IDEM EST NON ESSE ET NON PROBARI: A EUROPEAN ISSUE

Team France 3

Alexia CUSSAC
Morgane ESTIVAL
Pauline POTTIER

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European Civil procedure

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Introduction

Idem est non esse et non probari[1]. The Latin principle sheds light on the fact that the way a party is allowed to prove allegations before European judges is linked somehow to the effective enforcement of law in the European Union (EU). Therefore, the admissibility of evidence ensures the fundamental right of access to justice within the EU (article 17, CFREU) as well as other fundamental rights guaranteed by the ECHR. Thus, evidence represents a meaningful marker for the level of development of a legal system and a law-abiding State.

Scholars and practitioners have tried over and again to find a proper definition for evidence. While some say that evidence is an element used to establish the materiality of a fact, others reply that there is no such thing as reality. There is only judicial truth. Therefore, evidence would constitute whatever convinces the judge in respect of a party's arguments[2]. More precisely, the Court of Justice of the European Union (ECJ before 1st December 2009, and CJEU since then) has attempted to give its own definition of evidence through its utility: the essential function of evidence is "to establish convincingly the merits of an argument"[3].
The notion of civil and commercial matters is an autonomous concept that the ECJ has interpreted in light of the Union's Treaties. It applies to litigation based on civil and commercial law, consumer law, employment law and even competition law.

We assume that the admissibility and taking of evidence is an issue that matters both to national judges who have to settle cross-border litigation and deal with the application of European Union (EU) law, as well as Community judges.
Evidence regards the procedural regime observed by a national court of justice. From now on, Member States' procedural regimes are considerably divergent, as the CJEU has accepted the procedural autonomy principle. This principle establishes a systematic referral to national laws as far as evidence is concerned, except for EU intervention in this matter[4]. For instance, the EU has occasionally intervened on the issue of evidence regarding secondary law, such as the regulation on intellectual property, or discrimination. Recently, the European Council has dealt with judicial cooperation regarding the taking of evidence in civil and commercial matters. But the nature and probative value of such evidence are issues that have yet to be unified.

[1] "It is the same thing not to be and not to be proved"
[2] *La preuve judiciaire, étude de sociologie juridique*, Henri LEVY-BRUHL
[3] CJEU, *Commission / Tetra Laval BV*, 15 February 2005,
[4] *La preuve dans le droit de l'Union européenne*, Maria FARTUNOVA

Besides, the same reason explains the fact that the European Court of Human Rights (ECHR) also refers to national law as far as civil and commercial evidence is concerned, but controls potential violations of the right to a fair trial according to its own unified standards.

From now on, the process of bringing national laws on evidence closer together is much more advanced in criminal law than in civil or commercial law. Even though different considerations are at stake, the same motivations explain the choice made by EU Member States and institutions in this matter: the effective enforcement of EU law, the protection of fundamental rights and the assurance of legal certainty for everyone in Europe.
The procedural autonomy principle does not mean that the EU has no legitimacy in taking action regarding the issue of civil and commercial evidence. The main question is at what level EU institutions should intervene in order to resolve the concrete problems engendered by the issue of disparate rules of evidence.

Scholars point out the fact that the most flexible international legal instrument should be favoured. No earlier than 1987, a group led by Professor Storme, called "Commission European Judiciary Code", was assigned to work on the approximation of civil procedure as regards its impact on the completion of the international market. The issue of evidence was already tackled alongside other issues such as jurisdiction, access to a court and the recognition and enforcement of national judgements. Indeed, the Working Group's definitive report to the Commission pointed out how a pre-trial period could involve difficulties linked with the admissibility and taking of evidence which would later have an impact on the judgement period. However, this report remains nothing more than a doctrinal study.
In addition, in 2014, another Working Group on access to Information and Evidence of the International Institute for the Unification of Private Law (UNIDROIT) and the European Law Institute (ELI) drew up a project setting out leading rules on evidence. Yet, neither the Commission nor Parliament seems to be moving forward.
Therefore, given the current lack of unified regulation in the field of evidence, practitioners cannot do much on their own to enhance international cooperation in evidence matters. This is why, in the footsteps of UNIDROIT experts, we consider that enacting a Charter of Basic Principles on evidence could be a solution to potential violations of the right to access to justice.

Why would it be « Community-friendly » to have a unified system of evidence?

The current situation: everyone for themselves and unity for others

The Procedural Autonomy principle. According to International law and case law such as the famous International Court of Justice decision known as the "Lotus" case, procedural rules have territorial application. Even though the Lotus Case was a criminal case, the ICJ indicates in the body of its decision that its content also applies to civil cases. Therefore, rules of evidence being procedural rules, they come within the scope of national laws.

This logic applies to both International law and Community law. In the absence of Community rules of evidence, the answers to the administration of evidence come within the scope of the national law that has jurisdiction[5] according to the principle of Member States' procedural autonomy[6].

This general principle promoted by the CJEU has two major implications:

1/ Firstly, it implies that judges (Community judges or national judges) have to apply national rules of evidence of the competent national law, when Community law is silent. For instance, as far as indirect discrimination is concerned, secondary law deals with evidence in directive 97/80/CE of 15th December 1997. Therefore, judges in the EU must apply the rules of evidence coming from this directive. However, no Community law deals with how to prove prejudice in the matter of tort, delict or quasidelicts between EU citizens. Therefore, the Application judge has to refer to the national law of evidence of the country that has jurisdiction, according to Brussels I regulation.

2/ Secondly, as a basic principle, it implies that national rules are compatible with EU law. Yet, this compatibility is limited by the principles of effectiveness and proportionality. This means that the Application judge can apply national rules of evidence as long as they ensure the effective achievement of objectives set out by Union treaties, and a uniform application of Community law.

How does it work? In brief, Community law has to combine with private international law principles.

- *When EU law deals with evidence*: European judges must apply the said common rules. Previously, we took the example of evidence of indirect discrimination in labour law. To be more precise, the employee can establish discriminatory practice by proving objective or factual elements. This creates a presumption of discrimination. Later on, it is the defendant's responsibility to prove that the said discriminatory practice is justified by objective and proportional reasons.

- *When EU law is silent on the matter*: European judges must refer to the competent national law, and apply what the said law establishes on the issue of evidence. Let us take the example of filiation. In order to test the paternity or non-paternity of a child, the competent substantial law in

[5] CJEU, *Joachim Steffensen,* 10 of April 2003
[6] CJEU, Grand Chamber, *Konstantinos Adeneler*, 4 July 2006

filiation will determine which types of evidence are admissible to prove such a fact. For instance, how can the non-paternity of a German child who lives in France be proved by the alleged father? According to French private international law, the national law of the mother at childbirth has jurisdiction. German rules of evidence are therefore to be applied by the French judge. The *lex fori*, here French rules of evidence, cannot interfere, except for public policy exceptions, which tend to become more and more unusual among European Member States.

Therefore, it can be said that at the moment, there is only an attempt to reconcile national rules of evidence through minimum common rules that eradicate the most important disparities, e.g. discrimination. The idea of substituting common rules of evidence with national ones is not yet seen as a solution, even though this could undoubtedly make things easier.

What unifying the evidence system in Europe would mean

As seen previously, proving a fact in Europe might be difficult. Indeed judicial cultures and differences regarding procedural systems impact heavily on how one might prove their claim before a Member State court. Above all, two general procedural systems coexist: the common law system and the continental one.

Non-deterrent disparities. For instance, in the Anglo-Saxon judicial culture of evidence, oral testimony occupies a very important place, while in France written elements are given more weight. Common law systems also refer to the technique of "judicial notice". This technique implies that when facts are common knowledge, judges may rely only on what they know to comment on the matter. This concept is absent from French or Italian judicial cultures. These differences are minor drawbacks that can be overcome easily by the parties adapting to the judicial culture with which they are faced.

Hard-to-overcome disparities. However, other differences might widen the gap between European judges and their attitude towards the administration of evidence. The dichotomy between the use of a legal system of evidence and a moral one is the best example of this.

- In a moral system of evidence one can prove by any means desired, and judges play a central and active role in the admission of evidence. They must weigh up each element of proof and evaluate its relevance to the case law in hand.

- On the contrary, in a legal system, one has to prove facts according to specific rules. Judges thus have a more passive role, restricting themselves to checking how evidence has been taken.

These two systems of evidence are present in Europe on various levels. Both have their advantages and drawbacks: simplicity and security in a legal system where everything is codified, accuracy and flexibility in a moral one.

Yet, the adoption of different evidence systems by EU Member States might prove to be a hindrance in cross-border litigation, with parties not being able to figure out how they might successfully prove their claim. Overall, it is an issue of legal certainty.

For instance, a German creditor wants to sue his French debtor for payment of a credence over 10,000 €uros. The litigation is set before a French civil court according to the rules implemented by the Rome I Regulation[7]. The German complainant will have to bow to French civil procedural requirements regarding evidence i.e. presenting before the court an authentic act proving the existence of his credence, whereas according to German procedural law, he would not be bound to produce such an act.

Furthermore, the gap widens between judicial systems regarding evidence, with the use of presumptions i.e. a rule of law which allows a court to assume that a fact is true until such time as there is a preponderance of evidence which disproves or outweighs it. Every Member State has its own presumptions and national judges have to refer to them when they are presented with cases involving them. In France, when a child is born in wedlock, the mother's husband is presumed to be the father, whereas such a presumption does not exist in Hungarian law, for instance.

Consequences. National judges in Europe adopt different positions towards evidence while examining claims submitted to them. These differences have several consequences when it comes to access to justice by individuals in Europe. Indeed, proving one's allegations is the first step towards recognition of one's rights. The aim of the European Union Area of Freedom, Security and Justice (AFSJ) is to improve access to justice for all. Article 3(2) of the Treaty on the European Union reads as follows: "The Union shall offer its citizens an area of freedom, security and justice without internal frontier" while article 67 of the Treaty on the Functioning of the European Union clearly states that: " The Union shall facilitate access to justice in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters".

The issue of evidence, its administration and its costs before national European courts is also part of the right to a fair trial developed in the European Convention on Human Rights, which is to be ratified by the EU in the foreseeable future.

The disparity between systems might just prove to be a major limit to the creation of a unified area of justice and rights. Besides it has other side-effects which might be regarded as detrimental for

[7] Regulation (EC) n° 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I)

European judicial cooperation. Indeed, it encourages a system of forum shopping i.e. a party's action of looking for a court or judge that is deemed likely to render a favourable result. This might favour disparities between jurisdictions and undermine all the efforts put into judicial cooperation in civil and commercial matters. Therefore, the issue of evidence is a central one in Europe and the question of harmonisation or unification of rules of evidence must be brought forth.

Comparison with criminal evidence. On the contrary, EU institutions have tackled the unification process regarding criminal evidence quite seriously, based on the same reasons presented previously. While there is already a set of common tools regarding evidence in criminal matters, rules of evidence in civil and commercial matters remain local and far from unified. From the European arrest warrant, to the setting up of joint investigation teams, or the work of Europol, the effort of EU institutions regarding evidence is easier in criminal matters as it rests on the established principle of freedom of proof. Contrary to this, practical and legal limits exist in civil and commercial matters; whether these limits can be overcome remains to be seen.

Is harmonisation possible?

The true difficulty concerning evidence in civil and commercial matters is that rules of evidence are strongly linked with the substantial law applied to the matter in hand. Indeed all -or most - matters relating to procedure, such as questions of evidence, are governed by the national law that has jurisdiction. Therefore, harmonisation will be difficult to tackle insofar as there are internal complexities on the one hand, and various territorial applications on the other.

The complexity of national rules of evidence. This complexity of national rules of evidence implies a variety of interpretations, types of evidence and ways to use and take evidence into account, which can scarcely be ignored. Differences might be found between national evidence systems, as mentioned in the first subsection, but also within these systems. For instance, according to French rules governing evidence one must prove a transaction over 1500 €uros using a written act. Nevertheless, derogatory rules are applied if the matter referred to the court concerns traders.

Furthermore, national rules of evidence deal with several issues: the object, the burden and the administration of proof. For each and every one, a unified and adapted solution should be found.

- *The object*: Substantial law dictates what and how a fact or a right might be proven before a court. For instance, it used to be impossible in Irish law for a father to gain custodial rights over his children if he could not prove he had means enough to sustain them. Such an impediment prescribed by

the law and the country's judicial culture would not be found elsewhere in Europe. In this case, the object of the proof was clearly determined by national substantial law.

- *The burden*: The rules about the burden of proof seem to be more homogeneous since it is nearly universally acknowledged that the person putting forth an argument is the one bound to prove it. Yet many exceptions exist, and on many occasions the burden of proof is reversed on considerations depending solely on the judicial traditions of Member States or derogatory rules.

- *The administration*: The administration of proof is another issue but also a thorny one. It depends greatly on the system applied in the country with regards evidence: a legal or free system of evidence.

Other limits exist; some peculiar rules, public policy or even State secrecy considerations might prevent people from substantiating their claims. For instance, the case of anonymous childbirth is a considerable hindrance to the ability to prove one's family ties. Yet this is not the case in Germany, where such anonymity is discarded in front favour of the right to establish one's origins.

Terms of the debate over the opportunity for unifying rules of evidence. A unified system of evidence would mean going over national differences and finding common and concrete principles that would have to be applied by every national judge in Europe. Yet, one might wonder if this is something to wish for. Among opposing arguments, judicial traditions and cultures cannot be ignored so lightly on the sole argument that a unified system of proof would mean an improvement of rights effectiveness within the AFSJ. That would go against the very spirit of European construction ("united in diversity"), which is clearly underlined in Article 67 of the TFEU stating that "The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

Furthermore, the question surrounding on which legal basis EU institutions could intervene in this matter remains problematic. Primary law does not make them competent to legislate directly on civil procedure.

If total harmonisation or unification of rules of evidence is not the solution yet, finding a basic common ground on which to move forward towards greater judicial unity in Europe is essential.

What has already been done for evidence in Europe?

Regulating evidence: the ECHR's position

General remarks. As the European Convention on Human rights has had to be ratified by the EU since the adoption of the Lisbon Treaty, the Rights and principles that the Convention and its interpretation

grant bind laws and judges more and more, whether they are European or national. The issue of evidence also falls within its scope.

As a preliminary remark, ECHR case laws mostly deal with criminal evidence, as the central issue of criminal proceedings. As far as civil and commercial evidence is concerned, the Court considers that article 6§1 ensures the right to a fair trial, but does not regulate the admissibility or the evaluation of evidence. These issues fall within the scope of national law and courts[8]. Therefore, the Strasbourg Court only cares about the exigency for proceedings to be fair according to article 6§1, implying the means of evidence adduced by a litigant. Both in criminal and civil law, several case laws have claimed the Court's desire to spare national laws and the specificities of judicial cultures[9]. However, considering that the impossibility to prove an alleged fact prevents the party from obtaining judicial effects attached to the substantial right invoked, the European law on Human Rights has a lot to say regarding evidence, even in civil and commercial matters.

Principles enacted by the ECHR regulating evidence. First and foremost, the ECHR ensures general procedural principles that apply to both civil and criminal proceedings. Among such principles, we can find rights of the defence, respect for the adversarial principle, the principle of impartiality that frames the judge's action, equality of arms, which implies that parties should be able to submit their evidence to the judge, contest the evidence submitted by their opponent and have effective examination of said evidence[10], respect for human dignity, respect for loyalty in the collection of evidence, respect for privacy (…) etc. For instance, the ECHR has said that article 8 of the European Convention on Human Rights is not violated when a spouse submits letters exchanged between her husband and his lover to the judge in order to get a divorce[11].

However, these principles might not lead to the same solutions depending on the case law in hand since some are not absolute rights. Indeed, the right to privacy previously invoked to accept the admissibility of evidence can be used to refuse it in another case. Let us take the example of the decision rendered on 10th October 2006, *L.L. v/ France*[12]. Once again in a divorce procedure, the Court rejected the submission of information contained in a husband's medical record by his wife in order to prove his alcoholism. The Court considered that "the impugned interference with the applicant's right to respect for his private life, in view of the fundamental importance of the protection of personal data, was not proportionate to the aim pursued and was therefore not 'necessary in a democratic society for the protection of the rights and freedoms of others'".

[8] ECHR *Garcia Ruiz v/ Spain*, 21 January 1999; *Kalender v/ Turkey*, 15 December 2009
[9] ECHR *Teixeira v/ Portugal*, 9 June1998; *Jalloh c/ Germany*, 11 July 2006.
[10] ECHR, *Kremar and others v/ Tchek Republic*, 3 March 2000
[11] ECHR, *N.N. and T.A. v/ Belgium*, 13 May 2008
[12] §46

The rise of a right to evidence. A special right to evidence is gradually emerging in ECHR case law. Indeed, the Strasbourg Court has estimated that the right to a fair trial ensured by article 6§1 includes the right to access to a judge through the presentation of one's evidence[13]. Following this idea, another ECHR case law has underlined that the equality of arms, which derives from the right to a fair trial, implies that evidence must be submitted to the judge with a view to an adversarial debate[14]. As an example of concrete application of such a right to evidence, Strasbourg judges decided that the impossibility for the director of a corporation, party to proceedings, to be heard as a witness in court violates the right to equality of arms and therefore, the right to a fair trial[15].
Therefore, European law on Human Rights regulates evidence through general principles that govern the interpretation of national and Community judges. However, not all cases are brought before the ECHR.

Cross-border litigation: making everything easier for European judges through regulation on the taking of evidence

Context of the 2001 Regulation. As mentioned previously, rules of evidence deal with the different means of evidence, its probative value, admissibility, the burden of proof, and the taking of evidence. Community law has only intervened with regards the last aspect, following the Hague Convention of 18th March 1970. Based mainly on article 81 TFUE, the Council regulation of 28th May 2001 was seen as necessary for the improvement of cooperation between courts on the taking of evidence in civil and commercial matters. The proportionality principle made it better for EU institutions to take action at Community level. Furthermore, a practice guide for the application of the regulation on the taking of evidence was issued. This regulation is a great achievement in cross border proceedings, in which a party from a Member State goes to an Application judge located in another Member State, even though the competent substantial law might not be Community law. Indeed, in cross-border proceedings, it is often essential to take evidence in one EU country in order to decide over a civil or commercial matter pending before a court in another EU country.

The Regulation is applicable in all EU countries except Denmark where the Hague Convention on the taking of evidence abroad in civil or commercial matters is applicable.

[13] ECHR, *Golder v/ United Kingdom*, 21 February 1975
[14] ECHR, *Isgro v/ Italy*, 19 February 1991
[15] ECHR, *Dombo Beheer v/ Pays-Bas*, 27 October 1993

The new system implemented by the Regulation. The 'Regulation on cooperation between the courts of EU countries in the taking of evidence in civil or commercial matters'[16] has created a European system of direct and rapid transmission and execution of requests, that improves the performance of taking evidence between courts in EU Member States. The Regulation provides for two means of evidence taken in another EU country: the court before which a case is heard in one EU country can request the competent court of another EU country to take the necessary evidence; alternatively it can take evidence directly in another EU country.

The Regulation is based on the principle of direct transmission between the courts, in which the requests for taking evidence are transferred directly from the 'requesting court' to the 'requested court'. Each EU country has drawn up a list of the courts competent to take evidence according to the Regulation. This list also indicates the territorial jurisdiction of those courts. In addition, each EU country has designated a central body responsible for supplying information to the courts and seeking solutions for any difficulties arising in respect of a request.

Form and content of the request for evidence. The Regulation lays down precise criteria regarding the form and content of the request, and provides specific forms in its annex:

- the requested court must take evidence expeditiously and, at the latest, within 90 days of receiving the request; where this is not possible, the requested court must inform the requesting court accordingly and state the reasons;

- a request for the hearing of a person will not be made when this person claims the right to refuse to give evidence; the law of the EU country of the requested court or the law of the EU country of the requesting court may also refuse to give it.

Otherwise, a request to take evidence may only be refused in a few exceptional circumstances.

The 1206/2001 Regulation did pave the way towards a unified system of evidence by enabling real cooperation in the taking of evidence in cross-border litigation, making it thus possible for dialogue between judges concerning this particular issue. Yet, it remains silent about the issue of the nature and admissibility of evidence that is requested.

Litigation concerning EU law: the emergence of a European judicial evidence system thanks to the work of the CJEU

Even if every European country has its own particular laws and rules concerning evidence, a move towards a harmonised European system is becoming visible in Community law. Indeed, the EU can

[16] Council Regulation (EC) n° 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

legislate on matters regarding its competences or shared competences. Given the fact that there are more and more subjects concerned by European legislation, it has become necessary for all European national judges to apply some common principles regarding evidence in order to uniformly enforce Community law.

Rules of evidence in Secondary law. The intervention of EU law regarding evidence is possible when a regulation at Community level is necessary to achieve the aims pursued by European Treaties. Harmonisation of evidence in EU law aims at implementing rules over time limits by presenting evidence before a court or the use of specific means of proof recognised in every country.

On the one hand, EU institutions have regulated evidence on issues that regard exclusive EU competences. For instance, in order to render the free movement of goods easier in the EU, regulation n°2913/92 of 12th October 1993 on the transit of goods regulates Community transit procedures and the acceptable means of evidence to establish the Community origin of goods. In customs litigations, every European country has to work with certificates, which are recognised by national courts[17]. Therefore, the use of certificates eases the work of the judge and ensures legal certainty for parties. Another example is directive 93/13/CEE of 5th April 1993, which qualifies the clause that puts the burden of evidence on the consumer as abusive.

On the other hand, EU intervention in secondary law regarding evidence can refer to some CJEU decisions. Once again, let us take the example of directive 97/80/CE issued on December 15th 1997 concerning the issue of evidence in cases of gender discrimination in labour litigation. This directive was based on CJUE case law from the 1980's[18].

CJEU case law regarding evidence in EU law. The CJEU has set up some principles and guidelines concerning evidence and its admissibility in EU law. It has produced case law regarding the use of evidence in free-trade litigation and has extended the rules derived from here to general judicial cooperation in civil and commercial matters.[19]

Community judges have found general constant principles guiding evidence from national and international principles. They fill in the blanks in EU law regarding this issue. For instance, the principle according to which it is impossible to pre-establish evidence for oneself was discovered by CJEU case law on 11th May 1989[20]. The Latin principle stating that "*ei incumbit probatio qui dicit, non*

[17] ECJ, *Trend Moden,* 7 March 1990
[18] ECJ, *Macarthys*, 27 March 1980; ECJ, *Bilka*, 13 May 1986
[19] ECJ, *HOESCHST AG v/ Commission* 21 Sept 1989
[20] ECJ, *Henri Maurissen v/ Court of Auditors*, 11 of May 1989

qui negat" was also found by the Court of First Instance[21]. The adversarial principle has been emphasised as a major procedural rule of EU law[22].

Moreover, the famous Joachim Steffensen case law states that national judges have to take into account the compatibility of means of evidence in respect of fundamental rights guaranteed by the ECHR[23].

Apart from that, the CJEU has put forth the principle of loyalty of proof and judicial supervision of its use. Evidence has to be collected in a loyal way i.e. in a precise context and with a precise aim. This is meant as a means to guarantee individuals' rights (right to privacy, habeas corpus[24], protection of private information, *non bis in idem* principle, etc) To guarantee the integrity of evidence, the EU based itself on three elements: reasonable time limits, justification, non-distortion of evidence[25].

Several steps towards a free system of evidence. It still remains to be decided whether or not the European system on evidence is a legal or moral one. However several clues make us lean towards the adoption of a free EU system of evidence.

Firstly, evidence used in Community litigation has to be examined by national judges under the principle of equivalence: national judges have to accept evidence for what it is worth in other countries, no matter what their national law might say. This would be impossible in a legal system.

Secondly, the way Community or national judges evaluate the evidential value of proof rests on the inner conviction of the application judge. Limited by the search for legal certainty, effective judicial protection, and the duty to state reasons, the judge can have a subjective appreciation of submitted evidence. Indeed, he must explain why he decided not to deem relevant a document for the resolution of a dispute[26]. This also sustains that the system of evidence in Europe tends to be a moral one.

Thirdly, European judges often use the Standard of Proof technique. This technique informs litigants of the attitude that the judge will adopt regarding submitted means of evidence, and set up general requirements. There are different levels in the standard of proof: 1/ proof beyond reasonable doubt prevails (standard often referred to in criminal law), 2/ proof on the balance of probabilities (sufficient, reliable and consistent evidence); 3/ manifest error (the weakest persuasion level). The major advantage of this technique is its flexibility: it does not set in stone the appreciation of the judge, who can adapt. The use of this technique, usually adopted in common law systems, which are moral systems of evidence, also make us assume that the EU tends to adopt a free system of proof.

[21] CFI, *Paul F. Sens v/ Commission*, 10 May 1990,
[22] ECJ, *SNUPAT,* 22 March 1961
[23] ECJ, *Joachim Steffensen*, 10 April 2003
[24] ECJ, *AM & S*, 18 May 1982
[25] ECJ, *GENERAL MOTORS*, 6 April 2006 (conformity of interpretation art 4§3 Treaty of Lisbon)
[26] ECJ, *Ufex v/ Commission*, 4 March 1999

***Limits that can be overcome*?** The predominant limit to this harmonisation is that the first European judge still remains the national judge with his own judicial culture and interpretation of the law. Yet mechanisms exist to ensure the equal application of Community law: preliminary ruling and primacy of EU law[27]. Thus, mutual trust between European countries is the very key towards a unified system of evidence in Europe.

Besides, the EU referral to the Standard of Proof technique also has its limits. Indeed, the very notion of standard of proof is not a universal one. It is barely known by continental law systems, and it remains quite a loose notion in EU law. Its flexibility leaves the level of proof precisely required undetermined. The appreciation of the judge remains subjective, with all the arbitrariness that this solution entails[28]. Eventually, there is a strong risk that this technique will, *in fine*, prioritise the different rights granted by EU law, depending on the level of proof required according to the Standard of Proof technique.

To sum up, the majority of principles put forth by International courts (CJEU and ECHR) are found in national laws. The complexity of the administration of proof is the result of all these coexisting legal and jurisprudential solutions. As the current system of evidence in Europe is thus unfinished and too complicated, the issue of what can be done remains to be analysed seriously.

What remains to be done?

Now that the scene is set, some improvements can be added to the emerging EU system of evidence to reinforce its coherence and enhance its efficiency. A proposal could also be made to draw up a Charter between European Member States on basic common principles concerning evidence.

Improving the 2001 European Regulation

In its report on the Regulation of 5th December 2007, the Commission concluded that the taking of evidence in Europe operates properly, while some difficulties remain. First of all, better communication about the existence and application of this Regulation should be developed for its potential users. Secondly, proof is not defined in the Regulation; giving a proper definition for proof as a first provision of the Regulation would enhance it. Thirdly, even if its application is satisfactory, the time limit of three months is not always respected. Establishing a penalty system and favouring the use of new technologies would allow the reduction of delays.

[27] ECJ, *Costa v/ Enel*, 15 July 1964; ECJ, *Simmenthal*, 9 March 1978
[28] Professor Rostane Mehdi, *La preuve devant les juridictions communautaires*

Improving communication of the Regulation. It is essential that stakeholders in the European judicial scene know about the Regulation and how to use it properly. Such players are lawyers, judges, legal experts and complainants. A practical guide issued by the Commission should be broadcast more widely. For instance, the guide plus lectures given by professionals using this instrument would be addressed to judicial trainees and students preparing for the Bar.

Giving an official definition of proof in the Regulation. The 2001 Regulation deals with the taking of evidence between EU Member States without defining the main notion. Two different interpretations are possible: the concept of evidence may be understood by the law of one of the different States involved; or, the CJEU's own independent and autonomous interpretation may be used. In its report, the Commission promotes the second solution. We agree with this position, as we think that an official and Community-accepted definition of proof should be included in the Regulation. Indeed, the absence of a proper definition of proof is likely to provoke divergent interpretations. For example, in matters regarding paternity tests, blood or DNA tests are not always considered as evidence among different national laws. Similarly, in the decision *Tedesco v/ Fittings SrL*[29], the question arose as to whether a request concerning seizure for counterfeiting fell within the Regulation's competence or not.
As the goal of the Regulation is to favour the exchange of proof between Member States and to increase the effectiveness of EU law, the broadest definition of evidence must be retained. In its decision *Commission v/ Tetra Laval* of 15 February 2005[30], the ECJ stated that the essential function of evidence is "to establish convincingly the merits of an argument". More precisely, we can add that an element of proof is a means to convince the judge, through the demonstration of the existence of a fact or an act, respecting loyalty and adversarial principles. This official definition of evidence could be enacted at the beginning of the Regulation, as a foreword, in order to reinforce its coherence. We assume that it is not necessary to specify the nature of the different means of evidence that can be submitted to European judges, insofar as a free system of evidence does not request this.

Reducing the delays. Currently, the time limit of 90 days is relatively well respected, especially in the new Member States, which are even faster in their answer. Some other States take much longer to answer a request, sometimes up to six months. This attitude goes against the principles of a fair and prompt trial and hinders loyal cooperation between Member States. Two solutions may be considered to enhance the efficiency of the procedure.
On the one hand, a penalty system could be established in order to penalise countries taking too long in answering. The procedure would resemble an accelerated action for failure to fulfil obligations. In such

[29] CJEU, *TEDESCO v/ Fittings SrL*, 17 September 2007
[30] ECJ, *Commission v/ Tetra Laval*, 15 February 2005

a procedure, the Claimant State could bring the matter directly to the knowledge of the CJEU after having tried to find an amicable solution. A single judge, even though such a formation does not yet exist in the organisation of the CJEU[31], would have jurisdiction. The CJEU could automatically impose a fine, proportionately to the time taken beyond the time limit (for example, 1,000€ for each day's delay) on the sole grounds that the request was sent more than three months previously and amicable proceedings were sought. No hearing would be necessary.

On the other hand, new technologies should be used as far as possible in order to accelerate communication between the Claimant State and the Requested State. Videoconferencing is a good way to contact a national court directly and quickly. The problem is that national courts are not equally equipped in new technologies. Pursuing the action plan of November 2008 on European e-justice, a special budget could be dedicated to the creation of secured software, set up on a computer in each court in every Member State. This would also favour direct execution, enabling the Claimant State to proceed by itself with witness or expert testimony and, in the end, reduce the cost of justice. In this way, the requests would be dealt with faster and the principle of a prompt process respected.

Enacting basic principles with to regards evidence in Europe

The idea of enacting basic principles with regards evidence in Europe is not new. The STORME commission in the 1990's already evoked it. But harmonisation between European States has never been as important as it is nowadays; that is why this is a recurring question. The form, framework and content of such an act must be determined. The Charter must concern both litigants and the court in their attitude towards evidence. We shall provide an overview of the basic principles that we consider necessary. However we would like to add that this list is just a premise of what could be done.

Ratifying a Charter of principles on evidence in Europe. Scholars and practitioners who worked on the subject are quite unanimous that whatever the intervention by the EU in the matter of civil and commercial evidence, using the most flexible legal instrument that prevails in Community law would be the best solution. For instance, Maria FARTUNOVA and Professor Marcel STORME suggest the use of the directive insofar as it gives quite considerable leeway to EU Member States. Each sort of legal instrument presents advantages and drawbacks regarding its binding force and ease of ratification by the largest number of EU Member States to provide the broadest application. Thus, a Regulation is compelling for the State that signs it and any violation can be subjected to action before the CJEU. The effectiveness of such an instrument is therefore important. But, even if less efficient, a Charter would reveal a spirit of cooperation between States which voluntarily agree to unify part of their law on

[31] Rules of procedure of the ECJ of 19 June 1991

evidence. In practice, this would facilitate dealing with cross-border litigation while respecting Member State autonomy in procedural rules. Indeed, the judge would have guidelines to clarify his position towards evidence, and litigants' rights would be better ensured insofar as the need for final action before a Supreme Court would be reduced. That is why we suggest the signature of a Charter of principles on evidence in Europe. In our opinion, each principle would lead to commonly accepted and concrete practices.

Our study on the issue of evidence in Europe has made us realise that most common rules generally acknowledged by Member States have already been put forward, whether by CJEU or ECHR case law, and may be found in international judicial instruments such as EU law. They could easily be enacted to make the system of evidence more intelligible in cross-border litigation. Yet, more controversial principles could be discussed between Member States as to their potential insertion in the Charter. Let us take the example of the rule according to which admitted facts do not need to be proven. Not every State in the EU has adopted this basic rule even though it is quite rational and contributes to lightening judicial debate.

As far as the material application of the Charter is concerned, we consider that it could apply to national judges in cross-border litigation but also nationally on a wider scale, without substituting the already existing national rules of evidence. International judges' attitudes towards the admission of evidence before Community jurisdictions would also be affected by these general guidelines. The territorial application would depend on the ratification process by each Member State, according to international law.

For the implementation of the Charter, we assume that it might be possible to use the AFSJ, and more precisely, the European Judicial Training Network. The choice of the EJTN would be a way to harmonise the practices of national judges in the field of evidence, in a spirit of cooperation[32]. Naturally, proper communication from the EJTN and the different national schools of judicial training would be necessary.

Principles regarding the responsibilities of litigants. In this first part, issues as basic as the burden of evidence and the principles regulating litigant behaviour regarding the collection of evidence could be tackled.

- The universal rule according to which anyone who asserts something must also prove it could be enacted, except when specific binding law calls for a reversal. We are thinking here about the reversal of the burden of proof in discrimination matters. This principle is commonly applied before national and European judges.

[32] As exists for example in France with the "*Recueil des obligations déontologiques des magistrats*" edited by the High Council for the Judiciary, a collection of principles to be applied by French magistrates regarding their codes of conduct

- The need for cooperation between litigants should be highlighted through the consecration of the adversarial principle that would also entail the insertion of the duty to act loyally during the taking and producing of evidence. It is universally accepted that parties must have a right to discuss their opponent's evidence. Yet, parties cannot be deemed to spontaneously produce every piece of evidence before Court, especially not when said evidence might go against their claim. Nevertheless, the search for judicial truth implies that all elements relevant to the case are produced before the judge. Therefore, it could be suggested that parties should be encouraged to behave in a loyal way, for instance by avoiding the retention of a valuable piece of evidence for the matter in hand, the destruction of evidence, or the threatening of witnesses.
- The equal right to have access to means of evidence to sustain one's claim may be derived from the principle of equality of arms. Proving something might be very lengthy and costly, as we saw previously. Many expert testimony procedures last for months and cost a vast amount of money. In French procedure, the expenses for such expert testimony have to be covered by the parties themselves. Usually it is the litigant who asked for the report who covers the whole cost. Such a consideration might be detrimental to the right to a fair trial since many people will withdraw their claim rather than continue with it when faced with the idea of having to pay a lot of money. Thus, to facilitate access to evidence, a sum of money should be allotted to the winning party in order to cover evidence-seeking costs.
- The respect of fundamental rights ensured by Human Rights instruments is another principle that could help litigants' attitudes in the collection and production of evidence before Court. We have in mind the respect for private life (article 8 ECHR), or the right to be judged in a reasonable length of time.

Principles regarding responsibilities of the Court. Even though the role of the judge differs somewhat between Common law and Continental law systems, such differences seem to blend, since judges have been given a more and more active role over the years regarding the collection, production and admission of evidence. This is why we assume that an agreement on basic principles and guidelines on the role of the judge could be found.
- European judges should be able to regulate procedure length, once again in order to respect the right of litigants to be judged in a reasonable length of time. The possibility for a judge to draw up a calendar for the presentation of evidence could be mentioned.
- As the counterpart to litigant responsibility to cooperate loyally, the judge must oversee their behaviour. It could be suggested in the Charter that a judge should be able to order the taking of evidence via injunction, which exists in national and international courts of justice. Furthermore, damages could be ordered as a penalty for each day's delay in communicating evidence. The judge

would appreciate the amount of damages depending on the financial capabilities of the defendant. It could be added that the Court may impose sanctions on parties refusing to comply with orders concerning proceedings. The sanction might take the form of the risk that such attitude could be held against the litigant, or of a financial penalty. Further sanctions for severe or aggravated misconduct by parties, such as submitting perjured evidence, threatening witnesses or the destruction of evidence could also be taken.

- Based on the principle of mutual recognition, national lists of experts already existing in Member States could be recognised as legitimate when expert reports are used by other Member States. This would facilitate the use of expert testimony in cross-border litigation.
- Finally, the principle that inner conviction prevails in the assessment of evidence brought before the Court should be enacted. Consequently, whether in a free or legal system of proof, judges would have to measure the value of evidence according to their inner conviction. This would entail a duty to give the reason why they set aside an element of proof. A detailed opinion would therefore contribute to creating minimum common guidelines that would apply to all.

Ratifying such a Charter by European Member States would mean more legal certainty for litigants, and common guidelines to which all European judges, whether national or Community judges, would refer. Yet, the potentially weak binding effect of such a Charter reveals that EU institutions should take complementary measures and if necessary modify European Treaties. The Charter would just provide an initial step towards greater harmonisation of rules of evidence in Europe, and overall of civil procedure.

Conclusion

To conclude our study, the issue of evidence in Europe is a complex and sticky one, not yet tackled by European political and judicial institutions. Yet the paradox is huge. Evidence is so great a matter regarding the protection and enforcement of individuals' rights that it should not be left in such disarray. Coherence and harmonisation are therefore priority concerns to be worked on. At the moment, we suggest the promotion of minimum basic guidelines which could provide a useful tool in filling in for a lack of further unified civil procedure rules in the EU.

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