusionary

[15] Turner and Weigend, 2019, p. 259.
[16] Ibid.
[17] Turner and Weigend, 2019, pp. 261 ff.
[18] Turner and Weigend, 2019, p. 269.

rules apply within EU law. This requires, first, a brief look at the scope of EU evidence law. Secondly, written EU law on exclusionary rules will be examined before general principles as they were developed in EU antitrust law and the Charter of Fundamental Rights will be examined.

3.1 Scope of application of European evidence law

In European criminal law, the question of the admissibility of illegally obtained evidence arises in all criminal proceedings in which EU law is implemented. These include all proceedings in which crimes are committed in order to protect the financial interests of the European Union or which fall within the scope of application of Union law for other reasons.[19] The European law of evidence is also applicable if evidence is to be recognized within the framework of mutual recognition in criminal proceedings or if evidence has been obtained in violation of the accused's rights harmonized in the EU.[20]

In principle, it does not matter whether a natural person or a company is the accused, provided that the proceedings against the company are subject to the rules of criminal procedure in the Member States. However, not all directives on natural persons are applicable to companies. For example, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings explicitly applies only to natural persons (Article 2), and Directive 2016/343/EU on procedural safeguards for children in criminal proceedings is also unlikely to play a role for companies. This means that violations of the rights contained in these directives cannot form the basis of an exclusionary rule for companies and other legal entities.

3.2 EU secondary law

Although EU law has promoted the mutual recognition of evidence and harmonized defence rights to some extent, there is surprisingly little written law on exclusionary rules.

3.2.1 Directives on the rights of the defendant

The six directives on defendants' rights (interpretation, notification, access to counsel, presumption of innocence, children's rights, and legal aid) do

[19] On the scope of EU law, see, e.g., Böse, 2014b, pp. 107 ff.
[20] Böse, 2021, pp. 399 ff.

contain requirements that affect the collection of evidence. For example, according to Article 4 of Directive 2013/48/EU, the confidentiality of communications with the defence counsel must be ensured, from which it follows that evidence may not be taken if it is evident that these communications are affected. Therefore, for example, correspondence between the defence counsel and the defendant may not be accessed and read.

However, by default, the Directives do not regulate the consequences of a violation of these rights. Most directives have provisions on remedies for violations of the defence rights contained in the directives:[21]

> Article 8 Verification and remedies Directive 2012/13/EU
> […]
> 2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.
>
> Article 12 Remedies Directive 2013/48/EU
> 1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.
> 2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

[21] With the exception of Directive 2010/64/EU, which indicates a need for remedies, but not as explicitly as the other directives, see Caianiello and Lasagni, 2022, p. 233.

> Article 10 Remedies Directive 2016/343/EU
> 1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
> 2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.
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> Article 19 Remedies Directive 2016/800/EU
> Member States shall ensure that children who are suspects or accused persons in criminal proceedings and children who are requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.
>
> Article 8 Remedies Directive 2016/1919/EU
> Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Thus, while the accused is entitled to an effective remedy, it remains completely open how this remedy ought to be structured.[22] Only two provisions touch upon the topic of the admissibility of evidence,[23] but only to make clear that an impact on the national system of admissibility of evidence was not intended. Other than that, the provisions simply state that the rights of the defence and the fairness of proceedings have to be respected. Considering that all EU Member States are part of the Council of Europe and adhere to the European Convention on Human Rights, this

[22] Caianiello and Lasagni, 2022, pp. 233 ff.
[23] Art. 12(2) of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty and Art. 10(2) of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

requirement is hardly surprising and does not help to clarify when evidence that was unlawfully obtained is admitted in criminal proceedings.

This was different in the original Commission draft for Directive 2013/48/EU, which, in view of the case law of the European Court of Human Rights, provided for a ban on the use of evidence obtained in violation of the right of access to a lawyer in Article 13(3) COM(2011) 326 final:

> (3) Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.

This rule would have excluded evidence collected in breach of the right of access to a lawyer from criminal proceedings, but was rejected in the legislative process by the Member States who did not want binding exclusionary rules.[24] This makes sense considering that the systems of admitting evidence are very different and that not all Member States operate with binding exclusionary rules.[25] Nonetheless, the effectiveness of the legal remedies is hampered by the Directives' silence on the admissibility of evidence.

3.2.2 European Public Prosecutor's Office

The European Public Prosecutor's Office, which has been operational since June 2021, has the possibility to collect evidence in the Member States through the Delegated European Public Prosecutors without having to go through the classical mutual legal assistance procedure.[26] The criminal proceedings are conducted before the national courts of the Member States. Regarding the admissibility of evidence collected by the European Public Prosecutor's Office in national criminal proceedings, the Regulation states:

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[24] Corell and Sidhu, 2012, p. 250.
[25] Giuffrida and Ligeti, 2019.
[26] Arts. 30, 31 of the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

> Article 37 Evidence Regulation 2017/1939/EU
> 1. Evidence presented by the prosecutors of the EPPO or the defendant to a court shall not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State.
> 2. The power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO shall not be affected by this Regulation.

This regulation does not help with the question of the admissibility of unlawfully obtained evidence, either. The fact that evidence may not be rejected as inadmissible solely because it was obtained in accordance with the law of another Member State is a consequence of the principle of equivalence. However, it is not clear from the provision what applies if the collection of evidence was already unlawful in the executing state. Rather, the principle of the free assessment of evidence applies in this respect (Article 37(2)), which means that it is up to the Member States to decide whether or not to admit the evidence.[27]

3.2.3 European Investigation Order

In the context of mutual legal assistance, the rules are not more precise as can be seen with the example of the European Investigation Order. Article 14(7) of Directive 2014/41/EU reads:

> 7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.

Again, the Member States are only obliged to respect the rights of the defence and the fairness of the proceedings when assessing evidence. Even

[27] See, in more detail, Burchard, 2021, Art. 37 para 5 ff.

a successful challenge against the EIO, i.e. a court decision recognizing that either the execution or the recognition of the EIO was unlawful, does not necessarily lead to the exclusion of the evidence.[28] It is up to the individual Member State to assess the evidence collected abroad.

3.2.4 Conclusion

The analysis of EU secondary law shows that the EU has so far been very reluctant to oblige Member States to exclude certain evidence. Although, to be fair, one must say that the drafting of general EU exclusionary rules would have been a very difficult task and might be beyond the EU competence. EU law does not even provide for the exclusion of evidence that was gathered in breaching minimum defence rights or which has been held to have been illegally collected in the executing state. Similarly, rules on admitting or excluding evidence collected by the EPPO are largely missing.

3.3 Charter of Fundamental Rights

In the absence of explicit prohibitions on the use of evidence, the question arises whether a prohibition on the use of evidence can arise from the principle of a fair trial set forth in Article 47 Charter of Fundamental Rights of the European Union and other Charter rights such as Article 7, 8 of the CFR. The Court of Justice of the European Union (CJEU) had to deal with this question primarily in connection with VAT fraud. In *WebMindLicences*, the question was whether evidence that had been collected in criminal proceedings without the necessary court order could be used in administrative taxation proceedings.[29] The CJEU stated that the requirements of an effective remedy are satisfied if the court can verify '[...] whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter.'[30] It is not clear from the judgment, what happens if such a violation of rights is found.

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[28] See Böse, 2014a, p. 161.

[29] *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* - Case C-419/14 – 17 December 2015.

[30] *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* - Case C-419/14 – 17 December 2015, para 87.

In *Dzivev*, the CJEU had to decide whether the exclusion of evidence unlawfully obtained by surveillance, i.e. without judicial authorization by a competent court, was compatible with the principle of effectiveness as laid down in *Taricco*.[31] The CJEU answered the question in the affirmative:

> In that regard, it is common ground that the interception of telecommunications at issue in the main proceedings was authorised by a court which did not have the necessary jurisdiction. The interception of those telecommunications must therefore be regarded as not being in accordance with the law, within the meaning of Article 52(1) of the Charter.
> It must therefore be observed that the provision at issue in the main proceedings reflects the requirements set out in paragraphs 35 to 37 above, in that it requires the national court to exclude, from a prosecution, evidence such as the interception of telecommunications requiring prior judicial authorisation, where that authorisation was given by a court that lacked jurisdiction.
> It follows that EU law cannot require a national court to disapply such a procedural rule, even if the use of that evidence gathered unlawfully could increase the effectiveness of criminal prosecutions enabling national authorities, in some cases, to penalise non-compliance with EU law […].
> In that regard, the fact, pointed out by the referring court, that the unlawful act committed is due to the imprecise nature of the provision transferring power at issue in the main proceedings is irrelevant. The requirement that any limitation on the exercise of the right conferred by Article 7 of the Charter must be in accordance with the law means that the legal basis authorising that limitation should be sufficiently clear and precise […]. It is also of no relevance that, in the case of one of the four defendants in the main proceedings, only the interception of telecommunications initiated on the basis of authorisations granted by a court lacking jurisdiction could prove his guilt and justify a conviction.[32]

[31] *Ivo Taricco and Others* – Case C-105/14 – 8 September 2015.
[32] *Petar Dzivev and Others* – Case C-310/16 – 17 January 2019, paras 37-40.

Accordingly, EU law does not prevent the exclusion of evidence, at least in cases, in which the privacy rights guaranteed in the Charter support this approach. This is even true if the evidence excluded was the only evidence on which a conviction could be based. However, the Court again did not specify whether the exclusion of evidence is mandatory when defence rights or procedural guarantees are violated.

This follow-up question was the subject of the joined *IN and JM* proceedings, which dealt with the usability of evidence obtained in violation of an international agreement.[33] The CJEU dismissed the proceedings as inadmissible, as recommended by the Advocate General. In her opinion, however, AG Kokott addresses the question of an exclusionary rule for evidence that was obtained unlawfully:

> In this regard, it should be noted, first, that EU law does not provide for any rules on the gathering and use of evidence in the context of criminal proceedings in the field of VAT, and hence that sphere falls, in principle, within the competence of the Member States. Criminal procedures for countering infringements in the field of VAT therefore fall within the procedural and institutional autonomy of the Member States. This applies a fortiori to the use of evidence for the assessment of income tax if that evidence was gathered in a preliminary investigation due to VAT-related offences.
> In the implementation of Union law, that autonomy is nevertheless limited by the fundamental rights and the principle of proportionality as well as the principles of equivalence and effectiveness. Against this background, however, it is not apparent that the principles of equivalence and effectiveness preclude an evaluation by the national court in the context of assuming a prohibition on the use of evidence. Nor is violation of fundamental rights apparent. Article 47 of the Charter does not entail an automatic prohibition on the use of evidence. […] An assessment of the proportionality of the intervention on a case-by-case basis is the best way of taking the fundamental

[33] *IN and JM v Belgische Staat* - Joined Cases C-469/18 and C-470/18 – 24 October 2019.

> rights into account, as takes place in the evaluation by the national courts […].[34]

According to AG Kokott, evidence that was obtained unlawfully is not automatically excluded. Instead, an assessment by national authorities, taking into account EU fundamental rights, is acceptable.

Her point of view mirrors that which the CJEU has taken in *Steffensen* for punitive administrative proceedings.[35] In this case, Mr. Steffensen was to be fined for a violation of EU food law provisions. However, the competent national authorities failed to take additional samples of the contested food as was prescribed by EU law. The question was whether the analysis of the food samples was admissible as evidence even though Mr. Steffensen had not been provided with samples of his own in order to have them tested independently. The Court stressed that it was up to the Member States to decide on the admissibility of evidence, as long as the principles of equivalence and effectiveness were respected.[36] However, it also pointed out that the Member State ought to take the fair trial principle and fundamental rights into account.[37] Again, a clear and predictable rule cannot be found in EU law.

It can thus be summarized that, as things stand, EU law leaves the Member States a great deal of leeway with regard to the admissibility of evidence that was obtained illegally. An exclusionary rule for illegally obtained evidence is not automatically given in case of violations of EU law, but it is also not prohibited to adopt such a rule. Clear rules are missing in EU criminal procedure law.

3.4 EU Competition Law

When analysing EU criminal procedure law, one should not forget to have a look at other areas of EU Law which have a punitive function. EU punitive administrative law has a longer tradition than EU criminal law and was the first area of EU law in which defence rights and procedural safeguards were discussed. Therefore, it is well worth looking at EU competition law and the respective jurisprudence by the CJEU.

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[34] *IN and JM v Belgische Staat* - Joined Cases C-469/18 and C-470/18 – 24 October 2019, AG Kokott Opinion, paras 73-78.
[35] *Joachim Steffensen* - Case C-276/01 – 10 April 2003.
[36] *Joachim Steffensen* - Case C-276/01 – 10 April 2003, paras 62 ff.
[37] *Joachim Steffensen* - Case C-276/01 – 10 April 2003, paras 78 ff.

EU competition law acknowledges several procedural rights for the companies that are the subject of investigations and are to be fined, including legal professional privilege[38] and nemo tenetur[39]. The general rule in competition law is that a violation of the procedural safeguards by the Commission leads to the exclusion of the evidence thus collected. In *Akzo Nobel*, the question was whether a violation of legal professional privilege had occurred and what the consequences of such a violation would be. The European Court clarified that evidence obtained in breaching legal professional privilege was not only excluded from sanctioning proceedings, but should not become known to the Commission at all:

> Therefore, even if that document is not used as evidence in a decision imposing a penalty under the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by LPP might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by LPP could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.[40]

This shows that all use of evidence gathered in breach of legal professional privilege is forbidden. The Court has also repeatedly stressed that '[…] if the Community judicature annuls the inspection decision or holds that there has been an irregularity in the conduct of the investigation,

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[38] *AM & S Europe Limited v Commission of the European Communities* - Case 155/79 – 18 May 1982.
[39] *Orkem v Commission of the European Communities* – Case 374/87 - 18 October 1989.
[40] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities* - Joined cases T-125/03 and T-253/03 – 17 September 2007, para 87.

the Commission will be prevented from using, for the purposes of infringement proceedings, any documents or evidence which it might have obtained in the course of that investigation […]'.[41] These examples show that evidence that was obtained illegally cannot be used in sanctioning proceedings under EU competition law.

4. Assessment and conclusion

When comparing EU criminal law and EU competition law, it becomes obvious that the exclusion of evidence is dealt with differently. While the exclusion of illegally obtained evidence is not necessary in EU criminal law, it is undisputed in EU competition law. This result is, at first glance, astonishing because one might expect the rules on admissibility of evidence to be more precise in criminal law than in administrative law, be it punitive or not. Nonetheless, there are many differences between EU competition law and EU criminal law, not the least historically, that can explain these differences.

One way to explain this alleged contradiction has to do with the rationales for exclusionary rules that have been presented above. The different treatment can be traced back to the fact that different goals are pursued in individual areas of European criminal law in a broad sense.

In competition law proceedings, the Commission has far-reaching investigative powers of its own, which are opposed by rather restrictive regulations for the protection of the accused.[42] Although national authorities support the Commission in its investigations, the main rules of procedure have been laid down in EU law. Keeping in mind that competition law was one of the earlier areas in which EU authorities could deal out punishment, it was and is important to control the Commission diligently. Therefore, the idea of deterring the Commission's officials from breaking the law is prominent in EU competition law. The fact that the Member States have transferred the power to sanction violations of competition law to the EU makes it necessary for the Commission to follow these rules detailly and operate by the book. This is especially true because the EU has limited

[41] *Deutsche Bahn AG and Others v European Commission* - Case C-583/13 P - 18 June 2015, para 45; see also *Roquette Frères SA v Commission of the European Communities* - Case C-94/00 - 22 October 2002, para 49.

[42] For an overview on competition law from a comparative perspective, see Scholten and Simonato, 2017, pp. 28 ff.

competences in the criminal sector. Following this rationale, it is easy to see why a violation of procedural safeguards in collecting evidence must lead to its exclusion. This is particularly compelling when taking into consideration that the investigating body and the sanctioning body are, at least initially, the same, i.e. the Commission.

In contrast, EU criminal law in the strict sense has so far not had a player that was as powerful as the Commission in competition law. In contrast, when it comes to protecting the Union's financial interests, the Member States are primarily responsible for prosecution and enforcement. Even the EPPO is dependent on national investigative measures and national police officers for its investigations. The risk that EU authorities in criminal matters break the law unpunished is thus low. The EU's influence is much more limited. Accordingly, the deterrence approach plays no significant role here.

The idea of redressing human rights violations has also played a subordinate role in European criminal law to date. This is due to the fact that all Member States are members of the Council of Europe and the European Court of Human Rights monitors compliance with the ECHR. The EU legislator refers to the ECHR and the fair trial principle, but – so far – does not provide for an equivalent regime for protecting individual rights in EU evidence law.

European criminal law thus follows an approach that is geared to preserving the integrity of the criminal procedure system and dispenses with rigid rules for this purpose. There are no binding rules on the admissibility of evidence. Instead, it is the Member States' task to apply their own law on the use of illegally obtained evidence. However, this flexibility comes at the price of a certain arbitrariness and unpredictability of results. While this is true for any legal system that chooses such a flexible approach, the results are more arbitrary in EU law because the decision on admitting or excluding evidence might differ from Member State to Member State. For example, a breach of lawyer-client confidentiality[43] might exclude the use of evidence in one Member State, make it inadmissible at trial in another and allow for compensation, but not inadmissibility in a third Member State. Such

[43] Art. 4 of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

differing results can impair the harmonization of criminal procedure law severely. The idea behind this is, of course, to preserve the integrity of the Member States' criminal justice system, but at the price that an integrated EU criminal justice system is far away. In this respect, it is doubtful whether this approach is convincing in an area of law that is by nature fragmented.

What is the solution? The current trend in EU criminal law to leave out any reference to the admissibility of evidence leads to fragmentation and threatens the goal of harmonization. It is therefore advisable to include the consequences of violations of EU law for criminal proceedings in the law. A starting point could be the Directives on defence rights which already prescribe minimum defence rights. It would not be hard to identify core rights whose violation must lead to the exclusion of evidence thus gathered. For other rights, the consequences of a violation could still be left to the devices of the national systems. Such an approach might be a starting point towards an EU law of evidence in criminal matters and could also provide guidelines for the EPPO.

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