

Strasbourg, 20 September 2004  
[PC-OC (2004) 16 Request for the extraction of DNA]

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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**Committee of Experts on the Operation of European Conventions in the Penal Field**  
**(PC-OC)**

**49th meeting**  
**Strasbourg, 11 - 13 October 2004**

**Mutual Assistance in Criminal Matters - the practical application of the  
European Convention and its Protocols:  
Requests for the collection of DNA samples and their use**

**submitted by**  
**Mr Jürgen SCHNIGULA**  
**(Germany)**

**Issue relating to the scope of application of Article 22 of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters**

The German Act Concerning the Establishment of a Person's Identity by means of DNA Analysis (DNA-IFG) (in connection with sections 81 g and f of the Code of Criminal Procedure (StPO)) provides under its section 2 that, for the purpose of identifying an offender in future criminal proceedings, if an accused person has been convicted of

1. an offence of substantial significance, in particular a serious crime, grievous bodily harm, a particularly serious case of theft or extortion, or
2. an offence against sexual self-determination (sections 174 to 184f of the German Criminal Code)

or was not able to be convicted, solely due to an inability to be held criminally liable, whether this was substantiated or because it could not be ruled out, or due to being unfit to stand trial based on mental illness, or due to a lack of responsibility, whether this was substantiated or because it could not be ruled out (section 3 of the Youth Court Act), such person may have somatic cells taken from him which may be subject to molecular genetic examination for the determination of the DNA code and sex, if due to the type or manner of the offence, or to the personality of the accused or to other findings, there is reason to believe that criminal proceedings might again have to be conducted in respect of the Applicant in the future on account of one of the offences listed under number 1 above.

This means that in these cases, the sampling of DNA material is possible, without a criminal proceeding presently being conducted in respect of the data subject. The purpose is to secure evidence in case of any future criminal offences and to make the investigation of such offences easier.

In cases in which the data subject's residence is in a foreign country, the question arises as to whether and perhaps on what basis it would be possible to submit a request for mutual legal assistance toward the collection of DNA material pursuant to section 2 DNA-IFG.

#### *Registration*

On the one hand there are doubts as to whether a request for the collection of DNA material in those cases which fall under section 2 of the DNA-IFG could be based upon the European Mutual Assistance Convention, since it is a prerequisite pursuant to Article 1 para. 1 that the act constitute a punishable offence for whose prosecution the justice authorities of the requesting State are responsible at such point in time when mutual legal assistance itself is requested. In the additional protocol to the European Mutual Assistance Convention and the Schengen Implementation Convention, there is also no legal basis which could be referred to for these cases.

On the other hand, in German legislation, a preventative as well as a repressive nature of the aforementioned provisions is acknowledged. It is therefore also characterised as a kind of annex decision subsequent to a closed criminal proceeding. Therefore, if one works from the premise of carrying out a criminal prosecution measure which links to the suspicion of a criminal offence of substantial significance, then a request which is made for the collection and dissemination of DNA carrier information could be the object of mutual assistance. In any event, DNA identification is carried out for a – possibly future – proceeding, which is aimed at the imposition of a – perhaps later – criminal sanction in respect of a certain offender.

In relation to requests for mutual assistance for the collection of DNA material in those cases which fall under section 2 of the DNA-IFG on the basis of the European Mutual Assistance Convention, compared to neighbouring European countries, processing as well as refusal of such requests has been carried out. Uniformity of action would therefore be desirable.