

**REPONSES DES ETATS MEMBRES
AU QUESTIONNAIRE
SUR LA PREUVE SCIENTIFIQUE**

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Réponse du ministère fédéral de la Justice – Traduction libre

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Réponse au questionnaire sur la preuve scientifique en matière pénale (dans sa version adressée avec l'invitation officielle, comprenant 10 questions).

Remarques préliminaire :

1. Voici quelques remarques préliminaires destinées à une meilleure compréhension de l'état du droit et de la pratique en Allemagne. Les moyens de preuve qui peuvent être utilisés pour la manifestation de la vérité dans le cadre d'une procédure pénale, c'est à dire les preuves qui peuvent être utilisées pour forger la conviction du Tribunal quant à la culpabilité ou l'innocence du prévenu, sont listées de manière exhaustive par la loi allemande. Il s'agit des témoins, des experts, des „apparences“ [*l'Augenschein est un concept difficilement traduisible: il regroupe tout les faits, ou plutôt les „phénomènes“ qu'un individu peut constater par lui-même, de manière sensorielle. Il s'agit par exemple de regarder une photo, de faire un transport sur les lieux, d'écouter un bruit, etc.*], des documents officiels et autres documents écrits, ainsi que les déclarations du prévenu et des co-prévenus, bien que leur interrogatoire ne fasse pas partie du recueil des preuves au sens technique du terme [*sous entendu : un interrogatoire de police ou autre donnant lieu à un procès verbal n'est pas un mode de „preuve“ au sens procédural : seules le sont les déclarations devant le tribunal. C'est la même différence qu'entre „proof“ et „evidence“ aux USA*]. Les perceptions et déductions de personne („moyens de preuves personnels“) sont pris en compte au moment de leur déposition devant la cour, durant l'audience de fond. Les moyens de preuve matériels, c'est à dire les objets, qui sont significatifs pour l'instruction des faits (pièces à conviction) et les données perceptibles sont pris en compte par la réalisation d'une „mise en situation“ [*tous les actes par lesquels les juges sont mis en situation de constater quelque chose d'eux-mêmes*].

2. Sous le concept de „preuve scientifique“, objet de cette recherche, nous comprenons essentiellement les constatations et l'analyse des traces en lien avec un fait criminel qui mettent en œuvre les moyens de la criminalistique moderne. La science criminelle qui se développe en permanence permet aujourd'hui aux services d'enquête d'appréhender et d'analyser de manière quasi-exhaustive les objets, substances et autres traces en lien avec une infraction. Dans le domaine de l'analyse de traces biologiques (sang, racines capillaires, salive, etc.), c'est surtout l'analyse de l'ADN qui est aujourd'hui d'une importance centrale.

3. La preuve scientifique n'est pas un moyen de preuve réglementé de manière indépendante et autonome au sens procédural du terme, mais une combinaison des moyens de preuve „témoin“, „sachant“, „expert“, „document officiel“ et „mise en situation“. Cette combinaison est finalement dominée par les experts. Le cercle fermé, déjà évoqué, des moyens de preuve au sens procédural, ne connaît pas d'autre catégorie. La prise en compte de preuves qui ne sont pas des témoignages, des expertises ou des preuves résultant de documents officiels, sont réglementés par le mode de preuve de la „mise en situation“. De ce fait, ce type de preuves ne peut être pris en compte au stade de l'audience de fond que par la présentation successive de chaque élément de preuve par l'expert, qui les résume et les analyse. Ce dernier se trouve au début et à la fin d'une „chaîne de la preuve“, qui doit remonter jusqu'à la scène de crime ou à la trace en lien avec l'infraction.

4. La découverte de l'indice et les constatations sur les traces d'un crime sont des circonstances qui doivent être introduits en procédure par la voie du témoignage des fonctionnaires impliqués dans les investigations sur la scène de crime. La présence de l'expert dès la scène de crime est souhaitable, dans la mesure où il est le seul à pouvoir identifier l'importance de certaines découvertes.

5. Dans une seconde phase se déroule la sécurisation, c'est à dire la „documentation“ de la trace par des photographies, des croquis et d'autres moyens de criminalistique. Les conditions de la conservation et de la transmission des éléments de preuve nécessitent des vérifications, qui sont réalisées par l'interrogatoire des fonctionnaires qui s'en sont chargés. Il s'agit de s'assurer que la trace qui doit faire l'objet d'une analyse de criminalistique n'a pas été modifiée, et que la qualité de cette preuve n'est pas obérée.

6. Au cours d'une troisième phase, il est procédé à l'exploitation de la preuve par une technique d'investigation criminelle, qui nécessite en règle générale l'intervention d'un expert du Bundeskriminalamt (BKA) ou d'un Landescriminalamt (LKA), ou encore d'un expert des instituts de médecine légale des universités allemandes. En ce qui concerne les infractions routières (droit pénal de la route), des spécialistes – en général étrangers au BKA et LKA - de ce domaine interviennent (leur activité, au delà de la simple analyse des preuves, consiste à reconstruire, sur la base de données et de calculs analytiques, le déroulement d'un accident afin d'établir dans quelle mesure il était prévisible et évitable).

7. Pour conclure, un point de vue particulier doit être présenté. Lorsqu'il est question de preuve scientifique, en particulier lorsqu'il s'agit de la prise en compte d'éléments de preuve (des traces), ce que l'on appelle le „traitement de la scène de crime“, c'est à dire la sécurisation et la documentation des traces, se trouve souvent au premier plan (c'est

également l'esprit de ce questionnaire). Bien que cet aspect soit important, ce n'est pas le seul aspect de cette thématique.

En particulier, « l'attribution » [*mot à mot l'affectation des traces, c'est-à-dire le fait d'établir leur provenance*] des traces sur la scène de crime est aussi important pour la manifestation de la vérité et la présentation des preuves, tant vis-à-vis de l'accusé que d'autres personnes.

Ceci concerne les traces biologiques (par exemple les empreintes digitales, le sang ou les cellules) comme les traces liées à un objet (attribution d'un éclat de peinture à un véhicule particulier ou d'une balle à une arme particulière). Dès lors, les dispositions procédurales qui s'appliquent au prélèvement de matériel de comparaison chez le mis en cause et chez d'autres personnes sont aussi significatives, dès lors que ces opérations sont le pendant nécessaire à la réglementation du traitement de la scène de crime. En pratique, une importance particulière revient aux prélèvements biologiques et à leur exploitation, ainsi qu'à la prise d'empreintes digitales. Pour cette raison, il sera renvoyé aux règles de conservation du matériel de preuve, mais pas seulement pour le traitement de la scène de crime, dans les réponses aux questions 1, 2 et 6.

Réponse à la question 1 :

Le traitement de la scène de crime (dont font partie la recherche et la sécurisation des traces) est de la responsabilité du parquet local (en tant que directeur d'enquête) et d'autres autorités de poursuite comme les polices et la douane (dans les hypothèses d'infractions douanières). Pour les cas de criminalité grave, des groupes spécialisés dans les scènes de crime sont activés, renforcés si nécessaire par des experts en criminalistique, agissant sous le contrôle d'un fonctionnaire supérieur.

S'agissant des dispositions procédurales, voici les dispositions pertinentes tant pour la scène de crime que pour la prise en compte par la justice de la preuve qui en résulte :

La disposition fondamentale pour la sécurisation des éléments de preuves est le § 94 du code de procédure pénale (Stafprozessordnung – StPO). D'après cet article, les objets qui peuvent être importants pour l'enquête doivent être prélevés ou sécurisés de toute autre manière. Si ces objets se trouvent en possession d'une personne (ce qui n'est pas le cas pour les traces comme les empreintes digitales, les traces de sang ou de pneus sur une scène de crime, sauf si ces traces se trouvent sur des objets qui sont en possession de quelqu'un) et qu'ils ne sont pas remis spontanément, il est nécessaire de les saisir (ce qui est le cas pour les objets utilisés pour la commission du crime ou le butin qui se trouvent en possession de quelqu'un). La personne qui est en possession d'un objet utile à la preuve est obligée de le remettre à la

demande d'un service d'enquête. Il ne peut cependant être procédé à une saisie que par un juge ou, en cas de péril en la demeure, par le parquet et ses enquêteurs (certains fonctionnaires de police ou d'autres services d'enquête).

L'injonction d'une recherche corporelle du mis en cause aux fins de prise de sang ou de toute autre atteinte corporelle revient au juge conformément au § 81a premier alinéa de la StPO, mais également au parquet ou à ses enquêteurs en cas de risque de déprédation. Seul un médecin est autorisé à procéder à de telles atteintes corporelles.

Le matériel obtenu sur la base de cet article ne peut être utilisé que pour des recherches de génétique moléculaire, dans la mesure où elles sont nécessaires à l'établissement de la provenance ou au constat que ces traces proviennent du mis en cause ou d'un blessé. Ceci, ainsi que les conditions générales pour la réalisation d'une analyse ADN, est réglé en détail dans les articles 81e, 81f de la StPO. Sans consentement écrit de la personne concernée, ces analyses ne peuvent être ordonnées que par le Tribunal, ou par le parquet en cas de péril en la demeure. Afin de préserver une protection suffisante des données personnelles, seuls peuvent être chargés de cette analyse des experts officiels appartenant à l'administration ou agréés, mais n'appartenant pas au service d'enquête, ou qui appartiennent à une unité séparée de l'unité d'enquête du même service.

Les fonctionnaires du service de police peuvent réaliser des prises de vues photographiques, prélever des empreintes digitales, réaliser des mesures et autres sur la personne du mis en cause uniquement dans la mesure où cela apparaît nécessaire à la réalisation de la procédure pénale (§ 81b StPO).

Réponse à la question 2 :

Oui. Il existe des protocoles, des circulaires contraignantes ou des recommandations (par exemple la circulaire sur les services de police n°100 ou la directive sur les traces de scènes de crime (ATOS)), ainsi que des normes d'administration et de traitement des scellés dans les organismes de recherche criminelle officiels ou publics (c'est-à-dire les services de criminologistique des polices mais aussi par exemple des instituts médicaux légaux des universités). En pratique, des protocoles sont également mis en œuvre pour les actes médicaux.

S'agissant des dispositions législatives, il est prévu par la procédure pénale que les experts chargés du prélèvement de matériel biologique pour la réalisation d'une analyse ADN doivent garantir, par des mesures techniques et organisationnelles, que toutes opérations irrégulières

de recherche de génétique moléculaire et la prise de connaissance par des tiers soient exclues. Le matériel à analyser doit être communiqué à l'expert sans mention de nom, d'adresse ni de mois et jour de naissance, conformément à l'article § 81f Abs. 2 Satz 2 et 3 de la StPO.

Réponse à la question 3 :

Une appréciation diligente tant des qualités techniques que personnelles doit présider au choix d'un expert approprié. Lors de ce choix, une attention particulière doit être portée au fait que la doctrine qu'il représente et les techniques qu'il met en œuvre soient généralement reconnues dans les milieux spécialisés. L'article § 73 Abs. 2 StPO prévoit à cet égard que, lorsque certains experts sont désignés officiellement pour la réalisation de certains types d'expertises, d'autres personnes ne peuvent être désignées que lorsque des circonstances particulières le nécessitent. L'habilitation de l'expert, sur la base du droit fédéral ou du droit du land, pour une période déterminée, est un des éléments démontrant sa fiabilité et le fait qu'il dispose des compétences techniques.

Les tribunaux, les parquets et les services de poursuites désignent surtout des établissements publics et officiels. Occasionnellement, certains experts (exerçants dans les services ou les instituts) sont désignés nominativement ou encore certains instituts sont spécialement désignés du fait de leur réputation, de leur spécialisation ou d'une accréditation/certification spéciale. Dans certains cas, des experts privés sont (aussi) désignés, par exemple des psychologues spécialisés en criminologie, des psychiatres ou des bureaux d'experts pour la technique automobile ou l'analyse d'accident.

Les experts des établissements publics ou officiels sont (au minimum) évalués dans le cadre des procédures habituelles de contrôle qualité. Certains instituts médicaux-légaux sont accrédités pour la norme DIN EN ISO/IEC 17025.

Réponse à la question 4 :

Il est renvoyé au dernier paragraphe de la question 3.

Réponse à la question 5 :

Il n'existe pas en droit allemand de règle de preuve qui privilégierait un moyen de preuve particulier. Le critère d'appréciation est toujours la conviction du Tribunal quant à la valeur et de la force de conviction de tel ou tel moyen de preuve pour la manifestation de la vérité.

L'expert est, comme le témoin, un moyen de preuve personnelle et n'a pas, de par la loi, de valeur probante supérieure. Le rapport d'expertise ne peut à ce titre être qu'un élément de la conviction du tribunal. Il n'est pas du rôle de l'expert de retirer au tribunal la prise de décision. Le tribunal n'a pas qu'à statuer sur les questions de droit au regard des conclusions de l'expertise, il a aussi le devoir d'apprécier personnellement la valeur probante de l'expertise d'un point de vue technique.

Malgré ces prescriptions légales et de la jurisprudence des plus hautes instances, il ne faut pas méconnaître le fait que, dans la vérité de la pratique du droit, une preuve de criminalistique se verra attribuer une (particulièrement) forte valeur probante, dès lors qu'elle est réputée être particulièrement objective.

Un cas allemand récent illustre le poids qui peut revenir à une expertise dans une procédure pénale. Le Landgericht de Berlin avait condamné une accusée pour incendie volontaire et homicide volontaire par incendie sur la personne de son père. L'expertise en incendie avait été un élément important dans la prise de décision. Sur appel de l'accusée, le BGH a infirmé cette décision et a renvoyé l'affaire à Berlin. Cette juridiction a relaxé l'intéressée, ce à quoi une nouvelle expertise criminalistique d'incendie (du BKA) a contribué.

En complément, une remarque particulière doit être faite s'agissant de l'analyse ADN : elle est un moyen de preuve significatif. La question est cependant discutée de savoir si les résultats d'une telle analyse doivent être considérés comme absolument certains. Une condamnation ne saurait être prononcée sur la seule base des résultats d'une analyse « PCR » (par polymérisation). Le Tribunal doit être conscient que l'analyse ADN implique une simple analyse statistique, qui ne rend pas l'appréciation de toutes les autres circonstances superfétatoire. L'éventualité d'une induction en erreur par une analyse ADN doit être considérée.

Réponse à la question 6 :

En règle générale, uniquement dans les cas de criminalité grave ou organisée. Indépendamment de la mise en œuvre d'unités de recherche technique de la police, des experts sont désignés par la justice, et ce également dans d'autres types d'infractions, en particulier pour les infractions routières.

Réponse à la question 7 :

1. Du fait de l'importance de l'expertise dans la preuve technique en matière pénale, le fait d'influer sur le choix de l'expert sera un élément déterminant pour la défense, tant au stade de l'enquête que de la procédure intermédiaire et de la procédure principale.

L'avocat de la défense peut aussi désigner lui-même un expert, et présenter l'expertise comme moyen de preuve lors de l'audience au fond. Lors de l'audience au fond, l'avocat de la défense peut en outre essayer, par ses questions et objections, de décrédibiliser les aspects de l'expertise qui sont défavorables à son client. Il peut également réclamer l'audition d'un autre expert. Une défense fructueuse nécessite cependant que l'avocat dispose de connaissances suffisantes en matière de criminalistique, par lui-même ou sur la base de conseils spécialisés.

2. La défense dispose aussi du droit de déposer une requête en nullité de la preuve et d'obtenir sur cette base une déclaration d'irrecevabilité de cette preuve. Le droit sur ce point n'est pas réglementé en procédure, et fait toujours l'objet de discussions sur certains points. La règle de base est la suivante : une preuve recueillie de manière illégale (ou irrégulière) peut mais ne doit pas nécessairement conduire à l'irrecevabilité de la preuve. Le critère retenu est celui de la gravité de la violation de la norme, en particulier lorsque cette violation a été arbitraire. D'après la jurisprudence du BGH, la défense qui souhaite obtenir l'irrecevabilité d'une preuve doit soulever expressément sa nullité lors de l'audience.

Le moyen de droit de l'appel peut être couronné de succès lorsque, lors de l'appréciation des preuves, un résultat a été pris en compte alors qu'il fait l'objet d'une irrecevabilité (soulevée à l'audience par la défense) et que le jugement repose sur ce résultat.

Réponse à la question 8 :

Oui, par exemple dans les domaines suivants : la caractérisation d'ADN de plante ou d'animal, les investigations techniques de microprocesseurs protégés, la caractérisation précise de matériel ADN et de cheveux « télogènes », la reconnaissance vocale et l'analyse de bruit, l'analyse de traces de carrosserie et de verre, tests de traces de fumées, etc.

Réponse à la question 9 :

Le principe est le suivant : les coûts des expertises (criminalistiques ou autres) sont des frais de procédure au sens du § 464a Abs. 1 StPO. Les frais de procédure sont à la charge de l'accusé dans la mesure où ils résultent d'une infraction pour laquelle il a été condamné.

Le montant des honoraires facturés par les experts pour leur activité dans le cadre des procédures pénales sont réglementés par la loi sur les frais de justice et les dommages et intérêts. En fonction de l'objet de l'expertise, le coût horaire varie entre 50 et 95 euros, conformément à l'article 9 de cette loi et à son annexe. Si la prestation concerne un domaine qui n'est pas mentionné par la loi, le coût est apprécié équitablement en fonction des taux horaires généralement facturés pour des prestations de ce type, pratiquées en dehors des expertises judiciaires ou officielles. Au cas par cas, le coût concret des expertises dépendra, au-delà de cette règle abstraite, de l'effort déployé et de l'importance de l'expertise. En principe, le coût horaire de l'utilisation d'une machine et les frais administratifs sont également pris en compte.

Il n'existe pas de disposition légale prévoyant de prendre en compte les frais anticipés d'une expertise pour décider d'y procéder. Le principe est celui de la manifestation de la vérité. Toutefois, le principe général de la proportionnalité des moyens de l'action de l'Etat doit être pris en compte, qui pourrait s'opposer par exemple à la réalisation d'une expertise complexe et coûteuse pour une infraction de très faible gravité.

En complément des principes présentés, il doit être remarqué que la plupart des établissements publics et officiels des Länder facturent leurs prestations à celui qui les a désignés, ce qui signifie qu'en l'absence de condamnation, les coûts sont à la charge du service de justice qui les a ordonnés. Les prestations de l'institut criminel du BKA sont en règle générale gratuites, sauf en cas de condamnation où le montant de la facture reviendra au condamné.

Réponse à la question 10 :

Oui, très rarement, dans les cas où une neutralité particulière était nécessaire. Par contre, l'institut criminel du BKA a été et est encore fréquemment désigné par des services étrangers pour des cas graves qui ont eu des retentissements particuliers dans l'opinion publique.

Beantwortung des Fragebogens zu dem Seminar in Lyon am 15. und 16. Oktober 2008

„Scientific evidence in criminal matters“

(in der mit der offiziellen Einladung versandten, zehn Fragen umfassenden Version)

Vorbemerkung:

1. Zum besseren Verständnis von Rechtslage und Praxis in Deutschland werden die folgenden Bemerkungen vorangestellt. Die Beweismittel, die zur Aufklärung des Sachverhaltes im Strafverfahren, d. h. zur Überzeugungsbildung des Gerichtes von der Schuld oder Unschuld des Angeklagten, zulässig sind, sind in Deutschland gesetzlich abschließend bestimmt. Es handelt sich dabei um Zeugen, Sachverständige, Augenschein, Urkunden und andere Schriftstücke sowie um die Aussagen der Beschuldigten und der Mitbeschuldigten, obwohl deren Vernehmung nicht zur Beweisaufnahme im prozesstechnischen Sinn gehört. Wahrnehmungen und Erkenntnisse von Personen („persönliche Beweismittel“) werden durch deren Aussage vor Gericht in die Hauptverhandlung eingeführt. Die sogenannten sachlichen Beweismittel, d. h. die Gegenstände, die als Beweismittel für die Untersuchung von Bedeutung sind (Beweisgegenstände) und die beweiserheblichen wahrnehmbaren Gegebenheiten werden durch Einnahme des Augenscheins zur Kenntnis genommen.

2. Unter dem kriminaltechnischen Sachbeweis, dem Gegenstand dieser Untersuchung, wird grundsätzlich die mit den modernen Mitteln der Kriminalistik vorgenommene Feststellung und Auswertung aller im Zusammenhang mit der Tat aufgenommenen Spuren verstanden. Dabei erlaubt die sich ständig weiterentwickelnde naturwissenschaftliche Kriminalistik den Ermittlungsbehörden heute eine nahezu vollständige Erfassung und Auswertung tatrelevanter Gegenstände, Substanzen u. a. Spuren. Im Bereich der Auswertung von Körperspuren (Blut, Haarwurzeln, Speichel etc.) hat vor allem die DNA-Analyse zentrale Bedeutung gewonnen.

3. Strafprozessual ist der kriminaltechnische Sachbeweis kein selbständiges und eigenständig geregeltes Beweismittel, sondern eine zielgerichtete Kombination der Beweismittel Zeuge,

sachverständiger Zeuge, Sachverständiger, Urkunde und Augenschein, die letztendlich von Sachverständigen dominiert wird. Der bereits erwähnte, geschlossene Kreis strafprozessualer Beweismittel kennt andere Beweismittel nicht. Beweisaufnahmen, die nicht als Zeugen-, Sachverständigen- oder Urkundenbeweis gesetzlich besonders geregelt sind, unterfallen den Regeln des Augenscheinsbeweises. In den Prozess eingeführt werden kann der Sachbeweis daher nur durch die Erhebung von Einzelbeweisen, wobei der den Sachbeweis zusammenfassende und auswertende Sachverständige am Anfang und Ende der Beweiskette steht, die lückenlos bis zu der am Tatort oder im Zusammenhang mit der Tat aufgenommenen Spur zurückzuverfolgen ist.

4. Das Auffinden des Beweisgegenstandes und die Feststellung der Tatspur sind hingegen Umstände, die im Wege des Zeugenbeweises durch die an der Tatortuntersuchung beteiligten Beamten in das Strafverfahren eingeführt werden. Bereits bei der Tatortuntersuchung ist der Einsatz des Sachverständigen wünschenswert, weil nur er die Bedeutung mancher Funde erkennt.

5. In einer zweiten Phase erfolgt die Sicherung bzw. Dokumentation der Tatortspur durch Fotografie, Skizzen u. a. kriminaltechnische Mittel. Die Sicherstellung und Weiterleitung der Beweisgegenstände bedarf der Überprüfung durch Befragung der damit betrauten Beamten. Es muss sichergestellt sein, dass die kriminaltechnisch auszuwertende Spur nicht verändert und die Beweisqualität nicht beeinträchtigt wird.

6. In einer dritten Phase erfolgt die Auswertung des Sachbeweises durch die eigentliche kriminaltechnische Untersuchung, zu der es in der Regel der Heranziehung eines Sachverständigen des Bundeskriminalamtes oder eines Landeskriminalamtes, gegebenenfalls auch eines Sachverständigen der rechtsmedizinischen Institute der deutschen Universitäten, bedarf. Bei Straftaten im Straßenverkehr (Verkehrsstrafrecht) werden – in der Regel außerhalb der Landeskriminalämter und des Bundeskriminalamtes – spezialisierte Gutachter für diesen Bereich herangezogen (deren Tätigkeit abgesehen von der reinen Sachbeweisanalyse auch in der Rekonstruktion des Unfallgeschehens in Bezug auf Vorhersehbarkeit und Vermeidbarkeit aufgrund von analytischen Bestimmungen und Berechnungen besteht).

7. Ein Gesichtspunkt soll abschließend hervorgehoben werden. Wenn, insbesondere in Bezug auf die Erhebung des Beweismaterials (Spurenmaterials), vom kriminaltechnischen Sachbeweis die Rede ist, steht oft (auch in der Intention dieses Fragebogens) die sogenannte Tatortarbeit, d.h. die Sicherung und Dokumentation der Spuren am Ort des Verbrechens, im Vordergrund. Dies ist aber nur ein, wenn auch sehr gewichtiger, Teil der Thematik.

Wichtig für die Aufklärung des Sachverhaltes und die Beweisführung ist aber insbesondere auch die Zuordnung der am Tatort gefundenen Spuren, sei es gegenüber dem Beschuldigten oder anderen Personen. Dies kann sowohl „körperbezogene“ Spuren (z.B. Fingerabdrücke, Blut und andere Körperzellen) wie auch „sachbezogene“ Spuren (z.B. Zuordnung des am Tatort aufgefundenen Lackabriebes zu einem bestimmten Fahrzeug oder der aufgefundenen Kugel zu einer bestimmten Waffe) betreffen. Dafür sind außerhalb der Tatortarbeit und dieser nachfolgend auch die strafprozessualen Bestimmungen von Bedeutung, die – als notwendiges Gegenstück zur Erhebung der Tatortspur – die Erhebung von „Vergleichsmaterial“ beim Beschuldigten und anderen Personen regeln, wobei bei den personenbezogenen Spuren der Entnahme und Untersuchung von Körperzellen sowie der Abnahme von Fingerabdrücken in der Praxis besondere Bedeutung zukommt. Auf entsprechende Regelungen zur Sicherstellung von Beweismaterial – auch abseits der Tatortarbeit – wird deswegen in den Antworten zu den Fragen 1, 2 und 6 auch hingewiesen.

Zu Frage 1:

Die Verantwortung für die Tatortarbeit (ein Teil davon sind Spurenfindung und -sicherung) tragen die zuständige Staatsanwaltschaft (als Herrin des Ermittlungsverfahrens) und andere Strafverfolgungsbehörden wie die Polizeien und der Zoll (letzterer bei zollrechtlichen Straftaten). In Fällen von Schwerekriminalität werden spezialisierte Tatortgruppen tätig, nötigenfalls unterstützt durch forensische Wissenschaftler unter Aufsicht eines leitenden Vollzugsbeamten.

Im Hinblick auf strafprozessuale Regelungen sind folgende Vorschriften für die Tatortarbeit, aber auch für die nachfolgenden Beweiserhebungen, von Bedeutung:

Die grundlegende Vorschrift für die Sicherung von Beweisgegenständen ist § 94 der Strafprozessordnung (StPO). Danach sind Gegenstände, die als Beweismittel für die Untersuchung von Bedeutung sein können, in Verwahrung zu nehmen oder in anderer Weise sicherzustellen. Befinden sich die Gegenstände in dem Gewahrsam einer Person (was auf am Tatort aufgefundenene Spuren wie Fingerabdrücke, Blutspuren oder Reifenabdrücke naturgemäß nicht zutreffen wird, es sei denn sie befinden sich auf weiteren Gegenständen in persönlichem Gewahrsam) und werden sie nicht freiwillig herausgegeben, so bedarf es der Beschlagnahme (dies kann beispielsweise bei Tatwerkzeugen oder der Tatbeute, die sich in Gewahrsam von Personen befinden, einschlägig werden). Die Person, die einen beweisrelevanten Gegenstand in Gewahrsam hat, ist verpflichtet, ihn auf Anforderung an die Strafverfolgungsbehörden auszuliefern. Die Beschlagnahme selbst darf nur durch den Richter,

bei Gefahr in Verzug aber auch durch die Staatsanwaltschaft und ihre Ermittlungspersonen (bestimmte Beamte des Polizeivollzugsdienstes oder anderer Strafverfolgungsbehörden) angeordnet werden.

Die Anordnung einer körperlichen Untersuchung des Beschuldigten nach § 81a Abs. 1 StPO, die zur Entnahme von Blutproben und anderen körperlichen Eingriffen vorgenommen wird, steht dem Richter, bei Gefährdung des Untersuchungserfolges durch Verzögerung auch der Staatsanwaltschaft und ihren Ermittlungspersonen zu. Nur ein Arzt ist befugt, den körperlichen Eingriff vorzunehmen.

An dem durch Maßnahmen nach § 81a Abs. 1 StPO erlangten Material dürfen auch molekulargenetische Untersuchungen durchgeführt werden, soweit sie zur Feststellung der Abstammung oder der Tatsache, ob aufgefundenes Spurenmaterial von dem Beschuldigten oder Verletzten stammt, erforderlich sind. Dies sowie die Rahmenbedingungen für die Durchführung einer solchen DNA-Analyse sind in §§ 81e, 81f StPO detailliert geregelt. Ohne schriftliche Einwilligung der betroffenen Person dürfen solche Analysen nur durch das Gericht, bei Gefahr im Verzug auch durch die Staatsanwaltschaft und ihre Ermittlungspersonen angeordnet werden. Damit ein ausreichender Datenschutz gewährleistet wird, dürfen mit der Durchführung der Analyse nur Sachverständige beauftragt werden, die öffentlich bestellt oder nach dem Verpflichtungsgesetz verpflichtet oder Amtsträger sind, die der ermittlungsführenden Behörde nicht angehören oder einer Organisationseinheit dieser Behörde angehören, die von der ermittlungsführenden Dienststelle organisatorisch getrennt sind.

Für die Aufnahme von Lichtbildern und Fingerabdrücken des Beschuldigten und die Vornahme von Messungen und ähnlichen Maßnahmen an ihm gilt, dass solche Maßnahmen von den Beamten des Polizeivollzugsdienstes vorgenommen werden dürfen, soweit es für die Zwecke der Durchführung des Strafverfahrens notwendig ist (§ 81b StPO).

Zu Frage 2:

Ja. Es gibt Protokolle, verpflichtende und empfohlene Richtlinien (u. a. die Polizeiliche Dienstvorschrift (PDV) 100 und die Anleitung Tatortarbeit-Spuren (ATOS)) sowie Vorgangs- und Asservatenverwaltungs-Systeme in behördlichen und öffentlichen forensischen Einrichtungen (d.h. den kriminaltechnischen Dienststellen der Polizeien, aber auch beispielsweise in den Rechtsmedizinischen Instituten der Universitäten). In der Praxis werden über ärztliche Untersuchungshandlungen Protokolle angefertigt.

Im Hinblick auf gesetzliche Regelungen gilt: Bei der Entnahme von Körpermaterial zur Durchführung einer DNA-Analyse haben die damit beauftragten Sachverständigen nach der Strafprozessordnung durch technische und organisatorische Maßnahmen zu gewährleisten, dass unzulässige molekulargenetische Untersuchungen und Kenntnisnahme Dritter ausgeschlossen sind. Dem Sachverständigen ist das Untersuchungsmaterial ohne Mitteilung des Namens, der Anschrift und des Geburtstages und –monats des Betroffenen zu übergeben,
§ 81f Abs. 2 Satz 2 und 3 StPO.

Zu Frage 3:

Bei der Auswahl des Sachverständigen ist nach pflichtgemäßem Ermessen ein fachlich und persönlich für die Erstellung des Gutachtens geeigneter Sachverständiger auszuwählen. Bei der Auswahl ist darauf zu achten, dass die von ihm vertretene Lehre wie auch die von ihm angewendeten Methoden in Fachkreisen allgemein anerkannt sind. Dazu sieht § 73 Abs. 2 StPO vor, dass dann, wenn für gewisse Arten von Gutachten Sachverständige öffentlich bestellt sind, andere Personen nur dann gewählt werden sollen, wenn besondere Umstände es erfordern. Die öffentliche Bestellung, die aufgrund bundes- oder landesrechtlicher Vorschriften auf bestimmte Zeit erfolgt, ist ein Anzeichen dafür, dass der Sachverständige zuverlässig ist und über die erforderliche fachliche Eignung verfügt.

Gerichte, Staatsanwaltschaften und Strafverfolgungsbehörden beauftragen vor allem behördliche und öffentliche, forensische Einrichtungen mit den entsprechenden Untersuchungen. Gelegentlich werden bestimmte Sachverständige (in den Behörden/Instituten) namentlich benannt oder Institute gezielt ausgewählt, abhängig von Reputation, Spezialisierung oder besonderer Akkreditierung/Zertifizierung. In bestimmten Fällen werden (auch) Privatsachverständige verpflichtet, so beispielsweise forensische Psychologen, Psychiater oder Sachverständigenbüros für Kraftfahrzeugtechnik und Unfallanalytik.

Sachverständige aus öffentlichen oder behördlichen forensischen Einrichtungen werden (mindestens) im Rahmen des normalen Beurteilungswesens periodisch bewertet. Einige forensische Institute sind gemäß DIN EN ISO/IEC 17025 akkreditiert.

Zu Frage 4:

Auf den letzten Absatz der Antwort zu Frage 3 wird Bezug genommen.

Zu Frage 5:

Es gibt im deutschen Recht keine Beweisregel, die einem bestimmten Beweismittel Vorrang einräumen würde. Maßgeblich ist stets die erforderliche Überzeugung des Gerichtes von Wert und Überzeugungskraft des jeweiligen Beweismittels in Bezug auf die Aufklärung des Sachverhaltes.

Der Sachverständige ist wie der Zeuge ein persönliches Beweismittel und hat von Gesetzes wegen keinen vorrangigen Beweiswert. Das Gutachten eines Sachverständigen kann daher ebenfalls auch nur ein Mittel für die Überzeugungsbildung des Gerichts sein. Es ist nicht Aufgabe des Sachverständigen, dem Gericht die Entscheidungsfindung abzunehmen. Das Gericht hat nicht nur hinsichtlich der Rechtsfragen, die auf der Grundlage gutachterlicher Befunde zu beurteilen sind, sondern auch schon bezüglich der Fachfragen die Pflicht, das Gutachten in eigener Würdigung beweisrechtlich zu verwerten.

Trotz dieser gesetzestheoretischen und auch von der höchstrichterlichen Rechtsprechung so vertretenen Befunde darf aber nicht verkannt werden, dass in der Rechtswirklichkeit einem kriminaltechnischen Sachbeweis einfach deswegen, weil vermeintlich besonders objektiv, (besonders) hohe Bedeutung zugemessen werden könnte.

Welches Gewicht kriminaltechnischen Gutachten im Strafverfahren zukommen kann, belegt in Deutschland ein jüngster Fall. Das Landgericht Berlin hatte die Angeklagte wegen Brandstiftung und durch die Brandstiftung begangenen Mordes an ihrem Vater verurteilt. Maßgeblich dafür war nicht zuletzt ein kriminaltechnisches Brandgutachten. Auf die Revision der Angeklagten hat der Bundesgerichtshof dieses Urteil aufgehoben und an das Landgericht Berlin zurückverwiesen. Dieses hat die Angeklagte im Frühjahr dieses Jahres rechtskräftig freigesprochen, wozu maßgeblich ein weiteres kriminaltechnisches Brandgutachten (des Bundeskriminalamtes) beigetragen hat.

Speziell zur DNA-Analyse ist ergänzend zu bemerken: Sie ist ein bedeutsames Beweismittel. Umstritten ist aber, ob den gewonnenen Ergebnissen ein absolut sicherer Beweiswert zukommt. Soweit nur eine PCR-Analyse (Polymerase-Kettenreaktion) vorliegt, kann die Verurteilung darauf allein jedenfalls nicht gestützt werden. Das Gericht muss sich bewusst sein, dass die DNA-Analyse lediglich eine statistische Aussage enthält, die eine Würdigung aller Beweisumstände nicht überflüssig macht. Mögliche Fehlerquellen bei DNA-Analysen sind zu beachten.

Zu Frage 6:

In der Regel nur in Fällen von Schwerer und Organisierter Kriminalität. Außerhalb der Heranziehung von kriminaltechnischen Einheiten der Polizei werden Sachverständige von der Justiz aber auch bei anderen Straftaten, insbesondere zur Aufklärung von Straftaten im Straßenverkehr, herangezogen.

Zu Frage 7:

1. Da beim kriminaltechnischen Sachbeweis die gutachterliche Tätigkeit des Sachverständigen wesentlich ist, wird es für den Verteidiger in erster Linie darauf ankommen, auf die Auswahl des Gutachters durch die Justiz - im Ermittlungsverfahren, im Zwischenverfahren und im Hauptverfahren - Einfluss zu nehmen. Er kann auch selbst einen Sachverständigen mit der Erstellung eines Gutachtens beauftragen und ihn als Beweismittel in der Hauptverhandlung präsentieren. In der Hauptverhandlung kann der Verteidiger versuchen, im Wege des Frage- und Beweisantragsrechtes gutachterliche Äußerungen zu erschüttern, die seinem Mandanten nachteilig sind und gegebenenfalls Beweisantrag auf die Anhörung eines weiteren Sachverständigen stellen. Dabei ist es für eine erfolgreiche Verteidigung wichtig, dass der Verteidiger, entweder selbst oder sachverständig beraten, über ausreichende Kenntnisse der Kriminaltechnik verfügt.

2. Dazu kommt für die Verteidigung die Möglichkeit, Mängel bei der Beweiserhebung und ein daraus gegebenenfalls folgendes Beweisverwertungsverbot geltend zu machen. Die Lehre von den Beweisverwertungsverböten ist in Deutschland ein gesetzlich nicht geregelter und in Einzelfragen hoch umstrittener Bereich. Als Faustregel gilt: Eine rechtswidrige (regelwidrige) Beweiserhebung kann, muss aber nicht, zu einem Verbot der Verwertung des erhobenen Beweises vor Gericht führen. Maßgebend ist die Schwere des Regelverstoßes bei der Beweiserhebung, insbesondere, ob dieser Regelverstoß willkürlich begangen wurde. Nach der Rechtsprechung des Bundesgerichtshofes muss die Verteidigung, will sie ein Beweisverwertungsverbot geltend machen, in der Hauptverhandlung der Beweisverwertung ausdrücklich widersprechen.

Das Rechtsmittel der Revision kann erfolgreich sein, wenn bei der Beweiswürdigung ein Untersuchungsergebnis berücksichtigt worden ist, obwohl dem ein (von der Verteidigung beanstandetes) Verwertungsverbot entgegen stand und das Urteil auf diesem Umstand beruht.

Zu Frage 8:

Ja, beispielsweise auf folgenden Gebieten: Typisierung pflanzlicher und tierischer DNA, kriminaltechnische Untersuchung zugriffsgeschützter Mikroprozessoren, Verbesserte Typisierung von DNA-Material aus telogenen Haaren, Sprechererkennung und Geräuschanalyse, Spurenuntersuchungen von Beschichtungsstoffen und Glas, Ringversuche und Leistungstestprogramme im Bereich der Schmauchspurenanalytik, usw.

Zu Frage 9:

Im Grundsatz gilt folgendes: Kosten, die für (kriminaltechnische, aber auch andere) Sachverständigengutachten entstanden sind, sind Kosten des Strafverfahrens im Sinne von § 464a Abs. 1 StPO. Die Kosten des Verfahrens hat der Angeklagte insoweit zu tragen, als sie durch das Verfahren wegen einer Tat entstanden sind, wegen der er verurteilt worden ist. Die Höhe der Honorare, die Sachverständige im Rahmen ihrer Tätigkeit in Strafprozessen geltend machen können, ist im Justizvergütungs- und -entschädigungsgesetz (JVEG) geregelt. Je nach Gutachtensgegenstand bewegen sich die nach § 9 JVEG in Verbindung mit der zugehörigen Anlage ansetzbaren Stundenhonorare zwischen 50 und 95 €. Wird die Sachverständigenleistung auf einem Gebiet erbracht, das in keiner Honorargruppe genannt wird, ist sie unter Berücksichtigung der allgemein für Leistungen dieser Art außergerichtlich und außerbehördlich vereinbarten Stundensätze einer Honorargruppe nach billigem Ermessen zuzuordnen. Im Einzelfall wird die konkrete Höhe von Gutachtenskosten, ausgehend von diesem abstrakten Maßstab, von Aufwand und Umfang der Begutachtung abhängen. Grundsätzlich gilt, dass mit den Stundensätzen üblicherweise auch Maschinenzeiten und Verwaltungskosten mit abgegolten sind.

Eine gesetzliche Regelung, Gutachten in Abhängigkeit von den zu erwartenden Kosten zu vergeben, besteht nicht. Es besteht der Grundsatz der umfassenden Sachaufklärung im Strafverfahren. Zum anderen ist aber auch der ganz allgemein das hoheitliche Handeln prägende Grundsatz der Verhältnismäßigkeit der Mittel zu beachten, der im Einzelfall z.B. entgegenstehen könnte, wegen einer Bagatelldelikt ein ganz besonders aufwändiges und teures Gutachten zu vergeben.

Ergänzend zu diesen grundsätzlichen Ausführungen ist auf folgendes hinzuweisen: Manche öffentlichen oder behördlichen Einrichtungen der Bundesländer stellen den Auftraggebern ihre Dienste in Rechnung, d.h., dass, wenn keine Verurteilung erfolgt, die Kosten von der auftraggebenden Justizbehörde zu tragen sind. Die Leistungen des Kriminaltechnischen Instituts des Bundeskriminalamtes sind für die Auftraggeber in der Regel kostenfrei, dem Verurteilten werden sie jedoch in Rechnung gestellt.

Zu Frage 10:

Ja, sehr selten, in Fällen, wo besondere Neutralität gefordert war. Hingegen wird/wurde das Kriminaltechnische Institut des Bundeskriminalamtes häufiger schon auf Anfrage ausländischer Behörden in schweren, öffentlichkeitswirksamen Fällen von besonderer Bedeutung tätig.

AUTRICHE

Questionnaire on “Scientific evidence in criminal matters” (Austria)

1 - Which authorities are responsible for scientific evidence collection?

The Austrian Criminal Procedure differentiates between the pre-trial phase and the trial. During the pre-trial phase the public prosecutor and police decide which evidence will be collected (sec. 99 para 1 and 103 para 1 and 2 CCP). According to Section 101 of the Austrian Code of Criminal procedure – CCP (“Strafprozessordnung”) public prosecutors lead the preliminary investigation (proceeding) and, in this connection, they can instruct the police to obtain evidence. In most of the cases the actual sampling is carried out by the police during the crime scene investigation. In rare cases, if no appropriate expert within the police is available, a private expert can be appointed by the public prosecutor to gather evidence (sec. 126 para 3 CCP).

During the trial the judge may order an appointed expert or the police to do the evidence sampling.

2 - Is there a mechanism to ensure the quality, traceability and preservation of sampling?

A crime scene manual (“Tatortleitfaden”) ensuring quality and optimum preservation of sampled evidence has been in use for three years. Special IT protocols (PAD) guarantee that all samples are traceable.

3 - How are experts selected? Do they have a periodic appraisal?

There are neither formal criteria for the selection of experts within the police nor periodic evaluation. Nevertheless their work is monitored by supervisors to ensure a high degree of professionalism.

During the pre-trial the experts are appointed by the public prosecutor, during the trial, judicial investigations or judicial taking of evidence by the court. The parties (in the pre-trial phase the criminal police as well) have to be informed about the expert who shall be appointed. In cases of imminent danger the parties can be informed after the appointment of the expert. Within a reasonable time the parties have the right to raise well founded objections against the appointment of a certain expert (s. question 7). During the trial the court might choose the same expert as appointed during the preliminary investigation.

There are formal criteria for court certified experts (permanently appointed to the courts). Above all experts who are already registered in the list of sworn experts and interpreters which is set up by the ministry of justice should be appointed. If other experts are selected they have to be informed about their rights and duties. Before becoming a permanent court certified expert, the candidate has to pass an examination (comprises legal and technical/ scientific knowledge). Later on there are periodic evaluations (interval 10 years). If there are serious doubts about the knowledge of the subject the expert can be displaced.

The law regulation governing certification of court experts and their registration in the List of Sworn and Certified Court Experts and Interpreters (*Liste der allgemein beeideten und gerichtlich zertifizierten Sachverständigen und Dolmetscher*) is the Court Experts and Interpreters Act (*Sachverständigen- und Dolmetschergesetz – SDG*); the text of this act is, like all Austrian law regulations, available on the Internet at: www.ris.bka.gv.at (see section “Federal Law” - “*Bundesrecht*”).

Which expert is appointed for a concrete assignment is decided by the court in the specific case. In this process, the judges also can *ad hoc* appoint and put under oath persons who have the necessary expertise, but are not registered in the List of Sworn and Certified Court Experts.

The requirements for the registration in the court expert's list are regulated by §2 SDG. These requirements include, but are not limited to, professional expertise, appropriate occupational experience, know-ledge of law and expert opinion methodology, the equipment necessary for acting as an expert, a sound and legal economic situation and the conclusion of a liability insurance policy.

The initial and continued fulfillment of these requirements is reviewed by means of a quality-assurance proceeding (certification and/or recertification) which the Presidents of the Courts of the first instance carry out as competent certification authorities. The certification comprises three subjects: knowledge of the specific field of expertise (*Sachkunde*), expert opinion methodology (*Gutachtensmethodik*) and knowledge of procedural law (*Verfahrensrechtskunde*). The applicants may be exempted only from certification in “knowledge of the specific field of expertise”, but only provided that they are appointed to teach the respective economic subject or have the authority to practice an occupation or profession which according to the Professional Code also comprises the preparation of expert opinions (e.g., medical doctors, civil engineers, Public Auditors and Tax Advisers (*Wirtschaftstreuhänder*) and psychologists).

The registration in the List of Court Experts and Interpreters is limited at first until the end of the fifth calendar year after the year of registration on the List in the respective field of expertise, and can be extended afterwards upon application by periods of ten years each. The experts, however, are not entitled to such a recertification automatically.

The application for recertification must indicate all judicial proceedings in which the expert has been appointed since his registration, including file number and respective court, however, in case of very frequent appointments, this information shall be limited only to appointments in a relevant period immediately before the application. In addition, the application has to indicate advanced training schemes completed by the expert. If the suitability of the expert is not anyhow well-known to the decision-making body (Presidents of the Courts of the first instance) - particularly due to him/her being frequently appointed in judicial proceedings -, copies of the application are forwarded to randomly chosen courts in order to receive opinions on the suitability of the expert, particularly concerning his/her diligence in the compilation of reports as well as the conclusiveness, the reliability and the correct structure of his/her expert opinions. The decision-making body has to review on the basis of the opinions received and the advanced training scheme certificates submitted the further suitability of the expert.

4 - What is the legal status (public or private) of crime laboratories performing analysis?

The Ministry of the Interior runs a crime lab (Forensic Science Service within the Criminal Intelligence Service Austria) and there are smaller provincial labs run by the police. In addition, there are Departments of Legal Medicine (part of the Medical Universities) doing the examination of bodies and DNA analysis. There is no private laboratory in Austria dealing with a wider range of forensic methods. Accreditation is not a formal requirement for crime labs but is welcome.

The Court Experts and Interpreters Act is based on the principle that Sworn and Certified Court Experts are exclusively natural persons individually (*ad personam*) appointed by a court. The expert may, of course, employ auxiliary persons or auxiliary facilities within the scope of his work (including, for example, criminal labs mentioned in the questionnaire). As far as the legal personality of such auxiliary persons or auxiliary facilities and the quality criteria, they are required to meet, is concerned, the Court Experts Act itself does not explicitly define specific requirements. However, such quality requirements may arise from other legal regulations (for example the Act Governing Accreditation - *Akkreditierungsgesetz*).

5 - What is the probative value conferred to the expert's report in a criminal trial?

The judge is completely independent in the evaluation of every kind of evidence. The court has to consider the pieces of evidence carefully and conscientiously as to their credibility and probative force separately as well as in their interrelation. About the question whether a fact can be accepted as proved the judges do not decide in pursuance of statutory rules of evidence, but only according to their free conviction arising from the conscientious examination of all the pieces of evidence which have been offered for and against (sec. 258 para 2 CCP). Therefore the probative value does not differ from other types of evidence.

6 - Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Whenever resources are available and a technical or scientific expertise is needed the "technical/scientific" police is called in.

7 - In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

According to sec. 126 para 3 CCP the defence may raise objections against a certain expert appointed by the public prosecutor during the pre-trial phase (s. also question 3). If the expert is appointed despite the objections the defence has the right to object on the grounds of infringement of the law (sec. 106 para 1 subpara 1 CCP). During the trial the defence – as well as the public prosecutor - has the right to appeal (sec. 87 CCP).

During the trial the defence may propose an additional collection of evidence or an additional expertise by an expert already appointed by the court (court's expert). Of course the defence can question the court's expert about his/her findings and conclusions. Additionally the defence may present the expertise of a private expert hired by the defence. It is likely that this expert is called into the witness box, although there is no obligation for the court to accept a private expertise (sec. 258 CCP).

8 - Have you developed a special appraisal in certain fields of forensic evidence?

Evaluation of forensic services:

The DNA labs contracted by the Ministry of the Interior are accredited to ISO 17025

The Accreditation of the forensic lab within the Ministry of Interior is in progress There will be a long-term project to accredit crime scene work according to ISO 17020.

Evaluation for evidential value:

The forensic labs of the Ministry of the Interior and the police labs use a unified conclusion scales for all types of expertise.

In 2007, the "Psychiatric Criminal Prognostics" (*Psychiatrische Kriminalprognostik*) has been introduced as a new field of expertise for court experts. Consultant Psychologists and/or Consultant Neurologists which have acquired the Austrian Chamber of Physicians certificate in the training course in „Forensic-psychiatric expert opinions“ may be registered in this field of expertise. Since this field of expertise is reserved for physicians, it falls into the professional

category of "Medicine", although it comprises not only medical issues, but also deals with the preparation of prognoses in the criminal field, in particular in relation to psychoses, personality disorders, sexual delinquency, drug habituation and drug addiction, e.g. in connection with institutionalization of an offender for treatment, probation, conditional release and issuance of instructions/recommendations, as well as with questions of credibility, examination of fitness for interrogation, fitness for trial and fitness for detention. Such predictions require - as the necessary extensive advanced training schemes indicate - in particular also sound criminological and criminal-scientific knowledge.

BELGIQUE

1. Quelles autorités procèdent au recueil de la preuve scientifique ?

En Belgique, les opérations de prélèvements sont majoritairement effectuées par les membres des laboratoires de la police technique et scientifique (**LPTS**). Ces derniers sont répartis sur le territoire par arrondissement judiciaire (27) et relèvent de la Police judiciaire fédérale (PJF).

Les LPTS peuvent travailler - à la demande du magistrat instructeur - en collaboration avec des **experts externes** sollicités pour des prélèvements spécifiques (le service de déminage pour la détermination d'engins explosifs improvisés, les experts en balistique, les experts en incendies, les médecins, les membres de l'INCC, etc....).

La collecte de la preuve se fera néanmoins la plupart du temps par les services de police en raison de l'absence de pouvoir de saisie des experts externes.

En pratique, les membres de la **police locale** effectuent des prélèvements sur les lieux de certains délits. Ils les transmettent ensuite aux LPTS ou directement au greffe en vue d'une enquête complémentaire.

2. Comment sont assurées la qualité des prélèvements, leur traçabilité et leur conservation ?

En ce qui concerne la **qualité des prélèvements et leur conservation**, des normes – relatives à des techniques particulières - ont été édictées à l'attention des 27 LPTS par l'Institut national de criminologie ou de criminalistique (INCC, rattachée au ministère de la Justice) et par la Direction de la police technique et scientifique (DJT, au sein de la Police judiciaire fédérale). L'INCC prévoit également des kits de prélèvements. Dès que les pièces à convictions arrivent à l'INCC, elles sont conservées dans les meilleures conditions.

En matière d'empreintes digitales, les techniques décrites dans le « Manual of Fingerprint Development » du SPF Intérieur (Ministère des Affaires Intérieures) sont principalement utilisées.

De plus, certains protocoles avec différents partenaires intervenant sur le terrain (démineurs, maîtres-chien, Disaster Victim Identification Team de la Police fédérale) ont également été rédigés pour assurer une bonne collaboration au niveau de la descente sur les lieux, de la protection des lieux et de la gestion des pièces à conviction.

Le membre du LPTS est le premier responsable de la qualité, du respect et de l'application des normes en vigueur. Ce dernier doit éventuellement rendre compte au responsable de l'enquête.

Un système informatisé national de gestion administrative est en vigueur depuis 2007 au sein des LPTS. Celui-ci peut également constituer un outil de suivi et de contrôle de la gestion des pièces à conviction et de leur traitement au sein des différents LPTS.

La **traçabilité** est régie par le Code d'instruction criminel qui impose le passage obligatoire par le Greffe du tribunal de l'arrondissement concerné pour tous les indices matériels saisis. Le suivi administratif y est assuré.

En outre, des lois particulières déterminent dans de nombreuses matières les méthodes de recherche à suivre. Notamment, en matière d'ADN, une loi particulière (22.03.1999) et son arrêté d'exécution (04.02.2002) fixent les règles en matière de prélèvement, de traçabilité et de conservation des traces biologiques.

3. Comment sont sélectionnés les experts ? Sont-ils évalués périodiquement ?

- Les experts externes (conseillers techniques)

Conformément au Code d'instruction criminelle, ces experts sont désignés de manière souveraine par le magistrat compétent sur base de leur connaissance dans le domaine et d'exigences en matière de diplôme. L'expert désigné se voit notifier son mandat et prêter serment.

Une liste d'experts (inscrits suite à un examen des antécédents) établie par le tribunal de 1^{ère} instance est disponible au sein des arrondissements judiciaires.

Cependant, des lois particulières limitent la liberté de choix du magistrat dans la désignation de l'expert. Par exemple, en ce qui concerne les expertises ADN, la loi spéciale exige que les laboratoires d'expertises soient agréés par le Roi (loi de 1999 et AR de 2002) et contrôlés régulièrement par l'organisme BELAC - chargé de veiller au respect de la norme ISO 17025 -. Neuf laboratoires privés ou publics sont actuellement agréés pour effectuer les analyses ADN sur le territoire national.

Il n'existe pas d'évaluation régulière des experts externes.

- Les experts de la police

Le mandat des LPTS est établi par le magistrat compétent. A la différence des experts externes, les experts des LPTS ne prêtent pas serment.

- Le personnel de l'INCC

Le magistrat compétent peut désigner- en tant qu'expert - un membre de l'INCC. L'expert de l'INCC nommé reçoit un mandat et prêter serment. Une liste des experts de l'INCC est établie et revue périodiquement en fonction de la validité des domaines de compétences des experts ainsi que des nouveaux experts reconnus comme tels suite à une formation se terminant par un examen personnel. Cependant, il n'existe pas de procédure formelle d'évaluation des experts.

2. Quel est le statut, public ou privé, des laboratoires qui procèdent aux analyses ?

Le statut des laboratoires d'analyses est très variable selon le type d'analyse.

Les membres des LPTS (analyses dactyloscopique, des traces de chaussures, de pneus, d'outils, de voix, etc.) tombent sous le statut de fonctionnaires de police. A l'instar de l'INCC (analyses toxicologiques, de drogues, de fibres, la comparaison balistique, etc.), ces laboratoires ont un statut public.

La loi régit la manière dont l'expertise de nombreuses enquêtes légale doit se dérouler (p.ex. test d'alcoolémie).

En matière d'ADN (cfr supra), les laboratoires agréés sont aussi bien publics que privés.

Les experts "indépendants" - hors INCC - désignés par le magistrat (médecins légistes, incendies, balistique, experts divers, etc.) effectuent leurs expertises à domicile, en laboratoires privés au sein d'universités, etc.

Les analyses chimiques en rapport avec des explosifs sont réalisées à l'Ecole Royale Militaire (Ministère de la Défense).

Pour les agréments et certification, seule l'analyse ADN y est légalement soumise (cf. supra). Cela n'empêche pas certains laboratoires (notamment l'INCC pour les analyses toxicologiques par exemple) de répondre à la norme ISO 17025.

3. Quelle est la valeur probante accordée à l'expertise scientifique dans le procès pénal ?

La valeur probante accordée aux expertises scientifiques dans le procès pénal n'est pas légalement différente de celle accordée aux autres modes de preuve. En effet, sauf lorsque la loi prévoit un mode de preuve particulier ou restreint la force probante d'un élément de preuve, le juge peut fonder son intime conviction sur **tous les moyens de preuve régulièrement obtenus** et que les parties ont pu librement contredire (principe de la liberté des moyens de preuve).

Dans ce contexte, le rapport d'expertise est un élément d'information pouvant aider le juge à se forger une conviction personnelle. Il en apprécie - au cas par cas - la validité et la force probante et n'est pas lié par ce rapport d'expertise.

Il convient de noter que toutes les parties de ce rapport n'ont pas la même valeur probante. En effet, tandis que les constatations ont une valeur probante authentique, les avis, conclusions et conseils n'ont aucune valeur probante particulière.

En pratique néanmoins, la jurisprudence reconnaît en général une valeur probante plus élevée à l'expertise scientifique.

4. La police technique et scientifique est-elle utilisée pour tout type d'infraction ou seulement pour les infractions les plus graves ?

La Police Technique et Scientifique est utilisée pour TOUS les types d'infraction. Cependant, il y a une certaine proportionnalité quant aux moyens mis en œuvre en fonction de la gravité du fait infractionnel (impact de l'infraction sur la société).

5. De quelle manière et à quel stade de la procédure la preuve scientifique peut-elle être discutée par la défense ?

L'admissibilité des moyens de preuve et l'appréciation de leur valeur probante ont lieu devant la juridiction de jugement au cours du procès.

En général, la défense peut discuter la preuve scientifique à partir du premier passage en chambre du Conseil (après 5 jours) et pendant toute la phase de l'instruction. Elle a accès au dossier pénal et peut demander des devoirs d'enquête complémentaires, en ce compris des demandes de contre-expertises. Lors du procès, la défense a encore l'occasion de demander certaines contre-expertises.

Cependant, de nombreuses lois spéciales régissent de manière spécifique la connaissance par les parties du résultat de l'expertise et le délai pour la contre-expertise. Pour certaines expertises – p.ex. la fouille corporelle-, la présence d'un expert propre aux parties est légalement prescrite.

La législation-ADN prévoit la possibilité pour le juge d'instruction d'ordonner une expertise avec contrainte physique pour les infractions à partir d'une peine déterminée. En principe, l'expertise est secrète et non contradictoire. Néanmoins, des exceptions à ce principe existent. Au niveau légal, la procédure Franchimont prévoit la possibilité pour les parties de demander une enquête complémentaire. En outre, en pratique, il peut s'avérer de l'intérêt des parties, en vue d'une accélération de la procédure pénale, de connaître rapidement le résultat d'une expertise afin de faire valoir les éventuels moyens de défense aussi vite que possible.

CHYPRE

Question 1

Which authorities are responsible for scientific evidence collection? (who makes the decision that a sampling is necessary? who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

Cyprus Police is responsible for the collection of scientific evidence. Such powers are vested to the Police, according to Police Law 73(1)/2004, as amended.

It should be noted that scientific evidence collection is carried out by "Police Scene Crime Examiners". In cases where a serious crime has been committed, the evidence collection is carried out by the "Mobile Laboratory Experts" of the Criminalistic Service of the Cyprus Police Headquarters, whilst scientific evidence of minor cases are collected by trained police officers, from Divisional Criminal Investigation Departments.

The decision of whether or not sampling is necessary is taken by the Head of the Crime Investigation Team/Investigator, in cooperation with the Police Scene Crime Examiners. Sampling operations are carried out by trained Police Officers. Members of the Police who are carrying out sampling duties are always supervised by the Head of the Crime Investigation Team.

Question 2

Is there any mechanism to ensure the quality, traceability and preservation of sampling? (Do protocols, specific rules exist?)

The quality of the sampling, as well as traceability and preservation is ensured by documented procedures to be followed, as set in the relevant Police Standing Order, as well as by the rules and regulations as set in a specific handbook prepared by the Criminalistic Service of the Police Headquarters, which is also taught at the Police Academy, during the course of expert training lectures.

Questions 3

How are experts selected? Do they have a periodic performance appraisal?

After a basic course in the Police Academy, a person could either be appointed to serve at the Criminalistic Service of Police Headquarters and then get trained at the Mobile Laboratory, or be positioned in a Divisional Criminal Investigation Department and occasionally receive training at the Police Academy, by Police Experts of the Criminalistic Service, for evidence collection.

For the time being there is no specific periodic performance appraisal, other than regular annual appraisals, which are carried out for all members of the Police.

Questions 4

What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025 quality standard) ?

The legal status of the crime laboratories is public. There is no obligation for public laboratories to have a certification of quality standard.

Recently, due to the fact that Police Forensic Labs have been enlisted to the ENFSI, accreditation on ISO 17025 is considered obligatory and hence, most of the Police Crime Laboratories are now accredited. The aim of the Police is to also receive accreditation of the procedures followed at the crime scene, according to ISO 17020. This is expected to be fulfilled in the coming years.

Questions 5

What is the probative value conferred to the experts report in criminal trial? Does this value differ from that of the other types of evidence {testimony...}?

The experts report/ testimony is highly valued, during Court proceedings.

Questions 6

Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Please refer to the answer of question # 1.

Questions 7

In which way and during which stage of the proceedings may the defence challenge the forensic evidence ?

Defence lawyers may challenge the forensic evidence at the stage of cross-examination (if this is after the prosecution has presented the expert and the evidence collected). Furthermore, defence lawyers, during the course of the trial, may request a private expert to assist them during the cross-examination process.

Questions 8

Have you developed a special appraisal in certain fields of forensic evidence? (if yes which ones)

Yes.

Appraisal has been developed in the fields of :

- Handwriting
- Document Examination
- Fingerprinting
- Ballistics
- Toolmarks / Shoemarks
- Counterfeit Currency
- Trace Evidence (Glass / Paint/ Fibres)
- Digital photography

DANEMARK

The French Presidency has forwarded a questionnaire regarding scientific evidence in criminal matters with a view of preparing a seminar in Lyon on 15-16 October 2008 on the matter.

Please find below the Danish answers to the questionnaire:

1. Which authorities are responsible for scientific evidence collection?

(Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

The National Police provide assistance in the field of forensics to the police districts including the examination of crime scenes, the securing and examination of evidence and assist in the solution of special tasks.

The police districts may contact the National Police in any case with a view to get forensic assistance. However, in cases which do not require specific expertise or routine, the police districts by itself shall conduct the examination of crime scenes and secure and forward the evidence if necessary.

In general the National Police shall be contacted for forensic assistance in the examination of crime scenes and the securing of evidence in cases regarding:

1. homicide and attempted homicide
2. serious sexual offences
3. burnt in persons where the cause of the fire cannot be established immediately, or where it is assessed that there are useful evidence on the crime scene which cannot be secured by the police district itself
4. finding of bombs if there is a suspicion of a criminal act and it is assessed that there are useful evidence which cannot be secured by the police district itself
5. accidents of a catastrophic nature including within the areas submitted to systematic monitoring by the police and within the areas where a separate strategy for the action has been drawn up and if it is assessed that there are useful evidence on the crime scene which cannot be secured by the police district itself.

Furthermore, it is in general recommended that the National Police are contacted for forensic assistance in the examination of crime scenes, the securing of evidence in cases regarding:

1. suspicious deaths
2. serious crimes of violence
3. robberies where it is assessed that there are useful evidence which cannot be secured by the police district itself
4. traffic accidents where one of the parties involved has removed himself (hit-and-run drivers) and where there might be a case of negligent homicide or negligent bodily harm.

Moreover, the National Police may be contacted for forensic assistance in cases regarding:

1. parachute accidents
2. serious industrial accidents and other serious accidents
3. serious and extensive theft where the way of breaking in cannot be established immediately or it is assessed that there are useful evidence on the crime scene which cannot be secured by the police district itself

4. the investigation of organised crime when it is assessed that there might be found useful evidence which cannot be secured by the police district itself
5. assistance in connection with the examination of crime scenes the securing of evidence and physical examination in other serious cases
6. project orientated and/or thematized investigation.

2. Is there any mechanism to ensure the quality, traceability and preservation of sampling? (Do protocols, specific rules exist?)

A set of guidelines describing the measures which shall be observed on crime scenes and scenes of accidents during the forensic work have been drawn up. The guidelines shall inter alia contribute to ensure the quality of the forensic work.

It appears from this that the crime scene shall be sealed off effectively as quickly as possible, that as few as possible should set foot on the area, that toilet, wash hand basin and telephone on the crime scene may not be used, that smoking on the crime scene is prohibited and that disposable gloves and overshoes should be used.

It further appears that clues and other pieces of evidence may not be collected or moved unless it is absolutely necessary and if so that their placing shall be marked and noted and if necessary also documented by photos.

The guidelines also contain measures regarding the handling of biological evidence. It appears hereof that masks and disposable gloves are to be used when securing biological evidence, that all containers must be absolutely clean and unused. Furthermore, it appears that two pieces biological evidence must be secured separately because the equipment used to the securing of one piece of evidence may only be used for this, after which new equipment must be used. Only one piece of evidence must be placed in each container.

The measures also contain guidelines for the drying of effects, the storage of these and the packing and forwarding of effects.

3. How are experts selected? Do they have a periodic performance appraisal?

It is a requirement to become a forensic expert that you are a trained police officer. In addition a requirement for several years of practical investigative experience applies. Further, persons who are employed in the Forensic Centre under the National Police undergo a special education.

Forensic experts are chosen from the permanent staff in the Forensic Centre on the basis of their general forensic education and special capabilities and competences within a specific field. These specialists are hereinafter further trained by participating in special courses.

All employees in the Forensic Centre participate in a yearly employee development interview where an assessment of the professional capabilities is a part.

4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025 quality standard)?

The Danish National Police cooperate with both private and public laboratories that perform analysis of scientific evidence in criminal cases. There are no formalised requirements regarding certification of the laboratories, but please be informed that the staffs of both the public and private laboratories in concern are required to be highly skilled specialists in their field of work.

Both the private and public laboratories are used as expert witnesses during trial in criminal cases.

5. What is the probative value conferred to the expert's report in criminal trial? Does this value differ from that of the other types of evidence (testimony...)?

According to Section 880 in the Danish Administration of Justice Act the court's assessment of the evidence is not bound by rules. Thus the court is free to consider the evidence including any scientific evidence presented before them.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Reference is made to the answer to question 1 from which it follows under which conditions the police districts may and shall contact the Forensic Centre.

7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

According to Section 729 a, the defence has the right to make itself acquainted with the material procured by the police for the purpose of the case. This enables the defence to follow the investigation and to comment it during the pre-trial stage of the case. Where the investigation involves difficult technical questions the defence may be assisted by an expert in order to better assess the result of the police investigation.

The defence may also request the police to initiate further investigative measures and if the police do not comply with the request the defence can present the matter to the courts.

During the trial, the defence also has the opportunity to challenge the evidence in accordance with the principle of the free assessment of proof mentioned above.

8. Have you developed a special appraisal in certain fields of forensic evidence? (If yes which ones?)

In certain areas case law exists which has set up a precedent for the evaluation of the evidence. As an example can be mentioned the identification of persons based on fingerprints where the number of identical specific details between the piece of evidence and the persons fingerprint has been decided by a judgement from the Supreme Court in 1915. This practice is observed in the forensic work.

In other areas as for instance comparison of handwriting, voices and tracks from tools, the appraisal in the Forensic Centre depend on international adopted standards.

Yours sincerely

ESPAGNE

Questionnaire in view of the Conference on “Scientific evidence in criminal matters” (15-16 October 2008, Lyon)

1. Which authorities are responsible for scientific evidence collection? (Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

Collection of evidence on the scene of the crime is generally conducted by the Police during the investigation. According to Section 164 (2) of Act XIX of 1998 on the Criminal Procedure Act (CPA), the aim of the investigation is to conduct an inquiry into the criminal offence, identify the offender, as well as to locate and secure the means of evidence. Therefore mainly specially trained police technicians are involved in this process. In special cases forensic experts are invited as consultants to help this activity or the collection is performed by these experts. Samples for examination (when it is needed and depending on specific domain) shall be separated from the evidence exclusively by forensic scientists.

2. Is there any mechanism to ensure the quality, traceability and preservation of sampling? (Do protocols, specific rules exist?)

The traceability and quality of sampling is ensured by the legislation. The handling of evidence and samples is regulated by ministerial decree (Decree 11 of 2003 of Minister of Justice, Minister of Interior and Minister of Finance). Technicians taking part in the collection of evidence are systematically trained. They are supplied with basic documentation, protective clothing and with sampling kits. Internal protocols for the separation of samples for examination from evidence are under compilation as part of the preparation of institutes for accreditation. Rules for preservation of sampling are not complete, the evidence from the scene of the crime is generally returned to the Police, the samples for examination are saved in the Institute For Forensic Sciences for further examination in case it is needed.

3. How are experts selected? Do they have a periodic performance appraisal?

To become a forensic expert, one have to meet requirements of education and of practice at different standards, depending on the forensic discipline. According to the recent rules, experts shall take part in legal and professional training every two years.

Criminal technicians are also important in inspections. They are members of the professional team of the Police and have to meet special requirements. They have to be qualified in digital and analog photo and video technology, securing clues and DNA, and must have basic chemistry skills. Beyond that, stamina is also required, when for example site inspections lasts more than 24 hours in case of homicide. Criminal technicians are trained in specials schools of the National Police Headquarters.

4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025 quality standard)?

In Hungary both public and private laboratories (institutes) may perform forensic analysis. In some disciplines, exclusively public ones are assigned and licensed by a ministerial decree. Neither public nor private laboratories are obliged for having certification, but following the rules

of ENFSI, some institutes involved in forensic activity are preparing themselves for accreditation based on ISO 17025 standard.

5. What is the probative value conferred to the expert's report in criminal trial? Does this value differ from that of the other types of evidence (testimony)?

According to Section 75 (1) of the CPA, evidence shall cover the facts which are relevant to the application of criminal statutes and legal regulations in criminal proceedings. The objective of gathering evidence shall be the thorough and complete elucidation of the true facts.

Section 76 (1) of the CPA says that means of evidence shall be the testimony of the witness, the expert opinion, physical evidence, documents and the pleadings of the defendant.

Pursuant to section 78 (1)-(4) in the course of criminal proceedings, all means of evidence specified by law and all evidentiary procedures may be used without restriction. However, the use of certain means of evidence may also be statutory. Neither the means of evidence nor proofs have a legally prescribed probative force. The court and the prosecutor shall freely weigh each piece of evidence separately and collectively and establish the conclusion of evidence based on their belief thus formed. Facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by way of committing a criminal action, by other illicit methods or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

The Criminal Technical Department of the National Police Headquarters does not carry out site inspections. In case of the most serious crimes (e.g homicide, battery threatening life or causing death, robbery committed by force of arms against financial corporations, crimes against property committed in respect of a particularly considerable value, organized crimes and crimes in connection with drugs) committed in the area of the jurisdiction of the county police headquarters (Budapest Police Headquarters), site inspections are carried out by the criminal technical units thereof.

Criminal technical units of the city police departments and Regional Criminal Technical Units of the Budapest Police Headquarters carry out site inspections in connection with less serious crimes, such as theft of vehicles, burglary, robbery committed without firearms, etc.

Forensic experts can be appointed for special laboratory examinations from the Institute for Forensic Sciences governed by the Ministry of Justice and Law Enforcement and from Criminal Technical Departments of the county police headquarters (Budapest Police Headquarters).

(Explanation: The criminal technical organization of the Hungarian Police can be divided into three levels. On the first level, the National Police Headquarters carry out the professional leading of the organization, such as supervising the criminal technical work of the Police, the training of the criminal technicians, the supply of the criminal technical units with modern equipments and coordinating the national criminal psychological activity.)

Criminal Technical Departments are on the second organizational level, and Criminal Technical Onsite Investigator Units of the city police departments are on the third level.)

7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

During the whole proceeding until the end of the evidentiary procedure and according to the rules of the CPA.

Pursuant to section 108 (1) of the CPA, the expert opinion may be presented in the form of an oral statement by the expert, or submitted in writing, within the deadline set by the court, the prosecutor or the investigating authority. If the expert opinion is incomplete, unclear, contradicts itself or it is required for other reasons, the expert shall – at the request of the court, the prosecutor or the investigating authority – provide the relevant information or complement the expert opinion (Section 109). If the information requested from the expert or the complemented expert opinion still fails to bring the desired result, or it is necessary for other reasons, another expert shall be assigned [Section 111 (1)]. In the course of the investigation the defendant and the counsel for the defendant may motion for the assignment of another expert. Decision on the assignment shall be made by the prosecutor [Section 111 (2)]. In the event of a decision concerning involuntary treatment in a mental institution, another expert shall also be assigned upon a motion by the defendant, the legal representative or spouse, or common-law spouse, or counsel for the defendant thereof [Section 111 (3)].

If the prosecutor or the investigating authority has assigned an expert in the course of the investigation and the accused or the counsel of the defendant submits a motion to this effect within fifteen days following the delivery of the indictment, the court shall assign another expert to examine the same fact. In view of the proceeding, this is the only case when it's obligatory for the court to assign another expert, only this provision shall not be applicable if the court has also assigned an expert in the case, or the involvement of the person invited by the defendant or the counsel thereof as an expert has been permitted by the court or the prosecutor.

The defendant and the counsel for the defendant may advise the prosecutor or the court that they intend to obtain and submit an expert opinion. The decision on the involvement of the person invited by the defendant or the counsel for the defendant as an expert to prepare an expert opinion shall fall within the scope of authority of the court or the prosecutor. The expert invited may conduct a professional examination on his own; in the course of the court procedure, he shall be entitled to the same rights and bound by the same obligations as the expert assigned by the court or the prosecutor. The experts shall mutually inform one another about the expert examination that they intend to carry out and the expert notified so may attend the examination made by the other expert [Section 112 (1)-(2)].

8. Have you developed a special appraisal in certain fields of forensic evidence? (If yes which ones?)

If the question refers to method: in view of the evaluation of results, in the Institute for Forensic Sciences no special mathematical development technique is applied.

If the question concerns the weight of the evidence:

Pursuant to section 78 (1)-(3) of the CPA, in the course of criminal proceedings, all means of evidence specified by law and all evidentiary procedures may be used without restriction. However, the use of certain means of evidence may also be statutory. Neither the means of evidence nor proofs have a legally prescribed probative force. The court and the prosecutor shall freely weigh each piece of evidence separately and collectively and establish the conclusion of evidence based on their belief thus formed.

ESTONIE

Questionnaire in view of the Conference on "Scientific evidence in criminal matters" (15-16 October 2008, Lyon)

11407/08 CATS 61

Answers by the Estonian Delegation

- Investigation of crime scene is mainly performed by the police who are the investigative body during pre-trial investigation. A Prosecutor's Office is responsible of all pre-trial proceedings and may give to police instructions concerning of collecting evidence. The decision which evidence shall be collected is made by police officer responsible for case. Sampling operations are carried out by police and it depends on the seriousness of the crime and other circumstances. Mainly it is done by crime scene technicians belonging to the police or forensic experts who daily work for Estonian Forensic Science Institute (EFSI). The task of latter mentioned specialists is to give more detailed advice what evidence should be collected and how it could be best reserved/packed for laboratory investigations.
- The police have imposed the rules on collecting, handling and reserving/packing of evidence (Handbook of technical investigation of a crime scene). In addition police have instructions on ordering or ruling on expert assessment and special forms of recording collection, preservation and destroy of biological evidence.
- The selection of forensic experts is based on education and professional and personal qualities of applicant. A person may be employed as a forensic expert if the person has acquired higher education required in his or her field of expertise and has been employed in his or her field of expertise in a forensic or research institution or in another position for at least two years immediately prior to commencing employment as a forensic expert. The person with no prior experience in particular field must come through at least 2-year training period. There is no standalone appraisal procedure for experts but in the field having ISO-17025 certification the names of experts are included to the terms of given approval and the names can be added or removed during the periodic inspection of certification.
- EFSI is a state institution and is the only forensic laboratory in Estonia specialized on examination of crime evidence. Metrology Act enacts that in the performance of expert analysis in pre-trial proceedings the traceability of measurement results has to be proved. This kind of proof is provided by certification of laboratory or by assessing a measurer's competence. At the moment EFSI is granted ISO 17025 certification in fields of DNA, forensic chemistry, toxicology and fingerprints and it is under development to widen this list.
- Code of Criminal Procedure enacts that no evidence has predetermined weight which means that in criminal trial an expert's report does not differ from other types of evidence.
- The crime scene technicians belonging to the police attend most crime scene investigations regardless the type of crime. The forensic experts attend only in most serious crimes.
- The defense may challenge the forensic evidence of course on trial but also during pre-trial investigation as well. Code of Criminal Procedure enacts that the body conducting a proceeding shall not refuse to order an expert assessment requested by a suspect, accused, counsel, victim or defendant if the facts for the ascertainment of which the assessment is requested may be essential for the adjudication of the criminal matter. In case the suspect, accused or counsel doubt the results of prior made forensic examination they can demand it to be reassessed or removed from list of evidence.

No

FRANCE

Questionnaire PFUE : La preuve scientifique dans le procès pénal

1) Quelles autorités procèdent dans votre pays au recueil de la preuve scientifique ?

(qui prend la décision de prélèvement ? qui effectue les opérations de prélèvement : expert ou policier ? sous quel contrôle ?)

Le plus souvent, c'est l'officier de police judiciaire directeur d'enquête qui prend la décision d'effectuer un prélèvement. Se trouvant sur le terrain, c'est lui qui procède ou fait procéder à l'opération de prélèvement. En pratique, il confie le plus souvent cette tâche à un technicien de l'identité judiciaire, agent scientifique spécialement formé et habilité.

Le magistrat du parquet et le juge d'instruction, qui contrôlent les investigations dans le cadre des procédures dont ils sont saisis, peuvent également demander à l'officier de police judiciaire de procéder ou de faire procéder à un prélèvement. Cette pratique est facilitée par le développement du traitement en temps réel des procédures et, de manière générale, des contacts téléphoniques entre les enquêteurs et l'autorité judiciaire.

Enfin, dans le cadre de sa mission, définie par l'officier de police judiciaire ou le magistrat, la personne qualifiée ou l'expert commis peut aussi procéder à des prélèvements.

Le contrôle des opérations de prélèvement est double :

- *opérationnel* : dans les affaires les plus complexes ou les plus sensibles, un contrôle est réalisé par le coordinateur de la police technique et scientifique intervenant sur la scène de crime ; dans les autres cas, un contrôle est exercé par l'officier de police judiciaire directeur d'enquête ;

- *juridique* : le magistrat du parquet dans le cadre de son pouvoir de direction de la police judiciaire, ou le juge d'instruction dans le cadre des délégations et des réquisitions qu'il délivre, s'assure que les prélèvements ont été exécutés. En respectant l'intégrité des matériaux prélevés et sans modification injustifiée de la scène d'infraction.

2) Comment sont assurées la qualité des prélèvements, leur traçabilité et leur conservation ?

(existence de protocoles, de règles particulières ?)

Les prélèvements sont placés sous scellés. Une étiquette mentionnant la nature de l'objet saisi, le numéro du scellé, le numéro de la procédure, et le service qui a procédé à la saisie, est attachée à chaque scellé, garantissant ainsi sa traçabilité. La traçabilité des scellés dits génétiques est en outre garantie par l'apposition de codes barres.

Les scellés sont mentionnés dans la procédure et numérotés. Un bordereau récapitulant l'ensemble des scellés est annexé à la procédure.

Les enquêteurs doivent pouvoir rendre compte de la méthode qu'ils ont mise en œuvre pour sélectionner les prélèvements.

Les scellés issus de prélèvements biologiques doivent être conservés dans des locaux répondant à des conditions bien déterminées de température (éventuellement en recourant à la congélation), de conditionnement, et de sécurité. Les scellés génétiques sont conservés dans un service national dédié répondant à ces exigences.

3) Comment sont sélectionnés les experts ? Sont-ils évalués périodiquement ?

Les experts auxquels ont recours les enquêteurs et les magistrats sont en général inscrits sur une liste, nationale ou circonscrite au ressort d'une cour d'appel.

Pour bénéficier de cette inscription, le professionnel doit remplir des conditions de moralité, d'âge, d'expérience professionnelle et d'indépendance, qui sont appréciées par l'assemblée générale des magistrats du siège de la Cour de cassation ou de la cour d'appel concernée, selon que la liste est nationale ou non.

La première inscription est faite à titre probatoire pour une durée de deux ans. Si l'expert a donné satisfaction, il pourra prétendre à une réinscription pour une nouvelle durée de cinq ans, renouvelable.

L'expert doit remettre annuellement un rapport indiquant le nombre de rapports d'expertise remis pendant l'année, ainsi que les formations suivies, ce qui permet aux magistrats d'exercer un contrôle sur la qualité de son travail.

Il convient, cependant, de mentionner la possibilité pour les enquêteurs ou les magistrats de faire appel ponctuellement à des experts non inscrits sur les listes précitées, à condition qu'ils prêtent serment. Cette pratique permet de pallier l'absence d'expert inscrit dans la spécialité demandée sur le ressort géographique du magistrat ou de l'enquêteur, ou la trop grande sollicitation de certains experts, contraints de remettre leurs rapports dans des délais trop longs.

4) Quel est le statut, public ou privé, des laboratoires qui procèdent aux analyses ?

Doivent-ils bénéficier d'un agrément et d'une certification (par exemple norme ISO 17025) ?

Les laboratoires qui procèdent aux analyses peuvent être publics ou privés. La France est dotée de deux laboratoires publics : l'un rattaché à la police nationale, l'autre à la gendarmerie nationale.

La procédure de certification n'est pas obligatoire. Certains laboratoires, publics comme privés, se sont cependant engagés dans ce processus de certification.

Il convient de distinguer le cas particulier des experts et laboratoires qui procèdent aux identifications par analyses génétiques dans le cadre de procédures judiciaires : ils doivent obligatoirement bénéficier d'un agrément délivré pour une durée de cinq ans par une commission nationale présidée par un magistrat.

5) Quelle est la valeur probante accordée à l'expertise scientifique dans le procès pénal ?

Cette valeur probante est-elle différente de celle des autres modes de preuve (témoignages, etc.) ?

La preuve en droit pénal français est libre : les infractions peuvent être établies par tout mode de preuve, laquelle est soumise à la discussion contradictoire des parties et à l'appréciation souveraine des juges du fond.

L'expertise scientifique ne fait pas l'objet d'un régime dérogatoire, et sa valeur probante sera donc appréciée souverainement par les juges du fond.

En pratique, le crédit accordé à une expertise scientifique en fait souvent un élément probatoire déterminant, quoique toujours apprécié en regard des autres indices et preuves de l'enquête.

Toutefois, l'attention des magistrats est appelée dans certains rapports d'expertise, comme en matière de comparaison de profils génétiques, sur la nécessité de relativiser la valeur à accorder à la preuve scientifique, une marge d'erreur, même infime, pouvant exister.

6) La police technique et scientifique est-elle utilisée pour tout type d'infraction ou seulement pour les infractions les plus graves ?

Dans les procédures diligentées pour les infractions les plus graves, comme en matière criminelle, il est recouru à la preuve scientifique de manière exhaustive, afin d'avoir la certitude de ne négliger aucun indice matériel.

Dans les procédures moins graves, la preuve scientifique peut être utilisée, notamment quand un élément apparaît manifestement susceptible d'être exploité (trace apparente, par exemple sur un vol de voiture).

Des réflexions interministérielles sont par ailleurs en cours pour généraliser progressivement le recours à la police scientifique par une recherche systématique pour tout type de procédure, et notamment en matière de délinquance de masse (cambriolages, dégradations volontaires, etc.), afin d'augmenter substantiellement le taux d'élucidation de ces affaires.

7) De quelle manière et à quel stade de la procédure la preuve scientifique peut-elle être discutée par la défense ?

Le régime applicable est différent selon la phase du procès pénal considérée.

- *dans la phase d'enquête :*

Peu de textes prévoient expressément la possibilité de discuter une preuve scientifique, le principe étant que dans ce type de procédure, la discussion se fait, soit au cours de l'instruction qui suivra dans les cas où elle est ouverte, soit de toute façon à l'audience devant le tribunal qui procède à l'instruction définitive du dossier (cf. infra).

Toutefois, le rapport établi à la suite d'un examen scientifique peut toujours être communiqué au mis en cause. Ce dernier peut alors solliciter du procureur de la République la réalisation d'un contre-examen. La décision, expresse ou tacite, de ce magistrat n'est susceptible d'aucun recours.

Il y a lieu de préciser que, dans le cas particulier des examens alcoolémiques et toxicologiques réalisés sur un conducteur de véhicule, le contre-examen est de droit.

- *dans la phase d'instruction :*

La défense peut toujours demander au magistrat instructeur une expertise complémentaire ou une contre-expertise. En cas de refus de ce magistrat, un recours lui est ouvert devant la chambre de l'instruction, juridiction du second degré.

- *devant la juridiction de jugement :*

La preuve scientifique est discutée contradictoirement entre les parties. La juridiction de jugement peut ordonner, d'office ou à la demande des parties, la réalisation d'une expertise ou d'une contre-expertise.

8) Avez-vous développé une expertise particulière dans certains domaines de la preuve scientifique ? (si oui, lesquels?)

En matière de révélation d'empreintes digitales, il a été créé une cabine de *révélation par fumigation de vapeurs de cyanoacrylate*, capable d'accueillir des véhicules entiers et dotée d'un dispositif de recyclage des vapeurs.

S'agissant des analyses de prélèvements génétiques opérés sur des individus, les deux laboratoires publics sont aujourd'hui dotés d'unités de génotypage automatisées qui permettent de réaliser massivement les identifications par empreintes génétiques. Leur capacité actuelle globale est de 220 000 analyses par an.

Des laboratoires privés travaillent également à l'instauration d'unités de génotypage de masse destinées à analyser de manière automatisée les traces biologiques prélevées sur des scènes d'infractions relevant de la délinquance de masse (par exemple les cambriolages), aux fins d'identification génétique.

HONGRIE

Questionnaire in view of the Conference on “Scientific evidence in criminal matters” (15-16 October 2008, Lyon)

1. Which authorities are responsible for scientific evidence collection? (Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

Collection of evidence on the scene of the crime is generally conducted by the Police during the investigation. According to Section 164 (2) of Act XIX of 1998 on the Criminal Procedure Act (CPA), the aim of the investigation is to conduct an inquiry into the criminal offence, identify the offender, as well as to locate and secure the means of evidence. Therefore mainly specially trained police technicians are involved in this process. In special cases forensic experts are invited as consultants to help this activity or the collection is performed by these experts. Samples for examination (when it is needed and depending on specific domain) shall be separated from the evidence exclusively by forensic scientists.

2. Is there any mechanism to ensure the quality, traceability and preservation of sampling? (Do protocols, specific rules exist?)

The traceability and quality of sampling is ensured by the legislation. The handling of evidence and samples is regulated by ministerial decree (Decree 11 of 2003 of Minister of Justice, Minister of Interior and Minister of Finance). Technicians taking part in the collection of evidence are systematically trained. They are supplied with basic documentation, protective clothing and with sampling kits. Internal protocols for the separation of samples for examination from evidence are under compilation as part of the preparation of institutes for accreditation. Rules for preservation of sampling are not complete, the evidence from the scene of the crime is generally returned to the Police, the samples for examination are saved in the Institute For Forensic Sciences for further examination in case it is needed.

3. How are experts selected? Do they have a periodic performance appraisal?

To become a forensic expert, one have to meet requirements of education and of practice at different standards, depending on the forensic discipline. According to the recent rules, experts shall take part in legal and professional training every two years.

Criminal technicians are also important in inspections. They are members of the professional team of the Police and have to meet special requirements. They have to be qualified in digital and analog photo and video technology, securing clues and DNA, and must have basic chemistry skills. Beyond that, stamina is also required, when for example site inspections lasts more than 24 hours in case of homicide. Criminal technicians are trained in specials schools of the National Police Headquarters.

4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025 quality standard)?

In Hungary both public and private laboratories (institutes) may perform forensic analysis. In some disciplines, exclusively public ones are assigned and licensed by a ministerial decree. Neither public nor private laboratories are obliged for having certification, but following the rules

of ENFSI, some institutes involved in forensic activity are preparing themselves for accreditation based on ISO 17025 standard.

5. What is the probative value conferred to the expert's report in criminal trial? Does this value differ from that of the other types of evidence (testimony)?

According to Section 75 (1) of the CPA, evidence shall cover the facts which are relevant to the application of criminal statutes and legal regulations in criminal proceedings. The objective of gathering evidence shall be the thorough and complete elucidation of the true facts.

Section 76 (1) of the CPA says that means of evidence shall be the testimony of the witness, the expert opinion, physical evidence, documents and the pleadings of the defendant.

Pursuant to section 78 (1)-(4) in the course of criminal proceedings, all means of evidence specified by law and all evidentiary procedures may be used without restriction. However, the use of certain means of evidence may also be statutory. Neither the means of evidence nor proofs have a legally prescribed probative force. The court and the prosecutor shall freely weigh each piece of evidence separately and collectively and establish the conclusion of evidence based on their belief thus formed. Facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by way of committing a criminal action, by other illicit methods or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

The Criminal Technical Department of the National Police Headquarters does not carry out site inspections. In case of the most serious crimes (e.g homicide, battery threatening life or causing death, robbery committed by force of arms against financial corporations, crimes against property committed in respect of a particularly considerable value, organized crimes and crimes in connection with drugs) committed in the area of the jurisdiction of the county police headquarters (Budapest Police Headquarters), site inspections are carried out by the criminal technical units thereof.

Criminal technical units of the city police departments and Regional Criminal Technical Units of the Budapest Police Headquarters carry out site inspections in connection with less serious crimes, such as theft of vehicles, burglary, robbery committed without firearms, etc.

Forensic experts can be appointed for special laboratory examinations from the Institute for Forensic Sciences governed by the Ministry of Justice and Law Enforcement and from Criminal Technical Departments of the county police headquarters (Budapest Police Headquarters).

(Explanation: The criminal technical organization of the Hungarian Police can be divided into three levels. On the first level, the National Police Headquarters carry out the professional leading of the organization, such as supervising the criminal technical work of the Police, the training of the criminal technicians, the supply of the criminal technical units with modern equipments and coordinating the national criminal psychological activity.)

Criminal Technical Departments are on the second organizational level, and Criminal Technical Onsite Investigator Units of the city police departments are on the third level.)

7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

During the whole proceeding until the end of the evidentiary procedure and according to the rules of the CPA.

Pursuant to section 108 (1) of the CPA, the expert opinion may be presented in the form of an oral statement by the expert, or submitted in writing, within the deadline set by the court, the prosecutor or the investigating authority. If the expert opinion is incomplete, unclear, contradicts itself or it is required for other reasons, the expert shall – at the request of the court, the prosecutor or the investigating authority – provide the relevant information or complement the expert opinion (Section 109). If the information requested from the expert or the complemented expert opinion still fails to bring the desired result, or it is necessary for other reasons, another expert shall be assigned [Section 111 (1)]. In the course of the investigation the defendant and the counsel for the defendant may motion for the assignment of another expert. Decision on the assignment shall be made by the prosecutor [Section 111 (2)]. In the event of a decision concerning involuntary treatment in a mental institution, another expert shall also be assigned upon a motion by the defendant, the legal representative or spouse, or common-law spouse, or counsel for the defendant thereof [Section 111 (3)].

If the prosecutor or the investigating authority has assigned an expert in the course of the investigation and the accused or the counsel of the defendant submits a motion to this effect within fifteen days following the delivery of the indictment, the court shall assign another expert to examine the same fact. In view of the proceeding, this is the only case when it's obligatory for the court to assign another expert, only this provision shall not be applicable if the court has also assigned an expert in the case, or the involvement of the person invited by the defendant or the counsel thereof as an expert has been permitted by the court or the prosecutor.

The defendant and the counsel for the defendant may advise the prosecutor or the court that they intend to obtain and submit an expert opinion. The decision on the involvement of the person invited by the defendant or the counsel for the defendant as an expert to prepare an expert opinion shall fall within the scope of authority of the court or the prosecutor. The expert invited may conduct a professional examination on his own; in the course of the court procedure, he shall be entitled to the same rights and bound by the same obligations as the expert assigned by the court or the prosecutor. The experts shall mutually inform one another about the expert examination that they intend to carry out and the expert notified so may attend the examination made by the other expert [Section 112 (1)-(2)].

8. Have you developed a special appraisal in certain fields of forensic evidence? (If yes which ones?)

If the question refers to method: in view of the evaluation of results, in the Institute for Forensic Sciences no special mathematical development technique is applied.

If the question concerns the weight of the evidence:

Pursuant to section 78 (1)-(3) of the CPA, in the course of criminal proceedings, all means of evidence specified by law and all evidentiary procedures may be used without restriction. However, the use of certain means of evidence may also be statutory. Neither the means of evidence nor proofs have a legally prescribed probative force. The court and the prosecutor shall freely weigh each piece of evidence separately and collectively and establish the conclusion of evidence based on their belief thus formed.

IRLANDE

1. AGS and in some cases GSOC are responsible for the collection of scientific evidence. Occasionally forensic scientists visit scenes and advise on sampling and collection methods.
2. Scene of Crime Gardai undergo training courses and there is some literature and guidelines available.

The FSL checks that items are appropriately packaged, sealed and labelled and will not undertake an examination if the results could be compromised by its treatment prior to reception. The locations of the items within the laboratory are recorded.

3. Scientific experts are selected through an open competition. They have an annual performance appraisal and two interim reviews. Competency in the areas of expertise has to be established through testing and maintained. The FSL participates in internal and external proficiency tests to check both organisational and individual competency.
4. The Forensic Science Laboratory is part of the Department of Justice, Equality and Law Reform. It has the ISO 17025 quality standard that was awarded by the Irish National Accreditation Board.
5. Expert's evidence is treated differently to other types of evidence in Irish courts. Experts are allowed to give opinions in their area of expertise. The probative value conferred depends on the particular scientific evidence in the case.
6. The FSL gives priority to serious crime but also work on volume crime. The latter will increase following the introduction of a National DNA Database.
7. The defence may request disclosure of all laboratory documentation and results in relation to the case and in relation to the organisation's quality system. They may engage a scientist to examine the documentation, the exhibits or in some cases to carry out analyses themselves. During the trial, the defence may request a voir dire where the evidence is heard in the absence of the jury and can make an application to the judge to forbid the evidence to go to the jury. The defence has been successful in getting forensic evidence ruled out on the basis of non-compliance with legal proceedings or the evidence being more prejudicial than probative. The scientist may be cross-examined on the appropriateness of their expertise as well as the reliability of their scientific findings. Many of the cross-examinations focus on the interpretation of the results.

Materials identified in the FSL	Trace evidence types for linkage	Case types examined
Alcohol	DNA profiling	Armed robbery
Accelerants	Fibres	Assault
Anti-personnel sprays	Footwear marks	Burglary
Blood (human and animal)	Glass	Criminal/malicious damage
Drugs	Hair	Drugs; possession and sale
Dyes and markers	Ink	Fires
Explosives	Mobile phone calls	Fraud
Faecal material	Paint	Identification of bodies
Fabrics	Soil	Murder/manslaughter
Firearm residues		Sexual assault
Plastics		Shootings
Saliva		Suspicious death
Semen		Traffic accidents
Urine		Unauthorised taking of m/v

In Ireland the Forensic Science Laboratory (FSL) is a completely separate organisation from the police. This questionnaire will be answered in relation to the FSL.

1. Which authorities are responsible for evidence collection?

Police who have received training as Scene of Crime Officers. In certain serious crimes, scientists from the Forensic Science Laboratory will visit scenes and advise.

2. Is there any mechanism to ensure the quality, traceability and preservation of samples?

Once samples are brought to the FSL, they are stored, transferred, handled and examined using specific protocols.

3. How are experts selected?

Forensic scientists are selected through an open competition, where the minimum qualification is an honours science degree. They then receive training and have to succeed at competency tests before they can start casework. All reports are peer reviewed before issue. The Quality manager can request that a scientist undergoes re-training if his or her work is not satisfactory.

There are three to four formal meetings a year between scientist and manager to set targets, monitor and evaluate performance.

4. What is the legal status of crime laboratories performing analysis?

The Forensic Science Laboratory is part of the Department of Justice, Equality and Law Reform. It is accredited to ISO 17025.

5. What is the probative value conferred to the expert's report in criminal trial?

In this jurisdiction, experts are permitted to give expert opinions, whereas witnesses may not.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

The FSL receive approximately 15,000 cases a year of which 13,000 are drugs cases. Most of the remaining cases tend to be serious (murder, sexual assault, assault, shootings etc) but some volume crime is covered. The latter is expected to increase when a national DNA database is established.

7. In which way and during which stage of the proceedings may the Defence challenge the forensic evidence?

All laboratory documents or records must be disclosed to the Defence.

Prior to the trial, the Defence may engage a scientist to inspect the analysis and laboratory records or carry out some analysis on their behalf.

The Defence may challenge the evidence during the trial. Occasionally, they will request a voir dire, where the evidence is heard in the absence of the jury to allow the judge to decide if it should be allowed into evidence.

8. have you developed an appraisal in certain fields of forensic evidence?

Yes.

Drugs, DNA, paint, glass, footprints, fibres, BPA, sexual assaults, firearm residue, explosives, fires, phones, tachographs

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LITUANIE

Scientific evidence in Criminal matters

Questionnaire to the Member States

1. Which authorities are responsible for the collection of scientific evidences?
The main authority is police. According Criminal procedure code of the Republic of Lithuania the main authority which performs pretrial investigation, i.e. crime scene investigation and other acts, is police. Regarding special crimes (crimes of war, customs, finances) there are special authorities - Service of financial crimes and others to whom the obligation to perform pretrial investigation is transferred. The main evidences which later have to be examined by forensic experts are gathered in crime scene. The obligation to control and organize, in some times to perform pretrial investigation is delegated to prosecutors.
2. Is there any mechanisms to ensure quality, traceability and preservation of sampling?
There are methodical regulations adopted by Police Department or Prosecutor General which defines the main regulations of sampling. Local regulations exist in State forensic institutions.
3. How experts are selected? Do they have periodic performance appraisal?
Criminal procedure code of the Republic of Lithuania defines that forensic expert may be chosen only from the Register of experts. Detailed order of becoming of forensic expert and forming of the Register is stated in the Law on Forensic Examination of the Republic of Lithuania. Under said law forming of the register is obligation of Ministry of Justice and education and training, certification of forensic experts is obligation of state forensic institutions. The period of issuance of the certificate of forensic expert is 5 years.
4. What is the legal status of forensic laboratories? Do they have to be granted the approval or certifications under the international standards"?
Under the Law on Forensic Examination of the Republic of Lithuania there can be state and private forensic experts. The majority of forensic experts in Lithuania are state forensic experts — working in state forensic institutions. All state forensic institutions are certified or seek for certification or accreditation under International standards. For example, Forensic Science Centre of Lithuania by the Ministry of Justice is certified under ISO 9001, Forensic Science Centre of Lithuanian police is accredited under ISO 17025, Institute of Legal medicine is seeking for accreditation. But there is no obligation under any legal acts of the Republic of Lithuania to be accredited or certified for Forensic Labs.
5. What is the probative value conferred to the expert's report in criminal trial? Does this value differ from that of the other type of evidences (testimony...)?

The probative value of expert report is very big in Lithuanian courts. Because of that we have a problem of surplus (not necessary) forensic examinations — when prosecutor or judge orders forensic examinations just in case or for additional approval of other evidences gathered.

6. Do the technical or scientific police intervene in any kind of offences or only in the most serious ones? Technicians may be invited to the any offence; this is the right of pretrial investigator or prosecutor to decide. The staff of forensic labs may be invited only to the serious offences.
7. In which way and in which stage of the proceedings may the defense challenge the forensic evidence?

The defense can get acknowledged with all evidence in pretrial investigation at any time when they officially asks. If they are not satisfied with forensic evidences at this stage they can ask for additional investigation but the decision to order new examination is made only by pretrial investigator or prosecutors. Also they can order the examination by themselves, but in court this type of evidences will be accepted not as forensic evidences but as other written evidences. In court the defense may apply for questioning of forensic expert.

8. Have you developed a special appraisal in certain field of forensic evidences? If yes which ones?
Yes. The special spheres in which we have good results are speech and audio analysis, handwriting, examinations, examinations of digital images, information technologies.
9. What are the costs resulting from the recourses to the technical and scientific police? Under the laws of the Republic of Lithuania state forensic institutions perform the forensic examination in criminal cases - free of charge, in civil and administrative cases — the costs are calculated under the formula accepted in every state forensic institution and they are paid by the court. After the civil or administrative case is solved all the expenses of the court is covered from the defeated party.
10. Yes, they have appealed and also we have performed examinations under the request of foreign law enforcement institutions.

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LUXEMBOURG

La preuve scientifique en matière pénale

Questionnaire

1. Quelles autorités procèdent dans votre pays au recueil de la preuve scientifique ?

Au Luxembourg la preuve scientifique peut être recueillie soit par un fonctionnaire soit par un expert désigné à cette fin.

Le fonctionnaire de police, en principe un membre d'une cellule de police technique régionale ou de la section police technique du service de police judiciaire, procède au recueil de la preuve scientifique. Il peut agir sur sa propre initiative ou sur ordre du parquet, resp. du juge d'instruction.

Sur une scène de crime le fonctionnaire de police décide, sur base de formations, resp. de ses expériences, quels prélèvements sont à faire.

Les fonctionnaires de police exercent leurs missions sous le contrôle du parquet, resp. du juge d'instruction.

A part de la mise en œuvre des membres de la fonction police technique, un expert peut être désigné par

- l'officier de police judiciaire, en cas d'un flagrant délit/crime¹
- le parquet²
- le juge d'instruction.

L'Administration des Enquêtes Techniques peut également intervenir dans cette matière. Rentrent dans leur champ d'application tous les accidents et les incidents graves survenus dans les domaines de l'aviation civile, des transports fluviaux et maritimes et du chemin de fer font l'objet d'une enquête technique répondant à certains critères.

2. Comment sont assurées la qualité des prélèvements, leur traçabilité et leur conservation ?

Les traces prélevées font l'objet d'un inventaire des traces prélevées sur une scène de crime (« Tatortfundprotokoll »). La loi en matière d'empreintes génétiques définit les inscriptions à faire sur l'échantillon lors d'un prélèvement d'ADN.

Les porteurs de traces font l'objet d'un procès-verbal de saisie lorsqu'il n'est pas possible de pouvoir directement prélever la trace sur la place, resp. si la saisie d'un objet doit être opérée afin de service comme pièce à conviction en tant que tel.

Toutes les traces prélevées sur une scène du crime sont expédiées, en principe, vers la section police technique du service de police technique qui procède à l'archivage et à l'enregistrement des traces dans la base données spécifique. Les cellules de police technique régionales dispose d'un accès à cette base de données afin de pouvoir faire des recherches.

3. Comment sont sélectionnés les experts ? Sont-ils évalués périodiquement ?

Toute personne disposant d'une qualification spécifique peut demander d'obtenir la qualité d'expert judiciaire sur base d'un dossier administratif renseignant sur sa qualification professionnelle.

Il n'existe pas d'évaluations périodiques des experts judiciaires repris sur la liste des experts émise par les autorités judiciaires.

4. Quel est le statut, public ou privé des laboratoires qui procèdent aux analyses ?

5. Quelle est la valeur probante accordée à l'expertise scientifique dans le procès pénal ?

1

Conformément à l'article 36 du Code d'Instruction Criminelle en vigueur S'il y a lieu de procéder à des constatations qui ne puissent être différées, l'officier de police judiciaire a recours à toutes personnes qualifiées. Sauf si elles sont inscrites sur la liste des experts assermentés établie par le ministre de la Justice, les personnes ainsi appelées prêtent, par écrit, serment d'apporter leur concours à la justice en leur honneur et en leur conscience.

2

Conformément à l'article 24-1 du Code d'Instruction Criminelle en vigueur et en dehors d'un délit/crime flagrant le procureur d'Etat peut requérir du juge d'instruction d'ordonner une expertise sans qu'une instruction préparatoire ne soit ouverte.

Au Luxembourg il faut faire la distinction entre un expert en matière civile et en matière criminelle. Il en découle que les règles du Code de procédure civile, relatives à l'expertise en matière civile, ne sont pas applicables, que la présence ou la convocation des parties aux opérations d'expertise n'est pas exigée et que seule l'assermentation du ou des experts commis est obligatoire.

Toutefois, au cas où il serait établi que les droits d'une partie ont été lésés, en raison de l'omission par l'expert de l'une ou de l'autre formalité, même non prescrite par la loi, l'expertise pourrait être annulée. (Cour 21 décembre 1981, 25, 221.)

Au cas, où l'expert, commis par le tribunal correctionnel, est cité à l'audience, non pour y rendre compte, sous forme d'un rapport verbal de l'accomplissement de sa mission, mais pour y fournir des explications orales sur le contenu de son rapport écrit antérieurement, l'homme de l'art est entendu non plus comme expert, mais comme témoin et doit, en cette qualité, prêter le serment de témoin prévu aux articles 155 et 189 du Code d'instruction criminelle.

En matière répressive, le juge base sa décision sur son intime conviction. Tant l'infraction que le préjudice qui en est résulté peuvent donc être prouvés par les pièces et documents produits par la partie civile, à la seule condition que ces pièces et documents aient été communiqués aux parties intéressées et que les droits de la défense n'aient pas été lésés.

Rien n'empêche dès lors le juge répressif de faire état, dans son jugement, en dépit de l'opposition du prévenu, d'un rapport d'expertise non contradictoire versé aux débats par la partie civile, du moment que ce rapport a été communiqué par la partie civile au prévenu et a été librement discuté à l'audience. (Cour 13 mai 1959, 17, 451).

Evidemment il est parfaitement loisible au prévenu de demander à ce qu'une contre-expertise soit faite.

Il en découle que la valeur probante accordée à l'expertise scientifique dans le procès pénal est la même que celle accordée à un témoin, pièce à conviction, etc.

6. La police technique est scientifique est-elle utilisée pour tout type d'infraction ou seulement pour les infractions graves ?

En principe lorsque qu'il faut procéder au prélèvement de traces sur un lieu du crime, cette mission est confiée à un membre de la fonction police technique (régionale ou centrale).

Ceci dit, ça n'exclut pas que tout autre fonctionnaire de police peut procéder à un prélèvement de traces sous condition qu'il dispose des connaissances techniques nécessaires pour garantir un traitement correct des traces.

L'organisation interne de la Police Grand-Ducale veut que le prélèvement de traces soit faite par une unité de la fonction police technique.

La loi du 25 août 2006 relative aux procédures d'identification par empreintes génétiques en matière pénale et portant modification du Code d'instruction criminelle a arrêté une liste d'infractions où le prélèvement ADN est autorisé. Le prélèvement ADN peut être fait par un Officier de police judiciaire. Il n'est pas fait référence à la fonction police technique.

7. De quelle manière et à quel stade de la procédure la preuve scientifique peut-elle être discutée par la défense.

Dès qu'une personne est comparue devant le juge d'instruction et que ce dernier l'a inculpé des faits contenus dans le dossier, elle a accès au dossier répressif et elle peut visionner les différents actes de procédure consignés dans ce dossier. A partir de ce moment l'inculpé peut attaquer des éventuelles expertises ordonnées par les autorités judiciaires. Entre autres, il peut demander une contre-expertise.

L'inculpé pourra également déposer une requête en nullité de l'expertise sur laquelle statuera la chambre du conseil.

Toute personne intéressée par une ordonnance rendue par le juge d'instruction peut faire une requête en nullité contre cet acte judiciaire devant la chambre du conseil.

La dernière possibilité d'attaquer une telle preuve scientifique est lors des débats contradictoire devant le juge de fond, resp. les instances judiciaires ultérieurs.

PAYS-BAS

Scientific evidence in criminal matters – questionnaire

Input of The Netherlands

1. Which authorities are responsible for scientific evidence collection?
(Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

The collection and securing of trace evidence at a crime scene is the responsibility of the police forensic investigations section. In cases involving or expected to involve complex trace evidence, an expert will be called in after consultation with the Forensic Investigation Support Unit (FSO), an agency set up by the police and the Dutch Forensic Institute (NFI). Forensic advisers with a police or NFI background work together in the FSO to match supply to demand in the field of forensic investigation. This basically amounts to asking the right questions (technically speaking) and agreeing delivery dates.

The NFI handles all forensic investigation work requested by the police and the Public Prosecution Service and most of the experts used come from the NFI. In the event of a large-scale disaster or terrorist attack the National Forensic Investigation Team is called in. The Team is composed of a number of forensic experts from the regional police forces, the KLPD (National Police Services Agency), the Ministry of Defence and the NFI.

Once the evidence has been collected and the trace evidence secured at the crime scene, senior members of the investigation team, the Forensic Coordinator and Forensic Adviser at the FSO, the forensic public prosecutor and the public prosecutor responsible for the case decide which evidence, including trace evidence, should be sent to the NFI for further investigation.

The NFI and the police have reached agreement on which trace evidence should be secured and sampled by the police and which should be sent to the NFI for sampling. A number of regional forces have their own laboratories where investigators trained by the NFI but employed by the police work.

2. Is there any mechanism to ensure the quality, traceability and preservation of sampling?
(Do protocols, specific rules exist?)

In the Netherlands this is guaranteed by means of the FT standards (see below), the National Track and Trace System (LSV) and the National Confiscation System (LBH) project.

FT standards

The Forensic and Technical (FT) standards prescribe a standard method of operation for securing and analysing samples and trace carriers with a view to preserving optimal quality in the interests of further investigation.

National Track and Trace System

In January 2008 a national database of trace evidence was set up which enables police staff throughout the Netherlands to see at a glance where such evidence is located and what is being done with it.

When investigating cold cases it is important to know how the trace evidence was handled and what analyses were conducted at the time, and where it is stored at present. The LSV assigns each item of evidence a unique identification number (SIN). Up till now, each organisation has employed its own numbering system, which means that each item may have five different identification numbers. Linking the various systems enables the police and the NFI to exchange digital data and reports of investigations. This is both faster and less subject to error than when such information is sent by post.

National Confiscation System

The system is currently being implemented throughout the Netherlands. The aim is to make the confiscation process more efficient, so that the public can in the future rely on the correct and speedy handling of confiscation procedures. In addition, the three participating partners (the Public Prosecution Service, the State Property Service [fin.org] and the police) will benefit from a streamlined and coordinated method of operation, better information provision and a focus on core tasks.

3. How are experts selected? Do they have a periodic performance appraisal?

Selection

As stated in the answer to question 1, in all cases involving or expected to involve complex trace evidence, an expert will be called in after consultation with the FSO.

During the preliminary investigation and the court hearing, various persons and organisations are entitled to call on experts to give evidence. The police can call on the National Experts Broker (LDM), part of the Knowledge Network of the Police Academy. The LDM can be contacted round the clock and its services are free. This relieves the burden on the investigation team's capacity and funds, since it does not have to look for experts, whose expertise may be unverified, through informal networks. The team can continue its investigation while the LDM contacts suitably qualified experts. The LDM consists of a team of advisers with a legal/tactical, behavioural science or forensic background and with experience in the field of criminal investigations. It is a national one-stop shop that works together with the National Criminal Intelligence Department, the NFI, 'knowledge brokers' at various police forces and Europol. In addition, the LDM makes use of the networks of the National Crime and Operations Faculty in the UK and the Federal Bureau of Investigation in the US.

It is usually the public prosecutor who decides whether or not to call in an expert, after consulting with the senior members of the investigation team.

The judiciary is currently working on creating an independent national register of court experts. A bill at present before the House of Representatives seeks to amend the Code of Criminal Procedure in order to improve the position of experts in criminal proceedings. The amendment includes an article on the creation of the register. The aim is to establish criteria with which experts, including DNA experts, psychiatrists, psychologists and fingerprint experts, will have to comply. A specialist board will assess whether experts meet the conditions for entry in the register. The judiciary will be able to consult the register if an expert needs to be appointed. It is hoped that the register will be in place as of 1 January 2009 and will thereafter be kept up to date. The courts can still appoint experts who are not in the register, but each participant in the proceedings will then have to ascertain for him/herself whether the expert is sufficiently qualified, as is the case at present.

Requirements

As yet, the law sets no substantive requirements with which candidates have to comply if they wish to be designated as an expert. According to case law, an expert must possess certain specialised knowledge even if this is not scientific knowledge in the narrowest sense. Nor are there any conditions attached to how such knowledge, whatever its nature, has been acquired. Some experts

have become so through formal training, others may be ‘amateurs’. Whether a person may be deemed an expert is therefore not only a question of academic education. Experience, training or even a passionate interest in a subject can make someone an expert in his/her field. This is partly to do with the way experience can allow for interpretation of what is observed, and for conclusions to be drawn, even in a situation new to the observer.

The court decides on the basis of the a person’s statement whether he/she may be designated as an expert. There is no periodic appraisal of experts’ performance, but they are assessed separately in each case on their suitability as expert in the relevant proceedings.

4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted approval and certification (for example, ISO 17025 quality standard)?

Dutch legislation states that in order to carry out DNA analyses a crime laboratory has to be accredited by the Dutch Accreditation Council on the basis of general criteria governing the work of testing laboratories set out in NEN-EN ISO/IEC 17025, and to have expertise in performing forensic DNA analysis.

5. What is the probative value conferred to the expert’s report in criminal trials? Does this value differ from that of the other types of evidence (testimony ...)?

An expert may be expected to give an opinion, view or judgment concerning a matter which falls within his/her area of expertise and has been presented to him/her for an opinion. If the expert meets the requirements set by law and has been sworn in by the court as an expert, his/her opinion, view or judgment may, according to the Code of Criminal Procedure, have probative value. In other words, his/her expert report and the statements he/she makes during the hearing are listed as items of evidence in the Code.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Police forensic experts are not only called in when the case is a complex one. However, a distinction is drawn between the different sorts of crime scenes, which will determine the speciality and experience required. The more complex the crime scene, the more highly qualified the experts deployed.

7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

The Code of Criminal Procedure and related legislation explicitly regulate the defence’s right to call its own independent expert witnesses in certain forensic investigations. Examples include investigation of blood alcohol levels in drink-driving cases and DNA analyses. The defendant must be informed of this right, after which the criminal justice authorities make the necessary arrangements.

In addition, counsel for the defence are entitled to file a request for independent investigations as soon as they have taken on a case. If he/she wishes to have the costs paid by the justice authorities, the request should be addressed to the public prosecutor and/or the examining magistrate. The defendant may of course have an independent forensic investigation carried out at his/her own expense and submit the resulting report as evidence in the proceedings.

The general right to call independent expert witnesses will also be regulated afresh in the future amendments to the Code of Criminal Procedure aimed at improving the position of experts in criminal proceedings.

The defendant or his/her counsel can ask for a court-appointed expert through the public prosecutor. If the public prosecutor is not in favour of this he/she must provide reasons why the request should be denied. The defendant/counsel may then lodge an objection to such a denial with the examining magistrate within fourteen days.

The defence may cast doubt on the forensic evidence presented by the Public Prosecution Service to the court during the trial. He/she may request that the criminal justice authorities carry out further investigations or that further investigations be carried out by an independent forensic laboratory in the Netherlands or abroad.

If defending counsel makes use of the opportunity to call for independent investigations during the preparatory phase, this will mean that less doubt is cast on the evidence presented at trial.

8. Have you developed a special appraisal in certain fields of forensic evidence?

The NFI employs experts in 32 fields, including DNA analysis, toxicology, pathology, fibre and hair analysis, weapons and ammunition etc. The value of having an internal pathology department has been clearly demonstrated. The advantage is that a full forensic investigation can be carried out within a single institution, and that experts can agree on the order of investigation.

There is also special expertise available on the use of luminol and blood spatter analysis.

The NFI is a leading European institute and member of ENFSI, which brings together 54 forensic institutes from 31 countries aiming to safeguard the quality of forensic investigations by means of comparative analysis of laboratory results and other activities. In this context, the NFI was also involved in setting up accredited laboratories in other European countries including Croatia and Latvia.

PAYS-BAS (suite)

ad 1:

The authorities in the Netherlands are:

- Police
- Prosecutor and
- Investigating judge or Court judge

ad 2:

- The question can be answered better by the (Netherlands) experts joining the seminar

ad 3:

- In the Netherlands there is up till now no independent system selecting experts. This concerns the performance appraisal as well.

Happily, this is all going to change January 1st, 2009 when there will be a Register (to be filled) with selected 'judicial experts' (not only Dutch experts!).

In short, the system will include: 1. committees who will be responsible for the valuing of the expertise, 2. committees that will judge the candidate-experts

on their expertise and 3. the Board that will decide who, as an expert, is allowed to be a 'registered expert'.

There will be a periodical performance appraisal as well. Every four years the 'registered expert' has to apply for reentering the register.

(I can make this clear following my suggestion concerning a PPP on the NRGD)

ad 4 :

- Just to let you know: In the Netherlands to use scientific evidence as such in a criminal trial does not require a legal status of the laboratory.

ad 5 and 8:

- In the Netherlands there is no probative value conferred to any sort of evidence brought to court.

Of course the experts may tell us judges that DNA-evidence in a particular case is stronger evidence than evidence coming from fingerprint-identification.

But it is all up to the judge to value the evidence using the credo: "*Beyond a reasonable doubt*" (requirements are: credibility, relevance and inferential weight).

(As you might know, there is no jury trial in Dutch court of law)

ad 6:

- In the Netherlands there are 'no such thing' as scientific police, technical police there are. They are concerned with petty offences as well as (major) crimes.

ad 7:

- In the Netherlands the defence lawyer is able to challenge the prosecutor's expert (forensic) evidence right from the beginning of the enquiry.

Still, there are some restrictions by law, the defendant not being able to intervene where major investigative interests are concerned.

From January, 1st, 2009 onwards the defence lawyer in circumstances is allowed to intervene in an even earlier stage of the enquiry.

ad 8:

- See ad 5.

ad 9:

- In the Netherlands the costs are paid by the State, unless in the case of a defence lawyer being the principal the investigation ordered by the defence can not have anything to do with results concerning the trial.

ad 10:

- In the Netherlands we have. To member states like: Great-Brittain, Belgium and Germany, as far as I know. There may be many other countries involved here.

But also outside of Europe, like the USA.

High Court Judge

POLOGNE

Ad 1/

Various authorities are responsible for scientific evidence collection. Mainly it depends on the stage of criminal proceedings. The actions which pertain to the detection of offences are generally carried out by technical and scientific police. The police make use of their own experts who are either police officers or civil servants involved in the specific kind of the science. The police may also take advantage of the independent experts who give the guarantee of appropriate level of scientific knowledge (i.e. physicians, engineers, etc.).

The main role of the police is to detect and preserve the samples which are ascertained as important for the proceeding. Assessment of usefulness of such samples is made by relevant authority supervising the police action which is either a prosecutor office or a court (it depends on the stage of the proceeding).

If the police regard that the specific sample might play an important role as evidence in the trial, it preserves it either in place where the offence was committed or in other place where the sample may be preserved. If the police has not preserved the sample and it still may be done, the police expert or independent expert legitimated upon the decision made by the competent authority may collect the samples irrespectively of the place where the sample were located.

Ad 2/

Pursuant to Article 143 of the Polish Code of Penal Procedure, a record in writing shall be required of an inspection, of an autopsy of a corpse, or exhumation of a corpse, of the conduct of experiments, confrontations, and identifications, of searches made of persons, premises, material objects, and IT systems, and seizure of material objects and IT data, of the opening of a letter or a parcel, or playing or viewing recorded material.

The manners how to collect and preserve the samples were described in many legal acts concerning the activity of competent authorities empowered to conduct the investigations and participate within the relevant investigatory actions. Also internal instructions enshrining the legal activity of competent authorities empowered to conduct the investigations describe methods of collection and preservation the samples.

Ad 3/

According to Article 195 of the Polish Code of Penal Procedure, in addition to the permanent court experts, any person generally recognised to have sufficient knowledge in a particular field, shall be obligated to act as an expert.

It means that any person having specialized and qualified knowledge may be appointed as a expert in criminal proceedings. The act of appointment by competent authority changes the procedural status of such persons who become legal experts entrusted to act in the proceeding.

There are officially available lists consisting of the names of such experts who are either members of scientific institutions or were qualified by a president of proper district court to be consulted as the experts. The competent authority appoint the experts basing on such legal lists.

The appraisal concerns only forensic experts who work in 5 years lasting terms. If the appraisal of their reports were unsatisfactory, the term would not be extended.

Ad 4/

The laboratories performing analysis for the purpose of criminal proceedings might defer from the legal status. Generally the police as a competent authority make use of the laboratories existing by the relevant police unit. That is of course not an obligation. However in case of availability of usage of the independent experts, the police prefers their own specialists (on average it results in duration of preparation of the reports). Many of such crime laboratories fulfill ISO 17025 quality standards. Yet such a standard is not compulsory to each of them.

Furthermore every expert giving the guarantee of the appropriate level of the scientific knowledge might be appointed by the competent authority in pre-trial proceeding. In the trial the court decides whether to appoint the police expert or the expert running their own activity in form of private laboratories. There is nevertheless no obligation to fulfill ISO 17025 quality standards referral to private laboratories.

Ad 5/

According to Article 7 Polish Code of Penal Procedure, the agencies responsible for the proceedings shall make a decision on the basis of their own conviction, which shall be founded upon evidence taken and appraised at their own discretion, with due consideration to the principles of sound reasoning and personal experience.

This means that every evidence should be properly assessed by a competent authority and prior to such assessment their value is equal. From this point of view the expert's report do not defer from the other types of evidence (such testimony of witnesses, etc.).

Ad 6/

The technical and scientific police has the legal obligation to intervene in any kind of cases when there are sufficient grounds to suspect that the crime has been committed.

Ad 7/

Pursuant to Article 167 Polish Code of Penal Procedure, evidence shall be taken upon a motion of the parties or *ex officio*. On every stage of criminal proceeding the parties may challenge the forensic evidence. It can be done at the moment of rendering an order on presenting charges when the person becomes the suspect till the final court decision.

Ad 8/

A special appraisal has not been developed yet in fields of forensic evidence.

PORTUGAL

Portuguese reply to the questionnaire on “Scientific evidence in criminal matters”.

Question 1

In accordance to the Portuguese legal order regarding the criminal procedure and under Article 154 of the Portuguese Criminal Procedure Code “1 – *The expertise is ordered, unofficially or at request, by the judiciary authority, and shall contain the name of the experts and a brief indication of the object of the expertise, as well as, whenever possible, indication of the date, time and place of the event, prior to the audition of the experts.*

2 – *Whenever the expertise is on physical or psychological features of someone who has not given prior consent, the order foreseen in the previous paragraph shall be issued by the judge, who shall ponder on the need of its performance, taking into account the personal integrity and privacy of the concerned person.”*

The collection of samples and consequent analysis shall depend on the type of expertise at stake, article 152 of the CPC foreseeing that: “1 – *The expertise shall be performed in the appropriate facility, laboratory or official service or, whenever such is not possible or convenient, by an expert chosen from within a list of experts present in all the judicial districts, or in the lack of such list or if the request does not take place in due time, by a honourable person of recognized competence in the matter at stake.*

2 – *Whenever the expertise shows to be of special complexity or if it requires knowledge in different subjects, it may be deferred to several experts functioning in the form of college or in interdisciplinary terms.”*

Under Article 162-A of the CPC, these expertises, as well as those foreseen under Article 160, may be performed by a third party.

Seeing that there are forensic and legal medicine expertises, Article 159 of the CPC lays down the specific proceedings for performing them; Law 45/2004, of August 19 should also be taken under consideration since it establishes the criminal system of expertises in legal medicine.

However, this issue should be seen from a different perspective, which is the collection of evidence, understood as the physical action of confiscating objects, products or samples, the probative value of which may depend on its submission to expert examinations (ex: fingerprints, biological traces, drugs, etc.)

In this case, one must refer the general rules of preservation, collection and confiscation of objects/products, foreseen under Article 171. 4 and Article 178 of the CPC and, namely, the rules on injunctions regarding means of proof, foreseen under Article 249 of the CPC.

One must also refer that there are specific systems regarding some types of scientific evidences, the collection and analysis of DNA samples being a paradigmatic case, ruled within the scope of Law 5/2008, of February 12.

In Portugal we have three major police authorities that may collect evidence for crime investigation (Polícia Judiciária, Polícia de Segurança Pública and Guarda Nacional Republicana). One of them, The Judiciary Police do have crime scene teams that collect evidence on most violent cases. These teams are attached to Laboratory of Scientific Police (LPC), a national forensic laboratory with several fields of expertise. When sampling is needed, as for large drug seizures, the criteria is defined by the head of the department involved in the expertise that will usually denominate a technical team to go into the field for the counting or weighing, the collecting and sealing of the seizure

Question 2

There are protocols for the collecting of samples.

Question 3

Experts are selected through public announcement and selection according to curricula, exam qualification and interview. After admission they will have one year of training/evaluation before full acceptance. The forthcoming stages will have routinely, and every year, a personal professional evaluation with numerical and ranking classification.

Question 4

The legal status of (public) crime laboratories performing analysis in Portugal are granted by legal diplomas that define the fields of expertise and intervention. ISO quality standards have been gradually prepared and incorporated in forensic methodologies, for certification.

Question 5

In accordance to Article 163 of the CPC, “1 – *the technical, scientific or artistic judgement inherent to the expert evidence is presumed to be subtracted to the free appraisal of the judge.*
2 – *Whenever the judge’s conviction differs from the judgement contained in the expert’s opinion, he must fundament the divergence.*”

The probative value of this type of evidence thus diverges from the general rule foreseen under Article 127 of the CPC – which constitutes one of the exceptions foreseen under the criminal procedure law to the principle of the appraisal of the evidence according to the rules of experience and free conviction of the judge.

Question 6

The definition of “technical and scientific police” does not adjust to the Portuguese reality. Portugal has bodies of criminal police with generic attributions and bodies of criminal police with specific attributions.

The Judicial Police is the department of criminal police with specific attributions, reserved in some types of crimes, as a rule more complex or more serious, as laid down in Article 5 of Decree-Law 275-A/2000, in the wording of Decree-Law 304/2002.

Please note that this question reports to the intervention of units or police departments of technical and scientific nature, as is the case of the Laboratory of Scientific Police or the Legal Medicine Institute, one may say that there are no legal limitations in resorting to such specialities, being therefore possible to use their resources in all types of crimes, if required to make proof of the facts.

Question 7

In accordance to Article 155 of the CPC, “1 – *Once the expertise is ordered, the Public Prosecutor’s Office, the accused person, the assistant and the civil parties may, whenever possible, designate a technical consultant of their trust to be present when the expertise takes place.*

2 – *The technical consultant may propose that certain proceedings be undertaken and he may make observations and objections, which shall be written in the records.*

3 – *In case the technical consult is appointed after the performance of the expertise, he may, except in the case foreseen under Article 4, a) of the previous article, have access to the contents of the report.*

4 – *The appointment of a technical consultant and the performance of his duties cannot delay the performance of the expertise and the normal progress of the proceedings.*”

Thus, ever since the stage of inquest and at the time of performing the expertise, the defence may intervene and influence its result; without prejudice of, in given situations, and during the stage of inquest, the competent judicial authority may decide not to communicate that the expertise is being performed to the procedural subjects who are, eventually, interested in it – Article 154.4, CPC.

However, the defence may contradict the results of the expertise in any stage of the proceedings, once the defence has no limits to any type of proof, in strict observance of the procedures and through suitable means to remove the probative value of the expertise (audition of experts or of technical consultants in a hearing, presentation, oral or in writing, of a technical opinion – ex: scientific opinion with equivalent value) taking in account the provisions of Article 163 of the CPC.

The evidence may be challenged at any time before and during the trial. Also after trial on recurrent appeals.

Question 8

We have no special appraisal in any fields of evidence in particular, but the most common forensic expertises are routinely covered.

Question 9

The costs of the technical and scientific expertises depend on their type, on the analysis or exam at stake and on the body that is going to perform them. Most of these expertises are performed by public bodies, which may, statutorily, belong to the investigation police department (ex: Laboratory of Scientific Police). In this case, the costs shall be supported by the police's budget.

Whenever the expertises must be performed by public bodies not belonging to the police departments, they are, usually, subject to the payment of a price established by the Government, that shall be supported by the budget of the bodies conducting the investigation (Public Prosecutor's Office or, being the case, the competent Court).

Whenever they are performed by private entities, the technical and scientific expertises are paid in accordance to the prices established by law (Court costs regulation).

In exceptional cases, expertises may be requested that implicate the payment of values established in a different manner.

The costs concerning the performing of the expertises may, in some cases, be included in the account of the courts costs.

The authorities with competence to perform technical and scientific expertises must always ponder whether the results intended with its performance and the inherent costs justify the use of this means of proof.

Question 10

Yes, expertises have already been requested to foreign laboratories, in exceptional cases and regarding highly specific or complex exams or analysis.

ROUMANIE

SCIENTIFIC EVIDENCE IN CRIMINAL MATTERS QUESTIONNAIRE TO THE MEMBER STATES

1. Which authorities are responsible for scientific evidence collection?

(Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

The scientific evidence is a mean of evidence and it concerns technical-scientific and legal-medical acknowledgments and the expertise. They are provided by art. 64 from the Criminal procedure code (the general provision) and by art. 112-125 (the special provisions).

The means of evidence legally obtained can be used during the criminal proceedings.

The criminal investigation is performed by the police investigation bodies for any offence that does not obligatorily fall under the competence of other investigation bodies (art. 207 from the Criminal procedure code - CPC). The criminal investigation is also performed by other special bodies (art. 208 CPC: officers especially appointed by commanders of military units, for the subordinated militaries; officers especially appointed by the garrison commanders, for crimes committed by militaries outside the military units; officers especially appointed by the commanders of military centers, for crimes falling under the competence of military courts, committed by civil persons in relation with their military duties; frontier officers, especially appointed for the frontier offences).

The prosecutor supervises the criminal investigation; while performing this attribution, the prosecutors conduct and control the criminal investigation performed by the police and other bodies. The prosecutor may perform any criminal investigation acts in the cases under his/her supervision (art. 209 CPC).

According to their competence, the criminal investigation bodies (the prosecutors and the police investigation bodies) and the courts administer the means of evidence taking into account the phase of the proceedings of each case.

The judicial authorities responsible to collect the technical-scientific evidence are the criminal investigation bodies and the courts. The decision on the necessity to administer scientific evidence is taken by the competent judicial body, according to art. 65 para. (1) CPC. This provision establishes the judicial organs' obligation to administer the evidence, obligation deriving from their active role in solving the criminal cases.

The operations to collect evidence are accomplished by the criminal investigation bodies, according to their competence, during the criminal investigation, and by the courts, during the judicial investigation.

The judicial experts do not collect evidence; they perform a technical-scientific work, based on the documents and evidence gathered in the case file, upon the order of the criminal investigation bodies or the courts.

Collecting evidence, including the technical-scientific evidence, is performed, according to art. 209 para. (1) CPC, under the prosecutor's supervision, in those cases in which the prosecutor supervises the criminal investigation, or directly by the prosecutor, in those cases in which the criminal investigation is performed by him/her (art. 209 para. 3 CPC).

The Forensic structures from the Romanian Police perform the crime scene investigations for all the crimes that fall under its jurisdiction according to the Romanian Penal Procedure Code and are responsible for all the activities that concern uncovering, lifting, collecting and transporting evidence. When performing crime scene investigation, the forensic experts/specialists from the Police forces secure all the evidence items present at the scene. The evidence related activities at the scene are conducted under the coordination of the senior investigative officer who, depending on the nature of the crime, can be a police investigator or a prosecutor.

2. Is there any mechanism to ensure the equality, traceability and preservation of sampling?

(Do protocols, specific rules exist?)

The CPC does not provide for a special mechanism to ensure the quality, traceability and preservation of the evidence. These guarantees are provided by methodologies and internal regulations, which are drafted based on the regulations of the institutions entitled to perform different types of judicial expertise.

The quality of the evidence is ensured within the forensic institutes and laboratories through ISO 17025 or ISO 9001:2000 accreditation¹. The preservation of evidence is done in the material evidence rooms of the criminal investigation bodies (before being sent to the experts and also after restitution, after performing the analysis).

The Forensic Science Institute from the General Inspectorate of the Romanian Police and 7 territorial forensic services are accredited according to ISO 17025. This is an ongoing process with the aim of obtaining accreditation by the end of this year for an additional 5 territorial forensic services.

Therefore protocols, specific general procedures and working instructions are used in the current practice. Starting from 1st July 2007, all the forensic labs from the Romanian Police work with accredited procedures according to ISO 17025.

Traceability and sample preservation are covered in detail by the "Procedures at the level of the Romanian Police for Crime Scene Investigation" and ensured by the crime scene report and by the chain of custody charts.

3. How are experts selected? Do they have a periodic performance appraisal?

The modalities used for the selection of the judicial experts are: exams, contests, authorisations.

¹ For example, in 2008, the National Institute for Forensic Medicine was granted the ISO – 9001:2000 accreditation. The National Institute for Forensic Expertise is under ISO/CEI 17025 accreditation.

Following an exam and with the fulfilment of the requirements specified in the law, any person can be certified as an authorized forensic expert, according to the Government Decision (GD) no. 368/1998 on setting up the National Institute for Forensic Expertise, subordinated to the Ministry of Justice (MoJ), and according to the Government Ordinance (GO) no. 75/2000 on the authorisation of forensic experts.

The certification for the technical experts performing the judicial technical expertise is acquired through an exam, as stipulated by art. 7 from the GO no. 2/2000, with the fulfilment of the criteria set out in the same normative act: Romanian citizenship and good Romanian speaker; has full legal capacity; has a university degree proving the specialization required by the exam; has a minimum 5 years length of service in the area of expertise; is medically qualified for being an expert; has no criminal record and a good professional and social reputation; passed the exam organized for filling in experts' positions.

With regard to the judicial accounting expertise, the certification for the accountant expert is acquired also through an exam, as provided by GO no. 65/1994 on the organization of the accounting expertise activities and of the authorized accountants, republished. According to art. 20 let. e) from the same normative act, the Body of Expert and Licensed Accountants ensures, for the expert accountants, a good performance of the evaluation activity, based on the International Evaluation Standards.

For the forensic medicine expertise, the procedures to nominate the experts are similar to the ones described above. Thus, the certification for the forensic medicine expert is acquired according to GO no. 1/2000 on the organization and functioning of the forensic medicine institutions, republished, and the certification, the suspension or the withdrawal of the forensic medicine experts are carried out based on the criteria established by the Forensic Medicine Superior Council (FMSC) and approved by the minister of Public Health. The certification for a forensic medicine expert is assessed on an annual basis by FMSC, the Council being able to suspend or withdraw it, as the case may be (art. 34 from the GD no. 774/2000 on approving the Regulation for the application of OG no. 1/2000).

In other cases, the law does not provide for a specific evaluation procedure of the experts' results, this activity being carried out on the basis of the internal regulation and in the framework of the continuous professional training.

The experts working in the following fields: chemistry, physics, pharmacy, forensic medicine, IT, psychology, linguistic, bio-chemistry, biology and anthropology are university graduates and they have to pass an exam in order to work in the forensic field of the Police.

For other fields of forensic science (for example fingerprints comparison, handwriting, questioned documents, tool marks etc.) the experts are Police Academy graduates in forensic science.

We have a periodic performance appraisal specified in orders and internal regulations. The forensic personnel are evaluated once a year and an evaluation chart is made.

4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025 quality standard)?

The Romanian forensic institutes and laboratories have a public statute. Under the legislation in force, there is no specific provision regarding the obligation of the forensic institutes and laboratories to be granted an approval or certification. But in fact, the respective institutions were granted the accreditation, for example, the Forensic Institute within the General Inspectorate of Romanian Police was accredited and the National Institute for Forensic Expertise within MoJ is under ISO/CEI 17025 accreditation – on the quality standard.

The other two types of expertise (judicial technical and judicial accounting), have a public status, all the activities being carried out administratively and methodologically under the coordination and guidance of MoJ: the Central Office for Judicial Technical Expertises within MoJ and the Local Offices for judicial, technical and accounting expertises, within the tribunals.

The judicial expertises are carried out according to the CPC and to the normative acts regulating different types of expertise.

With regard to the forensic and medicine expertises, the request to perform one of these expertises is addressed by the judicial body to the institution, and not to an expert indicated by them; the expert is nominated, in this case, by the leader of the respective institution.

With regard to the technical and judicial accounting expertises, the request to perform them is addressed to a specific expert indicated by the judicial body, according to the law. In this case, the judicial body communicates directly with the expert, without the interposing of the leaders of the expertise office. Thus, the technical and judicial accounting expertises are performed independent of an institution, which makes these expertises private.

In all the four types of judicial expertise, the parties in a case can designate other experts to perform the expertise together with the official experts.

Also, there are a small number of private labs that perform a small range of forensic examinations (handwriting, tool marks, questioned documents, technical examination of vehicles involved in traffic accidents etc.).

The Romanian Police labs function in accordance with the ISO 17025 standard starting from July 2007 and the appropriate documentation to implement the ISO 17020 standard to the crime scene examinations is in the process of preparation.

5. What is the probative value conferred to the expert's report in criminal trial? Does this value differ from that of the other types of evidence (testimony...)?

According to the Romanian legislation in force, irrespective of the type of expertise, the experts, related to the activity carried out, don't issue an expert report. After performing the analysis and the checks requested by the judicial body, the experts issue an "expertise report", which constitutes a means of evidence and it is used during the criminal proceedings.

According to the Romanian Criminal Procedure Code, the evidence submitted to court does not have a predetermined value and no evidence is more important than the other. The value of each evidence item is given by the investigation officer (police or prosecutor) and by the Court after examining all the evidence items, in order to discover the truth.

6. Do the technical and scientific police intervene in any kind of offence or only in the most serious ones?

Yes, the forensic departments from the Romanian Police investigate all crimes for which the Penal Procedure Code deems them competent.

7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

The defence may challenge the forensic evidence in any stage of the criminal investigation, if the content and the conclusions of the expertise are brought to his/her knowledge. The defence may also challenge any means of evidence during the judicial investigation on the merits and during the remedies.

It can suggest the admission of new evidence and can request that a new forensic report be made with the participation of a private expert (designated by the defence).

8. Have you developed a special appraisal in certain fields of forensic evidence? (If yes, in which ones?)

During the continuous training of the trainee prosecutors and of the prosecutors carrying out the criminal investigation in the prosecutor's offices attached to the tribunals (forensic prosecutors), a large scale of topics related to the probation system were debated, especially the technical-scientific evidence (technical-scientific and legal-medical acknowledgments, the judicial expertise) in the context of the other procedural documents in the case.

The evaluation of these means of evidence was done in the above mentioned seminars by the participants, for each case, with a view to identify the positive or negative aspects related to the administration of each kind of evidence.

The National Institute for Forensic Expertise developed a method to expertise the video/audio evidence, IT and telecommunications, presented in Grigoras, C. (2008), 123rd AES Convention, New York, USA; Grigoras, C. (2007) [Applications of ENF criterion in forensic audio, video, computer and telecommunication analysis](#), *Forensic Science International* 167 v2-3 (2007) 136-145; Grigoras, C. (2005) [Digital audio recording analysis: The Electric Network Frequency \(ENF\) Criterion](#), *International Journal of Speech, Language and the Law* 12(1) 64-76 and a method to expertise the voices, presented in Becker, T., Jessen, M., Grigoras, C. (2008) Forensic Speaker Verification Using Formant Features and Gaussian Mixture Models, in print; F. Nolan and C. Grigoras (2005) [A case for formant analysis in forensic speaker identification](#), *International Journal of Speech, Language and the Law* 12(2) 143-173.

At the level of the Romanian Police, no special appraisal method for different fields of forensic evidence was developed.

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ROYAUME-UNI

Q1. Which authorities are responsible for scientific evidence collection? (Who makes the decision that a sampling is necessary? Who carries out sampling operations? Are they carried out by an expert or police? Under which supervision?)

Police forces are responsible for scientific evidence collection. Each force has a Scientific Support Department and the following staff:-

- a Scientific Support manager;
- Head of Scenes of Crime, Crime Scene Investigators (CSIs) and Assistant CSIs;
- Fingerprint Experts and other Fingerprint Examination Staff eg trainees;
- DNA Bureau staff, responsible for quality assurance of samples;
- Forensic technicians eg fingerprint technicians, footwear technicians, lab technicians, handwriting technicians etc
- other Scientific Support Unit Staff – eg Administrative Staff, Photographic/ Imaging staff (Forensic), forensic intelligence etc.

The police force management team (senior police staff and the Scientific Support Manager) decide which crimes should have a crime scene examination and usually do this through the setting of scene examination/ deployment policy.

In the majority of police forces, crime scene examinations are carried out mainly by Crime Scene Investigators but, in a few forces, police officers also carry out crime scene examinations.

Crime scene investigators are trained staff. They work independently and are mostly unsupervised in less serious crime eg vehicle crime. In serious crimes, they are supervised by the Head of Scenes of Crime.

The taking of samples from arrested persons in custody is usually carried out by police officers or detention officers dedicated to the custody function.

In Scotland, the Scottish Police Services Authority (“**SPSA**”) Forensic Services has responsibility from crime scene to court. The police determine which case scene Examiners are to attend. Once at a scene, it is the responsibility of the Scene Examiner to decide which samples be taken, packaged and then what happens with productions from that point on. On occasion police staff may be required to recover productions this may occur in rural police divisions. For all major crime investigation there is a Crime Scene Manager who would supervise proceedings.

Q2. Is there any mechanism to ensure the quality, traceability and preservation of sampling? (Do protocols, specific rules exist?)

At crime scenes, crime scene investigators are trained to search for and collect the best possible trace evidence which may have been left by the offender. DNA crime scene samples and fingermarks collected at crime scenes are sealed to prevent contamination and preserve the evidence and are fully labelled and recorded on police internal IT systems. Each transfer of evidence is recorded to ensure traceability and to provide a full audit trail.

Fingerprint evidence is then sent to the internal force fingerprint laboratory for processing (including enlargement, if needed) by a fingerprint expert and comparison against the UK national fingerprint database. Fingerprint matches are then checked by a further two fingerprint experts to provide quality control.

DNA and other forms of forensic evidence is sent to an external forensic laboratory for examination and analysis. Most forces operate a gatekeeper (forensic submissions) system to

ensure that appropriate samples and accompanying information is submitted with the case; in many cases this includes a further quality check of packaging and labelling.

The results of such examinations are presented in the form of evidential statements which are checked and peer reviewed within the external forensic provider before sending back to the police force.

In Scotland, all productions recovered from crime scenes are labelled and once transferred to the laboratory their traceability and preservation follows UKAS 17025 documented procedures. Crime scene examiners are working towards ISO 17020 accreditation.

Q3. How are experts selected? Do they have a periodic performance appraisal?

Interested persons can apply to police forces to train to become a crime scene investigator etc. They undergo selection procedures, aptitude tests etc. All crime scene investigators and fingerprint experts have extensive training and, in some forces (but not all), these staff are tested for their competency.

All staff generally take part in their force performance development review scheme (appraisals).

Whilst all crime scene investigators and fingerprint experts take part in structured nationally accredited learning programmes, there are currently no national standards around competency in these areas, and the participation in these national programmes is not mandatory. The UK National Policing Improvement Agency is currently undertaking a programme of work to ensure that all crime scene staff in England and Wales have a common recognised level of competency ie that training, specialised knowledge and skills should be laid down in national standards and confirmed by certification or licensing, leading to registration of expertise status, and maintained via continuous personal development and accreditation.

Her Majesty's Inspector of Constabulary (Police forces) has also recommended that chief police officers ensure that scientific police staff have regular performance review in order to maintain and improve professional competence.

In Scotland, experts are selected using competency based assessments and all staff have regular personal development reviews and are monitored on a monthly basis by their line manager.

Q4. What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example, ISO 17025 quality standard)?

Forensic laboratories performing analysis in England and Wales are mainly private commercial companies.

The National Policing Improvement Agency recently completed a project to introduce an approved competitive framework for police forces to use to procure forensic services locally. The specifications used on this framework have incorporated levels of accreditation and quality standards that the forensic laboratory service providers must have achieved to be awarded a place on the framework. These include the requirements for ISO17025 for laboratory analytical work.

In relation to DNA analysis, all prospective new forensic laboratory suppliers of profiles to the National DNA Database (NDNAD) must demonstrate to the NDNAD Custodian Accreditation Service (CAS) that they can provide reliable profiles that are compatible with those from other forensic laboratories. The NDNAD Custodian sets the technical and procedural standards to which the laboratories must adhere and monitors their performance against these standards.

The standards are all contained within the Custodian's quality management system and shared with the forensic laboratories.

The NDNAD Custodian Accreditation Service is responsible for the scientific and technical scrutiny of forensic supplier laboratories that carry out DNA analyses of forensic DNA samples submitted by police forces. The Custodian recommends to the National NDNAD Database Strategy Board that a forensic laboratory is granted accreditation to load DNA profiles to the NDNAD on the basis of findings from the range of activity that CAS carry out, together with the outcomes of on-site audits that are conducted by the United Kingdom Accreditation Service (UKAS).

After gaining accreditation, all approved forensic laboratories must continue to participate fully in the Custodian's ongoing programme of proficiency testing and performance monitoring.

The SPSA is a non-departmental public body and currently laboratories work to ISO 17025 certification, Fingerprints to ISO 9001. There is however a program to move Fingerprints to ISO 17025 and Scene Examiners to 17020 certification.

Q5. What is the probative value conferred to the expert's report in criminal trial?

Expert reports are widely used as circumstantial evidence in criminal trials. As such, an expert report is not directly probative of an issue and in order to be of evidential value, the court must be able to draw an inference from it which supports that issue. Consequently, it requires scrutiny on the part of the party who recovers the evidence and seeks to lead it, on the part of the court to consider its relevance, and on the part of the judge or jury to consider what inferences may be drawn from its findings. On this basis, the oral testimony of an expert witness is often required to elaborate and explain the conclusions contained in their report.

In England and Wales, the Criminal Procedure Rules 2005 (see Rules 1, 3 and 33) specify that experts have a duty to the Courts and set out the requirements of expert witnesses. There is no specific probative value placed on scientific evidence which has to be considered in the light of all the circumstances of the case.

In Scotland, procedure exists under the Criminal Procedure (Scotland) Act 1995 for the evidence of forensic scientists to be produced in court by written report or certificate without their attendance in court. S.280(4) provides that in any criminal proceedings, a report purporting to be signed by two authorised forensic scientists will be sufficient evidence of any fact, or conclusion as to fact, contained in the report, provided that it has been served and not challenged by the defence prior to the trial. Since no limit is placed on the matters which may be certified, the procedure is capable of being applied to a wide range of scientific reports.

Q6. Do the technical and scientific police intervene in any of offences or only in the most serious ones?

The type of crime that Crime Scene Examiners and laboratory staff would be called to attend is determined by the local force requirements. In dealing with the call the Scene Examiner would examine the crime scene and they would then determine together with the investigative officer, if there was value in a more specialist analysis e.g. for the interpretation of blood pattern analysis. This is when scientists would be required to attend the crime scene.

Q7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

Experts for the prosecution and defence are encouraged to agree pre-trial what points of evidence are agreed and which issues are to be tested, by oral evidence, during the trial. The defence may however challenge a piece of evidence at any point during the trial.

In Scotland, the defence may challenge a qualification, finding or conclusion of a forensic scientist within seven days of receiving a copy of their report. If such a challenge is made, the procedure under s.280(4) will no longer be applicable and the scientist will be required to give oral evidence during the trial.

When forensic evidence has been led by the Crown during a trial, it may be challenged by the defence through cross-examination. During cross-examination, the defence may challenge the soundness of the conclusions drawn from the forensic evidence. This may involve challenging the extent of the forensic expert's knowledge and understanding of the findings. Alternatively, it may involve asking the expert's opinion on the facts as the defence hopes to establish them.

The defence may also challenge forensic evidence by raising an objection during examination in chief of an expert witness. It may be the form of a question which is objectionable such a leading question or it may be that the evidence sought to be elicited is irrelevant or otherwise infringes a rule of admissibility. Such objections are dealt with immediately during proceedings.

Q8. Have you developed a special appraisal in certain fields of forensic evidence?

Forensic Practitioners may apply to be registered with the Council for the Registration of Forensic Practitioners (CRFP). Assessments are carried out of the applicant's work and if an applicant is successfully registered with the CRFP their registration is reviewed every 3 years. In Scotland, they are currently developing a career grade scheme which recognises scientific skills and managerial excellence and this will be for the whole organisation from crime scene through to court.

Q9. What are the costs resulting from the recourse to the technical and scientific police?

The overall size of the forensic science market is estimated to be circa £400m p.a. split between commercial forensic providers and police in-house forensic services. Each police force in England and Wales has a delegated budget for the provision of forensic services and is expected to operate within their individual budget.

In Scotland, there is a budget of £24m to provide a crime scene to court service for Scotland. This money is transferred to SPSA at the beginning of the financial year from Scottish Police budgets.

Q10. Have your national authorities already appealed to laboratories/ experts located in another member State for the purposes of criminal proceedings? If not, will you consider it an advantage?

The procurement of forensic services in the United Kingdom is a matter for individual police forces. However, in August 2008, the National Policing Improvement Agency announced a new national framework agreement for the supply of forensic analysis services which could enable police forces in the UK to procure scientific services from other EU countries.

The National Forensic Framework Agreement allows police forces to procure services, such as DNA analysis and toxicology, without having to run their own European procurement exercises. It will offer many benefits to the police service and suppliers, for example, it will reduce turnaround times and provide greater efficiencies. It will run for four years and will allow police forces to select forensic service providers from 14 lots (eg DNA crime scene

stains; drugs; footwear marks; fire investigation; casework (gun crime); casework (homicide/violent crime); casework (sexual offences); casework (volume crime); road traffic incident investigation; and toxicology) and run mini-tendering exercises to achieve the most competitive outcome.

The Forensic Science Service Ltd (FSS), which is a Government Owned Company in the UK, has assisted with many criminal investigations with numerous cases from many European Union countries.

For casework, the FSS has estimated that it has worked with over 20 different European bodies over the last 3 years, where it is estimated to have carried out over 15 cases per year. For example, the FSS carried out work for a law enforcement agency from Sweden, which requested a fingerprint examination of tarpaulin within which a murder victim had been wrapped. A further example from a Dutch law enforcement agency required the involvement of one of the FSS' specialist DNA units to carry out LCN DNA analysis on the deceased's remains for identification purposes.

In Scotland, such assistance from another member state has only taken place in a very limited way so far; although it is considered an advantage to be able to do so.

ECOSSE

Scientific Evidence in Criminal Matters Questionnaire Response from Scotland

Q1. Which authorities are responsible for scientific evidence collection?

A1. In Scotland Scottish Police Services Authority (“SPSA”) Forensic Services has responsibility from crime scene to court. The police determine which case scene Examiners are to attend. Once at a scene, it is the responsibility of the Scene Examiner to decide which samples be taken, packaged and then what happens with productions from that point on. On occasion police staff may be required to recover productions this may occur in rural police divisions. For all major crime investigation there is a Crime Scene Manager who would supervise proceedings.

Q2. Is there any mechanism to ensure the quality, traceability and preservation of sampling?

A2. All productions recovered from crime scenes are labelled and once transferred to the laboratory their traceability and preservation follows UKAS 170205 documented procedures. Our crime scene examiners are working towards ISO 17020 accreditation.

Q3. How are experts selected? Do they have periodic performance appraisal?

A3. Experts are selected using competency based assessments and all staff have regular personal development reviews and are monitored on a monthly basis by their line manager.

Q4. What is the legal status (public or private) of crime laboratories performing analysis?

A4. SPSA is a non-departmental public body and currently laboratories work to ISO 170205 certification, Fingerprints to ISO 9001. We have program to move our Fingerprints to ISO 17025 and Scene Examiners to 17020 certification.

Q5. What is the probative value conferred to the expert’s report in criminal trial?

A5. Under Scots law, expert reports are widely used as circumstantial evidence in criminal trials. As such, an expert report is not directly probative of an issue and in order to be of evidential value, the court must be able to draw an inference from it which supports that issue. Consequently, it requires scrutiny on the part of the party who recovers the evidence and seeks to lead it, on the part of the court to consider its relevance, and on the part of the judge or jury to consider what inferences may be drawn from its findings. On this basis, the oral testimony of an expert witness is often required to elaborate and explain the conclusions contained in their report.

However, procedure exists under the Criminal Procedure (Scotland) Act 1995 for the evidence of forensic scientists to be produced in court by written report or certificate without their attendance in court. S.280(4) provides that in any criminal proceedings, a report purporting to be signed by two authorised forensic scientists will be sufficient evidence of any fact, or conclusion as to fact, contained in the report, provided that it has been served and not challenged by the defence prior to the trial. Since no limit is placed on the matters which may be certified, the procedure is capable of being applied to a wide range of scientific reports.

Q6. Do the technical and scientific police intervene in any of offences or only in the most serious ones?

A6. The type of crimes that Scene Examiners and laboratory staff would be called to attend is determined by the local force requirements. In dealing with the call the Scene Examiner would examine the crime scene and they would then determine together with the investigative officer, if there was value in a more specialist analysis eg. for the interpretation of blood pattern analysis. This is when scientists would be required to attend the crime scene.

Q7. In which way and during which stage of the proceedings may the defence challenge the forensic evidence?

A7. The defence may challenge a qualification, finding or conclusion of a forensic scientist within seven days of receiving a copy of their report. If such a challenge is made, the procedure under s.280(4) will no longer be applicable and the scientist will be required to give oral evidence during the trial.

When forensic evidence has been led by the Crown during a trial, it may be challenged by the defence through cross-examination. During cross-examination, the defence may challenge the soundness of the conclusions drawn from the forensic evidence. This may involve challenging the extent of the forensic expert's knowledge and understanding of the findings. Alternatively, it may involve asking the expert's opinion on the facts as the defence hopes to establish them.

The defence may also challenge forensic evidence by raising an objection during examination in chief of an expert witness. It may be the form of a question which is objectionable such a leading question or it may be that the evidence sought to be elicited is irrelevant or otherwise infringes a rule of admissibility. Such objections are dealt with immediately during proceedings.

Q8. Have you developed a special appraisal in certain fields of forensic evidence?

A8. We are currently developing our career grade scheme which recognises scientific skills and managerial excellence and this will be for the whole organisation from crime scene through to court.

REPUBLIQUE DE SLOVAQUIE

Ministry of Interior of the Slovak Republic
Presidium of the Police Force

Scientific evidence in criminal matters **Questionnaire to the Member States**

- 1. Which authorities are responsible for scientific evidence collection?
(Who makes the decision that a sampling is necessary? Who carries out sampling operations?
Are they carried out by an expert or police? Under which supervision?)**

The Penal Procedural Code lays down that the authorities active in criminal procedure (a police authority, a prosecutor) are responsible for forensic evidence collection, but sampling operations are usually carried out by crime scene technicians active within the Police force. The leader of the police team at the scene of crime is mostly the investigator from the Bureau of Judicial and Criminal Police, Slovak Police Headquarters, which is managing the team at the crime scene, is responsible for the group and decides about further actions. Forensic-technical activity is a part of the Bureau of Judicial and Criminal Police, Slovak Police Headquarters. Forensic-technical operations at the crime scene (seeking, fixation, evidence packing, photo documentation, etc.) executes scene-of-crime technician, who also takes responsibility for the correctness of the operations. The Institute of Forensic Science of the Slovak police is an independent part of the Slovak police. The forensic expert of the Institute is called to the scene of crime only in cases when the authorities at the scene of crime need specialized expert opinion – scientific assistance at the scene of crime or to explain facts important for the criminal procedures, mostly by serious criminal events where experts give advice and instructions for correct execution of the forensic-technical operations or if the expert activity is needed in cases of fires, explosions and accidents, or other serious events where expert examination of the scene of crime is part of the expertise. The expert – civilian, who fulfils all legal conditions (medical examiners, traffic experts, etc.), can be also called at the scene of crime.

- 2. Is there any mechanism to ensure the quality, traceability and preservation of sampling?(Do protocols, specific rules exist?)**

Accreditation of the scene of crime is in the decision-making process. Mechanisms ensuring the quality follow from the internal directives and regulations (e.g. Directive for execution of the expert and scientific activity in the Police, European Crime Scene Management Good Practice Manual developed by European Union police experts and the document no. 10138/01 Crime Scene Management – Standards of performance). The registration of the results of the crime scene investigation is made in a *Protocol of crime scene searching*. The protocol is signed by all participants. A third party summoned as a witness should be present, if possible. All physical means of evidence should all be tracked down and gathered, and their proper safe-keeping ensured. Audio and/or video records, drawings or drafts to be made of the object of the inspection, and they shall be attached to the records. Police force also carries out usability test of the forensic evidence tracking system called “*EVIDENCE*” which is a management system for the handling of evidences included data about transportation (chain of evidence), forensic examination and storage. The system will be guarantee fair Quality Management procedures.

3. How are experts selected? Do they have a periodic performance appraisal?

Experts are chosen according to their university education and gained scientific experience, after acceptance they complete a three year special training process. Experts are evaluated once per every year by their superior officer, and a complex evaluation is done by the superior officer when needed, at least once per five years. A part of the complex evaluation is proving the competence to perform expert activity, verifying the theoretical and practical knowledge by a examination committee consisting from specialists in the particular branch.

4. What is the legal status (public or private) of crime laboratories performing analysis?

Do they have to be granted an approval and certification (for example ISO 17025 quality standard)?

The Institute is the only institution dealing with expert activities in the sphere of evaluation of material evidence and proves in expert investigation, and the Institute is a state organization. In the Legal system of expert activity is not defined the need to acquire a quality standard certification. For the Institute the certification and accreditation of quality standards follows from the ENFSI membership.

5. What is the probative value conferred to the expert's report in criminal trial?

Does this value differ from that of the other types of evidence (testimony...)?

In criminal judicial proceedings, the principle of the free assessment of evidence is applied, i.e. the Penal Procedural Code does not provide precise limits determining when a court must accept a fact as proven or not. The Penal Procedural Code provides that the authorities active in criminal procedure (a police authority, a prosecutor) and court assess evidence at its discretion, each piece of evidence separately and all evidence in its mutual context; the court shall take due account of everything which comes to light in proceedings, including the facts presented by the parties.

6. Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Crime scene technicians usually intervene in any kind of offences (if there is a crime scene) except administrative delicts. In the most serious criminal offences (and also arsons, explosions, disasters) the authority active in criminal procedure (a police authority, a prosecutor) may require forensic expert to take part in the crime scene investigation.

7. In which way and during which stage of the proceedings may the defense challenge the forensic evidence?

The defense can challenge the forensic evidence in any stage of the proceedings. The proof of evidence is realized upon request of a criminal authority, and in the court action upon a judge's request, in case of providing an expert evaluation – formal decision of the competent criminal authority on appointment of an expert. The defense may appeal against this decision. Expert evidence can be also submitted by a party (a defendant). Such expert evidence is admissible if possesses all the pre-requisites required under the Penal Procedural Code and includes the clause signed by the expert that he/she is aware of consequences of knowingly written untrue expert evidence.

8. Have you developed a special appraisal in certain fields of forensic evidence?

(If yes which ones?)

The Institute has developed a system of evaluation for relevant evidence sent to expertise. Where the drawbacks are evaluated, the feedback is sent to the relevant units and authorities and the overview is published on the web-site. This system has been developed for certain spheres of evidence collection where skills, experience and knowledge is needed.

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Scientific Evidence in Criminal Matters

1) Which authorities are responsible for scientific evidence collection? Who makes the decision that a sampling is necessary? Who carries out sampling operations (expert or police)? Under which supervision?

If the word “sampling” means evidence recovery then the overall responsibility lies with the leader of the investigation, i.e. police/prosecutor. The crime scene examiner has the responsibility to take relevant samples at the crime scene. However, evidence recovery at crime scenes in cases identified as volume crime, might be performed by the local police officer.

The Swedish National Laboratory of Forensic Science is sometimes asked to assist at the crime scene. This usually occurs when expertise knowledge in a certain area is required, e.g. clandestine laboratories and fire scenes.

The forensic pathologist takes samples from forensic autopsy cases for identification and toxicology. Those samples are analyzed by the laboratory of the National Board of Forensic medicine (Department of Forensic Genetics and Forensic Toxicology) which is situated in Linköping, Sweden, and is serving all six departments of Forensic Medicine in Sweden.

2) Is there any mechanism to ensure the quality, traceability and preservation of sampling?

The person collecting evidence should usually follow a general procedure, but it does not always include a detailed description of the steps and local differences might occur. Detailed procedures are only used when a certain type of scene is often reoccurring. There is also a field manual with instructions for the first officer on the crime scene. Further,, there is an on-going project within the police with the objective to select package materials and common ways to give samples unique identities. Moreover, the police have started to adapt to the ISO standard 17020 regarding crime scenes.

The traceability of the sample is ensured by always referring to the number given to each seizure or trace recovered.

The preservation of samples is usually performed according to written recommendations.

As far as the National Board of Forensic Medicine is concerned, the samples taken from cases undergoing forensic autopsy follow a special protocol and rules to ensure the quality, traceability and preservation of samples.

3) How are experts selected? Do they have periodic performance appraisal?

There is at present only one forensic science laboratory in Sweden, the Swedish National Laboratory of Forensic Science (SKL). Some tasks in relation to certain expert fields are also performed at the crime scene units within the police authorities. There is no defined list of experts that can be used within the judicial system.

Within the forensic laboratory (SKL), different criteria must be met for a person to be considered competent within a forensic field. In accordance with a new competence assurance system within the forensic laboratory, periodical assessments of competence is performed. A written and oral exam, and in some cases also a practical exam, is used to deem a person competent after being a trainee. Moreover, there is a surveillance of competence every 18 months and a reassessment of competence every six years. All written statements are peer reviewed.

Nordakt is a competence assessment system for finger print examiners. This is a Nordic system and has a documented routine for assessment and reassessment with set criteria.

Education and training for crime scene investigators are well defined and applied.

At the National Board of Forensic Medicine (RMV), forensic pathologists are licensed to practice legal medicine.

4) What is the legal status (public or private) of crime laboratories performing analysis? Do they have to be granted an approval and certification (for example ISO 17025)?

The Swedish National Forensic Laboratory (SKL) is a public agency under the Swedish National Police Board. The crime scene units within the local police authorities are also public. The Police or Prosecutors could use any laboratory they find appropriate. There are no private laboratories with these competencies in Sweden.

SKL is accredited according to ISO/IEC 17025. The police laboratories are working towards the same quality standard.

The National Board of Forensic Medicine including its laboratory is a public authority, a central government agency. The Department of Forensic Genetics and Forensic Toxicology is accredited according to the ISO 17025 standard.

5) What is the probative value conferred to the expert's evidence in criminal trial?

The Swedish penal and procedural system is based on the principle of free examination of evidence. Therefore, it is not possible to say which value is conferred on an expert's report in a criminal trial or if it differs from that of other types of evidence. As for all other types of evidence, the court has to evaluate the expert reports individually in every particular case.

6) Do the technical and scientific police intervene in any kind of offences or only in the most serious ones?

Sweden has nothing called Technical and Scientific police. Instead of technical police we have the crime scene investigators, and the scientific police correspond to our forensic experts from the forensic laboratory.

The investigation leader, police or prosecutor, may ask at anytime for forensic experts to assist in a case. It is up to the investigation leader and the police authority to decide how the resources are to be used.

7) In which way and during which stage of proceedings may the defence challenge forensic evidence?

This depends on the investigation, but the defence can always challenge the evidence, throughout the judicial procedure (starting with the initiation of a preliminary investigation).

When it comes to court proceedings, the defence has the right to challenge the forensic evidence at any stage of the court proceedings, i.e. even in the higher courts. This can e.g. be done by presenting own evidence in order to disprove the forensic evidence or by arguing that the forensic evidence shall be given no or low value. As for all types of evidence, the court may reject forensic evidence if the evidence is deemed to be unnecessary or evidently should be of no effect.

8) Have you developed a special appraisal in certain fields of forensic evidence?

Assuming that the question regards how statements from different forensic disciplines are valued, this depends on the circumstances of the case. However, the fields of finger print and DNA are of great importance since they can be directly linked to an individual.