

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 (ZPO – *Zivilprozessordnung*) for contentious proceedings and the Non-Contentious Proceedings Act (AußStrG – *Außerstreitgesetz*) 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 of the ZPO (contentious proceedings) and Section 35 of the AußStrG in conjunction with Section 277 of the 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.

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

In accordance with Section 277 of the ZPO (contentious proceedings) and Section 35 of the AußStrG in conjunction with Section 277 of the 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.

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 his/her 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. There is no rule in Austrian law according to which videoconferencing for the taking of evidence is permitted only in court buildings.

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 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 10(2) of Regulation (EC) No 1206/2001 on cooperation between the courts in 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, is made in accordance with the law of the requesting State (Article 17(6) 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 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 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 10 to 12; and (b) where there is direct taking of evidence under Article 17?

(a) Under Article 10(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 are 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 if it is not possible due to major practical difficulties (Article 10(3) of the Regulation).

(b) Under Article 17(6) of the Regulation, the requesting court is to 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 17(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 under both types of hearing and where should they be located?

With regard to the indirect taking of evidence, regardless of any reimbursement made in accordance with Article 18(2) of the Regulation, the 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 17 of the Regulation the responsibility for providing interpreters lies primarily with the requesting court. Article 17 does not require the requested Member State to provide assistance with this, but it does not preclude such assistance either. Section 39a(4) of the Court Jurisdiction Act (JN *Jurisdiktionsnorm*) requires a court providing judicial assistance to give practical help with the taking of evidence upon request from the foreign court. This would include finding a suitable interpreter, for instance.

The decision on the State from which interpreters are to come 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? 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 by 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 using 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 17(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 17(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 (EC) No 1206/2001, 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 Article 17?

The provisions pertaining to oath-taking for parties are in Sections 377 and 379 of the ZPO and those for witnesses can be found in Sections 336 to 338 of the 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 of the ZPO; punishments 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 (StGB – *Strafgesetzbuch*), giving or confirming false evidence under oath or otherwise falsely taking an oath provided for in the relevant legislation are punishable by a term of imprisonment of between six months and five years.

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

In accordance with Article XL of the Introductory Act to the Code of Civil Procedure (EGZPO – *Einführungsgesetz zur Zivilprozessordnung*) the provisions of the Act of 3 May 1868, Imperial Law Gazette (RGI.) 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) of the ZPO, persons who have previously been convicted of giving false testimony, or who are under the age of fourteen, 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?

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 (BMJ – *Bundesministerium für Justiz*). From there, IT administrators can fine-tune all videoconferencing systems located across Austria.

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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