



The Law Society

Freedom, Security and Justice



# Study of the laws of evidence in criminal proceedings throughout the European Union

Summary Report October 2004



## **Study of the Laws of Evidence in Criminal Proceedings throughout the EU**

This report was written by Roger Ede and compiled by Charlotte Ford. The study was conducted by the International Department of the Law Society of England and Wales and was funded by the European Commission. The views expressed in this publication cannot be taken to represent the official opinion of the European Community.

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# **Study of the Laws of Evidence in Criminal Proceedings throughout the European Union – Summary Report**

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- 14 If forensic material or objects are produced as evidence, does there have to be a chain of evidence showing in whose care the item has been at all times?
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- 25 Do third parties (such as a child care organisation which holds information about the alleged victim) or potential witnesses have to produce documents if asked by the police/defence/prosecution/investigating judge? In what circumstances may the third party/witness refuse to do so, if at all?
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# **Study of the Laws of Evidence in Criminal Proceedings throughout the European Union: Introduction**

## **This Study**

The European Commission's DG Justice and Home Affairs announced for 2004 an initiative on fairness in obtaining, handling and using evidence throughout the EU. This covers many rights and many aspects of the proceedings. It includes, *inter alia*, the right to silence, the right to have witnesses heard, anonymous witnesses, the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed) and other aspects of the law of evidence.

The purpose of this study by the International Department of the Law Society of England & Wales, commissioned and funded by DG Justice and Home Affairs, is to find out what the current laws on obtaining, handling and the use of evidence are in the twenty seven legal systems of the Member States. This is to assist the Commission to ascertain what common ground and safeguards exist and what the rules on admissibility are. It is a tool with which to compare different practices and legal provisions. The results of the study will be used to assess whether it is possible to devise common minimum standards in fairness in obtaining, handling and use of evidence throughout the EU.

The Commission asked for factual replies, quoting the relevant legal references, to a list of questions covering the legislation of each of the Member States. We produced a questionnaire from the Commission's list of questions and sent this to the bar associations of each Member State (including Northern Ireland and Scotland). The questions are listed on page 7. Each bar was asked to nominate an expert in criminal law to complete the questionnaire. We thank the experts who carried out this task and the European Union bars which facilitated it. The questionnaires, reproduced as completed by the experts, are contained in annex 1 starting on page 212.

To enable the reader to consider the range of responses across the EU to a particular question, the information provided by the experts has been edited slightly, with the aim of making it more understandable and set out on a question-by-question basis. This starts at page 49.

The information has then been further simplified and arranged in a matrix so that the headline responses to a particular question can be understood at a glance. This starts at page 22.

Finally, as a summary of the results of the study, an analytical report has been written. This is at the beginning of this study starting at page 9. 'Member States' refers to the twenty seven legal systems in the European Union.

We present the study as an overview of the current laws on obtaining, handling and using evidence. Covering such a wide and complex area, the questions which were put to the experts were quite broad, to keep the task manageable. Some respondents went into greater depth than others and referred to issues which underlie the question asked. These responses raise yet further questions which could be put and answered in a follow-up study.

## **Background**

On 7 February 1992 the Treaty on the European Union was signed in Maastricht. Article 6(2) states: "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms .....as fundamental principles of community law." This is the principal treaty, setting standards for procedural safeguards for suspects and defendants in criminal proceedings, binding all Member States.

In 1998, the European Commission produced a paper "Towards an Area of Freedom, Security and Justice", one aim of which was to ensure that judicial co-operation measures

that enhance the powers of prosecutors, courts and investigating officers are counterbalanced by respect for and protection of individual rights. This was developed into the Vienna Action Plan of December 1998.

In 1999, in Tampere, Finland, the European Council held a special meeting on the creation of an area of freedom, security and justice in the European Union. The "Tampere Conclusions" issued at this meeting set the mandate for action in this area, focusing on three key areas: mutual recognition, approximation of procedural law and approximation of substantive law. The meeting concluded that EU citizens and visitors to the EU should have the right to move freely throughout the EU in conditions of security and justice. There should be a genuine area of justice, including better compatibility and more convergence between the legal systems of Member States and judgments and decisions respected and enforced throughout the EU. Formal extradition procedures should be abolished among the Member States, replaced by a simple transfer of such persons.

The Justice and Home Affairs Council of 30 November 2000 announced a Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, establishing the notion that mutual recognition shall be the "cornerstone" of judicial co-operation. One of the mutual recognition measures is the European Arrest Warrant. One of the Programme's aims is to enhance the protection of individual rights.

On 19 February 2003, the Commission published a Green Paper "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU." It covered rights of access to legal representation; access to interpretation and translation; notifying suspects and defendants of their rights; ensuring that vulnerable suspects and defendants in particular are protected; and consular assistance to detainees.

The paper states that "mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards." The paper was launched with a view to setting such standards. It also stated that the purpose of the Green Paper was to ensure that rights were not "theoretical or illusory" in the EU but "practical and effective". It referred to "harmonisation" and developing "European best practice aimed at facilitating and rendering more efficient and visible the practical operation of these rights." It led to the proposal of a Council Framework Decision in April 2004

Discrepancies in the level of safeguards in operation in the different Member States may prevent the process of mutual recognition from being fully developed in practice. Therefore, there is a perceived need to support, by way of concrete measures aimed at defining common standards, a genuine mutual confidence in the way in which those rights are respected throughout the EU.

Mutual trust and a belief in the value of mutual recognition can only develop on the basis that practitioners can rely on the concrete application of these standards in the daily legal life of the Member States.

Two of the rights which the Commission had identified appeared to warrant separate measures of their own: the right to bail; and the right to have evidence handled fairly. The Commission published a separate consultation paper on bail in August 2004.

### **Abbreviations**

- DR Decisions and Reports. Series of reported decisions of the European Commission on Human Rights
- ECHR European Convention on Human Rights
- EHRR European Human Rights Reports
- EWCA Court of Appeal Criminal Division (England & Wales)
- ICTR International Criminal Tribunal for Rwanda
- ICTY International Criminal Tribunal for Former Yugoslavia

For a copy of the full report please contact the International Department of the Law Society, contact details can be found on page 1.

## The Questionnaire:

- 1 Before the accused is interviewed about an offence is he/she warned that information obtained may be used against them at a future trial? If so, what is the wording of the caution?
- 2 Does the accused have a right not to incriminate himself/herself by remaining silent in interview with the police/with the investigating judge?
- 3 If so, how is this right protected in law and in practice?
- 4 Is an interview conducted by the police/investigating judge electronically recorded? If not, how is it recorded and by whom?
- 5 Is the accused required to give details of his/her defence? In interview with the police/investigating judge? If the accused does not do so, what may the consequences be?
- 6 When must the accused produce documents to the police or the investigating judge if asked? If the accused refuses to do so, what may the consequences be?
- 7 What evidence of identification (such as DNA, fingerprints) can be collected from the accused without his/her agreement?
- 8 What evidence of identification, if any, can be taken from the accused by force?
- 9 If the accused refuses to co-operate with the collection of such evidence will assumptions of guilt be made?
- 10 What part, if any, does an assessment by the prosecution of the strength of the evidence play in the decision whether to prosecute?
- 11 Is the accused required to give details of his/her witnesses? If the accused does not do so, what may the consequences be?
- 12 Do the police/prosecution have a duty to disclose to the defence/investigating judge all the evidence in their possession? If so, how is the evidence disclosed (e.g. copies of statements)?
- 13 Do the police/prosecution have a duty to provide the defence/investigating judge with evidence and/or other information in their possession which will not be used at trial that may undermine the prosecution's case or may support the defence's case? If so, how is this evidence and/or information disclosed (e.g. lists, schedules or an invitation to the defence to inspect the police file?)?
- 14 If forensic material or objects are produced as evidence, does there have to be a chain of evidence showing in whose care the item has been at all times?
- 15 Is the responsibility always on the prosecution to prove the defendant's guilt, or are there circumstances where the defendant is responsible, once the prosecution have established certain facts, to prove his/her innocence?
- 16 Does the accused have a right to give evidence at trial?
- 17 Does the accused have a right to remain silent at trial without the court drawing assumptions of guilt?
- 18 When, if at all, is evidence obtained in breach of procedural rules admissible?
- 19 When, if at all, is evidence obtained by entrapment admissible

- 20 What are the rules governing the collection of evidence by electronic surveillance?
- 21 If evidence is obtained unlawfully by electronic surveillance, can it be used at trial? If so, in what circumstances?
- 22 When, if at all, is evidence presented by video-conferencing admissible?
- 23 What is the standard of proof required for a conviction (for example 'conviction intime' or beyond reasonable doubt)? What is the test that is applied?
- 24 In what circumstances do potential witnesses have the right to refuse to be interviewed when requested to give information by the police/defence/prosecution/investigating judge?
- 25 Do third parties (such as a child care organisation which holds information about the alleged victim) or potential witnesses have to produce documents if asked by the police/defence/prosecution/investigating judge? In what circumstances may the third party/witness refuse to do so, if at all?
- 26 When can information obtained from third parties/witnesses by police/investigating judge be disclosed to the prosecution and by the prosecution to the defence?
- 27 Are any witnesses not compellable (e.g. the spouse of the accused)?
- 28 Are any witnesses not competent to give evidence (e.g. young children)?
- 29 May written statements/affidavits/authenticated acts be used as evidence at trial instead of live evidence being called? If so, in what circumstances?
- 30 Are there categories of witness whose identity may be kept from the defendant? If so, in what circumstances?
- 31 May the testimony of an anonymous witness which is not disclosed to the defence be used during a trial? If so, in what circumstances and what is the procedure?
- 32 What are the rules governing the admission of expert evidence at trial?
- 33 Must the expert give evidence in person?
- 34 Are there any limitations on who may be allowed to give evidence as an expert? Are there rules governing the qualifications required of an expert witness?
- 35 Are communications between an expert and the party instructing the expert 'privileged' in that the expert cannot be required to disclose them?

## **Study of the Laws of Evidence in Criminal Proceedings throughout the European Union : Analytical Report**

### **Presumption of Innocence**

The study considered how the presumption of innocence is established in law and in practice in the Member States.

The responses to nine questions (numbers. 1, 2, 3, 5, 9, 15, 26, 17 and 23) provide the information about this.

A fundamental principle of the right to a fair trial is that the prosecution has to prove a person's guilt and the accused has the benefit of the doubt. Every person charged with a criminal offence is presumed innocent until and unless proved guilty according to law after a fair trial. The court must be convinced of the guilt of the accused beyond reasonable doubt. If there is reasonable doubt, the accused must not be found guilty. European Court of Human Rights (ECHR) Article 6(2): everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The presumption of innocence is enshrined in the International Criminal Tribunal for the Former Yugoslavia (ICTY) Article 21(3) and the International Criminal Tribunal for Rwanda (ICTR) Article 20(3).

### **What is the standard of proof?**

Question 23 asked what standard of proof was required in each of the Member States. The most common test in the Member States (14) was expressed as 'beyond reasonable doubt'. In a significant number (11) it was the 'inner conviction' (or 'subjective certainty') of the judge, sometimes (3) said to be following a 'free evaluation' of the evidence by the judge.

There did not appear to be a set level or degree of certainty although the Portuguese respondent said that the judge's decision must not be arbitrary, irrational, emotional or subjective. One Member State (Slovenia) had no explicit standard but in practice proof beyond reasonable doubt was required. Doubts would normally be resolved in favour of the accused. One Member State (Lithuania) commented that in practice courts would sometimes convict on probability rather than certainty.

### **Can the burden of proof switch to the defence?**

Question 15 asked whether it was always the prosecutor's responsibility to prove guilt or whether there were occasions when, the prosecutor having established certain facts, the onus was on the defendant to prove his/her innocence. In most Member States (19), the burden was always on the prosecution although one Member State (Slovenia) commented that in practice the defendant sometimes had to prove his/her innocence. The Spanish respondent noted that it was safer for the defence to attempt to prove the defendant's innocence than to rely upon the prosecution case to fail.

In a few Member States (6) in exceptional cases, such as document or regulatory offences (possession of driving licence, insurance) once the prosecution had proved the existence of a duty on the accused there was a reverse burden on the accused to prove that he /she had complied with that duty. There were also occasions where the accused had to raise a defence (such as self defence or alibi) before the prosecution was required to disprove it.

### **The right of silence**

The presumption of innocence includes the right not to be compelled to testify against oneself and the right to remain silent and not confess guilt. No one charged with a criminal offence may be compelled to testify against themselves or to confess guilt. The burden of proof is on the prosecution.

The ICTY Yugoslavia and Rwanda Rules of Procedure 42 (a) expressly set out the right to remain silent and that a suspect who is to be questioned by the prosecutor shall...prior to questioning...be informed of the right to remain silent and that any statement he makes shall be recorded and used in evidence.

The first group of questions dealt with the right of the accused to remain silent in interview (Question 2) and at trial (Question 17) and the informing of the accused about the right not to make a statement in interview (Question 3) and that if the accused made a statement in interview that this may be used against him/her at a future trial (Question 1).

The laws of all the Member States contain a provision that the accused is not required to make a statement in interview. But this right only has meaning if the accused is aware of it and able to enforce it. Most Member States (12) indicated that the right is protected by the suspect being told about it. It is surprising that of those, only 5 (England & Wales, France, Ireland, Northern Ireland and Portugal) referred to the role of the defence lawyer in protecting the suspect's rights by being present at the interview. Ten Member States indicated that the mere existence of the right in law was the means of its protection.

In Lithuania this information is habitually given implicitly rather than explicitly as the accused is told that he/she has the right to make a statement (rather than not to make a statement), requiring the accused to deduce that he/she is not obliged to make a statement. But, on the other hand, in Lithuania a confession alone can not secure a conviction. Although in order to understand the significance of this it is necessary to know what can amount to corroboration. In a few Member States the comment was made that a statement unfairly obtained could be excluded from the trial. In the Netherlands the fact that the accused is unaware of this right can result in its exclusion. The Lithuanian respondent noted that there was no established procedure there for excluding evidence obtained when the suspect was not aware of the right to remain silent.

In many Member States (12) the accused is not told that any statement made may be used in evidence at a future trial (without this knowledge the accused can not be expected to understand the significance of the right not to make a statement). In an equal number (12) of Member States that warning is given. The comment was made in Denmark that the police have the duty of telling the accused his/her rights and this information is not necessarily included. The Slovak respondent said that a record of a previous interview with the accused will only be read at trial if the account given by the accused at the hearing then is different, when the accused will be asked to account for the difference.

In all Member States the accused has the right to remain silent at trial but this does not, of course, prevent a statement made by the accused during interview from being used at trial. In a significant minority of Member States (Belgium, England & Wales, France ('it will indispose the court'), Luxembourg ('the judge may draw conclusions'), Northern Ireland, the Netherlands and Slovenia) an adverse inference may be drawn from silence at trial. In Malta, legislation is planned which would allow the court to draw an adverse inference. In the Netherlands, the accused can not give sworn evidence and his/her evidence can only be used as evidence of guilt.

Question 5 asked what the consequences would be if the accused did not give details of his/her defence in interview. Only in Luxembourg is there a requirement on the accused to give details of his/her defence. In the other Member States, the responses included those which stated categorically that no assumption of guilt could be made (9); those which stated that despite the law in practice the judge would assume guilt (2); those which said that the lack of information about the defence would prejudice the investigation of the defence case (4); and those which stated that an adverse inference may be drawn (4).

The right to silence is not absolute. The question of whether fair trial rights are infringed if a court draws adverse inferences from the accused's silence is determined in the light of:

Inferences are only drawn after the prosecution has made out a prima facie case against the accused.

- The judge has the discretion whether or not to draw inferences
- The only permissible inferences were 'common sense' inferences
- The reasons for drawing them were explained in the court's judgment
- The evidence against the accused was formidable.

The European Court of Human Rights has stated that drawing an adverse inference against an accused for remaining silent would violate the presumption of innocence and the privilege against self-incrimination if a conviction was based solely or mainly on the accused's silence. The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6: *Murray v UK* (1996) 22 EHRR 29.

Question 9 dealt with the right of the accused not to incriminate himself through providing evidence of identification during the investigation. Most Member States (22) responded that in law guilt could not be assumed from a refusal by the accused to co-operate with the investigation. Four of those respondents added that in practice an assumption of guilt would be made. Seven Member States responded that an adverse inference could be drawn: Belgium, England & Wales, Estonia, France (in practice), Latvia, N. Ireland and Scotland.

In *Funke v France* (1993) 16 EHRR 297, a prosecution for refusing to hand over documents to customs officials was held by the Court to constitute an "attempt to compel the accused to provide the evidence of offences he had allegedly committed" and was "an infringement of the right of anyone charged with a criminal offence...to remain silent and not to contribute in incriminating himself.

### **Disclosure**

The study considered how the disclosure of documents and information between the police, prosecution, investigating judge and defence operates in law and in practice in the Member States.

The responses to nine questions (11,12,13, 25, 26, 30, 31, 35 and 36) provide the information about this.

Article 6(1) of the ECHR provides that everyone charged with a criminal offence has the right to a fair hearing. Article 6(3)(b) states that a minimum right is the right to adequate facilities to prepare a defence. This includes documents, information and other evidence that might help the accused prepare their case, exonerate them or, if necessary, mitigate a penalty. Such information provides the defence with an opportunity to learn about and comment upon the observations filed or evidence adduced by the prosecution. The right to adequate facilities to prepare a defence implies a right of reasonable access to the prosecution files: *X v Austria* (7138/75) 5 July 1977, 9DR 50.

The prosecution has all the machinery of the state behind it and this is an important aspect of the fundamental principle of "equality of arms": the prosecution and the defence must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case during the course of the proceedings. Each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis-à-vis the opposing party.

In *Jespers v Belgium* (1981) 27 D.R. 61, the Commission considered the impact of the equality of arms principle on the pre-trial disclosure of evidence. The Commission noted:

"As regards the interpretation of the term 'facilities' [in Article 6(3)(b)], the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its

disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion....In particular, the Commission takes the view that the 'facilities' which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6(3)(b)...It matters little moreover, by whom and when the investigations are ordered or under whose authority they are carried out...Any investigation [the prosecution] causes to be carried out in connection with criminal proceedings and the findings thereof consequently form part of the 'facilities' within the meaning of Article 6 (3)(b) [which] recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities."

#### *The duty of the police/prosecutor to disclose all their evidence*

Question 12 asked about the duty of the police and prosecution to disclose all the evidence in their possession to the investigating judge and to the defence and how that duty was carried out.

In all the Member States except Malta (where the response was that the defence had no right of access to the police files but that the prosecution –senior police officers- had a duty to bring all the evidence to trial), the evidence which will be presented at trial is disclosed to the defence beforehand. Only the Cyprus and the Netherlands responses stated that this would happen following the accused's request.

#### *When the duty of disclosure arises*

This duty arises at different stages. In three Member States (Lithuania, Spain and Sweden) the responses state that the defence are entitled to receive information about the on-going police investigation, although this right may be denied in certain cases. Seven Member States responded that disclosure would take place only after the preliminary investigation/investigation had taken place and/or an accusation/charge made. In Cyprus, disclosure takes place after a plea of not guilty has been entered.

#### *How disclosure is made*

In most Member States (13) reference was made to the existence of a file of documents of some sort such as: a 'book of evidence' 'case file', 'criminal proceedings file', 'police reports', 'investigation record', or 'prosecution file'. In other Member States (4) reference is made instead to disclosure of copies of the witness statements. The notion of a case file as an open document has no parallel in English criminal procedure where the police, rather than the Public Prosecutor or the judge, conduct and supervise the investigation. In Scotland, a list of witnesses and their addresses is given to the defence. No witness statements are provided and the defence have to interview the witnesses themselves.

The method of disclosure of the file varies. In most Member States it can be read/inspected. Copies are stated to be available in some Member States (Cyprus, Denmark, England & Wales, Estonia, Italy, the Netherlands, N. Ireland, Poland, Portugal and Spain). The Austrian respondent stated that the defence receive information on the content of files by reading them in the presence of the examining magistrate. Only the German response stated that the file could be taken to the defence lawyer's office for inspection there.

#### *Disclosure of other evidence/information obtained during the investigation*

Question 13 asked about the disclosure of information gathered during the investigation which was not evidence that would be used at trial and Question 26 asked about the disclosure of information obtained from 3<sup>rd</sup> parties. The answers revealed the extent to which the police/prosecution investigation could be expected to include matters helpful to the defence.

Most Member States (19) responded that normally all information – whether it supported the prosecution or the accused – would be included in the file. The comments included: ‘all material gathered whether favourable to the accused or not’, ‘including material which vindicates the suspect or mitigates guilt’, ‘must investigate evidence for or against the suspect’, ‘case file should include all documents that may reasonably be of interest, either inculpatory or exculpatory the accused’, ‘a record is kept of all matters of importance to the preliminary investigation’, ‘the prosecution’s main purpose is not just to accuse someone of committing a criminal offence but, above all, to find the truth’.

The comment was made in Luxembourg that that whole prosecution file should be handed over, but there was no specific rule about this and no detailed record of the contents, which posed major practical problems. In Slovakia, the comment was made that in practice the police tended to collect only evidence against the accused. In Slovenia the respondent said that it was not possible to verify whether the police/prosecution had made full disclosure and that they tended not to disclose evidence in favour of the accused.

The idea of the police as trustees of the information they uncover has yet to establish itself as fundamental in England & Wales. Similarly, in Malta where senior police officers prosecute the cases and there is no access to police files, the defence have to rely upon the police to be fair and even-handed regarding disclosure.

The English domestic law embodied in the Criminal Procedure and Investigations Act 1996 (CPIA) and the Strasbourg case law differ in certain respects. The CPIA adopts a narrower test of relevance, limiting disclosure to material which undermines the prosecution case or advances the defence, rather than giving access to all material. The CPIA gives a wide discretion to the police and prosecution to determine relevance and the service of a defence statement is a precondition to the disclosure of further material.

In Denmark, the defence lawyer may be ordered not to disclose certain information to his/her client. In Estonia the comment was made that there was no duty on the investigator to disclose information which was not supported by evidence and so unsuitable for use at trial. In Lithuania the comment was made that there was no duty to disclose material which was obtained by the police/prosecution on their own initiative rather than as a result of a request of the defence and that disclosed material would not include plans of the investigation, flow charts and other information of an operational or crime investigation nature. In Sweden the comment was made that even material deemed unimportant by the police would be disclosed.

#### *The use of anonymous witnesses*

Question 30 and Question 31 considered whether there were categories of witness whose identity could be kept from the defendant and whose testimony could be used at trial and, if so, the circumstances in which this evidence could be used.

Where the accused is unaware of the witness’s identity at trial, the accused is unable to challenge the witness’s reliability and motives. Article 6(3)(d) of the ECHR provides that everyone charged with a criminal offence has the right ‘to examine or have examined witnesses against him’.

In the majority of Member States’ legal systems (21), the identity of a witness who gives evidence for the prosecution can be withheld from the defence. The circumstances which enable this to happen are usually a serious danger to the life or property of the witness or a relative of his/hers. In 6 Member States the offence must be exceptional (Estonia: ‘justified by gravity and extraordinary circumstances of the offence’; France: the offence must be punishable by 3 years imprisonment; Germany and Hungary: ‘a crime of considerable importance’; Portugal: human trafficking, criminal gangs, drug trafficking/production, terrorist organisations, terrorism and crimes punishable by more than 8 years imprisonment committed by a person in a criminal gang; Slovenia and Greece: in practice, limited to organised crime cases. In Denmark the information about the name, position and address of the witness must be judged not to be of importance to the defence. In Estonia, the identity of the victim can not be withheld. The German respondent stated that the witness needed to be

an undercover investigator. In Austria, Lithuania and Portugal, a conviction can not be based solely on the testimony of anonymous witnesses.

In 6 Member States' legal systems a witness's identity can never be withheld (Cyprus, Finland, Italy, Luxembourg, Malta and Sweden) although in Finland and Luxembourg legislation is being drafted to change this.

The respondents in their answers did not go on to consider the relevance of the importance of the evidence itself as a ground for inclusion or exclusion of anonymous evidence. The Strasbourg case-law appears to prohibit reliance on anonymous witnesses whose evidence is likely to be 'decisive' to the outcome of the case. On the other hand, the International Criminal Tribunal for the former Yugoslavia in the Blaskic (Protective Measures) decision (U.N. Docs IT-95-14-T November 5 1996) issued guidelines allowing witness anonymity if (amongst other things) the testimony of the witness was important to the prosecutor's case. This is similar to the existing practice in England & Wales.

In *Kostovski v. Netherlands* (1991) 12 EHRR 434, the Court commented that: "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or to cast doubt on his credibility. The dangers inherent in such a situation are obvious."

In *Doorson v. Netherlands* (1997) 23 EHRR 330, the Court noted that in certain circumstances, the disclosure of a witness's identity could put his right to physical security, or even his life, at risk. The Court considered it necessary to balance the interests of the witness against the interests of the accused: "Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled." The safeguards approved by the Court in *Doorson* were that the anonymous witnesses had been questioned in the presence of counsel by an investigating magistrate; the magistrate was aware of their identity; the magistrate noted in the official report the circumstances on the basis of which the court was able to draw conclusions as to the reliability of the evidence; counsel was able to ask the witnesses whatever questions he considered to be in the interests of the defence except those which might lead to the disclosure of their identity and all questions had been answered.

*Is the accused required to give details of his/her witnesses?*

Turning to defence disclosure, Question 11 asked whether the accused was required to give details of his/her defence witnesses and what the consequences would be of a failure to do so. Article 6(3)(d) provides that everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witnesses on their behalf under the same conditions as prosecution witnesses. Although courts have a relatively broad discretion in deciding which witnesses to summons, judges must not violate the principles of fairness and equality of arms. Although the attendance and examination of every witness on the accused's behalf is not required, in *Briemont v. Belgium* (1990) 12 EHRR 217, the Court observed that failure to call witnesses helpful to the defence would amount to a breach of Article 6(3)(d).

Although the police/prosecution are under a duty to investigate evidence for and against the accused, without prompting from the defence, one purpose of disclosing details of defence witnesses is to ensure that they are included in the investigation. The French and German respondents comment that without this information the police/investigating judge are restricted in their ability to examine the case for the defence and gather exonerating or mitigating evidence. The Finnish respondent comments that a failure to give this information may lead to the postponement of the trial as the prosecution may, as a result, require further investigations to be conducted. The Portuguese respondent said that if no identifiable witnesses were presented by the accused there would be a lack of evidence to support the defence case.

Another purpose is to enable those witnesses to participate in the trial. In most Member States, witnesses will only be heard by the court if their details have been provided beforehand. In Austria, the nature of the evidence that the witness will give must also be disclosed. In Estonia and France, the witness should be interviewed by the investigating judge and in Finland by the police before being included in the proceedings. In Scotland, a list of witnesses must be prepared by the accused for the prosecutor to interview.

In Cyprus, England & Wales and Northern Ireland the defence will investigate its own case and decide which witnesses it will call for the accused. In Italy, the accused has the right to carry out his/her own investigations and in some cases must disclose the results to the prosecutor before trial. The Luxembourg respondent noted that it was not advisable to communicate evidence to the prosecutor in advance if the defence intended to confront the victim with it. In England & Wales and Northern Ireland only details of alibi witnesses must be disclosed, although in England & Wales new legislation is in place (and in Northern Ireland proposed) which requires the disclosure of defence witness details. Alibi witness details must also be given in Ireland.

#### Disclosure of experts' opinions

Question 35 and Question 36 dealt with expert evidence: whether communications from experts were privileged and/or confidential. Communications with experts are confidential and privileged when the expert is instructed by the defence in England & Wales (an accused is entitled to assume that any communication the accused has with the expert is protected in the same way as any communication the accused has with his solicitor: *R v Davies* [2002] EWCA Crim 85), Finland, Ireland, Luxembourg, Northern Ireland, Poland and Portugal. The respondent from Slovakia reports that experts engaged by law enforcement agencies are regarded by the courts as preferential to experts instructed by the defence.

In the majority of Member States (12), the expert's report is not privileged or confidential. In most cases (8), this is expressed to be because the expert is instructed by the court and the expert's opinion is available to both parties. In France, when the expert is instructed by the examining magistrate, the report will form part of the dossier. In Denmark, both parties may agree the questions which the expert has to answer. In England & Wales, Finland and Northern Ireland, when the defence intend to call expert evidence, the expert's report must be disclosed to the other party.

The use of court-appointed experts in criminal proceedings does not easily fit the adversarial style of criminal trials where one party's evidence is tested by the other party.

#### **Gathering of evidence**

The study considered the rules which govern the process of gathering evidence. The answers to ten questions (numbers. 4,6,7,8,9,14,20,21,24 and 27) provide the information about this.

#### How interviews with suspects are recorded

Question 4 of the study considered how evidence gathered from the suspect in interview is recorded. Electronic recording routinely takes place in the minority of Member States (England & Wales, Ireland (common but not compulsory), Luxembourg, Northern Ireland, Poland and Scotland). In Italy and Portugal, it may be tape recorded or hand written, but in Italy, if it is hand written it may not be used as evidence in a trial.

In most Member States, the interview is hand-written and 5 Member States responded that the suspect is asked to sign the record. The respondent from Lithuania noted that the accused is not given a copy of the written record. The respondent from Slovakia commented that the written record is often "distorted", "imprecise" or "partially untrue". In Denmark, the written police report of the interview is not evidence in a trial unless it is confirmed by the accused during the hearing.

The ICTY Yugoslavia and Rwanda Rules 43 require the questioning of a suspect by a prosecutor to be audio-recorded or vide-recorded and set out the procedure to be followed. A copy of the recorded tape (and under ICTR rule 43 a copy of the transcript) is supplied to the suspect afterwards.

Must the accused produce documents to the investigation?

Question 6 asked if the accused was under a duty to produce documents to the police if requested to do so. There is an obligation on the accused in only 4 Member States: Cyprus, the Czech Republic, Estonia and Malta. In Finland, there is only an obligation in a complex case. In Cyprus, the Czech Republic and Malta there is a criminal sanction for refusal. In all Member States the police have power to search for and seize documents which are required for the investigation.

Identification evidence: samples

Questions 7,8 and 9 asked what evidence of identification could be taken without the accused's consent and whether, if the accused refused to co-operate, an assumption of guilt could be made.

There are only 4 Member States which prohibit the taking of such evidence without the accused's consent: Belgium, Cyprus, Italy and Spain. In Malta, the authorisation of a magistrate is needed and in several Member States, the power to obtain DNA is limited (Hungary: 'special cases'; Netherlands: crimes carrying 4 years or more imprisonment and on the order of the public prosecutor; Sweden: an imprisonable offence).

The Member States were fairly evenly split between those which may and those which may not make an assumption of guilt following a refusal by the accused to co-operate with the collection of evidence of identity. Member States where an assumption of guilt can not be made are: Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. The French and Lithuanian respondents noted that an assumption would be made in practice although there was no legal foundation for this. In Italy it is a crime to refuse to give details of one's identity and refusing to allow evidence of identification to be taken is an aggravating factor for sentencing purposes.

In *Sanders v UK* (1997) 23 EHRR 313, the court held that the right not to incriminate oneself does not extend to "real evidence". The court said: "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissues for the purpose of DNA testing".

Expert evidence: chain of custody

Question 14 asked whether a chain of evidence was necessary to ensure the integrity of expert evidence. Most Member States responded that there was no such requirement. Only Cyprus, the Czech Republic, France, Ireland, Malta, Slovakia and Spain stated that there was. In England & Wales, Northern Ireland and Scotland, as a matter of practice there needs to be a chain of evidence showing in whose care objects and material have been prior to the admission of such evidence. Denmark, Italy and Lithuania referred respectively to 'internal regulations', 'special measures taken to avoid exhibits being opened' or 'procedures stipulated in the Criminal Procedures Code'.

The Luxembourg respondent said that the lack of such a requirement caused problems in practical terms and the respondent from Slovenia said that this lack was one of the biggest flaws in the Slovene law. The Lithuanian respondent said that failures to show how materials came into the hands of experts are not treated seriously by the courts.

In England & Wales, advice is given on how to ensure that physical evidence is reliable and admissible:

- it must be correctly and securely packaged, i.e. in a sealed, referenced container which is appropriate to the character and properties of the item;
- where applicable it must be stored in appropriate ambient conditions;
- continuity must be assured, i.e. that from the moment of initial packing until removal by the scientific support officer or forensic scientist:
  - the item has been held under secure circumstances;
  - no individual has unsealed, removed to inspect or to handle, or caused others to remove or to handle (particularly the suspect) the item in question.

Good practice within police forces will be to ensure that:

- there are appropriate and adequate containers, packages and equipment for packaging samples;
- there are adequate procedures for continuity, storage and preservation (including drying) of items;
- there is separation of victim and offender samples.

Documents record every person who has had custody of the evidence from the time it was found at the scene until it is presented in court. The police service and forensic suppliers have procedures to document the chain of custody. It is the individual investigator's duty to make sure these are followed.

The chain of custody must be established. A court will require the progress of an exhibit from the crime scene to its arrival at court to be fully accounted for by provable documentation. The court needs to know the identification of the custodian of evidence at each stage and of that person's awareness of the consequences of deficiency: the need to protect items from deterioration and contamination.

Continuity is fundamental to ensuring the integrity of an item of collected contact trace material (CTM). Integrity means the expectation by the forensic scientist who conducts the analyses that there has been no change, loss or addition, so that the item received is in precisely the same state as when it was collected at the scene (accepting the occurrence of natural physical changes such as desiccation, i.e. that blood dries and semen cracks and powders).

The police, civilian staff and external providers of services, and the prosecution have to demonstrate to the defence and the courts integrity in the process of collecting, recording and handling of physical evidence: that nobody, or nothing, affected, or was allowed to affect, the character of the item from the time of collection to the time of analysis.

#### Electronic surveillance

Questions 20 and 21 asked about the rules governing the use of electronic surveillance and whether such evidence could be admitted at trial if it was obtained unlawfully. In most Member States electronic surveillance can only be carried out by authorisation of a judge (10) or a warrant from a government minister (3). Most Member States also limit such surveillance to serious crimes (10). The other requirement stated by 4 respondents (England & Wales, Estonia, Germany and Northern Ireland) was that it was not practicable to obtain the evidence by other means. Three respondents said that they had no rules governing electronic surveillance: Cyprus, Luxembourg and Poland.

Most Member States (14) do not allow such evidence to be admitted at trial if it was obtained unlawfully. In other Member States (7) the judge has a discretion whether to admit it (England & Wales, Germany, Lithuania, Malta, the Netherlands, Northern Ireland and Poland). In Sweden, all evidence is subject to a 'free evaluation' by the judge, who will decide how much weight to give to it.

In *Schenk v. Switzerland* (1991) 13 EHRR 242, intercept evidence used against the applicant in a trial for attempted incitement to murder had been obtained unlawfully in domestic law and in contravention of Article 8. The Court found no violation of Article 6: "While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court cannot therefore exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether [the] trial as a whole was fair."

#### *Can witnesses refuse to help the investigation?*

Question s24 and 27 asked whether there were categories of witness who could refuse to give information to the investigating authorities or who could refuse to testify in court. Some Member States (Denmark, England & Wales, Ireland, the Netherlands, N. Ireland and Sweden) responded that no-one was obliged to assist the police or the public prosecutor, although anyone could be summonsed to attend court.

19 Members States' respondents (except Belgium, France, England & Wales, Malta and Northern Ireland) listed types of relatives who could not be compelled to testify against an accused (Hungary referred to 'dependants of the accused'); 17 said that a professional witness could not be required to breach client confidentiality; and 10 added that a person can not be required to incriminate him/herself.

The Czech Republic respondent stated that a professional witness could breach confidentiality with the consent of the Bar Association. The Slovenian respondent said that the protection for professional witnesses did not apply in cases of sexual or certain other offences against children. In England & Wales, Northern Ireland and Scotland a spouse of the accused can not be compelled to give evidence unless she/he is the victim of an assault or witness to a sexual offence or assault on a person under 17. In Malta also, a spouse who is a victim is compellable. In France a relative does not need to swear that he/she will tell the truth and in Sweden a relative may not give evidence on oath – so that they can not commit perjury.

#### **Admissibility**

The study looked at the rules about admissibility of evidence. The answers to eight questions (numbers. 18,19,21,28,29,32,33 and 34) provide information about this.

Questions 18, 19 and 21 asked whether particular categories of evidence were admissible: evidence obtained in breach of a procedural rule (Question 18), evidence obtained by entrapment (Question 19) and evidence obtained unlawfully by electronic surveillance (Question 21).

#### *Is evidence of entrapment admissible?*

In answer to Question 18, most Member States (13) do not allow evidence obtained in breach of a procedural rule to be used. The Austrian respondent, having said that the evidence was inadmissible, added that there were few procedural rules in Austria to contravene. In Belgium, the test is whether the evidence is 'sincere'. In Denmark, the seriousness of the offence is a relevant factor and in Greece, for the evidence to be admissible the crime must be a felony punishable by life imprisonment. In Cyprus, England & Wales and N. Ireland, its probative value must outweigh the prejudicial effects of admitting it. In Estonia and Scotland, it must be 'justified by public interest' and in Estonia corroborated. In Sweden, under the principle of 'free evaluation' all evidence of importance to the case is admitted at trial and it is up to the court to evaluate it. In Ireland, evidence obtained as a result of a deliberate and conscious breach of a person's constitutional rights is not admissible. Evidence obtained in breach of either the judges' rules or the procedural rules may be excluded at the discretion of the judge.

In answer to Question 19, an almost equal number of Member States would either exclude evidence obtained by entrapment (11) or admit it (9). Some Member States would exclude it if it was obtained in breach of their rules: Cyprus, 'if it breached the accused's constitutional rights'; the Czech Republic, 'if it breached the Code of Criminal Procedure'; Denmark, 'complicated rules, all entrapment is subject to prior approval by the courts and may only be used for serious offences; Estonia, 'must be conducted in accordance with the law'; Hungary, 'detailed rules in the Code of Criminal Procedure'; Scotland, 'there was an on-going course of activity and no excess pressure was exerted'.

In *Teixeira de Castro v. Portugal* (1999 28 EHRR 101), the Commission considered the case where a criminal offence is committed and the accused convicted purely as a result of the conduct of the police officers. The Commission decided that the proceedings as a whole violated Article 6 because “the role played by the police officers was so decisive in the commission of the offence with which the applicant was charged that it affected the fairness of the proceedings in question”. The Commission attached importance to the fact that the officers were conducting the operation without judicial supervision; that there was nothing in the evidence to “pinpoint any conduct of the applicant, prior to his arrest, which would suggest that he would have committed the offence in question even if the police officers had not provoked him”; and that the verdict of guilty was based “mainly” on the evidence of the officers concerned.

The Commission said: “They [the police] thus incited the applicant to commit a criminal offence which he might not have committed if he had not been provoked. In the Commission’s opinion, this situation irremediably affected the fairness of the proceedings.”

*Which witnesses are not competent to give evidence?*

Question 28 asked about categories of witnesses who are not competent to give evidence. In England & Wales and Northern Ireland, a witness is not competent if he/she can not understand the proceedings or the need to tell the truth. In Denmark, a witness who can not give a ‘useful, meaningful statement’ is not competent. Most Member States respondents (16) stated that they had special provisions for ‘children’ (1); ‘a child of tender years’ (1), ‘young children’ (3), children under 14 (4), under 15 (3) or under 16 (4). In most cases (7) children can not give sworn evidence. In a few cases (3) a ‘child expert’ needs to be present when the child is interviewed or gives evidence, in order to facilitate communication with the child. In Portugal, questions to a child must be put by the Judge President or Single Judge. 4 Member States would deem the mentally ill as not being competent, unless he/she is the victim (Italy) or has a health certificate (Lithuania). In Sweden, a mentally ill person can not give sworn evidence.

*Can documentary evidence be admitted in place of live evidence?*

Question 29 asked whether written statements, affidavits or authorised acts could be used as evidence at trial, instead of live evidence. Only Belgium, Denmark, Estonia, Latvia and Sweden categorically said that they could not.

In the majority of Member States (19) written statements may be used. In most of those Member States certain conditions have to be fulfilled: the witness is dead (8); the parties agree (6); the witness is ill (5); there is another significant reason (4); the witness is old (3); the witness is overseas (4); the witness can not be found (2); the witness is afraid (2); the witness refuses to attend (2); the witness has been granted anonymity (1); the witness is aged under 18 (1). The Czech Republic respondent said that there were very detailed rules. The Polish respondent referred to the circumstances set out in the Polish Code of Criminal Proceedings. In Portugal, the witness’s statement must have been given to the investigating judge. In Luxembourg, it is at the judge’s discretion. In the Netherlands, evidence is usually presented by written statements, unless the defence require the witness to be questioned. In Slovakia, any written statement can be used as evidence.

Article 6(3)(d) provides that everyone charged with a criminal offence has the right: “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses in his behalf under the same conditions as witnesses against him.”

The term “witness” includes a person whose statements are produced as evidence before a court, even though the maker is not called to give oral evidence. The opportunity to cross-examine need not be available at the trial itself, provided the witness was available for cross-examination at an earlier stage. The European court has occasionally referred to “the lack of confrontation” as the reason for finding a trial unfair.

The starting point of the Strasbourg interpretation of Article 6(3)(d) is that “all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument.” In certain situations the admission of depositions or other witness statements for the prosecution, without the presence of the maker, may be inconsistent with the right to confrontation. However, the Court will examine the reasons advanced for the non-

attendance of the witness; any compensating safeguards; the opportunity, if any, which the defence has had to confront the witness at an earlier stage of the proceedings; whether the defence requested the attendance of the witness; and the importance of the evidence in the context of the proceedings as a whole.

Questions 32, 33 and 34 dealt with experts as witnesses. They asked whether there were special rules governing the admission of expert evidence (Question 32), whether the expert's evidence could be admitted as a statement rather than oral evidence (Question 33) and who could be regarded as an expert and give evidence (Question 34).

#### Who chooses the expert(s)?

The expert is chosen by the pre-trial investigation judge (Lithuania); the investigator or examining magistrate/judge (Austria, Estonia); the investigator, prosecutor or the court (Hungary); the prosecutor or the judge (Italy); a 'judicial authority' (Portugal); the court (Denmark, Germany, Greece, Malta, Slovenia). The respondents in Austria and Denmark specifically state that the accused has no right to call his or her own expert.

The respondent from Slovenia said that the evidence of expert witnesses who are not instructed by the court (but instructed by the parties) is in practice considered inadmissible, or at least unreliable. The respondent from Slovakia said that only experts instructed by law enforcement agencies are deemed independent experts. The opinions of experts instructed by the defence are admissible as documentary evidence only and those witnesses are referred to as "your expert".

The respondents from Belgium, England & Wales and Germany reported that, apart from being able to give opinion evidence, experts are treated like other witnesses. The respondent from England & Wales noted though that an expert witness is allowed to sit in court and listen to the other evidence.

If a single expert is instructed, whether by the investigator, prosecutor, investigating judge or court, it is necessary to ensure that the accuracy and robustness of that expert's evidence can be tested. It is also important to ensure that if the expert's evidence is capable of an alternative interpretation or the defence case may be supported by the presence or absence of other forensic evidence which has not have been touched upon by the expert, the court is made aware of this.

The Member States were equally split between those which selected the expert from a register (Austria, the Czech Republic, France, Greece, Hungary, Italy, Lithuania, Portugal, Slovakia and Slovenia) and those which just stated that the expert had to be suitably qualified. The Austrian respondent said that there were 'regulations governing the registration and quality requirements' for their list of sworn experts. The Slovenian respondent said that only expert witnesses or institutions that have been specially licensed by the Ministry of Justice may be appointed by the court and that the Ministry tests their qualifications before licensing them.

The person who instructs an expert witness needs to satisfy him/herself about the competence and ability of a particular 'expert' to undertake work in an individual case. It is not always appreciated that different areas of forensic expertise require different training and skills. It is necessary to find out:

- on what basis he or she feels qualified to advise in that particular case;
- his or her recognised scientific qualifications;
- what practical experience he or she has:
  - in investigating the sort of case which involves that client;
  - in applying scientific techniques to assess the evidence at issue.

In England & Wales, to remedy the lack of a system of independent accreditation, the Council for the Registration of Forensic Practitioners (CRFP) has been established with support from the Home Office. It maintains a register of currently competent forensic practitioners. CRFP publishes the register, ensures through periodic revalidation that forensic practitioners keep up to-date and maintain competence and deals with registered practitioners who fail to meet the necessary standards. CRFP has a code of conduct which defines the essential standards

and values that apply to every forensic practitioner. The register is published on the CRFP website for anyone to consult and is kept up to-date daily. Applicants for registration have their current competence individually assessed by an external assessor from their own speciality. The assessor looks at the quality of the applicant's work.

*Must the expert give evidence orally?*

Only the respondents from Austria, Belgium and Denmark said that the expert's evidence had to be given orally. In the Czech Republic, Italy, England & Wales, Ireland, Northern Ireland, Scotland and Slovakia the evidence need not be given orally if both parties agree.

	<b>Question 1</b>	<b>Question 2</b>	<b>Question 3</b>	<b>Question 4</b>
	Before the accused is interviewed about an offence is he/she warned that information obtained may be used against them at a future trial?	Does the accused have a right not to incriminate himself/herself by remaining silent in interview with the police/with the investigating judge?	If so, how is this right protected in law and in practice?	Is an interview conducted by the police/investigating judge electronically recorded? If not, how is it recorded and by whom?
<b>Austria</b>	Yes	Yes	Because law exists	Hand-written short hand transcripts, computer transcripts and audio recordings.
<b>Belgium</b>	Yes	Yes	--	--
<b>Cyprus</b>	Yes	Yes	Evidence collected in breach of such right will be excluded and in practice the rights of the accused are respected.	In writing by investigating officer.
<b>Czech Republic</b>	No	Yes	Told of right to silence.	In writing, can be in electronic form
<b>Denmark</b>	Not necessarily	Yes	Because law exists	Written in police report: not evidence before courts; must be confirmed during hearing of accused in court.
<b>England &amp; Wales</b>	Yes	Yes	Told of right to silence and of right to legal representation.	Yes
<b>Estonia</b>	Yes	Yes	Told of right to silence	Rarely; Written and signed by interviewee
<b>Finland</b>	No	Yes	Because law exists	Written on computer, signed by interviewee.
<b>France</b>	No	Yes	Told of right to silence. Solicitor present before examining magistrate.	
<b>Germany</b>	No	Yes	Can exclude statement unfairly obtained	No.
<b>Greece</b>	No	Yes	Because law exists	No.
<b>Hungary</b>	Yes	Yes	Told of right to silence	Takes minutes; shorthand. Special provision: camera/sound recorder if accused pays
<b>Ireland</b>	Yes	Yes	Yes, by access to legal advice during detention	Yes but not compulsory

<b>Italy</b>	Yes	Yes	Can exclude statement unfairly obtained	Interview in prison: tape/videotapes. Other accused: tape or hand-written. If hand-written shall not be used in trial.
<b>Latvia</b>	--	Yes	Because law exists	Written record
<b>Lithuania</b>	No	Yes	Confession alone not sufficient for conviction; told he has right to make a statement	Written record, accused signs. Accused not given a copy and not allowed to take a copy.
<b>Luxembourg</b>	No	Yes		Yes
<b>Malta</b>	Yes	Yes	Because law exists	Preferably in writing
<b>Netherlands</b>	No	Yes	Statement cannot be used in evidence if accused not aware of right to remain silent; because law exists	No. Written, accused asked to sign
<b>N. Ireland</b>	Yes	Yes	Right to legal advice	Yes
<b>Poland</b>	No	Yes	Because law exists.	Typed/word processed.
<b>Portugal</b>	No	Yes	Duty of defence lawyer to ensure right is not violated	It can be if considered helpful
<b>Scotland</b>	Yes	Yes	Told of right to silence	Yes
<b>Slovakia</b>	--	Yes	Told of right to silence	Written, information given by the accused is often distorted, "imprecise", "partially untrue"
<b>Slovenia</b>	Yes	Yes	Because law exists	Interview writted and accused asked to sign.
<b>Spain</b>	No	Yes	Because law exists; police officer who fails to tell suspect of right to silence can be punished.	Written
<b>Sweden</b>	No	Yes		Tape recorded or written.

	<b>Question 5 (a)</b>	<b>Question 5 (b)</b>	<b>Question 6</b>	<b>Question 7</b>
	Is the accused required to give details of his/her defence in interview with the police/investigating judge?	If the accused does not do so, what may the consequences be?	When must the accused produce documents to the police or the investigating judge if asked? If the accused refuses to do so, what may the consequences be?	What evidence of identification (such as DNA, fingerprints) can be collected from the accused without his/her agreement?
<b>Austria</b>	No	--	Police can confiscate property & conduct house searches	DNA, fingerprints
<b>Belgium</b>	No	--	Police can seize	Nothing
<b>Cyprus</b>	No	None	If ordered by investigator failure to comply is an offence	None
<b>Czech Republic</b>	No	None	Accused must produce object to court on request. If not, can be taken by force and fine imposed.	Biological material
<b>Denmark</b>	No	--	No obligation	DNA, fingerprints but extensive preconditions.
<b>England &amp; Wales</b>	No, but at later stage alibi evidence must be given and defence statement can be required.	Can exclude alibi evidence. Adverse inference can be drawn.	Only regulatory offences. Police can search and seize	Non-intimate samples providing certain conditions met
<b>Estonia</b>	No	Failure to account for presence of certain matters or accused in particular circumstances may account to corroboration.	Accused must produce documents to investigator, otherwise investigator can search. No sanction for failure	Any evidence of identification
<b>Finland</b>	No	May have to cancel the main hearing for prosecution to carry out additional investigation.	In complex case.	Fingerprints, handprints, footprints, handwriting specimens, voice
<b>France</b>	No	Examining magistrate's mission is to seek truth and examine case for defence so defence data must be furnished ASAP and verified by examining magistrate.	Power to search	External samples, blood sample in sex assault cases

<b>Germany</b>	No	Police / investigating judge restricted in capability of gathering exonerating / mitigating evidence.	No obligation; investigator can search	Fingerprints, blood sample
<b>Greece</b>	No	Weakens his defence position if he doesn't.	--	Fingerprints, DNA
<b>Hungary</b>	No	--	No obligation	Fingerprints, hand prints. Special crimes: DNA
<b>Ireland</b>	Alibi evidence must be given.	Can exclude alibi evidence. A failure to account for presence of certain matters or accused in particular circumstances may amount to corroboration.	Only regulatory offences	Footprints, hair other than pubic hair
<b>Italy</b>	No	None	No obligation; power to search.	None
<b>Latvia</b>	No	--	No obligation.	All except handwriting
<b>Lithuania</b>	No	Passivity of suspect may be taken by judge to indicate guilt.	No obligation. Prosecution can search and seize	Fingerprints, blood, saliva, urine
<b>Luxembourg</b>	Yes	--	No obligation	DNA, fingerprints
<b>Malta</b>	In serious cases, a list of defence witnesses must be presented within 15 days from notification of charge.	Amendment proposed to law so adverse inference can be drawn.	When requested by police / interviewing judge; guilty of offence if refused	All providing has magistrate's authority
<b>Netherlands</b>	No	Adverse inference can be drawn.	No obligation; police can use compulsory powers	Fingerprints; offence punishable by 4 years imprisonment or more and by order of public prosecution: DNA
<b>N. Ireland</b>	Defence statement can be required at later stage	Adverse inference can be drawn.	No obligation	Fingerprints and other non-intimate samples.
<b>Poland</b>	No	None	No obligation	DNA fingerprints
<b>Portugal</b>	No	None	No	Fingerprints
<b>Scotland</b>	No	None	Only road traffic documents	DNA, hair, nails, blood samples and dental impressions if a warrant is obtained.
<b>Slovakia</b>	No	--	No obligation	DNA, fingerprints
<b>Slovenia</b>	No	None	No obligation; police can search	Fingerprints, saliva, blood
<b>Spain</b>	No	No consequences in theory but in practice may corroborate prosecution evidence.	No obligation	None

Sweden	No	None	No obligation, police can search and seize	Fingerprints; offence for which imprisonment can be imposed: samples from body.
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	<b>Question 9</b>	<b>Question 11(a)</b>	<b>Question 11(b)</b>	<b>Question 12</b>
	If the accused refuses to co-operate with the collection of such evidence will assumptions of guilt be made?	Is the accused required to give details of his/her witnesses?	If the accused does not do so, what may the consequences be?	Do the police/prosecution have a duty to disclose to the defence/investigating judge all the evidence in their possession? If so, how is the evidence disclosed (e.g. copies of statements)?
<b>Austria</b>	--	If accused requests witnesses, must cite subject of evidence.	If doesn't do so, witnesses will not be heard.	Yes, original documents.
<b>Belgium</b>	Yes	Accused can ask for defence to be investigated.		Yes, crime file
<b>Cyprus</b>	No	No	None	Yes - after plea of not guilty copies of statement and documents on request.
<b>Czech Republic</b>	No	No		Yes, right to see criminal file. Can be withdrawn during preliminary procedural stage if organised crime.
<b>Denmark</b>	No	Accused identifies witnesses to police and has right to have witnesses heard by the court.		Yes, copies of police reports. Defence can be ordered not to disclose to client.
<b>England &amp; Wales</b>	Yes	Alibi witnesses; new legislation in place requiring defendant to give police the names and addresses of the defence witnesses.	Those witnesses may not be heard	Prosecution disclose copies of evidence which they intend to rely upon
<b>Estonia</b>	Yes	Accused can request that a witness is interviewed, otherwise existence of witness unknown.	Not required in preliminary investigation. If accused doesn't make request and witness not interviewed by investigating judge, witness not included in proceedings.	Yes, criminal proceedings file - once investigation completed - defence can examine file and request copies
<b>Finland</b>	No	To be heard as a witness in the case, must be heard by police in the preliminary investigation	Naming a witness late may lead to delays in processing the case	Yes, investigation record

<b>France</b>	Yes in practice, but no legal foundation	Accused's witnesses will have been interviewed during investigation	May summon new witnesses to trial.	Yes, police reports and examining magistrate's dossier
<b>Germany</b>	No	No but may request evidence to be taken in his defence.		Yes, defence can inspect files available for the court - may take files to office for inspection.
<b>Greece</b>	No	--		--
<b>Hungary</b>	No	--		Right to inspect the documents: confession, expert reports, interviews of witnesses. Following completion of investigation: all documents and evidence.
<b>Ireland</b>	Adverse inference can be drawn from refusal to provide samples that require written consent.	Alibi witnesses.	Alibi witnesses may be excluded.	Yes - book of evidence.
<b>Italy</b>	No, but can be factor when deciding appropriate sentence.	No	Nothing	Police only under duty to disclose all evidence to prosecution.
<b>Latvia</b>	Yes	--	--	Right to look at all evidence after preliminary investigation.
<b>Lithuania</b>	No, but in practice yes	If accused wishes person to be questioned as a witness, the request should be made to prosecution in writing.	Prosecutor may decline to question the defence witness.	Right to familiarise oneself with all information collected during pre-trial investigations. No duty to disclose without request. Not permitted to make copies of material during pre-trial investigation.
<b>Luxembourg</b>	Judge can draw conclusion from refusal to cooperate.	Accused must give list of witnesses before hearing. Preferable to give witnesses' details so examining magistrate can cross examine.	Accused can summon witnesses to trial if prosecution doesn't do so - judge can refuse to hear spontaneous witnesses.	Whole prosecution file handed over after investigation completed. File may be examined before examining magistrate cross examines.
<b>Malta</b>	Yes	Only in offences punishable with more than 10 years imprisonment.	In exceptional cases courts will hear witnesses not listed.	Duty to disclose but no access to police files so have to rely upon genuineness of police.

<b>Netherlands</b>	No	If accused asking public prosecutor / investigating judge to summon witness to trial, must give details of witnesses.	Accused has no autonomous right to summon witness to court.	Yes on accused's request copies provided from prosecutor's file. Information can be withheld until charges filed.
<b>N. Ireland</b>	Yes	New legislation in place requiring defendant to give police names and addresses of witnesses. Alibi witnesses.	Those witnesses may not be heard.	Duty to supply written versions of all witness statements.
<b>Poland</b>	No	If accused wants witnesses to be heard by police / judge must give details.	If doesn't give witness details - witness can't be called to trial.	Defence can research main files of investigation and can receive copies of documents.
<b>Portugal</b>	No	No	If no identifiable witnesses are presented by him there is lack of evidence to support his position.	Defence have no access to evidence during the investigation. After the accusation - can access legal process in public bureau or court and obtain copies
<b>Scotland</b>	Yes	A list of witnesses with names and addresses must be prepared in indictment cases.		List of witnesses with addresses and exhibits is provided.
<b>Slovakia</b>	No	No, law enforcement agencies responsible for objective evidence in favour of accused.		Once accusation made, can inspect the files.
<b>Slovenia</b>	No	Yes	The court will not hear the witness.	Obligated to disclose all evidence which is going to be used in original form. But can't verify in practice whether this has been done or not.
<b>Spain</b>	No	No	None	Yes - police must produce copies of statements and evidence to be disclosed to the defence.

<p><b>Sweden</b></p>	<p>No</p>	<p>In order to have witnesses heard it is necessary to give details of them.</p>	<p>Witness will not be heard.</p>	<p>Suspect has right to be continuously informed of ongoing investigation. Defence can state what enquiries should be conducted by police. After investigation - before prosecution - all material must be presented to the suspect.</p>
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	<b>Question 13</b>	<b>Question 14</b>	<b>Question 15</b>	<b>Question 17</b>
	Do the police/prosecution have a duty to provide the defence/investigating judge with evidence and/or other information in their possession which will not be used at trial that may undermine the prosecution's case or may support the defence's case?	If forensic material or objects are produced as evidence, does there have to be a chain of evidence showing in whose care the item has been at all times?	Is the responsibility always on the prosecution to prove the defendant's guilt, or are there circumstances where the defendant is responsible, once the prosecution have established certain facts, to prove his/her innocence?	Does the accused have a right to remain silent at trial without the court drawing assumptions of guilt?
<b>Austria</b>	Yes, original documents.	No	Yes	Yes
<b>Belgium</b>	Normally all information good or not for prosecution / defence will be on file.	No	No	Risk of guilt inferred.
<b>Cyprus</b>	Yes	Yes	Yes	Yes
<b>Czech Republic</b>	--	Yes	Yes	Yes
<b>Denmark</b>	All materials gathered whether favourable to the accused or not if directly related to the case.	No - internal regulations as to handling but no statutory requirement	Yes, reverted in a few exceptional circumstances.	Yes
<b>England &amp; Wales</b>	All material undermining prosecution or supporting defence.	Routine practice to satisfy court about its integrity and reliability but no statutory requirement.	Yes, in most cases. Some driving offences have reverse burden; some defences must be proved beyond balance of probabilities.	Risk of adverse inference.
<b>Estonia</b>	All aspects including those which vindicate suspect or mitigate guilt and all such evidence must be used at trial. But no duty to disclose information not supported by evidence and so unusable at trial.	No	Yes, but defendant has to prove alibi.	Yes
<b>Finland</b>	Yes, must investigate evidence for or against the suspect.	Items are in the custody of the police	Yes	--

<b>France</b>	Duty to search for truth. Magistrate's dossier in its entirety remitted to defence.	Yes	Yes	Risk of guilt inferred
<b>Germany</b>	Same answer as question 12.	No	Yes	Yes
<b>Greece</b>	--	--	Yes	Yes
<b>Hungary</b>	Following completion of investigations, all documents and evidence.	Items are deposited with the court.	Yes	Yes
<b>Ireland</b>	Yes, in letter of disclosure	Yes	Road traffic offences	Yes
<b>Italy</b>	During investigation, generally no duty to disclose. Before trial all evidence and information - for or against accused - must be disclosed. It is deposited in an office and accused has right to inspect or have copies.	In special office. Special measures taken to avoid opening exhibits	If accusation is omission by defendant - defendant must prove took action once prosecution has given evidence no action taken	Yes
<b>Latvia</b>	Defence have access. All the material gathered in the case must be used.	Materials kept in investigation office	Yes	Yes
<b>Lithuania</b>	Only disclose material to be used to try case. Material obtained by police or prosecutor on own initiative - no duty to disclose. Plans of investigations, flowcharts and other operational/crime investigation material not disclosed.	Procedures stipulated by Criminal Procedure Code.	Yes	Yes
<b>Luxembourg</b>	No specific rule. File handed over without a detailed record of contents - poses major practical problems.	No, causes problems in practical terms	Yes, unless strict liability when just prove the act	Judge may draw conclusions from silence.
<b>Malta</b>	No access to police files. Prosecution has duty to bring all evidence to trial.	Yes	Yes, but a few instances where defendant has to prove innocence.	Yes

<b>Netherlands</b>	Records of case should include all documents that may reasonably be of interest, either inculpatory or exculpatory. Defence may ask to inspect originals.	No	Yes	Judge may draw inference
<b>N. Ireland</b>	All material which might undermine the prosecution must be disclosed.	No rule of law; as matter of practice needs to be a chain of evidence showing in whose care the objects have been prior to admission of such evidence.	Some regulatory offences.	Court may draw inference
<b>Poland</b>	All evidence gathered must be recorded and submitted to court - judge must consider circumstances for and against accused.	No	Yes	Yes
<b>Portugal</b>	Yes, evidence which undermines accusation and supports defence will be included in the legal process - main purpose of prosecution is to find the truth.	Items deposited with the judicial official responsible.	Yes	Yes
<b>Scotland</b>	Crown must disclose information indicative of innocence of accused. Defence can apply to court to view material in hands of Crown.	Yes - to satisfy court	Yes, normally.	Yes
<b>Slovakia</b>	Must obtain evidence for and against accused - in practice evidence only usually obtained against the accused.	Yes	Yes	Yes

<b>Slovenia</b>	Police/prosecution must find out & consider all relevant facts - whether for/against accused - but not clear obligation to produce all. Usually don't reveal evidence in favour of accused and defendant has no means of obtaining evidence not disclosed.	No, this is one of the biggest evidentiary flaws in Slovene law	Yes, but in practice sometimes shifts to the defence.	Assumption of guilt
<b>Spain</b>	File open to the parties.	Yes	Yes	Yes
<b>Sweden</b>	A record kept of all matters of importance to preliminary investigation. When prosecution decides to prosecute, suspect entitled to copies of the records/other notes made. Also applies to material deemed unimportant by police.	Not normally put forward - but integrity of forensic evidence can be challenged.	Yes	Yes

	<b>Question 18</b>	<b>Question 19</b>	<b>Question 20</b>	<b>Question 21</b>
	When, if at all, is evidence obtained in breach of procedural rules admissible?	When, if at all, is evidence obtained by entrapment admissible?	What are the rules governing the collection of evidence by electronic surveillance?	If evidence is obtained unlawfully by electronic surveillance, can it be used at trial? If so, in what circumstances?
<b>Austria</b>	Inadmissible but few procedural rules to contravene.	Prohibited.	See rules referred to in questionnaire answer	Must be legally ordered
<b>Belgium</b>	Evidence in breach of procedural rules can be used if "sincere"	Not admissible.	--	Cannot be used
<b>Cyprus</b>	When its probative value outweighs its prejudicial effect.	Inadmissible if entrapment breaches accused's constitutional rights.	None	Cannot be used
<b>Czech Republic</b>	Not	Not admissible if in breach of Code of Criminal Procedure	Limited to capital offences; prior consent of judge.	Cannot be used
<b>Denmark</b>	Not automatically excluded: court will assess seriousness of offence.	Complicated rules: all entrapment subject to prior approval by courts. May only be used for serious offences.	See rules referred to in questionnaire answer.	--
<b>England &amp; Wales</b>	If evidential value outweighs prejudicial effect.	Unreliable evidence will be excluded.	Electronic communications may be intercepted under warrant by certain public authorities.	If evidential value outweighs prejudicial effect.
<b>Estonia</b>	If justified by public interest; must be corroborated	Must be conducted in accordance with the law.	Allowed if evidence can't be obtained by other means. Offence must be punishable by more than 3yrs imprisonment and authorisation by a judge.	Cannot be used, evidence obtained by illegal surveillance is not admissible
<b>Finland</b>	Not at all.	Not allowed	Possible in serious offences	Cannot be used
<b>France</b>	Violation of procedural rule leads to cancellation of deed leading to violation.	Admissible providing police officers conduct did not determine the committing of the offence.	Only on examining magistrate's authority.	Cannot be used
<b>Germany</b>	Admissible in most cases	Admissible.	Limited to serious criminal offence and other means disproportionately more difficult or offer no prospect of success.	Might be used but accused can try to exclude it.

<b>Greece</b>	Only if felony punishable by life imprisonment.	--	--	--
<b>Hungary</b>	Can not be used.	Details in code of criminal procedure	Judicial permission; serious crime, on motion of state attorney	Cannot be used
<b>Ireland</b>	Evidence obtained as a result of a deliberate and conscious breach of a person's constitutional rights is not admissible. Evidence in breach of judge's or constitutional rules may be excluded.	Evidence obtained in context of encouraging a person to commit a crime should be excluded as a criminal conspiracy	Provided does not breach person's constitutional rights.	--
<b>Italy</b>	Can not be used.	Admissible	Certain major crimes including: punishable by more than 5 yrs imprisonment; crimes against public administration, punishable by 4 yrs imprisonment; drug crimes; illegal detention; and sale of weapons or explosives.	Cannot be used
<b>Latvia</b>	Never	Never	See rules referred to in questionnaire.	Cannot be used
<b>Lithuania</b>	Depends on whether violation material or immaterial (procedural)	Prohibited - if it is a pressure, active encouragement, incitement to commit an offence	Serious crime: punishable by more than 6 yrs. imprisonment. Crime punishable by 3-6 yrs if victim/witnesses may be exposed to violence, extortion or other illegal activity. Require permission of judge	Depends whether violation material or immaterial (procedural)
<b>Luxembourg</b>	No - evidence ruled out	Not allowed	No rules	Cannot be used
<b>Malta</b>	Always	Admitted	Warrant by minister required	Can be used
<b>Netherlands</b>	Can be used if no harm done to defendant's interests	Can not be used if commission of crime due to undue persuasion / fraud of police.	On order of public prosecutor and consent of investigating judge.	Can be used if no harm done to defendant's interests

<b>N. Ireland</b>	No automatic rule of exclusion - depends on seriousness of breach, reliability of evidence and potential impact on fairness of trial.	Admissible; can be excluded if evidence obtained unfairly.	Permission under warrant by public authority.	No automatic rule of exclusion - depends on seriousness of breach, reliability of evidence & potential impact on fairness of trial.
<b>Poland</b>	Under no circumstances - in theory.	Limited to serious crimes, crimes against state safety: terrorism, drug trafficking, money laundering, bribery, illegal arms trade.	No specific rules.	No specific rules.
<b>Portugal</b>	Not admissible	Not admissible.	Answer limited to cameras.	Cannot be used as evidence at trial
<b>Scotland</b>	Decided on balance between public interest and interest of the accused.	Admissible providing ongoing course of activity, no excess pressure exerted.	Order by judge in writing.	Unlawful, would not be used at trial.
<b>Slovakia</b>	Practically, cannot be used but its existence may influence court's decision.	Not admissible	Order by judge in writing.	Practically cannot be used but in existence may influence court's decision
<b>Slovenia</b>	Inadmissible	Admissible	On order of investigating judge. High crime against national security (punishable by more than 8 yrs imprisonment) and specific crimes: money laundering, drugs, bribery, extortion.	Cannot be used
<b>Spain</b>	Never	Never	Permission of examining magistrate required.	Cannot be used.
<b>Sweden</b>	Principle of free evaluation of evidence - all evidence of importance to the case is allowed in the trial - up to court to evaluate it.	Admissible as there is free evaluation of evidence.	Answer limited to cameras.	Admissible as free evaluation of evidence.

	Question 23	Question 24	Question 26	Question 27
	What is the standard of proof required for a conviction (for example 'conviction intime' or beyond reasonable doubt)?	In what circumstances do potential witnesses have the right to refuse to be interviewed when requested to give information by the police/defence/prosecution/investigating judge?	When can information obtained from third parties/witnesses by police/investigating judge be disclosed to the prosecution and by the prosecution to the defence?	Are any witnesses not compellable (e.g. the spouse of the accused)?
<b>Austria</b>	Subjective certainty: doubts resolved in favour of accused	When would incriminate oneself; when called to testify against a relative; professional privilege: when evidence would breach professional confidentiality rule	Police must pass on all information/evidence to public prosecution or examining magistrate.	See answer to question 24.
<b>Belgium</b>	Intime conviction	None except very precise circumstances e.g. breach of lawyer confidentiality	All information has to be disclosed to defence.	Yes
<b>Cyprus</b>	Beyond reasonable doubt	When would breach lawyer confidentiality; when called to testify against a spouse or relative; mentally disordered people.	Third parties must provide the information after the accused pleads not guilty.	The spouse of the accused.
<b>Czech Republic</b>	Beyond reasonable doubt	When would incriminate oneself, when called to testify against a relative/spouse/partner/ad optive child/parent	--	Professional witness, breach of confidentiality unless has prior consent of professional/state body
<b>Denmark</b>	Beyond reasonable doubt	A witness is not obliges to give a statement to the police or incriminate him/herself or a relative in court.	See rules refered to in questionnaire.	Close family of accused; professional witness in breach of confidentiality
<b>England &amp; Wales</b>	Beyond reasonable doubt	Can refuse to be interviewed by police; otherwise has to obey witness summons.	If undermines prosecution case or supports defence.	Spouse - except when victim of crime in domestic violence case.
<b>Estonia</b>	Inner conviction: all doubts resolved for benefit of accused	Against a relative; breach of professional confidentiality rule	Investigator presents file to prosecution and to defence after close of pre-trial investigation	Compellable, but some may refuse to answer questions, (testifying against a relative, breach of professional confidentiality rule.)
<b>Finland</b>	Full evidence	Against a relative.	At anytime during the process.	Testifying against a relative
<b>France</b>	Deep-seated conviction	Compulsory	When the accused is examined by the examining magistrate.	Compellable but relatives don't need to swear to tell the truth.

<b>Germany</b>	Free conviction, belief based upon estimation	Breach of professional confidentiality which would incriminate him/herself or a relative.	Entitled to information obtained legally at any time.	Testifying against a relative; breach of confidentiality, professional witness
<b>Greece</b>	--	Against a relative; breach professional confidentiality.	--	Testifying against a relative; breach of professional confidentiality
<b>Hungary</b>	Beyond reasonable doubt	Against dependant of the accused; professional witness - breach of confidentiality.	State attorney supervises investigation and may inspect all documents.	Against dependant of the accused. Professional witness - breach of confidentiality.
<b>Ireland</b>	Beyond reasonable doubt	Cannot be compelled	Information should be given to the defence	See rules stated in questionnaire answer.
<b>Italy</b>	Rules of evaluation: must be sufficient evidence.	Against relative of accused; when would incriminate oneself; professional witness - breach of confidentiality.	--	Against relative of accused; when would incriminate oneself, professional witness - breach of confidentiality
<b>Latvia</b>	Inner confidence	Would incriminate him/herself or a relative.	Information disclosed to prosecution when file handed over to prosecutor's office.	Testifying against a relative.
<b>Lithuania</b>	Inner conviction, no degree/set level, no prescribed formula for reaching it. Can be problematic in practice.	Against a relative; professional witness - breach of confidentiality.	Prosecutor supervises pre-trial investigation so police have to share information with him.	Testifying against a relative; professional breach of confidentiality.
<b>Luxembourg</b>	Inner conviction	When would incriminate oneself	--	When would incriminate oneself; testifying against a relative
<b>Malta</b>	Beyond reasonable doubt	When would incriminate oneself	Senior police officers are also prosecution officers and information is disclosed when witnesses give evidence in court.	Spouse, except where victim
<b>Netherlands</b>	Beyond reasonable doubt	When interviewed by police/public prosecutor; in court - against a relative, professional witness - breach confidentiality.	Always disclosed by prosecutor if it is included in case file which needs to be disclosed.	Compellable but not required to answer questions.
<b>N. Ireland</b>	Beyond reasonable doubt	When interviewed by police; can be witness summoned to court.	If undermines prosecution case or supports defence.	Spouse, except when victim of assault against spouse or someone under 17 or where involves sexual offence against a person under 17
<b>Poland</b>	Beyond reasonable doubt	Professional witness - breach of duty of confidentiality	All information disclosed to prosecutor, will be disclosed to defence if prosecution allows.	Relative
<b>Portugal</b>	Inner conviction on free evaluation	When would incriminate oneself; against a relative, professional witness - breach of confidentiality.	Must be disclosed by police for prosecution and then defence as part of the legal process.	When would incriminate oneself; testifying against a relative, professional witness, breach of confidentiality

<b>Scotland</b>	Beyond reasonable doubt	May be required to give precognition to defence/prosecutor	Must be disclosed	Spouse, except where victim of crime
<b>Slovakia</b>	Beyond reasonable doubt	Against a relative; breach confidentiality, professional witness.	Depends on nature of item and if it will be evidence - difficult question in current Slovak legislation.	Testifying against a relative; breach of confidentiality, professional witness
<b>Slovenia</b>	In practice, beyond reasonable doubt but no explicit legal standard	Professional witness - except if case of sexual / other offence against a child.	When prosecution files charge.	Relative
<b>Spain</b>	Free evaluation according to conscience.	Against relative; accused's lawyer can refuse	All evidence must be disclosed	Testifying against a relative; accused's lawyer can refuse.
<b>Sweden</b>	Beyond reasonable doubt	No one obliged to give statement to police; can be witness summonsed to court; when not obliged to incriminate oneself.	All materials must be disclosed.	Relatives need not testify; spouse and other relative may not give evidence on oath so can't commit perjury.

	<b>Question 28</b>	<b>Question 29(a)</b>	<b>Question 29 (b)</b>
	Are any witnesses not competent to give evidence (e.g. young children)?	May written statements/affidavits/authenticated acts be used as evidence at trial instead of live evidence being called?	If so, in what circumstances?
<b>Austria</b>		Yes	Dead; age, illness, infirmity; resides significant distance away; parties agree; witness refuses to give evidence; other significant reason.
<b>Belgium</b>	Young children will not be interrogated under oath.	No	
<b>Cyprus</b>	Children; mentally disordered people.	Yes	--
<b>Czech Republic</b>	Children under 15 can't be interviewed without pedagogical expert.	Yes	Very detailed rules
<b>Denmark</b>	If witness can't give useful or meaningful statement. Must be capable of understanding court proceedings and need to tell the truth.	No	
<b>England &amp; Wales</b>	Children under 14 can't give sworn evidence.	Yes	Dead; overseas; afraid; if parties agree.
<b>Estonia</b>	Children under 14 can only be interviewed in presence of childcare/ social worker / psychologist	No	Only to contradict live evidence
<b>Finland</b>		No	
<b>France</b>	Children under 16 don't take the oath.	Yes	Witnesses heard during inquiry/investigation rarely called unless Assize court, where always called; written statements may be furnished to court.
<b>Germany</b>	Children under 16 don't take oath.	Yes	In certain circumstances
<b>Greece</b>	If mental state such so can't comprehend.	Yes	Death; old age/illness; residence abroad.
<b>Hungary</b>	Children under 14 - admission has to be corroborated.	Yes	Must have electronic signature or be authenticated by judge or notary.
<b>Ireland</b>	Child of 'tender years' must have sufficient intelligence to justify the reception of the evidence and understand the duty to tell the truth.	Yes	If agreed by both parties; other special exceptions - see answer to questionnaire.
<b>Italy</b>	Special care and rules for children under 16; witness mentally ill unless victim.	Yes	Parties agree; death; live evidence impossible for unforeseen reasons.
<b>Latvia</b>	No	No	

<b>Lithuania</b>	If physical or psychological deficiency - must have health institute certificate or conclusion of forensic psychological or medical specialist.	Yes	Statements made in front of pre-trial investigation judge: has died; refuses; offers different testimony at trial; doesn't take part for good reason; under 18; granted anonymity
<b>Luxembourg</b>	Child under 15 doesn't take oath.	Yes	At judge's discretion
<b>Malta</b>	Young children must understand meaning of taking oath.	-	--
<b>Netherlands</b>	--	Yes	Almost all circumstances unless defendant requires court to question the witness and witness testimony essential.
<b>N. Ireland</b>	Child under 14 can only give unsworn evidence	Yes	Other parties agree; dead/unfit; outside UK; person can't be found; statement made to investigating office and person doesn't give evidence through fear/ being kept out of way; in interest of justice to admit.
<b>Poland</b>	No	Yes	In circumstances set out in Polish code
<b>Portugal</b>	Must not be restrained by psychological abnormality; if under 16 may be prior expert analysis by competent person.	Yes	Principle of immediacy of evidence favours oral evidence but: death; serious illness; moved abroad; mentally incapable; impossible for some other reason; victim of sexual crime; providing declaration made before investigating judge.
<b>Scotland</b>	A matter for the court	Yes	Death
<b>Slovakia</b>	Children may give evidence in presence of psychologist, psychiatrist, teacher, parent (someone with experience of child raising).	Yes	Any written instrument can be used as evidence.
<b>Slovenia</b>	Young children who don't understand meaning of oath - unless accused wants them to testify.	Yes	General rule-all evidence material should be evaluated during trial in its original form but with consent of both parties; dead/mentally ill/could not be found/old age.
<b>Spain</b>	Mentally ill	Yes	If impossible to produce the evidence at trial, e.g. the witness has left the jurisdiction.
<b>Sweden</b>	Children under 15 / mentally ill person may not testify under oath.	No	Principle of immediacy of evidence requires oral evidence.

	<b>Question 30 (a)</b>	<b>Question 30 (b)</b>	<b>Question 32</b>	<b>Question 33</b>
	Are there categories of witness whose identity may be kept from the defendant?	If so, in what circumstances?	What are the rules governing the admission of expert evidence at trial?	Must the expert give evidence in person?
<b>Austria</b>	Yes	Serious danger to life or health of witness or 3rd party	Accused has no right to call own expert witness.	Yes
<b>Belgium</b>	Yes	Witness in danger	Same as for ordinary witness	Yes
<b>Cyprus</b>	No	--	If in the opinion of the judge such evidence should be admitted.	No
<b>Czech Republic</b>	Yes	Risk to life or property	Many rules - see code of criminal procedure	No, expert opinion may be presented instead of expert present with consent of accused and prosecutor
<b>Denmark</b>	Yes	Where safety of witness makes it urgent but information about name, position & address must not be of importance to defendant.	Can not call your own expert, court can ask parties to establish a survey or statement.	No - statement can be submitted
<b>England &amp; Wales</b>	Yes	Where to disclose identity would put life of witness in peril.	Experts can rely upon hearsay to justify their opinions; must be on matter beyond competence of court for expert to give opinion; can sit in court and listen to evidence of other witnesses.	No, if parties agree contents of expert's statement or court grants leave.
<b>Estonia</b>	Yes	To ensure security of witnesses must be justified by gravity and extraordinary circumstances of offence. Victim cannot be anonymous.	Ordered where specific non-judgemental expertise required; expert has to follow rules of procedure governing preparation of expert opinion.	Expert evidence is given in written form unless expert requested to attend trial by prosecutor/defence.
<b>Finland</b>	No, but being considered by legislature			Can be heard personally

<b>France</b>	Yes	If offence punishable with at least 3 yrs imprisonment and witness or family gravely in danger.	Must carry out role and duties of expert.	Yes
<b>Germany</b>	Yes	Undercover agent / investigator in crime of considerable importance	Same as ordinary witnesses; must possess more specialist knowledge than the court	Yes
<b>Greece</b>	Yes	Criminal organisation case		Rule is for reports to be read, exceptionally may be called to give verbal explanation by the court
<b>Hungary</b>	Yes	Evidence concerns important circumstances of case of high importance or if his/her life/physical integrity or personal freedom would be exposed to great threat.	Expert evidence admitted when special experience required.	Oral / written
<b>Ireland</b>	Yes	For security reasons	Admitted on matters of opinion outside the competence of the court.	No, if the report is agreed in advance.
<b>Italy</b>	No.			No, if agreement reached between defence and prosecutor.
<b>Latvia</b>	Yes	Serious offence, witness in danger	See Criminal Procedure Code	Yes
<b>Lithuania</b>	Yes	Real danger to life, health, freedom/property of victim/witness or family members or close relatives. Decision to allow anonymity must be confirmed by prosecutor who has to satisfy himself about reliability of witness evidence.	Based on general rules of admissibility of evidence	If expert assessment not sufficiently clear and comprehensive.
<b>Luxembourg</b>	No, but legislation being drafted to permit this		No specific rule	Generally, but not necessarily
<b>Malta</b>	No		Where special knowledge and skill is required.	Yes

<b>Netherlands</b>	Yes	When witness' or 3rd party's life, health, security at stake.	Admissible if the testimony is relevant	Expert's report will be incorporated in case file; common for experts to give evidence in writing; expert can give evidence at trial if their testimony is relevant.
<b>N. Ireland</b>	Yes	To achieve administration of justice	If the matter to be addressed calls for expertise.	No, if parties agree contents of expert's statement.
<b>Poland</b>	Yes	Threat to his/her life, health, freedom/property	If special information is requested at trial	Can give evidence in writing, can be asked by judge to give evidence in person.
<b>Portugal</b>	Yes	Testimony related to human trafficking, criminal gangs, terrorist organisations, terrorism, crimes punishable with more than 8 yrs imprisonment committed by member of criminal gang.	When special knowledge is required	No, but may ask the expert to give evidence in person.
<b>Scotland</b>	Yes	If witness' life in danger		No, if the evidence is agreed by the parties.
<b>Slovakia</b>	Yes	See Criminal Procedures Code	Regulated by Criminal Procedure Code.	Expert opinions submitted by the defence are documentary evidence only; otherwise expert's opinion / appraisal may be read in court with consent of all parties.
<b>Slovenia</b>	Yes	If witness' life in danger; if witness in care of police officer. In practice only in organised crime cases.	Many rules	Usually asked to give evidence in writing; court may summon expert for cross-examination.
<b>Spain</b>	Yes	If witness/relative or their property in danger.	See the Criminal Prodecure Act.	Expert evidence can be proved by document but parties have right to call him at trial.
<b>Sweden</b>	No		Extensive regulations.	If requested by one of the parties.

	<b>Question 34</b>	<b>Question 35 (a)</b>	<b>Question 36</b>
	Are there any limitations on who may be allowed to give evidence as an expert? Are there rules governing the qualifications required of an expert witness?	Are communications between an expert and the party instructing the expert 'privileged'?	Is the expert required to keep such communications confidential?
<b>Austria</b>	Choice of expert made by examining magistrates and selected from a list of sworn experts; regulations govern registration and quality requirements.	No. Expert is called by the court and must produce the information publicly.	No. Expert is called by the court and must produce the information publicly.
<b>Belgium</b>	Must be competent	No.	No
<b>Cyprus</b>	Must be competent and qualified.	Yes	Yes
<b>Czech Republic</b>	Must be in register of experts	No.	No, unless member of professional association e.g. doctor
<b>Denmark</b>	Court decides who to appoint as expert; conditions regarding personal qualifications.	Both parties may agree the questions which the expert has to answer.	
<b>England &amp; Wales</b>	Court must be satisfied they are an expert; CRFP accredits experts - independently verifies their competence and maintains register	Yes if defence, unless called as evidence when must be disclosed beforehand. Where prosecutor instructs expert, report must be disclosed.	Yes
<b>Estonia</b>	Expert is appointed by investigator/judge; experts working in state forensic institutions and officially recognised experts are preferred; prosecutor, investigator or courts appoint people with relevant qualifications	No. Expert instructed by investigator, prosecutor or judge.	Yes
<b>Finland</b>	Honest and skilled	Yes if defence, unless called as evidence when must be disclosed beforehand. Where prosecution instruct special expert, report must be disclosed.	Yes
<b>France</b>	Registered on court's list	Yes, unless expert instructed by examining magistrate when will be part of dossier.	Yes, unless in dossier
<b>Germany</b>	Judge selects	No. Expert instructed by the court.	No
<b>Greece</b>	Degree; if summoned by court, should work in recognised laboratory or be on list drawn up by council of magistrates.	No. Expert instructed by the court.	No

<b>Hungary</b>	Court, state attorney or investigator appoints; on register of experts.	See court decisions	See court decisions
<b>Ireland</b>	The judge decides whether the expert is sufficiently qualified.	Only if the expert is instructed by the defence; communications between expert and prosecution should be disclosed.	Yes, between defence and expert. Communications between prosecutor and expert must be disclosed.
<b>Italy</b>	Prosecution and defence produce list 7 days before trial date; no limit on choice of defence expert; expert chosen by judge/prosecutor must be on special list.	Yes	Yes
<b>Latvia</b>	Person with special knowledge in the field	Expert is instructed by the court.	
<b>Lithuania</b>	Expert is appointed by pre-trial investigation judge, has special knowledge and experience and is on list of forensic experts, if list doesn't have someone with required speciality, must have special knowledge	Expert is instructed by pre-trial investigation judge or court.	
<b>Luxembourg</b>	No specific rules	Only if the expert is instructed by the defence; communications between expert and prosecution should be disclosed.	No. Expert instructed by examining magistrate
<b>Malta</b>	Court appoints own experts, no rules.	No. Expert instructed by court.	No. Expert instructed by court.
<b>Netherlands</b>	No rules other than expert has knowledge of subject	Quite common for expert to be instructed by the court. If instructed by defence doubtful if privileged	No.
<b>N. Ireland</b>	Court must be satisfied person suitably qualified.	Yes - if instructed by defence	Yes between defence and expert
<b>Poland</b>	Must have sufficient knowledge or be a 'court expert'	Yes - if instructed by defence	No, but information obtained can't be used at trial.
<b>Portugal</b>	Will be requested by judicial authority, must be produced by a proper institution, laboratory or official service; or according to a list of existing experts; or provided by someone with competence.	Yes, when expert instructed by defence	Yes, when expert instructed by defence
<b>Scotland</b>	Court must be satisfied witness has necessary expertise and qualifications		
<b>Slovakia</b>	Registered in roll of sworn experts		

<b>Slovenia</b>	Expert witness appointed by the court, only witnesses or institutions that have special licence of Minister of Justice who tests qualifications before licence issued	No, only judge can appoint an expert	No, only judge can appoint as expert
<b>Spain</b>	Expert must have official title in art/science or specialist knowledge/experience in some art/science.	No	No
<b>Sweden</b>	Public authority/officer/from person specially authorised to furnish opinions or someone known for his integrity/knowledge.	No	No

### Annex 3: Participating Organisations

The Law Society of England and Wales would like to thank the following organisations for their assistance with this project:

Austria	Österreichischer Rechtsanwaltskammertag
Belgium	Ordre Francais Des Avocats Du Barreau De Bruxelles
Cyprus	Cyprus Bar Association
Czech Republic	Ceska Advokatni Komora
Denmark	The Danish Bar & Law Society
England & Wales	The Law Society of England & Wales
Estonia	Eesti Advokatuuri Juhatus
Finland	Suomen Asianajaliito
France	Barreau de Paris
Germany	Bundesrechtsanwaltskammer
Greece	Dikigorikos Silogos Athinon
Hungary	Magyar Ügyvédi Kamara
Ireland	Law Society of Ireland
Italy	Consiglio Nazionale Forense
Latvia	Latvijas Zverinatu Advokatu Padome
Lithuania	Lithuanian Bar Association
Luxembourg	Ordre des Avocats de Barreau de Luxembourg
Malta	Chamber of Advocates
Netherlands	Netherlands Bar Association
Northern Ireland	Queen's University Belfast
Poland	Naczelena Rada Adwokacka
Portugal	Ordem Dos Advogados
Scotland	The Law Society of Scotland
Slovakia	Slovenská Advokátska Komora
Slovenia	Odvetniska Zbornica Slovenije
Spain	Consejo General de la Abogacia Espanola
Sweden	Sveriges Adokatsamfund