



BUNDESRECHTSANWALTSKAMMER

**Position
of the Bundesrechtsanwaltskammer
(The German Federal Bar)
on the Green Paper on the Presumption of Innocence
of 26 April 2006 (COM(2006)174)**

**drafted by the
Bundesrechtsanwaltskammer's
Criminal Law Committee**

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The German Federal Bar thanks the Commission for the opportunity to express its opinion.

The German Federal Bar is the self-regulatory body of the German legal profession. As the umbrella organisation it represents the 27 regional Bars and the Bar at the Federal Court of Justice which represent a total of currently approximately 138,300 lawyers in the Federal Republic of Germany.

I.

First of all, The German Federal Bar strongly supports the Commission's view that a common legal basis for the elaboration of binding minimum standards for the procedural rights of accused persons and defendants in criminal proceedings is to be deduced from Article 31 (1) (c) of the Treaty on the European Union (TEU). At present, Article 31 (1) (c) TEU is in any case the basis for all cross-border criminal cases. However, judicial cooperation that follows the principle of mutual recognition of national decisions taken by EU Member States will only attain the desired scope if the Member States can trust a particular judicial decision completely. The German Federal Bar believes that in order to establish such trust, it is absolutely necessary that decisions "are taken fairly" (cf. Green Paper p. 3), which in turn requires common and binding minimum standards, applied by all EU-Member States in their codes of criminal procedure. Any European criminal case can develop into a potential case requiring judicial cooperation according to the principle of mutual recognition. Therefore, The German Federal Bar shares the Commission's point of view to develop such binding minimum standards that apply to all criminal procedures in every EU Member State via an existing and sufficient legal basis.

In June 2004 The German Federal Bar expressed its critical view of the Proposal for a Framework Decision on the European Evidence Warrant (COM (2003) 688), pointing out that a common foundation of safeguards must be provided in order to guarantee the protection of individuals' rights, in particular with regard to the cross-border collection of evidence. The German Federal Bar also noted that minimum standards for the collection of evidence in a cross-border exchange of evidence are an indispensable precondition for mutual trust (Green Paper p. 5, question asked in 1.4).

II.

The German Federal Bar welcomes the fact that the Commission includes the presumption of innocence in its work on the elaboration of common evidence-based safeguards in the EU for the collection and use of evidence. However, we would like to take this opportunity to stress that first of all a precise catalogue of common minimum standards is needed for the rights for accused persons and defendants in EU criminal proceedings, starting with the right to be informed about the charges

brought against a person (including obligatory provisions with respect to advising the accused of his rights), the right of defence (consultation of a defence lawyer at every stage of proceedings) and the comprehensive right to remain silent at any moment of the proceedings, plus further aspects of the presumption of innocence. The German Federal Bar intends to submit a detailed paper on this issue in co-operation with the German Association of Judges and Public Prosecutors (Deutscher Richterbund). This paper will also deal with the question of *in absentia* proceedings.

III.

In the following, we shall elaborate on certain aspects of the presumption of innocence as addressed in the Green Paper. These individual aspects overlap and they interact. A reversal of the burden of proof could trigger an obligation to give evidence; the obligation to produce incriminating evidence would logically lead to self-incrimination; evaluating silence at the expense of the accused violates the accused person's right regarding liberty to testify.

Reversal of the burden of proof

From the European Court of Human Rights (ECtHR) case-law the authors of the Green Paper have identified three case scenarios where, according to national legislation, the burden of proof does not rest entirely on the prosecution:

- a) strict liability offences
- b) *prima facie* cases
- c) confiscation

The notion of strict liability offences does not exist in German criminal law. The differentiation of situations into types (a) and (b), as presented by the Green Paper, is not quite understandable to German lawyers. For both types, the Green Paper refers to the case of *Salabiaku v. France*. The circumstances of this case were the following:

The applicant had been found guilty of smuggling narcotics without proof of the applicant's awareness of the fact that he was bringing drugs into the customs territory. Under French law, "any person in possession" is presumed to be legally liable for smuggling. However, this presumption can be rebutted. In Germany, a similar provision would be contrary to the Constitution because it violates the "principle of guilt" (*Schuldgrundsatz*), according to which every conviction requires proof that the perpetrator has committed a criminal offence, that his action was unlawful and that he is guilty. For this reason – because it was incompatible with the principle that comprehensive proof of the accused person's guilt must be established - the German legislator abolished the rebuttable statutory rule of evidence which put the accused at a disadvantage, by introducing an introductory law (*Einführungsgesetz*) to the Criminal Code (EGStGB) on 02.03.1974 which entered into force on 01.01.1975. This statutory rule of evidence had previously applied to the offence of receiving stolen goods (*Sachhehlerei*).

Other difficulties arise from situations where certain exculpatory aspects are known (exclusively) to the accused. Where aspects indicating the accused person's guilt

exist, it may in fact be the accused person's or his lawyer's task to adduce and prove exculpatory facts. But this does not mean (legal) reversal of the burden of proof. The legal obligation to prove that an offence has been committed remains entirely with the judiciary, with both the prosecution as well as the courts having to examine and/or clarify exculpatory facts. Anyone accused of having committed an offence is considered innocent until the accused's guilt is legally proved. The statutory proof of the accused person's guilt is brought in the form of a final and absolute, i.e. non-appealable judgment.

Regarding the recovery of assets, German law only provides for a reduction of the standard of proof in the event of "*erweiterter Verfall*" (extended forfeiture, § 73 Criminal Code, *Strafgesetzbuch*, StGB), and only within narrow limits. Following the interpretation of this law in line with the Constitution, it is necessary for the judge to be unconditionally convinced of the assets' criminal origin (cf. Federal Constitutional Court, *Bundesverfassungsgericht*, *Neue Juristische Wochenschrift*, NJW, 2004, 2073). Lawyers do have concerns regarding the "*erweiterter Verfall*", but the principle of the presumption of innocence is probably still guaranteed despite this exemption which has been examined from a constitutional point of view.

Privilege against self-incrimination

An obligation to produce self-incriminating evidence and coercion to co-operate with the authorities during the pre-trial stage, may violate the right regarding liberty to testify and the privilege against self-incrimination, and may jeopardize the right to a fair trial. The Green Paper is right in referring to this problem in 2.4. However, there is a potential contradiction with the case-law of the ECtHR and the European Court of Justice (ECJ) (cf. Green Paper in 2.6). Unfortunately, the ECJ believes that legal persons may be ordered to produce documents. This collides with the right to refuse to give evidence of the legal person's representative organ (e.g. director, management board of a *Aktiengesellschaft* / public limited company) where there is a danger of this organ incriminating itself by giving truthful information. This problem is particularly clear in European antitrust laws. In accordance with Council framework regulation 1/2003 of 16.12.2002, the violation of a legal person's obligation to provide information about facts and to submit incriminating documents is sanctioned with a fine (may amount up to 1% of the previous year's turnover). Even if nobody may be compelled to admit to an infringement, the imposition of a fine as a sanction for not complying with the duty to provide information and to submit documents, leads to the end of the privilege against self-incrimination. This is a violation of the *nemo tenetur* principle.

Unfortunately, the German Federal Constitutional Court (*Bundesverfassungsgericht*) also denied the existence of a legal person's right to refuse to give evidence (cf. NJW 1997, 1841, 1844). It held that the right to refuse to incriminate oneself – which flows from Article 2 (1) in combination with Article 1 (1) of the Basic Law (*Grundgesetz*, GG) - does not apply to legal persons according to Article 19 (3) of the Basic Law because it does not affect human dignity – the fundamental principle underlying the right of silence. The German Federal Bar would like to recall that this judgment could (indirectly) compel the legal person's representative organ to incriminate itself and thus incriminate the respective natural persons. The accused person's right to testify

and the witness's right to refuse to testify (§ 55 Code of Criminal Procedure, *Strafprozessordnung*, StPO) must have priority in the individual case. This must be made clear, also at European level.

Right of silence

The Green Paper does not pay enough attention to the fact that the right of silence and human dignity are inseparable. Human dignity has highest constitutional rank not only in Germany (see also Article 1 of the EU Charter of Human Rights). According to established practice of the German Federal Constitutional Court and the Federal Criminal Court the accused person's right to refuse to give evidence, or the right to remain silent, is an absolute right insofar as the exercise of this right is neither subject to any kind of evaluation nor to employment against the accused person. From a human dignity point of view, the accused is not a (mere) object of proceedings, but a subject with procedural rights. To summarize briefly: There must be a (absolutely protected) possibility for the accused to behave in a neutral manner, without the court viewing this behaviour negatively or evaluating it to the accused's disadvantage.

Regarding the scope of the right of silence, on the other hand, the Green Paper only refers to ECtHR case-law and states that the right of silence is not an absolute right. Using the case of *Murray v. UK* as a catchword, it states that adverse inferences from an accused's silence should only be permissible after the prosecution has made out a prima facie case. It was then at the court's discretion to draw inferences; but only those that were "common sense inferences are permissible". The evidence against the accused had to be "overwhelming". In that case, evidence obtained using (indirect) pressure could be used. Only if the evidence against the accused "called" for an explanation which he ought to be able to give, then a failure to do so could as a matter of common sense allow the drawing of an inference that there was no explanation and that the accused was guilty.

The German Federal Bar rejects the way of reasoning vigorously. It violates human dignity and is unconstitutional according to German law. The Commission deduces the authorization to restrict the right of silence from the *Murray* case, despite the fact that in this case the accused's silence had no importance in the evaluation of the evidence. The Court had not drawn conclusions from the accused's silence, but from other circumstances that were evident and could be used without objections from a procedural point of view. There are two other, more recent ECtHR decisions – not mentioned in the Green Paper – which limit the criteria established by the ECtHR in the *Murray* case considerably.

In the case of *Condron v. UK* (ECtHR Third Section of 2.5.2000, Reports 2000-V no. 56) the Court held that there had been a violation of Article 6 (1) of the ECHR since the trial judge had directed the jury in accordance with the relevant specimen direction at the time, but that this specimen had disregarded the observations made by the Court in the *Murray v. UK* judgment. In its judgment on *Telfner v. Austria* (ECtHR Third Section of 20.03.2001) the Court held that, in principle, neither legal presumptions nor inferences drawn from the accused's silence were incompatible with Article 6 ECHR. In the case in question, however, the Court could not find that

the elements of evidence which were moreover not corroborated by evidence taken at the trial in an adversarial manner, would have called for an explanation from the applicant. In requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the courts had shifted the burden of proof from the prosecution to the defence. According to the Court, this constitutes a violation of Article 6 (2) ECHR, i.e. a violation of the presumption of innocence.

The German Federal Bar underlines that the ECtHR's judgments are unsuitable for the use as guidelines for the establishment of minimum standards for criminal procedure since the Court necessarily makes these judgments in retrospect, i.e. from an *ex post* control perspective, taking into account the entirety of all national criminal proceedings. This means that possible infringements resulting from subsequent control mechanisms of national law can be compensated to the effect that ultimately the ECtHR denies a violation of Article 6 ECHR.

“The accused’s right of silence, derived from human dignity, would be an illusion if the accused had to fear that his silence will be used against him later, when the evidence is evaluated. Using silence to prove the accused’s guilt would indirectly put the accused under an inadmissible mental compulsion to give evidence” (*Bundesverfassungsgericht* NStZ 1995, 555).

Article 14 (3) (g) of the International Covenant on Civil and Political Rights states:

*(.. everyone shall be entitled to the following minimum guarantees, in full equality):
Not to be compelled to testify against himself or to confess guilt.”*

Therefore, The German Federal Bar believes that – on the basis of the intended joint position paper with the German Association of Judges - the following must apply in the present matter:

- The accused has the right to refuse to testify or to testify at any moment of the criminal procedure. He must be advised to this effect. The right to refuse to testify also applies to his personal information provided it does not serve identification purposes.
- Full exercise of the right to refuse to testify must not be used to the accused’s disadvantage.
- The accused’s right to refuse to testify in criminal proceedings must be safeguarded by the fact that he must not be compelled to incriminate himself when he is heard as a witness in another case.
- The accused’s right to refuse to testify must not be violated by his obligations to cooperate in criminal proceedings. His obligations to tolerate remain unaffected.
- In principle, secret investigation measures do not violate the accused’s right of silence.
- Any person accused of an offence is considered innocent until legal evidence proves his guilt.
- Legal proof of the accused person’s guilt is provided in any case by a final declaration of guilt made by the judge.

- In principle, the presumption of innocence is not opposed to rules on the reduction of the standard of proof in cases regarding the recovery of assets. However, the content and application of such reductions must follow the maxim of the presumption of innocence.
- The presumption of innocence does not oppose preliminary measures undertaken to elucidate an offence, to protect the conduct of proceedings and to safeguard the expected sanction, or to avert danger. However, their content and application must follow the maxim of the presumption of innocence.
- Where the accused is not convicted, major encroachments for prosecution purposes (e.g. deprivation of liberty) in principle give rise to a compensation claim.