

SUMMARY

Forensic DNA investigation: an exploration based on legal comparison

This research report contains a study based on legal comparison of the legal framework for the application of forensic DNA investigation in criminal proceedings. Apart from the Netherlands, the following countries are involved in this study: Belgium, Germany, England & Wales and France. The report contains eight chapters and an extensive set of appendices. These appendices concern the composition of the supervising committee, the respondents consulted in the various countries, the questionnaire used and a display of the applicable regulations by means of matrices. In addition, the (most important) applicable regulations of each country are added as separate appendices.

This report is aimed at describing the legal framework on the basis of the legal sources (regulations and, if relevant, case law). Naturally, legal doctrine plays a role as well in searching and interpreting these sources. In carrying out a comparison of the legal frameworks of the countries concerned, the Dutch regulation is used as a starting point. Working with questionnaires and interviews seemed to be the best way to investigate the practice. Initially, the researchers had the intention to look for respondents in each country in the spheres of a) legislation, b) policy, also in respect to the international exchange of information (mutual legal assistance), and c) daily practice. A questionnaire (enclosure 3) has functioned as a guideline for the interviews and e-mail communication with the 20 respondents in the various countries. However, the researchers partly had to leave the idea to find respondents in the mentioned areas (legislation, policy, practice) in each of the countries. The area seems highly specialized and through the references one ends up with the same (group of) persons every time.

Paramount in this report is the question what the legal framework and the related practice concerning DNA investigation in criminal law is in the abovementioned countries, in comparison to the Netherlands – specifically with regard to the acquisition, the preservation and the administration, as well as the (evidential) use and the international exchange of DNA information. The main goal in this respect is to examine if the Netherlands, as compared to the other countries, have an appropriate legal framework for forensic DNA investigation in criminal proceedings, and how the actual practice relates to the law. The selection of the comparison countries is based, among others, on reasons as proximity, accessibility and comparability, as well as on the fact that the Netherlands maintain extensive relations with these countries with regard to mutual legal assistance.

The investigation has produced the following results concerning the legal framework for the use of DNA investigation in criminal proceedings. In the Netherlands, the public prosecutor can order in the interest of the investigation that the suspect of an offence as described in article 67 Code of Criminal Procedure (paragraph 1), in the case of a serious charge, be subjected to the extraction of cell material. Cell material can be extracted from a convict when he is sentenced for an offence as described in article 67 Code of Criminal Procedure (paragraph 1). A DNA investigation can also be ordered when a suspect or a third person (victim, witness, participator in a large-scale DNA screening test) has agreed upon it.

In Belgium, DNA can be extracted from suspects in the interest of the criminal proceedings, and from persons sentenced unconditionally to prison or internment. In France, the extraction of DNA is possible for persons against whom exists a strong suspicion that they have committed specific (grave) offences (mentioned in the law). The aim is to put their DNA profile into a databank. The law does not require an investigation interest. Furthermore, DNA can be extracted from suspects of grave and light offences ("crimes et délits") in order to compare their profile with the profiles in the databank, but without putting their profiles into the databank. The extraction of DNA from convicts is possible when they have committed grave offences as mentioned in the law. In Germany, DNA can be extracted from suspects and convicts. In case of extraction from suspects aimed at a specific criminal case, there are no further requirements. When extracting DNA from a suspect, only aimed at preventing potential future offences, or from convicts, stronger requirements are posed. In England and Wales the extraction of DNA is possible when the person concerned is in custody and there are reasonable grounds to suspect his involvement in a recordable offence (which is broader than the Dutch suspicion in article 27 Code of Criminal Procedure!). Another requirement is that there be a reasonable ground to assume that an investigation will contribute to the confirmation either rebuttal of involvement in the offence. Here the investigation interest is formulated.

Besides, an investigation has taken place to the so-called large-scale DNA screening test in the various countries. In the Netherlands the head public prosecutors need to ask permission for such a test to the College of Attorney-General. In the application it should be argued why this 'last remedy' is necessary, and why there is no other procedural measure available that could lead to the offender. Furthermore a description should be given on what the group of persons concerned will look like – and on which grounds – and an estimation of the size of this group. In Belgium a large-scale DNA screening test is not permitted by the law. Germany does not have a legal framework for these tests, but on 8 July 2005 the Bundesrat has accepted a regulation, which will be adopted still in 2005. In Germany large-scale DNA screening tests take place on the initiative of the public prosecutor and the police. According to the new regulation, a written and motivated judicial order is required. In England, all large-scale DNA screening tests are initiated by the police. France still does not have a legal framework in this field.

All the investigated countries know provisions for the protection of privacy; in our country the processing of DNA information takes place in accordance with the 'Decree DNA investigation in criminal proceedings' and the 'Protection of Personal Data Act'. Privacy legislation is quite different in the investigated countries, and it is difficult to compare the various regulations to each other. The Dutch legislation seems to be quite a match for the investigated foreign legislations. Compared to the English law it is striking that the Dutch law has more safeguards for the protection of privacy. An example of this difference is the English regulation concerning the elimination of DNA profiles from the databank: once a person is consented in a DNA investigation, even in a large-scale DNA screening test, he cannot achieve removal of his profile from the databank anymore.

The international exchange of DNA information mainly takes place by means of mutual legal assistance, and partly via police cooperation. The countries discussed in this report do not have any specific legislation concerning mutual legal assistance with regard to the exchange of DNA profiles. Because the Netherlands consider DNA information as judicial information instead of police information, a permanent exchange or an exchange through Interpol is not possible right now; an official request for legal assistance is always required. Therefore, the Netherlands have

signed an additional treaty concerning mutual legal assistance with Germany in March 2005, which involves the abovementioned subject. Furthermore the Treaty of Prüm was signed on May 27, 2005.