NATIONAL REPORT FOR GERMANY ON ELECTRONIC EVIDENCE AND VIDEOCONFERENCING

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Questionnaire for national reports

GERMANY

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On electronic evidence and videoconferencing

This questionnaire addresses practical and theoretical aspects regarding the taking of (electronic) evidence and videoconferencing in (cross-border) civil litigation. Each partner should provide substantive answers for their respective Member State (or additional Member State, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation (EU) 2020/1783 ("Recast Taking of Evidence Regulation"). The latter questions address the interplay between national law and the EU regime on cross-border enforcement in civil and commercial matters.

For useful information, especially relating to B IA and cross-border enforcement in the EU, please refer, among other sources, to:

- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783),
- Impact assessment of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285),
- Other *travaux preparatoires* of the Recast Taking of Evidence Regulation (see e.g. https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-ec-no-1206-2001-on-cooperation-between-the-courts-of-the-member-states-in-the-taking-of-evidence-in-civil-or-commercial-matters/)
- Council Guide on videoconferencing in Cross-border proceedings (https://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/)
- The Access to Civil Justice portal hosted by the University of Maribor, Faculty of Law together with the results of our previous projects, especially our previous project

Dimensions of Evidence in European Civil Procedure (https://www.pf.um.si/en/acj/projects/pr01/).

The structure of each individual report should follow the list of questions enumerated below, to the utmost extent possible. If authors choose to address certain issues elsewhere within the questionnaire, then they are instructed to make cross-references and specify where they have provided an answer for the respective question (e.g. "answer to this question is already provided in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

The list of questions is not regarded as a conclusive one. It may well be that we did not foresee certain issues that present important aspects in certain jurisdictions. Please address such issues on your own initiative where appropriate. On the other hand, questions that are of no relevance for your legal system can be left aside. If so, indicate expressly the lack of relevance and consider explaining the reason(s).

Please provide representative references to court decisions and literature. Please try to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data. **Where the answer would be "no" or "not applicable", because something is not regulated in your national legal order, please specify how you think it should be regulated**.

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Languages of national reports: English.

Deadline: 31 March 2023.

In case of any questions, remarks or suggestions please contact project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si ; or to assist. Denis Baghrizabehi: denis.baghrizabehi@um.si.

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1. General aspects regarding electronic evidence

(Note that the following definitions apply:

- *Authentic evidence: the content of evidence was indeed created or drawn by a person or entity declared to be its creator or author; authenticity refers to the genuine source.*
- *Reliable evidence: the content of evidence is true, accurate and non-compromised; reliability refers to the truth and accuracy of content.)*

Preliminary remarks: In German civil proceedings, the claimant and the respondent have five different means of evidence at their disposal. These are the witness evidence (*Zeugenbeweis*, §§ 373 et seqq. *Zivilprozessordnung* (German Code of Civil Procedure; hereafter: ZPO)), the documentary evidence (*Beweis durch Urkunden*, §§ 415 et seqq. ZPO), the evidence provided by experts (*Beweis durch Sachverständigen*, §§ 402 et seqq. ZPO; hereafter: expert evidence), the evidence taken by (visual) inspection (*Beweis durch Augenschein*, §§ 371 et seqq. ZPO; hereafter: visual evidence) and the evidence provided by examination of a party (*Parteivernehmung*, §§ 445 et seqq. ZPO). Evidence obtained within the framework of the evidentiary procedures specified in §§ 355 et seq. is known as '*Strengbeweis*' (strict evidence).

However, the rules on taking of evidence contained in §§ 355 to 455 ZPO do not apply in cases where both parties agree to the taking of evidence (§ 284 s. 2 ZPO) or where the court has to examine circumstances ex officio.[1] The courts can assess evidence regardless of these rules in such cases; so-called '*Freibeweis*' (free evidence). In the case of '*Freibeweis'*, the procedure for taking evidence and the individual means of evidence used are at the court's discretion.[2]

In addition to the aforementioned cases the *Freibeweis* is always admissible in legal aid review proceedings (§ 118 (2) ZPO[3]), in reinstatement proceedings pursuant to § 236 (2) ZPO, in proceedings in which the amount in dispute does not exceed €600.00 (so-called '*Bagatellverfahren*' § 495a ZPO)[4] and in proceedings without oral hearings.[5]

Electronic evidence - regardless of its form – is (insofar as the provisions of §§ 355 to 455 ZPO apply) always accessible only to the taking of evidence by inspection. However, §§ 371a, 371b ZPO establish cases in which the probative value of electronic documents is equivalent to the probative value of documents. Apart from these and some similar legal determinations on the probative value of different means of evidence, the evidence procedure in German civil proceedings is subject to the central principle

[1] *K. Bacher,* in V. Vorwerk and C. Wolf (eds.), Beck´scher Online-Kommentar Zivilprozessordnung (C.H. Beck; Published online and continuously updated, update status 01.12.2022) [BeckOKZPO], § 284 ZPO, para.14; *G. Groh and R. Werner* in Weber (ed.), Rechtswörterbuch,(C.H. Beck 2022), Freibeweis.

[2] *H. Prütting,* in T. Rauscher and W. Krüger, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen Band 1 (C.H. Beck 2020) [MüKo ZPO], § 284 ZPO, para. 26.

[3] in this context, however, the investigations are limited in factual terms to those required under §§ 114, 115 ZPO – *G. Reichling,* in BeckOK ZPO, supra n.1, § 118 ZPO, para.20.

[4] S. Röß, 'Das vereinfachte Verfahren nach § 495a ZPO', 51 Neue Juristische Wochenschrift – NJW, p. 3673 at p. 3684.

[5] *H. Prütting,* in MüKo ZPO, supra n.2, § 284 ZPO, para. 31)

of free assessment of evidence (*Grundsatz der freien Beweiswürdigung*, § 286 ZPO), according to which there are no specific rules after which certain means of evidence are assigned or denied a certain probative value.

1.1. Does the law of your Member State provide any definition of electronic evidence?
(If applicable, cite the definition of electronic evidence.)

The German legislator does not provide a definition for electronic evidence. The only types of electronic evidence to which the legislator makes explicit references are electronic documents within the meaning of § 371a ZPO and 'scanned public documents' within the meaning of § 371b ZPO, as a sub form of electronic documents. The latter are public documents that have been transferred into an electronic document by a public authority or by a person with public trust in a way that is state of the art.
Nonetheless, other electronic evidence is also admissible in German civil proceedings, but it does not have any special statutory probative value, so it is not mentioned separately in the ZPO.

1.2. Does the law of your Member State define of what is considered as paper document?
(If yes, please provide the definition. If not, please indicate the relevant case law.)

The term 'paper document' is not used in this or a clearly corresponding form in German civil procedure law. Thus, there is no clear definition for the word 'paper document'. Depending on the nature of the 'paper document', such an evidence may be accessible to three different types of taking evidence: visual evidence (§ 371 ZPO), documentary evidence (§ 416 ZPO) and expert evidence (§ 411 ZPO).
Most `paper documents` are documents in the sense of §§ 415 to 444 ZPO and are therefore amenable for documentary evidence. Documents in this sense are the embodiment of a declaration of thought in written letters on a negotiable medium that are generally known or can be made understandable to the court.[6] A differentiation is also made between the documents that are accessible to documentary evidence regarding their probative value. While the probative value is in principle to be determined by the judge within the framework of the free assessment of evidence, without there being any fixed rules for this, separate determinations apply to the documents within the meaning of §§ 415 to 419 ZPO, which strengthen the latter's probative value.

[6] BGH, 28 Novermber 1975, V ZR 127/74, BGHZ 65, 300 (301), ECLI:DE:BGH:1975:281175UVZR127.74.0; *I. Bach*, in V. Vorwerk and C. Wolf (eds.), Beck´scher Online-Kommentar Zivilprozessordnung (C.H. Beck; Published online and continuously updated, update status 01.09.2022) [BeckOKZPO], § 371 ZPO para. 3.

By means of evidence by inspection (sensory perception) it is possible to present printed screenshots,[7] pictures, or similar documents.[8] Therefore, such printouts are not documents within the meaning of §§ 415 to 444 ZPO.

An expert's findings may be presented to the court orally, but may be presented in writing as well; this is customary especially in more complicated subjects.[9] The expert's report must be signed by the expert themselves and sent to the court's registry to avoid fraudulent use.[10]

1.3. How is electronic evidence categorised among means of evidence within the law of your Member State?

(In answer to this question, please explain whether electronic evidence is categorised among traditional means of evidence or if electronic evidence forms a new means of evidence. Please cite relevant provisions (esp. if electronic evidence forms a new means of evidence). If electronic evidence is categorised among traditional means of evidence, please explain the reason for this categorisation and elaborate to which category of traditional evidence electronic evidence is assigned (for example, elaborate when electronic evidence is considered a document and when it is an object of inspection). Should electronic evidence be categorised among traditional means of evidence, please also comment on possible problems regarding an analogous application of traditional evidence rules.)

The ZPO does not provide for a separate form of evidence for electronic evidence, so that the general means of evidence listed in the preliminary remarks must be used in this regard.

In this context the German legislator has deliberately chosen not to equate electronic documents with certified documents.[11] This is justified by the fact that electronic documents are not embodied in a carrier medium perceptible without aids (in the sense that they are available at any time without any technical aid - this is one of the essential criteria for distinguishing between taking evidence by (visual) inspection and documentary evidence).[12] The direct application of the rules on documentary evidence to electronic documents is therefore ruled out. Nevertheless, electronic documents can also be introduced as evidence

[7] OLG Jena, 28 Novermber 2018, 2 U 524/17, ECLI:DE:OLGTH:2018:1128.2U524.17.00.

[8] *W. Zimmermann*, in T. Rauscher and W. Krüger, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen Band 2 (C.H. Beck 2020) [MüKo ZPO], § 371 ZPO para. 2; *M. Knopp*, `Digitalfotos als Beweismittel`, 5 Zeitschrift für Rechtspolitik - ZRP (2008) p. 156.

[9] *W. Zimmermann* in MüKo ZPO, supra n.8, § 411 ZPO para. 3.

[10] *M. Huber* in H.-J. Musielak and W. Voit, Zivilprozessordnung mit Gerichtsverfassungsgesetz – Kommentar (Verlag Franz Vahlen 2022) [Musielak/Voit ZPO], § 411 ZPO para. 4; *Zimmermann* in MüKo ZPO, supra n.8, § 411 ZPO para. 5.

[11] *S. Fischer-Dieskau, R. Gitter, S. Paul and R. Steidle*, `Elektronisch signierte Dokumente als Beweismittel im Zivilprozess', 11 Multimedia und Recht – MMR (2002) p. 709 at p. 710.

[12] *I. Bach*, in BeckOK ZPO, supra n.6, § 371 ZPO para.3.

in the proceedings in the course of the inspection (§ 371 (1) s. 2 ZPO).[13] All other forms of electronic evidence are to be classified as objects of inspection anyway.

1.4. Does the law of your Member State explicitly regulate that evidence or data in electronic form has evidentiary value?

(If yes, please cite the provision regulating the evidentiary value of electronic evidence (e.g., "electronic data shall not be denied legal effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form"). Please also explain if there is any presumption regarding the evidentiary value, admissibility, reliability or authenticity of electronic evidence.)

In accordance with the principle of the free evaluation of evidence, neither electronic nor conventional evidence is assigned or denied a certain probative value. It is therefore ultimately up to the judge to determine the probative value.

However, §§ 371a and 317b ZPO use references to §§ 415 et seqq. ZPO to determine the probative value of certain electronic documents by equating their probative value with the probative value of signed certified documents (point 1.2). Accordingly, the corresponding electronic documents benefit from the evidentiary presumptions of §§ 415 - 419, 437 ZPO.

This reference applies to the following electronic documents:

§ 371a (1) s. 1 ZPO: Private electronic documents that are provided with a qualified electronic signature (hereafter: e-signature). All declarations of intent and knowledge in electronic form are covered.[14] The requirements fort the e-signature are determined in accordance with Art. 3 No. 12, Art. 32 Regulation (EU) No. 910/2014 (hereafter: eIDAS).[15] Here, the probative value can only be shaken by facts that give rise to serious doubts about the maker of the document (§ 371a (1) s. 2 ZPO. Otherwise, the provisions of § 416 ZPO apply to such electronic documents, so that a corresponding electronic document provides full proof that the statements it contains were made by the issuers.

§ 371a (3) s. 1 ZPO: Public Electronic Documents ('*Öffentliche elektronische Dokumente'*); These are electronic documents created in the prescribed form by a public authority within the limits of its official powers or by a person vested with public trust within the scope of business assigned to it. §§ 415, 417, 418 ZPO, among others, are applicable to such public electronic documents, so that they generally constitute full proof with regard to the authenticated transaction (§ 415 ´ZPO), the official order, decree or decision contained therein (§ 417 ZPO), and other facts contained therein (§ 418 ZPO).

[13] *P. P. Wagner*., `Das elektronische Dokument im Zivilprozess`, 1 Juristische Schulung - JuS (2016) p. 29 at p. 31; *I. Bach* in BeckOK ZPO, supra n.6, § 371 ZPO para. 7.

[14] *M. Huber*, in Musielak/Voit ZPO supra n.10, § 371a ZPO para. 2.

[15] *B. Gehle*, in M. Anders and B. Gehle, Beck'scher Kurz-Kommentar zur Zivilprozessordnung mit GVG und anderen Nebengesetzen (C.H. Beck 2023) [Anders/Gehle ZPO], § 371a ZPO para. 1.

§ 371a (2) ZPO: Electronically sent messages sent by a duly registered natural person from a De-Mail account[16] have at least the appearance of authenticity, which can be shaken only by the facts giving rise to serious doubts that the message was sent by the identified person with the content contained.
§ 371b ZPO: Electronic documents originating from a public physical document according to the state of the art by a public authority or a person provided with public faith in the course of transmission are equal to public electronic documents within the meaning of § 371a (3) s. 1 ZPO.

1.5. Does the law of your Member State explicitly differentiate between electronic and physical private documents as evidence?

(Please elaborate on whether the law of your Member State regulates electronic documents and if an electronic document has the same legal effect as a physical document. Please emphasise whether there are any provisions differentiating between electronic and physical documents. If applicable, please cite the provisions regulating electronic documents.)

As a result, the electronic documents listed in point 1.4 have the same probative value as physical signed documents. Electronic documents other than those listed in point 1.4 are just as little provided with a legally prescribed probative force as physical documents, which are not to be regarded as certified documents within the meaning of §§ 415 et seqq. ZPO.
A differentiation therefore takes place primarily regarding the formal classification of the evidence. Whereas physical documents (regardless of whether they are signed) regularly constitute documentary evidence. Electronic documents (irrespective of the presence of an e-signature) are always introduced into the process as objects of inspection.
Separate provisions in the ZPO for electronic documents address their evidential value. In addition to §§ 371a and 371b ZPO, electronic documents are also mentioned in § 416a ZPO (evidential value of printouts of electronic documents) and § 371 (1) s. 2 (Commencement of the evidence with electronic documents). Further legal mentions of electronic documents can be found in § 130a ZPO (here, however, referring to the submission of pleadings, expert opinions, information, statements, translations and declarations by third parties) and in § 126a of the German Civil Code (*Bürgerliches Gesetzbuch*, hereafter: BGB). § 126a BGB refers to the observance of substantive legal form requirements by means of electronic form.

1.6. Does the law of your Member State recognise the special evidentiary value of public documents, and does this also apply to electronic public documents?

[16] De-Mail services is a way of sending electronic messages in a verifiable and confidential manner, based on e-mail technology

(If yes, please cite the provision regulating public documents in electronic form. Please emphasise whether any provisions differentiate between electronic and physical public documents.)

The special probative value of public documents (as already described in point 1.4) is laid down in §§ 415, 417, 418, 437, 438 ZPO. In the cases described in point 1.4, reference is made to these provisions.
In this context, the special probative value of (electronic) public documents is considered, in particular, with the presumption of authenticity under § 437 ZPO.[17]

1.7. Describe the legal effects of changing the form of electronic evidence to physical.
(In answer to this question, please explain whether it is admissible to change electronic evidence (e.g., websites, social networks, or e-mail) to a physical form and, what legal effect such change has. Please also specify, whether electronic evidence is treated as a copy and whether printouts are necessary when submitting particular types of electronic evidence (e.g., websites, social networks or e-mail). If applicable, please cite the provisions relating to changing the form of electronic evidence.)

The *Oberlandesgericht* (Higher Regional Court, hereafter: OLG) Jena[18] ruled in this regard that the printout of a screenshot is not an electronic document within the meaning of § 371 (2) ZPO or a document within the meaning of §§ 415 et seqq. ZPO, but an object of (visual) inspection within the meaning of § 371 (1) s. 1 ZPO.[19] In this respect, a conversion is only relevant to the extent that the printout leads to a requirement to present the evidence. Otherwise, the same rules apply for the electronic document as well as for the corresponding printout. The original form of evidence is not taken into account. It only depends on the perception of the court. Thus, in the case of a copy of a document or a printout of an electronic document, only the rules on visual evidence can be applied.[20]
An exception applies to printouts of public electronic documents, which constitute documents pursuant to § 416a ZPO provided that they are provided with a notarisation.[21]

1.8. Describe the legal effects of changing the form of physical evidence to electronic.

[17] M. *Huber* in Musielak/Voit ZPO, supra. n.10, § 371b ZPO para. 5; *W. Zimmermann* in MüKo ZPO, supra. n.8, § 371b ZPO para. 6.
[18] The OLG Jena is the highest instance of ordinary jurisdiction in the Free State of Thuringia.
[19] OLG Jena, 28 Novermber 2018, 2 U 524/17, ECLI:DE:OLGTH:2018:1128.2U524.17.00.
[20] BGH, 16. November 1979, V ZR 93/77, ECLI:DE:BGH:1977:161179UVZR93.77.0; *A. Roßnagel and D. Wilke*, `Die rechtliche Bedeutung gescannter Dokumente', 30 Neue Juristische Wochenschrift – NJW (2006) p. 2145 at p. 2148; *I. Bach*, in BeckOK ZPO, supra n.6, § 371 ZPO para. 3.
[21] *I. Bach in* BeckOK ZPO, supra n.6, § 371 ZPO para. 3.

(In answer to this question, please explain whether it is admissible to change evidence in the physical form to electronic and what legal effect such a change has. If applicable, please cite the provisions relating to changing the form of physical evidence.)

It is admissible to submit a document, which original existed in physical form, in electronic form (§ 371 (1) s.2 ZPO). However, in this case a document can only be evaluated by way of visual inspection, as it cannot be read without the aid of an electronic device and is thus not considered a certified document within the meaning of §§ 415 et seqq. ZPO.[22]

§ 371a ZPO applies to a document that is scanned and contains a declaration by the scanning authority, provided with a qualified e-signature, that the original physical document is identical in comparison to the electronic document. However, this presumption occurs only to the declaration and not to the target document, as the signature only covers the declaration of conformity, but not the declaration of the electronic document.[23] With regard to the declaration, the presumption rules on probative value from §§ 415 ff ZPO are applicable.

1.9. Explain the rules and what is considered to be an original and what a copy (the concept of original).

(If applicable, please cite relevant provisions.)

In German civil law, any reproduction by photocopying of a document is to be assumed to be a copy.[24] The same applies to the transcript, regardless of whether it is presented in certified form.[25] This is accompanied by a loss of probative value, since the statutory provisions on the probative value of documents (§§ 416, 418, 419 ZPO) do not apply in these cases. It should be noted, however, that the fact that the document is a copy does not mean that documentary evidence would not be applicable. Therefore, private documentary evidence by means of copies is possible in any case if the original has been destroyed or cannot be found for other reasons.[26] In such cases, the probative value regularly corresponds to the probative value of the original if it cannot be disputed that the copy is true to the original.[27]

1.10. Describe the legal effects of a copy of electronic evidence within the law of your Member State.

[22] M. *Huber* in Musielak/Voit ZPO, supra. n.10, § 415 ZPO para. 5; *A. Krafka*, in BeckOK ZPO, supra n.1, § 415 ZPO para. 2, 4; *K. Schreiber*, in MüKo ZPO supra n.8, § 415 ZPO para. 7.
[23] *A. Roßnagel and D. Wilke*, supra n.20, at p. 2148 – 2149.
[24] *M. Huber* in Musielak/Voit ZPO supra n.10, § 415 ZPO, Rn.5.
[25] BGH, 16 November 1979, V ZR 93/77, ECLI:DE:BGH:1977:161179UVZR93.77.0
[26] *E. Zoller*, `Die Mikro-, Foto-, und Telekopie im Zivilprozess`, 7 Neue Juristische Wochenschrift – NJW (1993), p. 429 at p. 435.
[27] *E. Zoller*, supra n.26, at p. 435.

(In answer to this question, please explain when electronic evidence is considered a copy. Please also elaborate on the legal effects of a copy of electronic evidence, and, if applicable, cite the relevant provisions. Should the law of your Member State not regulate copies of electronic evidence, please explain how the court perceives a copy of electronic evidence.)

In any case, as already explained, the principle of free assessment of evidence applies as a rule, so that the judge must form his conviction regarding the probative value of electronic documents independently of certain specifications anyway. This applies regardless of whether electronic documents are copies or originals. It must be assumed that the probative value is diminished in any case if the copying process cannot guarantee that the information contained will not change during the copying process. In any case, a copy of a private electronic document with an e-signature within the meaning of § 371a (1) s. 1 ZPO loses value because it is not possible to copy the e-signature and the presumption of probative value under § 371a I 1 ZPO in conjunction with § 416 ZPO is not applicable.

2. Authenticity, reliability and unlawfully obtained electronic evidence

2.1. Are there any particular procedure, guidelines, mechanism or protocol on how the parties shall obtain electronic evidence in order to preserve their authenticity and reliability before submitting them to the court?

(If applicable, also comment on possible effects regarding the admissibility of electronic evidence if they are not obtained in accordance with such procedures or technical guidelines.)

There are no procedures, guidelines, mechanisms or protocols, concerning the question of how the parties shall obtain electronic evidence to preserve their authenticity and reliability. In general, the assessment of the authenticity and reliability of evidence - electronic or physical - is the responsibility of the judge, following the principle of free evaluation of evidence, § 286 ZPO.[28]

It is thus decisive that evidence leads to a full judicial conviction regarding the fact to be proved.[29] Sufficient conviction exists when there is a degree of certainty useful for practical life which leads to the receding of doubts concerning the facts to be proved, without excluding them completely.[30]

Even in cases where the free evaluation of evidence is restricted in favour of certain presumptions of probative value (§§ 371a, 371b, 415-418, 438 II ZPO), there are no particular rules on obtaining electronic evidence.[31] With regard to the way in which electronic evidence is obtained, this presupposes in any case that a procedure is chosen which can best exclude doubts about the authenticity and reliability of the electronic evidence.

It should always be noted that if the authenticity of evidence is disputed, the burden of proof regarding the authenticity of the evidence in question lies with the party who provided the evidence. Especially if the electronic evidence is a scan of an original document, care should be taken to ensure that the original document remains available as much as possible. Under no circumstances should original documents be destroyed after scanning, as the party who

[28] *K. Bacher*, in BekOKZPO, supra n.1, § 286 ZPO para. 1.
[29] *K. Bacher* in BeckOK ZPO, supra n.1, § 286 ZPO, Rn.2.
[30] BGH, 19 July 2019, V ZR 255/17, ECLI:DE:BGH:2019:190719UVZR255.17.0; BGH, 28 April 2015, ECLI:DE:BGH:2015:280415UVIZR161.14.0.
[31] However, in these cases it must be considered that the presumption of probative value presupposes that the respective means of certification (especially the e-signature) retains its validity . An inspection of copies is therefore out of the question.

destroyed the original document will always have to be held responsible if no investigation can take place that can provide evidence that the original was not forged.[32]
Exceptions to the burden of proof rule regarding the authenticity of evidence exist in the cases outlined in point 1.4.

2.2. Is there any particular procedure on how the court should identify the source of electronic evidence?
(If any official guidelines, mechanisms or protocols are established within the law of your Member State to identify the source of evidence, by either the expert or the court, please mention those as well (e.g. in the case of evidence derived from cloud computing, blockchain or using AI algorithms).)

A specific procedure for the examination of electronic evidence is not stipulated.

2.3. Does the law of your Member State stipulate different rules or provisions for different types of electronic evidence? (*Please explain whether certain types of electronic evidence are presumed authentic and reliable and others inauthentic and unreliable. If applicable, please cite the provisions regarding (in)authenticity and (un)reliability of electronic evidence.)*

Apart from the special rules regarding the probative value of certain electronic documents in §§ 371a, 371b ZPO (see point 1.4), there are no special rules for certain types of electronic evidence.

2.4. Does an unfamiliarity with the technical part and a (high) possibility of manipulation of electronic evidence impact its evidentiary value?
(Please elaborate on whether the technical nature and a [high] possibility of manipulation of electronic evidence have any impact on the court's assessing of the evidentiary value.)

Due to the principle of free assessment of evidence, it is also true here that no generally valid statements can be made on the probative value of electronic evidence. This also applies to the potential reduction of the probative value due to lack of knowledge regarding the relevant technology or the possibility of manipulation. So the only conclusion to be drawn is:

If it is indeed assumed that electronic evidence has a higher risk of manipulation, this affects its probative value within the framework of the free assessment of evidence to the extent that the authenticity of electronic evidence is more likely to be challenged than the authenticity of other evidence. If this were

[32] cf. *W. Zimmermann* in MüKo ZPO, supra n.8, § 371a ZPO, Rn.5.

the case, its probative value would in fact be diminished because it is less likely that the judge would come to a sufficient conviction (see point 2.1) regarding the facts of the case by the (visual) inspection of the evidence. Ultimately, in the case of electronic evidence, as with conventional evidence, if the authenticity of the evidence is doubted, an expert will have to be called in to assess the authenticity of the evidence. Otherwise, within the framework of the free assessment of evidence, it applies to electronic as well as to conventional evidence that the higher the probability of manipulation of the concrete evidence, the more the probative value decreases.[33]

2.5. When should the court appoint experts to process electronic evidence?

(Please enumerate cases in which the court may or must appoint an expert when processing electronic evidence.)

There are no concrete rules on when an expert is to be consulted in the specific case of electronic evidence, so that the general rules on this must be used.

Pursuant to § 144 (1) s. 1 ZPO, the court may order an expert's report ex officio.[34] An expert opinion is regularly required when a matter requiring specialist knowledge is up for decision.[35] This is particularly the case with medical or technical problems.[36] Thus, when examining electronic evidence, an expert must usually be consulted at least if the taking of evidence requires technical knowledge beyond mere sensory perception and general technical understanding in order to examine the evidence itself or to determine the value of the evidence.[37] For example, it is necessary to call in an expert if unclear, pixelated images from a video camera are to be made easily recognisable.[38]

If a party makes a conclusive request to obtain expert evidence, the court has no discretion as to the ordering of the expert evidence (§ 372 (1) ZPO).

2.6. Who bears the costs if an expert needs to be appointed to assess the reliability, authenticity and (un)lawful manner of obtaining electronic evidence?

(Please explain the distribution of costs related to potential expert assessments and opinions on the reliability, authenticity and lawful manner of obtaining electronic evidence.)

[33] This paragraph is not based on legal literature but on the statements of judges interviewed.
[34] *S. Scheuch* in BeckOK ZPO, supra n.1, § 402 ZPO para.11.
[35] *S. Scheuch* in BeckOK ZPO, supra n.1, § 402 ZPO para.11.
[36] BGH, 06. March 2019, VII ZR 303/16, ECLI:DE:BGH:2019:060319UVIIZR303.16.0
[37] *M. Huber*, in Musielak/Voit ZPO, supra n.10, § 372 ZPO, Rn.2.
[38] LAG (*Landesarbeitsgericht*) Düsseldorf, 18. December 2013, 7 Sa 1792/12, ECLI:DE:LAGD:2013:1218.7SA1792.12.00 The LAG Düssledorf is the highest Labour Court in the federals state of North-Rhine-Westphalia.

If the involvement of an expert is ordered under § 144 (1) s. 1 ZPO, § 17 (3) *Gerichtskostengesetz* (German Court Costs Act; hereafter: GKG) leaves it to the discretion of the court whether to request an advance payment.[39] However, the court may not make the execution of the order to call in the expert dependent on the payment of the advance.[40] As a rule, following the intention of the legislator, [41] no advance payment will have to be requested anyway.[42] The final bearing of costs is determined by the bearing of the legal costs and according to § 91 (1) s. 1 ZPO. Consequently, the losing party in the legal dispute has to bear the costs of the proceedings.

2.7. What options are available to a party claiming that electronic evidence has been compromised, tampered with, manipulated or obtained illegally (e.g. by hacking into an IT system)?
(Please explain whether any special procedures are established within the law of your Member State to challenge the reliability, authenticity or manner of obtaining electronic evidence. If no special procedure exists, explain regular remedies that would apply in such a case. If applicable, cite relevant provisions, case law, guidelines or other sources regulating the procedure to challenge the admissibility of compromised electronic evidence.)

Electronic evidence is always collected within the framework of evidence by inspection, whereby - unless §§ 371a, 371b ZPO are applicable - the principle of free assessment of evidence applies. Thus, the parties have the opportunity to convince the judge of the lack of probative value of the evidence within the framework of the examination of the evidence. In addition, there is always the possibility of requesting that an expert be called in to examine the evidence so that he or she can falsify the unchanged nature of the evidence.

If the evidence is an electronic document within the meaning of §§ 371a, 371b ZPO, the facts presented by the opposing party must give rise to substantial doubts as to its authenticity.

In the case of unlawful obtaining of electronic evidence, the opposing party may under certain circumstances assert a prohibition of the use of evidence. This is to be assumed generally if the visual evidence is inadmissible as a result of it's illegal acquisition. This is usually to be assumed if the

[39] *W. Zimmermann*, in K. J. Binz, J. Dörndorfer and W. Zimmermann (eds.), Gerichtskostengesetz, Gesetz über Gerichtskosten in Familiensachen, Justizvergütungs- und -entschädigungsgesetz und weitere kostenrechtliche Vorschriften – Kommentar (C.H. Beck 2021), § 17 para 13.
[40] OLG Köln, 17. September 2009, I ZR 103/07, ECLI:DE:OLGK:2009:0917.IZR103.07.00; *J. Volpert*, in N. Schneider, J. Volpert and P.Fölsch (eds.), Nomos Kommenta -Gesamtes Kostenrecht (Nomos Verlag 2017), § 17 GKG para 45.
[41] *Bundestags-Drucksache* (Official Record of the German Bundestag) 19/13828 at p. 26 –32.
[42] *B. Windau*, `Die Hinzuziehung von Sachverständigen gem. § 144 ZPO n.F.`., ZPO-Blog des DAV, 05.01.2020, <https://anwaltsblatt.anwaltverein.de/de/zpoblog/hinzuziehung-von-sachverstaendigen-144-zpo-beweisbeschluss>, visited on 09th of march 2023.

respective evidence was obtained illegally.[43] However, the use of illegally obtained evidence is possible if a weighing of rights and interests shows that the realisation of the right which the object of the inspection is intended to serve must take precedence over the protection of the right opposing the use of the evidence.[44] Among other things, the exploitation of videos recorded with a dash cam was approved, although this is incompatible with data protection regulations.[45]

2.8. How is the admissibility of compromised or illegally obtained electronic evidence regulated within the law of your Member State?

(Is the court bound by any rules regulating the admissibility of compromised or illegally obtained (electronic) evidence (e.g. explicit rules provided under your national legislation, rules developed through case law, etc.)? If the rules regulating the admissibility of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

In the case of illegally obtained evidence, the use of evidence may be prohibited (see 2.7), although this is not regulated by law. Rather, it is case law that has developed over time. Compromised evidence is to be evaluated within the framework of the free assessment of evidence and is admissible insofar as it still has probative value despite this.

2.9. Which party carries the burden of proving the (in)authenticity or (un)reliability of electronic evidence?

(Please explain whether the party producing electronic evidence carries the burden of proving such evidence authentic and reliable or whether the party who challenges electronic evidence is charged with proving its inauthenticity and unreliability.)

The party providing the evidence also bears the burden of proof regarding the authenticity and reliability of the electronic evidence. If the opposing party conclusively submits that the evidence is inauthentic or unreliable, the party submitting the evidence must prove that this submission is not true.

2.10. Does the court have the discretion to challenge the authenticity and reliability of electronic evidence even if neither party objects the authenticity and reliability of electronic evidence?

[43] *W. Zimmermann*, in MüKo ZPO, supra n.8, § 371 ZPO para.6; in a further lawsuit in such a case, an action can also be brought for the destruction of the evidence.
[44] *W. Zimmermann*, in MüKo ZPO, supra n.8, § 371 ZPO para. 7; BGH, 24. November 1982, VI ZR 164/79, ECLI:DE:BGH:1982:241182UVIZR164.79.0.
[45] BGH, 15 May 2018, VI ZR 233/17, ECLI:DE:BGH:2018:150518UVIZR233.17.0.

(Please explain if the court can challenge the authenticity and reliability of electronic evidence ex officio, e.g. when there is a high possibility that electronic evidence has been manipulated and neither party objected the authenticity and reliability of electronic evidence.)

Following the principle of free assessment of evidence, the court has the possibility to doubt the authenticity and reliability of evidence independently of the parties' submissions. In doing so, the court may also order, independently of the parties, that authenticity and reliability be examined by an expert (§§ 144 (1), 372 (1) ZPO).

2.11. How is the manipulation or (un)lawful manner of obtaining electronic evidence assessed by the court in the case of a challenge?

(In answer to this question, please explain whether judges are expected to assess if evidence was compromised or illegally obtained by themselves, whether an expert may or must be appointed, and whether any other rules and requirements have to be complied with.)

Following the principle of free assessment of evidence, the court has the possibility to doubt the authenticity and reliability of evidence independently of the parties' submissions. In doing so, the court may also order ex officio, that authenticity and reliability be examined by an expert (§§ 144 (1), 372 (1) ZPO). The situation is different in cases where §§ 371a, 371b ZPO refer to §§ 415 ff ZPO. In these cases, only the opposing party can provide counterevidence with regard to the established presumption of evidence.

2.12. What are the consequences if the court finds that evidence was indeed compromised or obtained illegally?

(The question refers to procedural implications, e.g. the exclusion of evidence or considerations when assessing the weight of such evidence.)

In cases of compromised evidence, it is - following the principle of free assessment of evidence - still up to the court to evaluate the probative value of the respective evidence.
However, in cases where evidence is compromised, a considerable loss of evidence, up to and including complete inadmissibility, must be assumed. In principle, the object of inspection must be genuine and unadulterated.[46]

[46] *W. Zimmermann*, in MüKo ZPO, supra n.8, § 371 ZPO, para. 5.

2.13. Does the law of your Member State enable for the parties to submit written statements of witnesses?

(*If yes, are pre-recorded oral statements of witnesses admissible as evidence?)*

§ 377 (3) ZPO allows the court to hear a witness in written form, whereby the written answer to the question of evidence can already be ordered before the oral hearing according to § 358a No.3 ZPO. The precondition is that the question of evidence is suitable for a written answer.[47] This is especially the case if the facts on which the witness is to be questioned are largely uncomplicated and it is excluded from the outset that there might be ambiguities and that further questions are to be asked as well as that the witness is to provide information on the basis of extensive records.[48] The decision to examine a witness in writing is at the discretion of the court.[49]

However, the witness is not obliged to answer the evidential question in writing; in case of refusal to give a written answer to the question, the witness may be summoned to testify in person.[50]

Answering the question of evidence by means of the pre-recording of the testimony on tape is, however, not provided for within the framework of § 377 (3) ZPO.

If the court has not made an order within the meaning of § 377 (3) ZPO, statements recorded in writing may only be used as documentary evidence or as evidence of inspection.[51] In this context, however, it should be noted that such a statement is generally considered to have less probative value than a statement made directly in the course of the proceedings.[52] It should also be noted that a corresponding examination must comply with the civil procedural requirements for the examination of a witness, otherwise a prohibition of the use of evidence must be assumed.[53]

Since a tape recording, as explained above, cannot constitute testimony within the scope of § 377 (3) ZPO, the anticipated provision of information on a factual matter that reaches the court as a tape recording would only be to be used as an object of (visual) inspection, which would be accompanied by a reduction in the value of the evidence.

[47] *S. Scheuch* in BeckOK ZPO, supra n.1, § 377 ZPO, para.13; *J. Damrau and A. Weinland*, in MüKo ZPO, supra n.8, § 377 ZPO, para.7.
[48] *S. Scheuch* in BeckOK ZPO, supra n.1, § 377 ZPO, para.13.
[49] *J. Damrau and A. Weinland*, in MüKo ZPO, supra n.8, § 377 ZPO, para.9.
[50] *S. Scheuch* in BeckOK ZPO, supra n.1, § 377 ZPO, para.15.
[51] for private written statements made outside of court proceedings: BGH, 13. February 2007, VI ZR 58/06, ECLI:DE:BGH:2007:130207UVIZR58.06.0, para.15; for the testimony of a witness from previous proceedings - irrespective of whether civil litigation, proceedings for the preservation of evidence, criminal proceedings or legal aid proceedings are involved: S. Scheuch in BeckOK ZPO, supra n.23, § 373 ZPO para.17.
[52] *S. Scheuch* in BeckOK ZPO, supra n.1, § 373 ZPO, para.19.
[53] *S. Scheuch* in BeckOK ZPO, supra n.1, § 373 ZPO, para.20.

3. Duty to disclose electronic evidence

3.1. How is the duty to disclose electronic evidence regulated within the law of your Member State?
(Please explain whether there are any special rules explicitly regulating the disclosure of electronic evidence or if general rules of disclosure apply instead. Should the rules regulating disclosure of particular means of evidence (e.g. documents, physical objects, affidavits) be applied to disclosure of electronic evidence by analogy, please explain which rules are to be used under which circumstances. Include the name of the act and the article(s) containing relevant provisions.)

Special rules on the disclosure of electronic evidence do not exist, so that the general rules (on taking evidence by inspection) apply.

German civil procedural law does not recognise a general obligation to provide evidence that the opposing party, who bears the burden of proof, can use in the context of his or her presentation of evidence. Thus, it is always up to the party who bears the formal burden of proof regarding certain facts to provide the evidence in the proceedings and to file corresponding applications for the taking of evidence.

However, according to § 144 (1) s. 1, s. 2 ZPO, the court may order a party or a third party to present an object in his or her possession for the purpose of taking a visual inspection or to tolerate inspection by an expert.[54] This general rule also applies to electronic evidence - for which access codes or equivalent must be disclosed.[55] The court shall decide on an order according to § 144 ZPO at its discretion.[56] In the corresponding consideration, the probable value of the evidence, the interest in privacy, possible protection of personality, constitutional values and the possibility of the party burdened with evidence to provide evidence by other means are taken into account.[57] A corresponding order is usually made upon application, but can also be made ex officio in exceptional cases.[58]

Furthermore, according to §§ 371 II 2 ZPO, 422 to 432 ZPO, which apply to documentary evidence, are applicable mutatis mutandis to the taking of evidence through the taking of visual

[54] cf. *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO para.4.
[55] *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO para.4; *C. Berger*, `Beweisführung mit elektronischen Dokumenten', 15 Neue Juristische Wochenschrift – NJW (2005), p. 1016 at p. 1020.
[56] *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO para.4; *J. Fritsche*,in MüKoZPO, supra n.2, §§ 142-144 ZPO para. 4, 7; KG, 24. November 05. June 2008, 12 U 188/04, ECLI:DE:KG:2008:0605.12U188.04.00. - The *Kammergericht* (KG) is the highest court of ordinary jurisdiction in the Federal State of Berlin.
[57] *J. Fritsche*, in MüKo ZPO, supra n.2, §§ 142- 144 ZPO, para.4.
[58] *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO, para.7; BGH, 11. May 2001, V ZR 492/99, ECLI:DE:BGH:2001:110501UVZR492.99.0.

inspection.[59] Accordingly, the court's discretion with regard to a corresponding order is reduced if the party providing the evidence can demand the relevant object of inspection to be produced in accordance with the procedural or substantive rules of civil law (§ 422 ZPO) or if the opposing party has itself referred to the relevant object as evidence in the course of the proceedings (§ 423 ZPO). If in such a case the party burdened with evidence makes an admissible and substantiated application under § 424 ZPO, the court must order the submission in accordance with § 425 ZPO.

3.2. What is the scope of the party's duty to disclose electronic evidence within the law of your Member State?

(Please address the circumstances under which the party is required to provide electronic evidence (e.g. the evidence was obtained in a particular manner, the evidence refers to both parties, the parties brought up the evidence when testifying, etc.), the type of evidence they are required to provide (if applicable) and procedural requirements (e.g. does the party in need of evidence have to request particular evidence with an explicit motion, does the court have any discretion when ordering disclosure, are there any time limits, etc). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

As already explained under point 3.1, there is an obligation to disclose the evidence only in the case of a corresponding order by the court. As also explained under point 3.1, such an order is in general at the discretion of the court. The situation is different in cases of a claim for surrender of the party burdened with evidence against the opposing party regarding electronic evidence (§ 371 (2) s.2 ZPO in conjunction with § 422 ZPO) as well as in cases in which the opposing party brings in the relevant evidence itself to provide evidence (§ 371 (2) s.2 ZPO in conjunction with § 423 ZPO). In these cases, there is no discretion on the part of the court.

In a negative respect, the discretion of the court is limited by the inadmissibility of a party application.[60] In particular, a so-called `*unzulässige Ausforschung*` (inadmissible exploration) is not allowed.[61] Therefore, such a proposal for taking evidence is inadmissible in any case if it is merely aimed at obtaining facts through the requested taking of evidence that would enable a more detailed submission or the naming of further evidence in the first place.

[59] *A. Krafka*, in BeckOK ZPO, supra n.1, § 422 ZPO, para.2.
[60] *A. Stadler*, in Musielak/Voit, ZPO, supra n.10, § 144 ZPO para. 3.
[61] *A. Stadler*, in Musielak/Voit, ZPO, supra n.10, § 144 ZPO para. 3.; OLG Naumburg, 27 June 2002, 14 WF 83/02, ECLI:DE:OLGNAUM:2002:0627.14WF83.02.00. - the decision, however, concerns the order of an expert hearing).

3.3 Does the duty to disclose electronic evidence apply to third persons?

(Please elaborate on whether persons not directly involved in proceedings must present or disclose electronic evidence under the same conditions as the parties or whether different rules apply. If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

Pursuant to § 144 (1) s. 2 ZPO, the court may also order third parties to submit evidence or to tolerate the inspection by an expert. However, it should be noted that the court's discretion is further limited in such a case. According to § 144 (2) ZPO, third parties cannot be compelled to submit or tolerate evidence if they cannot justifiably be expected to do so or if the third party has a right to refuse to testify pursuant to §§ 383 to 385 ZPO.

3.4. Are there any limits to the duty to disclose electronic evidence specified within the law of your Member State?

(Does your national legislation stipulate reservations and exceptions to the duty of disclosure that would apply to (or also to) electronic evidence? On the one hand, the question refers to the right to refuse disclosure, privileges, the protection of secrecy and similar restrictions. On the other hand, it refers to measures imposed to prevent abuse in the form of fishing expeditions (requesting non-specific or broad information and evidence in the hope of gaining compromising materials) or excessive disclosure (providing an unmanageable volume of information in the hopes of confusing the parties or the court and delaying proceedings). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

Limits regarding a corresponding order against the opponent party are shown in point 3.2.
Additional limits regarding an order against a third party are shown in point 3.3.

3.5. What are the consequences of a violation or non-compliance with the duty to disclose electronic evidence?

(Please explain whether any coercive measures or sanctions may be imposed against a party or a third person who unjustifiably refuses to comply with their duty to disclose (electronic) evidence. Does your national legislation provide for any presumptions or fictions regarding the truth of facts to be proved with undisclosed evidence? If the rules for disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

If a third party refuses to cooperate, the court may enforce cooperation in accordance with § 390 ZPO, initially by means of an administrative fine, and in the event of a further refusal by means of administrative custody.[62]

Corresponding possibilities of enforcement do not exist in the case of refusal to cooperate by the opponent party. In such a case, it is up to the court to assess the failure to cooperate in accordance with the principle of free assessment of evidence.[63] The court may consider the evidence in this case to be provided; however, this is not mandatory.[64]

3.6. Have there been any problems before the national courts in your Member State arising from differences in national regulations of the duty to disclose electronic evidence, or are such problems to be expected in the future?

(The answer to this question should contain an overview of any case law addressing the duty to disclose electronic evidence (or other evidence, if the same issue could arise concerning electronic evidence) in the context of cross-border proceedings, most notably any cases in which the problems resulted from national differences in the scope of the duty to disclose such evidence (e.g. a broader scope of the duty to disclose evidence in one participating Member State than in the other, privileges or exceptions existing in one Member State but not in the other, etc.). If no such case law exists, please explain any potential problems discussed in legal literature or any problems you expect to arise in practice.)

There are neither corresponding judgements, nor has the German legal literature addressed to any significant extent any existing problems or those feared in the future.

[62] Cf. *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO, para.10.
[63] *D. von Selle*, in BeckOK ZPO, supra n.1, § 144 ZPO, para.10; *D. von Selle*, in BeckOK ZPO, supra n.1, § 142 ZPO, para. 17; BGH, 26. June 2007, XI ZR 277/05, ECLI:DE:BGH:2007:260607UXIZR277.05.0.
[64] *D. von Selle*, in BeckOK ZPO, supra, n.1 § 144 ZPO, para.10.

4. Storage and preservation of electronic evidence

(Storage and preservation of electronic evidence refer to the preservation of electronic evidence in active cases which have not yet been concluded with a final act. For archiving electronic evidence in closed cases, see the next part of the questionnaire.)

4.1. How is the storage and preservation of electronic evidence regulated within the law of your Member State?

(Please list legal acts or other documents establishing rules for the proper storage and preservation of electronic evidence (e.g. including guidelines, protocols and instructions) and shortly indicate their content or purpose. If the relevant solutions have developed in practice, explain these as well.)

§ 298 ZPO regulates the printout of files. According to § 298 (1) ZPO, if the files are kept in paper form, a printout of an electronic document shall be made for the files. If this cannot be done or can be done only with disproportionate effort in the case of annexes to preparatory pleadings, a printout may be omitted. In this case, the data shall be stored permanently; the storage location shall be recorded in the file. Because of para. 4, the electronic document and the paper printout must be kept in parallel for six months. The provision presupposes that court files are kept in paper form. For electronic record keeping, § 298a (2) s. 1 ZPO provides for media transfer in the reverse direction.

4.2. Provide a short overview of requirements, standards, and protocols for properly storing and preserving electronic evidence.

(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of evidence. If there are any special rules regulating the storage of metadata, please describe them.)

In accordance with the requirements of § 130a ZPO, it must be noted in the file if the document was submitted by a secure means of transmission, § 298 (2) ZPO. This also applies to electronic documents which do not meet the formal requirements of § 130a or are received by a means not provided for therein (e.g. e-mail).[65]If this is not the case, a so-called transfer note must be created for documents with a qualified electronic signature, from which basic information on the validity of the signature can be seen (what the result of the integrity check of the document shows (No. 1), who the signature verification shows to be the holder of the signature (No. 2) and what time the signature verification shows for the application of the signature (No. 3)).[66]

[65] *K. Bacher* in BeckOK ZPO, supra n.1, § 298 ZPO para 5.
[66] *K. Bacher* in BeckOK ZPO, supra n.1, § 298 ZPO preface.

4.3. Is electronic evidence stored in one central location, or is the storage decentralised?

(Please explain the "physical" location of servers or media where electronic evidence is stored, e.g. each court might be responsible for storing electronic evidence to be used before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to store electronic evidence for all (or several) courts, etc.)

In Germany, the storage of electronic evidence is not necessarily handled uniformly in the different districts of the Higher Regional Courts (OLG). In the district of the OLG Celle, each court is responsible for storing electronic evidence to be used before that court in its own premises/on its own servers. Storage has therefore been decentralized to date. It is rare that evidence is submitted electronically at all, and if so, it is submitted via the special lawyers' mailbox (BeA). However, evidence that is actually submitted electronically is stored on a physical storage medium, which is then added to the case file. Some courts are currently looking into the establishment of the electronic file. So far, however, the e-file has only rarely found its way into judicial practice.

In order to archive the goals set out in the eJustice Act, the German States Bremen, Lower Saxony, North Rhine-Westphalia, Hesse, Saarland and Saxony-Anhalt have joined forces by signing an agreement to establish a joint development and maintenance network with regard to electronic file management – 'the e^2-Verbund'. Currently, four e^2 products (software applications) are being developed. In each case, one federal state is in charge and thus has the main responsibility. The goal is to be able to use these software applications in all of the states in the network.

4.4. Who is entitled to carry out the activities related to storing and preserving electronic evidence?

(Please explain any potential requirements or limitations on who may carry out activities related to storing and preserving electronic evidence, e.g. private vs. public entities, certification or qualification requirements, etc.)

In the OLG district of Celle, the courts themselves have been responsible for the preservation and storage of electronic evidence up to now. Whether evidence will be stored in a central location in the future, will presumably also depend on how the e-file establishes itself.

4.5. Who may access electronic evidence in a particular case and how?

(Please explain who has access to electronic evidence, which conditions must be met, and which procedure must be followed.)

The general rules of access to evidence apply, provided the file is kept in paper form and there is a physical storage medium in the file. Pursuant to § 299 (1) ZPO, the parties may inspect the case files and have copies, excerpts and transcripts made by the court office. The court's executive board may only allow third parties to inspect the files without the consent of the parties if a legal interest is credibly shown. If the case files are kept electronically, the court's office shall grant inspection of the files by providing the contents of the files for access or by transmitting the contents of the files by a secure means of transmission, § 299 (3) s. 1 ZPO. On special request, access records shall be granted by inspection of the files in the offices of the court, § 299 (3) s. 2 ZPO. A printout of the file or a data medium with the contents of the file shall only be transmitted upon a special justified request if the applicant demonstrates a legitimate interest, § 299 (3) s. 3 ZPO. If there are important reasons preventing the inspection of files in the form provided for in sentence 1, the inspection of files in the form provided for in sentences 2 and 3 may also be granted without an application, § 299 (3) s. 4 ZPO.

4.6. How is the accessibility of stored electronic evidence preserved over time?

(Which measures are taken to guarantee the accessibility of stored electronic evidence in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

Despite the availability of new, more secure types of storage media, Germany has not made any adjustments yet to ensure continued access to old storage media.

4.7. How is the transmission of electronic evidence to other courts (e.g. to an appellate court) carried out in order to preserve the integrity of evidence?

(Please explain whether there are any special procedures to be followed by another court to access the stored electronic evidence and/or protocols for transmitting such evidence intended to preserve the integrity of the evidence and to prevent any manipulation.)

Until now, the transmission of electronic evidence to other courts has been carried out with the file as such - i.e., in printed form or made available on a storage medium. Something different could arise if, exceptionally, the storage location is indicated in the file without a physical deposit. A practice that makes the transmission of electronic evidence in the context of the e-file uncomplicated and secure is currently being developed.

4.8. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa?

(Please describe rules regarding the possibility of a conversion from electronic form to physical and from physical form to electronic when storing evidence.)

Regarding the conversion of electronic documents into physical evidence see point 4.1.
§ 298a (2) ZPO shall apply to the conversion of physical evidence into electronic evidence. The aim is to avoid keeping hybrid files. If the case files are kept electronically, paper documents and other documents shall be transferred into an electronic document in accordance with the state of the art to replace the original, § 298a (2) s. 1 ZPO. It shall be ensured that the electronic document corresponds visually and in terms of content to the existing documents and other records, § 298a (2) s. 2 ZPO. According to § 298a (2) s. 3 ZPO the electronic document shall be provided with a proof of transmission documenting the procedure used for the transmission and the visual and substantive conformity. If a judicial document signed by hand by the persons responsible is transmitted, the proof of transmission shall be provided with a qualified electronic signature of the registrar of the court registry, § 298a (2) s. 4 ZPO. However, para. (2) only concerns the files that accrue in the respective instance. If, for example, only the appellate court keeps the files in electronic form, it is not required to transfer the parts of the file that accrued in the lower instances into this form.[67] The same applies if only the court of first instance keeps the files electronically; in this case, however, a media transfer after the files have been returned may be appropriate in order to facilitate storage.[68]An obligation to retain the transferred documents results from § 298a (2) s. 5 ZPO. According to this, the documents and other records available in paper form may be destroyed six months after the transfer, unless they are subject to return.

5. Archiving of electronic evidence

(Archiving of electronic evidence only refers to the preservation of electronic evidence in closed cases that have already concluded with a final act. Please include all information regarding the storing and preserving of electronic evidence in active cases in the preceding part of the questionnaire.)

5.1. How is the archiving of electronic evidence regulated within the law of your Member State?

(Please list legal acts or other documents establishing rules for the proper archiving of electronic evidence (e.g. including guidelines, protocols, instructions) and shortly indicate their content or purpose. If relevant solutions have developed in practice, explain these as well. If the rules regulating the archiving of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

[67] *K. Bacher* in BeckOK ZPO, supra n.1, § 298a ZPO para 3.2.
[68] *K. Bacher* in BeckOK ZPO, supra n.1, § 298a ZPO para 3.2.

The Act on the Retention and Storage of Files of the Courts and Public Prosecutor's Offices after the Termination of Proceedings (*Justizaufbewahrungsgesetz* - JAktAG) regulates in § 1 that files of the courts and public prosecutor's offices that are no longer required for the proceedings may only be retained or stored after the termination of the proceedings for as long as the interests of the parties to the proceedings or other persons or public interests require this. § 2 JAktAG standardises the authorisation to issue ordinances and contains more detailed provisions on § 1 JAktAG. The Ordinance on the Preservation and Storage of Judicial Records (*Justizaktenaufbewahrungsverordnung* - JAktAV) provides further details.

5.2. Shortly explain the requirements, standards and protocols for properly archiving electronic evidence.

(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of electronic evidence. If there are any special rules regulating the archiving of metadata, please describe them.)

§ 2 JAktAV regulates the implementation of retention and storage. The files, file registers, card indexes, name indexes and other indexes that have been put away or finally processed shall be kept in their entirety until the expiry of the respective retention and storage periods, secured against unauthorised access and protected against damage and deterioration. Their readability shall be guaranteed. In the case of electronically stored files, file registers, card indexes, name directories and other directories, confidentiality, integrity, availability and authenticity shall be guaranteed by appropriate measures.

5.3. Is electronic evidence archived in one central location, or is archiving decentralised?

(Please explain the "physical" location of archives, e.g. each court might be responsible for archiving electronic evidence collected before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to archive electronic evidence for all (or several) courts, etc.)

Up to now, archiving has been carried out decentrally in the respective courts. The establishment of the e-file could result in other developments.

5.4. Who may carry out the archiving of electronic evidence?

(Please explain any potential requirements or limitations on who may carry out the archiving, e.g. private vs. public entities, certification or qualification requirements, etc.)

The court having jurisdiction in each case shall be responsible for archiving.

5.5. Must electronic evidence be archived indefinitely, or must it be deleted or destroyed after a certain period? How is the accessibility of archived electronic evidence preserved over time? *(As electronic evidence is generally kept in an archive for an extended period of time, which measures are taken to guarantee its accessibility in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)*

Pursuant to § 3 (1) JAktAV the retention and storage periods shall be determined in accordance with the Annex. If parts of a file kept in paper form, to which different retention and storage periods apply, are transferred to electronic form or to a microform and their respective timely deletion is thus no longer possible or only possible with unjustifiable effort, the retention and storage period shall be determined according to the longest period, § 3 (2) JAktAV. The management of the body responsible for the preservation or storage of files may ex officio order a longer or shorter preservation and storage period for individual files or parts of files in individual cases, insofar as this is necessary due to special circumstances, § 3 (3) JAktAV.

5.6. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa? *(Please describe rules regarding the possibility of conversion from electronic form to physical and from physical form to electronic when archiving evidence.)*

§ 299a ZPO regulates the archiving of paper files and enables the archiving of files of closed cases on microfilm or other data storage media. The principles to be observed in this regard are laid down for microfilming in a uniform federal guideline; corresponding regulations for other data storage medaia are still pending. Once archiving has been carried out to replace the original, further processing, i.e., the granting of inspection and the issuing of copies, is carried out on the basis of the data carrier, even if the originals are not destroyed.[69]

[69] *K. Bacher* in BeckOK ZPO, supra n.1, § 299a ZPO preface.

6. Training on IT development

6.1. Are the judges, court personnel or other legal practitioners required to undergo any training on technological developments relevant to taking, using and assessing electronic evidence?

(Please explain whether there are any official requirements for judges or other professionals to undergo training aimed specifically at improving their skills related to technological aspects of taking evidence, and if any such trainings (voluntary or mandatory) are provided by ministries, state agencies or other entities.)

Most federal states now stipulate an obligation for judges to undergo further training in their respective judiciary laws. Training opportunities in new technological developments are offered, but not prescribed. However, the overwhelming majority of the trainings offered does not concern technological innovations, but rather developments in procedural or substantive law, the conduct of proceedings or other organisational issues. The same applies to further training for *Rechtspfleger* (judicial officers).

Further training is offered by the courts themselves, federal and state ministries, the German Judicial Academy, the judicial academies of the federal states and the German Police University. Further training opportunities at European Union level are open to German judges.

7. Videoconference

Preliminary Remarks: The main regulations on proceedings by way of video and audio transmission are found in § 128a ZPO and are still quite limited. However, there is a draft bill by the Federal Ministry of Justice[70] that is intended to significantly expand § 128a ZPO and thus the possibilities of proceedings by way of video and audio transmission. In the following editing of this chapter, the current legal situation will always be presented first. Since it is not unlikely, however, that a regulation comparable to the aforementioned draft bill will be adopted in the near future, the anticipated legal situation is also presented in this instance. In order to make this recognisable, the comments that refer to the draft bill are shown in square brackets.

7.1. In general, does the law of your Member State provide for videoconference technology to be used in civil proceedings?

(If you answered in the affirmative, please list the legal grounds (e.g. "Art. 100 of the Civil Code"). Please indicate when the legal grounds entered into force (e.g. 01.02.2010) and specify any amendments to the legal grounds. If an online (official or unofficial) English translation of the relevant provisions exists, please provide the URL (link). If there are "soft-law" instruments (e.g. guidelines) that supplement rules on conducting the videoconference, then please specify them.)

§ 128a (1) ZPO[71] allows the court, upon application or ex officio, to allow a party, his or her representatives and counsels to be in another place during the oral proceedings. The hearing shall be transmitted simultaneously to this place in sound and vision. If this is ordered ex officio, the parties, their representatives and counsels shall nevertheless be free to appear in person for the oral proceedings in the courtroom.[72]

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[70] *Referentenentwurf des Bundesministeriums der Justiz – Entwurf eines Gesetzes zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten* (Draft bill of the Federal Ministry of Justice - Draft law to promote the use of videoconferencing technology in civil jurisdiction and the specialised courts; hereafter: draft bill; Where reference is made in the following to the ZPO norms as they would appear if the corresponding draft bill were implemented, this is made clear by using the abbreviation 'ZPO-E' for *ZPO-Entwurf* (ZPO Draft)., <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>,visited 18th of January 2023.

[71] § 128a entered into force on the 25th of April 2013 (Art. 2 *Gesetz zur Intensivierung des Einsatzes von Videokonferenztechnik in gerichtlichen und staatsanwaltschaftlichen Verfahren*; Act to intensify the use of videoconferencing technology in judicial and prosecutorial proceedings); § 128a received its current form on the 2nd of Febraury 2017 through Art. 42 of the *2. Kostenrechtsmoderniesierungsgesetz* (2nd Cost Law Modernisation Act).

[72] *Bundestags-Drucksache* (Official Record of the German Bundestag) 17/12418, 14; *J. Fritsche,* in MüKo ZPO, supra n.2, § 128a ZPO para. 5; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO, para. 3.

§ 128a (2) ZPO allows the court, upon application, to permit witnesses, experts or parties to be connected by way of video and audio transmission for the purpose of questioning. The court is not permitted to connect from another place. It must continue to be present in the courtroom. The principle of publicity can likewise only be upheld by granting the public access to the courtroom.
Usually, the request is made by the person giving evidence.[73] It is discussed whether the witness is obliged to participate in the hearing by means of video and audio transmission. The wording that the court only "allows" the witness to participate indicates that this does not result in an obligation to actually use the possibility of transmitting images and sound into the courtroom. The order is intended to arrange a hearing in the interest of the person giving evidence. This interest should be taken into account in the exercise of judicial discretion. If a witness insists on being heard in the courtroom, this is possible. However, the resulting additional expenses due to travel or loss of earnings are not reimbursable under the *Zeugen-Sachverständigenentschädigungsgesetz* (Witness and Expert Compensation Act; hereafter: ZSEG).[74]

§ 128a ZPO in English language[75]:
(1) The court may permit the parties, their attorneys-in-fact ,and advisers, upon their filing a corresponding application or ex officio, to stay at another location in the course of a hearing for oral argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcast in real time to this location and to the courtroom.

(2) The court may permit a witness, an expert, or a party to the dispute, upon a corresponding application having been filed, to stay at another location in the course of an examination. The images and sound of the examination shall be broadcast in real time to this location and to the courtroom. Should permission have been granted, pursuant to subsection (1), first sentence, for parties, attorneys-in-fact and advisers to stay at a different location, the images and sound of the examination shall be broadcast also to that location.

(3) The broadcast images and sound will not be recorded. Decisions given pursuant to subsection (1), first sentence, and subsection (2), first sentence, are incontestable.

§ 128a entered into force on the 25th of April 2013

[73] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 5.
[74] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 9.
[75] from the ZPO in English – official translation (recognised by the german federal ministrry of justice), as can be found at the following link: <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0522> visited 12th of Match 2023; Notes on the translation <https://www.gesetze-im-internet.de/Teilliste_translations.html>.

[It should be noted that there is currently a draft bill[76] which aims to amend § 128a ZPO. This draft bill also provides that in future § 128a (2) s. 1 ZPO-E[77] will allow for the ordering of participation in the oral proceedings by video and audio transmission upon application or ex officio. If the order is made ex officio, the parties to the proceedings may request to be exempted from it within a period to be determined by the presiding judge, § 128a (2) s. 3 ZPO-E. The taking of evidence shall continue to be possible pursuant to § 284 (2) ZPO-E.

However, the draft bill also provides that the court itself is free to connect from a place other than the courtroom, provided that all other parties to the proceedings also connect from another place within the scope of § 128a ZPO-E (so-called ‚*vollvirtuelle Verhandlung*' - fully virtual hearing). In this case, in order to preserve the principle of publicity, a separate room shall be created in the court building into which the hearing shall be broadcasted].

7.2. Does the law allow for videoconference technology to be used solely for the taking of evidence or also for conducting other procedural stages of the hearing? Videoconference in your Member State may be used for:

a) Witness testimony

b) Expert witness testimony

c) Inspection of an object (and/or view of a location)

d) Document (document camera)

e) Party testimony

f) Other means of evidence (please elaborate)

g) Conducting the hearing in broader/general terms (please elaborate)

(Specify whether videoconference technology can be used only for the taking of evidence by highlighting the categories of evidence. Please note that some Member States may not use the same categorisation of evidence or contain all above categories (e.g. party testimony). In such cases, please approximate your answer and provide additional explanation if needed. If the technology can be used in other stages of the procedure, please specify the scope of the technology's use.)

[76] *Referentenentwurf des Bundesministeriums der Justiz – Entwurf eines Gesetzes zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten* (Draft bill of the Federal Ministry of Justice - Draft law to promote the use of videoconferencing technology in civil jurisdiction and the specialised courts; hereafter: draft bill; Where reference is made in the following to the ZPO norms as they would appear if the corresponding draft bill were implemented, this is made clear by using the abbreviation 'ZPO-E' for *ZPO-Entwurf* (ZPO Draft)., <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>,visited 18th of January 2023.

[77] Where reference is made in the following to the ZPO norms as they would appear if the above-mentioned draft bill were implemented, this is made clear by using the abbreviation 'ZPO-E'

§ 128a ZPO allows both the (limited) taking of evidence and oral proceedings by way of video and audio transmission. [The draft bill also provides for oral proceedings and the taking of evidence by means of video and audio transmission. At the same time, the circle of admissible parties to the proceedings and the admissible means of evidence are expanded].

a) Witness testimony

§ 128a (2) s. 1 var. 1 ZPO allows the examination of witnesses by way of video and audio transmission - if the court allows it upon application. [Pursuant to § 284 (2) ZPO-E, the examination of witnesses shall continue to be possible in future by video and audio transmission. Pursuant to § 284 (2) s. 3 Draft Code of Civil Procedure, the witness may be ordered to be present at a court location designated by the court. Pursuant to §§ 284 (2) s. 1, 128a (2) ZPO-E, the examination of a witness can be ordered not only upon application but also ex officio.[78]]

b) Expert witness testimony

§ 128a (2) s. 1 var. 2 ZPO permits this equally for the examination of experts. [§ 284 (2) ZPO-E also provides for the hearing of experts by way of video and audio transmission. The hearing of the expert is to be ordered not only upon application, but also ex officio.]

c) Inspection of an object (and/or view of a location)

The taking of evidence by inspection of objects is not regulated in § 128a (2) s. 1 ZPO.[79] There, only the examination of witnesses, experts and parties is deliberately mentioned, but not the visual evidence.[80] The taking of evidence within the framework of the so-called ‚*Tele-Augenschein*' (inspection by way of audio and video transmission) finds its basis in the concretisation of the principle of production and the principle of free assessment of evidence in §§ 371 (1), 284 s. 2 ZPO; the consent of the parties is required..[81] However, as this form of inspection is not explicitly mentioned, the admissibility of the corresponding ex officio order is subject to considerable debate.

If the parties agree to the form of taking evidence, on the other hand, the court is always free to take evidence in the form it deems appropriate, § 284 s. 2 ZPO. [The legislator wants to defuse the problem in the future. § 284 (2) ZPO-E is to expressly provide for the possibility of visual evidence by way of video and audio transmission.[82]]

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[78] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 49, visited 18th of January 2023.

[79] *T. Brand and Y. Skowronek*, `Die Herausforderungen der Digitalisierung für das zivilprozessuale Beweisverfahren', 4 Recht Digital – RDi (2021) p. 178 at p. 180–186; *P. M. Reuß*, `Die digitale Verhandlung im deutschen Zivilprozessrecht`, 23 JuristenZeitung – JZ (2020) p. 1135 at p. 1137.

[80] *A. Stadler*, in Musielak/Voit ZPO, supra n.5, § 128a ZPO para. 5; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para. 10; *M. Anders*, in Anders/Gehle ZPO, supra n.15, § 128a ZPO para. 6.

[81] *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para. 10.

[82] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 50, visited 18th of January 2023.

d) Document (document camera)

The possibility of documentary evidence by way of video and audio transmission, on the other hand, is almost unanimously rejected.[83] The transmission of such a document would not be equivalent to the production of the original in view of the high evidentiary value accorded to original documents (as also mentioned in Chapter 1 of this questionnaire). [In the future, documentary evidence shall also not be able to be taken in the course of a video hearing. The draft law explicitly rejects documentary evidence as admissible evidence.]

7.2.1. If the law allows for (remote) view of location, how would such a videoconference be practically implemented?

(E.g. does the court appoint a court officer to operate the audio-visual equipment on site? For example, suppose there is a dispute between parties regarding the border/boundary between their immovable properties and the court needs to view the alleged border/boundary. Does a court officer carry the technical equipment to the site and follow instructions from the court, regarding the viewing angles etc.)

§ 128a ZPO does not provide for the possibility of conducting an inspection of a location by means of video and audio transmission.[84] [The draft bill also does not provide for such a possibility.]

7.3. Which applications (software) are used for videoconferencing in civil court proceedings?

(Please investigate whether the courts use multiple applications.)

The ZPO does not prescribe any specific software for conducting hearings. Nevertheless, the requirements for data protection and data security result from Art. 24, 25, 32 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing

[83] *B. Windau*, `Gerichtsverhandlung per Videokonferenz: Keine Angst vor § 128a ZPO`, 1 Anwaltsblatt – AnwBl (2021) p. 26 at p. 28.
[84] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 5.

Directive 95/46/EC (General Data Protection Regulation; hereafter: GDPR). Mostly Cisco Webex or Skype for Business[85] , but also own platforms are used.[86].

7.3.1. Are the applications (see Question 7.3.) commercially available?

(If so, specify whether they are specially modified for use in court proceedings.)

Skype for Business and Cisco Webex are available without restrictions. No special modifications are used for use in the context of negotiation by way of video and audio transmission. Usually, a free for use web application is used, so it is not necessary to buy the corresponding application.

7.3.2. Are the applications (see Question 7.3.) interoperable with other applications?

(e.g. can a subject, using application X, join a videoconference, which is conducted via application Y)

The applications mentioned are not compatible with each other.

7.3.3. Does the application allow a text-based chat function during the videoconference; does it allow screen sharing and sharing of documents?

(whether and to what extent the court can restrict these functions (e.g., the parties can talk at any time, but only share their screen if permitted by the court.)

Skype for Business and Cisco Webex allow screen sharing and document sharing, as well as text-based chat during the video conference. It was not possible to find out how this is handled on court-operated platforms.

[85] Notes on IT and data security for video hearings pursuant to § 128a ZPO of the LG Osnabrück (Regional Court Osnabrück, Lower Saxony), <https://landgericht-osnabrueck.niedersachsen.de/startseite/service/videoverhandlungen_nach_128a_zpo/>, visited 09th of February 2023; Notes on video hearings of the AG Braunschweig (Local Court Braunschweig, Lower Saxony), <https://www.amtsgericht-braunschweig.niedersachsen.de/startseite/service/hinweise_zu_videoverhandlungen/videoverhandlungen-198977.html>, visited 09th of February 2023; Notes on video conferences at the AG Frankfurt am Main (Local Court Frankfurt am Main, Hesse),<www.ordentliche-gerichtsbarkeit.hessen.de/landgerichtsbezirk-frankfurt-am-main/amtsgericht-frankfurt-am-main/videoverhandlung>, visited 08th of February 2023.

[86] 'Teilnahme an Videoverhandlungen der Justiz des Landes NRW als externer Teilnehmer über das Internet'(Participation in video hearings of the judiciary of the federal state of North Rhine-Westphalia as an external participant via the Internet) <https://www.justiz.nrw/Gerichte_Behoerden/zentraler_dienstleister/videokonferenz/Als-externer-Teilnehmer-in-einer-Videoverhandlung.pdf>, visited 09th of February 2023; 'Videoverhandlung bei den bayrischen Gerichten für Arbeitssachen' (Video hearing at the Bavarian labour courts), <www.lag.bayern.de/imperia/md/content/stmas/lag/muenchen/210204_leitfaden_prozessbeteiligte.pdf>, visited 09th of February 2023.

7.4. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when taking evidence?
(E.g. may the court order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; only with the consent of the person providing testimony; at the request of (both) parties; only in exceptional circumstances etc.)

Pursuant to § 128a (2) s. 1 ZPO, the taking of evidence by way of video and audio transmission is only to be permitted by the court upon application (unlike § 128a (1) s. 1 ZPO, where the court can also permit this kind of taking of evidence ex officio).[87] Witnesses/experts/parties remain free to appear in person. [Pursuant to § 284 (2) ZPO-E, the taking of evidence may be ordered by the court upon request or ex officio (unlike in § 128a (2-4) ZPO-E, where the presiding judge decides, whether he decides that way).]

7.5. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when conducting hearings?
(E.g. whether the court may order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; at the request of (both) parties; only in exceptional circumstances etc.)

Regarding to party hearings and the examination of witnesses, what has been stated under point 7.4 applies equally. § 128a (2) ZPO imposes the same requirements on all possible means of evidence. [The draft law is now also to allow the court to order the hearing by way of video and audio transmission. This results from § 128a (2) ZPO-E. As already stated under point 7.1, the parties to the proceedings may apply within a period to be determined by the presiding judge to be exempted from the necessity of participation by way of audio and video transmission if participation in this form has been ordered ex officio.]

7.6. If the court orders the use of the technology, may the parties oppose that decision? If so, how do the parties make their opposition clear (e.g. appeal)?

[87] *M. Anders*, in Anders/Gehle ZPO, supra n.15, § 128a ZPO para. 13.

Decisions pursuant to § 128a (1) and (2) s. 1 ZPO are in principle non-appealable.[88] The only possibility to appeal against a (negative) decision would be, to claim against the judgement that by not using the video hearing, evidence that could not be obtained in any other way remained unexploited.[89]

[Against the order to take evidence pursuant to § 284 (2) ZPO-E, the respective person providing evidence may apply for exemption from the order pursuant to § 128a (2) s. 1 ZPO-E and § 128a (3) s. 1 ZPO-E (without giving justification[90]) within a time limit set by the court. After expiry of the time limit, an exemption from the order is principally no longer possible.

However, if unforeseen circumstances arise that make the taking of evidence in the framework of a audio and video transmission impossible pursuant to § 284 (2) ZPO-E, the person providing evidence must appear in the courtroom - insofar as this is feasible. If this is no longer possible, the hearing shall be cancelled, rescheduled or adjourned in accordance with § 227 ZPO-E.[91]]

If, on the other hand, the taking of evidence pursuant to § 284 (2) ZPO-E is requested and rejected by the person providing evidence, only the immediate appeal pursuant to §§ 284 (2) s. 1, 128a (7) ZPO-E is admissible. Otherwise, all decisions pursuant to § 128a (7) sentence 2 ZPO-E are incontestable. In both cases, the right to appeal against a decision/order is only available to the person giving evidence, not to one of the parties to the dispute.[92]]

7.7. Does the law of your Member State provide that courts can, in civil procedure cases, impose coercive measures against a witness or a party to provide testimony?

(*Explain also if the rules differ for videoconference testimony*.)

There are four duties of a witness:

1. Apart from certain federal and state mandate holders (e.g, the Federal President, who is to be questioned in his or her home (§ 375 (2) ZPO) or Members of the Federal Government, who are to be questioned at their official residence or place of stay (§ 382 (1) ZPO)), the witness must attend the evidentiary hearing on site. This does not apply if the witness is prevented from attending (in particular due to illness) or if he/she has exercised his/her right to refuse to testify in advance (§ 286 (3) ZPO).

[88] *M. Anders*, in Anders/Gehle ZPO, supra n.15, § 128a ZPO para. 23.
[89] *R. Greger*, in R. Zöller (ed.), ZPO – Zivilprozessordnung – Kommentar (Verlag Dr. Otto Schmidt 2022) [Zöller ZPO], § 128a ZPO para. 11.
[90] Draft bill <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 37, visited 18th of January 2023.
[91] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 37, visited 18th of January 2023.
[92] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 50, visited 18th of January 2023.

Furthermore, the witness does not have to attend if a hearing by audio and video transmission has been ordered pursuant to § 128a (2) ZPO (§ 375 (1) no. 1 ZPO) or if the court has exceptionally allowed a written answer to the question of evidence and has not requested the summoning (§ 377 (3) ZPO).[93] If a witness does not appear despite being properly summoned, he will be sanctioned by having the costs incurred imposed on him pursuant to § 380 (1) s. 1 ZPO. In addition, an administrative fine is imposed on him and, if this cannot be recovered, he is ordered to be held in custody, § 280 (1) s. 2 ZPO.

2. The witness must give evidence on his or her person and on the matter. This is not the case if the witness has a right to refuse to testify and the witness also makes use of this right. Rights to refuse to testify arise from §§ 383 (1), 384 ZPO.

3. Pursuant to § 378 (1) ZPO, the witness must inspect regarding records and documents in preparation for his or her testimony and bring them with him or her. However, the witness is only obliged to do so if he or she is permitted and can reasonably be expected to do so. If the witness does not fulfil this obligation, the court will charge the witness with the costs incurred pursuant to §§ 378 (2), s. 2 and 390 (1), s. 1 ZPO. In addition, the witness will be ordered to pay an administrative fine and, if this cannot be recovered, to serve a period of administrative custody (§§ 378 (2), s. 2, 390 (1), s. 2 ZPO). In case of repeated refusal, administrative custody is to be threatened to enforce the testimony, too (§§ 378 (2) (2), 390 (2) s. 1 ZPO).

4. Pursuant to § 391 ZPO, the witness must swear to his or her testimony at the request of the court. Pursuant to § 392 s. 1 ZPO, this takes place after the testimony (so-called *`Nacheid'*; subsequent oath). An oath must not be administered in the cases mentioned in § 393 ZPO. If a witness states that he or she does not wish to take an oath for reasons of faith or conscience, a sworn affirmation in accordance with § 484 (1) s. 1 ZPO shall take its place. (Details on oath taking in §§ 481, 483 ZPO). If the oath is refused without authorisation, the sanctions of § 390 ZPO apply.[94]

7.7.1. Under which circumstances may a witness refuse testimony?

(*Explain also if the rules differ for videoconference testimony*.)

General explanations on the privilege to refuse to testify can be found in the explanations on the duties of a witness in point 7.7.

According to the current arrangement of the hearing by way of video and audio transmission, §128a (2) ZPO, the examination of a witness may be admitted upon request. According to the prevailing opinion, the witness himself/herself can make the request. The court does not have the right to disposal. For this reason, there are currently no special rules for the examination of witnesses during video conferences.

[93] *J. Braun*, `Lehrbuch des Zivilprozeßrechts` (Mohr Siebeck 2014) p. 797.

[94] *R. Greger*, in Zöller ZPO, supra n.89, § 391 ZPO para 1; *S. Scheuch* in BeckOK ZPO, supra n.1, § 391 ZPO para. 7.

[There are plans to amend the authority to issue orders so that the court can order a witness to be examined digitally. The witness to whom a corresponding order is issued shall be given the opportunity, pursuant to section 128a (3) ZPO-E (applied mutatis mutandis pursuant to section 284 (2) ZPO-E), to refuse to be connected by way of audio and video transmission within a period to be determined by the court. It shall not be necessary to state the reasons for which the refusal is made.]

7.7.2 Does the law of your Member State allow for cross-examination?

(*Explain also if the rules differ for videoconference testimony*.)

There is no cross-examination in German civil proceedings.

7.8. If videoconference technology is used to conduct hearings, how (if at all) can the court and/or parties terminate the use of videoconference technology and revert to regular (on-site) proceedings?

(Please explain the powers of the court and the parties in relation to choosing to conduct regular proceedings after the court has already decided that the hearing will be conducted through videoconference.)

The court has no possibility to make the videoconference mandatory, it can only allow participation. This means that the parties are free to appear in the courtroom even though the video conference has been allowed. In case of interruptions during the video conference, the legal situation is unclear. The court can pronounce a default judgement if the connection is interrupted deliberately or if the technology culpably fails.[95] In the event of malfunctions, it is also possible to attend in court in person.

[The draft bill provides that a video hearing can be arranged by the court. Before the hearing, the parties may object to this. The parties do not have a right of appeal if a witness is connected. After the start of negotiations, the draft does not provide for any explicit regulation.]

7.9. Does the law (or best practice) provide, that the court should – before ordering the use of videoconference technology – check (please elaborate):

a) the internet connection availability (and/or speed) of the persons involved in the videoconference;

b) the technical equipment of the persons involved in the videoconference;

c) the technical literacy of the persons involved in the videoconference;

d) the physical capacity of the persons involved in the videoconference (e.g. if they are located in the Member State, their health status (hospitalisation; vocalisation, hearing and seeing));

[95] Point 7.11.a).

e) other (please specify)?
(In addition, please specify if the court has to conduct a "test" session" before the actual videoconference.)

The law does not regulate points a-d. There is no uniform answer to the question of how the individual points were handled.

7.10. Does the law (or best practice) offer special safeguards for vulnerable persons?
(Please explain whether the use of the videoconferencing technology must follow any special rules for vulnerable partakers (e.g. children; persons with illness; persons located in hospitals; whistle-blowers; elder persons).)

The regulations on hearings by means of video and audio transmission do not provide for any special features for persons in need of protection. However, the purpose of the regulations is seen precisely in the addition of such persons.

7.11. Does the law of your Member State provide:

a) The location of the persons engaged in the videoconference (i.e. where the videoconference must or may be conducted) and the use of virtual filters and backgrounds?
(Member States' laws may allow only for court2court videoconference; other laws may not contain restrictions and the partakers may enter the videoconference from the location of their choice; explain whether, for example, a person may join the videoconference through their mobile device from their domicile or a car etc. Explain whether a person may use filters or change the background/backdrop. If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

The court allows the connection to a location other than the courtroom by a resolution. The court either permits the other place beforehand or informs about it in the summons.[96] However, the mere permission of the court to connect from another location via video and audio transmission does not constitute a corresponding obligation, so that the parties are still free to appear in the courtroom.

Should the party connect digitally, it is disputed whether he or she must physically be at the location permitted by the court or whether the location itself is irrelevant and only the ability to transmit the

[96] *M. Anders*, in Anders/Gehle ZPO, supra n.15, § 128a ZPO, para. 11; *P. M. Reuß*, supra n.79, at p. 1136; *R. Greger*, in Zöller ZPO, supra n.89, para 4.

audio-video signal without interference is important. This question is particularly relevant with regard to the default of digitally connected parties, so that further explanations are given under aa).

aa) How does the law sanction a person who does not conduct the videoconference at the designated location?

The law does not have a clear provision for this. In Germany, if a party does not appear in court, a default judgment can be issued. In the context of the video hearing, default is imposed as a sanction if the party is not present at the place indicated. The default essentially depends on the disputed question of whether the presence at the other location is taken into account or the technical connection to the video hearing. It was concluded that the place was also decisive for the default. Since it is open to the parties, despite the decision to conduct the proceedings by way of § 128a ZPO, to also appear on site in the courtroom, the default should therefore be given if the party is neither present at the "other place" nor at the place of the court.[97] Since only the physical presence is taken into account, it does not matter whether there are technical disturbances or whether the parties are responsible for them.[98]

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This has been severely criticised. Another view therefore focuses on whether the party is either present in person in the courtroom or is connected via video and audio transmission.[101] Accordingly, it should not matter whether the person connected is actually present at the place mentioned in the decision. However, since the connection is not based on the physical presence at the "other place", but on the transmission, technical problems can also lead to a default, insofar as they can be attributed.[102]

[97] *F. Zschieschack*, in H. Schmidt (ed.) COVID-19 – Rechtsfragen zur Corona-Krise (C.H. Beck 2021) [COVID-19], § 14 para. 87f.; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para.10; *J. Fritsche*, in MüKo ZPO, supra n.56, § 128a ZPO para.9.
[98] *B. Windau*, supra n.83, at p. 28.
[99] *F. Zschieschack*, in Schmidt COVID-19, supra n.97, § 14 para. 87f.; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para.10; *J. Fritsche*, in MüKo ZPO, supra n.51, § 128a ZPO para.9.
[100] *B. Windau*, supra n.83, at p. 28.
[101] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 4; *F. Zschieschak*, in COVID-19, supra n.97, § 14 para. 87, 88; *B. Windau*, `Die Verhandlung im Weger der Bild- und Tonübertragung`, 38 Neue Juristische Wochenschrift – NJW (2020), p. 2753 at p. 2756.
[102] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 4.

[The dispute would become largely obsolete after the implementation of the draft bill. The draft provides that no other location is specified in the decision, but only that stable and interference-free transmission must be guaranteed at the respective location.]

ab) Are there any rules for the inspection of the location where the person heard is situated and the privacy it offers?

(If the person is situated at a private location, does the person have to "show" the court whether any other person is present at the location and/or – where (professional/business) secrecy is involved – whether the location offers sufficient privacy. Must the location adhere to any form of decency or décor? If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

§ 128a ZPO does not contain any explicit provision regarding the inspection of the location where the person heard is situated. As shown under aa), it is not clarified whether the other place can be determined by the court. Dependent on this, of course, is the question of the requirements to be placed on the other location. If one takes the opinion that the court cannot determine the other location, the unanimous opinion is that the transmission in picture and sound must be free of interference. The responsibility for this lies with the party. However, there are no precise requirements.

The court's powers are also not clearly regulated in the event of an existing risk that witnesses could be influenced during a hearing by means of video and audio transmission. However, it can be assumed that the court has the option of discontinuing the hearing and adjourning it in accordance with § 227 (1) ZPO in the event of repeated technical disruptions or the risk of influence.[103]

[The draft bill merely focuses on interference-free transmission. However, it also leaves adherence to this up to the parties. A special feature not previously regulated relates to the examination of witnesses. Accordingly, if there is a risk of interference, the witnesses may be summoned to a place in the courthouse to be designated by the court for the connection].

ac) Suppose a person lives in a one-room apartment with family or a room rented with friends, and cannot find another suitable location. Does the law allow the presence of family members, roommates etc. in such cases? If yes, do these persons have to identify themselves?

There is no regulation for this.

[103] *C. Resch and H. K. Erden*, `Videoverhandlung im Biergarten? – Anforderungen an den »anderen Ort« in § 128a Abs.1 ZPO`, juris – Die Monatszeitschrift – jM (2022), p. 46 at p. 49.

b) the time when the videoconference may be conducted?

(Member States' laws may provide that videoconferences should not take place before e.g. 06:00 and no later than e.g. 18:00; does the law provide rules for videoconferencing if the persons are located in different time zones? If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

There is no regulation for this.

c) the apparel and conduct of the persons taking part in the videoconference?

(Member States' laws may compel partakers to dress or conduct themselves in a special manner (e.g. toga outfit; standing in attention of the judge); please explain how these rules or traditions are followed if videoconference technology is used. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

Legal representatives are required to wear robes in court. No exceptions apply in this regard to proceedings conducted bey means of video and audio transmission. else applies to video hearings. The video hearing is not seen as a separate hearing, so that there is still an appearance in court.

d) the identification of the persons taking part in the videoconference?

(If the videoconference takes place in a court2court setting, this concern is usually dispelled, since court officials may check the identity; however, checking the identity of a person entering the videoconference from a private location may be troublesome. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)
There are no special rules for identification. If there is any doubt about the identity of a witness, he or she can still be summoned in person. In the future, the court will also be able to order the person to be examined to be present at a court location to be specified by the court.)

There are no special rules for identification. If there is any doubt about the identity of a witness, he or she can still be summoned in person.
[In the future, according to the draft bill, the court should also order that the person to be examined be present at a place to be determined by the court.]

7.12. Can (or must) a videoconference be recorded?

According to the current legal situation, proceedings held by means of video and audio transmission cannot be recorded. However, the general rules on recording also apply when video transmission

technology is used. According to § 160a (1) ZPO, a preliminary audio recording is permitted for the purpose of recording, whereas a complete audio and video recording of the video conference is not permitted.[104] With regard to the preliminary recording, the court can choose between a continuous and verbatim audio recording of the entire content of the hearing and a summarized recording, which can be made in abbreviations or by dictation of the presiding judge on an audio recording device.[105] Therefore, an audio recording of the video hearing can also be considered admissible.

[It is intended to allow video and audio recording for the purpose of preliminary recording in the future. The recording should then be able to be recorded by the court using the common recording functions of the respective software providers. The parties, on the other hand, shall be prohibited from making a recording. The possibility of requesting audio(-visual) documentation of the statements of witnesses, experts or parties (within the framework of the party hearing) shall only exist in proceedings with an amount in dispute of more than five thousand euros.
Like the preliminary verbatim audio recording, the preliminary video recording shall be the basis for transcripting a protocol. It cannot be used as a protocol itself.[106]
To enable the parties to check the accuracy of the written record on the basis of the preliminary record and, if necessary, to apply for correction, it is clarified that the preliminary audio(-visual) records are part of the case file and are subject to the right to inspect files from § 299 ZPO (§ 160a (5) ZPO-E).[107]]

7.12.1. Does the recording of a videoconference contain video feedback from all cameras in the court or only the camera in focus?

(Many software applications pin or highlight only one of the persons during the videoconference and close or minimize other (usually non-active) persons. A recording might thus capture only the actions of one person at a time.)

There is no explicit regulation. However, it is considered necessary that the participants can perceive each other. In this respect, the judge will adjust the screen.

7.12.2. Which persons are shown on video during the videoconference?

[104] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a para. 10; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a para. 14.
[105] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 160a para. 2.
[106] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 44, visited 18th of January 2023.
[107] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 23, visited 08th of March 2023.

(I.e. which persons have a camera pointed at them and can be seen on the screen; e.g. judge, party, advocate, expert witness, interpreter, court staff, witness, public.)

Since different video systems are used, there is no explicit regulation on this either.

7.12.3. How (which medium and format) and where is the footage of the videoconference stored and later archived?

(For example, it may be stored on a local machine or at a remote server.)

Audio-visual recordings of the entire proceedings are not yet permitted; For preliminary audio recording, the general recording rules apply (see introduction to point 7.12) it is sufficient to store the recording on a central drive under the directory of the respective office responsible for the recording.[108] Recordings on an audio or data storage medium may be deleted if the parties have not objected to their content (or the content of the corresponding supplement) within one month after receipt of the final transcript of the hearing, at the latest after the final conclusion of the proceedings.[109]

[Under the planned new regulation, the recordings are only to be used for the preparation of the minutes, but not to be minutes themselves. It remains a preliminary record to be included in the case file.[110]
In the future, the provisional records are to be deleted for reasons of data economy when the proceedings have been legally concluded or otherwise terminated. Only in exceptional cases may the judge order a longer retention.]

7.12.4. Does the footage of the videoconference enter the record of the case?

Already answered in point 7.12.3. and 7.12.4.

7.12.5. Who has access to view the footage after it has been recorded?

In principle, the parties have a right to inspect files pursuant to § 299 ZPO. According to the prevailing view, this also includes the preliminary recordings of the minutes, which include the sound recordings. This is referred to as "*Abhörrecht*" (right to listen [to the tape]).[111] Due to reasons of the protection of

[108] *H. Wendtland*, in BeckOK ZPO, supra n.1, § 160a para. 11.
[109] *H. Wendtland*, in BeckOK ZPO, supra n.1, § 160a para. 13.
[110] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 44, visited 08th of March 2023.
[111] OLG Stuttgart, 08 April 2021, 19 W 11/21, ECLI:DE:OLGSTUT:2021:040819W11.21.00; *I. Bacher*, in BeckOK ZPO, supra n.1, § 299 para. 6; *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 160a para. 6.

personal rights and the potential risk of falsification of the recording, it is predominantly considered that the interception of the recording must take place at the clerk's office and that no own transfer to a data storage medium may take place.[112]

[According to the draft bill, such a right of inspection shall in future also apply to the audio-visual recording. § 160a (5) ZPO-E regulates the procedure for granting access to preliminary recordings of the minutes, insofar as these are audio, video or audio-video-recordings. It provides for the corresponding application of § 299 (3) ZPO for this purpose.

In direct application § 299 (3) ZPO only regulates the procedures for the inspection of electronically stored files. As a standard form of inspection, § 299 (3) s. 1 ZPO-E provides for the files to be made available for access via a file inspection portal (including the possibility of downloading) or by transmission via a secure transmission channel (§ 130a ZPO-E). As an alternative, § 299 (3) s. 2 ZPO-E provides for inspection at the offices. Finally, according to § 299 (3) s. 3 ZPO-E, the transmission of a data storage medium can take place. These last two forms of inspection of records generally require a special request, and the transmission of a data carrier also requires a justified interest on the part of the applicant. Due to the risks to the personal rights of the parties to the proceedings, the decision on the form of inspection is to be made by the judge.[113]]

7.12.6. Presume that the proceedings have concluded at the first instance and an appeal or other recourse has been submitted by the party. May the second instance court access and view the recording of the videoconference?

Pursuant to § 541 ZPO, in the event of an appeal (pursuant to § 565 ZPO, § 541 ZPO shall apply mutatis mutandis to the appeal), the clerk's office shall, after the notice of appeal has been filed, immediately request the records of the proceedings from the clerk's office of the court of first instance. Also included in those files are any preliminary recordings (thus also preliminary sound recordings) until they are deleted.[114] However, the recordings on sound recording media or data storage media may be deleted insofar as the transcript is produced after the hearing or supplemented by the provisionally recorded findings if the parties have not raised any objections within one month after notification of the transcript. This may have the consequence that the audio-only recording is no longer in the case file and is not transmitted to the next instance.

[112] *J. Fritsche*, in MüKo ZPO, supra n.2, § 160a para.9 seq.
[113] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 46, visited 08th of March 2023.
[114] *I. Bacher*, in BeckOK ZPO, supra n.1, § 299 para. 5.).

[According to the draft bill, the deletion of the video recording should now only take place after the legal conclusion or other termination of the proceedings. In addition, it is clarified that the video recording becomes part of the case file, so that the next instance should receive the video recording by sending the case file.]

7.12.7. If the court orders *ex post* transcription of the hearing, does the court reporter write the Minutes of the case by transcribing the footage of the videoconference or is there a separate audio log for transcription?

As far as we know a separate audio log for transcriptions is not in use.

7.13. Concerning court interpreters – does the law (or best practice) provide for successive or simultaneous interpretation during the videoconference?

§ 185 (1) a ZPO stipulates that the court may allow the interpreter to be present at another location during the trial, hearing or questioning, i.e., that it is possible for the interpreter to be connected by means of video and audio transmission. Whether simultaneous or successive translation is permissible is a question of the `*Recht auf rechtliches Gehör*` (right to be heard as part of the right to a fair trial), which the court must decide on its own responsibility, without any further legal regulation. The decisive factor is that the party who does not speak German can react to the text to be translated in the same way as if the statement had been made in his or her native language.
It would therefore not be sufficient if a translation was only submitted after the oral proceedings or at the end of the oral proceedings.

7.13.1. Where is the interpreter located during the videoconference?
(E.g. in the court room; in the room with the person being heard etc.)

The regulations on hearings by means of video and audio transmission do not contain any requirements for hearings with interpreters. However, the Berlin regional association of the `*Deutscher Richterbund*` (German Judges' Association) recommends that the speaker and the interpreter physically be in the same place.[115]

[115] *Leitfaden zur Videoverhandlung während der Coronapandemie* (Video negotiation guide during the corona pandemic), Stand Mai 2020, S: 8, <https://www.drb-berlin.de/fileadmin/Landesverband_Berlin/Dokumente/leitfaden_videoverhandlung/Leitfaden_Videoverhandlung__Mai_2020_.pdf>, visited on 09th of March 2023.

[The draft bill provides for an amendment of the corresponding standard for interpreters. The chairperson is also to be able to order the interpreter to participate via video and audio transmission. The regulation is intended to help speed up proceedings. This effect is expected in particular due to the fact that interpreters for rare languages do not have to travel to the venue.[116]]

7.14. Immediacy, equality of arms and case management

7.14.1. How does the law of your Member State generally sanction an infringement of the principle of immediacy?

In German civil proceedings, a distinction is made between different forms of immediacy (formal, material and temporal immediacy). Formal immediacy is probably the most important. Formal immediacy means that the taking of evidence must take place before the judges (the chamber), who ultimately deliver the verdict.[117]

If taking of evidence violates the requirement of formal immediacy, the result of the evidence may not be used as a matter of principle.[118] The provision of § 295 (1) ZPO must be taken into account, so that the defect is cured if the party waives the objection or fails to raise it in time.[119]

If the violation is still recognised within the instance, for example because it turns out in the course of the assessment of evidence that the court is not `capable of properly assessing` the evidence (§ 375 (1) ZPO), the relevant taking of evidence is to be repeated before the court.[120]

7.14.2. Does the law of your Member State specify any special aspects regarding the principle of immediacy when using videoconferencing technology?

There are no special regulations. In the past, there has been criticism that interviewing via a videoconferencing system loosens the principle of formal immediacy and that face-to-face summoning is preferable.[121] Today, no violation is assumed. In the sense of formal immediacy, no third party intervenes between the court and the person giving evidence, but only a `technical barrier`, so that the

[116] Draft bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 30, visited 08th of March 2023.
[117] *I. Bach*, supra n.1, § 355 ZPO para. 1.
[118] *I. Bach*, supra n.1,§ 355 ZPO para. 24.
[119] *C. Heinrich*, in MüKo ZPO, supra n.8, § 355 ZPO para. 18.
[120] *I. Bach*, supra n.1, § 355 ZPO para. 24; *C. Berger*, in R. Bork H. Roth (ed.), Stein/Jonas Kommentar zur Zivilprozessordnung Band 5 (Mohr Siebeck 2006) [Stein/Jonas ZPO], § 355 ZPO para. 31.
[121] *C. Berger*, supra n.120, § 355 ZPO para. 10.

hearing takes place immediately before the adjudicating court as a consequence.[122] All that is required is sufficient recording and transmission quality.

Nevertheless, due to the danger of reduced perceptibility, it is recommended in the literature to avoid the examination of witnesses by means of audio and video transmission, at least in those cases in which the credibility of the witness is particularly important.

7.14.3. Have your courts dealt with cases alleging an infringement of the principle of immediacy or the impartiality of judges in videoconference proceedings?

(If so, please provide the core of the legal question addressed and the resolution, as well as citations.)

German courts rarely had to deal with the principle of immediacy. In the rare instances, German courts had to address the principle of immediacy, they stated the above-mentioned (point 7.14.1.) criteria as a prerequisite. Thus, each participant should be able to perceive all other participants visually and acoustically at the same time.[123]

The principle of immediacy was explicitly part of a professional proceeding in the OLG Saarbrücken, judgement of 15.7.2021.[124]

The court had permitted the parties' representatives to participate in the hearing by video and audio transmission. However, due to technical problems on the side of the plaintiff's representative, only an audio connection could be established, whereas a visual transmission remained unavailable. This was recorded at the beginning of the hearing and noted in the minutes. None of the parties raised any objections during the hearing to holding the hearing with the plaintiff's representative in the aforementioned form.

The defendant did not complain of a violation of § 128a ZPO until the appeal. However, the OLG Saarbrücken[125] ruled that the procedural error was cured by the defendant's unopposed plea pursuant to § 295 ZPO.

7.14.4. How do parties (and their advocates) express objections or pose questions during a videoconference?

(This may be especially important when "leading questions" are posed.)

Regarding the negotiation process, there is no difference between the hearing on site and the hearing via audio and video transmission.

[122] *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para. 1; *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 6.
[123] OLG Celle 15 September 2022, 24 W 3/22, ECLI:DE:OLGCE:2022:0915.24W3.22.00.
[124] OLG Saarbrücken 15 July 2021, 4 U 48/20, ECLI:DE:OLGSL:2021:0715.1O181.18.00.
[125] The OLG Saarbrücken is the highest civil court in the federal state of Saarland.

7.14.5. How does an inspection of an object take place during a videoconference?

(For example, imagine a court has to examine a knife, which was submitted as evidence by a party in physical form to the court.)

There is no precise regulation on the topic of taking evidence by inspection during court proceedings held by the means of audio and video transmission.

Under the current legal situation, it is disputed whether visual evidence via § 128a ZPO is admissible at all. For further information see point 7.2.b

However, the opponents of such a "Tele-Augenschein" (tele-eye inspection) only reject the court's inspection by way of video and audio transmission. Thus, the connection of a party from another place (by way of video and audio transmission) is not considered harmful as long as the court can carry out the taking of evidence by means of visual inspection at the same place with the object of inspection (because, for example, the object of inspection has been sent in advance).[126]

For the advocates of a tele-eye inspection, on the other hand, a presentation of the object of inspection via the camera (in the case of documents and photos, the sharing of one's own screen) could also be considered.

[According to the draft bill, an inspection shall now also be possible for video hearings. The draft only provides a rudimentary explanation on how this might be handled.[127]]

7.14.6. Can documents only be presented by means of a document camera or also through the use of file/screen sharing in the videoconference application?

The law does not stipulate any specific requirements in this regard. This is mainly due to the fact that the possibilities of viewing the proceedings depend on the type of participation of the parties to the proceedings. If all parties are digitally connected, a presentation via the screen sharing function is the most feasible. If only one party is digitally connected and the other party is on court, a document camera can be considered if the party on court wants to present the document.

7.14.7. During the videoconference, does the application (software) highlight only the person actively speaking or are all participants visible at all times (and at the same size)?

[126] *M. Fries, R. Podszun and B. Windau*, `Virtuelle Verhandlung statt fliegendem Gerichtsstand`, 1 Recht Digital – RDi (2020) p. 49 at p. 51, para. 13.

[127] Draft Bill <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 2, visited 08. March 2023.

(Often, the application will minimize or close the video of the person who is not active (speaking) during the videoconference.)

Since different applications are in use, this question cannot be answered in general. The requirements for the application only presuppose that the possibility of mutual perception is provided.
[Likewise, the draft bill does not make any concrete stipulations in this regard. The draft merely emphasises that each participant in the proceedings (including the court) should have the possibility to perceive all other participants both visually and acoustically at any time during the proceedings. However, according to the draft, this does not require the continuous simultaneous display of all parties to the proceedings and the court on a single screen. Depending on the selected setting of the videoconferencing technology, the viewing options may vary.[128]]

7.14.8. Suppose that the connection becomes unstable, and the quality of the audio and/or video feed drops. One of the parties considers that the quality does not allow for correct testimony. Consider also that the video feed breaks down before or in the middle of the videoconference and only the audio feed is available. What options do the court and parties have in regards to the continuation of the videoconference? Can a continuation in such circumstances constitute grounds for appeal?

Only simultaneous audio and video transmission fulfils the requirements of § 128a ZPO.
If, for example, the video transmission fails, a party can object to it.
However, if the party accepts the disruption without objection, the procedural error is considered cured, § 295 ZPO.[129] In addition, the presiding judge also has the option to break off the hearing in the event of repeated technical malfunctions and to adjourn it in accordance with § 227 (1) ZPO.[130]

7.14.9. If one party enjoys a better audio-visual experience due to better technical equipment and/or internet connection than the other, and the court allows the continuation of the proceedings, can the other party allege a breach of equality of arms?

Under the current legal conditions, it is not possible to claim a violation of the right to equality of arms in such cases.

[128] Draft Bill <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 34, visited 08. March 2023.
[129] OLG Saarbrücken 15 July 2021, 4 U 48/20, ECLI:DE:OLGSL:2021:0715.1O181.18.00.
[130] *C. Resch and H. K. Erden*, supra n.103, at p. 49.

There is no necessity for this for the very reason that § 128a ZPO only allows the audiovisual transmission of the hearing at the request of the parties and that the parties are still free to appear in the courtroom in any case.
[Even under the planned amendments, the parties are to be entitled to refuse the court's order for video negotiation.[131] It is therefore not to be assumed that it will be possible to assert a violation of the right of equality of arms in the future.]

7.14.10. During the videoconference, the court suspects that a person being heard is receiving outside help/suggestions or is under duress. Can the court order the person to turn the camera and show the apartment or share their screen? Can the court request the person to shut down other technological devices in their vicinity during the videoconference? Can the court request that other persons be removed from the location of the videoconference?

It's predominantly assumed that the "*Sitzungspolizei*" (police power in court) also extends to the place from which the participants are joining the proceedings in the courtroom.[132] According to the proponents of this opinion, this results from the fact that §§ 176, 180 GVG do not limit the *Sitzungspolizei* to the courtroom. Rather, the local limits are to be determined according to the meaning and purpose of § 176 GVG (ensuring the proper conduct of the court proceedings). Thus, according to the general view, the *Sitzungspolizei* also applies to the rooms and corridors adjoining the courtroom as well as at the location of a local inspection. A fortiori, this would then also have to apply to the place where a video hearing is held. In this case, the *Sitzungspolizei* supersede the domiciliary rights.

There is at least agreement that disturbances can be stopped by disconnecting the disturbing participant.[133] The view that affirms the *Sitzungspolizei* assumes so to the full extent. Thus, the removal of parties, witnesses, experts or parts of the audience as well as the removal for order in case of disturbance of order in the rooms of the connection is also permissible.[134] According to this, it must also be possible for the court to terminate the hearing in the event of repeated technical disruptions and to adjourn it in

[131] Draft Bill, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_%20Videokonferenztechnik.pdf?__blob=publicationFile&v=3>, p. 6, visited 08th of March 2023.
[132] LAG Düsseldorf 13 January 2021, 12 Sa 453/20, ECLI:DE:LAGD:2021:0113.12SA453.20.00; *H. Schultzky*, `Videokonferenzen im Zivilprozess`, 5 Neue Juristische Wochenschrift – NJW (2003), p. 313 at p. 316, 317; *D. von Selle*, in BeckOK ZPO, supra n.1, § 128a ZPO para. 9a; *J. Fritsche*, in MüKo ZPO supra n.2, § 128a ZPO para. 8; *R. Greger*, in Zöller ZPO, supra. n.89, § 128a ZPO para. 4; However, this is viewed differently by *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 2.
[133] *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para. 2.
[134] *H. Schultzky*, supra n.132, at p. 316, 317.

accordance with § 227 (1) ZPO.[135] In practice, it can be assumed that measures in the digital space will be limited to removing or muting participants of the proceedings.

7.15. Does the law (or best practice) provide any special rules for the participation of the party's advocate (e.g. together with the party at the same location, or in separate locations)?

The law does not contain any requirements for attendance. However, it is common for the party to attend the hearing from the office of their legal representative. However, there are no reliable figures on this.

7.16. Are there any special rules pertaining to the distribution of costs in case of videoconferencing?

(Generally, a videoconference will have the effect of reducing the costs of the proceedings; nevertheless, does the law provide special rules on who bears the costs if, for example, one party opposes the videoconference but the court decides on it anyway? Are there special rules regarding the bearing of costs incurred for technical equipment? Are there special rules regarding the bearing of costs for interpreters?)

There are no special regulations regarding the distribution of costs in the case of litigation by way of audio and video transmission. This is not necessary for the sole reason that the court costs in such a case differ at most minimally from the court costs that are assessed in a traditional hearing in persona. The lawyer's fees (based on the settlement according to *Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte* (Law on the Remuneration of Lawyers; hereafter: RVG) do not change either, as video hearings are basically treated in the same way as other hearings in terms of cost law.
An exception for negotiations by way of video and audio transmission is only provided for in no. 9019 List of costs of the GKG (*KV-GKG*). According to this special provision, the court charges expenses of EUR 15 per proceeding for each half hour or part thereof for the "use of video conference connections". The fee is based solely on the time, not on the number of participants.[136]

7.17. How does the law guarantee the publicity of videoconference hearings?

(Please also explain legal measures to avoid problems that could arise due to the public nature of the hearing (e.g. too many participants in the video conference).)

[135] *C. Resch and H. K. Erden*, supra n.103, at p. 49.
[136] *L. Klahr*, in J. Dörndorfer, H. Wendtland, K.-H. Gerlach, T. Diehn, Beck'scher Onlinekommentar Kostenrecht (C.H. Beck; Published online and continuously updated, update status 01.09.2020), GKG KV 9019 para. 6 seqq.)

§ 128a ZPO only provides the possibility for parties, and their legal advisers (para 1) as well as witnesses and experts (para 2) of being at another place during oral proceedings. Thus, according to the wording, participation from another place only applies to the persons listed in § 128a ZPO. The principle of publicity is still complied with in the current law by opening the courtroom to potential spectators.[137] Even if a party is connected via video and audio transmission, the judges must therefore also be present in the court.

[According to the draft bill, it will be possible for the court to be connected to the proceedings online in the future. In such cases, the legislator speaks of a 'vollvirtuellen Verhandlung` (full virtual proceedings). If a party is present in person, however, the public is to continue to be present in the courtroom. In the case of fully virtual proceedings, the proceedings are to be streamed for the public in a separate room, so that there will still be no possibility for spectators to connect themselves by way of audio and video transmission. The digital court public is discussed repeatedly[138] but has never been included in draft legislation].

7.18. The Recast Regulation (EU) 2020/1783 on the taking of evidence in civil or commercial matters provides in Article 20 the primacy of direct taking of evidence through videoconference if the court considers the use of such technology to be "appropriate" in the specific circumstances of the case. What do you consider would fall in the category of "inappropriate"? In addition, should form N in Annex I of said Regulation be supplemented in your opinion (explain how and why)?

The most problematic aspect of proceedings via audio and video transmission is the examination of witnesses. The admissibility of a witness examination in Germany is largely decided on the basis of whether the credibility of the witness is the main focus of the examination.[139]

The current video conferencing applications do indeed create a realistic interrogation in which all factors important for credibility come close to the face-to-face interrogation (perceptibility of facial expressions, gestures and voice pitch). However, this only applies as long as the possibilities of the

[137] *S. Pabst*, in T. Rauscher and W. Krüger, Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen Band 3 (C.H. Beck 2022) [MüKo ZPO], § 169 GVG, para. 32; *H. Diemer*, in C. Barthe and J. Gericke (eds.) Karlsruher Kommentar zur Strafprozessordnung (C.H. Beck 2019) § 169 GVG para. 8.

[138] E.g. in *A. Paschke*, `Digitale Gerichtsöffentlichkeit – Informationstechnische Maßnahmen, rechtliche Grenzen und gesellschaftliche Aspekte der Öffentlichkeitsgewähr in der Justiz` (Duncker & Humblot 2018) passim.

[139] *S. Roller*, `Dabei sein, ohne dabei zu sein? – Kriterien für die Gestattung einer gerichtlichen Verhandlung als Videokonferenz`, 13 Neue Zeitschrift für Sozialrecht – NZS (2022) p. 481 at p. 485; *A. Stadler*, in Musielak/Voit ZPO, supra n.10, § 128a ZPO para.7.

respective application can be fully utilised. However, the court has no control over the quality of the interviewee's camera and sound. Even a change in the seating position or the angle of the camera can produce an image that impairs perceptibility. Therefore, in case of doubt, the online questioning will not be able to bring about any findings that are relevant to the decision. Moreover, the examination of a witness in a place other than the courtroom lacks the effect on the witness caused by the court's sovereignty.

Therefore, despite the technical possibilities, a hearing in the courtroom is preferable. In Germany, the legislator has also recognised this problem and regulates the possibility of summoning the witness to a room in the court building to be determined by the court in the draft bill.

Likewise, in the opinion of the processor, a summoning to the premises of a resident notary could be considered.

In any case, Form N should be extended to include the possibility of summoning witnesses to an independent place where it is not possible to influence witnesses and where optimal technical conditions for the transmission are ensured.

Instructions for contributors

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [-]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to literature

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English, French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.
- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.

- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co- editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

Subsequent references follow the rules of 1.3.2 supra.

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well- known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

Subsequent references follow the rules of 1.3.2 supra.

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens-europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept, the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:
- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.

- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].