

THE EUROPEAN JUDICIAL AREA IN PRACTICE: "EVIDENCE IN CRIMINAL
PROCEEDINGS FOR SERIOUS TRANS-NATIONAL CRIME

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Questionnaire regarding evidence-collecting methods within the different Member States of the European Union

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A. Instructions

The aim of this questionnaire is to provide detailed and up-to-date information concerning certain activities which take place during the investigation stages of criminal proceedings, prior to trial. These include certain restrictions on fundamental rights, collecting certain effects and instruments used in the crime, and evidence sources, as well as advancing and pre-establishing evidence in each of the Member States of the European Union. The aim is to assess compatibility and propose a set of minimum standards ensuring that the collection of evidence in one Member State shall have the probative value in an open criminal case in another Member State.

To this end, a team of Spanish researches, led by Dr. Luis Arroyo Zapatero, Professor and Director of the Institute of European and International Criminal Law (Universidad Castilla-La Mancha, Spain), along with Víctor Moreno Catena (Professor in Procedural Law, Universidad Carlos III de Madrid, Spain), Vicente Carlos Guzmán Flujá (Professor in Procedural Law, Universidad Pablo de Olavide, Seville, Spain), Gonzalo Quintero Olivares (Universidad Rovira i Virgili, Tarragona, Spain), José Antonio Colmenero (Senior University Lecturer in Procedural Law, Universidad Carlos III de Madrid, Spain), Amaya Arnaiz (Assistant Lecturer, Universidad Carlos III de Madrid, Spain), Ignacio Flores Prada (Senior University Lecturer in Procedural Law, Universidad Pablo Olavide, Seville, Spain), Emilio de Llera Suárez-Bárcena (Coordinating Prosecutor at the Seville Provincial Criminal Court, Spain), Asunción Rivas (Clerk, Barcelona Provincial Criminal Court, Spain), José Luis Albiñana (Prosecutor at the Barcelona Provincial Criminal Court, Spain), Rocío Zafra Espinosa de los Monteros (Assistant Lecturer, Universidad Pablo de Olavide, Seville, Spain) and Marta M. Morales Romero (Intern, Institute of European and International Criminal Law (Universidad Castilla-La Mancha, Spain) have drawn up this questionnaire in order to establish, with the help of experts from each of the Member State countries, a general framework regarding the different evidence-collecting methods within the European Union. Also participating in this project is Centre for Legal Studies pertaining to the Spanish Ministry of Justice and the prestigious German Institute Max Planck.

Please fill out this questionnaire in either English or French and return it to the following e-mail address: Marta.MMorales@uclm.es. However, should you have any doubts regarding the questionnaire; you may contact the author of each questionnaire directly:

- 1. Hearing of Witnesses, Experts and Suspects.** José Antonio Colmenero Guerra. Tel: +34 616099839. E-mail: jcolmene@der-pu.uc3m.es and acolgue@upo.es.
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Asunción Ribas.

8. Genetic Markers. José Luis Albiñana.

The questionnaire must be completed and returned at any time between 1 October and 1 November 2005. Should you be unable to do so within the set timeframe, please contact us as soon as possible.

As indicated above, the information collected from each questionnaire will be processed and used to draw up a practical guide in Spanish and English which will include a set of proposals and common standards for the collection of evidence in criminal proceedings.

B. Preliminary Questions

1. Has the Convention on Mutual Assistance in Criminal Matters been ratified by your country? Yes.

- If so,

a. Has your country made any reservation or unilateral statement?
Yes.

b. If you know of any specific example, could you please relay it to us?
Article 7 (3): Service of a summons on an accused person will only be effected if it is transmitted to Austrian authorities by 30 days before the date set for appearance.

Article 11: Transfer of a person in custody as a witness or for purposes of confrontation will be refused in the cases stated in article 11 paragraph 1 lit. a, b and c.

- If not so, do you believe that your country has the intent to ratify it?

2. Has your country ratified the 2000 Convention Protocol? Yes.

- If so,

a. Has your country made any reservation or unilateral statement?
no

b. If you know of any specific example, could you please relay it to us?

- If not so, do you believe that your country has the intent to ratify it?

3. A proposal of framework decision relating to evidence warrant has been made recently. Do you know of any discussions being conducted in your country over its constitutionality or legality? ---

4. Do you know if the framework decision on the execution of orders freezing assets or evidence in the European Union...

a. ... has been implemented by your country? ----

b. ... is being discussed in your country in terms of constitutionality or legality? ---

C. Specific Methods of Cooperation

1. Hearing of witnesses and experts and defendants' depositions

José Antonio Colmenero Guerra. Senior University Lecturer in Procedural Law,
Universidad Carlos III de Madrid (Spain)

Witnesses

I. National Regulations

1. Constitutional Regulations

A) Does your country's Constitution contain any provisions regarding witnesses and the protection of witness' rights? No.

B) If so, could you please transcribe them?

C) If there is any case-law in your country regarding the aforementioned regulations, could you please indicate the most fundamental cases?

2. Legal or Statutory Regulations

A) Does your country have any legal or statutory regulations concerning the questioning of witnesses and the protection of witness' rights in the course of a criminal investigation? Yes.

B) If so, could you please transcribe them, indicating the date of their publication, status, the legal body that they belong to, as well as the scope in which such protection is granted?

All regulations concerning the questioning of witnesses are determined in the Code of Criminal Procedure (StPO) which was enacted by parliament in 1873. New regulations regarding the questioning of children and of victims of sexual offences were established in 1993.

At this point it is important to state that as of January 1, 2008, there will be completely new regulations of criminal investigations. What I have transcribed in this questionnaire is the law that currently has to be applied.

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XIII. Hauptstück

Von der Vernehmung der Zeugen

§ 150. In der Regel ist jeder, der als Zeuge vorgeladen wird, verpflichtet, der Vorladung Folge zu leisten

und über das, was ihm vom Gegenstande der Untersuchung bekannt ist, vor Gericht Zeugnis abzulegen.

§ 151. (1) Als Zeugen dürfen bei sonstiger Nichtigkeit ihrer Aussage nicht vernommen werden:

1. Geistliche über das, was ihnen in der Beichte oder sonst unter dem Siegel geistlicher Amtsverschwiegenheit anvertraut wurde;

2. Staatsbeamte, wenn sie durch ihr Zeugnis das ihnen obliegende Amtsgeheimnis verletzen würden, insofern sie dieser Verschwiegenheitspflicht nicht durch ihre Vorgesetzten entbunden sind;

3. Personen, die zur Zeit, in der sie das Zeugnis ablegen sollen, wegen ihrer Leibes- oder Gemütsbeschaffenheit außerstande sind, die Wahrheit anzugeben.

(2) Der Schutz der geistlichen Amtsverschwiegenheit nach Abs. 1 Z 1 darf bei sonstiger Nichtigkeit nicht umgangen werden, insbesondere nicht durch Überwachung einer Telekommunikation oder durch Überwachung von Personen unter Verwendung technischer Mittel oder durch Überwachung in Beichtstühlen oder Räumlichkeiten, die zur geistlichen Aussprache bestimmt sind.

§ 152. (1) Von der Verbindlichkeit zur Ablegung eines Zeugnisses sind befreit:

1. Personen, die sich durch ihre Aussage der Gefahr strafgerichtlicher Verfolgung aussetzen würden oder die im Zusammenhang mit einem gegen sie geführten Strafverfahren Gefahr liefen, sich selbst zu belasten, auch wenn sie bereits verurteilt worden sind;

2. Personen, die im Verfahren gegen einen Angehörigen (§ 72 StGB) aussagen sollen oder deren Aussage die Gefahr strafgerichtlicher Verfolgung eines Angehörigen mit sich brächte, wobei die durch eine Ehe begründete Eigenschaft einer Person als Angehöriger aufrecht bleibt, auch wenn die Ehe nicht mehr besteht;

2a. Personen, die durch die dem Beschuldigten zur Last gelegte strafbare Handlung in ihrer Geschlechtssphäre verletzt worden sein könnten, sofern die Parteien Gelegenheit hatten, sich an einer vorausgegangenen gerichtlichen Vernehmung zu beteiligen (§§ 162a, 247);

3. Personen, die zur Zeit ihrer Vernehmung das vierzehnte Lebensjahr noch nicht zurückgelegt haben und durch die dem Beschuldigten zur Last gelegte strafbare Handlung verletzt worden sein könnten, sofern die Parteien Gelegenheit hatten, sich an einer vorausgegangenen gerichtlichen Vernehmung zu beteiligen (§§ 162a, 247);

4. Verteidiger, Rechtsanwälte, Notare und Wirtschaftstreuhänder über das, was ihnen in dieser Eigenschaft bekannt geworden ist;

5. Psychiater, Psychotherapeuten, Psychologen, Bewährungshelfer, eingetragene Mediatoren nach dem Zivilrechts-Mediations-Gesetz, BGBl. I Nr. 29/2003, sowie Mitarbeiter anerkannter Einrichtungen zur psychosozialen Beratung und Betreuung über das, was ihnen in dieser Eigenschaft bekannt geworden ist.

6. jedermann darüber, wie er sein Wahl- oder Stimmrecht ausgeübt hat, wenn dessen Ausübung gesetzlich für geheim erklärt ist.

(2) Den in Abs. 1 Z 4 und 5 erwähnten Personen stehen deren Hilfskräfte und jene Personen gleich, die zur Ausbildung an der berufsmäßigen Tätigkeit teilnehmen.

(3) Das Recht der in Abs. 1 Z 4 und 5 sowie in Abs. 2 erwähnten Personen, sich des Zeugnisses zu entschlagen, darf bei sonstiger Nichtigkeit nicht umgangen werden.

(4) Steht eine als Zeuge vorgeladene Person nur zu einem von mehreren Beschuldigten in einem der vorstehend erwähnten Verhältnisse, so kann sie sich des Zeugnisses hinsichtlich der anderen nur dann entschlagen, wenn eine Sonderung der Aussagen, die die anderen betreffen, nicht möglich ist. Gleiches gilt, wenn sich der Grund für die Zeugnisentschlagung nur auf einen von mehreren Sachverhalten bezieht.

(5) Der Untersuchungsrichter hat die in den Abs. 1 und 2 erwähnte Personen vor ihrer Vernehmung oder sobald der Grund für die Zeugnisbefreiung bekannt wird, über ihr Entschlagungsrecht zu belehren und ihre darüber abgegebene Erklärung in das Protokoll aufzunehmen. Hat der Zeuge auf sein Recht, sich des Zeugnisses zu entschlagen, nicht ausdrücklich verzichtet, so ist seine Aussage nichtig.

§ 153. (1) Wenn die Ablegung des Zeugnisses oder die Beantwortung einer Frage für den Zeugen oder einen seiner Angehörigen (§ 152 Abs. 1 Z 2) Schande oder die Gefahr eines unmittelbaren und bedeutenden vermögensrechtlichen Nachteils mit sich brächte, und er deshalb das Zeugnis verweigert, so soll er nur zum Zeugnis verhalten werden, wenn dies wegen der besonderen Bedeutung seiner Aussage unerlässlich ist.

(2) Eine durch eine strafbare Handlung in ihrer Geschlechtssphäre verletzte Person kann die Beantwortung von Fragen nach Umständen aus ihrem höchstpersönlichen Lebensbereich sowie nach Einzelheiten der strafbaren Handlung, deren Schilderung sie für unzumutbar hält, verweigern. In diesem Fall ist nach Abs. 1 vorzugehen.

(3) Sobald sich Anhaltspunkte für die Möglichkeit einer Zeugnisverweigerung nach Abs. 1 oder 2 zeigen, hat der Untersuchungsrichter den Zeugen hierüber zu belehren.

§ 154. Personen, die durch Krankheit oder Gebrechlichkeit vor Gericht zu erscheinen verhindert sind, können in ihrer Wohnung vernommen werden.

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§ 162. (1) Jeder Zeuge wird vom Untersuchungsrichter in der Regel ohne Beisein des Anklägers, des Privatbeteiligten, des Beschuldigten, ihrer Vertreter oder anderer Zeugen einzeln vernommen.

(2) Auf Verlangen des Zeugen ist jedoch einer Person seines Vertrauens die Anwesenheit bei der Vernehmung zu gestatten. Auf dieses Recht ist in der Vorladung hinzuweisen. Als Vertrauensperson kann ausgeschlossen werden, wer der Mitwirkung an der strafbaren Handlung verdächtig oder am Verfahren beteiligt ist oder besorgen läßt, daß seine Anwesenheit den Zeugen bei der Ablegung einer freien und vollständigen Aussage beeinflussen könnte.

(3) Der Vernehmung eines noch nicht Vierzehnjährigen, eines psychisch Kranken oder geistig Behinderten ist, soweit es in dessen Interesse zweckmäßig ist, jedenfalls eine Person seines Vertrauens beizuziehen.

§ 166a. Ist auf Grund bestimmter Tatsachen zu befürchten, daß der Zeuge sich oder einen Dritten durch die Bekanntgabe des Namens und anderer Angaben zur Person (§ 166 Abs. 1) oder durch die Beantwortung von Fragen, die Rückschlüsse darauf zulassen, einer ernsten Gefahr für Leben, Gesundheit, körperliche Unversehrtheit oder Freiheit aussetzen würde, so kann ihm der Untersuchungsrichter gestatten, solche Fragen nicht zu beantworten.

C) Could you please summarise your country's courts' case-law regarding the hearing of witnesses and the protection of witness' rights? ---

D) Do you consider that your country's legislation satisfactorily or sufficiently covers the issue of hearing of witnesses and the protection of witness' rights?

E) Do you know of any reform project or initiative in your country's regulations regarding the hearing of witnesses and the protection of witness' rights?

F) If so, could you please indicate the justification for such reform and the general direction such reform would take?

3. Grounds for Hearing of Witnesses

A) Subjective Grounds

a) Who in your country can determine whether a witness should be questioned in the course of a criminal investigation or trial?

In criminal investigations witnesses are generally questioned by the investigating magistrate. The public prosecutor may also ask the police to question witnesses (which also is a general practice), however, nobody is obliged to answer to the police.

b) If the hearing of witnesses can be determined by different authorities, in what situations and under what conditions may the different authorities do so? ---

c) When the hearing of a witness is determined by someone other than a court, does it affect the probative value of the sources and the evidence obtained from the witness's deposition? Does the stage at which the proceedings are at affect the probative value of the evidence? Under what safeguards should the deposition be obtained from?

There is no difference between the probative value of a witness's deposition to the police and his / her deposition before the investigating judge.

d) Who in your country may request from the authorities that a witness provide a deposition? Can the witness provide a deposition voluntarily? Does it depend on the stage of the process as to whom and how it may be determined?

In the Austrian Code of Criminal Procedure there are two forms of criminal investigation: "Voruntersuchung" in the case of a serious crime and when the suspect is held in custody and "Vorerhebung" in all other cases. In the course of a "Voruntersuchung" the investigating magistrate decides who has to provide a deposition as a witness.

In the case of "Vorerhebung" the public prosecutor may ask the police or the investigating magistrate to question witnesses.

If a witness voluntarily provides a deposition, she / he is usually questioned. However, the law does not provide specific rules for this case.

B) Objective Grounds

a) Who in your country may act as a witness in the course of a criminal investigation or trial?
See section 151 StPO. Persons who due to their mental or physical condition are unable to report what they have experienced, must not act as a witness.

b) Can the witness appear in person or provide a written deposition? The witness has to appear in person.

c) Could you tell us what your country's legal system defines as a *witness* in a criminal trial? Is the victim also considered a witness? Every person who is considered to be able to report about facts that are of importance for the investigation, is a witness. The victim is also considered a witness.

d) Are witnesses obliged to appear before the court and provide a deposition? Are there witnesses who are not obliged to do so (that is, both appear before an official and provide a deposition)? Are there witnesses who are not obliged to appear before the court but, yet, are obliged to provide a deposition (the deposition being given somewhere else or in writing)? Are there witnesses who are obliged to provide a deposition but not appear before the court?

In the pre-trial investigation every witness who is summoned by the investigating magistrate is obliged to appear before the court. In the cases mentioned in sections 152 and 153 StPO the witness may refuse making a deposition. This applies to relatives, lawyers, therapists of the accused person and to person who by a truthful deposition would put themselves in the danger of criminal prosecution, as well as to persons who have to keep official secrecy or the seal of confession (priests).

It is not possible to make a deposition without appearing before the court.

e) What penalties does your country's legislation provide for in the case of non-compliance with the aforementioned obligations? If a witness does not appear before the court he / she may be fined and brought before the judge by the police. If he / she without sufficient reason refuses to make a deposition he / she may be fined or – in important cases – arrested for up to six weeks.

f) Is it possible to compare depositions provided from other witnesses or from the defendant if there are discrepancies in the depositions? Yes, this is possible.

4. The Hearing Process

A) Who in your country may determine whether a witness should provide a deposition in the course of an investigation prior to the opening of a criminal trial (for example, is it the Police or the Department of Public Prosecutions)? If so, who, according to your national legislation, must be present during the questioning process? In addition to those who must be present during the questioning process, does your country's legislation provide for the possible presence of anyone else? If so, could you please indicate who?

This is determined by the investigating judge.

Only the investigating judge must be present during the questioning process. Every witness has the right that a person enjoying his / her confidence is also present at the hearing (see section 162 paragraph 2 StPO)

Children and victims of sexual offences shall in the pre-trial investigation be questioned in the presence of the prosecutor and the defence attorney. In this case the witness may refuse to make a deposition in the main trial and his / her deposition before the investigating magistrate may be read out in the main trial.

B) In the above-mentioned case, what effect would the absence of one of the persons who are required to be present have on the questioning process? If the persons were duly summoned to the hearing before the investigating magistrate, their absence has no consequences.

C) When the hearing is conducted by a court, who, according to your country's legislation, must be present during the questioning? In addition to those who must be present during the questioning process, does your country's legislation provide for the possible presence of anyone else? If so, could you please indicate who? See item A.

D) In the above-mentioned case, what effect would the absence of one of the persons who are required to be present have on the hearing process? See item B.

E) Could you briefly describe the procedure for hearing of witnesses; that is, how it is conducted and the potential restrictions to the procedure (leading or suggestive questions), as well as questioning by other people involved in the process?

The witness answers the magistrate's questions. Suggestive questions shall not be asked.

F) Does your country's legislation require that the hearing of the witness be documented?

The hearing must be documented in a written record which has to be signed by the witness.

G) If so, how must the hearing process be documented and who is responsible for doing so? The investigating magistrate may work with a secretary who is responsible for the written record. If there is no secretary present, the record is the magistrate's responsibility.

H) Must the person to be questioned be notified that he/she is to be questioned? Yes. He / she has to be informed in advance.

I) If so, what measures and safeguards does your country's legislation provide for as regards the witness's rights? There are no special safeguards.

5. Probative value of hearing of witnesses

A) Do the witness's depositions in your country go through a *legal* or *open* assessment system?

There is no legal assessment system for witness's depositions.

B) How are the data, sources and evidence that have been collected from the hearing of the witness presented in court? Can they be rebutted?

Generally the witness must be heard personally in the main trial. Exceptions: see item 4 A

C) How does the issue of inadmissible or forbidden evidence work in your country with regard to the hearing of witnesses? Inadmissible or forbidden evidence must not be used as evidence in the main trial. If the conviction should be based on such evidence this would be a reason for nullity of the verdict.

Experts

I. National Regulations

1. Constitutional Regulations

A) Does your country's Constitution contain any provisions relating to experts and the safeguard of experts? No.

B) If so, could you please transcribe them? ---

C) If there is any case-law in your country regarding the aforementioned regulations, could you please indicate the most fundamental cases? --

2. Legal or Statutory Regulations

A) Does your country have legal or statutory regulations concerning the deposition (report) of an expert and the protection of experts in the course of a criminal investigation or trial? Yes.

B) If so, could you please transcribe them, indicating the date of their publication, status, the legal body that they belong to, as well as the scope in which such protection is granted? See item 2 B (witnesses)

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Abkürzung

StPO

Text

§ 124. Die Angaben der Sachverständigen über die von ihnen gemachten Wahrnehmungen (Befund) sind vom Protokollführer sogleich aufzuzeichnen. Das Gutachten samt dessen Gründen können sie entweder sofort zu Protokoll geben oder sich die Abgabe eines schriftlichen Gutachtens vorbehalten, wofür eine angemessene Frist zu bestimmen ist.

§ 125. Ist der Befund dunkel, unbestimmt, im Widerspruche mit sich selbst oder mit erhobenen Tatumständen oder weichen die Angaben zweier Sachverständiger über die von ihnen wahrgenommenen Tatsachen erheblich voneinander ab, und lassen sich die Bedenken nicht durch eine nochmalige Vernehmung beseitigen, so ist der Augenschein, sofern

es möglich ist, unter Zuziehung desselben oder derselben Sachverständigen zu wiederholen. Erforderlichenfalls können an ihrer Stelle andere Sachverständige zugezogen werden.

§ 126. (1) Ergeben sich solche Widersprüche oder Mängel in bezug auf das Gutachten oder zeigt sich, daß es Schlüsse enthält, die aus den angegebenen Vordersätzen nicht folgerichtig gezogen sind, und lassen sich die Bedenken nicht durch eine nochmalige Vernehmung der Sachverständigen beseitigen, so ist das Gutachten eines anderen oder zweier anderer Sachverständiger einzuholen.

(2) Handelt es sich um eine Begutachtung psychischer Zustände und Entwicklungen, so ist in einem solchen Fall das Gutachten eines Sachverständigen mit Lehrbefugnis (venia docendi) an einer in- oder ausländischen Universität einzuholen.

C) Could you please summarise your country's courts' case-law regarding the deposition (report) and protection of experts?

D) Do you consider that your country's legislation satisfactorily or sufficiently covers the issue of deposition and protection of experts?

E) Do you know of any reform project or initiative in your country's regulations regarding the depositions and protection of experts?

F) If so, could you please indicate the justification for such reform and the general direction such reform would take?

3. *Grounds for using the deposition of an expert*

A) Subjective Grounds

a) Who in your country can determine if the deposition (report) of an expert may be used in the course of a criminal investigation or trial? The investigating magistrate

b) If the use of an expert's deposition (report) may be determined by different authorities, in what situations and under what conditions may the different authorities do so? ---

c) When the use of an expert's deposition (report) is determined by someone other than a court, does it affect the probative value of the sources and the evidence obtained from the deposition? Does the stage at which the proceedings are at affect the probative value of the evidence? Under what safeguards should the deposition be obtained from? ---

d) Who in your country may request from the authorities that an expert's deposition (report) be provided? Can it be provided voluntarily? Does it depend on the stage of the process as to whom and how it may be provided? The court alone decides whether an expert is to be heard.

B) Objective Grounds

a) Who in your country may act as an expert in the course of a criminal investigation or trial?
Qualified experts are registered in lists that are recorded by the courts. The courts are also entitled to appoint experts who are not registered in these lists.

b) Must he/she be a qualified expert? Yes.

c) Could you tell us what your country's legal system defines as an *expert* in a criminal trial?
An expert is a qualified specialist appointed by the court to give an expert opinion.

d) Are experts required to work in their specialist field? Are there certain experts that are not required to do so? There is no law that requires that experts work in their specialist field.

e) What penalties does your country's legislation provide for an expert's non-compliance with his/her obligations? The expert can be fined to a maximum of EUR 1,000.- or cancelled from the list mentioned under item Ba).

f) May the expert's depositions (reports) be compared to those of other experts in your country? ¿How many reports are required? Generally only one expert is appointed. In difficult cases or when the first expert's report seems inconclusive to the court, one or two other experts shall be appointed.

4. *The hearing process*

A) Who in your country may determine that an expert's report be used in the course of a criminal investigation or prior to the opening of a criminal trial (for example, is it the Police or the Department of Public Prosecutions)? The investigating magistrate.

B) Is there any difference between the reports being submitted to court during the investigation stages and being submitted during the oral proceedings? Who, according to your country's legislation, must be present during the hearing process, depending at which stage the trial is at? In the pre-trial investigation the expert makes a written report. His oral hearing takes place in the main trial.

C) In the aforementioned case, what effect could the absence of any of the persons who are required to be present have on the process of giving a deposition according to your country's legislation? ---

D) Can the expert's deposition be challenged? When and for what reasons may it be challenged? During pre-trial investigation there are no regulations for challenging the expert's opinion.

E) Could you please briefly describe the procedure for an expert providing a deposition (report) with regard to the role of the proper authorities and possible restrictions, as well as the role of anyone else involved in the process?

The expert is always appointed by the investigating magistrate. If, in the case of "Vorerhebungen" (see Witnesses, item 3Ad) the public prosecutor demands an expert's report, the investigating magistrate has to appoint an expert. The expert provides a written report.

F) Does your country's legislation require that the expert's deposition (report) be documented (ratified/verified)? The expert either makes a written report or an oral report in the course of the inspection of the scene of the accident or crime. In the latter case his report is documented by the court under the responsibility of the investigating magistrate.

G) If so, how must it be documented and who is responsible for doing so? See item F.

H) Does your country's legislation require that the expert be notified that he/she must provide a deposition? Yes.

I) If so, what protection measures does your country's legislation provide for such experts?
There are no such regulations.

5. Probative value of the expert's deposition

A) Does the expert's deposition in your country go through a *legal* or *open* assessment system? There is no legal assessment system.

B) How are the data, sources and evidence obtained from the questioning of the expert presented in court? Can they be rebutted?
Generally the expert must be heard personally in the main trial.

C) How does the issue of inadmissible or forbidden evidence work in your country with regard to the use of an expert's deposition (report)?
Inadmissible or forbidden evidence must not be used as evidence in the main trial. If the conviction should be based on such evidence this would be a reason for nullity of the verdict.

The Defendant

I. National Regulations

1. Constitutional Regulations

A) Does your country's Constitution contain any provisions relating to the defendant and the protection of the defendant's rights? The European Convention on Human Rights is part of the Austrian constitution. Moreover, there are constitutional laws on the protection of personal liberty and the protection of the rights of the home.

B) If so, could you please transcribe them?

Federal Constitutional Law of 29 November 1988 on the Protection of Personal Liberty

Article 4

(1) An arrest under Art. (2), para. 1, sub-paras. 2b and c above is admissible only in execution of a substantiated judicial order which must be served on the person concerned on arrest or at the latest within 24 hours thereafter.

(2) If delay entails danger as well as in the case of Art. (2), para. 1, sub-para. 2a above, a person may be arrested also without judicial order. He/she shall be set free as soon as it is established that no reason for his/her further detention is on hand, otherwise he/she shall be brought without needless

deferment, at the latest however prior to the expiration of 48 hours, before the competent court.

(3) A judge shall without delay interrogate a person brought before a court and inquire into the grounds for the detention.

...

(6) Everyone arrested shall at the earliest opportunity, if possible at the time of his arrest, be informed in a language which he/she understands of the reasons for his/her arrest and of any charge against him/her. The rights accorded by constitutional law to the lingual minorities remain unaffected.

(7) Everyone arrested is entitled to have at his/her request a relative and a legal adviser of his/her own choosing notified without unnecessary delay of the arrest.

C) If there is any case-law in your country regarding the aforementioned regulations, could you please indicate the most fundamental cases?

2. Legal or Statutory Regulations

A) Does your country have legal or statutory regulations concerning the deposition of the defendant and the protection of the defendant's rights in the course of a criminal investigation or trial? Yes

B) If so, could you please transcribe them, indicating the date of their publication, status, the legal body that they belong to, as well as the scope in which such protection is granted?

Inkrafttredatum 19751231 Außerkrafttredatum 20071231

Abkürzung

StPO

Text

XIV. Hauptstück

Von der Vorladung, Vorführung, vorläufigen
Verwahrung und Verhaftung des Beschuldigten

I. Vorladung

§ 173. (1) Der Beschuldigte wird, wo das Gesetz nichts anderes vorschreibt, zuerst nur zur Vernehmung vorgeladen.

(2) Diese Vorladung geschieht durch Zustellung einer vom Untersuchungsrichter unterzeichneten, an den Vorzuladenden gerichteten schriftlichen und verschlossenen Ladung. Diese muß den Namen des Gerichtes und des Vorgeladenen, die allgemeine Bezeichnung des Gegenstandes der Untersuchung, den Ort, den Tag und die Stunde des Erscheinens und den Beisatz enthalten, daß der Vorgeladene als Beschuldigter vernommen werden solle und im Falle seines Ausbleibens persönlich werde vor Gericht geführt werden.

§ 179. (1) Jeder dem Gericht eingelieferte ist vom Untersuchungsrichter unverzüglich, längstens aber binnen 48 Stunden zu vernehmen. Zu Beginn der Vernehmung ist der Beschuldigte vom Untersuchungsrichter über die gegen ihn erhobenen Anschuldigungen zu unterrichten und darauf hinzuweisen, daß es ihm freistehe, sich zu äußern oder nicht zur Sache auszusagen und sich zuvor mit einem Verteidiger zu verständigen. Er ist darauf aufmerksam zu machen, dass seine Aussage seiner Verteidigung dienen, aber auch als Beweis gegen ihn Verwendung finden könne.

Von der Vernehmung des Beschuldigten

§ 198. (1) Der Beschuldigte ist in der Voruntersuchung ohne Beisein des Anklägers oder anderer hiezu gesetzlich nicht berufener Personen vom Untersuchungsrichter zu vernehmen. Diese Vernehmung muß mit Anstand und Gelassenheit vorgenommen werden. Sie findet in der Regel mündlich statt, doch kann der Untersuchungsrichter bei verwickelten

Punkten auch eine schriftliche Beantwortung gestatten. Gerichtszeugen sind der Vernehmung des Beschuldigten nur dann beizuziehen, wenn es der Untersuchungsrichter für nötig erachtet oder der Beschuldigte verlangt.

(2) Ist ein Verhafteter mit Fesseln belegt worden, so müssen ihm diese vor seiner Vernehmung abgenommen werden, sofern dies ohne Gefahr geschehen kann. Auch ist jedem Beschuldigten während seiner Vernehmung ein Sitz zu gestatten.

(3) Ist der Beschuldigte der Gerichtssprache nicht kundig oder ist er gehörlos oder stumm, so sind die Vorschriften der §§ 163 und 164 zu beobachten.

§ 199. (1) Der Untersuchungsrichter hat vor dem Beginne der Vernehmung den Beschuldigten zu ermahnen, daß er die ihm vorzulegenden Fragen bestimmt, deutlich und der Wahrheit gemäß beantworte.

(2) Nach der Vernehmung über die persönlichen Verhältnisse des Beschuldigten hat ihm der Untersuchungsrichter das Verbrechen oder Vergehen, dessen er beschuldigt ist, im allgemeinen zu bezeichnen und ihn zu veranlassen, daß er sich über die den Gegenstand der Anschuldigung bildenden Tatsachen in einer zusammenhängenden, umständlichen Erzählung äußere. Die weiteren Fragen sind mit Vermeidung aller unnötigen Weitläufigkeit auf die Ergänzung der Erzählung, auf die Entfernung von Dunkelheiten und Widersprüchen zu

§ 200. (1) Die an den Beschuldigten zu richtenden Fragen dürfen nicht unbestimmt, dunkel, mehrdeutig oder verfänglich sein; sie müssen eine aus der andern nach der natürlichen Ordnung fließen. Es ist daher insbesondere die Stellung solcher Fragen zu vermeiden, in denen eine vom Beschuldigten nicht zugestandene Tatsache als bereits zugestanden angenommen wird.

(2) Fragen, durch die dem Beschuldigten Tatumstände vorgehalten werden, die erst durch seine Antwort festgestellt werden sollen, oder durch die ihm die zu erforschenden Mitbeteiligten durch Namen oder andere leicht erkennbare Merkmale bezeichnet werden, dürfen erst dann gestellt werden, wenn der Beschuldigte nicht in anderer Weise zu einer Erklärung über sie geführt werden konnte. Die Fragen sind in solchen Fällen wörtlich in das Protokoll aufzunehmen.

§ 202. Es dürfen weder Versprechungen oder Vorspiegelungen noch Drohungen oder Zwangsmittel angewendet werden, um den Beschuldigten zu Geständnissen oder anderen bestimmten Angaben zu bewegen. Auch darf die Voruntersuchung durch das Bemühen, ein Geständnis zu erlangen, nicht verzögert werden.

§ 205. Wenn die Aussagen eines Beschuldigten in erheblichen Punkten von den Angaben eines wider ihn aussagenden Zeugen oder Mitbeteiligten abweichen, sind ihm diese im Laufe der Voruntersuchung nur dann gegenüberzustellen, wenn es der Untersuchungsrichter zur Aufklärung der Sache für notwendig hält. Bei solchen Gegenüberstellungen ist das im § 168 Abs. 3 vorgeschriebene Verfahren zu beobachten.

C) Could you please summarise your country's courts' case-law regarding the deposition and protection of the defendant's rights?

D) Do you consider that your country's legislation satisfactorily or sufficiently covers the issue of the defendant's deposition?

E) Do you know of any reform project or initiative in your country's regulations regarding the defendant's deposition?

F) If so, could you please indicate the justification for such reform and the general direction such reform would take?

3. Grounds for the defendant's deposition

A) Subjective Grounds

a) Who in your country may determine whether the defendant's deposition be used in the course of a criminal investigation or trial? The court

b) If the use of the defendant's deposition may be determined by different authorities, in what situations and under what conditions may the different authorities do so? ---

c) When the use of the defendant's deposition is determined by someone other than a court, does it affect the probative value of the sources and the evidence obtained from the deposition? Does the stage at which the proceedings are at affect the probative value of the evidence? What is the legal validity of the defendant's deposition? In the case of holding the defendant in custody, what would the validity of such actions be? ---

d) Who may request that the proper authorities determine that the defendant provide a deposition? Can the defendant voluntarily provide a deposition? Does it depend on the stage of the process as to whom and how it may be determined? The public prosecutor may request that the defendant provide a deposition before the investigating magistrate. There is no regulation concerning the defendant voluntarily providing a deposition.

B) Objective Grounds

a) Is the defendant's deposition used as evidence or in his/her defence?

b) What is the legal validity of the defendant's deposition during the investigation stages?

c) What is the legal validity of the defendant's deposition during the oral proceedings?

d) May the defendant's deposition be compared to depositions made by other defendants? What is the validity of the defendant's deposition, and what are the guidelines for comparing and assessing the depositions?

4. *Providing a deposition*

A) In your country, can suspects be required to provide a deposition prior to the opening of a criminal trial? (for example, by the Police or the Department of Public Prosecutions)? If so, who, according to your country's legislation, must be present when a suspect is providing a deposition? In addition to those who must be present during the questioning process, does your country's legislation provide for the possible presence of anyone else? If so, could you please indicate who?

Suspects can be summoned by the investigating judge in pre-trial investigations. Only the investigating magistrate is present when a suspect provides a deposition.

Suspects under the age of 18 years have the right to demand that a person enjoying their confidence is present at the interrogation.

B) In the above-mentioned case, what effect would the absence of one of the persons who are required to be present have on the deposition process? ---

C) When the defendant is providing a deposition before a court, who, according to your legislation, must be present during this process? In addition to those who are required to be present, does your legislation require that anyone else be present? If so, please indicate as to who must be present?

See item A.

D) In the above-mentioned case, what effect would the absence of one of the persons who are required to be present have on the deposition process? ---

E) Could you please briefly describe the process in which the defendant provides a deposition, with regard to the role of the court and possible restrictions, and the role of anyone else involved in the process?

The investigating magistrate puts the questions. If he deems it to be necessary an expert can also be present at the interrogation. The defendant has the right to refuse to answer. Before the beginning of the interrogation he must be instructed about this right.

F) Does your legislation require that the defendant's deposition be documented? Yes

G) If so, how must the deposition be documented and who is responsible for doing so?
This is the investigating magistrate's responsibility.

H) Does your country's legislation require that the defendant be notified that he/she must provide a deposition?

Generally the defendant has to be notified. Only in the cases specified in section 175 StPO he / she can be brought to the court by the police without notification.

5. Probative value of the defendant's deposition

A) Does the defendant's deposition go through a *legal or open* assessment system?

There is no legal assessment system.

B) How are the data, sources and evidence obtained from the defendant's deposition presented in court? Can they be rebutted?

C) Is the judicial examination of evidence possible in the committal proceedings? What effect does this have? Can it take place during the oral proceedings?

D) How does the issue of inadmissible or forbidden evidence work in your country with regard to the defendant's deposition?

Inadmissible or forbidden evidence must not be used as evidence in the main trial. If the conviction should be based on such evidence this would be a reason for nullity of the verdict.

2. The use of video and telephone conferences for providing evidence
Amaya Arnáiz, Assistant Lecturer, Universidad Carlos III de Madrid (Spain)

1. Legal framework

1.2. National regulations on the use of video conferences

a. Does your country's legislation cover the use of telematic methods (for example, video and telephone conferences)? Could you please transcribe your country's major legal provisions on this issue?

Yes.

Inkrafttrededatum 20050301 Außerkräfttrededatum 20071231

Abkürzung

StPO

Text

§ 156.

(2) Ist der Aufenthaltsort eines Zeugen außerhalb des Sprengels des zuständigen Gerichtshofes gelegen, so ist es zulässig, dass der Untersuchungsrichter die Ladung des Zeugen durch das Bezirksgericht am Sitz jenes Gerichtshofes veranlasst, in dessen Sprengel sich der Zeuge befindet, in Wien durch das Bezirksgericht Innere Stadt Wien, und den Zeugen unter Verwendung technischer Einrichtungen zur Wort- und Bildübertragung vernimmt. § 179a Abs. 2 gilt sinngemäß.

b. Is there any case-law in your country relating to this? If so, could you please provide any major references? Could you please summarise your country's courts' case-law regarding the use of video and telephone conferences for providing evidence?

c. Has the constitutionality of this probative method been questioned in your country? If so, could you please provide any reference regarding the decisions on this issue? Could you please summarise the content of the decisions?

d. Do you consider that your country's legislation satisfactorily or sufficiently covers the issue of the use of this probative method?

Yes.

e. Do you know of any reform project or initiative in your country's regulations regarding the use of video and telephone conferences for providing evidence?

2. The use of video conferences for providing evidence, with special reference to witness and experts' depositions and the questioning of the defendant

2.1. General rules for providing evidence

a. Is the use of video or telephone conferences in your country considered as an independent form of giving evidence? No. It is just a form of questioning a witness who cannot appear personally before the court.

b. Could you provide a definition and determine the nature of this type of telematic evidence-providing method?

c. Do you know whether or not a judge must be present in your country for any evidence collecting practice? Could you give us any details on this? All pre-trial investigations are led by the investigating magistrate.

d. If a judge must always be present in any evidence collecting practice, is the use of video or telephone conferences an exception to the general rule for providing evidence? Video conference is the exception, reserved for cases when the witness or defendant lives in a great distance from the competent court.

e. Has the effect that the use of video or telephone conferences, being used for providing evidence, may have on the procedural principles, such as the trial, rebuttal and publicity, been assessed in your country?

To my knowledge no.

f. Has the effect of replacing the “visual appreciation” (i.e., the court being in direct contact with the person giving evidence) with a “material appreciation”, as is the case when using a video or telephone conference, been analysed in your country? To my knowledge no. The legal provisions for the video conference have only been in effect since March 2005.

2.2. Investigation proceedings and the collection of evidence

a. Can depositions using video or telephone conferences be determined in your country in the course of an investigation prior to the opening of a criminal trial?

Yes

b. Can the deposition given via video or telephone conference be determined in any criminal trial, or is it subject to the seriousness of the offence committed or based on a specific list of crimes for which its use is permitted?

It can be determined in every criminal trial.

c. When a deposition is given via a video or telephone conference in the course of an investigation prior to the opening of a criminal trial, does it affect the probative value? What are the requirements for the use of this method?

It does not affect the probative value. The questioning of a witness via video conference is possible when the witness does not live in the judicial district of the competent court.

2.3. Evidence given via video or telephone conference

2.3.1. The Witness's Deposition

a. Can the witness's deposition be given via video or telephone conference in your country?

Yes.

If so,

b. Is it common in your country for a witness to provide a deposition via video or telephone conference? If not, is this method only used for providing a witness's deposition in special cases? It is rather uncommon.

c. If so, are the established restrictions based on the witness's circumstances (illness, place of residence, witness protection, etc.) or are they based on the crime in question? The restrictions are based on the witness's circumstances.

d. Could you please list the special cases in which witness depositions may be given via video or telephone conference in your country?

The questioning of a witness via video conference is possible only when the witness does not live in the judicial district of the competent court or when due to illness or old age he / she cannot appear before the court.

e. Are these restrictions based on a list with *numerus clausus* (that is to say, a set list of offences)? Or are they based on a list with *numerus apertus* (that is to say, an open list of offences)? The use of video conference is not restricted to certain offences.

2.3.2. Expert evidence (expert's report)

a. Can the expert's report and questioning be ratified via video or telephone conference? The legal provisions on video conferences apply to the depositions of witnesses and defendants only.

If so,

b. Is it common in your country for an expert to provide a deposition via video or telephone conference? If not, is this method only used for providing an expert's deposition in special cases?

c. If so, are the restrictions established based on the expert's circumstances (illness, protection, nature of the expert's report) or are they based on the crime in question?

d. Could you please list the special cases in which an expert's deposition may be given via video or telephone conference in your country?

e. Are these restrictions based on a list with *numerus clausus* (that is to say, a set list of offences)? Or are they based on a list with *numerus apertus* (that is to say, an open list of offences)?

2.3.3. Presence and hearing of the suspect during the trial

a. Does your country's legal system allow the suspect to appear via video conference ("virtual presence"), as opposed to appearing in person in the courtroom? No. The suspect may be questioned via video-conference in pre-trial investigations only.

If your country's legal system allows the suspect's deposition to be used as evidence as well as in his/her defence,

b. Would it be possible for the suspect to be questioned via video or telephone conference?

If so,

c. Is it common in your country for the suspect to provide a deposition via video or telephone conference? If not, is this method only used for providing the suspect's deposition in special cases?

d. If so, are the restrictions established based on the suspect's individual circumstances (illness, a record for crimes such as terrorism, if the suspect poses a danger or threat to safety and order in the courtroom), or are they based on the crime in question (seriousness of the crime, the punishment requested, the public interest in the case, etc)?

e. Are these restrictions based on a list with *numerus clausus* (that is to say, a set list of offences)? Or are they based on a list with *numerus apertus* (that is to say, an open list of offences)?

f. Could you please list the special cases in which a suspect may be questioned via video or telephone conference in your country?

g. Does the above apply equally to suspects who are being held in custody? Or does it differ?

h. If the suspect is questioned via video or telephone conference, how is he/she defended? Are two lawyers required – one in the courtroom and the other in the place where the suspect is being questioned? If not so, what mechanisms are in place to ensure that the suspect can be questioned by his/her defence lawyer?

3. The process for conducting court proceedings via video conference

3.1. Persons entitled to request that evidence be given via video or telephone conference within the framework of the trial:

a. In your country, can the prosecutor request that evidence be given via video or telephone conference? No. This has to be determined by the court.

b. Can a court, by the powers vested in them, determine that evidence be given via video or telephone conference? Yes.

3.2. Approved authorities to decide the use video or telephone conferences for providing evidence

a. Who in your country has the authority to decide that evidence be collected via video or telephone conference? The courts.

b. Please indicate the requirements for such a decision.

The questioning of a witness via video conference is possible when the witness does not live in the judicial district of the competent court or when due to illness or old age he / she cannot appear before the court. In pre-trial investigations also the accused person may be questioned

via video-conference if he /she does not live in the district of the competent court and the judge does not deem necessary his / her personal appearance at the court.

c. If the request is refused, can one appeal against this decision? No.

If so,

d. Could you please indicate the grounds for appeal, the competent body to which the appeal is made, and the timeframe for placing the appeal?

d. If your country has ratified the 2000 Convention on Mutual Assistance in Criminal Matters, who has been appointed as the approved authority to request that the witness or expert's deposition be given via video conference (article 10) or telephone conference (article 11)?
The courts.

3.3. Validity of the use of video and telephone conferences as probative methods

a. What mechanisms are in place in your country to determine the identity of the person providing the deposition? As at video-conferences always two courts are involved, the identity of the witness or defendant is checked as in any other case.

b. What mechanisms are in place in your country to ensure the authenticity and integrity of the video and telephone conference? There are no specific regulations.

c. How does your country's legislation cover the issue of authentication in legal proceedings with regard to video and telephone conferences being used as a probative method? Is the approval of a commissioner for oaths sufficient or must there be one commissioner present at the place of issue and another one at the place of delivery?

d. Are there any special documentation requirements when proceedings are conducted via video conference? No.

3. Telephone tapping

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1. Legal Framework

a. Could you copy and paste here your country's major constitutional or statutory provisions on this topic?

Inkrafttredatum 20050301 **Außerkrafttredatum** 20071231

V. Überwachung einer Telekommunikation

§ 149a. (1) Im Sinne dieses Bundesgesetzes ist

1. "Überwachung einer Telekommunikation"

a) die Feststellung des räumlichen Bereiches, in dem sich ein durch einen bestimmten Teilnehmeranschluss gekennzeichnetes Endgerät befindet oder befunden hat,

b) die Feststellung, welche Teilnehmeranschlüsse Ursprung oder Ziel einer Telekommunikation sind oder waren, und

c) das Mithören, Abhören, Aufzeichnen, Abfangen oder sonstig Überwachen des Inhalts von Nachrichten, die durch Telekommunikation übermittelt oder empfangen werden,

2. "Ergebnis der Überwachung einer Telekommunikation" jedes durch sie gewonnene Stamm-, Verkehrs-, Standort- oder Inhaltsdatum,

3. "Teilnehmeranschluss" die Adresse, welche die technisch Einrichtung, die Ursprung oder Ziel einer Telekommunikation ist, kennzeichnet.

(2) Die Überwachung einer Telekommunikation ist zulässig,

1. wenn zu erwarten ist, dass dadurch die Aufklärung eine vorsätzlich begangenen, mit mehr als sechsmonatige Freiheitsstrafe bedrohten strafbaren Handlung gefördert werden kann und der Inhaber des Teilnehmeranschlusses der Überwachung ausdrücklich zustimmt,

2. in den Fällen des Abs. 1 Z 1 lit. a und b auch, wenn zu erwarten ist, dass dadurch die Aufklärung einer vorsätzlich begangenen, mit mehr als einjähriger Freiheitsstrafe bedrohten strafbaren Handlung gefördert werden kann und durch die Überwachung Daten des Verdächtigen ermittelt werden können,

3. in den Fällen des Abs. 1 Z 1 lit. c auch, wenn die Überwachung zur Aufklärung einer vorsätzlich begangenen, mit mehr als einjähriger Freiheitsstrafe bedrohten strafbaren Handlung erforderlich erscheint und

a) der Inhaber des Teilnehmeranschlusses selbst dringend verdächtig ist, die Tat begangen zu haben, oder

b) Gründe für die Annahme vorliegen, dass eine der Tat dringen verdächtige Person den Teilnehmeranschluss benutzen oder eine Verbindung mit ihm herstellen werde.

(3) Eine Überwachung nach Abs. 2 Z 2 oder 3 eines Teilnehmeranschlusses,

1. dessen Inhaber ein Medienunternehmen (§ 1 Z 6 des Mediengesetzes) ist, ist nur dann zulässig, wenn zu erwarten ist, dass dadurch die Aufklärung einer strafbaren Handlung gefördert werden kann, die mit lebenslanger Freiheitsstrafe oder mit einer zeitlichen Freiheitsstrafe bedroht ist, deren Untergrenze nicht weniger als fünf Jahre und deren Obergrenze mehr als zehn Jahre beträgt,

2. dessen Inhaber eine Person ist, die gemäß § 152 Abs. 1 Z 4 oder 5 von der Verbindlichkeit zur Ablegung eines Zeugnisses befreit ist (§ 152 Abs. 3), ist nur dann zulässig, wenn diese Person selbst der Tat dringend verdächtig ist.

(4) Eine Überwachung ist nur zulässig, soweit die Verhältnismäßigkeit zum Zweck der Maßnahme gewahrt wird. Dabei ist insbesondere darauf Bedacht zu nehmen, dass der angestrebte Erfolg in einem vertretbaren Verhältnis zu den voraussichtlich bewirkten Eingriffen in die Rechte unbeteiligter Dritter steht, und zu prüfen, ob nicht auch mit weniger eingreifenden Maßnahmen begründete Aussicht auf den angestrebten Erfolg besteht.

b. Do you know of any major case-law references regarding this topic? Could you please give us any details?

2. Types of tapping

a. How many types of tapping are there in your country? Does your country approve of the so-called *comptage*, or the recording of telephone calls? Do you know if there is any difference in your country's legislation regulating either of these cases?

There are three types of tapping: 1) finding out at which place a mobile phone was used or is used, 2) finding out the contacts a telephone had or is having, 3) recording of phone calls, e-mails or other messages. There are no substantial differences in the regulations for these three cases.

b. Are telecommunications companies in your country legally bound to record and store data on calls and e-mails? If so, for how long?

3. Approved Authorities and Requirements of the Telecommunications tapping Warrant

a. Who holds the authority to issue a telecommunications tapping warrant in your country? Must the said authority be a court? Do the police and/or the prosecutor have the authority to conduct the tapping?

The authority must be a court. The tapping is carried out either by the investigating magistrate or – by his order – by the police.

b. If your country has ratified the 2000 Convention on Mutual Assistance in Criminal Matters, who has been appointed as the approved authority to issue a telecommunications tapping warrant?

The courts.

c. Please indicate the requirements that your country's telephone tapping warrant should comply with.

The telephone tapping warrant must state the name of the accused person, the crime he / she is accused of, the name of the owner of the telephone, the exact time-period of the tapping and the facts that make the tapping necessary.

4. Special Cases

a. Do you know of any special cases regarding the right to privacy and confidentiality of communication? For example, must this right be equally observed with corporations, foreigners, terrorists, etc.?

There are special regulations regarding the tapping of telephones of lawyers and media companies.

b. Do you know of any special cases regarding the right to privacy and confidentiality of communication within a prison?

c. Is there any hurdle hindering the observance of the said right concerning corporations or foreigners?

5. Principle of Proportionality

5.1. Offences Giving Rise to Tapping

Does your country have a list of offences that may give rise to tapping? Yes.

a. If so, is it a list detailing offences one by one?

No.

b. Or does it resemble a general clause allowing the use of tapping only in those cases where offences involved must be punished with a specific penalty?

Yes.

c. Or is it maybe a mixed system?

No.

d. Is it a list with *numerus clausus*? That is to say, is it a list not admitting any more offences than those already included?

No.

5.2. Additional Grounds for Tapping

Does the suspect's type of participation in the alleged offence and/or the degrees of crime have any bearing or influence on the decision involving carrying out or not carrying out tapping?

5.3. Accidental Findings

How does your country handle the so-called *accidental findings*?

a. Are they expressly regulated by your country's legislation?

Yes. Accidental findings may be used as evidence if they concern a crime which would have justified a telephone tapping warrant.

b. If not, have they been regulated by your country's case-law?

5.4. For How Long can the Tapping Be Conducted?

a. For how long can the tapping be conducted in your country (maximum number of hours/days/weeks/months)?

There is no time-limit in the law. It is required that the tapping is conducted only for a period that is absolutely necessary.

b. Can that number of hours/days/weeks/months be extended?

c. If so, can it be extended unlimitedly?

6. Handling of Materials Obtained Through Tapping

a. What is the importance attached in your country to the materials obtained through tapping? Is it handled and regarded as documentary evidence? Yes.

b. Can the materials obtained be transcribed?

Yes.

If so, who performs the transcription? Are the materials submitted to any kind of selection? If so, who performs the selection? Is any judge, court clerk, or equivalent authority always present in these actions?

The selection and transcription is performed by the police by order of the investigating magistrate. The magistrate (judge) need not always be present at the transcription.

When deemed necessary, does your country consider it essential to seek the help of an officially appointed legal and/or judicial interpreter or translator?

Yes.

c. Once the whole process of tapping, transcribing, selecting and translating of materials has been completed, where do the materials go? Are they destroyed? If so, when, how and why?

The materials go to the court.. The tapes must be destroyed after the verdict has become final.

7. Right to Defence

Once investigations have been completed, is there any obligation in your country as to notify the suspect that they have been under tapping? If so, when and how is the notification been served to the subject?

Once investigations have been completed the telephone tapping warrant must immediately be served to the suspect personally.

8. Professional Secret/Confidentiality

Do your country's laws and regulations establish any limitations regarding the right of certain groups of people to keep the so-called professional secret/confidentiality?

Yes

- If so, can you name those groups?

Lawyers, therapists, psychiatrists, media companies

- If not, is it possible in your country to place a lawyer's telephone under tapping without any type of restriction? Must it be previously authorized by someone? Who exactly? A lawyer's telephone may be tapped only if the lawyer himself is the suspect of a crime.

9. Forbidden Evidence

What is in your country considered to be forbidden evidence when it comes to telecommunications tapping?

Records of telephone tapping that was conducted without a valid telephone tapping warrant and records of telephone calls between the suspect and his lawyer or therapist.

4. Search warrants in the course of a criminal investigation.

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I. National Regulations

1. Constitutional Regulation

1.1. Does your country's Constitution contain provisions covering the protection of homes and, where applicable, the protection of other buildings against intrusion?

Yes.

1.2. If so, could you please transcribe the constitutional provisions which cover such protection?

Law of 27 October 1862 on Protection of the Rights of the Home

Paragraph 1. A domiciliary visit, that is, a search of a home or the appurtenant premises may 888 rule only be undertaken on the strength of a judicial warrant stating the reasons. This warrant shall at once or at least within 24 hours be served on the party concerned.

Paragraph 2. For the purpose of criminal procedure a domiciliary visit can, should delay be dangerous, also be ordered by court officials, officials of the security authority, or municipality chairmen. The individual delegated to execute the order shall be furnished with an authority which he shall produce to the party concerned. For the same purpose a domiciliary visit can also be undertaken by the security authorities on their own

responsibility if a warrant to appear in court or for his arrest is issued against an individual, or if an individual is caught red-handed, qualified as suspect of committing an offence on the score of public pursuit or public reputation or found in possession of items which indicate participation in such.

In both cases the party concerned shall on demand be served at once or within 24 hours with the certification about the execution of the domiciliary visit and the reasons for it.

Paragraph 3. Domiciliary visits for the purpose of police and financial supervision may be undertaken by officials of these departments only in the Cases determined by law. Nonetheless here too the regulations in the foregoing paragraphs hold good with respect to authority for a domiciliary visit and the certification about its execution.

Paragraph 4. Every domiciliary visit contrary to the preceding provisions undertaken in exercise of office or in line of duty shall in case of malice aforethought be treated as an offence constituting abuse of official authority (para. 101 of the Criminal Law) and in ether Cases as punishable in accordance with the regulations in paras. 331 and 332 of the Criminal Law as a misdemeanour against the duties incumbent on a government office.

Paragraph 5. Domiciliary visits for the purpose of police supervision shall, like these for the purpose of criminal court administration, be undertaken in accordance with the regulations for Criminal Law Procedure. The execution of domiciliary visits for the purpose of financial supervision shall take place in accordance with the provisions of the Taxation Penalties Law.

1.3 If there is any case-law in your country regarding the aforementioned regulation, could you please indicate the most fundamental cases relating to the constitutional protection of homes and buildings?

2. Legal or statutory regulations

2.1 Does your country have legal or statutory regulations concerning search warrants for homes or buildings in the course of a criminal investigation?

Yes

2.2 If so, could you please transcribe them, indicating the date of their publication, status, the legal body that they belong to, as well as the scope in which such protection is granted?

Inkrafttrededatum 20021001 Außerkrafttrededatum 20071231

§ 139. (1) Eine Hausdurchsuchung, das ist die Durchsuchung der Wohnung oder sonstiger zum Hauswesen gehöriger Räumlichkeiten, darf nur dann vorgenommen werden, wenn begründeter Verdacht vorliegt, daß sich darin eine eines Verbrechens oder Vergehens verdächtige Person verborgen halte oder daß sich daselbst Gegenstände befinden, deren Besitz oder Besichtigung für eine bestimmte Untersuchung von Bedeutung sein könne.

(2) Gegen Personen, bei denen eine hohe Wahrscheinlichkeit für den Besitz solcher Gegenstände spricht oder die eines Verbrechens oder Vergehens verdächtig oder sonst übel berüchtigt sind, ist auch die Durchsuchung der Person und ihrer Kleidung zulässig.

§ 140. (1) Eine Durchsuchung ist in der Regel nur nach vorausgegangener Vernehmung dessen, bei oder an dem sie vorgenommen werden soll, und nur insofern zulässig, als durch die Vernehmung weder die freiwillige Herausgabe des Gesuchten noch die Beseitigung der die Durchsuchung veranlassenden Gründe herbeigeführt wird.

(2) Von dieser Vernehmung kann bei übelberüchtigten Personen sowie auch dann abgesehen werden, wenn Gefahr im Verzug ist oder wenn die Durchsuchung von dem Publikum offenstehenden Räumlichkeiten vorgenommen wird.

(3) In der Regel darf die Durchsuchung nur kraft eines mit Gründen versehenen richterlichen Befehles unternommen werden. Dieser Befehl ist dem Beteiligten sogleich oder doch innerhalb der nächsten vierundzwanzig Stunden zuzustellen.

(4) Von Hausdurchsuchungen wegen Verbrechen oder Vergehen, bei denen weitere polizeiliche Nachforschungen oder Vorkehrungen im Interesse der öffentlichen Sicherheit erforderlich sein können, ist, insofern dies ohne Verzögerung geschehen kann, die nächste Sicherheitsbehörde vorläufig in Kenntnis zu setzen, damit ein Abgeordneter dieser Behörde hiebei anwesend sein und, ohne auf den Untersuchungsakt Einfluß zu nehmen, sich die nötigen Kenntnisse zu den weiter erforderlichen Vorkehrungen verschaffen könne.

§ 142. (1) Haus- und Personendurchsuchungen sind stets mit Vermeidung alles unnötigen Aufsehens, jeder nicht unumgänglich nötigen Belästigung oder Störung der Beteiligten, mit möglichster Schonung ihres Rufes und ihrer mit dem Gegenstande der Untersuchung nicht zusammenhängenden Privatheimlichkeit sowie mit sorgfältigster Wahrung der Schicklichkeit und des Anstandes vorzunehmen.

(2) Der Inhaber der Räumlichkeit, die durchsucht werden soll, ist aufzufordern, der Durchsuchung beizuwohnen; ist er verhindert oder nicht anwesend, so muß die Aufforderung an ein erwachsenes Mitglied seiner Familie oder in dessen Ermangelung an einen Hausgenossen oder Nachbar ergehen.

(3) Außerdem sind bei der Durchsuchung stets ein Protokollführer und zwei Gerichtszeugen beizuziehen.

(4) Das über die Durchsuchung aufzunehmende Protokoll ist von allen Anwesenden zu unterfertigen. Ist nichts Verdächtiges ermittelt worden, so ist dem Beteiligten auf sein Verlangen eine Bestätigung hierüber zu erteilen.

2.3 Could you please summarise your country's courts' case-law regarding search warrants for homes or buildings in the course of a criminal investigation?

2.4 Do you consider that your country's legislation satisfactorily or sufficiently covers the legal protection of homes and buildings?

2.5 Do you know of any reform project or initiative in your country's regulations regarding search warrants?

2.5.1 If so, could you please indicate the justification for such reform and the general direction such reform would take?

3. *Grounds for entry*

A) Subjective Grounds

3.A.1 Who in your country can issue a warrant to enter and search a home or building in the course of a criminal investigation?

Only judges are entitled to issue search warrants.

3.A.2 If a search warrant can be issued by different authorities, in what situations and under what conditions may the different authorities do so?

3.A.3 When the search warrant is issued by someone other than a court, does it affect the probative value of the sources and the evidence obtained from the search?

3.A.4 Who may request that a search warrant of a home be issued in the course of a criminal investigation?

The public prosecutor may demand a search warrant to be issued

3.A.5 Does the level of protection differ depending on whether the homeowner or the proprietor of the building is a citizen of your country or a foreigner? Is there any difference if the property belongs to an individual as opposed to a corporation?

There is no difference between Austrian citizens and foreigners or between individuals and corporations.

B) Objective Grounds

3.B.1 What types of buildings in your country are legally protected against search warrants in the course of a criminal investigation?

None.

3.B.2 Could you please categorise the nature and protection level of such buildings?

3.B.3 Could you provide your country's legal definition for *home* and *building* for the purpose of issuing search warrants in the course of a criminal investigation?

3.B.4 Is the protection for a home different from the protection of a building in your country?
If so, could you please specify what these differences are?

No

3.B.5 Are buildings belonging to corporations exempt from being searched?

No

C) Circumstantial Grounds

3.C.1 Can search warrants be issued in your country in the course of investigations prior to the opening of a criminal trial?

Yes

3.C.2 Can the search warrants be issued for any criminal trial, or are they subject to the seriousness of the offence committed or based on a specific list of crimes which allow such measures?

They can be issued for any criminal trial.

D) Formal Grounds

3.D.1 What formal requirements are there for a search warrant to be issued?

There must be reasonable suspicion that in the building or home there is a suspect or evidence needed in a criminal investigation.

3.D.2 Do the formal requirements differ if the issuing authority is not a court?

The issuing authority must be a court.

3.D.3 Is it always necessary to provide justification in order for a search warrant to be issued?

Yes.

3.D.4 In your country, is it necessary to notify the person concerned that a search warrant has been issued?

Yes

3.D.5 Are there any provisions or restrictions in your country's legislation regarding the time of day that the search be carried out? No.

4. Monitoring of the decision to issue a search warrant

4.1 Does your country's legal system provide for the right to appeal against the search warrant being issued?

Yes.

4.2 If so, could you please indicate the grounds for appeal, the approved body to which the appeal is made, and the timeframe to place the appeal?

The grounds for appeal may be that the legal preconditions for a search warrant were not fulfilled (e.g. no reasonable suspicion, no reason to believe that in the building evidence could be found). There is no timeframe for the appeal.

5. The search process

A) Subjective Requirements

5.A.1 Who, according to your country's legal system, must be present during the search of a home or a building?

The owner of the building or one of his relatives must be given the opportunity to be present. There must be present one secretary and two witnesses.

5.A.2 In addition to those who must be present, does your country's legal system provide for the presence of anyone else? If so, please indicate who else may be present during the search? If a search takes place in the office of a lawyer or a public notary, an official of the respective professional association shall be given the opportunity to be present.

5.A.3 What effect does the absence of one of the persons whom, according to your country's legal system, must be present have on the search proceedings?
It has no direct effect on the search proceedings.

B) Requirements of the search

5.B.1 What do search proceedings involve according to your country's legal system?

5.B.2 Are there legal or specific case-law restrictions in your country, precautions or requirements (as regards the content or the type of building) relating to the search of a building?

No.

5.B.3 How does your country handle so-called *accidental findings*?

* Are they expressly regulated by your country's legislation?

* If not, have they been regulated by your country's case-law?

There are no regulations.

5.B.4 Is there a time limit for conducting the search of a building in your country?

No

C) Formal Requirements

5.C.1 Does your legislation require that the search be documented?

Yes

5.C.2 If so, how must the search be documented and who is responsible for doing so?

There has to be made a written report of the search. If the investigating magistrate was present at the search, the report is his responsibility, otherwise the police is responsible for the report.

5.C.3 How are the effects and instruments collected from the search processed?

6. *Probative value of conducting the search of a home or building*

6.1 What is the nature of investigations, proceedings, and the involvement of different people during the search of a building in your country?

6.2 How are data, sources and evidence obtained from the search presented in the trial? Can they be rebutted?

The written report of the search is read out in the main trial. The evidence cannot be rebutted.

6.3 What is considered as inadmissible evidence with regard to the search of homes or buildings in your country? None

5. Protection of privacy and personal data processing relating to criminal trials.
Ignacio Flores Prada. Senior Lecturer in Procedural Law, Universidad Pablo de Olavide
(Seville, Spain).

I. National Regulations: General Aspects

1. Does your country's legislation contain regulations that cover the electronic collection and recording of personal data, in order for said data to be subsequently processed?

Yes

2. If so, do these regulations comply with the European Parliament and Council's 95/46/CE Directive, dated 24 October 1995?

To my knowledge yes

3. Could you please indicate the date, status, and basic structure of the regulations in your country relating to the protection of personal data? Could you please enclose a copy of these regulations or transcribe the major provisions?

The regulations can be found in the Austrian Code of Criminal Procedure and date from 1997. Electronic collection and recording of data is only admissible if it is absolutely necessary in the investigation of a serious crime.

Inkrafttrededatum 20021001 Außerkräfttrededatum 20071231

Abkürzung

StPO

Text

VII. Automationsunterstützter Datenabgleich

§ 149i. (1) Der automationsunterstützte Abgleich von Daten (§ 4 Z 1 DSG 2000) einer Datenanwendung, die bestimmte, den mutmaßlichen Täter kennzeichnende oder ausschließende Merkmale enthalten, mit Daten einer anderen Datenanwendung, die solche Merkmale enthalten, um Personen festzustellen, die auf Grund dieser Merkmale als

Verdächtige in Betracht kommen, ist zulässig, wenn die Aufklärung eines Verbrechens ansonsten aussichtslos oder wesentlich erschwert wäre und nur solche Daten einbezogen werden, die Gerichte und Sicherheitsbehörden für Zwecke eines Strafverfahrens oder sonst auf Grund bestehender Bundes- oder Landesgesetze ermittelt oder verarbeitet haben.

(2) Sofern die Aufklärung eines mit mehr als zehn Jahren Freiheitsstrafe bedrohten Verbrechens oder eines Verbrechens nach § 278a oder § 278b StGB ansonsten aussichtslos oder wesentlich erschwert wäre, ist es zulässig, in einen automationsunterstützten Datenabgleich auch Daten, die den Gerichten nach § 26 zu übermitteln sind, und Daten über Personen einzubeziehen, die von einem bestimmten Unternehmen bestimmte Waren oder Dienstleistungen bezogen haben oder die Mitglieder von Personenvereinigungen des Privatrechts oder von juristischen Personen des Privatrechts oder des öffentlichen Rechts sind.

(3) Es ist unzulässig, in einen Datenabgleich Daten einzubeziehen, die die rassische Herkunft, politische Anschauungen, religiöse oder andere Überzeugungen oder Merkmale des Gesundheitszustandes oder des Sexuallebens erkennen lassen. (Anm.: Der erste Satz lautet richtig: Es ist unzulässig, in einen Datenabgleich sensible Daten (§ 4

Z 2 DSG 2000) einzubeziehen.) Dieses Verbot gilt nicht für die Einbeziehung von Daten über die Staatsangehörigkeit, Daten zur tatbildmäßigen Bezeichnung einer Tätergruppe sowie von Daten, die die Sicherheitsbehörden durch erkennungsdienstliche Maßnahmen ermittelt haben, in einen Datenabgleich nach Abs.

1. Daten von Personenvereinigungen, deren Zweck in unmittelbarem Zusammenhang mit einem der besonders geschützten Merkmale steht, dürfen in einen Datenabgleich in keinem Fall einbezogen werden.

(4) Ein automationsunterstützter Abgleich von Daten ist nur zulässig, soweit die Verhältnismäßigkeit zum Zweck der Maßnahme gewahrt wird. Dabei ist insbesondere darauf Bedacht zu nehmen, dass der angestrebte Erfolg in einem vertretbaren Verhältnis zu den

voraussichtlich bewirkten Eingriffen in die Rechte unbeteiligter Dritter steht, und zu prüfen, ob nicht auch mit weniger eingreifenden Maßnahmen begründete Aussicht auf den angestrebten Erfolg besteht.

4. If your country's regulations do not comply with the 1995 Directive, are there plans to bring them into line with said Directive or, at least, the willingness to bring them into line in the near future?

II. National Regulations: Specific Aspects

1. Does your country's legislation contain provisions that specifically cover the protection of personal data collected during the trial process?

Yes

2. Do these provisions in particular refer to the data collected during the criminal trial process?

Yes

3. If so, could you please enclose or transcribe your country's general and specific basic provisions with regard to the protection of personal data collected in the course of a trial?

VIII. Besondere Durchführungsbestimmungen

§ 149m. (1) Sämtliche Ergebnisse der Überwachung einer Telekommunikation und - wenn das Gericht die Überwachung angeordnet hat - einer optischen oder akustischen Überwachung von Personen unter Verwendung technischer Mittel sowie sämtliche Daten, die in einen Datenabgleich einbezogen oder durch ihn gewonnen wurden, sind vom Gericht zu verwahren und nach rechtskräftigem Abschluß des Verfahrens zu löschen, soweit sie nicht in Bild- oder Schriftform übertragen wurden.

III. Data processing

A) *Creating files*

1. In your country, is there any approved authority regulating the creation, modification or removal of automated personal data files taken from court proceedings?

No

2. If so, could you please indicate to which authority these duties are assigned?

3. Is the decision to create, modify or remove files made public? Are ordinary citizens aware of the personal data that the justice administration handles?

No

4. Is there a national body in your country responsible for coordinating personal data protection?

Yes

5. Must the creation, modification or removal of personal data files related to a trial be notified to a national personal data protection authority in your country?

Yes

6. If a file is created containing personal data linked to any court proceedings, should the file include details relating to the type of data that has been collected? Should it also indicate that the data may be processed, the kind of data protection applicable to the data, and the control and protection of the data contained therein?

There are no specific regulations

7. With regard to content and public notification, is the decision to create a file with personal data, collected in the course of a criminal trial, subject to special conditions in your country?

It must be deleted after the verdict has become final.

8. What personal data files have been created in your country relating to criminal trials?

B) *Information collected in the course of a criminal trial*

1. What data used in a criminal trial in your country may be recorded and processed?

Personal data of a suspect (name, nationality, date of birth, names of parents, address etc.) may be recorded by the police.

2. Are there limits to what data may be collected? Is it forbidden to record certain data?

3. Can the data collected in the course of a criminal trial include photographs, fingerprints, sounds or voices?

C) Data collection procedures

1. Is the data collection procedure in your country a manual or an automated procedure?

2. Is personal data recorded in all criminal trials in your country, or only in certain ones?

3. If personal data is only recorded in certain criminal trials, could you please indicate what kind of criminal trials in which the data is collected?

4. Could you please indicate the common data that is recorded on each individual involved in a criminal trial?

See item 8 B1.

5. Apart from the data generated from the trial itself, is there any difference in your country regarding the personal data recorded on the different individuals involved in the trial?

6. If so, could you please indicate which individuals have more data included in the file and what that additional data consists of?

7. Do the individuals involved in a criminal trial know that their personal data is being recorded and possibly processed?

8. Is permission requested from the individuals involved in a criminal trial for their personal data to be included in the file?

No

9. Is there data which is compulsorily included in the file, and data which requires the consent of the individual in question? If so, could you please indicate the kind of data in such cases?

10. What sources are used to obtain the data?

11. In addition to the trial documents, are other files used to complete the personal data of the individuals involved in a criminal trial?

D) Handling of data

1. In addition to the recorded data, are there any other kinds of processing that are allowed with regard to personal data collected in the course of a criminal trial?

2. Is there a special protocol in your country for handling data taken from pictures, fingerprints, sounds or voices?

E) Data storage and removal

1. For how long is personal data, recorded on the course of a criminal trial, stored?
2. Are there certain types of data that are stored longer than others? Does the timeframe for storing data depend on the person involved in the criminal trial?
3. If data is removed from file, must the order for its removal be issued by a certain authority? If so, which approved authority?
4. Once the data has been removed, is it permanently deleted and irretrievable?
5. Are there technical procedures in place in your country to prevent data that has been deleted or removed from being reproduced?

F) Public release of data

1. In the course of a criminal trial in your country, can the personal data obtained during the investigation be made public? If so, could you indicate in which cases this is possible?
No
2. What personal data may be included when the sentence is made public upon conclusion of the trial?
3. Does the sentence include the first and last names of the convict?
Yes
4. Does your country's legislation allow the publication of lists of individuals convicted of certain crimes?
No

IV. Approved authorities

A) Approved authority responsible for the files

1. Which authority in your country is responsible for the personal data files gathered by the justice administration in the course of a criminal trial?

B) Approved bodies or entities responsible for data processing

1. Which bodies or entities are entrusted with processing judicial files in your country? Are these bodies or entities responsible for the centres, headquarters, data systems, programmes and technical staff involved in the data processing?

V. Protection of individual rights

A) *Individual access to personal data*

1. Can individuals in your country have access to the contents of their personal data files in the course of a criminal investigation?
2. Are there time or content restrictions with regard to an individual's access to his/her personal data?

B) Updating, correction and removal of personal data

1. Is there a procedure in your country in order for an individual to request his/her personal data be updated, corrected or removed as a result of criminal trial proceedings?
2. If so, could you please briefly describe the said procedure?

C) Monitoring and review of decisions regarding individual protection of rights

1. May an individual appeal against being denied access to his/her personal data, or having it corrected or removed?
2. If so, to which competent authority should the appeal be made?

VI. Data Assignment

1. Does your country's legal system allow personal data, recorded in files in the course of a criminal trial, to be assigned? In certain cases yes
2. If so, could you please indicate under what circumstances the data may be assigned or transferred? Also, could you please indicate what kind of data may be assigned or transferred? What is the procedure for the assignment of personal data?
Data may be transferred for purposes of criminal investigation or the process of naturalization of a foreigner.
3. Does your country's legal system clearly allow for personal data, collected or generated in the course of a criminal trial, to be assigned to other countries?
No
4. If so, could you please briefly indicate under what circumstances this is permitted? Also, what kind of data may be assigned and what is the approved procedure for that?

VII. File security

1. Are there human as well as computer security measures in place in your country for personal data files recorded in the course of a criminal trial?
2. If so, could you please briefly describe these measures?
3. Do these security measures include designated individuals who are responsible for the technological and functional security of the said data?

VIII. Offences and sanctions

1. Can criminal charges be brought in your country against those who violate the privacy of personal data recorded in the course of a criminal trial?
Yes
2. If so, could you describe the kind of offence and the corresponding punishment?

A person who uses personal data that were entrusted to him / her or who ha illegally acquired such data and who makes such data available to others with the intent to make a profit shall be punished with imprisonment up to one year.

3. Could you please briefly describe the sanctioning administrative measures in your country with regard to the protection of personal data recorded in the course of a criminal trial?

There are no specific regulations.

6. Information sharing between the police and the intelligence services.

Emilio Llera Suárez-Bárcena. Coordinating Prosecutor of the Seville Provincial Criminal Court (Spain).

A. Information sharing using the Schengen Information System.

1. Has your country ratified the Schengen Agreement and Amsterdam Treaty on security matters?

Yes

- If so,

b. Has your country made any reservations or unilateral statements?

To my knowledge no.

c. If you know of any specific cases, could you please relay them to us?

- If not, do you know if your country intends to ratify these Agreements?

2. Does your national law contain any provisions regarding information sharing determined in the Schengen and Amsterdam Agreements?

If so, could you please indicate these regulations? Could you please transcribe the most relevant provisions?

2. Do your country's police authorities provide data of police interest to the Schengen Information System (SIS) within the terms of the Schengen Agreement?

Yes

3. Are there any areas covered in the Amsterdam Treaty and the Schengen Agreement (either persons or objects) which, due to your country's legislation, hinder or prevent providing data to the SIS?

To my knowledge no.

If so, could you please indicate the obstacles for doing so, and the regulations that hinder or prevent the data being provided?

(Please clearly indicate whether these difficulties are due to your country's Constitution or legislation).

4. Which approved authorities in your country determine what data is entered into the SIS?

The police departments.

5. What is the most useful information that the SIS provides to your criminal system?

- Is it regarding people, objects, etc.?

- Could you earmark any particular case?

B. Voluntary information sharing as covered in section 7 of the Convention on Mutual Assistance in Criminal Matters.

1. Which approved authorities in your country assess whether the hunt for or punishment of the individual referred to in the information provided is the jurisdiction of the receiving country, and determine the voluntary sharing of information?

2. Does your country's legal system impose any restrictions on voluntary sharing of information?

If so,

- what restrictions are in place? (Please, specify if these restrictions are due to your country's Constitution or due to other national regulations).

- Could you please indicate a particular case?

3. In accordance with your national law, can the voluntary sharing of information stretch to all types of criminal offences and infractions of legal provisions?

If not, please indicate the type of criminal offences and other offences to which the voluntary sharing of information does not stretch.

4. In accordance with your country's domestic law, does the fact that the sources of the evidence have come from the voluntary sharing of information between police forces hold any bearing on the legality of the evidence?

5. Does your country's legislation require that certain conditions be imposed in order to use this information?

- If so, could you please indicate what the conditions of use are?

- If not, are the approved authorities – those allowed to conduct information sharing – legally empowered to impose any conditions for the use of this information? (If so, please indicate the most common conditions).

7. Undercover Agents.

Vicente Carlos Guzmán Fluja. Professor in Procedural Law.

Universidad Pablo de Olavide (Seville, Spain).

Rocío Zafra Espinosa de los Monteros. Procedural Law Assistant Lecturer.

Universidad Pablo de Olavide (Seville, Spain).

1. Legal Framework

a. Could you transcribe for us your country's major legal and constitutional provisions on this issue?

There are no specific regulations.

b. Is there any case-law regarding this issue in your country? If so, could you provide us with some references?

2. Types of undercover operations

- a. Who is legally authorised to act as an undercover agent?
- b. Is the undercover agent given a false identity?

If so, who holds the authority to issue one? What actions are covered by the false identity?

For how long may the false identity be used?

- c. How many types of operations does your country legally recognise (**long or short duration operations, etc.**)? Does your country recognise private individuals as undercover agents? Is there any difference in your country's legislation regulating either of these cases? See item 1a. There are no regulations on that issue.

3. Approved Authorities and Requirements for the use of an Undercover Agent

- a. Who holds the authority to determine the use of an undercover agent? Is it compulsory for the said authority to be a judge? Do the police and/or the prosecutor have the power to authorise the use of an undercover agent?
The use of undercover agents is determined by the police.
- b. If your country has ratified the 2000 Convention on Mutual Assistance in Criminal Matters, who has been appointed as the approved authority in this matter?
- c. Please indicate the requirements that your country must comply with.

4. Principle of Proportionality

4.1. Offences that Give Rise to the Use of an Undercover Agent

Does your country have a list of offences that permit police infiltration? No

- a. If so, is it a list detailing offences one by one?
- b. Or does it resemble a general clause allowing police infiltration only in cases where offences involved must be punished with a specific penalty?
- c. Or is it, perhaps, a mixed system?
- d. Is it a list with *numerus clausus*? That is to say, is it a list not admitting any more offences than those already included?

4.2. Additional Grounds for the Use of an Undercover Agent

Are the actions of an undercover agent limited solely to organised crime?

Does your country's legal system contemplate certain boundaries regarding the use of undercover agents? No.

4.3. Accidental Findings

How does your country handle the so-called *accidental findings*?

- a. Are they expressly regulated by your country's legislation?
No
- b. If not, have they been regulated in your country's case-law?

4.4. Duration of Police Infiltration

- a. For how long is police infiltration permitted in your country (maximum number of hours/days/weeks/months)? There is no timeframe.
- b. Can this timeframe be extended, if necessary?

If so, can it be extended indefinitely?

4.5. Monitoring Infiltration

- a. Is the undercover agent required to report information as it is received throughout the investigation?

If so, which body is responsible for receiving the said information? Has your country contemplated the use of liaison undercover agents? How often is the undercover agent required to report this information?

5. Handling of Material Obtained from Police Infiltration

- a. What is the importance attached in your country to material obtained as a result of police infiltration?
- b. Is it possible for an undercover agent to give a personal testimony, without revealing his/her identity, or do so through a referral witness?
- c. Once the whole process of infiltration and compilation of information has been completed, does your country's legislation provide protection for undercover agents?

6. Right to Defence

Once the investigations have been completed, is there any obligation in your country to notify the suspect that he/she has been the subject of police infiltration?

- If so, how and when is the individual notified of this?

7. Forbidden Evidence

In your country, what is considered to be forbidden evidence with regard to undercover agent operations?

9. Responsibility of the Undercover Agent

Does your country's legal system exonerate undercover agents from any responsibility in cases in which their actions may seemingly be criminal, albeit a direct result of his/her actions as an undercover agent?

Does your legislation require undercover agents to answer criminal charges for actions that were not strictly within their line of duty?

8. Documentary evidence. Banking confidentiality and trade secrets.

Asunción Rivas. Court Clerk. Provincial Criminal Court of Barcelona.

1. In your country are there any Public Records Offices or other bodies with the power to certify the identity or, where applicable, ownership of goods? Are these certificates issued by civil servants who have the authority to attest to and authenticate such documents?

2. Does your country permit the validation or harmonization of any kind of computer or audiovisual format that shows or contains data as documentary evidence? If so, are there any case-law references on this issue in your country that you could give us?

3. Are credit cards considered public or private documents in your country? Are they safeguarded against forgery and fraudulent use?

They are considered private documents. Forgery and fraudulent use of credit cards are criminal offences.

4. Classification of police action. Effectiveness and assessment during the oral proceedings.

5. What consideration does your country's case-law give to photocopies?

They are not regarded documents, but may be evidence

6. Does your country's legislation cover the manufacture or existence of pre-established evidence? Are these considered to be documentary evidence? What consideration does your country's case-law give to this, if applicable?

7. Company documents. Does your country's legislation recognise the difference between *company documents* in the broad sense of the expression (that is, all business documents), and *company documents* in the limited sense of the expression (it only recognises bills of exchange, drafts or securities that entail executive procedures)?

No

8. Assuming that a document is a piece of evidence, and that it could determine the conviction of a person, for example, in the case of forgery, are there different requirements in your country for them to be used in the proceedings?

No

9. Are there any professionals protected in your country by professional secret? Could you copy and paste here your country's constitutional or statutory provisions on this topic?

a. Who is protected under professional secret? Doctors, lawyers, therapists, journalists, priests (confessions), probation officers

b. Is there any limit?

c. What is case-law's position?

10. Is there banking confidentiality in your country? Could you sum up constitutional or statutory provisions on this topic?

Yes. Banks are obliged to keep confidentiality about all information they receive from their customers

- a. Is there any limit? Once a criminal investigation is opened, the bank must give to the court all required information
- b. Is it compulsory any type of decision in order to restrict banking confidentiality and access to a bank company's countable data?
- c. What kind of decision?

The court has to state in a formal order that the bank is obliged to hand out information.

- d. Who must pronounce it?
It is pronounced by the investigating magistrate

11. Apart from the possibility to obtain some data, is it possible to confiscate physically all the banking data or its telematic mediums? Is it necessary to observe any condition? If so, which one? What is case-law's position on this topic?

There are no regulations and no case law on this topic

12. Is there any judicial employee in your country who provides evidence for judicial proceedings and acts as guarantor for identifying and isolating any inspected data, or any type of objects during criminal proceedings' instruction? No

9. Genetic markers.

José Luis Albiñana. Judge. Barcelona Provincial Criminal Court.

I.- In criminal trials in your country, are body searches (examination of private parts of the human body and the taking of samples)

- a) Legally permitted Yes
- b) Permitted by case-law or by the Constitution
- c) Forbidden

II.- If they are permitted, to what extent are they?

Only body search is legal.

- a) X-rays?
- b) Scans and/or resonance imaging?
- c) Physical examination of tracts or bodily cavities (mouth, vagina, anus)? no
- d) Urine samples? no
- e) Blood samples? no
- f) DNA samples? Yes, in the case of dangerous persons suspected of a crime
- g) Cerebrospinal fluid sample?
- h) Other (as required)?

III.- Who or what is this restricted to?

Generally, neither a suspect nor a victim nor a third party may be forced to be subject to physical inspection.

A) The subject, who may be:

- a) Only the person under investigation. yes

- b) Can also extend to the victim.
- c) May also extend to a third party.

B) The criminal act being prosecuted:

- a) Crimes against another human being, which carry a heavy sentence.
- b) It is possible for all crimes that carry a heavy sentence.
- c) It is possible for all types of crimes.
- d) It is also possible for administrative offences, but:

a) In this case, only body searches may be conducted.

b) Samples may also be taken from the individual.

C) The trial:

- a) Because there is an open criminal investigation or proceedings being conducted under judicial control.
- b) Because there is an open police investigation as a result of an accusation or information that justifies action.
- c) Because no previous trial is necessary, as it is a question of preventive measures.

D) If the search is carried out on the potential offender, is it necessary:

- a) To formally call a trial against the individual in order to declare him/her as the suspect or defendant of the crime that has been committed.
- b) For the individual to merely be a suspect, who has not been called to trial.
Yes
- c) It is not even necessary for the individual to be a suspect.

E) There are no restrictions.

IV.- The body search must be ordered by:

- a) An Examining Court. Yes
- b) A Public Prosecutor. no
- c) The Criminal Investigation Police. no
- d) The State Security Forces (any other police department).

V.- During these proceedings is it:

- a) Necessary to adopt the required measures to ensure the privacy of the individual and medical assistance?
- b) Not necessary to adopt any special measures since it is being carried out by the police?
- c) Necessary to call in medical professionals in order to take the samples?

VI .- With regard to DNA samples, does your country's legal system regulate:

a) The setting up of an official DNA bank? Does this DNA bank come under the control of:

- a) The Judiciary?
- b) The Police?
- c) Any other official authority?

- a. That samples be stored in forensic files?
- b. That samples be stored in authorised laboratories?
- c. That samples be destroyed or disposed of?

VII .- Is the legal value of these kinds of proceedings in a criminal case:

- a) Backdated and pre-established evidence?
- b) Expert evidence? yes
- c) Documentary evidence, identified as such by the document that records the taking of the samples and the subsequent results?

VIII .- Does going beyond the confines of your country's law or the laws of forensic science:

- a) Render the evidence obtained as inadmissible? no
- b) Signify that a constitutional right has been violated? yes
- c) Both?

IX .- A complaint regarding the violation of these restrictions would signify:

a) That a complaint would be filed during the criminal trial, both by the aggrieved party and, where applicable, by the Public Prosecutor.

No

b) That your country's Constitutional Court would declare a violation of a fundamental right specially protected by the official authorities. In such a case, would this be considered in your country as a violation:

- a) Of an individual's physical privacy?
- b) Of an individual's physical integrity? Yes
- c) Of an individual's dignity or self-respect?

Both, a) and b), the latter only to be into motion if the former is not successful.