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Taking evidence by videoconference



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European Judicial Network
(in civil and commercial
matters)

At all locations with videoconferencing facilities owned by the Ministry of Justice, one employee is in charge of looking after the videoconferencing equipment. This person can operate the videoconferencing equipment and make minor adjustments to the settings. All videoconferencing equipment is linked to a central unit in the IT department of the Federal Ministry of Justice (Bundesministerium für Justiz – BMJ). From there, IT administrators can fine-tune all videoconferencing systems located across Austria.

1 Is it possible for evidence to be taken by videoconference either with the participation of a court in the requesting Member State or directly by a court of that Member State? If yes, what are the relevant national procedures or laws that apply?

Both types of evidence-taking via videoconference are possible and permitted in Austria. Austrian civil procedure law is regulated by the Code of Civil Procedure (*Zivilprozessordnung* – ZPO) for contentious proceedings and the Non-contentious Proceedings Act (*Außerstreitgesetz* – AußStrG) for non-contentious proceedings. The provisions relating to the taking of evidence can be found in the ZPO (Sections 266 to 389) and the AußStrG (Sections 16, 20 and 31 to 35, with partial reference to the ZPO) as well as in the individual provisions regulating specific types of proceedings, such as in Section 85 on the duty of participation in paternity proceedings. The relevant national procedures and legal rules are described in detail in the answers to the following questions and in the factsheet ‘Taking of evidence – Austria’.

2 Are there any restrictions on the type of person who can be examined by videoconference – for example, is it only witnesses or can others such as experts or parties also be examined in this way?

In accordance with Section 277 ZPO (contentious proceedings) and Section 35 AußStrG in conjunction with Section 277 ZPO (non-contentious proceedings), videoconferencing can be used for the taking of evidence and therefore also for the examination of parties and witnesses and for expert witness testimony.

In accordance with Section 132a ZPO (contentious proceedings) and Section 18 AußStrG (non-contentious proceedings), the court may also, under certain conditions, hold a ‘video hearing’ in which parties, their representatives and other people who should attend proceedings may, without being physically present, take part using appropriate communication technology to transmit words and images. In such hearings, the taking of evidence is limited to the delivery of opinions by sworn experts. Only in preparatory or first hearings may parties – and, in contentious proceedings, informed persons under Section 258(2) ZPO – also be heard.

3 What restrictions, if any, are there on the type of evidence that can be

obtained by videoconference?

In accordance with Section 277 ZPO (contentious proceedings) and Section 35 AußStrG in conjunction with Section 277 ZPO (non-contentious proceedings), videoconferencing can be used for the taking of evidence. However, factual impediments may preclude this, for instance when certificates or visual inspection are to be used in the taking of evidence.

With regard to the restrictions on the taking of evidence in a hearing under Section 132a ZPO (contentious proceedings) and Section 18 AußStrG (non-contentious proceedings), see Question 2.

4 Are there any restrictions on where the person should be examined by videoconference – i.e. does it have to be in a court?

Any person can be summoned by their local court and examined there by videoconference. All courts, public prosecutor's offices and prisons in Austria are equipped with at least one videoconferencing system.

5 Is it permitted to record videoconference hearings and, if so, is the facility available?

In civil matters there are no general data protection provisions in Austrian law for the recording of examinations conducted via videoconference. The agreement of all persons involved in the videoconference is therefore required for the recording. This applies to the indirect taking of evidence, which, under Article 12(2) of Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ('the Regulation'), is to be carried out in accordance with the law of the requested State.

A request for direct taking of evidence, however, must be made in accordance with the law of the requesting State (Article 19(8) of the Regulation). Should that law provide for the recording of videoconferences without the agreement of the persons concerned, this is admissible from Austria's point of view.

In principle, examinations conducted via videoconference can be recorded on all videoconferencing systems. In locations where court proceedings are generally recorded (in many criminal courts), the existing technical equipment can be used to record the examination conducted via videoconference. The examination can be recorded in all other locations by simply installing a relevant storage medium.

6 In what language should the hearing be conducted: (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation?

(a) Under Article 12(2) of the Regulation, evidence is to be taken in accordance with the law of the requested State. The examination must therefore be carried out in German (in some Austrian courts, Croatian, Slovenian or Hungarian is also permitted). The requesting court can apply to use its own official language (or any other language) as part of a special procedure for executing its request for the taking of evidence. However, the requested court can reject this, for example if it is not possible due to major practical difficulties (Article 12(3) of the Regulation).

(b) Under Article 19(8) of the Regulation, the requesting court must carry out the direct taking of evidence in accordance with the law of its own Member State, and thus in one of the official languages permitted by that law. However, as the requested Member State, Austria is entitled under Article 19(4) to require the use of its language as a condition for the taking of evidence.

7 If interpreters are required, who is responsible for providing them and where should they be located (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation?

With regard to the indirect taking of evidence, regardless of any reimbursement made in accordance with Article 22(2) of the Regulation, responsibility for providing interpreters lies primarily with the requested court. The courts involved should, however, cooperate in a constructive manner (here as in other areas).

With regard to the direct taking of evidence, according to Article 20 of the Regulation, responsibility for providing interpreters lies primarily with the requesting court. However, Article 20(2) lays down an obligation on the requested Member State to provide assistance.

The decision on which State interpreters are to come from and where they are to be present has to be made on the basis of what is appropriate in the individual case.

8 What procedure applies to the arrangements for the hearing and to notify the person to be examined about the time and place (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation? For both options, how much time should be allowed when arranging the date of the hearing to enable the person to receive sufficient notification?

The person to be examined is summoned to an examination conducted via videoconference in Austria in the same way and subject to the same periods of notice as would apply if they were being called before the court trying the case.

9 What costs apply to the use of videoconferencing and how should they be paid?

There are no call charges for videoconferencing via Internet Protocol (IP). For videoconferencing via ISDN, callers will incur charges, just as they do for a telephone call. These charges vary depending on the location of the installation being called.

10 What requirements, if any, are there for ensuring that the person examined directly by the requesting court has been informed that the performance shall take place on a voluntary basis?

This is primarily the responsibility of the requesting court, which is bound by Article 19(2) of the Regulation and which in most cases itself invites the persons concerned to attend the videoconference. If the Austrian central authority or an Austrian court notices that Article 19(2) of the Regulation may have been breached while the direct taking of evidence is being prepared or carried out, the authority or the court must, in cooperation with the requesting court, ensure compliance with this provision in an appropriate manner. Employees of the court in Austria are trained in the application of Regulation (EU) 2020/1783, and they also have access to the European 'Guide on videoconferencing in cross-border proceedings' via the intranet of the Ministry of Justice.

11 What procedure exists for verifying the identity of the person to be examined?

Photographic identification is used to verify the person's identity. The person's identity is also checked as part of the examination (Section 340(1) ZPO).

12 What requirements for taking oaths apply and what information is needed from the requesting court when an oath is required during direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation?

The provisions pertaining to oath-taking for parties are in Sections 377 and 379 ZPO and those for witnesses can be found in Sections 336 to 338 ZPO.

Parties and witnesses are both obliged to take an oath. While parties cannot be legally forced to take an oath, witnesses can be penalised for unlawfully refusing to take an oath (Sections 325 and 326 ZPO; penalties are the same as those for refusing to testify and include fines or up to 6 weeks' imprisonment).

According to Section 288(2) of the Criminal Code (*Strafgesetzbuch* - StGB), giving or confirming false evidence under oath or otherwise falsely taking an oath provided for in the relevant legislation is punishable by a term of imprisonment of between 6 months and 5 years.

False evidence given by a party to the proceedings who has not taken an oath is not considered a punishable offence. However, a witness who has not taken an oath and who gives false evidence can be sentenced to up to 3 years' imprisonment (Section 288(1) StGB).

In accordance with Article XL of the Introductory Act to the Code of Civil Procedure (*Einführungsgesetz zur Zivilprozessordnung* - EGZPO), the provisions of the Act of 3 May 1868, Imperial Law Gazette (*RGBl.*) No 33 (Wording of the oath and other formalities) must be observed (see <http://alex.onb.ac.at/cgi-content/alex?aid=rgb&datum=18680004&seite=00000067>).

According to Section 336(1) and Section 377(1) ZPO, persons who have previously been convicted of giving false testimony, or who are under the age of 14, or who have an insufficient understanding of the nature and meaning of the oath as the result of a lack of maturity or because of an intellectual disability, are unable to take an oath, and may therefore not be put under oath.

The aforementioned provisions relating to the examination of a witness or a party under oath cannot be applied in cases pursuant to the Non-contentious Proceedings Act (Section 35 AußStrG).

13 What arrangements are there for ensuring that there is a contact person at the place of the videoconference with whom the requesting court can liaise and a person who is available on the day of the hearing to operate the videoconferencing facilities and deal with any technical problems?

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14 What, if any, additional information is required from the requesting court?

The following information is required from the requesting court:

- IP address and/or ISDN number with the dialling code;
- name, telephone number and email address of an employee at the requesting court who is responsible for the technical aspects of the remote equipment.

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