

# Breaking the Chinese Walls: The Need for Cross-Border and Cross-Disciplinary Rules on Forensic Evidence

## Editorial

Scientific standardisation is a term requiring anything but further clarification. Both in legal and in scientific environments, the development of scientific standards has been strongly encouraged for quite some time. From a scientific point of view, efforts have been made both on a European and a global scale. The endeavours undertaken by the ENFSI (European Network of Forensic Science Institutes) Working Groups and Standing Committees (especially the Quality and Competence Committee) as well as actions by the organisations engaged at a geographically larger level, such as the ISO (17025 Accreditation requirement for testing laboratories) slowly find their way to the pencil of the European legislator. However, as the latter continues to focus predominantly on DNA evidence - turning a blind eye to the vast range of other forensic disciplines-European 'legislating' of scientific standards remains rather limited altogether.

From a legal point of view, the importance of scientific standards should not be underestimated or disregarded, since how and by whom forensic evidence has been gathered impacts upon the subsequent (non-)acceptance thereof in court. Explicit admissibility criteria have been developed in the US. In particular, the cases of *Frye v. the United States* (1923) and *Daubert v. Merrel Dow Pharmaceuticals, Inc.* (1993) served as pioneers in the continuous discussion on both the conditions for legal admissibility and the person(s) competent to decide on this. Whilst common law regimes such as England have followed this lead, other European legal systems work with an inconsistent and confusing set of implicit criteria that might affect the acceptance of the forensic evidence in the courtroom, but might just as well be passed on to the judge and merely influence (at best) its probative value.

The lack of European reflection on admissibility criteria is regrettable, particularly in view of the relentless attempts to ascertain mutual admissibility of evidence on a European level. In line with the mutual recognition principle in criminal matters, introduced at the 1999 Tampere Summit, the European Commission has already in 2003 voiced the idea that evidence lawfully gathered in one member state should be admissible before the courts of other member states. Until date, such free circulation or free movement of evidence has not been realized. Over the years, both the European legislator and scholars have stressed the importance of mutual admissibility of evidence for the forensic field. In 2009, the Stockholm Programme linked the idea to the development of common forensic quality standards, a change that should be seen in the context of the new competences granted by the 2007 Lisbon Treaty. Since this Treaty, Article 82.2 of the Treaty on the Functioning of the European Union (TFEU) makes it possible for the European legislator(s) to achieve mutual admissibility of evidence through harmonization by introducing common binding legal minimum standards in the domestic legal orders of the member states. Free movement of

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forensic evidence thus being both desired and legally possible, the question invariably arises as to why no break-through has been reached until date.

The essential hurdle for mutual cross-border admissibility of forensic evidence seems to be the requisite cooperation between the scientific and the legal communities, since both lay down requirements which, if not observed, may lead to rejection of the evidence in court. Quite obviously, the quality of forensic investigation, in terms of both forensic investigators/researchers and measures/techniques, is key. In addition, however, traditional legal principles of investigation in criminal matters need to be complied with, hence creating an equilibrium between the competences of crime-fighting authorities on the one hand and the (defence) rights of 'affected' individuals on the other. A combined cross-disciplinary (scientific-legal) approach will likely depend on the successful integration of four components in the envisaged minimum standards.

From a scientific point of view, admissibility depends on the quality of the actions performed and the actors performing them. Firstly, the 'actions performed' refer to both the standards for forensic examination (treatment of materials tested and analytical techniques used to gather or examine certain materials) as well as the interpretation of the forensic examination results. All of these elements should be sufficiently regulated in order to consider the evidence resulting from these actions scientifically reliable. Secondly, forensic evidence cannot be considered qualitative insofar the actors performing the actions concerned are not capable and/or competent to do so. Within this context, 'actors' are to be interpreted in a broad manner. Not only the proficiency of individual investigators/researchers gathering or analysing the forensic evidence (which depends on their education, training and experience), but also of the laboratory or the federation in which they function determine the reliability and objectivity of the evidence.

From a legal point of view, an equilibrium or fair balance between government and individual is a necessary prerequisite for legal admissibility. Firstly, the objective law implies that the government should be granted a certain degree of flexibility in adopting procedural rules, but sees its discretionary competences limited by the traditional 'proportionality principle'. With regard to forensic evidence, this principle will for instance imply that preservation of DNA samples is possible but cannot be arbitrary or for non-legitimate purposes (see also the ECHR-case of *S. and Marper v. the United Kingdom* of 4 December 2008). Secondly, whenever a forensic investigative measure has passed the first legal test and can be executed, the individual affected by this measure should be granted sufficient subjective or defence rights in order to consider the criminal proceedings fair. This is where the cornerstones protecting the individual's legal position

(such as the right not to incriminate oneself or to be properly informed) must be situated. These procedural safeguards are closely connected with the reliability component mentioned above, as the lack of such safeguards may cast doubt on the 'legal' reliability of the actions performed, relating for instance to the possibility of retesting a sample and the possibility of a reliability assessment by a legal authority.

Not with standing efforts undertaken in both legal and scientific spheres, a great deal of work remains to be done before mutual cross-border admissibility of forensic evidence becomes reality. For both science and the law to overcome one's own boundaries and to join forces is urgent. The above-sketched four component approach seems the way to go, in particular for the EU, probably on a more global scale.