

THE EUROPEAN JUDICIAL AREA IN PRACTICE: “EVIDENCE IN CRIMINAL  
PROCEEDINGS FOR SERIOUS TRANS – NATIONAL CRIME”

Luis Arroyo Zapatero, Víctor Moreno Catena y Elena Domínguez

GERMANY

Institute of European and International Criminal Law

Universidad de Castilla – La Mancha (Spain)

Centre for Legal Studies (Ministerio de Justicia, Spain)

<http://www.cienciaspenales.net>

**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](mailto: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](mailto:jcolmene@der-pu.uc3m.es) and [acolgue@upo.es](mailto:acolgue@upo.es).

**2. Video Conferences.** Amaya Arnaiz. Tel: +34 916245790. E-mail: [arnaiz@der-pu.uc3m.es](mailto:arnaiz@der-pu.uc3m.es).

**3. Telephone Tapping.** Marta M. Morales Romero. Tel. +34 926295234. Email: [Marta.MMorales@uclm.es](mailto:Marta.MMorales@uclm.es).

**4. Data Protection and Search Warrants.** Ignacio Flores Prada Tel: +34 656318568. E-mail: [iflopra@upo.es](mailto:iflopra@upo.es).

**5. Voluntary Exchange of Information.** Emilio de Llera Suárez-Bárcena. Tel: +34 607937829. E-mail: [emilio.llera@telefonica.net](mailto:emilio.llera@telefonica.net).

**6. Undercover Agents:** Vicente Carlos Guzmán Fluja and Rocío Zafra Espinosa de los Monteros. Tel: +34 639785537. E-mail: [vguzflu@upo.es](mailto:vguzflu@upo.es) and [mrzafesp@upo.es](mailto:mrzafesp@upo.es).

**7. Delivery of Documents from Individuals and Public Bodies. Banking Confidentiality.** 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?

- If so,

The EU-Convention from 29 mai 2000 has been adopted by the German Parliament at 22 July, 2005, entered into force 8 august 2005

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

(-)

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?

2. Has your country ratified the 2000 Convention Protocol?

The Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union from 16 oct. 2001 has been adopted at the same day as the EU-Convention.

- If so,

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

(-)

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?

The proposal has been discussed very controversial not only in the doctrine but also in the German Federal Parliament. In the competent parliamentary committee the former majority has criticised in a statement from the 28 April 2004, the EU-commission's proposal doesn't regard sufficiently the necessary guaranties of criminal procedure. So long the criminal procedures in the member-states of the EU are so different, the abandonment of the principle of dual criminality is not acceptable. The catalogue of offences mentioned in article 16 (2) of the proposal should be more precise. The Parliament has also criticised the missing of clear rules concerning the legal protection and the data privacy.

The national bar has followed the statement of the Parliament. Only the biggest union of judges and prosecutors (*Deutscher Richterbund*) has consented to the commission's proposal. In the doctrine it has been said that the principle of dual recognition of judicial acts entails the

risk of maximum punitivity in the European Space. The catalogue of offences is not conform to the constitution's principle of definiteness. Also the German constitution provide in Art. 19 (4) the possibility of appeal against any state measure. It is not guarantied that this principle has the same value in every other Member State. When an appeal against an evidence warrant is only possible in the issuing state, the right of appeal could be not practicable. Finally the German system demands that any attack of the inviolability of the home should be ordered by a judge (Art. 13 of the German constitution). But in some Member States the Department of Prosecution Service is allowed as well to order a search warrant.

4. Do you know if the framework decision on the execution of orders freezing assets or evidence in the European Union. (Rahmenbeschluss 2003/577/JI des Rates vom 22. Juli 2003 über die Vollstreckung von Entscheidungen über die Sicherstellung von Vermögensgegenständen oder Beweismitteln in der Europäischen Union)

- a. ... has been implemented by your country?  
Has not been implemented
- 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**

**Jost~ 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?

(-)

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?

The following paragraphs take part of the German Code of Criminal Procedure (G.C.C.P.):

### § 48. [Summons of Witnesses]

A summons for witnesses shall devote the legal consequences of non-appearance.

### § 51. [Consequences of Non-Appearance]

(1) A witness who fails to appear although he was properly summoned, shall be charged with the costs attributable to his failure to appear. At the same time, a coercive fine shall be imposed on him and in case the coercive fine cannot be collected coercive detention shall be ordered. A witness may also be brought before the court by force. Section 135 shall apply mutatis mutandis. In the case of repeated non-appearance the coercive measure may be imposed a second time.

(2) Costs shall not be charged and a coercive measure shall not be imposed if the witness provides a sufficient and timely excuse for his non-appearance. If such excuse is not made in time pursuant to the first sentence, the charging of the costs and the imposition of a coercive measure shall be dispensed with only if it is demonstrated that the delay of the excuse is not attributable to the fault of the witness. If the witness is sufficiently excused thereafter, the orders made shall be revoked under the conditions set out in the second sentence.

(3) The authority to order such measures is also vested in the judge in the preliminary proceedings as well as a commissioned and requested judge.

### § 52. [Right to Refuse Testimony on Personal Grounds]

(1) The following persons may refuse to testify:

1. the fiancé(e) of the accused;
2. the spouse of the accused, even if the marriage no longer exists;
3. a person who is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused.

(2) If minors for want of intellectual maturity or minors or persons placed in care for mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal to testify, testimony may be taken from those persons only if they are willing to testify and if their statutory representative also agrees. If the statutory representative is accused himself he may not decide on the exercise of the right of refusal to testify; the same applies to the parent who is not accused, if both parents are entitled to legal representation.

(3) Persons entitled to refuse to testify, in the cases of subsection 2 also their representatives authorized to decide on the exercise of the right of refusal to testify, shall be instructed concerning their right prior to each hearing. They may revoke the waiver of this right during the hearing.

§ 53. [Right to Refuse Testimony on Professional Grounds]

(1) The following persons may also refuse to testify:

1. clergymen, concerning the information that was entrusted to them or became known to them in their capacity as spiritual advisers;
2. defense counsel of the accused, concerning the information that was entrusted to them or became known to them in this capacity;
3. attorneys-at-law, patent attorneys, notaries, auditors, sworn certified accountants, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives, concerning information entrusted to them or which became known to them in their professional capacity;
- 3a. members or representatives of a recognized counseling agency pursuant to Sections 3 and 8 of the Pregnancy Conflicts Act, concerning the information that was entrusted to them or became known to them in this capacity,
- 3b. drugs dependency counselors in a counseling agency recognized or set up by a public authority or body, institution or public-law foundation, concerning the information that was entrusted to them or became known to them in this capacity,
4. members of the Federal Parliament, of a Land Parliament or of a second chamber, concerning persons who entrusted to them facts in their capacity as members of these bodies, to whom they entrusted facts in this particular capacity, as well as the facts themselves;
5. individuals who are or were professionally involved in the preparation, production or dissemination of periodically printed matter or radio broadcasts concerning the author, contributor or informant providing contributions and documentation and concerning information received by them in their professional capacity insofar as this concerns contributions, documentation and information for the editorial element of their activity.

(2) The persons specified in subsection (1), numbers 2 to 3b, may not refuse to testify if they have been released from their obligation of secrecy.

§ 53a. [Right of Professional Assistants to Refuse Testimony]

(1) Assistants and persons being trained for their profession who participate in their respective professional activities shall be considered equivalent to the persons specified in Section 53 subsection (1) numbers 1 to 4. The persons specified in Section 53 subsection (1) numbers 1 to 4 shall decide whether these assistants should exercise their right to refuse to testify, except if such a decision cannot be obtained within a foreseeable period.

(2) The release from the obligation of secrecy (Section 53 subsection (2)) shall also apply to the assistants.

Section 55. [Refusal of Information]

(1) Any witness may refuse to answer any questions the reply to which would subject him, or one of the relatives specified in Section 52 subsection (1), to the risk of being prosecuted for a criminal offense or a regulatory offense.

(2) The witness shall be informed of his right to refuse to answer.

§ 68. [Examination as to Witness' Identity and Personal Particulars]

(1) The hearing begins with the witness being asked to state his first name and family name, age, position or trade and place of residence. Witnesses who have made observations in their official capacity may state their place of work instead of their place of residence.

(2) If there is reason to fear that the witness or another person might be endangered by the witness stating his place of residence, the witness may be permitted to state his business address or place of work or another address at which papers can be served instead of stating his place of residence. Under the condition set out in the first sentence, the presiding judge may permit the witness not to state his place of residence during the main hearing.

(3) If there is reason to fear that revealing the identity or the place of residence or location of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to state personal particulars or to state particulars only of an earlier identity. However, if so asked at the main hearing he shall be required to state in what capacity the facts he is indicating became known to him. Documents establishing the witness' identity shall be kept by the public prosecution office. They shall only be included in the files when the danger ceases.

(4) Where necessary, questions relating to circumstances justifying the witness' credibility in the case at hand, particularly concerning his relationship with the accused or the aggrieved party, shall be submitted to him.

§ 68a. [Questions Concerning Degrading Facts and Previous Convictions]

(1) Questions concerning facts which might dishonor the witness or a person who is his relative within the meaning of Section 52 subsection (1) or which concern their personal sphere of life are to be asked only if essential.

(2) A witness is to be asked about his previous convictions only if their ascertainment is required for a decision on the existence of the conditions of Section 60 number 2 or Section 61 number 4 or to judge his credibility.

§ 68b. [Assignment of an Attorney-at-Law]

With the consent of the public prosecution office a lawyer may be assigned for the duration of the examination to witnesses who previously had no of legal counsel if it is evident that they are unable to exercise their rights themselves during the examination and if any of their interests that are worthy of protection cannot be taken into account in another way. Where the examination concerns

1. a serious criminal offense,
2. a less serious criminal offense pursuant to Sections 174 to 174c, 176, 179 subsections (1) to (3), Sections 180, 180b, 182, or Section 225 subsections (1) or (2) of the Penal Code, or
3. another less serious criminal offense of substantial significance committed on a commercial or habitual basis, or by a member of a gang, or in some other way committed in an organized fashion,

the assignment of counsel shall be ordered upon application by the witness or the public prosecution office provided the conditions of the first sentence have been fulfilled.

Section 141 subsection (4) and Section 142 subsection (1) shall apply mutatis mutandis to the assignment. The decision shall not be contestable.

§ 69. [Examination as to Subject Matter]

(1) The witness shall be directed to state coherently all he knows about the subject of his examination. The subject of the investigation and the name of the accused, if there is an accused, shall be indicated to the witness before the examination.

§ 241. [Withdrawal of the Right to Examine Witnesses]

(1) A person who in the case of Section 239 subsection (1), abuses his right to examine witnesses and experts may be deprived of this right by the presiding judge.

(2) In the cases of Section 239 subsection (1) and Section 240 subsection (2), the presiding judge may reject improper or irrelevant questions.

§ 241a. [Examination of Witnesses under 16 Years of Age]

(1) The examination of witnesses under 16 years of age is conducted solely by the presiding judge.

§ 247. [Removal of the Defendant from Courtroom]

The court may order that the defendant leaves the session hall during a hearing, if it is expected that a co-defendant or a witness when heard in the presence of the defendant will not tell the truth. The same applies if it is feared that an examination of a person under sixteen years as a witness in the presence of the defendant would result in a considerable prejudice to the well-being of such witness or if an examination of another person as a witness in the presence of the defendant presents an imminent risk of a serious prejudice to his/her health. The removal of the defendant may be ordered for the duration of discussions concerning the condition of the defendant and the prospects of the treatment, if a substantial prejudice to his health is to be feared. As soon as the defendant is present again the presiding judge shall inform him of the essential contents of the statements made or the subject tried during his absence.

§ 247a.

If there is an imminent risk of a serious detriment to the well-being of the witness were he to be questioned in the presence of those attending the main hearing, the court may order that the witness remain in another place during the questioning; such decision is also admissible under the conditions set out in Section 251 subsection (1), numbers 2, 3 or 4 insofar as is required in order to establish the truth. The decision shall not be contestable. A simultaneous audio-visual transmission of the testimony shall be provided to the courtroom. The testimony shall be recorded if there are grounds to fear that it will not be possible to question the witness at a future main hearing and if the recording is required in order to establish the truth. (...).

§ 252. [Improper Reading of Statement]

The statement of a witness examined prior to the main hearing, who only at the main hearing makes use of his right to refuse to testify, may not be read.

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?  
s.a.

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?

Actually: No new project.

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?

During Criminal

investigation: prosecution service (§§ 160, 161a German Code of C. P.);  
Police – by order of prosecution service;

judge – as 'juge d'instruction/investigating magistrate' (§ 162 G.C.C.P): at the  
instance of the prosecution service.

in trial: court, prosecution service, defendant

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?

Before prosecutor and judge/court: Obligation to appear, which can be enforced (§§ 51, 70, 161a G. C. C. P.).

Before police: no obligation

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?

1. Does not affect.
2. In case of a witness heard during criminal procedure, his testimony can be introduced in trial either by hearing him or by hearing the authority which has obtained the testimony. In this case, hearing of a witness by a judge has normally more value as hearing by a policeofficer. But it is valid the principle: The court shall decide on the result of the taking of evidence according to its free conviction obtained from the entire hearing (§ 261 G.C.C.P.). In case of a witness having the right to refuse testimony, because he is a relative, the Federal Court says, a testimony can only be introduced in trial by testimony of a judge, heaving heard the person during the investigation procedure (Bundesgerichtshof in Strafsachen, vol. 13. p. 394).
- 3: The witnesses has to be instructed over their rights and duties (§§ 52, 55 G.C.C.P.)

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?

1. The defendant
2. (+)
3. During criminal procedure: prosecution service. During main hearing: the Court

B) Objective Grounds

a) Who in your country may act as a witness in the course of a criminal investigation or trial?

Everyone; in the case of civil servants, the chief of the public service must agree the deposition.

b) Can the witness appear in person or provide a written deposition?

During investigation proc.: Both, if it is permitted.  
Before trial: Must 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?

The witness: personal evidence, person, who can inform over personal perceptions of facts in a criminal procedure not guided against him/her.  
So the victim can also be considered as a witness.

d) Are witnesses obliged to appear before the court and provide a deposition?

(+), § 48, 51 G.C.C.P.

Are there witnesses who are not obliged to do so (that is, both appear before an official and provide a deposition)?

Always obliged to appear, but witness can refuse a deposition if he/she is relative to defendant (§ 52) or if he/she charged him/herself by the deposition (§ 55 G.C.C.P.).

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?

(-)

e) What penalties does your country's legislation provide for in the case of non compliance with the aforementioned obligations?

Fine or arrest (§§ 51, 70 G.C.P.)

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

(+)

#### 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 Prosecution)?

Dep. of Public Prosecution

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?

It should be admitted the presence of a lawyer (fair trial);  
in case of witness-victim, a lawyer must be admit, within more or less the same rights as the prosecutor.

In case of minor the legal guardian,  
any other person if the court or the prosecution think it is necessary.

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?

No effect.

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?

A witness can only be heard by court, investigation judge, public prosecutor and police. The witness has always to be instructed over his rights and duties.

## **Experts**

### **I. National Regulations**

#### *1. Constitutional Regulations*

A) Does your country's Constitution contain any provisions relating to experts and the safeguard of experts?

(-)

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?

The following regulations take part of the German Code of Criminal Procedure:

#### § 72. [Application of Provisions Concerning Witnesses]

Chapter VI concerning witnesses shall apply mutatis mutandis to experts, except as otherwise provided by the following sections.

#### § 73. [Selection of Experts]

(1) The judge shall select the experts to be consulted, and shall determine their number. He shall agree with them on a time limit within which the opinions may be rendered.

(2) If experts are publicly appointed for certain kinds of opinions, other persons are to be selected only if this is required by special circumstances.

§ 74. [Challenge]

(1) An expert may be challenged for the same reasons which justify the challenging of a judge. The fact, however, that the expert was heard as a witness shall not be a reason for challenge.

(2) The public prosecution office, the private prosecutor, and the accused have the right of challenge. The appointed experts shall be made known to the person entitled to challenge, if there are no special circumstances to the contrary.

(3) The ground for challenge shall be substantiated; taking an oath to substantiate a challenge is not permitted.

§ 75. [Duty to Render Opinion]

(1) The person appointed as an expert must comply with the appointment, if he has been publicly appointed to render opinions of the required kind, or if he publicly and commercially practises a science, art, or trade, the knowledge of which is a prerequisite for rendering an opinion, or if he is publicly appointed or authorized to practise such profession.

(2) The obligation to render an opinion is also incumbent upon a person who has stated his willingness to do so before the court.

§ 76. [Privilege to Refuse to Render Opinion]

(1) An expert may refuse to render an opinion for the same reasons for which a witness may refuse to testify. An expert may also be released for other reasons from his obligation to render an opinion.

(2) The special provisions the of law concerning public officials shall apply to the examination of judges, officials, and other persons in the public service as experts. Members of the Federal Government or of a Land government are subject to the special provisions provided for them.

§ 77. [Consequences of Non-Appearance or Refusal]

(1) In the case of non-appearance or refusal of an expert obligated to render an opinion he shall be charged with the costs caused by his non-appearance or refusal. At the same time a coercive fine shall be imposed on him. In the case of repeated disobedience the coercive fine may be assessed a second time in addition to the costs.

(2) If an expert obligated to render the opinion refuses to agree upon a reasonable time limit pursuant to Section 73 subsection (1), second sentence, or if he fails to observe the time limit agreed upon, a coercive fine may be imposed on him. The assessment of a coercive fine must be preceded by an admonition fixing an extension of the time limit. In the case of repeated failure to observe the time limit the coercive fine may be assessed again.

§ 78. [Judicial Direction]

The judge shall guide the experts' participation, so far as deemed necessary by him.

§ 79. [Oath Administered to an Expert]

(1) Administration of an oath to the expert is left to the discretion of the court.

(2) The oath shall be taken after the opinion was rendered; it shall contain the assurance that the expert gave his opinion impartially and to the best of his knowledge and belief.

(3) If the expert has been sworn generally to give opinions of the kind concerned, a reference to his oath shall be sufficient.

§ 80. [Preparation of an Opinion]

(1) The expert may, at his request, be given further details for the preparation of his opinion by examining witnesses or the accused.

(2) For the same purpose, he may be allowed to examine the file, to be present at the examination of the witnesses or of the accused, and to address questions to them directly.

§ 80a. [Consultations During the Preparatory Proceedings]

An expert is to be given the opportunity to prepare his opinion to be rendered at the main hearing during the course of the preliminary proceedings, if it is expected that the committal of the accused to a psychiatric hospital, to an institution for withdrawal treatment or preventive detention shall be ordered.

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?

s. a.

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?

Prosec. Service – during criminal investigation - , Court – during trial -.

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?

Expert's report is always necessary when the authority do not dispose over sufficient expert knowledge.

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?

(-), in any case the expert has to be heard in trial.

d) Who in your country may request from the authorities that an expert's deposition (report) be provided?

The defendant or his lawyer can request an expert's report. The court can reject the request when it has enough knowledge to give a professional opinion to the moot point (v. § 244, IV G.C.C.P.). But if the court overestimate its knowledge, the judges violates their obligation to extend the taking of evidence to all facts and evidence which are important for the decision (§ 244 II G.C.C.P.).

The G.C.C.P. provides in the following cases an obligation to get an expert's report:

§ 80a:

An expert is to be given the opportunity to prepare his opinion to be rendered at the main hearing during the course of the preliminary proceedings, if it is expected that the committal of the accused to a psychiatric hospital, to an institution for withdrawal treatment or preventive detention shall be ordered.

§ 81:

For the preparation of an opinion on the mental condition of the accused, the court may, after hearing an expert and defense counsel order that the accused be brought to a public psychiatric hospital and be observed there.

§ 87 [Post Mortem Examination, Autopsy]

(1) The post mortem examination shall be made by the public prosecution office and, upon application of the public prosecution office, also by the judge with the assistance of a physician. The physician shall not be called in if this is obviously not necessary for the clarification of the facts.

(2) The autopsy shall be performed by two physicians. One of them must be a court physician or the head of a public forensic or pathologic institute or a physician of the institute entrusted with this task and having specialist knowledge of forensic medicine.

§ 91. [Suspected Poisoning]

(1) If there is suspicion of poisoning, the examination of the suspicious substance found in the corpse, or elsewhere, shall be made by a chemist or by a specialist authority appointed for such examination.

(2) It may be ordered that this examination be made with the assistance, or under the direction, of a physician.

§ 93. [Comparison of Handwriting]

To ascertain the authenticity or falsity of a document, as well as to ascertain the author of a script, a handwriting comparison may be conducted with the assistance of experts.

§ 246a:

A physician shall be heard at the main hearing as an expert on the mental and bodily condition of the defendant and the prospects of the treatment if it is expected that internment of the defendant in a psychiatric hospital, in an institution for withdrawal treatment or preventive detention will be ordered. If the expert had not examined the defendant previously, he is to be given the possibility to do so before the main hearing.

Can it be provided voluntarily?

(-)

Does it depend on the stage of the process as to whom and how it may be provided?

(-)

B) Objective Grounds

a) Who in your country may act as an expert in the course of a criminal investigation or trial?

As an Expert may act every person, who

- . is not witness (->personal perceptions of facts),
- . can inform the court about a general rule of experience value,
- . evaluates facts or considers conclusions, which only can be understood and estimated due to a special expert's knowledge.

b) Must he/she be a qualified expert?

s. a.

c) Could you tell us what your country's legal system defines as an *expert* in a criminal trial?

s. a.

d) Are experts required to work in their specialist field? Are there certain experts that are not required to do so?

(+)

e) What penalties does your country's legislation provide for an expert's non-compliance with his/her obligations?

There are no special rules for experts. They are supposed under the general rules like:

- . groundless suspicion,
- . defeat prosecuting,
- . false testimony or oath.

f) May the expert's depositions (reports) be compared to those of other experts in your country? How many reports are required?

(-)

#### 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 Prosecution)?

Only Dep. of Publ. Prosecution

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?

General: Every evidence has to be heard before the court – during the hearing process. (Principle of immediacy) – dito the expert.

Exception: § 256. [Reading of Official and Medical Statements]:

Statements containing a certificate or an opinion from public authorities as well as from

physicians performing services for the court — excluding certificates of good conduct — as well as medical certificates concerning minor bodily injuries may be read. The same applies to expert opinions with regard to the evaluation of a log book, the determination of the blood group or the blood alcohol contents including its reversion as well as to medical reports for the taking of blood samples.

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?

The expert has to be forced to appear before the court. If his presence is not possible, a new expert's report has to be ordered.

D) Can the expert's deposition be challenged? When and for what reasons may it be challenged?

§ 74. [Challenge]

An expert may be challenged for the same reasons which justify the challenging of a judge. That means: If he himself was aggrieved by the criminal offense; if he is or was the spouse or the guardian of the accused or of the aggrieved party; if he is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused or the aggrieved party, if he acted in the case as an official of the public prosecution office, as a police officer, as attorney-at-law of the aggrieved party, or as defense counsel; The fact, however, that the expert was heard as a witness shall not be a reason for challenge.

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?

(-)

F) Does your country's legislation require that the expert's deposition (report) be documented (ratified/verified)?

The expert's report has always be provided orally, there is no obligation of a written document (Ex. § 256 G.C.C.P. – s. a.). The judge is to be held to explain in his oral and written motivation of the judgement why and in which form he follows (or not) the expert's opinion. Usually the report is documented by the expert.

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

s. a.

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

In general there isn't an obligation to render an expertise. But § 75 G.C.C.P. provides in the following cases such a duty:

The person appointed as an expert must comply with the appointment, if he has been publicly appointed to render opinions of the required kind, or if he publicly and commercially practises a science, art, or trade, the knowledge of which is a prerequisite for rendering an opinion, or if he is publicly appointed or authorized to practise such profession. The obligation to render an opinion is also incumbent upon a person who has stated his willingness to do so before the court.

I) If so, what protection measures does your country's legislation provide for such experts?

s. question D)

#### *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?

General (-), exception, if the expert has been publicly appointed to render opinions of the required kind. The appointment is made by public institutions, f. ex. like the Chamber of Commerce.

B) How are the data, sources and evidence obtained from the questioning of the expert presented in court? Can they be rebutted?

1. Presented by the expert himself,
2. (+)

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)?

There is no special regulation.

## **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?

#### **Article 102**

Capital punishment is abolished.

#### **Article 103**

(1) In the courts everyone is entitled to a hearing in accordance with the law.

(2) An act can be punished only if it was a punishable offense by law before the act was committed.

(3) No one may be punished for the same act more than once in pursuance of general penal legislation.

#### **Article 104**

(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein. Detained persons may be subjected neither to mental nor to physical ill-treatment.

(2) Only judges may decide on admissibility or extension of a deprivation of liberty. Where such deprivation is not based on the order of a judge, a judicial decision must be obtained without delay. The police may hold no one on their own authority in their own custody longer than the end of the day after the arrest. Details shall be regulated by legislation.

(3) Any person provisionally detained on-suspicion of having committed a punishable offense must be brought before a judge at the latest on the day following the arrest; the judge shall inform him of the reasons for detention, examine him and give him an opportunity to raise objections. The judge must, without delay, either issue a warrant of arrest setting forth the reasons therefore or order the release from detention.

(4) A relative of the person detained or a person enjoying his confidence must be notified without delay of any judicial decision ordering or extending a deprivation of liberty.

B) If so, could you please transcribe them?

s. a.

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?

The following paragraphs take part of the G.C.C.P.:

### § 133. [Written Summons]

- (1) The accused shall be summoned, in writing to the examination.
- (2) The summons may provide that the accused shall be brought before the court in the case of non-compliance.

### § 134. [Bringing the Accused Before the Court]

- (1) It may be ordered that the accused be brought before the court immediately if reasons exist which would justify the issuance of a warrant of arrest.
- (2) The accused and the criminal offense with which he is charged shall be exactly specified in this order; the reason for his being brought before the court shall be indicated.

### § 135. [Immediate Examination]

An accused shall be brought before the judge without delay and be examined by him. He shall not be kept in custody by virtue of the order for longer than until the end of the day following the time when he was first brought before the court.

### § 136. [First Examination]

- (1) At the commencement of the first examination, the accused shall be informed of the offense with which he is charged and of the applicable penal provisions. He shall be advised that the law grants him the right to respond to the accusation, or not to make any statements regarding subject matter and even prior to his examination to consult with defense counsel of his choice. He shall further be instructed that he may request the taking of evidence for his exoneration. In appropriate cases the accused shall be informed that he may respond in writing.
- (2) The examination should give the accused an opportunity to dispel the reasons for suspicion against him and to assert the facts which are in his favor.
- (3) At the first examination of the accused, his personal situation should also be ascertained.

### § 136a. [Prohibited Methods of Examination]

- (1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception, or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
- (2) Measures which impair the accused's memory or his ability to understand shall not be

permitted.

(3) The prohibition under subsections (1) and (2) shall apply irrespective of the consent of the accused. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use.

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?

s.a.

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

The case-law concern mainly two fields: The necessity to instruct the defendant over his rights and forbidden hearing methods.

Necessity to inform:

Regarding § 136 G.C.C.P. the defendant has to be informed over his right to non-charge before his examination. This duty is imposed not only to the court but also – during the investigation procedure – to Prosecution Service and police (v. § 163a (2) and (3) G.C.C.P.). Examination begins when the authority questions a person who are suspected to commit offences.

Following the 'Miranda'-Jurisdiction of the US-Supreme Court, the German Federal Court decided in 1992 that the results of defendant-examination without prior information about his rights according to § 136 G.C.C.P. can not be used as evidence in trial (Bundesgerichtshof in Strafsachen, Vol. 38, p. 214).

But the Federal Court stated also some exceptions:

- . The interdiction to use in trial does not exist if the defendant has known his rights before the examinations begins,
- . dito if the defendant, supported by a defence counsel, does not contradict the use of his examination during the trial,
- . dito if the defendant has made spontaneous statements, before the examination begins.

Prohibited hearing methods:

According to § 136a (3) G.C.C.P. shall statements which were obtained in breach of prohibited hearing methods not be used. The Federal Courts says that even the use of an examination which has take lieu after the first incorrect hearing and according to the rules of law - without any prohibited pressure – cannot not be used unless the defendant is informed about the fact that the first hearing shall not be used.

The volunteer use of so called 'Polygraphs' is not violating § 136a G.C.C.P., but the Federal Court estimates that this instrument is an improper evidence-tool (Bundesgerichtshof in Strafsachen, vol. 44, p. 308).

The Federal Court says also that the hearing of an defendant who didn't sleep 30 hours before the examination violates § 136a (Bundesgerichtshof in Strafsachen vol. 13, p. 60).

It is not conform to § 136a G.C.C.P. to infiltrate a police-informer into the jail-cell of the defendant in order to sound him (Bundesgerichtshof in Strafsachen vol. 34, p. 342).

Also it is forbidden to keep the defendant under arrest in order to force him to confess (Bundesgerichtshof vol. 42, p. 262)

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?

During the criminal investigation it is principally the Pros. Service which determine the defendant's deposition. The police act only by order of the Pros. Service. Before the court, the presence and the hearing of the defendant is the first condition to start the trial.

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?

The accused shall be examined by the Prose. Service or the police at the latest prior to conclusion of the investigations, unless the proceedings result in termination. In simple matters it shall be sufficient for him to be given the opportunity to respond in writing. The deposition has to be provide always under the condition conform to §§ 136, 136a G.C.C.P. If the accused applies for the taking of evidence to his exoneration, such evidence shall be taken if it is of importance (§ 163a G.C.C.P.).

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?

There is no legal rule affecting the value of defendant's deposition when it has been determined by the police. But generally the courts estimate the value of defendant's deposition provided before a Public Prosecutor or a judge higher than before a Police-department.

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?

1. Nobody
2. (+)
3. During the criminal procedure the defendant can provide his deposition either to police, Prose. Service or the instruction-juge.

#### 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?

It is an evidence. But the deposition must be provide under the rules according to §§ 136 and 136a G.C.C.P (Information about his rights and prohibited hearing methods).

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

s. a.

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?

1. (+)
2. The validity of defendant's deposition depends of the defendant's credibility and the deposition's plausibility. His credibility depends on his personality, his past (with or without previous convictions), tendencies of self-charging, the relationship to others defendants and his personal interests. The plausibility is based on criterias like a logic and consistent behaviour in his deposition. The validity of the defendant's deposition is always very restraint because of his right to lie. According to the 'nemo tenetur'-principle the defendant is not obliged to say the truth.

#### 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 Prosecution)? 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?

1. (+), by the police, Pros. Serv. and experts – in order to prepare expertise concerning his mental condition.

2. In the case of a deposition required by the police the presence of a defence counsel *may* be admit but it is not an obligation. In fact the defendant can enforce a lawyer's presence when he refuses to provide a deposition with out him.

According to §§ 163a and 168c G.C.C.P. a defence counsel must be permitted to be present during the examination of the accused by a public prosecutor or a judge.

According to § 149 G.C.C.P. the spouse of an defendant shall be admitted to the main hearing to give assistance in the defense and shall be heard upon his (her) request. Time and place of the main hearing shall be communicated to him (her) in due time. The same rule shall apply to the statutory representative of the defendant. In preliminary proceedings the admission of such assistance shall be left to judicial discretion. During the criminal procedure there is no obligation to permit the presence of the mentioned persons.

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?

The illegal exclusion of the defence counsel during a hearing before a judge provoke the interdiction to use the deposition as evidence in trial.

Before trial, the process can not begin without the defence counsel.

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?

During the investigation procedure, according to § 168c G.C.C.P.: The defence counsel, if the defendant has one, and a substitute of the Dep. of Public Pros.

During the main hearing before trial, the session is open for all public – exception: trial against minors (-18 years).

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?

s. a.

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 authority (police, public prosecutor or judge) informs the defendant about his rights according to § 136 G.C.C.P. – Now the defendant has the right to refuse the entire deposition or only some questions. The defence counsel can take the opportunity to make statements in the name of his client, to stop the questioning and to ask himself.

In trial, after the questioning by the court, the Public Prosecutor can arraign the defendant.

In some offences the victim has the right to participate at process in form of *private accessory prosecution*. This concern mainly sexual offences, murdering, manslaughter, taking of hostage and physical injury. In this case the victim has more or less the same procedure rights like the prosecutor. So he may question the defendant after the prosecutor as well.

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

According to § 168 G.C.C.P. a record shall be made of each judicial investigatory act, especially the deposition of the defendant or a witness. This necessity is valid also for hearings required by the Pros. Service.

G) If so, how must the deposition be documented and who is responsible for doing so?

The deposition may be documented by a registry clerk but it can also be written down by the judge or prosecutor who has determined the questioning. The record must indicate the place and date of the hearing as well as the names of the persons involved and must state whether the essential formalities of the proceedings have been observed. The contents of the record may be provisionally recorded in regular shorthand, by stenotype or tape recorder or by comprehensible abbreviations. In this case the record shall be made without delay after the hearing.

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

In conformity with § 163a G.C.C.P. the defendant shall be examined at the latest prior to conclusion of the investigations, unless the proceedings result in termination. In this notification he is informed that he can – not must - provide a deposition.

##### 5. *Probative value of the defendant's deposition*

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

Open assessment system.

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

There is no specific legal rule for presentation in court of data sources and evidence obtained from the defendant's deposition. The presentation can be rebutted when the evidence has not been obtained conforms to the rules of law.

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?

It depends on the interference between the inadmissible or forbidden evidence and the defendant's deposition.

**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?

§ 58a. [Examination by Audio-Visual Medium]

(1) Questioning of a witness may be recorded on an audio-visual medium. Questioning shall be recorded:

1. in the case of persons of less than sixteen years of age who have suffered injury as result of the criminal offense; or
2. if there is a fear that the person cannot be questioned during the main hearing and if the recording is required in order to establish the truth.

(2) Use of the audio-visual recording shall be admissible only for the purposes of criminal prosecution and only to the extent that it is required in order to establish the truth. Section 100b subsection (6) and Sections 147 and 406e shall apply mutatis mutandis.

§ 247a.

If there is an imminent risk of a serious detriment to the well-being of the witness were he to be questioned in the presence of those attending the main hearing the court may order that the witness remain in another place during the questioning; such decision is also

admissible under the conditions set out in Section 251 subsection (1), numbers 2, 3 or 4 insofar as is required in order to establish the truth. The decision shall not be contestable. A simultaneous audio-visual transmission of the testimony shall be provided to the courtroom. The testimony shall be recorded if there are grounds to fear that it will not be possible to question the witness at a future main hearing and if the recording is required in order to establish the truth. Section 58a subsection (2), shall apply mutatis mutandis.

§ 255a.

(1) The provisions relating to reading a record of another examination pursuant to Sections 251, 252, 253 and 255 shall apply *mutatis mutandis* to showing an audio-visual recording of questioning of a witness.

(2) In proceedings relating to criminal offenses against sexual self-determination (Sections 174 to 184c of the German Penal Code) or against life (Sections 211 to 222 of the German Penal Code) or for ill-treatment of an individual placed in care (Section 225 of the German Penal Code) questioning of witnesses under sixteen years of age may be replaced by showing an audio-visual recording of his earlier judicial questioning if the defendant and his defense counsel were able to participate in such questioning. Supplementary questioning of the witness is admissible.

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?

§ 247a permits also the hearing of a witness abroad if the person can not be questioned before the court. The federal court says that the hearing must be conformed to the rules of the German procedure. Therefore the presiding judge shall conduct the hearing and examine the witness. Also it shall be guaranteed that the witness is not be influenced (Bundesgerichtshof in Strafsachen, vol. 45, p. 188).

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?

(+)

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?

At the moment there is no new project.

## **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 a subsidiary form of giving evidence. Only when it is not possible or opportune to hear a witness ('live') inside the court, the possibility of a video conference takes place. Exception: Hearing witnesses under the age of 16. Their judicial questioning shall be recorded on videotape and shown in trial in order to avoid a further mental strain.

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?

No, during the criminal procedure it is normally the police or the Publ. Pros. Service which collect the evidence. A judge is only present if the Publ. Pros. Service demands it. But the replace of a testimony in trial by a video-recorded hearing is only possible when it was a judicial examination.

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?

(-)

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?

(-)

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?

In the doctrine's discussion some authors say that the fact not to see the entire person and its gestures but only a part of the body reduce the validity of the evidence. Another problem can be the setting of the camera. For ex.: If the court sees only the face of a young abused child it may influence the affective impression of the witness rather than a natural distance like inside

the court.

## **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?

(+), v. § 58a G.C.C.P. (s. a.)

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?

Theoretical it is possible in any criminal trial, but the enormous efforts and costs of a video conference restraint the application field.

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?

A deposition may not be given in form of a telephone conference. A deposition via videoconference can be introduced in trial under the following conditions (§§ 58a, 163c, 255a G.C.C.P.):

- no restrictions concerning the quality of offence; in the case of minors, less than sixteen years of age who have suffered injury as result of the criminal offense and if there is a fear that the witness cannot be questioned during the main hearing, the hearing shall be recorded on video.

- In case of judicial examination the video-tape can be used in trial if the witness or co-accused died or became insane, or if his whereabouts cannot be determined or illness, infirmity, or other irremovable impediments prevent the witness, expert or co-accused from appearing at the main hearing for a long or indefinite period; the witness or expert cannot be expected to appear at the main hearing because of the great distance involved, taking into consideration the importance of his statement; the public prosecutor, defense counsel, and the defendant agree to the reading. In case of non judicial-examination (hearing by police or public prosecutor), the video-tape can be used in trial when the defendant has defence counsel, and the public prosecutor, defence counsel and the defendant agree. In other cases, the video-hearing is admissible only if the witness, expert or co-defendant has died or cannot be judicially examined for another reason within a foreseeable period of time.

## 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?

(+), s. a.

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 not common, only special cases like mentioned above.

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 established restrictions are based on the witness's circumstances:

- . witness protection, in case of minor witnesses, witnesses who are victims of sexual offences or very endangered witnesses like undercover agents,
- . place of residence: witness abroad
- . witnesses who are not able to appear before the court due to illness or death.

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

s. a.

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)?

It doesn't depend of a list of offences.

### 2.3.2. Expert evidence (expert's report)

a. Can the expert's report and questioning be ratified via video or telephone conference?

(-)

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?

(-)

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?

(+)

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

A court can determine that evidence is given via video conference under the conditions mentioned in 2.3.

#### **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?

Dep. of Prosecution Service during the investigation procedure.

The court in main hearing.

Prosecutor and defendant may require the hearing of a witness in form of video-conference as

a new evidence. This concern particularly witnesses living abroad. The Federal Court says, in this case the court can not refuse the demand with the argument, the witness doesn't be reachable (Bundesgerichtshof in Strafsachen, vol. 45, p. 188).

b. Please indicate the requirements for such a decision.

See § 58a G.C.C.P. (mentioned 1.2 a))

c. If the request is refused, can one appeal against this decision?

There is no appeal against the decision not to hear a witness by video-conference. But the judgement can be attacked in appeal.

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?

e. 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)?

In case of incoming request on mutual assistance in criminal matters there is no legal provision stipulating which authority is appointed to request the witness deposition. But the Bavarian High Court has decided that local competent is the court in the district where the witness is living.

### **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?

In the case of outgoing request on mutual assistance the deposition has to lead by judge. Finally the demanding court has to have confidence to the seriousness of the counter-part judge.

b. What mechanisms are in place in your country to ensure the authenticity and integrity of the video and telephone conference?

s. a.

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?

The national legislation does not cover anything in this matter. It depends on the court. The witness must be heard according to the national legislation. He must be informed about his rights and duties. At the other side the testimony shall also conform according to the national legislation of the request state. So the oath can also be delivered via video-conference. The approval of a commissioner for oaths at the place of issue doesn't be necessary.

d. Are there any special documentation requirements when proceedings are conducted via video conference?

The testimony has to be recorded.

### **3. Telephone tapping**

**Marta M. Morales Romero. Intern. Institute of European and International Criminal Law (Universidad de Castilla-La Mancha, Spain).**

#### **1. Legal Framework**

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

#### **Article 10 (Privacy of letters, posts, and telecommunications; amended 24 June 1968) of German Constitution (so called Basic law)**

(1) Privacy of letters, posts, and telecommunications shall be inviolable.  
(2) Restrictions may only be ordered pursuant to a statute. Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation, the statute may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

#### **Section 100a. [Conditions Regarding Interception of Telecommunications] G.C.C.P.**

Interception and recording of telecommunications may be ordered if certain facts substantiate the suspicion that a person was the perpetrator or inciter of, or accessory to

1a. criminal offenses against peace, of high treason, of endangering the democratic state based on the Rule of Law, or of treason and of endangering external security (Section 80 to 82, 84 to 86, 87 to 89, 94 to 100a, German Penal Code, Section 20 subsection (1), number 1 to 4, Associations Act);

1b. criminal offenses against national defense (Sections 109d to 109h, German Penal Code);

1c. criminal offenses against public order (Sections 129 to 130, German Penal Code, Section 92 subsection (1), number 7, Aliens Act),

1d. incitement or accessoryship to desertion or incitement to disobedience (Sections 16, 19 in conjunction with Section 1 subsection (3) of the Military Penal Act) without being a

soldier;

1e. criminal offenses against the security of the troops of the non-German contracting parties to the North Atlantic Treaty stationed in the Federal Republic of Germany or the troops of one of the Three Powers present in Land Berlin (Sections 89, 94 to 97, 98 to 100, 109d to 109g, German Penal Code, Sections 16, 19 of the Military Penal Act, in conjunction with Article 7 of the Fourth Criminal Law Amendment Act);

2. counterfeiting money or securities (Sections 146, 151, 152, German Penal Code), aggravated trafficking in human beings pursuant to Section 181, number 2, 3 of the German Penal Code,

murder, manslaughter or genocide (Sections 211, 212, 220a of the German Penal Code),

a criminal offense against personal liberty (Sections 234, 234a, 239a, 239b, German Penal Code),

gang theft (Section 244 subsection (1), number 3, German Penal Code) or aggravated gang theft (Section 244a, German Penal Code),

robbery or extortion resembling robbery (Sections 249 to 251, 255 of the German Penal Code),

extortion (Section 253, German Penal Code),

commercial handling of stolen goods or gang handling of stolen goods (Section 260, German Penal Code) or commercial gang handling (Section 260a, German Penal Code),

money laundering or concealment of unlawfully obtained assets pursuant to Section 261 subsection (1), (2) or (4) of the German Penal Code,

a criminal offense dangerous to the general public in the cases of Sections 306 to 306c, or Section 307 subsection (1) to (3), Section 308 subsections (1) to (3), Section 309 subsections (1) to (4), Section 310 subsection (1), Sections 313, 314 or Section 315 subsection (3), Section 315b subsection (3) or Sections 316a or 316c of German Penal Code,

3. a criminal offense pursuant to Section 52a subsections (1) to (3), Section 53 subsection (1), first sentence, numbers 1, 2, second sentence, Weapons Act, Section 34 subsections (1) to (6), Foreign Trade and Payments Act or pursuant to Section 19 subsections (1) to (3), Section 20 subsection (1) or (2), each also in conjunction with Section 21 or Section 22a subsections (1) to (3) of the Act on the Control of Weapons of War,

4. a criminal offense pursuant to one of the provisions referred to in Section 29 subsection (3), second sentence, number 1, of the Narcotics Act under the conditions set out therein or a criminal offense pursuant to Sections 29a, 30 subsection (1), numbers 1, 2, 4, Section 30a or Section 30b of the Narcotics Act, or

5. a criminal offense pursuant to Section 92a subsection (2) or Section 92b of the Aliens Act or pursuant to Section 84 subsection (3) or Section 84a of the Asylum Procedure Act

or, in cases in which the attempt is punishable, has attempted to perpetrate or participate in those acts or has prepared such acts by committing a criminal offense and if other means of establishing the facts or determining the accused's whereabouts would offer no prospects of success or would be much more difficult. The order may be made only against the accused or against persons about whom it can be assumed, on the basis of particular facts, that they are receiving messages intended for or the accused or receiving or transmitting messages from the accused or that the accused is using their connection.

### **Section 100b. [Order to Intercept Telecommunications] G.C.C.P.**

(1) The interception and recording of telecommunications (Section 100a) may be ordered only by a judge. In exigent circumstances, the order may also be given by the public prosecution office. The order of the public prosecution office shall become ineffective if it is not confirmed by the judge within 3 days.

(2) The order shall be given in writing. It must indicate the name and address of the person against whom it is directed as well as the telephone number or other identification of the person's telecommunications connection. The type, extent, and time of the measures shall be specified in the order. The order shall be limited to a maximum of 3 months. An extension of not more than 3 months shall be admissible if the prerequisites designated under Section 100a continue to exist.

(3) On the basis of this order all persons providing, or collaborating in the provision of, telecommunications services on a commercial basis shall enable the judge, the public prosecution office and officials assisting it working in the police force (Section 152, Courts Constitution Act) to intercept and record telephone calls. Whether and to what extent measures are to be taken in this respect shall follow from Section 88 of the Telecommunications Act and from the Ordinance issued thereunder for the technical and organizational implementation of intercepting measures. Section 95 subsection (2), shall apply *mutatis mutandis*.

(4) If the prerequisites of Section 100a no longer prevail, the measures resulting from the order shall be terminated without delay. The judge and the person bound by subsection (3) shall be informed of the termination.

(5) The personal information obtained by the measure may be used as evidence in other criminal proceedings only insofar as during their evaluation information was obtained which is required to clear up one of the criminal offenses listed in Section 100a.

(6) If the records obtained by the measures are no longer required for criminal prosecution purposes they shall be destroyed without delay under the control of the public prosecution office. The destruction shall be recorded in writing.

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

§ 100a G.C.C.P. does not allow the secret tapping of a conversation non-telecommunicated (Bundesgerichtshof in Strafsachen, vol. 34, p. 90).

It is also not conform to the mentioned rule to listen into conversations conducted in the room where the telephone is situated because it hasn't been hang up (Bundesgerichtshof in Strafsachen, vol. 31, p. 296).

## **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?

(-)

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

Telecommunications-companies are legally bound to store 80 days data on calls. This concern only the so called connections-data, not the content of calls.

### 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 tapping warrant has to be ordered by a court. Only in exigent circumstances the warrant can be ordered by the Prosecution Service. In this case the order of the Prosecution Service shall be confirmed by the judge within 3 days.

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?

There is no special legislation for mutual assistance in criminal matters. The request has to be sent to the competent authority – the Dep. of Prosecution Service – which shall examine if the conditions conforming to the national legislation are complied and apply on the court to render a corresponding order.

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

See § 100a G.C.C.P., mentioned above:

- serious crime, enumerated in the rule,
- other means of establishing the facts or determining the suspect's whereabouts would offer no prospects of success or would be much more difficult (Principle of subsidiarity).

### 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.?

The right of privacy is human right, so it shall be equally observed to any person even if he or she is an terrorist, foreigner or something else. The protection of mentioned right doesn't include corporations or 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?

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

See § 100a G.C.C.P. - mentioned above:

- criminal offenses against peace, of high treason, of endangering the democratic state based on the Rule of Law, or of treason and of endangering external security;
- criminal offenses against national defense;
- criminal offenses against public order;
- incitement or accessoryship to desertion or incitement to disobedience without being a soldier;
- criminal offenses against the security of the troops of the non-German contracting parties to the North Atlantic Treaty stationed in the Federal Republic of Germany or the troops of one of the Three Powers present in Land Berlin;
- counterfeiting money or,
- aggravated trafficking in human beings;
- murder, manslaughter or genocide;
- a criminal offense against personal liberty;
- gang theft;
- robbery or extortion resembling robbery;
- extortion ;
- commercial handling of stolen goods or gang handling of stolen goods or commercial gang handling;
- money laundering or concealment of unlawfully obtained assets;
- incendiary;
- serious offences against the interdiction to possess and to trade with weapons and war weapons;
- serious narcotic offences,
- serious offences against the immigration act (illegal traffic of immigrants)

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?

(-)

c. Or is it maybe 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?

It is a list with *numerus clausus*.

## 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?

§ 100b (5) G.C.C.P.:  
Accidental findings obtained by the measure may be used as evidence in other criminal proceedings only insofar as during their evaluation information was obtained which is required to clear up one of the criminal offences listed in § 100a. That means, the use of such information is allowed under the condition that it concerns one of the serious offences mentioned in § 100a.

But the Federal Court allows to start a new investigation procedure based on this information even for a offence not enumerated in the aforementioned list (Bundesgerichtshof in Strafsachen, vol. 27, p.355)

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

s.a.

#### **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)?

The order shall be limited to a maximum of 3 months.

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

An extension of not more than 3 months shall be admissible if the prerequisites designated under Section 100a continue to exist.

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?

According to a decision of the Federal Court the obtained material can introduce in trial either by hearing the audio-tape as apparent-evidence or by reading the records the transcription of the audio-tapes as documentary-evidence (Bundesgerichtshof in Strafsachen, vol. 27, p. 135). It is not allowed to read or to hear only summaries, dito. to select the material.

b. Can the materials obtained be transcribed?

(+)

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 transcription is performed by the police or the Prosecution service. A selection is not allowed (s. a.)

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

(+), but the interpreter/translator must not be officially appointed

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?

If the records obtained by the measures are no longer required for criminal prosecution purposes they shall be destroyed without delay under the control of the public prosecution office. The destruction shall be recorded in writing.

## **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?

The suspect shall be notified of the measures taken as soon as this can be done without endangering the purpose of the investigation, public security, life or limb of another or endangering the possible continued use of an undercover investigator (§ 101 G.C.C.P.)

## **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?

The telephone-tapping is not restricted to suspected persons. Also non-suspects may be tapped – even if they have a right to refuse the testimony on personal or professional grounds (Bundesgerichtshof in Strafsachen, vol. 30, p. 1).

- If so, can you name those groups?
- 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?

The Federal Court has decided that it is generally not allowed to place the defence counsel's telephone under tapping (Bundesgerichtshof in Strafsachen, vol. 33, p. 148). This rule is also valid if the defence counsel is under suspicion. First he has to be excluded as defence counsel according to § 138 G.C.C.P. (Defence counsel shall be excluded from participation in proceedings if he is strongly suspected, or suspected to a degree justifying the opening of the main proceedings, of being involved in the offence which constitutes the subject of investigation, of abusing the communication with an accused not at liberty for the purpose of committing criminal offenses or substantially endangering the security of a prison or of having committed an offense which in the case of the conviction of the accused would be accessoryship, obstruction of justice, or handling stolen goods.)

## **9. Forbidden Evidence**

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

S. a., concerning so called accidental findings and tapping of defence counsel's telephone.

It is also not allowed to use evidence when the tapping has not been ordered according to the conditions of § 100a G.C.C.P. – for example when the police tapes without order of the judge or the prosecution service or when their the concerned person doesn't be suspected an offences numerated in the catalogue of § 100a G.C.C.P.