

MEMORIAL
Journal Officiel
Grand Duchy of
Luxembourg
DIGEST OF LEGISLATION

A - N ° 163 September 8, 2006

S u m m a r y

GENETIC FINGERPRINTS IN CRIMINAL MATTERS

Act of August 25, 2006 on the procedures for identification by genetic fingerprinting
criminal and amending the Code of Criminal Procedure. Page 2984

**Act of August 25, 2006 on the procedures for identification by DNA fingerprinting in
Criminal and amending the Code of Criminal Procedure.**

We Henri, Grand Duke of Luxembourg, Duke of Nassau
Our State Council heard;
The concurrence of the House of Deputies;
Considering the decision of the Chamber of Deputies June 28, 2006 and the Council of State on July 14, 2006, there is no reason to second vote;

Have ordered and order:

Chapter I. Subject

Art. 1. This law regulates the use of DNA to identify a person as part of preliminary investigations and preparation instructions in criminal cases.

The processing of such data is subject to the provisions of Articles 6, paragraph (3) and 8, subsection (1) of the Act of August 2, 2002 on the Protection of Individuals with regard to processing of personal data.

Chapter II. Establishment of the Genetic Profile

Art. 2. The establishment of an alphanumeric code based on the analysis of several markers of deoxyribonucleic acid (hereinafter "DNA profile"), made from human cells are detected or removed in accordance with Articles 48-3 to 48-8 of the Code of Criminal Procedure, and the processing of data relevant staff must be made in accordance with the provisions of this Act.

Art. 3. (1) The DNA profiles are established, after amplification of DNA of human cells by the application of polymerase chain reaction, based on a minimum of seven DNA markers.

(2) As a complementary test, mitochondrial DNA can also be prepared as comparative method.

(3) A grand-ducal ruling determines the markers referred to in paragraph (1) that are used in addition to markers on X and Y chromosomes.

Art. 4. (1) Prior to the establishment of the DNA profile itself in accordance with Articles 1 and 2, the expert to proceed to a description of cells and orientation tests before to determine the and the origin of biological material.

(2) The expert compares the DNA profile of cells collected with the cell discoveries. He addresses this subject in a substantiated report to the state prosecutor or investigating judge who ordered the DNA analysis. This report contains, in addition to the data given in the statement of the sample, a description of samples, the other tests that were eventually made, the results of DNA analysis, the result of the comparison of profiles DNA, an interpretation of the meaning of comparison and a statistical probability indicating how a positive identification differs from a fortuitous match.

(3) In cases where no results were obtained for cells taken or if the DNA profile does not contain enough information to enable a comparison, the expert informs the state prosecutor or the investigating judge who ordered the DNA analysis regarding the other techniques that could still be used for to make any comparison.

(4) One may only be designated as an expert under this section as a person who holds a doctorate of Medicine, is a Doctor of Pharmaceutical Sciences, a Doctor of Science, PhD in biotechnology or PhD in bio-engineering on the one hand, and who has practical experience of at least three years in analysis of DNA, establishment and comparison of DNA profiles, or the sort.

The expert should be assigned to a laboratory with a service held on a permanent basis to receive traces of cells.

The requirements of this paragraph shall be deemed satisfied if the expert or the laboratory has received accreditation in a member state of the European Union.

Chapter III. The processing of personal data relating to DNA

Section I. Processing forensic DNA

Art. 5. It is meant by "processing forensic DNA" inclusion in a database of DNA profiles obtained through a preliminary inquiry or preliminary investigation in accordance with the Code of Criminal Investigation, modification, consultation, comparison, storage and communication for the power to directly or indirectly identify the persons referred to in Article 48-3 of the Code of Criminal Procedure.

Art. 6. (1) The processing of a DNA profile consisting of the insertion of this profile, or related data such as referred to in Article 13, in the DNA forensic processing is done by decision of the state prosecutor or judge who ordered the establishment of the DNA profile at issue in the context of a preliminary inquiry or a preliminary investigation before it.

(2) The inclusion in the treatment of forensic DNA profiles of DNA prepared on the basis of human cells found within the meaning of Article 48-4 paragraph (2) of the Code of Criminal Procedure, or information y related as referred to in Article 13 is carried by the state prosecutor or the judge or by a police officer acting on instructions from one of these magistrates.

(3) An insertion in the database of a profiles of DNA prepared on the basis of human cells levied on a specific person, voluntarily or under coercion, is performed when the comparison referred to in Article **48-6 paragraph (2) of the Code of Criminal Procedure** has been positive. If the DNA profile question is already the subject of forensic DNA processing, the relevant information as referred to in Article 13 y are added.

In case of negative comparisons, the DNA profile is not inserted DNA forensic processing.

Art. 7. (1) A DNA profile has been assigned to a specific person and related information may be held as forensic DNA (in the database) until:

1. the person to whom it relates has been acquitted by a court decision casting res judicata, for the facts giving rise to the establishment of his DNA profile, or
2. the facts giving rise to the establishment of the DNA profile in question are **prescribed**, or
3. after a period of 10 years as elapsed following the death of that person.

(2) However, notwithstanding the preceding paragraph, the information listed there may still be maintained database if the DNA profile in question has been a positive comparison in relation to the facts of a preliminary inquiry or preliminary investigation to justify keeping this information in the DNA database.

(3) Upon conviction, casting res judicata, a person to imprisonment or a heavier penalty, the data on the DNA profile of the person subject to the processing DNA convicted under Section II.

(4) The DNA profile that could not be attributed to a specific person can no longer be in the database 30 years after its establishment.

(5) Any processing of the data undergoing processing other than for DNA database entry, consultation, comparison or addition of any of the information referred to in Article 13 must be authorized by the Attorney General of State or judge appointed by him for that purpose.

Section II. Processing DNA of the convicted

Art. 8. (1) is meant by "processing DNA convicts' inclusion in a database of DNA profiles of persons convicted under the provisions of the Code of Criminal Procedure, amendment, consultation, comparison, storage and communication in order to be identify directly or indirectly the persons referred to in Article 48-3 of the Code of Criminal Procedure.

(2) Without prejudice to Article 48-6 paragraph (2) of the Code of Criminal Procedure, **cannot be the convicts DNA treatment that:**

1. DNA profiles as part of DNA forensic processing which could be attributed to a person determined having been finally sentenced to imprisonment or a sentence more heavy and
2. DNA profiles established pursuant to Article 48-7 of the Code of Criminal Procedure.

(3) The DNA profiles in the preceding paragraph shall be inserted DNA processing sentenced on decision of the State Attorney General or the judge delegated by him for that purpose.

Art. 9 (1) DNA profiles being convicted of DNA processing are available for purposes of consultation and comparing that state prosecutor and the judge entered a preliminary inquiry or a preliminary investigation in which a DNA profile has been established, and experts in the interests their assigned missions and police officers acting on instructions from the state prosecutor or judge instruction.

(2) Any treatment of data undergoing processing other than DNA of the condemned the consultation or comparison must be prior approval of the Attorney General of State or judge appointed by him to this end.

Art. 10. A DNA profile and the personal data related thereto, may no longer be the object of the convicted DNA storage 10 years after the death of the person to whom the information relates.

Art. 11. (1) The provisions of Articles 14, 6, paragraphs (1) and (3), 7, paragraphs (1) to (4), 8, subsections (2), 9 subsection (1) and 10 are to be observed on nullity of sentence.

(2) The provisions of Articles 48-2 and 126 to 126-2 of the Code of Criminal Procedure shall apply as appropriate requests for invalidation of actions taken under sections 2 to 10 and 13 to 16 of this Law, depending on whether the act in question was posed as part of a preliminary inquiry or preliminary investigation.

Art. 12. (1) Except for situations envisaged by Article 11, the person concerned may, by simple application submit an application for annulment of an act done by the Attorney General of State in pursuance of this Act to the council chamber of the district court of his domicile or place of habitual residence or, failing that, the Luxembourg district court. This request must be filed under penalty of foreclosure within ten days from knowledge of the act by the complainant. The request is communicated to the Attorney General of State through the Registry, which notifies the parties of the day, time and place of the hearing at least eight days in advance by letter. The person concerned, his counsel and prosecutors have the sole right to attend and provide submission to make such requisitions, verbal or written, that they deem appropriate. The council chamber decides on the request for a ruling that is subject to an appeal.

(2) The appeal is brought before the council chamber of the Court of Appeals. It is recorded in a register kept for that purpose at the Registry of the District Court having jurisdiction over the council chamber. It must be filed within five days, which runs against the Crown from the date of the order and against the person concerned from the date of notification of the order. The clerk notifies the respondent of the notice of appeal within twenty-four hours of recording on the register.

(3) The person concerned, his counsel and the Attorney General of State, which are informed by the Registrar at least eight days in advance of the day, time and place of hearing, have the sole right to attend and provide such written submissions and to make such requisitions, verbal or written, that they deem appropriate.

(4) The requirements of this section shall be observed on pain of nullity, unless the person concerned or his counsel is waived. Notifications and warnings listed in this section shall be made in the manner provided for notification of law enforcement. An appeal in cassation is open in the manner prescribed by the amended Act of February 18, 1885 on the appeals and the appeal procedure.

(5) An application for revocation under this section is inadmissible when the acts or argued for invalidity were raised by or on instructions from the state prosecutor or judge in a case under section 48 -- Paragraph 3 (1) of the Code of Criminal Procedure.

Section III. Provisions common to the treatment of forensic DNA and convict DNA

Sample v profile?

Art. 13. (1) The DNA profiles under this Act may only be treated with the following information:

1. full name, date of birth and sex of the person from whom the cells were collected or, if discovered human cells, the exact place, date and time that human cells have been discovered;
2. the file reference of the preliminary inquiry or preliminary investigation in which the sample was taken or human cells found;
3. The number assigned to the sample of human cells when delivered to the expert;
4. the exact description of the laboratory and the identity of the expert who conducted the profiling of DNA;
5. the name of the magistrate ordering the sample;
6. the acts for which the profiling of DNA has been ordered;
7. or the qualities by which the DNA profile of a particular person has been established and, where applicable, the dates at which these qualities have changed;
8. information on positive comparisons were made between the DNA profile in question and other DNA profiles;
9. provided that the DNA convicted treatment is concerned, the jurisdiction, date, penalties and the acts for which a sentence has been pronounced;
10. information referred to in Article 14.

(2) A DNA profile is set to be regarded as personal data within the meaning of the Act of August 2, 2002 on the Protection of Individuals with regard to processing of personal data, from the moment alphanumeric code of the DNA analysis has been combined with information on the individual in question can be identified.

Art. 14. (1) At each consultation with a DNA profile of each comparison between different DNA profiles or each data modification on a DNA profile, the following should be registered:

1. the full name of the person who carried out the operation in question;
2. the date and time of the transaction;
3. the file reference of the preliminary inquiry or preliminary investigation in which the transaction took place.

(2) The consultation DNA data managed by states, international organizations or institutions shall be in accordance with paragraph (1) of this section.

Art. 15. (1) The processing of forensic DNA and the DNA of convicts are carried out under the responsibility of the State Attorney General may delegate the exercise of its powers to a prosecutor general.

(2) The processing of forensic DNA and the DNA of convicts can not be any interconnection between them or with other drugs to treat personal data, other than those provided by this Act.

Art. 16. The communication data processing and DNA forensic DNA convicts is permitted:

1. national judicial authorities for all that is within their competence;
2. experts in the interests of their assigned missions and police officers acting on instructions from the state prosecutor or judge in the preliminary investigations and preparatory instructions that these judges are seized;
3. other states, international organizations or institutions, under the provisions of international law.

Chapter IV. Provision supplementing and amending the Code of Criminal

Art. 17. The Code of Criminal respectively amended and supplemented as follows:

1. It is added to Title II of Book I of the Code of Criminal Procedure a chapter V as follows:

Chapter V. Identification procedures by DNA

Art. 48-3. (1) A profile of deoxyribonucleic acid (hereinafter "DNA") of a person can not be established in order to compare this profile with other DNA profiles for people to identify affected by assumptions provided for in Articles 39 paragraph (4), 44 paragraphs (2) and (4), subsection 45 (6), 47-1 and 51 paragraph (2) and for the purpose of applying Article 48-7. In all cases, DNA profiles can be established on basis of segments of non-coding DNA.

(2) The state prosecutor, in accordance with Article 39 paragraph (4), subsection 44 (2), paragraph 45 (6) and 47-1, and the judge in accordance with Articles 44 paragraph (4) 51 paragraph (2) may direct that such a collection of human cells on a person for purposes of establishing a DNA profile for comparison.

(3) Except in cases provided by Articles 39 paragraph (4), 44 paragraphs (2) and (4), subsection 45 (6) and 48-7, the collection of human cells can be ordered only if the cells human have been found and collected during the preliminary inquiry or preliminary investigation with the state prosecutor or judge is seized.

Art. 48-4. (1) The sample of human cells required to establish the DNA profile is obtained by buccal swab, collecting hair follicles or blood sampling. The first two samples can only be executed by a police officer while the blood test can be performed by a physician acting in the presence of a police officer.

(2) The state prosecutor and the judge can also order it proceeded to establish a DNA profile on the basis of human cells that have been discovered and collected as part of 'preliminary inquiry or preliminary investigation before them. DNA profiles are well established treatments being provided in Article 48-6 paragraphs (1) to (3) and Article 6 paragraph (2) of the Act of August 25, 2006 on genetic fingerprints in criminal matters.

Art. 48-5. (1) The person against whom a sample of human cells has been ordered by the state prosecutor or the judge is informed of this decision. In case of agreement of the person concerned to submit to the taking of human cells, it must be informed prior to the sample, the circumstances of the facts covered by the preliminary inquiry or preliminary investigation and in particular the fact she has the choice between the three sampling procedures specified in Article 48-4, paragraph (1) and the DNA profile developed on the basis of the levy on his person will be referred for treatment at Article 48-6, paragraphs (1) to (3) of this Code and Articles 6, paragraph (3) and 8, subsection (2) of the Act of August 25, 2006 on impressions genetic criminal.

(2) Mention is made of the information referred to in the preceding paragraph in the written agreement of the person concerned. If it has not yet reached the age of 14 years, the agreement must be given by his legal representative.

(3) In the absence of agreement of the person concerned, sampling can be exercised under the physical restraint if the person appears to be related directly to the achievement of the facts involved and if those facts is sentenced criminal or misdemeanor, the maximum is less than two years imprisonment. Physical restraint is excluded for the blood test. The refusal of the person concerned to submit to the taking of human cells will be recorded in the minutes referred to in Article 48-8.

Art. 48-6. (1) The state prosecutor and the judge shall appoint a qualified expert within the meaning of Article 4, paragraph (4) of the Act of August 25, 2006 on DNA in criminal profiling of DNA of human cells harvested.

(2) The DNA profile can be established and compared:

1. with other DNA profiles prepared under preliminary investigation or preliminary investigation in which the DNA profile in question was established, and
- 2 with the DNA profiles of people whose profile has been established pursuant to Articles 48-3 to 48-5 and are the subject of forensic DNA treatment covered by the Act of August 25, 2006 on DNA in criminal matters, and
3. with the DNA profiles that are the subject of treatment by DNA sentenced under the Act.

(3) In the interest of the truth, the processing of data consisting of consultation and comparison of DNA profiles are made by the state prosecutor or the judge entered a preliminary investigation or a preliminary investigation in which the establishment of a DNA profile appears justified or has been made and that, under the responsibility of these judges, by experts in the interests of their assigned missions and the police officers acting on instructions from the state prosecutor or judge.

(4) When human cells were taken from a person determined to establish a DNA profile, voluntarily or under coercion, the result of the comparison referred to above shall be communicated to the complainant within two months after the state prosecutor or the judge who ordered the comparison notes. This communication is done either by letter in the mail, or verbally by the state prosecutor or the judge who ordered the comparison, or by a police officer acting on instructions from one of these magistrates. The verbal communication of the result must be a record or take evidence. Reasoned decision of the state prosecutor or investigating judge who ordered the comparison in question, the forwarding of the result can be extended to one year if the interest of the preliminary inquiry or preliminary investigation is required . The individual has the right, within a period of 10 days from the

communication, to ask the state prosecutor or judge to establish a DNA profile by a second expert to be designated under the provisions of paragraph 1.

Art. 48-7. (1) will be conducted as required under physical restraint, a collection of human cells for the purpose of establishing a DNA profile on each person who has been convicted by a final court decision in force of res judicata to a term of imprisonment or a heavier penalty for:

1. violations of attacks and plots aimed at the person of the Grand Duke, the Grand Ducal family, the form of government as well as internal and external security of the Grand Duchy of Luxembourg, under sections 101 to 133 of the Penal Code;
2. terrorism offenses under Articles 135-1 to 135-6 of the Penal Code;
3. crimes of torture under Articles 260-1 to 260-4 of the Penal Code;
4. offenses of conspiracy and participation in a criminal organization provided for in articles 322 to 325 of the Penal Code;
5. the offenses of kidnapping of minors under Articles 364 to 371-1 of the Penal Code;
6. offenses of indecent assault and rape under the Articles 372 to 378 of the Penal Code;
7. offenses relating to prostitution, exploitation and trafficking in human beings under Articles 379 and 379bis of the Penal Code;
8. sexual offense in connection with minors under section 384 of the Penal Code;
9. offenses of murder, assassination, parricide, infanticide, poisoning, homicide unskilled murder and assault and battery under the articles 393 to 409 of the Penal Code;
10. violations of attack on individual freedom under Articles 434 to 438 of the Penal Code;
11. the crime of hostage taking under Article 442-1 of the Penal Code;
12. offenses of robbery and extortion under the sections 467 to 476 of the Penal Code;
13. offenses relating to arson under Articles 510 to 520 of the Penal Code;
14. offenses under the Act of August 8, 1985 on the suppression of genocide.

(2) The placement decision made pursuant to Article 71 of the Penal Code for an offense under subsection (1) is considered, for purposes of applying this section to a conviction for this offense.

(3) The establishment of DNA profiling in implementing this Article shall be made under the authority of the Attorney General of State or magistrate appointed for this purpose in accordance with Articles 48-3 paragraph (1), 48-4 subsection (1) 48-5, 48-6 paragraph (1) and subsection 48-8 (1) and Articles 2 to 4 of the Act of August 25, 2006 on DNA in criminal matters.

(4) The provisions of this Article shall also apply to persons who have been convicted by a foreign court and serving all or part of their sentence in Luxembourg, where the conviction meets the requirements provided by paragraph (1) of this section. To determine if the person has been convicted of an offense under subsection (1), the acts for which the sentence has been imposed are considered even though, according to Luxembourg law and the law of the State conviction, the offense is not qualified by an identical or similar terminology and there is no correlation of the components of rights violations in Luxembourg and abroad.

(5) The provisions of this section apply to persons whose conviction became final after October 31, 2006.

Art. 48-8. (1) At each sampling or discovery of human cells to be the establishment of a DNA profile, a report must be compiled showing:

1. place, date and time that these transactions took place;
2. the identity and qualifications of the person who carried it out;
3. conditions in which removal or discovery has been made;
4. conditions in which human cells have been preserved;
5. the reference file corresponding to the preliminary inquiry or preliminary investigation in question.

(2) In the context of removal, the report must also provide information concerning:

1. agreement or refusal of the person concerned, respectively, his legal representative, to submit to them;
2. the name, date and place of birth and sex of the person concerned;
3. through the application of Article 48-7, the reference to the conviction in question and the decision Attorney General of State to perform the sampling.

(3) Statement in connection with a sample transaction or discovery of human cells to be the establishment of a DNA profile is to establish a judicial police officer.

Art. 48-9. (1) The provisions of Articles 48-3 to 48-8 are observed **on pain of nullity**.

(2) The provisions of Articles 48-2 to 126-2 and 126 respectively apply to requests for invalidation of actions taken pursuant to Articles 48-3 to 48-6 and 48-8 depending on whether the act in question was placed under preliminary investigation or as part of a preliminary investigation. "

2. Article 39 paragraph (4) of the Code of Criminal Procedure is amended as follows:

'(4) The state prosecutor may order the operations needed to identify the detainee, including the taking of fingerprints and photographs, and the taking of human cells for the establishment of a DNA profile in accordance with Articles 48-3 to 48-6 and 48-8."

3. Article 40 of the Code of Criminal Procedure is completed by a 2nd sentence reads as follows:

"However, the removal of human cells under physical restraint for the establishment of a DNA profile can be made only if the facts carry a felony or a misdemeanor whose maximum sentence is equal to or greater than two years of imprisonment. "

4. Paragraphs (2) and (4) of section 44 of the Code of Criminal Procedure are completed respectively by the following sentences:

"(2) (...) The state prosecutor ordered all measures necessary for the identification of the corpse. At this end the provisions of Articles 48-4 paragraph (2) and 48-8 apply.

(4) (...) In this case, the judge may proceed in accordance with Articles 48-4 paragraph (2) 48-8. "

5. Subsection (6) of Article 45 of the Code of Criminal Procedure is completed by a 4th paragraph to read as follows:

"In cases under paragraph 2 of this subsection, the state prosecutor may also order it sampling is of human cells to establish a DNA profile, provided that this measure is absolutely necessary to establish the identity of the person stopped. The provisions of Articles 48-3 to 48-6 and 48-8 are applicable. "

6. It is inserted in the Code of Criminal item 47-1 to read as follows:

"Art. 47-1. (1) By order of the state prosecutor, the police officer may require any person's prior written consent to carry on his person a sample of human cells for the establishment a DNA profile for comparison. In case of agreement of the person concerned shall be conducted in accordance with Articles 48-3 to 48-6 and 48-8.

(2) By order of the state prosecutor and with the consent of the person with whom the transaction takes place, the police officer may also, in the manner provided in Article 33, proceed to the seizure of human cell discoveries. The provisions of Article 48-4 paragraph (2) and 48-8 are applicable. "

7. In Article 51 of the Code of Criminal Procedure, it is inserted after paragraph (1) subsection (2) after paragraph (2) becoming the current paragraph (3):

"(2) The judge may also proceed in the interest of the truth, according to Articles 48-3 to 48-6 and 48-8."

Chapter V. Final Provisions

Art. 18. Link to this Act may be abbreviated using the terms "law of August 25, 2006 on DNA in criminal matters.

Art. 19. This Act comes into force October 31, 2006.

Command and order that this law is inserted in the Memorial to be performed and observed by everyone on the thing.

Le Ministre la Justice, Château de Berg, le 25 août 2006.

Luc Frieden Henri

Doc. parl. 5356; sess. ord. 2003-2004; 2004-2005 et 2005-2006

2989

Editeur: Service Central de Législation, 43, boulevard F.-D. Roosevelt, L-2450 Luxembourg