

**STUDY ON THE APPLICATION OF
COUNCIL REGULATION (EC)
N° 1206/2001, ON COOPERATION
BETWEEN THE COURTS OF THE MEMBER
STATES IN THE TAKING OF EVIDENCE IN
CIVIL OR COMMERCIAL MATTER.**

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We could not have prepared this study without feedback from the professionals mentioned above.

1 EXECUTIVE SUMMARY

The project

On 28 May 2001 the Council adopted Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.01, p. 1). Point 2 of the recitals states that “for the purpose of the proper functioning of the internal market, cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.” The Regulation came fully into force on 1 January 2004.

Article 23 of the Regulation provides that “no later than 1 January 2007, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.”

By monitoring certain provisions of the Regulation it should be possible for the Commission to establish whether rules which appeared to cause implementation difficulties for some Member States were applied without difficulty by others. The information should thus be of particular interest to Member States for their reciprocal information.

Against this background, the European Commission concluded a contract with MainStrat to obtain an empirical analysis of the application of the regulation. MainStrat has thus produced this Study Report, which will be used as input in the preparation of the Commission’s report referred to in Article 23 of the Regulation.

The study is based on the feedback provided by **Central Bodies and professionals from many judicial sectors across all applicable Member States (all 25 EU Members States except Denmark). This includes** private lawyers, *huissiers*, solicitors, judges, other public servants, etc).

The feedback was collected during a survey carried out over three months, from November 2006 to January 2007, on a selected group of **over 11,000** professionals across **all 24 EU Member States** where the Regulation applies. One of the main features of this survey is the detailed quality of the comments provided by the interviewees.

The results

GENERAL CONCLUSION

Our general conclusion is that the Regulation, in general terms, has served to simplify and speed up evidence-taking within the framework of the existing cooperation between Member States. In this sense, the Regulation satisfies its two main objectives; firstly, to **simplify** cooperation between Member States and secondly, to **speed up** evidence-taking procedures across the EU. Simplification has been brought about mainly due to the introduction of direct court-to-court communication, and by the introduction of standard forms. As far as speeding up the process is concerned, it can be concluded that most requests for the taking of evidence are executed within 90 days as foreseen by the Regulation, which is faster than before the Regulation came into force. Nevertheless, there are several issues that could be improved.

LIMITED APPLICATION OF A LITTLE-KNOWN REGULATORY INSTRUMENT.

Across all the replies to the three questionnaires, we saw a large number of respondents opting for “difficult to say” and “don’t know / no answer”. This fact demonstrates that the facilities offered by the Regulation have not been greatly used, a point that was also made clear in the replies relating to the number of applications for the taking of evidence submitted in accordance with the Regulation. This limited application appears to be attributable either to legal practitioners’ lack of familiarity with the instrument or to the difficulty of changing previous, well-established habits. However, justification for both lack of familiarity and a failure to adapt can be found in the newness of the Regulation. In this respect, it should be borne in mind that the survey conducted – referring to practice in 2005 – relates to the second year of application of the procedures provided for in the Regulation. For this reason, the conclusions drawn from this survey should be interpreted in the light of the limited practical experience in application of the Regulation.

COURTS.

The legal practitioners’ assessment of the effectiveness of the requested and requesting courts is, broadly speaking, positive. However, the courts’ positive assessment depends on the Member State to which they belong, which demonstrates that practice varies from one Member State to another. This does not help reinforce the trust in the Community that European citizens might have.

CENTRAL BODIES.

There is a positive evaluation of the effectiveness of the central bodies, although in this case effectiveness also depends on the Member State concerned. Meanwhile, the central bodies have largely fulfilled all the duties entrusted to them by the Regulation. Among these duties, special mention should be made of the proportionally high number of cases in which the central bodies have transmitted

requests to the competent courts of their States. Here we can perceive a significant degree of attachment on the part of the legal practitioners to the way things were done prior to the Regulation, and especially to the system of central bodies provided for in the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters.

FORMS.

The obligatory use of standard forms is one of the Regulation's most significant contributions vis-à-vis the previous rules. The forms help to simplify and speed up the process and, therefore, to attain the main goals of the Community rules. They facilitate the work of the legal practitioners and make the probative process faster and more flexible.

The study reveals that problems stemming from the use of standard forms are attributable to inadequate training on the part of those participating in the procedure. On many occasions we were able to observe how the lack of training and specialisation of civil servants in the departments of the Member States which come into contact with the procedure prevent its being used to the full.

CHANNELS AND MEANS OF COMMUNICATION.

The use of communications technology when taking evidence in an EU State other than that where the main proceedings are being brought is fundamental for meeting the objective of *swiftness* set out in the Regulation. However, the study reveals that most of the justice administrations in the Member States only have the appropriate means and resources installed to a limited extent. The lack of compatible infrastructure restricts those countries that are more advanced and leads to huge differences depending on whether a procedure is followed in one State or another. This results in inequalities for European citizens when it comes to guaranteeing their effective legal protection, since the degree of protection will vary depending on the State where they have to follow the procedure in question. For all these reasons, the implementation of the Regulation should be accompanied by a campaign to modernise the infrastructures of the States' administrations. The use of communications technology would make direct communication easier. The monitoring of evidence-taking in a different Member State by means of videoconferencing would make the probative process more trustworthy and efficient. The use of communications technology, particularly videoconferencing, would provide for a genuine virtual immediacy between the various people involved in the procedure.

DIRECT TRANSMISSION SYSTEM.

The direct transmission system is one of the most noteworthy new features of this Regulation. The direct transmission system contributes to greater procedural swiftness in the taking of evidence and constitutes one of the biggest steps forward in respect of the previous rules. However, the limited knowledge of this option and the lack of practice in making use of it lead to its only being employed on an irregular basis, and the central bodies are still often called upon to pass on the request to the competent courts. Therefore direct communication between the

competent courts needs to be encouraged and the importance of cooperation between the authorities of the different Member States needs to be stressed.

DIRECT TAKING OF EVIDENCE. This is one of the Regulation's most important innovations. Despite receiving a generally positive response from legal practitioners, who consider that it helps speed up and simplify evidence-taking abroad, this method has hitherto been used very little. Lack of knowledge and the voluntary nature of the probative measures to which it is limited appear to reduce the practical utility of this procedure.

THE ECONOMIC COSTS OF ASSISTANCE. Executing a probative procedure in an EU Member State other than that in which the main proceedings are being held should not imply a greater cost. There should be a guarantee that this is free of charge in order to avoid any increase in the differences in the taking of evidence in the various Member States to the detriment of cross-border cases. Despite this, cases in which a particular specialist is required to participate or where the use of a non-standard procedure is requested in the place where the evidence is being taken may give rise to a claim for the expenses arising.

INTERPRETATION OF THE REGULATION.

The interpretation of the Regulation, and especially the concepts of "civil or commercial matters", "evidence" or "court", looks like a relatively problematic issue, although not to such an extent as to undermine the Regulation's usability.

2 FRAMEWORK OF THE STUDY

2.1 CONTEXTUAL FRAMEWORK OF THE STUDY. THE 1206/2001 REGULATION.

2.1.1 INTRODUCTION AND BACKGROUND

The creation of an area of freedom, security and justice, where the free movement of people, goods, services, and capital can be performed with full legal guarantees, has always been a fundamental concern since the inception of the European Union, and a necessity for the achievement of the single market.

Despite its importance, cooperation in justice and home affairs has taken more time than expected. It was not until the application of the European Union Treaty of 1992, known as the Maastricht Treaty, that this dimension of judicial cooperation was finally rooted in the “third pillar”.

The entry into force of the Amsterdam Treaty in 1999 meant a great advance in this matter, incorporating it into the “first pillar” within the new Title IV (article 61) and specifying that in order to progressively establish an area of freedom, security and justice, the Council would adopt measures in the field of judicial cooperation in civil matters having cross-border implications, in conformance with article 65. Among other measures, this would include judicial cooperation for the taking of evidence in civil or commercial matters

It is precisely in this normative context, and responding to it, that the new Council Regulation 1206/2001, of 28 May 2001 (OJ L 174, June 27 2001) is placed. This Regulation is intended to contribute to the proper functioning of the internal market by improving, simplifying and accelerating the cooperation between courts in the taking of evidence.

Some background to Regulation 1206/2001 can be found in both the Hague Conventions of 1st March, 1954 (on civil procedure) and 18th March, 1970 (on evidence-taking in foreign countries, within civil or commercial matters)

-The Hague Convention of 1st March, 1954 on civil procedure:

This relies on diplomatic and consular institutions for evidence-taking in other countries, always through so-called “Letters Rogatory” (request made by a court in one country to that of another country). Nevertheless, two countries could agree (through bilateral agreements) on direct contact between their courts in order to issue the request. The receiver would usually proceed in line with his own country’s legislation, but, exceptionally, he might follow a different procedure if this was not contrary to his own internal legislation (article 7).

“Letters Rogatory” could only be rejected for specific reasons listed in the Convention. Among the most relevant was that, according to the required country, the task to be carried out was not under the auspices of the judiciary.

Proceeding with “Letters Rogatory” did not entitle the requested nation to the reimbursement of taxes or expenses of any kind. It had the right to claim only for expenses incurred in case of compensation paid to witnesses or experts, such as expenses caused by the intervention of a civil servant in the case of wilful failure to appear by a witness or in the case of special procedures.

-The Hague Convention of 18th March, 1970 on taking of evidence abroad in civil or commercial matters

This Convention amended the procedures put in place by the Convention discussed above in an attempt to improve and solve its failings (article 19). It replaced articles 8 to 26 of the former 1954 Convention for those countries which signed the new one.

The new Convention created two new different procedures: firstly, it establishes the taking of evidence by a foreign judicial authority through a “Letter Rogatory” addressed to a Central Body designated by each country. Secondly, it allows diplomatic servants, consular agents, or “commissaries” to undertake direct proceedings for the taking of evidence (article 15-17)

The 1970 Convention is only applicable to taking of evidence within judicial procedures. Arbitration is expressly excluded. The “Letter Rogatory” must be written in English or French, although those addressed to a country’s own courts could remain in their own official language. Again, the receiver proceeds in accordance with his own country’s legislation (article 9) but, exceptionally, he might follow a different procedure if this was not against his own internal legislation or impossible to fulfil.

Generally, “Letters Rogatory” are executed through Central Authorities. The jurisdictional authority concerned will submit the “Letter Rogatory” directly to the Central Authority of the Member State where the competent judicial authority exists. It will be the Central Authority who will forward such requests to the competent authority for their execution (article 2). Once the “Letter Rogatory” has been executed, the competent authority will send the requesting judicial authority the documentation of the execution. In order to do so, the competent authority will use the same channel – the Central Authority - that the requesting authority used.

The “Letter Rogatory” must contain adequate information concerning (article 3): a) The requesting and, if possible, the requested authority; b) identity and address of the parties and, if applicable, their representatives; c) the nature and subject of the action, as well as a summary of the facts; d) the evidence that needs to be taken or any judicial measures that need to be taken. Where applicable, it will also specify:

a) names and addresses of the people from who a declaration needs to be taken; b) documents or other objects that require examination; c) requests for the declaration to be taken under oath or solemn declaration without oath and, if applicable, the indication of the “formula” to be used; f) any special process whose application is requested in accordance with article 9

The “Letter Rogatory” procedure could only be rejected by the requested country in cases where, according to its rules, the judiciary was not competent to execute the task, or the task might be detrimental to the country’s sovereignty and/or security.

One of the main innovations of Regulation 1206/2001, compared to the Hague Convention, is that it bypasses the system of Central Authorities as a general mechanism for the taking and practice of evidence, creating a direct communication system between requesting and requested jurisdictional authorities. The direct communication system aims to simplify and also accelerate the taking of evidence between Member States.

2.1.1.1 Binding all the Member States

On 28 May 2001, on the basis of a proposal made by the Federal Republic of Germany¹ and after a favourable report by the European Parliament on 27 February 2001² and the opinion of the Economic and Social Committee of 28 February 2001³, the Council adopted Regulation 1206/2001.

This text draws its inspiration from the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters, and is made up of a Preamble, 22 recitals, 24 articles and an annex comprising ten forms identified by the letters A to J.

One of the reasons for the adoption of Regulation 1206/2001 is the fact that there is **no similar instrument** that binds all the Member States. The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters is not applicable in all the Member States of the Regulation (the 1970 Hague Convention is not applicable in four of the 26 Member States party to the Regulation because these countries have either not acceded to it or have not ratified it).

Germany	X
Austria	
Belgium	
Bulgaria	X
Cyprus	X
Slovakia	X

¹ OJEC 314 of 3 November 2000.

² Report of the European Parliament of 27 February 2001 on the Federal Republic of Germany’s initiative with a view to the adoption of a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (A5-0073/2001)

³ ESC 228/2001-2000/0823 of 28 February 2001. OJEC C139 of 11 May 2001

Slovenia	X
Spain	X
Estonia	X
Finland	X
France	X
Greece	X
Hungary	X
Ireland	
Italy	X
Latvia	X
Lithuania	X
Luxembourg	X
Malta	
Netherlands	X
Poland	X
Portugal	X
United Kingdom	X
Czech Republic	X
Romania	X
Sweden	X

(X) Member States party to the Regulation which are also contracting states to the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters.

2.1.2 THE CREATION OF AN AREA OF FREEDOM, SECURITY AND JUSTICE IN THE EU

International society today is characterised by the growing globalisation of human relations. The complexity inherent in the fact that this society is structured into States with their own sets of laws and their own jurisdictional machinery, together with the heterogeneous nature of the relations carried on therein, turns into a cornerstone for international cooperation in various fields. Cooperation and assistance between States sometimes appears the only way of finding effective solutions to the various problems stemming from the aforesaid globalisation of relations.

In the European Union (EU) the objective of judicial cooperation in civil matters is to maintain and develop an area of freedom, security and justice in which the free movement of persons is guaranteed.

The Member States' different rules and regulations can create an obstacle to the attainment of a single Community area of justice. The increase in cross-border relations highlights the procedural differences that exist in the different legal systems of the Member States. These differences can end up hampering European citizens' access to justice, lead to excessive procedural delays and raise the cost of

cross-border proceedings. Thus, the basic reason for harmonising procedures in civil matters at Community level is to guarantee the protection of the same civil rights in the different States, as a necessary measure for the creation of an area in which there is genuine freedom of movement for persons.

The definitive impetus towards harmonisation of procedural laws in civil matters was obtained with the “Communitarisation” of judicial cooperation in civil matters in the Treaty of Amsterdam of 1999, since judicial cooperation in civil matters then became subject to regulation in the First Community Pillar via the introduction of the new Title IV of the Treaty Establishing the European Community, “*Visas, Asylum, Immigration and other Policies related to Free Movement of Persons*”. The new Article 61 of the Treaty establishing the European Community includes a list of subjects on which possible Community measures are established, including judicial cooperation in civil matters, which is regulated in greater detail in Article 65 of the Treaty establishing the European Community.

Article 65 constitutes the key judicial basis for the system of judicial cooperation in civil matters and harmonisation of civil procedure. Pursuant to the aim of gradually establishing an area of freedom, security and justice, the following measures will be embarked upon:

“Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents;*
- cooperation in the taking of evidence;*
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases.*

b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”.

The Treaty of Amsterdam was therefore the definitive boost to the development of the area of freedom, security and justice. And Article 65 of the Treaty establishing the European Community can be seen as a starting point for the gradual and obligatory harmonisation of procedures followed in subsequent years and reflected in the increase in the EU’s regulatory activity on the subject.

In order to successfully create a genuine European Area of Justice, the Council places emphasis on three areas: better access to justice in Europe, the reciprocal recognition of judgements, and a better convergence of the rules of civil procedure. To this end, it requested the Commission to adopt a programme, at the latest by December 2000, incorporating the measures to be implemented on these subjects⁴. It also suggested that the expedient measures be drafted in procedural laws, such

⁴ Paragraph 37 of the Conclusions of the Presidency on the European Council meeting in Tampere.

as to make access to justice easier in cross-border cases, making special reference to the need to regulate the international taking of evidence.

In the proposal for measures for the application of the principle of reciprocal recognition of judgements in civil and commercial matters, submitted by the Council on 30 November 2000⁵, which is also the basis for the measures aimed at procedural harmonisation, the objectives set include the drafting of a system for the cross-border service or notification of judicial and extrajudicial documents and cooperation in the taking of evidence.

These two objectives came to fruition in two regulatory instruments: Council Regulation No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters⁶, and Regulation 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 matters⁷, which is the subject of this report.

⁵ OJEC C 12, of 15 January 2001.

⁶ Council Regulation (EC) No. 1348/2000 of 29 May 2000. OJEC L160, p. 37 *et seq.*

⁷ Council Regulation (EC) No. 1206/2001 of 28 May 2001. OJEC L 174 of 27 June 2001, p. 1 *et seq.*

2.2 THE CONTENT OF THE REGULATION

2.2.1 ADOPTION OF REGULATION 1206/2001 (“the Regulation”)

2.2.1.1 Relationship of Regulation 1206 with the European Judicial Network

Mention should be made of the European Judicial Network for civil and commercial matters⁸, which was created at the same time as the Regulation was adopted, and began operating on 1 December 2001. The aim of this Network is to expedite the work of the courts in order to facilitate cooperation between the Member States in civil and commercial matters, and therefore in the taking of evidence.

It establishes an updated information system for the Member States in the network, and another intended for the public (Article 3).

Meanwhile the European Judicial Atlas has also been drawn up, a tool of great help in identifying the competent authorities in matters relating to Regulation 1206/2001 and their territorial and jurisdictional powers, addresses and contact details.

2.2.1.2 Transitional measures and relationship with other regulatory instruments

Article 21 of the Regulation relates to transitional measures and stipulates that these shall take precedence in relevant areas over the provisions of bilateral or multilateral agreements or arrangements entered into by the Member States - and in particular those of the Hague Convention of 1 March 1954 on civil procedure, and of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters - in relations between States that are party to these Conventions.

The Member States may maintain, and even conclude, multilateral agreements or arrangements which are designed to further facilitate the taking of evidence, provided these are compatible with the Regulation (Article 21(2)). The principle underlying this compatibility clause is that of the application of the most favourable arrangement, so that Member States shall be free to maintain or conclude arrangements between themselves aimed at the taking of evidence in their respective territories, provided these serve to facilitate the said objective.

Article 21(3) lays down the Member States' obligation to inform the Commission, before 1 July 2003, of the agreements or arrangements between the States which are being maintained, have been concluded or are scheduled for the future, within

⁸ Council Decision of 28 May 2001 creating a European Judicial Network for civil and commercial matters, OJEC L 174 of 27 June 2001.

the meaning of the previous section, as well as any amendment or denunciation of such agreements.

The Regulation takes precedence over the Hague Convention of 1 March 1954 on civil procedure and the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters, but their precepts will continue to apply to the Member States' relations with third countries when both states are contracting parties to said Conventions.

They will even continue to apply between the Member States themselves that are party to the Regulation, in all those cases falling within the scope of one of the aforementioned Hague Conventions, but not falling within the scope of the Regulation. The Regulation only takes precedence between the Member States in respect of those matters that fall within the scope of both instruments.

2.2.2 SCOPE OF THE REGULATION

2.2.2.1 Introduction

-Territorial scope

The Regulation is binding upon all the Member States, except for Denmark whose relations with other member States on this matter shall remain framed within the Hague Convention of 1970 (as a consequence of articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community). This improves considerably the previous scenario, with only 19 Member States having signed the Hague Convention of 1970.

On the other hand, the Regulation applies only to cross-border cases, excluding domestic ones. It does not even apply to private taking of evidence from abroad for use in the main proceedings, which does not represent a true case of international cooperation and, thus, continues to be governed by the internal judicial law of the Member States

-Substantive scope

The regulation shall apply in civil or commercial matters where the Court of a Member State, in accordance with the provision of the law of that State, requests the competent Court of another Member State to take evidence, or to take evidence directly in another Member State.

There are three main conditions for the Regulation to become applicable:

1) Civil or commercial matters:

This is an autonomous concept which should be interpreted in light of the objectives of the Regulation and, in particular, in accordance with article 65 of the EC Treaty. The taking of evidence in court cases where States or public administrations are acting as public bodies is clearly excluded from its scope, although there are borderline cases where it is difficult to say whether they belong to public or private law. The European Court of Justice has, at different occasions, given its own interpretations⁹.

The Hague Convention of 1970 also refers to civil or commercial matters within its article 1. Precisely, this point was discussed at the Special Commission held in 1989 to analyse the application of the Convention, concluding that it should be interpreted extensively (thus allowing bankruptcy law, insurance law and labour law to be included within "civil and commercial matters", but not tax law).

⁹ 14. October 1976 29/76, LTU v. Eurocontrol, in ECR 1541; 16. December 1980 814/79 Ruffer, ECR, 3807; 21 April 1993, C-172/91 Sontag, ECR, I-1963; 14. November 2002, C-271/00, Steenbergen v. Baten

It is worth remarking that some matters excluded from Council Regulation 44/2001¹⁰ do fall within the scope of Regulation 1206/2001, such as those related to the legal capacity of natural persons, patrimonial rights arising out of a matrimonial relationship, wills and succession.

It would be desirable for the Commission to draw attention to this matter within its report in order to better define the scope of “civil and commercial matter”, via a new wording of article 1 or the adoption of further additional legislation (which could be extended to other similar European regulations on judicial cooperation)

Concerning definition and interpretation of concepts in the Regulation, it is possible to find some guidelines on the “Practice Guide for the application of the Regulation on the taking of evidence”¹¹

The concept of “evidence” is not defined in the Regulation, but it should include all kind of legal acts proposed in order to submit to court proceedings any information which could prove the truthfulness of the allegations made by parties in relation to the facts discussed. It includes, for instance, hearing from witnesses, the parties and experts, the production of documents, verifications, establishing facts, expert reports on family or child welfare, etc. On the other hand, judicial presumptions should not be included since they do not refer to facts, but only to an intellectual process of the Judge or Court in charge of the main case

2) By the court of a Member State

Again there is not a definition of “court” within the Regulation. It should, however, be given a broad interpretation, thus including all authorities in the Member States with jurisdiction in the matters falling within the scope of the Regulation. The concept of court does not cover arbitration tribunals.

According to the ECJ precedents on “standing”¹², other institutions also fall under the scope of the Regulation (as well as courts and tribunals) where they have been created in accordance with the law to carry out their tasks permanently and independently, pronounce binding decisions based on law, follow the principle of a fair hearing for both parties, and have obligatory jurisdiction.

The requesting courts could be any competent judicial body, as has been explained. However, the requested performing courts shall be only those judges or magistrates expressly selected to do so by each State. Therefore, article 2.2 calls on each Member State to draw up a list of the courts designated competent to take evidence

¹⁰ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgements and commercial matters

¹¹ <http://europa.eu.int/civilejustice>

¹² 30 June 1966, *G. Basen-Göbels v. Management of the Beambtenfonds voor het Mijnbedrijf*, case 61/65. 6 October 1981, *C. Borrelmeulen v. Huisarts Registratie Commissie*, case 246/80; 11 June 1987, *Pretore di Salò v. Persons unknown*, case 14/86; 30 March 1993, *Pierre Corbiau v. Administration des Contributions*, case 24/92; 27 April 1994, *Municipality of Almelo and others v. NV Energiebedrijf IJsselmij*, case 393/92; 12 December 1996, *Criminal proceedings against X*, joint cases 74/95 y 129/95; 17 September 1997, *Dorscha Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, case 54/96; 16 October 1997, *Maria Antonella Garofalo, Giovanni Pagano, Rosa Bruna Vitale, Francesca Nuccio, Giacomo Cangialosi, Giacomina D'Amico, Giulia Lombardo, Emanuela Giovenco, Caterina Lo Gaglio, Daniela Guerrera and Cesare Di Marco, v. Ministero della Sanità and Unità Sanitaria Locale (USL) n. 58 di Palermo*, joint cases 69/96 to 79/96; 4 November 1997, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, case 337/95.

within the scope of the Regulation. The list shall also indicate the territorial and, where appropriate, the special jurisdiction of those courts.

Also worthy of note is the creation, on January 1st, 2001 of the European Judicial Network on civil and commercial matters¹³, alongside the adoption of the Regulation. This Network intends to speed up and smooth cooperation between courts of Member States in civil and commercial matters (and therefore also on taking of evidence). It creates an updated information system both for the Member States and for individuals (article 3). Following the creation of this Network, a European Judicial Atlas has also been prepared which is proving a great help in the identification of the competent institutions and bodies for the purposes of Regulation 1206/2001, their territorial and jurisdictional competence, and their contact details.

3) To obtain evidence

The Regulation is applicable for both the taking of evidence for use in judicial proceedings which have already commenced and that taken before the actual filing of the proceedings in which evidence is to be used: for instance, if there is a need to take evidence which would not be available later.

There appears to be nothing against the application of the Regulation to voluntary jurisdiction proceedings.

¹³ Council Regulation of May 28th, 2001 (OJ L 174, 27 June 2001)

2.2.2.2 Territorial scope

The procedures laid down in the Regulation shall apply in the territories of the EU Member States (Article 1(1)) with the exception of Denmark under Article 1(3).

An efficient common system is thereby established in the entire Community arena, improving the previous situation in which there was no binding legal instrument between all the Member States, since, as was already pointed out, the 1970 Hague Convention is in force in only 23 of the EU Member States.

It is a strictly intra-Community instrument, reserved exclusively for the judicial area of the EU. It is not applicable to local or internal cases, but only to situations relating to more than one EU Member State; for its application, there must be “cross-border implications”, as established in Article 65 of the Treaty establishing the European Community.

Neither does it regulate the private provision of evidence from one Member State to another for this to be used in the main proceedings, since this does not constitute a genuine case of international judicial assistance and, despite having an international dimension, is subject to the Member States’ rules of domestic procedural law.

Relations between Denmark and the Member States will be governed by the 1970 Hague Convention, provided the Member States are contracting states to the Hague Convention.

For their part, the United Kingdom and Ireland could also have remained outside the scope of this Regulation, in accordance with Protocol no. 4 annexed to the Treaty on European Union and the Treaty establishing the European Community, which is similar to that pertaining to Denmark. However, making use of the opt-in/opt-out clause in this Protocol, they gave written notification of their desire to take part in the adoption and application of the Regulation.

We should emphasise the situation of the States of Bulgaria and Romania. With their recent membership of the EU, the Regulation also becomes applicable in these two new Member States, as of 1 January 2007. For obvious reasons, the situation in these two States does not form part of his study, although we should not overlook the importance of this new expansion.

2.2.3 BRIEF ANALYSIS OF THE METHODS FOR TAKING OF EVIDENCE IN THE REGULATION

The Regulation provides for two methods of taking of evidence,

1. the taking of evidence by the requested court, following a request transmitted directly from the requesting court to the requested court
2. the direct taking of evidence by the requesting court

-Both methods share some aspects:

- a) The request shall be made using Form A or I, and shall include the following details:
 - the requesting and, where appropriate, the requested court
 - the names and addresses of the parties to the proceedings, and their representatives, if any
 - the nature and subject matter of the case and a brief statement of the facts
 - a description of the taking of evidence to be performed
 - where the request is for the examination of a person: the name(s) and address(es) of the person to be examined; the questions to be put to these person(s) or a statement of the facts about which he is (they are) to be examined; where appropriate, a reference to a right to refuse to testify under the law of the member state of the requesting court; any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used; where appropriate, any other information that the requesting court deems necessary
 - where the request is for any other forms of taking of evidence, the documents or other objects to be inspected
 - where appropriate, any request related to the taking of the evidence under the law of the requiring court, the presence and participation of the parties, and/or the presence and participation of representatives of the requesting court

- b) Language:

Under article 5 of the Regulation, the request and any further correspondence have to be drawn up in the official language of the requested court's member state or, if there are several official languages in that member state, in the official language or one of the official languages of the place where the requested taking of evidence is to be performed, or in another language which the requested member state has indicated it accepts. Documents which the requesting court deems it necessary to submit for the execution of the request shall be accompanied by a translation into the language in which the request was written. Each member state shall indicate which official language or languages of the institutions of the European Community other than its own are acceptable to it for completion of the forms.

- c) Transmission means:

According to the regulation (article 6) all requests and communications have to be transmitted by the swiftest possible means which the requested member state has

indicated it can accept. Therefore, the transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible. It is a matter for discussion whether communications via fax and/or email are acceptable, provided they fulfil the requirements of accuracy and fidelity, since they are in practice the swiftest means.

d) Receipt of requests:

The requested court shall send an acknowledgement of receipt to the requesting court (using Form B) within seven days of receiving the request. In the event that a request does not fall within the jurisdiction of the court to which it was transmitted, this court shall forward the request to the competent court of its Member State and shall inform the requesting court thereof (using Form A). If the request does not contain all of the necessary information, the requested court shall notify the requesting court without delay and, at the latest, within 30 days of receiving the request (using Form C). The period for taking the evidence shall then commence only after receipt of the completed request by the requested court. Finally, if the taking of evidence requires a deposit or advance, the requested court shall notify the requesting court without delay (at the latest within 30 days of receipt of the request)

1. Request by the requesting court to the competent court

Under this method, the courts of the member states will communicate directly between themselves, without any intermediate parties who could complicate and delay the taking of evidence. The requesting court will directly submit the request for the taking of evidence to the requested court.

a) Execution of the request:

The requested court shall execute the request without delay and, at the latest, within 90 days of receiving it. In the event that the request cannot be executed in due time, the requested court shall notify the requesting court (using Form G) indicating the reasons for the delay.

In general, the requested court executes the request in accordance with its own law (article 10.2). It may, however, execute the request pursuant to a special procedure provided for by the law of the member state of the requesting court, if the latter so asks in accordance with paragraph 13 of Form A. Only in cases where the procedure is incompatible with the law of the member state of the requested court, or where there are major practical difficulties, may the requested court refuse to comply with such a requirement.

b) Refusal of execution of a request:

The execution of a request related to the hearing of a person shall be refused when the person concerned claims the right to refuse to give evidence or is prohibited from giving evidence under the law of the Member State of the requested court or the law of the member state of the requesting court.

There are other miscellaneous grounds for refusal, but since the Regulation aims at facilitating the taking of evidence in cross-border cases, they are strictly limited (article 14.2). The effectiveness of those established grounds and any extensions to some other cases should be considered. In any event, refusal based on the content of article 14.2 shall be reported within 60 days to the requesting court (using Form H)

c) Procedure after the execution of the request

When the requested court has executed the request, it sends the documents establishing its execution without delay to the requesting court and, where appropriate, returns the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using Form H.

The Regulation does not provide for the translation of the execution of the request to the language of the Member State of the requesting court

The execution of a request shall not give rise to a claim for any reimbursement of fees or costs. Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement without delay of the fees paid to experts and interpreters and the cost occasioned by the application of any special procedure provided for by the law of the member state of the requesting court or the utilisation of communications technology during the taking of evidence, in particular the using of videoconferences and teleconferences.

2. Direct taking of evidence by the requesting court

This method is established by the Regulation as an alternative to that previously described, thus allowing the court of a member state to take evidence directly in another member state.

This method speeds up the procedure of taking of evidence in cross-border cases, but it has some inconveniences due to the lack of coercive measures from the requesting court, meaning it may only be performed on a voluntary basis (article 17.2). Consequently, where the direct taking of evidence involves the hearing of evidence from a person, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

a) Requirements of the request

Requests for direct taking of evidence will be submitted by the requesting court (using Form I) to the Central Body or to the competent authority previously designated by each member state (articles 3.3 and 17.1). This could create, in practice, some confusion due to the multiplicity of competent authorities which may receive the request in these cases. It is recommended that the competent authorities in such a case be identified more precisely.

b) Persons competent to take evidence

According to article 17.3 the taking of evidence shall be performed by a member of court staff or by any other person, such as an expert, who will be appointed in

accordance with the law of the Member State of the requesting court. But it must be taken into account that, where judicial presence for the taking of evidence is also required, and the judge of the requesting court does not agree to travel to the foreign country, cooperation from the requested court will be needed.

c) Reception of the request

Within 30 days of reception of the request by a Central Body or competent authority, it shall inform the requesting court whether the request has been accepted or not, and if necessary, under what conditions according to its law the request is to be carried out (using Form J)

d) Refusal of the request

The Central Body or the Competent Authority of the requested State may refuse the direct taking of evidence only if the request does not contain all of the necessary information pursuant to article 4 (Form A), or the request does not fall within the scope of the Regulation, or the requested direct taking of evidence is contrary to fundamental principles of law in its member state (which are not defined within the Regulation)

However, in cases where the direct taking of evidence is refused there shall always remain the option of the first method (direct request from requesting court to requested court to take evidence)

2.2.4 PURPOSE OF THE REGULATION. AN EX-ANTE EVALUATION

The Regulation aims to provide an effective system for the taking of evidence by courts of the member states in cross-border cases. Thus, it is framed within the need for creation of an area of freedom, security and justice in the European Union, where the free movement of people, goods, services, and capital can be performed with full judicial guarantees.

In more detail, the Regulation intends to prevent judicial borders within the European Union acting as obstacles in cross-border cases, by creating an homogenous procedural system which allows a citizen from a member state to have access to evidence, no matter where that evidence has to be taken (as long as it is within the European Union)

The underlying judicial principle is that any citizen of a member state has access to the same judicial protection, regardless of which Member State his/her case is to be tried in. The scenario should be the same as if the evidence had been taken in his/her own Member State.

The system established by the Regulation has to ensure an effective taking of evidence within the whole European Union area, in order to consolidate the judicial guarantees which allow citizens to receive effective judicial protection. Thus,

effective judicial protection becomes the main measure of the Regulation's validity, and therefore also our main evaluation criterion.

In order to achieve full judicial protection when taking evidence, the Regulation establishes that it shall be carried out free of charge, except for participation of experts and/or interpreters, or in cases when a special procedure or technology is to be used at the requested court.¹⁴

In aiming to ensure effective judicial protection, the Regulation rests on four principles: simplicity, clarity, judicial security and speed. These must be analyzed in order to find out if the Regulation fulfils its objectives, and to what extent.

-Simplicity, clarity and judicial security:

in trying to ensure a simple, clear and smooth procedure, the Regulation creates a system of Standard Forms to be used compulsorily, and includes an Annex with all the Forms to be used within the procedure. This also contributes significantly to the improvement of judicial security.

Likewise, in line with the aims of clarity and judicial security, the Regulation creates a Central Body responsible for assisting the courts and facilitating the proper functioning of the procedure (article 3). Under the same principles, the Regulation requires (article 4.3) that, together with the request for taking of evidence, all additional necessary documents shall be enclosed and duly translated (a precaution that was not foreseen in the Hague Conventions). Precautions to solve any inaccuracy or defect in the request (article 8) can also be framed within these same principles.

Attempts to improve simplicity and smoothness under the Regulation can also be observed in the possibility of direct contact between requesting and requested courts from different member states. One of the main objectives of the Regulation is to ensure smooth and permanent communication between the courts, despite their belonging to different Member States, so that they are properly informed at any given moment. Pursuant to this, the presence of representatives from the requesting court is also permitted during the taking of evidence at the requested court. In this case, the use of new communication technologies is of great importance as an alternative to physical presence, being simpler and more cost-effective. The actual use of new communication technologies within the Regulation's procedures is still to be assessed in order to maximize its future role.

-Speed

The Regulation proposes smooth cooperation between courts in order to simplify and accelerate the taking of evidence (recital no. 2 of the Preamble). Efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the taking of evidence is to be made directly and by the most rapid means possible between member states' courts.

¹⁴ Chapter VII, Section VI

Accordingly, the Regulation intends that the entire procedure of evidence-taking should last no longer than 90 days, which is really quite an ambitious goal. Finally, the effective fulfilment of that deadline will depend upon the actual performance of the judicial bodies of the member states. Where this deadline is exceeded, the requested court shall inform the requesting court about the obstacles which have delayed the procedure.

Within the overall deadline of 90 days, each stage of the process has its own concrete deadline established by the Regulation. In spite of this, delays have no practical consequences, and thus their enforcement may become rather rare in the actual application of the Regulation

Also to help speed up the procedure, the Regulation requires the requested court to return documents received from the requesting court as soon as possible. Where the execution of the request does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the relevant presiding court in its member state and shall inform the requesting court thereof.

Also with the aim of simplicity and speed, the request and all documents accompanying the request shall be exempt from authentication or any equivalent formality, as established by Regulation 1348/2001 (article 4.4) and Regulation 44/2001 (art 56). This should, obviously, simplify the procedure.

Regarding the means of transmission of documents between courts, there is no concrete stipulation in the Regulation, thus leaving to the member states the freedom to establish the list of means they may consider appropriate, always ensuring that the content of the document is accurate and in accordance with the original issued, and that it is fully legible. Most of the member states are currently using post or courier, but the use of new technologies might be further explored in order to speed up the procedure.

For example, when merely a Form is to be sent, the use of email could be particularly appropriate. To ensure authenticity of the messages, an electronic signature with cryptographic password could be used. Another option could be to set up a European certifying service provider, specifically for the jurisdictional bodies of the member states. However, Directive 1999/93/CE on a community framework for electronic signatures¹⁵ establishes that certificates issued by a duly accredited national certification service provider are valid throughout the European Union (article 4). Applying this to communications between courts or judicial bodies means that an electronic signature duly certified by a national certification service provider should be sufficient. Contact points or other members within the European Judicial Network could offer an additional control to those courts wishing to check the authenticity of a request.

On the other hand, should additional documentation be enclosed with a Form it could be more convenient to send it physically by post or courier. But even in these cases, the request could be sent in advance by fax or email in order to make the

¹⁵ Directive of the Parliament and the Council 1999/93/CE of 13th December 1999 (OJ L 13th and 19th January 2000)

requested court aware and ready by the time the documents arrive and the evidence has to be taken.

It is worth noting that audiovisual files can also be sent by email, which could prove useful for the requested court in the taking of evidence or even allow for the requesting court to view the audiovisual records of a requested taking of evidence.

Advantages from the use of new communication technology are pointed out in article 10.4 of the Regulation, which allows the requesting court to ask the requested court to use communication technology during the taking of evidence, in particular by using videoconference and teleconference facilities.

Concerning the language to be used in communications, article 5 of the Regulation establishes that the request and any other communications required for the taking of evidence shall be drawn up in the official language of the member state of the requested court. For the sake of effectiveness and speed no translation is required (as in the Hague Conventions of 1954 and 1970), only that the requesting court shall complete the form in the language of the requested court. It is noticeable that only the contents of the Form shall be drawn up in the foreign language, not the Form itself. This could lead in practice to a bilingual document (form and contents), which should not create major problems to the requested court since it could easily compare the headings of the foreign language form and those in its own language.

Additionally, each member state shall indicate the official language or languages of the institutions of the European Community other than its own which is (or are) acceptable to it for completion of the forms. Some doubts remain on the interpretation of this article, namely as to whether it is compulsory or not. They will have to be clarified in an eventual future amendment of the Regulation, making it clearly compulsory. The extension of the European Union to other member states and the subsequent multiplicity of different languages within it make this a must.

Using one single language commonly accepted as the official one for communications between courts for the taking of evidence could speed up the procedure and save translation costs, which are ultimately borne by EU citizens.

2.3 OUR TASK IN CURRENT STUDY

The current Study aims to perform an empirical analysis of the application of the Regulation. That is, to identify and report on all the circumstances that have occurred since its entry into force and applicability in all Member States except Denmark.

The results of the Study, presented in the following pages, should lead to a synthesis reflecting the problems which occurred during its application, as well as the identification of those Member States where such problems could have occurred. In particular, of key relevance is the question of whether the application of the Regulation has resulted in cooperation between courts in the taking of evidence being **improved, simplified and accelerated**.

The Study deals with all of the above, pointing out proposals that may lead to adequate modifications concerned with the **improvement of this important EU normative instrument.**

3 STUDY METHODOLOGY

3.1 METHODOLOGY

In order to measure the extent to which the Regulation has been applied, MainStrat based its input collection strategy on a large-scale survey among professionals involved in the application of the Regulation.

3.1.1 Objectives

The main objective of this survey was to assess, in an objective and unbiased way, the **practical application of the Regulation** across the Member States.

Another important objective of this survey was to obtain **suggestions** and **proposals** for improvements, as well as an idea of the **major obstacles or problems** that the new Regulation has to overcome to become more operative. This feedback has been provided via the free text (narrative comments) fields that were included in the questionnaire form.

3.1.2 Approach taken

The selection criteria for the participants in the survey **were individualized for each Member State**, as each has different judicial structures and a different distribution of spheres of competence. This criterion included **not only judicial servants**, but also those that, although not directly belonging to the Justice Administrations of each Member State, **do cooperate with them**, as well as law professionals who **are involved in the application of the Regulation** due to their specific specialization .

The first starting point was determined by data contained in the **Manual** and the **Consolidated version of the Communications¹⁶ from Member States**. These documents provided us with **highly relevant information** from the very outset: In parallel, we also used the list of the **competent courts for taking of evidence**, according to the Regulation, in each Member State.

Another selection criterion used was to count the professionals in each Member State using desktop research. Some of the websites consulted are:

- Union International de Huissiers de Justice et Officiers de Justice: <http://www.uihj.com/uk/>
- European Union of Rechtspfleger: <http://www.rechtspfleger.org>

¹⁶ These communications have been published in accordance with article 22 of the Regulation 1206/2001, requiring Member States to provide the required information - contained in article 4 (nominating Central Bodies and competent authorities) - to the Commission.

- Council of the Bars and Law Societies of the European Union
<http://www.ccbe.org>
- Union des avocats européens: <http://www.uae.lu/>
- Lawyer associations: <http://lawyers.martindale.com>
- Lawyer associations: <http://www.lexadin.nl/wlg>
- Lawyer associations: <http://www.lawyers.com/>
- Lawyer associations: <http://www.worldlii.org/catalog/215.html>
- Belgium. Courts
www.juridat.be; www.cass.be; www.catalaw.com; www.just.fgov.be;
www.droitbelge.be.
- Czech Rep. Lawyers: http://www.cak.cz/pages/index_sound.html
- Germany Lawyers: www.anwaltverein.de; www.anwalt-suchservice.de;
www.anwaltverein.de.
- Estonia. <http://www.kohus.ee>
Notaries: http://www.notar.ee/index.aw/set_lang_id=2.
Lawyers: <http://www.advokatuur.ee/eng>.
- Greece
Lawyers: www.dsa.gr; www.lawyers.gr; www.bbc.gr; www.rokas.com;
www.maritimelawyers.gr. Jueces: www.esdi.gr.
Courts: www.jurisint.org.
- Spain
www.paginasamarillas.es; www.cgae.es; www.elabogado.com;
www.porticolegal.com; www.asoc-fiscales.org.
Courts: www.mju.es.
- France.
www.greffier-de-tribunal-de-commerce.fr.
www.infogreffe.com.
Lawyers: www.cnb.avocat.fr; www.barreau-marseille.avocat.fr;
www.avocatfrance.com; www.perso.wanadoo.fr; www.avocats-versailles.com;
www.ordre-creteil.avocat.fr; www.barreau-caen.avocat.fr; www.barreau-aixenprovence.avocat.fr;
www.ordre-avocats-rennes.com; www.barreau-hautsdeleine.com;
www.avocats-bobigny.com; www.barreau-colmar.avocat.fr;
www.ordre-metz.avocat.fr.
- Ireland
Lawyers: www.lawlibrary.ie.
Courts: www.courts.ie
- Italy
Lawyers: www.legali.it.
- Cyprus
Lawyers: <http://lawyers.martindale.com/>
- Latvia
Notaries <http://www.notary.lv/index.php?newlang=eng>.
Lawyers; <http://www.advokatura.lv/?lang=eng>
- Lithuania.
lawyers: <http://www.advoco.lt/?item=home&lang=3>
- Luxembourg
Lawyers www.barreau.lu. Tribunales: www.agfaj.lu; www.mj.public.lu.
- Hungary

Lawyers: <http://lawyers.martindale.com/>

- Malta.

Lawyers: <http://lawyers.martindale.com/>

- The Netherlands

Lawyers: www.advocatenorde.nl; www.consulfrance-amsterdam.org; www.dree.org.

Courts: www.rechtspraak.nl; www.regering.startpunt.com.

- Austria.

Lawyers: www.oerak.or.at

- Poland

Lawyers: <http://lawyers.martindale.com/>; <http://www.lexadin.nl/wlg/>.

- Portugal.

Lawyers and courts: www.oa.pt.

- Slovenia

Lawyers: <http://lawyers.martindale.com/>

- Slovakia.

Lawyers: <http://www.sak.sk>.

- Finland

Lawyers: www.asianajaliitto.fi; www.om.fi; www.ranska.net. Courts: www.oikeus.fi; www.kko.fi.

- Sweden

Lawyers: www.advokatsamfundet.se.

- United Kingdom

Lawyers: www.firms.findlaw.com; www.infolaw.co.uk; www.globallaw.net.

- Courts: www.courtservice.gov.uk

Professionals were selected using desktop research according to their experience in relation to Regulation 1206/2001 and their availability to provide us with their valuable opinion.

In this way we prepared a selection of people to interview that was not only representative, but also complete, since not only liberal professionals such as **attorneys** and **Huissiers de Justice** are included, but also public servants belonging to national administrations, from **officials to secretaries to judges**.

3.1.2.1 Groups of Professionals

It was decided to break down the various legal professionals using the following segmentation:

1. Members of national administration
2. Judge
3. Attorney
4. *Huissier de justice*
5. Other persons responsible for serving documents
6. Other professional groupings
7. Other citizens

These profiles were grouped into:

- A) Members of National Administrations

- B) Judges and Court authorized personnel
- C) Attorneys and other private agents

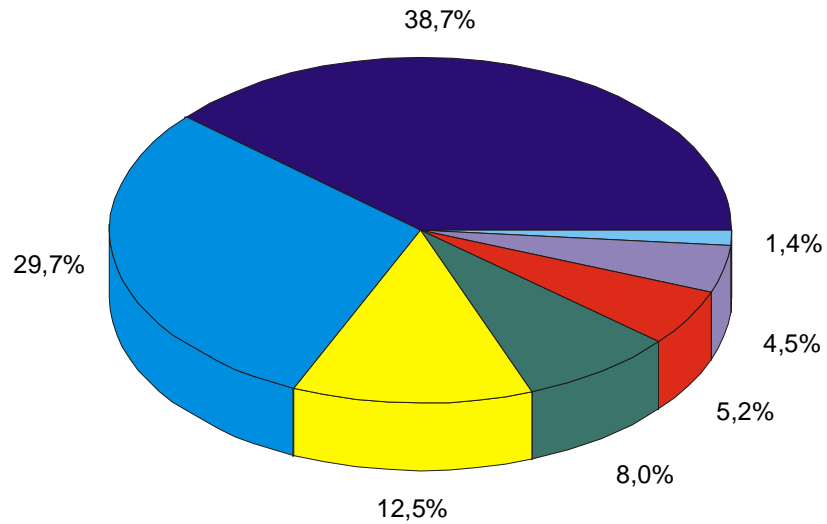
3.1.3 The Results

This Study was designed principally around gathering the opinions of professionals involved in the application of the Regulation. Opinions were gathered by means of a questionnaire based on interviews of two kinds: self-administered questionnaires filled in by professionals, and one-to-one telephone interviews.

An **invitation to participate** was sent to **11,705** professionals in the Central Authorities of Member States (except Denmark), interested bodies such as the *Union Internationale de Huissiers de Justice* and other professions involved in the application of the Regulation. The Survey was carried out over 3 months, from December 2003 to February 2004. 424 out of **544 survey responses received were used for our analysis**. 93 survey responses could not be taken into consideration in our analysis since they were survey forms received with not a single answer, only the identification data of the surveyed person. According to our discussions with such individuals it seems that the main reason forms were returned unanswered is the lack of knowledge about EC Regulation 1206/2001.

And the results obtained are:

Answers by profile



- Judge (164)
- Attorney (126)
- Member of National Administration (53)
- Huissier de Justice (34)
- Other professional groupings (22)
- Other people involved in the application of the Regulation (19)
- Other citizens (6)

3.1.3.1 Targets for the Survey

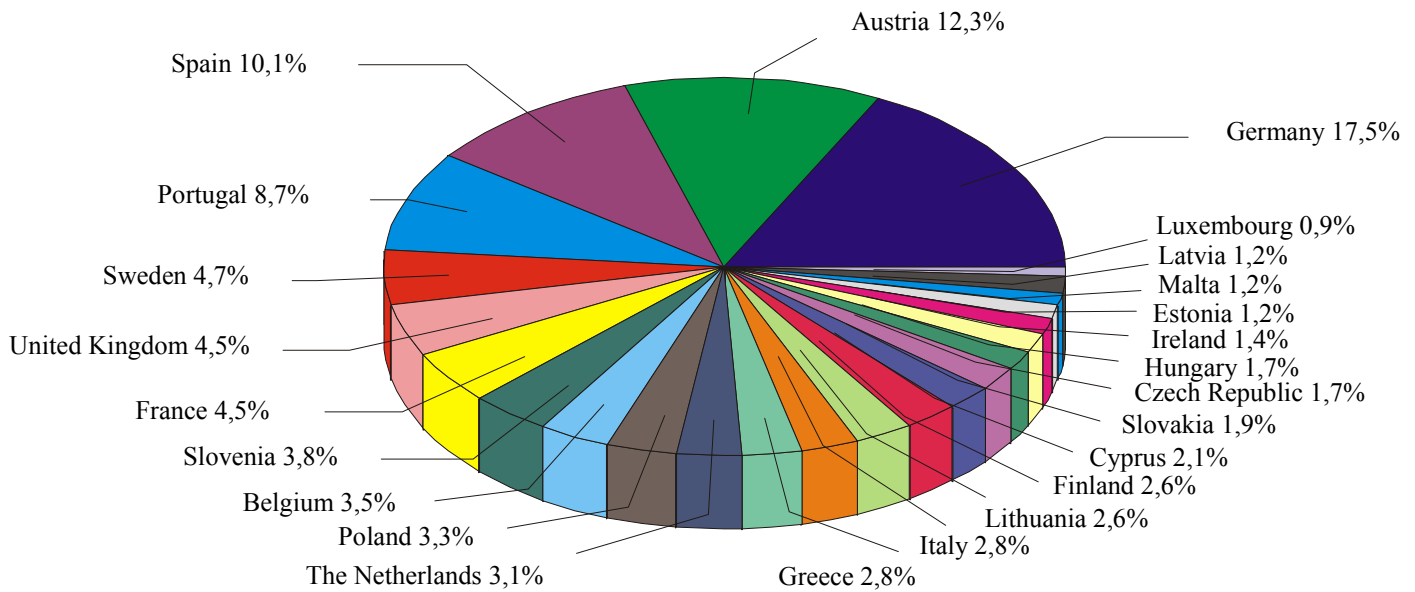
Finally, the selection of respondents had to be representative. Consequently, the Member States and the professions involved in the application of the Regulation had to be covered adequately and proportionally and, in order to do so, we set the following targets for the survey:

- » **Geographical criteria:** as per the Commission's request we had to obtain **a minimum of 300 survey answers covering all 24 Member States** in which the Regulation applies, which represents an average of 12.5 answers per country. Since many Member States are much smaller than others, obviously this figure would vary from State to State. Nevertheless, we set internally the minimum coverage criteria of 5 answers per each of the small Member States. Furthermore, in order to obtain a more representative statistical sample, our internal target was the figure of 500 answers, a goal for which we invested all necessary additional effort.

Note: the targets mentioned above were achieved and surpassed, with a total of 544 answers. The main obstacle in meeting the targets were lack of knowledge about the Regulation and its application in many Member States, and the lack of e-mail addresses in certain small states. Thus, taking into account the small number of professionals directly involved with the Regulation in small countries, the success of the survey is significant.

The distribution of the survey responses by profession is as follows:

Answers by Country



- » **Qualitative criteria:** We also concluded that all professions involved in the application of the Regulation had to be addressed adequately and proportionally. Therefore, we set the following minimum targets:
- Members of National Administrations. A **minimum target of 50 interviews** was set.
 - Judges and Court authorized personnel. A **minimum target of 100 interviews** was set.
 - Attorneys and other private agents. A **minimum of target 100 interviews** was set.

Note: all the targets mentioned above were reached.

3.1.3.2 Information-gathering procedure

The following procedure was followed:

1. Creation of **Questionnaires 1, 2 and 3** addressing mainly the aspects of the application of the Regulation directly relevant to our Study, **in six languages** (English, German, French, Spanish, Italian, and Greek), in order to facilitate their answering by the selected professionals. Questionnaire 1 was addressed to the general public, Questionnaire 3 was addressed to Courts, and Questionnaire 2 to Central Authorities. The final, on-line questionnaires are available at www.mainstrat.com/1206 (Questionnaire1) and www.mainstrat.com/1206-Courts (Questionnaire 3). Also, samples of the English versions are provided as Annex III to this document.
2. **Sending invitations** to the entire sample for its on-line completion at our website. This included the sending of over 10,000 invitation emails and 1,000 faxes with the Questionnaires for those contacts without an email address.
3. **Monitoring completion.** This was carried out mainly via email, with telephone reminders.
4. **Receipt and consolidation of data.** This step was carried out without applying any corrective factor depending on the country or profession. All answers received have contributed to the final result having the same influence or weight on the final result.

Large-scale faxing (1,000 faxes) had to be used for those contacts (mainly Courts) where there is no email infrastructure. In this case, Courts completed the forms manually and sent them back to us via fax.

Telephone surveys were planned for as a contingency measure in the event that the desired target figures for the number of completed questionnaires were not met, and this mechanism was used to achieve the targets described above. Indeed, the initial response turned out to be considerably smaller than that expected, so we had to set up a large-scale telephone survey campaign, in order to progress from 300 to 500 answers.

3.2 THE TEAM FOR THE CURRENT STUDY

For this project, **MainStrat** enlisted the expertise of legal specialists from the **University of the Basque Country**, in Spain.

In particular, **Professor Juan José Alvarez** supported by Ms. Nerea Magallón and Iñigo Iruretagoiena, from the Enterprise Law Department of the University of the Basque Country.

This study relied on their valuable expertise for the execution of the survey, providing as many specialized contacts as possible (over 11,000 contacts), and most importantly, their assessment of the analysis of the survey results and comments from the interviewees.

4 STUDY FINDINGS

In the following sections we address each of the main areas addressed to consider the application of the Regulation, following the same thematic order as the questions posed to the polled professionals.

4.1.1 Objectives of Regulation 1206/2001

The main aim of Regulation 1206/2001 is to organise an effective system for the taking of evidence in another EU Member State. In this regard it is directly related to Community intervention aimed at ensuring the proper functioning of the internal market and creating an area encouraging the free movement of persons. The idea behind these objectives is to prevent intra-Community legal borders from becoming an obstacle in cross-border legal proceedings, by creating a simple, homogeneous system enabling citizens to have the same facilities for gaining access to evidence irrespective of where the sources of that evidence are located, provided these are within the EU.

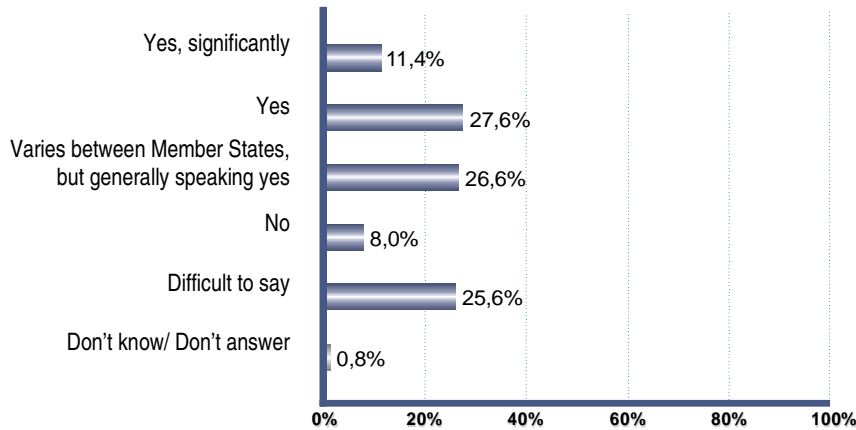
The measures aimed at achieving Community harmonisation of civil procedural law should be oriented towards guaranteeing the citizen the same degree of actual judicial protection irrespective of the State in which his proceedings are going to be held. In the right to evidence from which Regulation 1206/2001 takes its inspiration, a contribution is made towards the litigating parties following procedures abroad in a manner comparable to the taking of evidence in the court's own Member State.

The model established in Regulation 1206/2001 should ensure effective probative activity throughout the Community in the interests of achieving guarantees in the extra-territorial taking of evidence such as to enable the market to be consolidated and to ensure the effective judicial protection of citizens throughout the Community area.

In this regard, effective judicial protection, guaranteed by means of a simple and swift system, becomes a parameter of validity of Regulation 1206/2001 and a cornerstone of our study. The evaluation of the Regulation's effectiveness should be based on the degree to which the right to effective judicial protection afforded by it is guaranteed.

To this end, the surveys used as a basis for this study included a question aimed at ascertaining, in general terms, the degree of effectiveness, speed and clarity of Regulation 1206. The following answers were obtained:

From your experience, has the application of Regulation 1206/2001 simplified and accelerated cooperation between courts as regards the taking of evidence?



4.1.1.1 Conclusions

The majority of those polled feel that application of the Regulation has simplified and accelerated cooperation between the courts as regards the taking of evidence. But only 11% of them feel that it has done so significantly, and 26% make their affirmative reply dependent on the Member States in which evidence is taken.

The existence of such a high percentage of those polled making the distinction regarding the Regulation's effectiveness according to the State in which the taking of evidence is performed leads us to conclude that there is currently little harmonisation and optimisation in its application. Taking into account the fact that one of the objectives inherent in the Regulation is to bring access to justice to an equal level in all the EU Member States, we could conclude that there are notable lacunae or inefficiencies in the Regulation's harmonising objective.

Furthermore, the high percentage of people who do not know what to answer shows us that this kind of reply could be predetermined by a limited knowledge of the Regulation and the lack of practical experience on the subject.

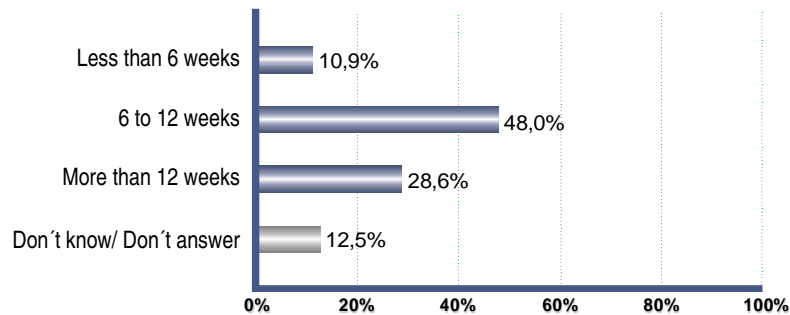
4.1.2 Speed of obtaining evidence

The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request, pursuant to the principle of swiftness on which the Regulation is founded (Article 10). This period comprises all the previous periods stemming from the rectification of the request's shortcomings and implies quite a demanding time scale, compliance with which will be conditional on the behaviour of the justice administrations of the Member States.

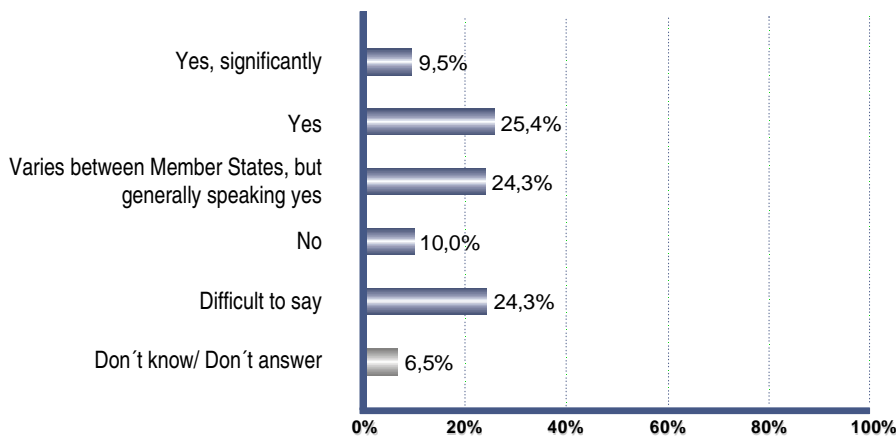
Moreover, if the requested court is not in a position to execute the request within this period, it will inform the requesting court using form G and indicating the reason for the delay and the period it requires (Article 15).

Our feedback on timeframes was:

From your experience, the average time required for the execution of requests is:



Is this faster than before the Regulation entered into force?



4.1.2.1.1 Conclusions

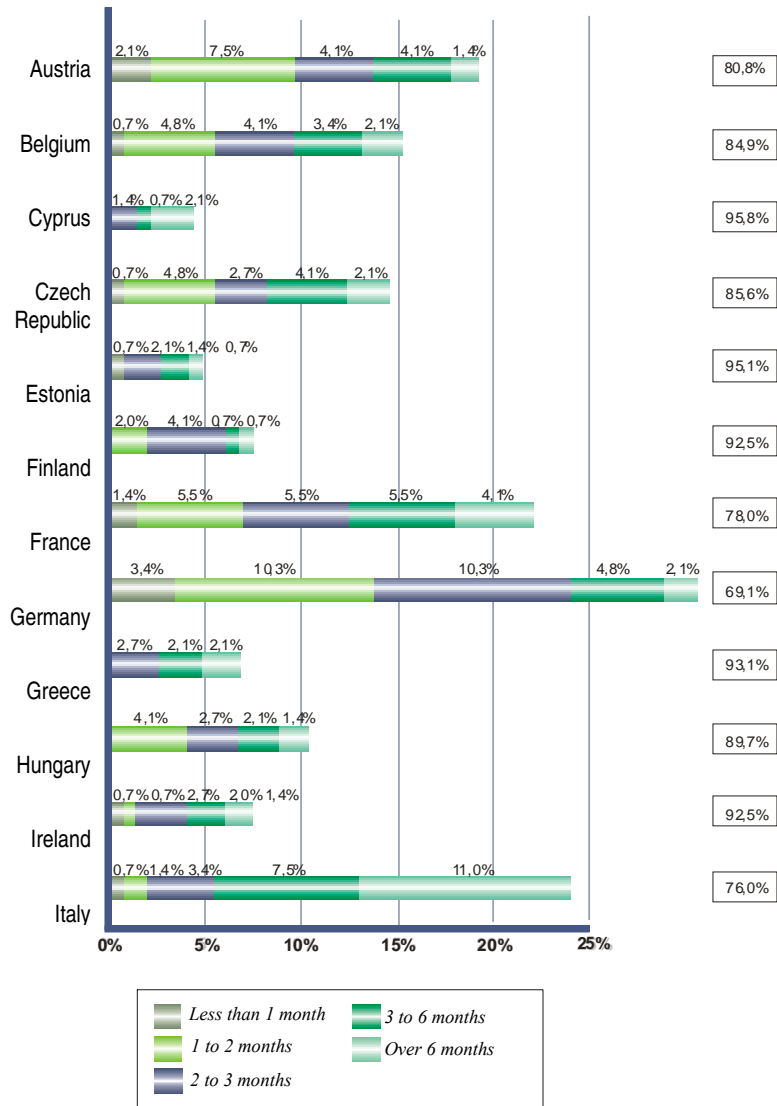
It is worth pointing out that in most cases requests for the taking of evidence are executed within the 90-day limit set by the Regulation. Less than a third of requests go over this limit.

Comparing this with the situation before the adoption of the Regulation, we can state that the Regulation has served, in general terms, to accelerate the process of evidence-taking within Member States. Only 10% of those polled believe the process to be slower after the adoption of the Regulation.

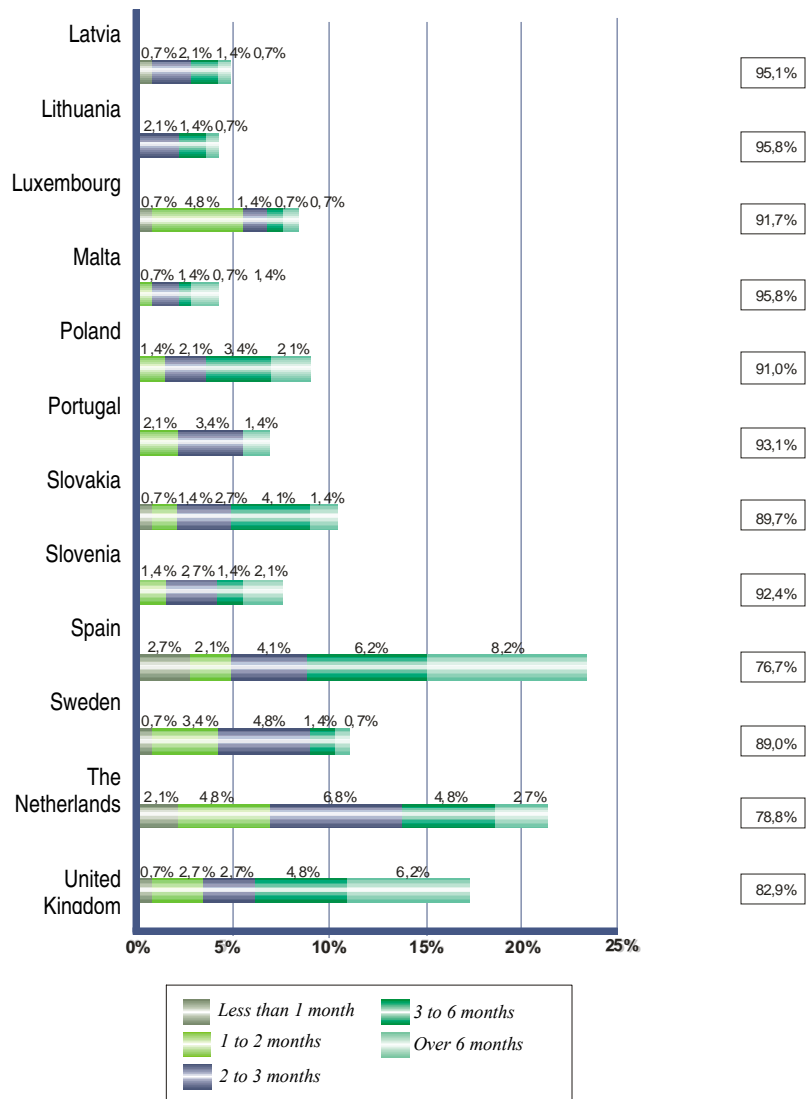
We can therefore conclude that the Regulation fulfils one of its main objectives: to reduce the time period necessary for the execution of the taking of evidence within the EU.

When the courts pursuant to Article 2(2) were asked about the average time that was needed, approximately, to execute requests in each Member State, the answers were as follows:

On average, approximately how long does it take for your request to be executed in each receiving Member State?



./...



The average time needed to execute a request for the taking of evidence varies considerably, depending on the country in which it is carried out. The longest period (more than six months) is frequently experienced in countries such as Italy and Spain, where 11% and 8% of requests took this long to be executed. Then comes the United Kingdom, with 6% of requests.

The next longest period, three to six months, is more commonplace. Together with Spain and Italy, which need three to six months in 7% and 6% of cases respectively, we find that this is a fairly typical period in the United Kingdom, the Netherlands, Slovakia, France, Germany, Poland, the Czech Republic, Austria and Belgium, in which between 4% and 5% of cases require this long.

The 90-day period laid down by the Regulation is found in the next bracket of two to three months, and is met in the majority of cases by Germany, the Netherlands, Sweden, Luxembourg, France, the Czech Republic, Austria and Belgium.

In the Netherlands the majority of cases need less time to be executed than that laid down in the Regulation, and 6.8% of cases have been executed in a period of between one and two months.

Behind the Netherlands come countries such as Germany, France, Lithuania, Sweden, Latvia, France, Finland, Belgium and Austria, with a high percentage of cases taking between one and two months.

Finally, cases of requests having been executed in less than a month have been recorded in Austria, Germany, Belgium, Spain and the Netherlands in smaller percentages, demonstrating that such cases do not occur regularly.

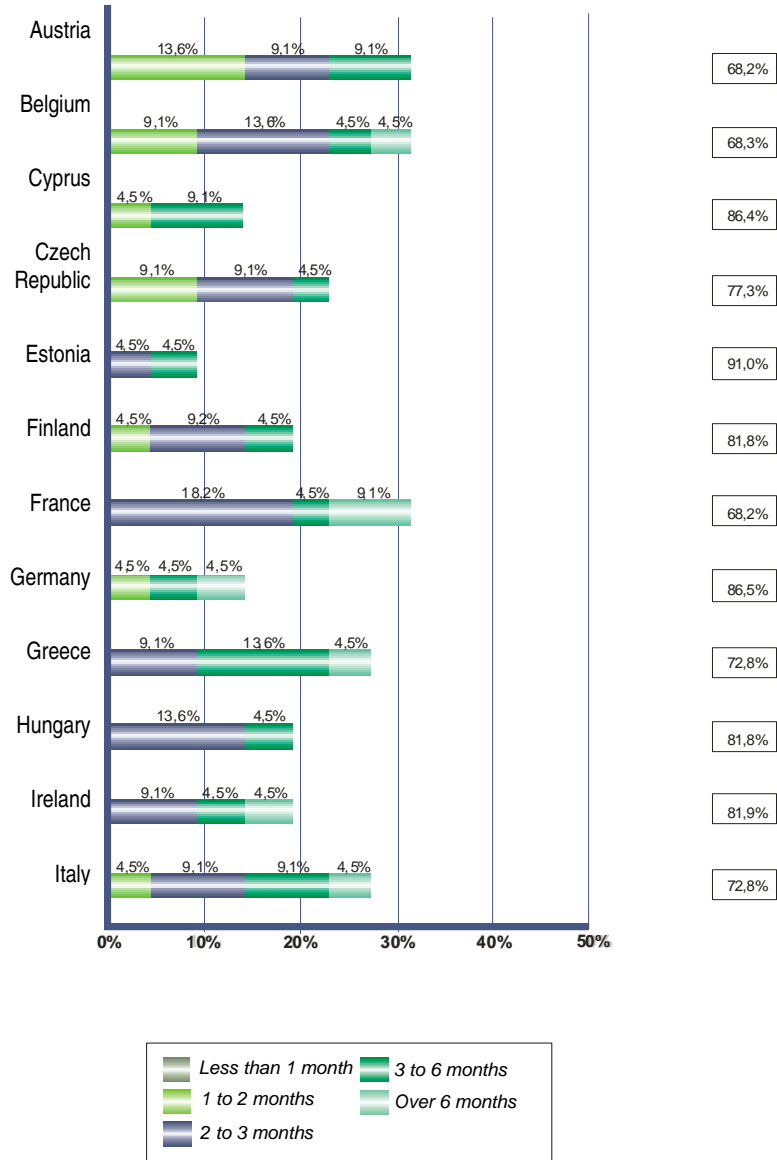
All this shows that the period required for the taking of evidence depends to a large degree on the countries in which it is requested to take place, and that there are major differences between countries like Italy and Spain, and countries such as Germany, Sweden or the Netherlands.

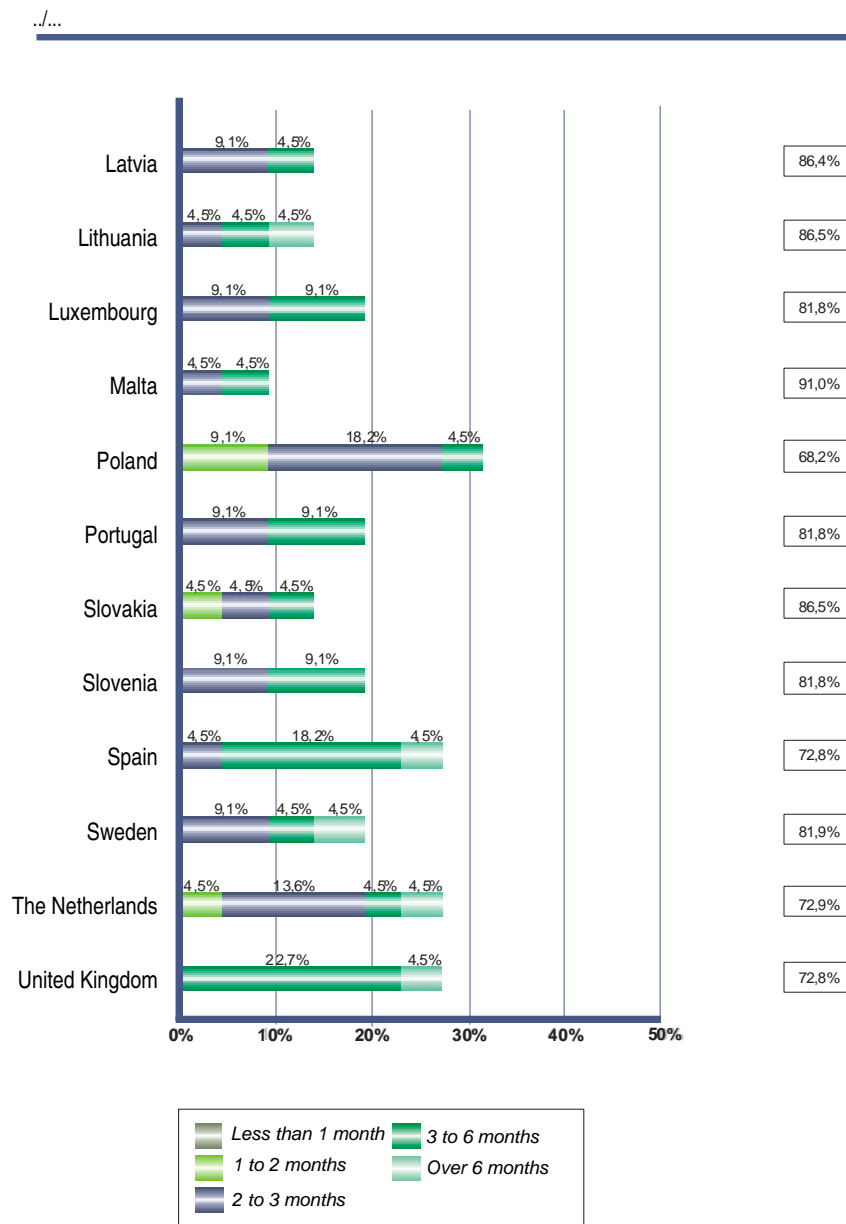
Secondly, the period for execution of the request will depend on the kind of evidence, since, despite their high percentages for requests taking a long time to be executed, countries such as Spain and Italy also show noteworthy percentages for requests executed within shorter time scales.

However, all this information should be analysed bearing in mind the high percentage of those who do not know or did not answer. These high figures, ranging from 69.1% as regards practice in German courts to 95.8% for Cyprus, Lithuania and Malta, can be put down to the still incipient application of the Regulation, its newness, and the fact that people are not familiar with it.

When the central bodies were asked the same question, the results were as follows:

On average, approximately how long does it take for your requests to be executed in each receiving Member State?





Here the number of those who do not know or did not answer, on account of the recentness of the Regulation's application, is lower. Whilst there are still few courts that have had to apply the Regulation, the central bodies – which in most of the States comprises a single body – have taken part in the Regulation's application from the outset.

Various findings merit mention. The first of these is that the time taken for a request to be executed varies considerably from one Member State to another. This seriously damages people's confidence in the European area, increasing uncertainty, with the execution of requests depending on the Member State in which they have to be executed.

The States that respect the periods for execution the most are Austria, Belgium, the Czech Republic, Hungary, Estonia, Poland, Slovakia and the Netherlands. This list is noteworthy for the strong representation of the new Member States (which joined further to the 2004 enlargement), which, far from needing a period for adaptation to the EU framework, even appear to be more efficient than the Member States that had joined earlier. Conversely, the inefficiency of Spain and the United Kingdom is eye-catching, with both these States being unable to respect the timescales laid down by the Regulation in the majority of cases.

4.1.2.1.2 Proposals

Some of the differences observed in the previous graphic are attributable to the different timescales existing between the laws of the States of the requesting judge and of the requested judge. The requested courts should make a comparison with the periods corresponding to their national laws and to the operation of their courts, which obliges them to modify the intra-Community periods and shorten them up should they be longer.

The differences existing in the laws as regards the method of calculating the periods are also relevant. For procedural purposes, there are huge differences and days are not always calculated as such. There are different ways of counting since there are countries that make a distinction between working days and non-working days. The Regulation does not stipulate how the 90-day period should be counted. To avoid discrepancies and differences in fulfilment by virtue of the country's national laws, it would be advisable to unify the way the period is calculated (working days and non-working days) or count by full weeks or months to avoid unequal applications.

A longer period is often needed, and in fact it could be extended in those procedures that have led to a deficient request and the previous periods could be added to the 90 days laid down by the Regulation. However, in executions that have not experienced any problems of a formal type the period of 90 days (three months) seems sufficient.

However, Article 15 of the Regulation includes the possibility of an extension, the grounds for which are given by the requested court, which leads one to infer that non-fulfilment of the periods is not liable to any penalty. In our opinion this lack of compulsion does not tally with the Regulation's objectives of efficiency, swiftness and right to evidence to be taken as soon as possible should cooperation not be provided within a suitable period.

An EU monitoring procedure should be set up concerning fulfilment of the Member States' jurisdictional obligations inherent in civil judicial cooperation in the EU ambit in accordance with the principles of cooperation and loyalty. Among these, there should be monitoring of the proceedings observed by the courts of the different States to ensure that the taking of evidence is performed within the periods laid down.

To this end the Member States should be required to make an effort to adapt to such periods and to see to it that deferment by means of form G is only used in exceptional cases.

4.1.3 Central bodies referred to in Article 3.1

In accordance with Article 3 of the Regulation each State should designate a central body. However, federal States, States where several legal systems apply and States with autonomous territorial entities are free to designate more than one central body. Only Germany and the United Kingdom have opted to designate more than one central body.

The Member States have designated the following central bodies (the addresses and contact details of which are given in the Manual):

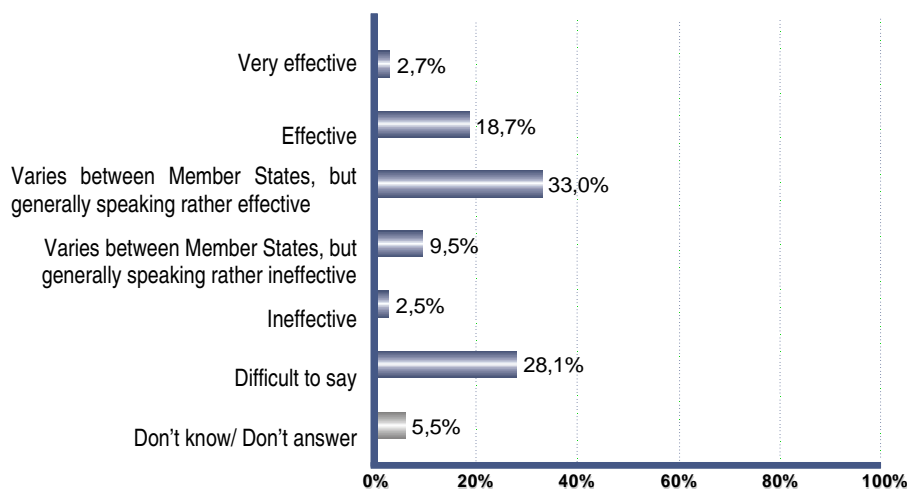
Germany
The central body's duties will be taken on in the federated states by a body determined by the governments of the respective <i>Land</i> , as indicated in the Manual.
Austria
The central body for the whole of Austria will be: Bundesministerium für Justiz (Federal Ministry of Justice).
Belgium
The central body entrusted with carrying out the duties provided for in Article 3(1) and (3) of the Regulation is the <i>Service public fédéral Justice</i> . <i>Service d'Entraide judiciaire internationale en matière civile</i> .
Bulgaria
Member State since 1 January 2007
Cyprus
Central Body: Ministry of Justice and Public Order / Unit for International Legal Cooperation.
Slovakia
Ministry of Justice of the Slovakian Republic. Department of Private International Law and International Judicial Cooperation.
Slovenia
Ministry of Justice
Spain
Ministry of Justice. International Legal Cooperation Section
Estonia
The central body mentioned in Article 3(1) is the Ministry of Justice.
Finland
The central body provided for in Article 3(1) of the Regulation is the Ministry of Justice.
France
France has opted to choose a single body, which will be the: <i>Bureau de l'entraide civile et commerciale internationale</i> of the Ministry of Justice.
Greece
Ministry of Justice. Section for international cooperation in civil matters.
Hungary
Ministry of Justice. Department for Private International Law.
Ireland
Central body entrusted with supplying information to the courts and seeking solutions to the various difficulties that

may arise: Circuit & District Court. Operations Directorate. Courts Service.
Italy
The Central body in Italy is the <i>Ministero della Giustizia – Dipartimento Affari di Giustizia – Direzione Generale della Giustizia Civile</i> (Ministry of Justice, Judicial Affairs Department, Civil Justice Office).
Latvia
The central body is the Ministry of Justice of the Republic of Latvia.
Lithuania
Ministry of Justice of the Republic of Lithuania
Luxembourg
The central body is the <i>Parquet général près la Cour supérieure de justice</i> (Office of the Public Prosecutor at the Court of Cassation)
Malta
Office of the Director of Public Prosecutions.
The Netherlands
The central body responsible for the duties referred to in Article 3(1) of the Regulation is: <i>Raad voor de Rechtspraak</i> .
Poland
Ministry of Justice / Department of Judicial Assistance and European Law.
Portugal
Direcção Geral da Administração da Justiça.
United Kingdom
England and Wales: - Central body for all cases except for those of reciprocal enforcement of orders on foodstuffs: The Senior Master. Queen's Bench Division. Royal Courts of Justice. - Central body for the reciprocal enforcement of orders on foodstuffs: Reciprocal Enforcement of Maintenance Orders (REMO). Department for Constitutional Affairs.
Scotland: Scottish Executive Justice Department. Private International Law Branch. European and International Team.
Northern Ireland: - Central body for all cases except for those of reciprocal enforcement of orders on foodstuffs: The Master (Queen's Bench and Appeals). Master Wilson. Royal Courts of Justice. - Central body for the reciprocal enforcement of orders on foodstuffs: Management Support Team. Northern Ireland Court Service.
Gibraltar: All formal communications should be addressed to: The Attorney General of Gibraltar. Attorney General's Chambers. Sent through: The United Kingdom Government Gibraltar Liaison Unit for EU Affairs. Foreign and Commonwealth Office. European Union (Mediterranean)
Czech Republic
Ministry of Justice. International Department
Romania
Member State since 1 January 2007
Sweden
Justitiedepartementet. Enheten för brottmålsärenden och internationellt.

4.1.3.1 Effectiveness of the central bodies

The questionnaires included a question aimed at ascertaining how effective the central bodies were in supplying information to the courts and in seeking solutions to any difficulties which may arise in respect of a request. The results obtained were as follows:

How effective are the central bodies in supplying information to courts and seeking solutions to any difficulties which may arise in respect of a request?



4.1.3.1.1 Conclusions

The results are similar to those obtained concerning the effectiveness of the courts. It can be seen that generally speaking the central bodies are effective in carrying out the duties described, and that the effectiveness depends to a large degree on the Member State concerned. It was pointed out that this is detrimental to the attainment of the objectives of the Regulation and to the citizens' confidence in the European area. For this reason, bringing the effectiveness of the central bodies of the Member States to the same level is currently seen as an objective of greater priority than that of increasing their effectiveness in general terms. However, there is substantial room for improvement in all the central bodies, with only 2.7% of those polled considering them to be "very effective".

Comparing the results, generally speaking those polled consider the central bodies to be less effective than the courts.

However, this should be interpreted together with the fact that almost 30% of those surveyed – and 44% of the judges polled – felt it was "difficult to say" how effective the central bodies were. Therefore, it is more difficult to assess the effectiveness of the central bodies than the courts. This is logical, since the central bodies' participation in their duties of supplying information to courts and seeking solutions to any difficulties which may arise in respect of a request, will be quantitatively less than the courts' participation in the taking of evidence, clearly explaining the difficulty in saying how effective they are.

4.1.3.1.2 Proposals

Increasing the central bodies' effectiveness is a desirable objective, especially in those States where the degree of effectiveness is lowest. In addition to designating the central bodies (generally a Department of the State's Ministry of Justice), it would be desirable to have specific training organised for part of the personnel of the designated institution, in their duties and in application of the Regulation. Should the institution have staff specialised in application of the Regulation, it would be advisable for legal practitioners to have the addresses and direct contact details of these members of staff. These details could be included in the Manual being compiled by the Commission.

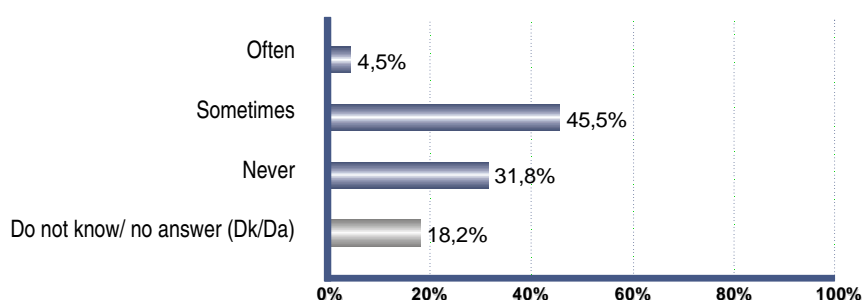
4.1.3.2 Participation of the central bodies

In accordance with Article 3 the central body is responsible for:

- 1.- supplying information to the courts;
- 2.- seeking solutions to any difficulties which may arise in respect of a request;
- 3.- forwarding a request to the requested court, in exceptional cases and at the request of a requesting court;
- 4.- taking decisions on requests pursuant to Article 17 (direct taking of evidence by the courts).

As can be seen the central bodies do not participate directly in the performance of taking of evidence. Except when they take decisions on requests for the direct taking of evidence referred to in Article 17, their duty is one of assistance and support, and their participation is, in principle, exceptional. With the aim of assessing the central bodies' participation in the duties entrusted to them by the Regulation, the questionnaires sent to the central bodies sounded out the frequency with which solutions had to be sought to difficulties that had arisen in respect of a request (article 3(1)(b)).

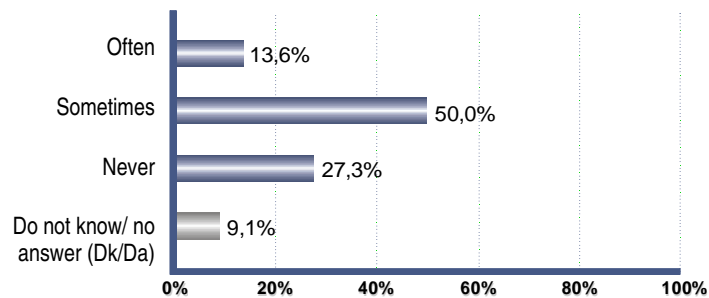
How often have central bodies had to seek solutions to difficulties which have arisen in respect of a request?



The relevant finding here is that half of the central bodies have at one time or another had to solve difficulties that have arisen in respect of a request made in accordance with the Regulation. However, the comments do not give any information about the kind of problems they have had to deal with. The Estonian central body, for example, points out that its function has hitherto been to advise its courts, and that no complicated subjects have arisen.

With regard to another of the duties provided for in Article 3 of the Regulation, the central bodies were asked about the frequency with which they have forwarded requests at the request of a requesting court.

From your experience, how frequently have central bodies forwarded a request to the competent court at the request of a requesting court?



Nearly 65% of the central bodies have forwarded a request to the competent court in their State for the taking of evidence at the request of a requesting court. The central body in Luxembourg states that it generally has between one and five cases a month, whilst the central body in the Netherlands calculates that it will have had around fifteen cases in 2006.

One of the central bodies designated in Germany says that it has not had any such cases, implying that the direct transmission between courts works. Conversely, the central body in Estonia believes that the fact that direct communication has only been established recently means that courts still prefer to forward their requests via the central authorities.

4.1.3.2.1 Conclusions

From the answers received it can be deduced that, in practice, the participation of the central bodies, in respect both of their task of solving specific difficulties and in their job of forwarding requests, is quantitatively substantial, always bearing in mind the limited use of the Regulation in Community practice. This circumstance highlights the importance of the central bodies' role in the proper functioning of the system introduced in the Regulation.

Especially surprising is the number of cases in which, at the request of the requesting courts, the central bodies have forwarded requests for the taking of evidence to the competent courts of their States. The figure of 64% is undoubtedly high, especially if we consider the fact that this is a duty that they should be carrying out in exceptional cases, according to the Regulation. The explanation for this could be that put forward by the Estonian central body: namely, the newness of direct transmission. Most of the courts of the Member States are used to the system of central authorities pursuant to the 1970 Hague Convention, which, it would appear, is convenient for them. The courts seem to prefer to use the well-known system of the central authorities, than to venture to use a new system whose operation and effectiveness they are not familiar with. The difficulty of changing well-established habits in the way the courts operate constitutes one of the obstacles inherent in any new procedure such as the procedures for the taking of evidence introduced by the Regulation. Another of the reasons for this could be ignorance of the Regulation,

rather than the conscious desire to continue with the previous system based on communication through the central bodies.

4.1.3.2.2 Proposals

The objective should be to minimize the participation of the central bodies in the procedures for the taking of evidence provided for in the Regulation. As was stated in Article 3, requests should be forwarded through central bodies only in exceptional cases. Therefore, requests made by requesting courts which are sent to the central body for the latter to forward them to the competent court should not be accepted in all cases, especially when the request is the result of inertia on the part of a requesting court accustomed to the system using the central bodies. The central bodies' participation as forwarding bodies must be justified, and consideration could therefore be given to the option of including in the Regulation guidelines for their participation or a list of cases in which this is accepted on account of the exceptional nature of the case (as demanded by the rule) being fulfilled.

Similarly, there are many cases in which the central bodies have had to seek solutions to difficulties that have arisen in respect of a request. With time, as and when the States' courts become familiar with the Regulation and get used to the way it is applied, the percentage of problems should fall. To speed up this trend it would be appropriate to devote time to the training of legal practitioners in the application of the Regulation, through specific training courses. Training courses or campaigns to further acquaint legal practitioners in the Member States with EU law could be sponsored by the States themselves or by the European Community.

4.1.4 Competent authorities referred to in Article 3(3)

Article 3(3) of the Regulation states that:

“Each Member State shall also designate the central body referred to in paragraph 1 or one or several competent authority(ies) to be responsible for taking decisions on requests pursuant to Article 17”.

To take decisions on requests for the direct taking of evidence pursuant to Article 17, the Member States had two options: to entrust this job to the central bodies referred to in Article 3(1) or to designate a number of “competent authorities” to carry out this task. Decisions on requests made pursuant to Article 17 will be taken in the Member States by the following bodies:

Germany
Except for Bayern, for the other <i>Länder</i> the respective central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Austria
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Belgium
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Bulgaria.
Member State since 1 January 2007
Cyprus
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Slovakia
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Slovenia
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Spain
The judicial authorities competent to decide on requests in accordance with Article 17 are the senior courts of each administrative area.
Estonia
The central body, i.e. the Ministry of Justice, has been designated as the competent authority, mentioned in Article 3(3) of the Regulation, with responsibility for taking decisions, in accordance with Article 17, on requests for the direct taking of evidence.
Finland
This central body, i.e. the Ministry of Justice, is also the authority provided for in Article 3(3) of the Regulation and responsible for deciding on requests concerning the direct execution of acts of instruction, in accordance with Article 17 of the Regulation.
France
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Greece
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Hungary
The Ministry of Justice is the central body and the competent authority under Article 3(3) for the entire territory of the Republic of Hungary.
Ireland

The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Italy
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Latvia
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Lithuania
The competent authority under Article 3(3) is the Ministry of Justice of the Republic of Lithuania.
Luxembourg
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Malta
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
The Netherlands
The name and address of the body competent to take decisions on the requests in accordance with Article 17 of the Regulation is: District Court of the Hague Prins Clauslaan 60, 2595 AJ 's-Gravenhage Postbus 20302, 2500 EH 's-Gravenhage Tel.: 070 381 3495 Fax: 070 381 1972 This court is the only competent authority and as such is responsible in respect of all requests in accordance with Article 17.
Poland
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Portugal
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
United Kingdom
The central bodies are also competent to decide on the request provided for in Article 17 of the Regulation.
Czech Republic
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.
Romania
Member State since 1 January 2007
Sweden
The central body is also competent to decide on the request provided for in Article 17 of the Regulation.

4.1.4.1 Conclusions

All the Member States, except Spain, Lithuania and the Netherlands, have designated the central body as the competent entity to decide on the requests provided for in Article 17 of the Regulation. Most of the Member States, therefore, have not deemed it necessary to designate one or more “competent authorities” for this purpose. Faced with this overwhelming reality, the usefulness of and need for the figure of the “competent authorities” should be questioned, since they only serve to complicate the panorama of the subjects participating in the application of the Regulation.

Both Lithuania and the Netherlands have designated a single competent authority. In this respect, Spain’s decision to designate as competent authorities the senior courts of each administrative area, making a total of 431 “competent authorities”, is striking.

4.1.4.2 Proposals

With a view to the future review of the Regulation consideration should be given to the expediency of removing the figure of the “competent authority”, leaving the job of deciding on requests for the direct taking of evidence, in accordance with Article 17 of the Regulation, to the central bodies.

4.1.5 The request: simplicity, clarity and legal certainty

The beginning of the procedure for assistance for evidence-taking abroad revolves around the “request”. The objective of the “request” may be either the taking of evidence by a foreign court (first procedure) or the performance of taking of evidence by the competent authority itself or a representative thereof (second procedure).

4.1.5.1.1 Requirements of the request

We use the expression “request” to identify “rogatory commission”, “letter of request” or “international requisitorial letter”, the customary instruments in cross-border cooperation. This is the request made by a judge within specific proceedings, sent to another judge, both belonging to the court of an EU Member State, either for the latter to carry out a specific procedural action which will subsequently be included in the main proceedings, or to carry out procedural steps directly (by the judge or representatives) on its territory.

Beyond what was laid down before with regard to its scope, Regulation 1206/2001 does not stipulate the circumstances in which the procedure can be commenced (and therefore the request can be made), but refers to the provisions of the law of the States which will have to provide for the authority of their bodies to resort to the mechanisms of international judicial assistance, their limits and requirements. Therefore, reference will have to be made to the provisions of the national laws to determine when the request for taking of evidence should be made by a court to another court in another EU Member State by means of either of the two procedures for the taking of evidence provided for in Regulation 1206.

Article 1. 1- *“Scope. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests: (...)”*

4.1.5.1.2 Forms

As regards the form and content of the requests, the Regulation establishes a series of requirements and specific content which should be checked before continuing with the procedure.

Firstly, with the aim of ensuring simple and straightforward procedures, Regulation 1206 includes a series of forms which must be used by all the courts that are going to use the Regulation. These are 10 models identified by the letters A to J, which appear as annexes at the end of the Regulation. The existence of forms on which all the possible vicissitudes involved in the taking of evidence can be noted also gives the system a high degree of legal certainty.

Likewise, as proof of the clarity and legal certainty desired, the Regulation institutes a central body as an instrument of assistance to facilitate the operation of the system (Article 3) and the requirement that, together with the request for taking of evidence, all the documents needed for the performance thereof are attached, and duly translated (Article 4(3)) (a precautionary measure that was not included in the Hague Conventions on the taking of evidence).

The request for the performance of the taking of evidence shall be made using *form A*, for requests for the taking of evidence to be performed by foreign bodies, and using *form I* when the request is for the direct taking of evidence by the requesting court itself.

The following details will have to be included (Article 4(1)):

- 1- The requesting court and, where appropriate, the requested court.
- 2- The names and addresses of the parties to the proceedings, and their representatives, if any.
- 3- The nature and subject matter of the case and a brief statement of the facts.
- 4- A description of the taking of evidence to be performed.
- 5- Where the request is for the examination of a person:
 - The name and address of the person
 - The questions to be put to the person to be examined or a statement of the facts about which he is to be examined
 - Where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court
 - Any requirements that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used.
 - Any other information that the requesting court deems necessary.
- 6- Where the request is for any other form of taking of evidence, the documents or other objects to be inspected.
- 7- Whether the evidence has to be taken in accordance with the law of the State of the requesting court and whether the parties or representatives of the requesting court will take part.

The request and all documents accompanying the request shall be exempt from authentication or any equivalent formality, making the procedure swifter and simpler.

Article 8 also provides for solutions to situations where requests contain inaccuracies or do not contain all the necessary information.

Article 8. Incomplete request -1. *If a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex, and shall request it to send the missing information, which should be indicated as precisely as possible.*

Conclusions on use of the forms

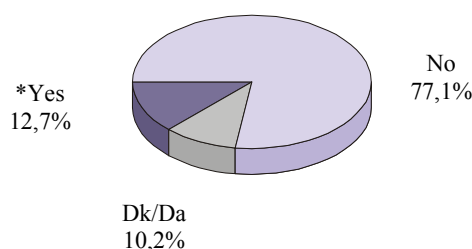
We regard the introduction of the obligatory use of predetermined forms as one of the Regulation's most positive contributions. This guarantees the "utmost clarity and legal certainty", as laid down in the ninth "recital" of the Regulation, partially fulfilling the key objectives thereof: *simplicity and clarity*.

The use of standard forms has a positive harmonising purpose which obliges the different States to align their participation in the procedure to one and the same format, facilitating the gradual convergence of national laws and the removal of differences obstructing effective cooperation in practice.

Problems with the forms

Generally speaking the majority of those polled consider that the use of the forms has not caused problems, as we can see in the graphic below:

Has the practical application of forms caused any problems? If so, which forms? Why?



However, the established forms run the risk of being too inflexible and bureaucratic. Thus we should stress that some of those polled regarded them as being too long, complex and difficult to interpret.

On the other hand, it is important to bear in mind how the answers reflect the fact that not all those entrusted with filling in the forms are specialists in the subject, and therefore they may make mistakes resulting in the procedure being slowed down rather than speeded up, causing an effect contrary to that pursued.

Proposals

For these reasons, the evaluation of the forms is broadly speaking positive, although it might be an idea to consider the possibility of shortening and simplifying the questions to facilitate the work of all the practitioners using them, irrespective of whether they are specialists in the subject.

A balance has to be found between the risk of inflexibility inherent in the introduction of standard forms, and the certainty and simplicity that such forms imply. The balance could be achieved through cooperation on the part of all the courts participating in the procedure and the possibility of the parties helping to draw up the forms.

- In this respect we have to highlight the importance taken of the requesting courts' role, since it is their task to check that the forms contain all the information required and to present this clearly, so that the taking of evidence in another State may be performed effectively.
- The requested courts should be required to display a co-operative approach promoting effectiveness in the taking of evidence, and are duty bound to communicate with the requesting court or the judge in the main proceedings concerning any doubt that arises as to the meaning of any part of the form.
- Finally, for the forms to be a faithful reflection of the needs of the proceedings and a guarantee of the respect for the fundamental rights inherent in any proceedings (including the right to defence, the principle of examination and cross-examination, and the right to an impartial judge) and bearing in mind the relevance that the evidentiary activity abroad may have in the final result of the lawsuit, the possibility is raised of the parties being given a hearing to see if they agree with the statement of the facts and the object of the debate (Article 4(1)(c) of Regulation 1206).

4.1.5.1.3 Language of the request and of communications

Language of the request

Pursuant to the principle of effectiveness and swiftness, Article 5 of the Regulation stipulates that the request and other communications to be effected for the performance of evidence-taking be drawn up in the official language of the requested Member State or in any language other than its own which is accepted for the completion of the forms. To this end each Member State must also indicate

the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for completion of the forms. Similarly, documents which the requesting courts deem it necessary to enclose for the execution of the request should be accompanied by a translation into the language in which the request was written (Article 4(3) of Regulation 1206).

Article 5. Languages. -*"The request and communications pursuant to this Regulation shall be drawn up in the official language of the requested Member State or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where the requested taking of evidence is to be performed, or in another language which the requested Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for the completion of the forms".*

The Member States had to inform the Commission of this aspect by 1 July 2003 at the latest. The Commission would also have to be informed of any change in this respect (Article 22(d)). However, there have not been any changes.

Article 22. Communication- *"By 1 July 2003 each Member State shall communicate to the Commission the following:*

d) the languages accepted for the requests as referred to in Article 5.

Member States shall inform the Commission of any subsequent changes to this information."

No provision is made for the option of enclosing a translation, as occurred in the Hague Conventions of 1954 and 1970. Rather, the requesting court has to fill in the form directly in the appropriate foreign language.

The Regulation does not call for a standard form drawn up in the language required by the assisting State to be used for the request; only the content filled in by the requesting judge must be in this language. This can give rise to a bilingualism that has not caused any practical difficulties for the requested court because the latter can compare the form used to that in its own language, since the forms are clearly marked with an identifying letter. Therefore, the form received can be superimposed on the form drafted in the State's own language, for the content of each section to be understood.

The only possible exception relating to the use of a particular language could be the possibility accepted by the Regulation for a request to be made for the communication to be effected in a particular manner, provided this is not incompatible with the laws of the requested Member State, which should be specified by the requesting court on the form.

Language of return

The requested court should fill in and return form H in the Annex. In accordance with Article 5 of the Regulation, the requested State will use its own official language for “communications”.

The official languages were included, by order of the Commission, in the Manual containing the information supplied by the States in accordance with the provisions of Article 22, and which is available electronically. The Commission has fulfilled the responsibilities imposed by Article 19, and the Manual is now available on the website of the European Judicial Atlas.

On the other hand, mention should be made of the fact that the Regulation does not refer to the language in which the rogatory commission should be completed, but obviously the court will take the evidence in the ordinary manner in its own language.

Meanwhile, when referring to execution costs, Article 18 of the Regulation does not talk of translation but of “interpreters”, on account of the possibility of the person who is the subject of the examination not speaking the language of the requested State.

Languages chosen by the Member States in accordance with Article 5 of the Regulation:

BELGIUM - French and Dutch
CZECH REPUBLIC - English, German and Slovak
GERMANY - German
ESTONIA - Estonian
GREECE - Greek, English and French
SPAIN - Spanish and Portuguese
FRANCE - French
IRELAND - English
ITALY - Italian
CYPRUS - English, Greek and Turkish
LATVIA - Latvian and English
LITHUANIA - Lithuanian, French and English
LUXEMBOURG - German and French
HUNGARY - English
MALTA - English
THE NETHERLANDS - English and Dutch
AUSTRIA - German, English and Austrian
POLAND - Polish, English, French and German
PORTUGAL - Portuguese and Spanish
SLOVENIA - English and Slovene
SLOVAKIA - Slovak
FINLAND - Finnish, Swedish and English
SWEDEN - Swedish and English
UNITED KINGDOM - English and French

Conclusions

Though the linguistic issue falls outside the ambit of this study, it is possible to make a few objective observations. There is no common language accepted by all the Member States. The most commonly accepted language is English, which is accepted by 15 countries and rejected by Belgium which only accepts French and Dutch, Portugal which accepts Spanish and Portuguese, Spain which accepts Spanish and Portuguese, Slovakia which only accepts Slovak, Estonia which only accepts Estonian, Italy which only accepts Italian, Luxembourg which accepts German and French, Germany which only accepts German, and France which only accepts French. The countries accepting the most languages are the Czech Republic which accepts English, German and Slovak, Greece which accepts Greek, English and French, Poland which accepts Polish, English, French and German, and Finland which accepts Finnish, Swedish and English.

Proposals

Given the large number of official languages following the enlargement of the EU and the disparity between the various languages chosen by the Member States, consideration could be given to the need to reach agreement as to the choice of a common language both for the receipt of the request and for cross-border communications. The acceptance of a single language as a means of communication for the taking of evidence would facilitate the procedure and save costs for translation services, which, when all is said and done, are paid by EU citizens. Having a translation service available for translation into all the languages causes an appreciable increase in cost, which would be substantially reduced in the event of such a service offering translations into one commonly accepted language for the submission and acknowledgement of requests, which would also further simplify the procedure.

4.1.6 Communications technology

The Regulation has established a system that seeks swiftness and simplicity in extra-territorial procedural activities. To this end it proposes methods of joint action. In its second “*recital*”, the Regulation stipulates that:

“cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated”.

To achieve these objectives, requests should be processed efficiently and transmitted “*by the swiftest possible means, which the requested Member State has indicated it can accept*” in accordance with Article 6 of the Regulation.

Recital no. (8) states that the efficiency of judicial procedures calls for the transmission of requests for the taking of evidence be made “*directly*” and “*by the most rapid means possible*”. As set out in the preamble to the Regulation (“*recital*” no. 10), requests for the taking of evidence should be executed “*expeditiously*”.

No provision is made for any specific procedural step for the States to establish which means they accept. Therefore, where this has not been specified explicitly, it has been deduced from information concerning the technical means at the courts’ disposal which the latter have communicated to the Commission further to Article 22(c).

Therefore, transmission may be carried out by any appropriate means, provided that “*the document received accurately reflects the content of the document forwarded and that all information in it is legible*”. Therefore, it will be the Member States’ responsibility to establish the means to be used, and no specific form is imposed as long as these requirements are met.

4.1.6.1 Means of communication

The means chosen by the Member States for receiving requests for the taking of evidence in accordance with Article 22(c) are:

BELGIUM - post and fax
CZECH REPUBLIC - post, fax and email
GERMANY - post and fax
ESTONIA - post, fax and email
GREECE - fax and email
SPAIN - post
FRANCE - post
IRELAND - post, fax or email
ITALY - post, fax and email
CYPRUS - post and fax
LATVIA - post, fax or email
LITHUANIA - post and fax.
LUXEMBOURG- post and fax
HUNGARY- post, fax or email
MALTA - fax and email
THE NETHERLANDS- post and fax
AUSTRIA - post, courier service and fax
POLAND - post
PORTUGAL - post and telematic means. In urgent cases, telephone and telegraph
SLOVENIA – fax mail and email
SLOVAKIA - post, fax and email
FINLAND - post, fax or email
SWEDEN - post, courier service and fax
UNITED KINGDOM - post

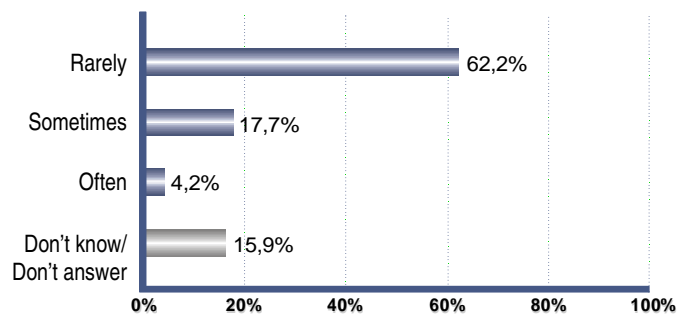
All the States receive requests by post. Most also use fax, except for Spain, France, Poland and the United Kingdom. Thirteen also accept email.

POST - The majority of the States opt for the post, probably as a safer means and because of a lack of new-generation communications technology, although use of communications technology will undoubtedly speed up the process.

FAX - Not all the Community administrations have a fax service.

COMMUNICATIONS TECHNOLOGY - The promotion and use of communications technology in the application of the Regulation can be seen as one of the most important aspects of the regulation. Interest in analysing the implementation, use and effectiveness of the new communications technologies led to three questions on this point being included in the questionnaires. Firstly, respondents were asked about the frequency with which communications technology was used for the taking of evidence. This gave rise to the following answers.

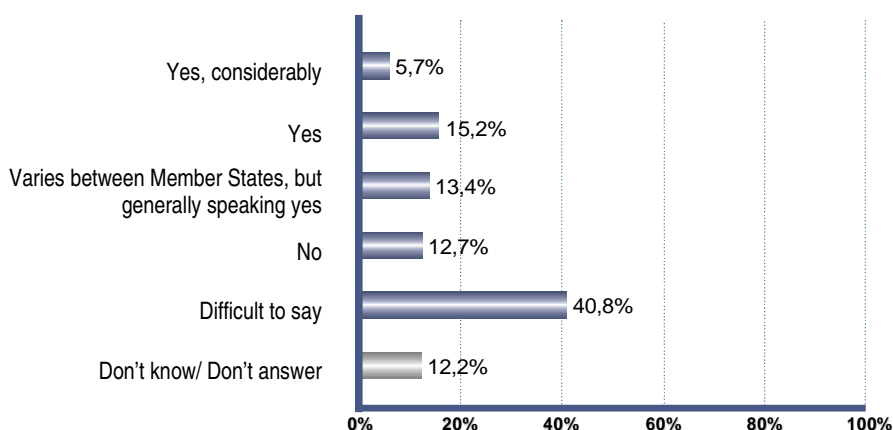
How frequently is communications technology used for taking evidence? In which types of requests?



The majority of those polled assert that communications technology is rarely used and a large number of them say that they are only used sometimes. These answers prompt us to conclude that new technologies are used only to a limited degree. Generally speaking this will depend mainly on the infrastructure of the requested State and the requesting State.

Despite this, the use of advanced communications technologies is of great interest, since it improves the efficiency of the taking of evidence, cuts costs and significantly reduces time scales, as inferred from the answers obtained to the following question:

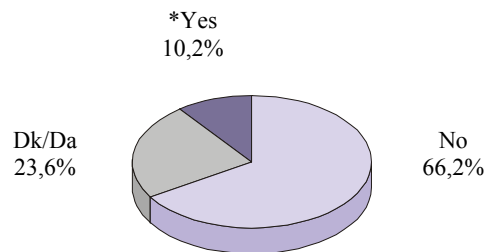
In practice, has the use of communications technology simplified and accelerated the taking of evidence in other Member States?



Conclusions

The heterogeneous nature of the various justice administrations in the European Union in respect of their infrastructure leads us to conclude that, for the time being, it is not possible to rely on the use of communications technology in judicial cooperation in civil matters, and that the traditional communication methods, namely the post and the telephone, continue to be used. The implementation of communications technology calls for a major effort on the part of all the Member States, combined with substantial investments in structure and training. When asked whether the use of communications technology had caused any problems, the majority replied that they had not.

Has the use of communications technology caused any problems? If so, which?



The main problems arising from the use of communications technology are related to the generalised lack of infrastructure in the EU States and the inequalities in use that this occasions, as well as legal practitioners' lack of information and training on the subject.

In the cases in which they have been used, the problems worth highlighting refer to the need for simultaneous interpreters when videoconferences are used, and the lack of specialist technical staff.

Pursuant to the replies obtained and the comments analysed, use of communications technology appears to be more widespread in criminal proceedings than in civil proceedings.

Despite the limited implementation of communications technology that we have been able to observe, there is no doubt that the adoption of this communications technology in the EU Member States would be very useful, and would speed up the procedure and appreciably reduce costs.

ADVANTAGES OF EMAIL – The use of email could be particularly interesting when all that has to be sent are the forms, in cases where nothing else is required for the relevant taking of evidence. For this, an electronic signature with cryptographic key could be used as a system for guaranteeing the authenticity of the messages.

A Community certification service provider could also be created for the courts of the Member States. In accordance with Directive 1999/93/EC establishing a Community framework for electronic signatures¹⁷, the internal market requires that certificates sent by a duly supervised national service provider be valid throughout the EU (Article 4 of the Directive). Therefore the electronic signature certified by a local service provider in accordance with the Directive and the national rules for its transposition will as a rule be enough to guarantee secure communications with courts or authorities of other Member States.

The points of contact or other members established in the European Justice Network could contribute to this, offering a complementary monitoring of the courts wishing to check the authenticity of the requests.

However, when additional documents have to be sent together with the form, sending the material in paper format, either by ordinary post or by courier service, becomes more efficient. In this case, the request could be sent ahead by fax or e-mail (although it would also be sent by post), by way of a preview, making it possible for the required court to prepare for the taking of evidence and thus speeding up the procedural steps.

We should point out that e-mail can also be used to send text and image files, meaning that this means of communication could be used for sending images and sound that may be useful for the requested court with a view to its intervention, or for the requesting court with a view to retransmission of audio-visual recordings of the taking of evidence requested.

VIDEOCONFERENCE – Countries that have videoconferencing facilities in some or all of the courts participating in Regulation 1206:

GERMANY
THE NETHERLANDS
AUSTRIA – Not all courts
PORTUGAL – Most courts
SLOVENIA – A very small number of courts
SWEDEN -Some
UNITED KINGDOM

Thus one of the main shortcomings observed in the potential offered by the Regulation is the technologically heterogeneous nature of the administrations of the Member States participating in the Regulation. These differences affect the quality and the cost of the way the Regulation works and therefore the proper safeguarding of effective judicial protection, for all citizens equally, in all the EU Member States.

The advantages of using communications technology in the field of the administration of justice are rendered more evident in the event of the requesting court asking the requested court to *use communications technology in the taking of evidence*, in particular by using videoconferencing and teleconferencing.

¹⁷ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999. OJEC L 13 January 2000.

The videoconference system enables real-time, two-way interactive communication, via image and sound, between two points separated by distance. Its advantages include its speed and the savings made in terms of time and costs:

- Speeding up of communication, and consequently of the court's activity, since the procedural steps can be carried out in real time even though people intervening are geographically far apart.
- Quality of the communication established, since it allows people to take part who are geographically far apart but are connected virtually, and are therefore able to give clarifications and make declarations.
- Authenticity of the declarations made, in that the image is seen and the voice heard at the same time.
- Security and saving of material and financial resources, since people do not have to travel.
- Convenience for the parties, witnesses, experts or court officials.
- Cost savings.

Currently, with the progressive development of telecommunications, videoconferencing equipment has become more affordable and the telephone networks making them possible have improved considerably.

The benefits of videoconferencing can be extended to include all those participating and cooperating in the administration of justice: judges, court officials, public prosecutors, forensic experts, and experts.

Videoconferencing offers various possibilities in the process:

- It would facilitate the performance of personal formalities such as the examination of the parties, witnesses or experts when they live in places other than the requesting court in all phases of the procedure
- For use in expert assistance by a specialist in forensic medicine.
- Allowing parties represented in the action to take part.
- To facilitate the relationship between judges and public prosecutors with the aim of unifying procedural criteria.
- For the performance of personal declaration, examination or exploration formalities that have to be carried out with a minor who is in a young offender institution, enabling communication without the examinee having to be moved.
- For the immediate taking of evidence, the guaranteeing of which prevents it being deferred or delayed to a later time.
- To enable monitoring of the trial.

Proposals

To benefit from these advantages the Member States should be urged to promote plans for the implementation of the videoconferencing system as an additional tool in the work of the justice administrations, and with the aim of giving a more efficient service guaranteeing effective judicial protection.

- Creation of a body within the justice administrations entrusted with strategic planning, and direction and implementation of this planning.
- Installation of the appropriate equipment in the selected court buildings.
- Programme to provide legal practitioners with training and information.
- Drafting of a list of courts with videoconference facilities.
- Establishment of specific legislation regulating cases in which videoconferencing can be used, and the conditions governing its use, at EU level. This would contribute towards its normalisation and would foster its use.

It is therefore necessary to achieve a similar degree of development in the technological infrastructures of the various States in order to arrive at a proper interaction between the players participating in Regulation 1206/2001 and to optimise its results. To this end:

- The EU should encourage all members to adapt to communications technology.
- The EU should support programmes directed at modernising the national justice administrations.
- The EU should grant funds to enable the States to undertake the task of modernising infrastructures and invest in training members of the national administrations in communications technology.
- The States should plan for the modernisation of their courts and to this end the work of national legislators will be necessary in granting budgets aimed at equipping national administrations with the infrastructure required to take advantage of the legal options established in Regulation 1206/2001.

4.1.6.2 The impact of communications technology

One of the most interesting aspects in the direct taking of evidence is the possibility of experts who are not resident in the State where the taking of evidence is being performed not having to travel to attend in person, which will appreciably reduce procedural costs. This is an option which would enable the taking of evidence to be performed in accordance with the procedural rules of the requesting court and even in its own seat, also avoiding the problems that could stem from the different appraisals of these services in the Member States.

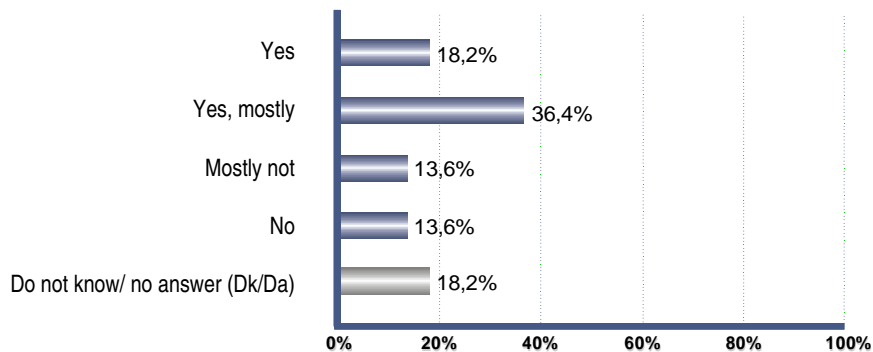
Furthermore, this possibility would also reinforce the legal certainty derived from the confirmation that it is the requesting court itself that controls the actions guaranteeing the value and efficiency of the evidence by virtue of its own impressions and not those forwarded to it by the requested court.

Technological means and the use of communications technology, especially videoconferencing, would result in a genuine virtual immediacy of the various protagonists in the procedure. Videoconferencing provides the opportunity to carry out comprehensive, accurate and inexpensive visual and auditory monitoring.

4.1.6.3 Use of the “swiftest possible means”

Article 6 of the Regulation states that requests and communications pursuant thereto “shall be transmitted by the swiftest possible means which the requested Member State has indicated it can accept”. The central bodies were asked about this obligation laid down by the Regulation.

Are the requests and communications addressed to your Member State pursuant to this Regulation transmitted by the “swiftest possible means” (Article 6 of the Regulation) which your Member State accepts?



Conclusions

In the central bodies’ opinion, transmission of the requests and communications is effected by the swiftest means that their State has indicated it can accept. However, this conclusion runs counter to the comments made in this regard, from which it can be inferred that the most widely used means is the post. In one case it was said that although the usual form of communication is the post, in urgent situations the fax is used. At any rate, in these conclusions we should not overlook the percentage of those polled that do not know or did not answer, who are numerous in all the results obtained, and highlight the limited use of the Regulation’s mechanisms.

4.1.7 The economic cost of assistance

With the aim of safeguarding effective judicial protection in access to evidence, Regulation 1206/2001 stipulates that assistance will be free of charge, except in cases of evidence of opinion and those involving the participation of interpreters, or in cases in which a special procedural form is used or a type of technology is used that is not usual in the assistant court.

Article 18. - 1. *The execution of the request, in accordance with Article 10, shall not give rise to a claim for any reimbursement of taxes or costs.*

2. *Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of:*

- *the fees paid to experts and interpreters, and*
- *the costs occasioned by the application of Article 10(3) and (4).*

The duty for the parties to bear these fees or costs shall be governed by the law of the Member State of the requesting court.

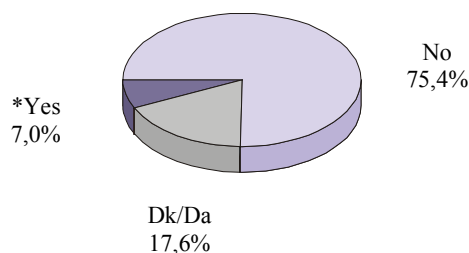
3. *Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request.*

The deposit or advance shall be made by the parties if that is provided for by the law of the Member State of the requesting court.

Pursuant to Article 18 of Regulation 1206 the execution of a request for the taking of evidence does not give rise to the reimbursement of taxes or costs of any kind, irrespective of whether the requested court makes a claim for the fees paid to experts or interpreters and the costs occasioned by the application of a special procedure requested by the requesting State or the use of technological resources.

The requested State's authorisation to ask for a deposit or advance to cover the costs that might be occasioned by the taking of evidence is an important new feature. Still, the advance must secure the procedural formality, since it is on this that the effective rendering of services depends.

Has the practical application of Article 18 (costs) caused any problems? If so, which?



4.1.7.1 Conclusions

From the replies to this question, we can deduce that there have not been many problems associated with this article, although these results may be determined by the lack of awareness of the Regulation and the lack of practical experience in the matter, as is inferred from the comments made by those surveyed.

However, bearing in mind that the parties' obligation to bear the fees and costs is determined in accordance with the *lex fori processus*, the problems may stem – as indicated by one of the replies obtained in the survey – from the differences between the different procedural laws of the Member States.

Similarly, differences in criteria and scales applied by the professionals taking part in the procedure in each EU Member State could result in discriminatory payments varying according to the State in which the evidence is taken.

As regards the use of technologies, it should be stressed that, in principle, when their use has been offered voluntarily by the requesting State no claim may be made for the costs stemming from their use, since Article 18 only makes provision for this when there has been a request by the requesting State pursuant to Article 10(4).

4.1.7.2 Proposals

To avoid the problems stemming from the differences in national laws concerning both the fees and costs of those specialists who have participated in the process and the scales establishing the fees of these professionals in each State, minimum and maximum levels could be set, between which the requested State's deposit would have to be fixed.

To set minimum and maximum levels for the costs that could be occasioned by the various procedures for the taking of evidence, the following measures need to be taken:

- An exhaustive analysis of the different probative procedures contained in the national laws of the Member States.
- A comparative analysis of the costs that said probative procedures imply.
- An analysis of the fees of the experts who are taking part or may take part in the procedure for the taking of evidence in the different States.
- A comparative analysis and setting of minimum and maximum levels.

4.1.8 Courts referred to in Article 2(2)

Two kinds of courts are distinguished from among those referred to in Article 2(2): requesting courts and requested courts. The requesting courts are those courts before which the judicial proceedings have either commenced or are contemplated (Article 2(1)).

The requested courts, meanwhile, are the courts that are able to perform the taking of evidence in accordance with the Regulation, and of which each Member State has drawn up a list indicating their territorial and, where appropriate, special jurisdiction.

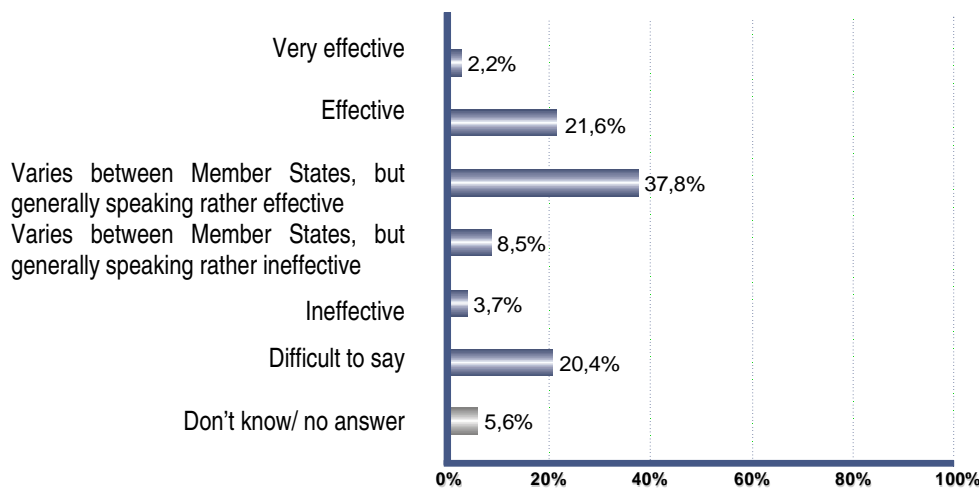
Germany
For the purposes of the taking of evidence the requested court in the Republic Federal de Germany, within the meaning of Article 2(1) of the Regulation, will be the competent court of first instance (<i>Amtsgericht</i>) in whose jurisdiction the proceeding has to be conducted. The governments of the Lander may by law attribute the duties of requested court to one court of law for it to handle the requests addressed to various courts in the district.
Austria
District courts (<i>Bezirksgerichte</i>) will be competent for the taking of evidence.
Belgium
Requests made for the taking of evidence are presented to the competent courts of first instance of the territory where said taking of evidence is to be performed. If the request must be executed in the territorial jurisdiction of various courts, the request will be sent to the competent court of the territory where the largest number of procedural steps for the taking of evidence have to be taken. Requests will be addressed to the civil secretariat of the competent court of first instance.
Bulgaria.
Member State since 1 January 2007
Cyprus
The District Courts are competent
Slovakia
Indicated on an individualised basis in the Manual
Slovenia
Competent courts for the taking of evidence (requested courts): district courts.
Spain
In Spain, the competent courts referred to in Article 2(2) will be the Courts of First Instance of each administrative area by means of distribution through the corresponding Senior Court.
Estonia
Indicated on an individualised basis in the Manual
Finland
All the district courts (<i>käräjäoikeus</i>) are of first instance, in the framework of their jurisdiction.
France
The <i>Tribunaux de Grande Instance</i> (TGI) on French territory, which will be competent within their geographical district, as defined at national level.
Greece
The courts of first instance
Hungary
Indicated on an individualised basis in the Manual
Ireland
Court competent for the performance of taking of evidence in accordance with this Regulation: DMD Court

Dolphin House Essex Street Dublin 2
Italy
The requesting Judicial Authorities in Italy are the <i>Tribunali</i> .
Latvia
Indicated on an individualised basis in the Manual
Lithuania
The requested courts are the courts of first instance.
Luxembourg
Indicated on an individualised basis in the Manual
Malta
Indicated on an individualised basis in the Manual
Netherlands
The courts competent for the taking of evidence in accordance with Article 2(2) of the Regulation are the district courts (<i>rechtbanken</i>). Territorial jurisdiction of the district courts. Requests for the obtaining of evidence should be presented to the district court in whose jurisdiction the request should be executed. For the hearing of witnesses or the drawing up of a report, the request must be presented to the district court in whose jurisdiction the witnesses or experts (or the majority thereof) live. If the request should be executed in more than one jurisdiction, each of the district courts of these jurisdictions shall be competent to execute the request in full.
Poland
The competent courts for the taking of evidence are the district courts (<i>S'dy Rejonowe</i>):
Portugal
The local courts are competent; within their special jurisdictions, the family and children's courts, the commercial courts and the maritime courts are competent
United Kingdom
The competent courts in England and Wales are indicated on an individualised basis in the Manual The competent courts in Scotland are indicated on an individualised basis in the Manual. All cases for the obtaining of evidence in Northern Ireland shall be addressed to: Royal Courts of Justice Chichester Street Belfast BT1 3JF When evidence is requested for the recording and execution of orders on children's foods, the competent courts may differ from those listed above. In accordance with the established procedures, the local courts of a Member State other than the United Kingdom will already have all the data from the competent local court in Northern Ireland before having to take the evidence. All cases related to the taking of evidence in Gibraltar shall be addressed to: The Supreme Court 277 Main Street Gibraltar Submitted via: The United Kingdom Government Gibraltar Liaison Unit for EU Affairs Foreign and Commonwealth Office European Union (Mediterranean) King Charles Street London SW1A 2AH
Czech Republic
Competent courts for the taking of evidence: district courts / regional courts
Romania
Member State since 1 January 2007

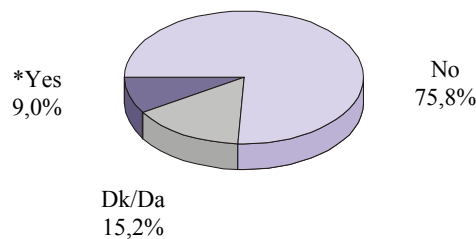
Sweden
Indicated on an individualised basis in the Manual

The questionnaires included a question aimed at ascertaining the efficiency of the requesting and requested courts referred to in Article 2 in fulfilling their tasks in accordance with the Regulation. The results obtained are as follows:

How effective are the requesting and requested courts (Article 2) in fulfilling their tasks under the Regulation?



Has the introduction of direct court-to-court contacts caused specific problems?



4.1.8.1 Conclusions

In general, both lawyers and the judges feel that the courts' effectiveness in fulfilling their tasks is satisfactory.

However, there is still appreciable room for improvement. Only 2.2% of those polled consider them to be very effective.

Another of the aspects worth highlighting relates to the differences in effectiveness between the courts of the different States. Most of those polled who felt that the courts were generally effective pointed out nonetheless that effectiveness varied from one State to another. This factor is detrimental to the establishment of a European area of freedom, security and justice. The fulfilment of this objective calls

for an effort on the part of each of the States making up the European Community. The citizens' confidence in this single area and the full exercising of freedom of movement will be diminished by the differing degrees of effectiveness of the different courts in the Member States. For these objectives to be met, the citizen should not encounter any differences between one State and another when exercising his rights. In other words, his rights should not be made conditional on the place where they are exercised. For this reason, bringing the effectiveness of the Member States' courts to the same level could be one of the main immediate goals, taking priority over that of increasing effectiveness in general terms.

A fifth of those polled feel that it is "difficult to say" how effective the courts are. Lack of experience or the lack of cases related to the Regulation could explain this percentage, which needs to be taken into account.

Finally, it should be stressed that lawyers are less satisfied than judges as regards the effectiveness of the courts, albeit not strikingly so.

4.1.8.2 Proposals

If we consider that the different degree of effectiveness of the Member States' courts in the performance of taking of evidence currently constitutes the main obstacle to the establishment of a European area of freedom, security and justice, and to the correct and complete freedom of movement of persons in the Member States, those States that are least effective should be identified, and targeted measures should be taken to increase effectiveness. To this end, both courses in Community law intended for the courts and the modernisation of national court structures would effectively contribute to increasing their effectiveness, and would increase citizens' confidence in the Community area, since they would see that their rights would not be affected depending on the Member State in which they exercised them.

4.1.9 The direct transmission system

As we have already pointed out, one of the Regulation's objectives is to further simplify and accelerate the taking of evidence in the Member States. To this end the Regulation establishes the possibility of direct communication between the competent courts of the different Member States, between the court making the request for the taking of evidence and the court executing said request, which is fundamental in the procedure. One of the Regulation's implicit concerns is that despite the fact that the procedure is carried out by courts in different States, there should be smooth communication between them, such that they are informed at all times of how the procedure is progressing.

Direct communication can be used both in communications and in the transmission of the requests establishing the first and most innovative of the Regulation's procedures.

4.1.9.1 The system of direct transmission between judges

In this procedure, it is the courts of the Member States that will communicate directly with each other, without the need for intermediary bodies that could complicate and lengthen the process of taking evidence, thereby hampering its efficiency and unduly delaying it.

Article 2. Direct transmission between the courts - 1. Requests pursuant to Article 1(1)(a), hereinafter referred to as "requests", shall be transmitted by the court before which the proceedings are commenced or contemplated, hereinafter referred to as the "requesting court", directly to the competent court of another Member State, hereinafter referred to as the "requested court", for the performance of the taking of evidence.

In the interests of achieving proper efficiency in the taking of evidence using this procedure, the Regulation requires each Member State to draw up a list of the courts whose job it is to provide assistance in the taking of evidence. This list should indicate the territorial and material jurisdiction of each court to which the request for the performance of taking of evidence should be forwarded in each Member State (Article 2(2) of Regulation 1206). In the direct transmission procedure, these will be the courts to which the requests will be sent directly.

Via this avenue, and once this list has been correctly drawn up, the aim is to speed up the process by obviating the need to approach a court with centralised duties that has to receive requests and forward them to the corresponding competent courts, thus simplifying the dynamic.

Therefore Article 7(2) of the Regulation makes provision for a formula for the correction of any mistakes in the choice of competent court:

Article 7(2)- *Where the execution of a request made using form A in the Annex, which complies with the conditions laid down in Article 5, does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the competent court of its Member State and shall inform the requesting court thereof using form A in the Annex.*

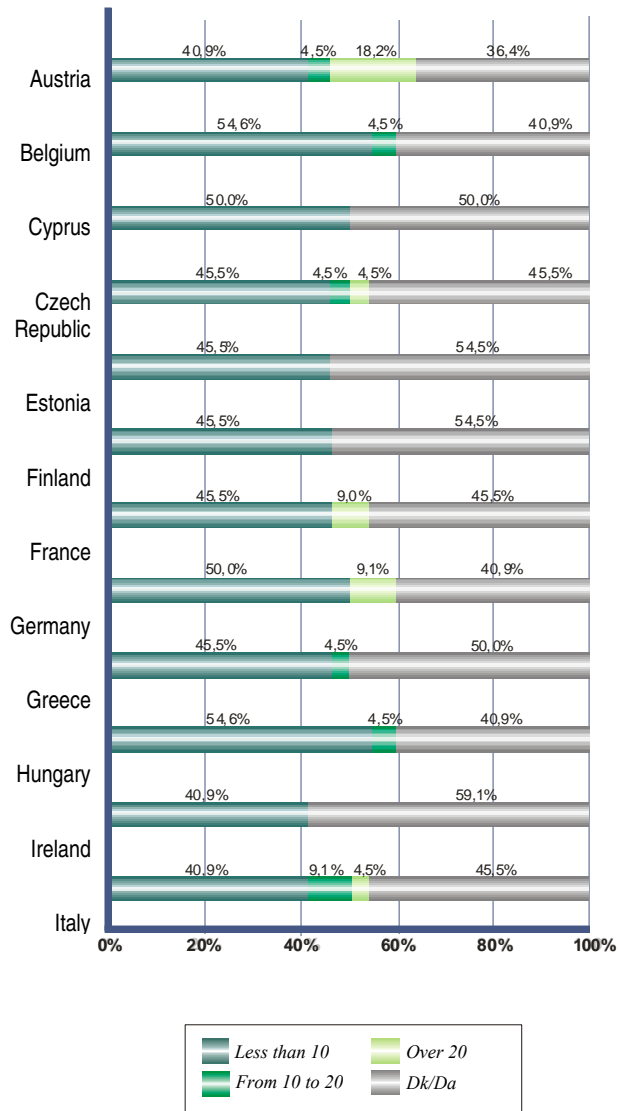
Likewise, as proof of the desired clarity and legal certainty, the Regulation makes provision for a central body as an instrument of assistance to facilitate the system's operation (Article 3). In this procedure, the central body has a secondary role in the transmission of request and in general in communications between the courts, as stated in Article 3 of Regulation 1206:

Article 3. Central body - 1. *Each Member State shall designate a central body responsible for:*

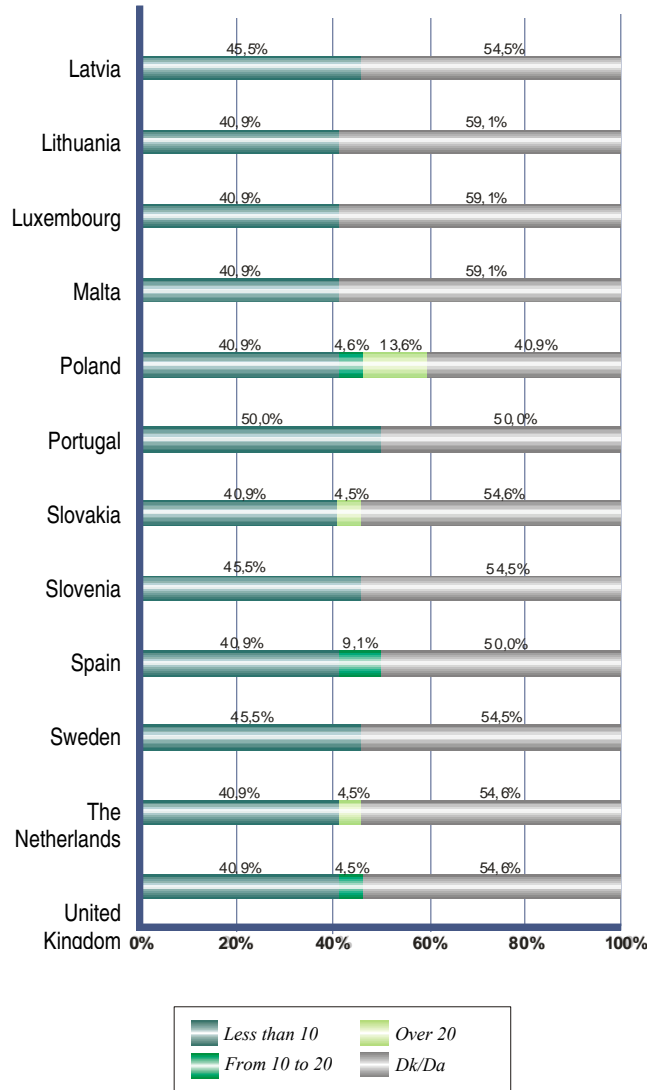
- a) supplying information to the courts;*
- b) seeking solutions to any difficulties which may arise in respect of a request;*
- c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court.*

When the central bodies were asked whether they had information on the number of requests from courts in other Member States transmitted in 2005 to the competent courts of their own Member State, in accordance with Article 1(1)(a) of the Regulation, the following results were obtained:

Do you have information concerning the number of requests from courts in other Member States transmitted in 2005 to the competent courts of your Member State in accordance with Article 1(1)(a) of the Regulation?



../...



4.1.9.1.1 Conclusions

An initial evaluation of the direct transmission method reflects a limited use thereof, which probably stems from its newness and therefore the fact that generally speaking many practitioners are not familiar with it. In fact, the majority do not know or did not answer, or state that they have received fewer than ten requests – a very small number.

However, it is also true that the central bodies do not take part directly in procedures for the requests for the taking of evidence. In theory, the requests for the taking of evidence in accordance with Article 1(1)(a) are sent from court to court,

which means that many requests may never come to the attention of the central body. This aspect was highlighted in more than one of the comments. The Portuguese central body, for example, states that only requests forwarded to the central body are counted, which means that its reply cannot serve to give a real answer as to the total number of requests that might have been made in Portugal in 2005. Estonia's central body also highlights this fact, asserting that "As requests are mainly sent by courts directly and some via Central Authority, it is difficult to give the number of requests sent in total and also to have knowledge in which country requests were sent".

4.1.9.1.2 Proposals

If it is felt that it would be worth having some means of counting the cases in which use is made of the procedure described in Article 1(1)(a) of the Regulation, it would be necessary for the courts competent for the taking of evidence referred to in Article 2(2) (requested courts) to be obliged to inform their State's central body of all requests received. Otherwise, it will be impossible for the central bodies to have such information at their disposal, unless they have made arrangements for this internally and the States have established mechanisms to secure it.

In any case, it would be desirable to foster direct communication between the competent jurisdictional authorities and to stress the importance of cooperation between Member States' authorities, since the direct transmission system is one of the most notable innovations of this Regulation. The direct transmission system between requesting and requested authorities helps speed up the process of evidence-taking, and comprises one of the greatest improvements over the previous legal framework.

4.1.9.2 Receipt of the request

The requesting court is given acknowledgement of receipt of the request for the taking of evidence by the requested court. The competent requested court will send the requesting court such acknowledgement of receipt within seven (7) days of receipt of the request, using form B in the Annex of the Regulation (Article 7).

Article 7(1). *Within seven days of receipt of the request, the requested competent court shall send an acknowledgement of receipt to the requesting court using form B in the Annex. Where the request does not comply with the conditions laid down in Articles 5 and 6, the requested court shall enter a note to that effect in the acknowledgement of receipt.*

If the request received does not meet the conditions - either because it is not drafted in one of the languages accepted by the requested State pursuant to Article 5, or because it is not legible or does not guarantee an accurate reflection of the content of the original (Article 6) - the requested court must mention this in the acknowledgement of receipt. Regulation 1206 does not lay down any time scale for the correction of these errors.

If the request is incomplete and does not contain all the necessary information pursuant to Article 4 of the Regulation, the requested court shall inform the requesting court without delay, and at the latest within 30 days of receipt of the request, using form C. In this case the period allowed for the taking of evidence shall begin from the moment the request is received again, duly completed.

***Article 8. Incomplete requests** – If a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex, and shall request it to send the missing information, which should be indicated as precisely as possible.*

The requesting judge will have a further 30 days in which to correct the shortcomings. Should this period lapse, the request shall be deemed to be refused and performance of the taking of evidence will be refused.

***Article 14. Refusal to execute** – ... if... c) the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 within 30 days after the requested court asked it to do so;*

For those cases in which a request is made for the taking of evidence which cannot be executed because a deposit or advance is necessary (Article 18(3)), the requested court shall inform the requesting court without delay, and at the latest within 30 days, also using form C. When the funds have been received, the requested court will send acknowledgement thereof within 10 days, using form D.

***article 8.2.** If a request cannot be executed because a deposit or advance is necessary in accordance with Article 18(3), the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using form C in the Annex and inform the requesting court how the deposit or advance should be made. The requested Court shall acknowledge receipt of the deposit or advance without delay, at the latest within 10 days of receipt of the deposit or the advance using form D.*

4.1.9.2.1 Conclusions

The Regulation does not establish whether it is possible to send the acknowledgement of receipt provided for in form B if any of the information referred to in Article 4 of the Regulation is missing. Despite this, if the omission is one of the shortcomings referred to in form B in accordance with Article 7(1), the acknowledgement of receipt will be necessary.

However, it is not completely clear what the procedure would be if the request meets the conditions of Articles 5 and 6. In such an event, form B can also be used.

4.1.9.2.2 Proposals

To avoid errors and dispel any doubts that could arise as regards incomplete requests, consideration could be given to the creation of a single form covering all these faults, irrespective of their cause, and thereby avoiding the confusion that the existence of forms B and C could generate.

4.1.9.3 Autonomous procedural law

Regulation 1206 stipulates that the request for the taking of evidence will be executed by the authorities of the requested State in accordance with that State's laws.

Article 10. *General provisions on the execution of the request -*

2. *The requested court shall execute the request in accordance with the law of its Member State*

However, there is a high degree of flexibility and the requesting court may ask for the request to be executed in accordance with one of the special procedures provided for in the law of its Member State, using Form A, and for communications technology to be used.

Article 10. *General provisions on the execution of the request*

3. *The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex.*

4. *The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.*

Provision was already made for this option in Article 14 of the 1954 Hague Convention and in Article 9 of the 1970 Hague Convention. It may be necessary to use a specific form to request performance of the procedure since the procedures carried out are to have effect in the State of the requesting court. The aim is to optimise the taking of evidence in the requesting State and to safeguard effective judicial protection.

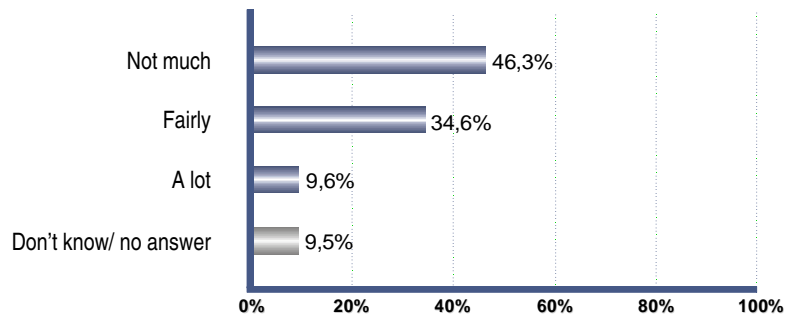
In this case, the reasons for the requested court's refusal are assessed in Article 10(3) of Regulation 1206 and refer to those cases in which,

- the procedure in question is incompatible with the law of the Member State of the requested court.
- there are major practical difficulties.

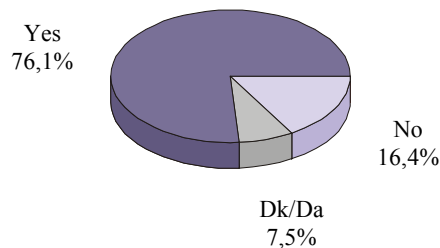
The reasons for refusal will thus be limited to failures to respect the fundamental rights and principles of civil proceedings in the requested State, or the material impossibility of its execution. These grounds are not described in detail, leaving the requested State an ample margin. To this end the Annex to the Regulation contains form E, which can be used to record the grounds for refusal. This does not imply grounds for definitive refusal and the resumption of the procedure can be requested by other means.

The reference to the national laws of Member States could cause problems on account of the different regulations that may exist. The questionnaires thus included two questions aimed at throwing light on the theoretical difficulties that these references could occasion and, where appropriate, the need for or desirability of harmonisation of the Member States' procedural laws.

Do you find it problematic that the Regulation often refers to the national laws of Member States?



Do you consider the harmonisation of the procedural laws of the Member States on the issue of the taking of evidence desirable?



4.1.9.3.1 Conclusions

It can be deduced from the results of the surveys that any reference to the national laws of the Member States is not regarded as very problematic, albeit problematic enough for it to be felt that there should be gradual harmonisation of national laws.

4.1.9.3.2 Proposals

The States should commit themselves to applying the Regulation as efficiently as possible, thus fulfilling the principle of cooperation and Community loyalty set out in Article 10 of the Treaty establishing the European Community.

The duties stemming from this undertaking by the States include a greater harmonisation of laws and rules in those aspects to which the Regulation refers. The Regulation makes reference to national laws in Articles 1, 6, 10, 11, 12, 13, 14, 17 and 18.

Efforts should be made to ensure that the coexistence of two regulatory levels, the EU level (Regulation 1206/2001) and national level (the different national laws), does not cause dysfunctions, and thus the gradual rapprochement of the national procedural laws on the matter should be promoted in order to arrive at enhanced efficiency in intra-Community assistance:

- a political awareness-raising campaign should be carried out among the EU Members.
- The European commitment to consolidate a genuine single judicial area should be encouraged.

Specifically, in the interests of achieving better harmonisation of the procedural laws of the Member States and facilitating the taking of evidence, the reasons for refusal referred to in Article 10. 3 of Regulation 1206 could be assessed.

The requesting court may ask the requested court to use communications technology such as videoconferencing or teleconferencing, provided this is not incompatible with the law of the court of the requested State and there are no practical difficulties rendering it impossible.

The taking of evidence by these means is undoubtedly very interesting and offers a host of guarantees and facilities, since it facilitates the involvement of the parties and of representatives without the need for travel and, moreover, will facilitate the taking of evidence relating to the examination of the parties, witnesses or experts, leading to immediacy. But, as we have seen in the section on the means for receipt of the request, only three countries have such technology at their disposal, with the result that refusal of the request because of a lack of infrastructure is a regular occurrence. Most of the courts of the EU Member States do not have these technological advances and the proportion rises with the incorporation of new member states which, as a rule, have a less advanced infrastructure.

For this reason the last part of Article 10(4) of the Regulation makes provision for the possibility that the requesting courts may provide the requested State with the necessary infrastructure, but bearing in mind the scarce resources available to the majority of the countries, only a genuine political willingness to modernise the justice administrations of each State will make this feasible.

4.1.9.4 Refusal of execution

We have already commented on the specific grounds for refusal for cases of assistance where a request is made for the use of a special procedure provided for in the laws of the requesting State or the use of communications technology for the performance of the taking of evidence. In these cases, in accordance with Article 10(3) and (4), the request may be refused using form E, on account of “incompatibility” with the law of the State of the requested court or because there are “major practical difficulties”. We will now mention cases of definitive refusal.

According to recital no. 11 of Regulation 1206 “*the possibility of refusing to execute the request for the performance of taking of evidence should be confined to strictly limited exceptional situations*”. This is a restrictive criterion that meets the willingness to guarantee optimal efficiency of the system established in the Regulation, reducing the legal uncertainty that has traditionally been observed with the conventional system.

Article 14(2) lists a series of cases in which the requested authority may refuse its cooperation, communicating this by means of form H.

1- Scope - The request for assistance should be refused definitively if it does not fall within the scope of Article 1 of the Regulation, or if it does not respect the objective and territorial limits laid down in the Regulation and dealt with above.

2- The request may also be refused when it is not permitted by the laws of the requesting State, since as we saw in Article 1(1) of Regulation 1206, it shall apply “*where the court, in accordance with the provisions of the law of that State, requests...*”. These grounds for refusal are not very effective at all, since they imply a knowledge of the law of the requesting State on the part of the requested court, as well as a breach of the principle of reciprocal trust that should underlie intra-Community cooperation.

3- Law and order. Violation of law and order or of the fundamental values of the Member States in the field of judicial competence of the requested court is considered improbable in intra-Community relations. Unquestionably the Member States must share a series of common legal/political values and principles as a requisite for membership of the EU.

4.1.9.5 After execution of the request

The requested court shall send the requiring court, without delay, the documents proving execution of the request and confirmation of execution of the request using form H.

There are no provisions concerning translation of the execution of the request into the language of the requesting State.

4.1.10 Direct taking of evidence by the requesting court

The second of the procedures laid down in the Regulation is established as an alternative to the one previously described, and allows the requesting court itself to perform the taking of evidence in accordance with its law in another Member State.

The direct taking of evidence can serve the objective of further accelerating the procedure, but its disadvantage is that the requesting court does not have authority

to apply coercive measures in the requested State, which means that if this procedure were used to obtain any kind of evidence, it would not be enforceable, since there is no way of obliging those involved to take part in the evidence-taking procedures. Therefore Article 17.2 stipulates that direct taking of evidence shall only take place if it can be performed on a voluntary basis, without the need for coercive measures.

4.1.10.1 Requirements of the request

Requests for direct taking of evidence are made using form I and sent to the central body designated by each Member State or the competent authority set up by the Member States (Articles 3(3) and 17(1)). This causes some confusion since it has resulted in an increase in the number of authorities competent to rule on requests for the taking of evidence presented under Article 17 of the Regulation. It is true that only three of the 24 Member States surveyed have decided to designate one or more competent authorities, leaving the task of ruling on requests under Article 17 in the hands of the central bodies. This can lead one to question the real value of the concept of “competent authority”.

4.1.10.2 Persons empowered to take evidence

Article 17(3) stipulates that

“The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court”.

However, when it comes to determining who can take evidence it should be borne in mind that in those cases where the presence of a judge is required, if the judge of the requesting State does not agree to travel to the other Member State, he will need to ask for the foreign court’s help.

4.1.10.3 Receipt of the request

On receipt of the request the requested central body or competent authority will notify the requesting court, within 30 days, of its acceptance (or refusal) of the request and the conditions under which it should be carried out, using form J. In particular, the central body or competent authority may designate a court of its own Member State to supervise the procedures for the taking of evidence. The aim of this supervision is to guarantee compliance with any conditions laid down and the correct application of the Regulation.

4.1.10.4 Reasons for refusal to allow direct taking of evidence

The reasons for the refusal to allow direct taking of evidence by the requesting court are as follows (Article 17(5)):

- 1-the request does not fall within the scope of the Regulation
- 2-the request does not contain all of the necessary information
- 3-the direct taking of evidence requested is contrary to fundamental principles of law in the Member State where evidence is to be taken.

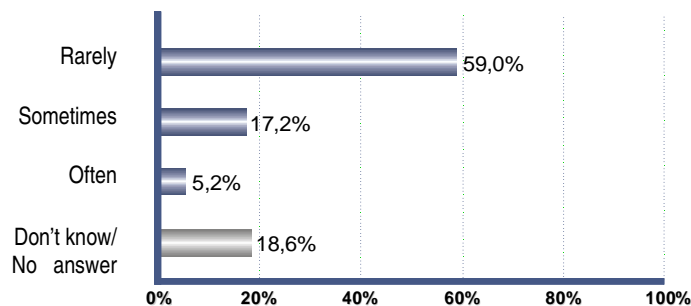
Where the request for the direct taking of evidence is not accepted by the requested State, the first procedure could always be used and direct communication between the courts could be initiated.

Article 23 of the Regulation, which constitutes the basis for this report, stresses the special attention to be paid to the practical application of Article 17 on the procedure for the direct taking of evidence by the requesting State. This requirement imposed by the Regulation itself led to three specific questions on this procedure being included in the questionnaire.

4.1.10.5 Frequency with which the method of direct taking of evidence is used

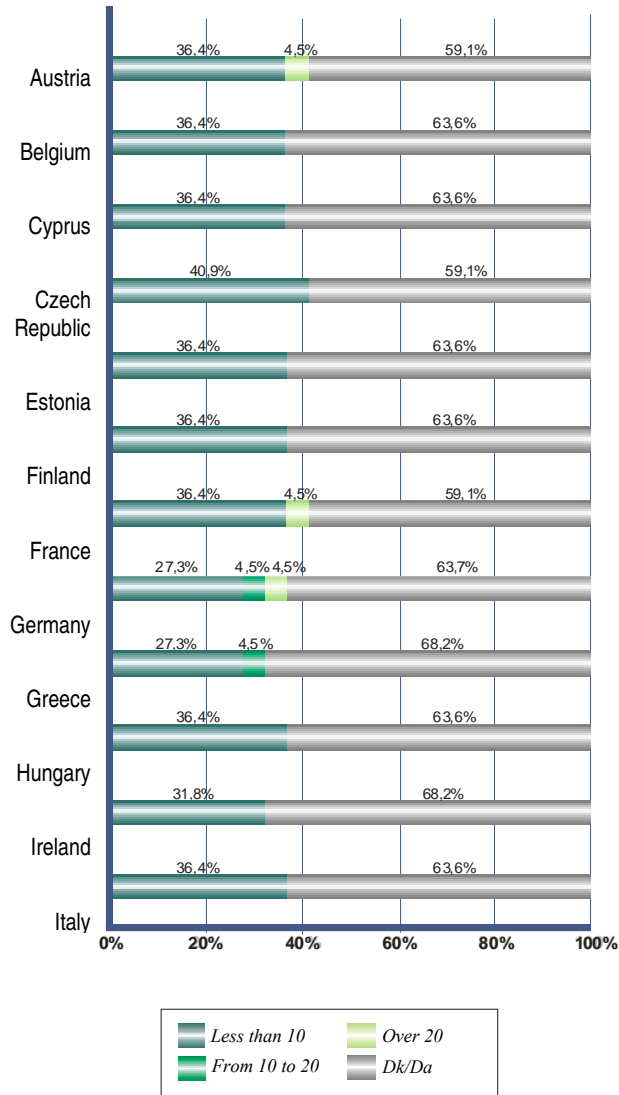
When asked how frequently this method of taking evidence was used, and what types of requests it was used for, the respondents replied as follows:

How frequently is this method of taking evidence used? For which types of requests?

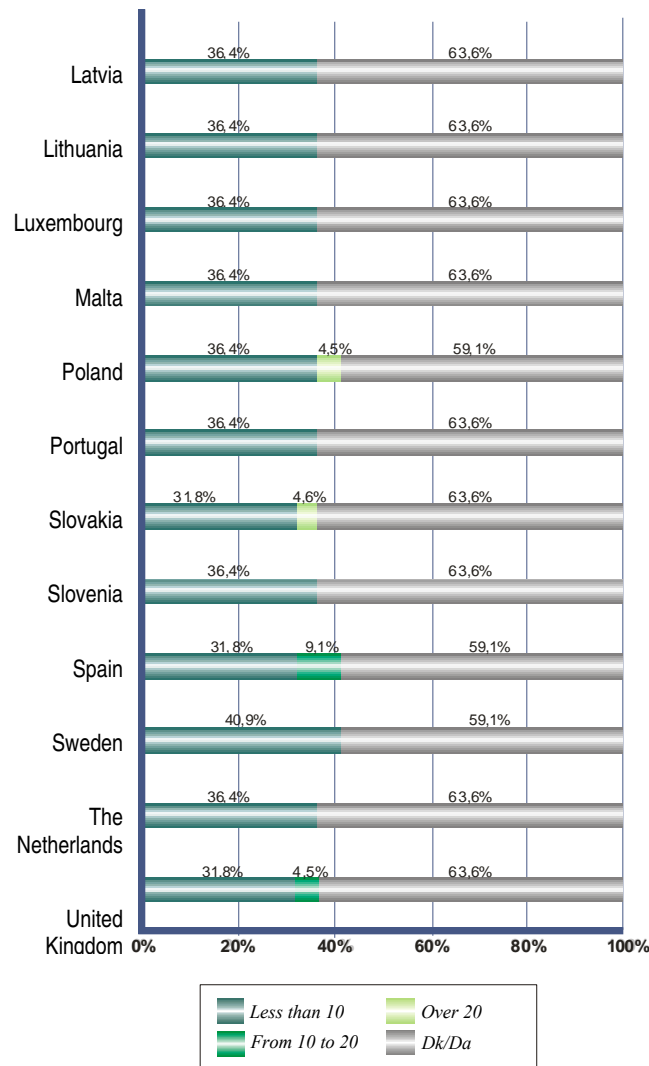


When the central bodies were asked:

Do you have information concerning the number of requests from courts in other Member States in 2005 to take evidence directly in your country in accordance with Article 1(1)(b) of the Regulation?



./...



4.1.10.5.1 Conclusions

The results highlight the very limited use of the procedure for the direct taking of evidence. Despite the inherent novelty of the introduction of this procedure in the Regulation, this option has not been used to the degree that might initially have been expected.

The results for the question put to the central bodies are particularly significant because in most of the States the latter are responsible for authorising the direct taking of evidence. Many of the central bodies have had no experience, since they have not had cases from many of the Member States. For their part, the courts that have used the procedure for direct taking of evidence the most have been those of Austria, France, Germany, Poland, and, to a lesser degree, Slovakia.

In respect of the question put to legal practitioners in general (not just the central bodies) it should be stressed, as is becoming customary, that one in five

respondents did not know or did not answer, which confirms the legal practitioners' lack of awareness of the Regulation's existence.

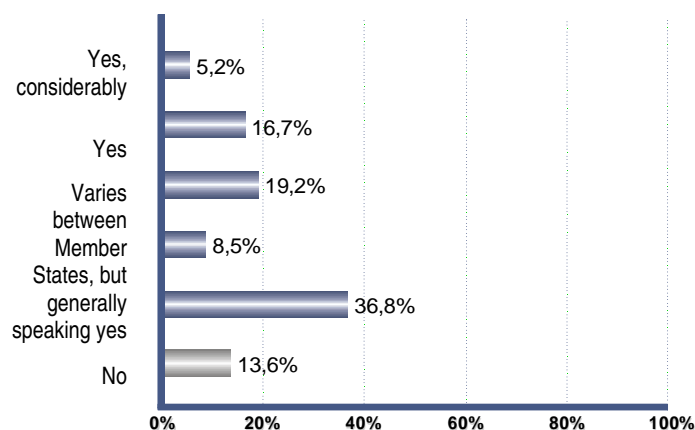
As regards the types of requests for which the direct taking of evidence is used, the comments received enable us to draw the following conclusions:

- The bulk of cases relate to requests to obtain evidence from witnesses, including expert witnesses. However, there have also been requests for the acquisition of documents, site inspections and the detection and tracing of persons or the checking of addresses.
- It has been used more in civil cases than in commercial cases;
- Within the field of civil cases, family law cases (especially those connected with minors) and the specific field of road accidents stand out;
- It can be seen from the comments received that teleconferencing or videoconferencing can be a particularly suitable means for taking evidence directly.
- Three of those surveyed raised, from Spain's perspective, the issue that this procedure can raise with the *principle of immediacy* which guides proceedings in Spain and requires the simultaneous presence of all the parties before the judge.
- In short, bringing together the conclusions drawn from the different comments, a paradigmatic case where the procedure for the direct taking of evidence by the requesting court is useful would be that of requests for testimonies, given by videoconferencing, from witnesses to road accidents. A case of this kind dovetails perfectly with the voluntary nature of the evidence characterising and conditioning the efficiency of this procedure.

4.1.10.6 The objectives of simplification and acceleration

When asked whether the introduction of this method of taking evidence had simplified or accelerated the taking of evidence in other Member States, those polled replied as follows:

In practice, has the introduction of this method of taking evidence simplified and accelerated the taking of evidence in other Member States?



4.1.10.6.1 Conclusions

Generally speaking, those polled feel that this method does speed up and simplify the taking of evidence between the Member States. Therefore, the assessment of this method is undoubtedly positive.

Only 8.5% feel that this method does not serve the objectives of simplification and acceleration.

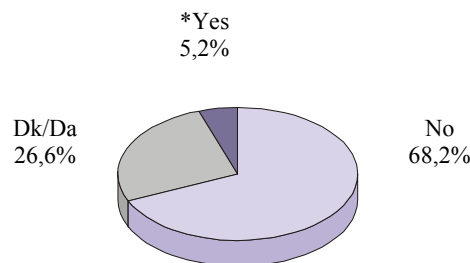
However, the opinions of those who feel that it is “difficult to say” whether it simplifies or accelerates the taking of evidence in other Member States, and of those who “do not know/did not answer”, represent half of those polled, and therefore a substantial proportion. Among judges, those who feel it is “difficult to say” and those who “do not know/did not answer” constitute 70% of the replies. These data can only be explained by the limited use of the procedure, combined with some people’s unawareness of the existence of the Regulation.

4.1.11 Problems in the application of Article 17

Because the method introduced in Article 17 (direct taking of evidence) is still relatively new, this is an area in which new problems are liable to arise. The questionnaires therefore included a question aimed at identifying any problems that may have arisen in application of this method.

When asked whether the application of Article 17 had caused any problems, and if so, which, the respondents replied as follows:

Has the application of Article 17 caused any problems? If so, which?



4.1.11.1.1 Conclusions

Only one in twenty have encountered problems with the application of Article 17. However, this should be interpreted in light of the limited use of this method. Among those who have not had any problems of application, many have not had any practical experience in its application. Therefore, the figure of 5% may herald more problems than the figure itself suggests. In reality, it is difficult to ascertain whether or not application of Article 17 is problematic. There is a lack of practical experience enabling the data to be interpreted without giving way to mere speculation as to the conclusions.

Nevertheless, the comments received highlight some of the problems caused by application of Article 17:

- One of those polled said he did not fully understand the way in which the roles were allocated between the competent authority and the requesting court as regards responsibility for the taking of evidence, and whether the judge of the requested Member State should oversee the procedure
- Another of the opinions reflects concern that the central bodies might well fail to respect the 30-day period in which they are obliged to inform the requesting court about its request
- Problems with technological resources. It was stated that in France there is insufficient information on the courts' technological resources for holding videoconferences. As regards Spain, it was said that the justice administration does not use the technology

- In more than one comment, reference was made to the method of “taking of evidence by qualified officials or consular staff and by Commissioners” regulated between Articles 15 and 22 of the 1970 Hague Convention on the taking of evidence, with a positive valuation being given to this. It was also said that Article 18 of the Hague Convention was more effective than Article 17 of the Regulation, that its application was simpler than the Regulation, and that it did not cause problems. All these comments reflect a greater familiarity with the Convention system. These comments appear to suggest that the Regulation does not contribute anything new in comparison with the provisions of the 1970 Hague Convention.
- Finally, it was also stressed that the voluntary nature of the method was not a positive aspect.

4.1.11.1.2 Proposals

It is clear that very little use is made of the direct method for the taking of evidence by the requesting court. The voluntary nature of the procedures, the limited opportunity to use technological resources in some States, the unclear wording of Article 17 and the lack of knowledge or practical experience of the Regulation, contribute to this limited use.

Therefore, training courses in EU law, and in particular in EU civil procedural law, could encourage use of this Regulation, as a great many legal practitioners are unaware of its utility.

The potential of the specific method described in Article 17 is closely linked to the use of technological means such as videoconferencing. Therefore, an effort is required on the part of all the States, first to introduce the technology into the judicial administration, and then to provide information about the available resources in an effective manner.

The impossibility of using coercive measures to acquire evidence in this type of procedure could excessively limit the number of cases in which this method is useful. This limitation goes some way towards explaining the positive assessment given by the respondents to Article 18 of the 1970 Hague Convention on the taking of evidence. This article states that the diplomatic or consular official or a Commissioner, who is authorised for the taking of evidence in the territory of another contracting State, may ask the competent authority designated by this State for assistance in obtaining evidence by coercive means. Returning to the Regulation, consideration could be given in the future to the introducing a similar provision; a provision allowing the requesting court to ask for assistance from or the involvement of the courts of the requested State for those cases in which the taking of evidence calls for coercion. It could therefore be desirable for Article 17 to include some solution, in the form of special cooperation or authorisation, enabling the use of coercion in the execution of requests for the direct taking of evidence.

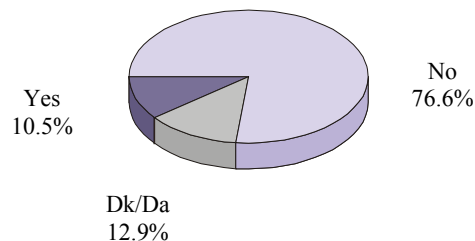
4.1.12 Compatibility of the Regulation with other instruments

The Regulation takes precedence over the Hague Convention of 1 March 1954 on civil procedure and the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters, but their precepts will continue to apply to Member States' relations with third States when both States are contracting parties to these Conventions.

They will even continue to apply between the Member States that are parties to the Regulation, in cases which fall within the scope of one of the aforementioned Hague Conventions, but not within the scope of the Regulation. The Regulation only takes precedence in cases that fall within the scope of both instruments.

The co-existence of different regulatory instruments covering a similar field, and the compatibility problems or application difficulties that may arise, **was the reason why the following question** was included in the questionnaires sent to legal practitioners in general, and the requested courts under the Regulation:

Have you found problems of compatibility between the Regulation and other instruments such as the 1970 Hague Convention on the Taking of Evidence?



4.1.12.1 Conclusions

Three quarters of those polled had not encountered any problems of compatibility between the Regulation and other legal instruments. Only one in ten had experienced problems of compatibility.

A number of conclusions can be drawn from the data, interpreted together with the comments received from the legal practitioners:

By and large there are no problems of compatibility.

However, this lack of problems in fact stems from the lack of experience on the part of those polled, as reflected in many of the comments. Indeed, many of those who claim not to have encountered any problems of compatibility admit to not having had any experience of, or any practical case involving, application of the Regulation.

Others do not think that the Regulation's compatibility with other regulatory texts is problematic, given the principle of primacy of the EU Regulation.

Some of those who had encountered compatibility problems, commented that these problems were not difficult to solve.

For all these reasons, time is needed for the Regulation to become an instrument familiar to and used by the Community's legal practitioners, since only then will there be significant experience of it to make possible an examination of the existence and extent of any possible problems of compatibility.

4.1.12.2 Proposals

Measures should be taken, or existing measures reinforced, to bring Community law closer to the judges and lawyers practising in the EU area. Training courses for legal practitioners in Community law in general, and in Regulation 1206 in particular, could significantly help to solve problems such as those of compatibility between different legal instruments. One of those polled who had not encountered problems of compatibility pointed out that his qualification as an expert in European Union law had been very worthwhile and useful to him.

4.1.13 The Scope of the Regulation

4.1.13.1 Material scope: problems of definition

Article 1 establishes the scope of Regulation 1206/2001. It states that:

1. *This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:*
 - a) *the competent court of another Member State to take evidence, or*
 - b) *to take evidence directly in another Member State.*
2. *A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.*

The Regulation shall apply when a court of a Member State requests:

A) the competent court of another Member State to take evidence. Judicial cooperation is effected between the court in one Member State and a court in another Member State;

B) that evidence be taken directly in another Member State. The court of one Member State may request that evidence be taken directly, by its own services, after authorisation from the central authority of the State where the evidence has to be taken.

Nothing prevents the scope of the Regulation from being extended to include procedures of voluntary jurisdiction.

Therefore the material scope of Regulation 1206/2001 calls for:

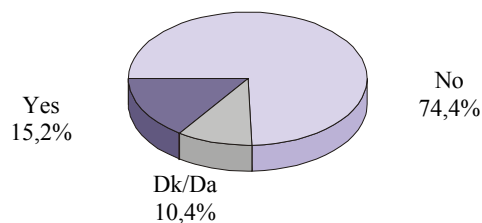
- 1.- the matter in question to be a civil or commercial matter;
- 2.- the request to pertain to the taking or obtaining of evidence;
- 3.- the request to be made by a court;
- 4.- the request to refer to proceedings commenced or contemplated.

In order to be able to determine the material scope of the Regulation as accurately as possible, all these concepts have to be defined. The importance of the definition or classification of the concepts dealt with in the Regulation is due to the diversity of the Member States' national laws, which may have different ideas about what is meant by the terms "civil or commercial matters", "evidence" or "court". So as to avoid, as far as possible, any future problems of classification, a definition of the Regulation's material scope will first be necessary.

For this definition, we can look at guidelines to the meaning of the terms used in the Regulation in the *Practice Guide for the application of the Regulation on the taking of evidence*¹⁸.

Nevertheless, in the light of the classification problems which are likely to arise in the application of Regulation 1206/2001, and especially as regards the Regulation's concept of "evidence", the questionnaires used in this study included the following question:

Have there been problems of interpretation of the Regulation, in particular concerning its scope and the concept of "evidence"? Has this led to a refusal to execute requests (Article 14)?



4.1.13.2 Conclusions

An interpretation of these results, together with the comments made by the respondents, enables the following conclusions to be drawn:

- Given that three-quarters of those polled answered "no", it could be concluded that, broadly speaking, interpretation of the Regulation does not present any problems. However, this assertion needs to be qualified. Many of those who have not had any problems point out that in fact they have had no experience of applying the Regulation. So the lack of problems is largely attributable to the lack of practical experience.
- Therefore, the figure of 15% of respondents who had had problems in interpreting the Regulation is a significant proportion, and needs to be taken into consideration. In fact one of the comments received was that this was the area of greatest difficulty.
- Interpretation problems do not relate solely to the concept of "evidence". One of the comments received was from someone who, faced with differing points of view, saw problems in the interpretation of tax matters within civil cases. Another respondent did not regard the concept of evidence as especially problematic, but thought an interpretation of the concepts "civil and commercial matters" and "proceedings, commenced or contemplated" was needed.

¹⁸ [http:// europa.eu.int/civilejustice](http://europa.eu.int/civilejustice).

4.1.13.3 Civil or commercial matters

The concept of “*civil and commercial matters*” should be understood as an autonomous concept of Community law. Therefore an independent definition should be made of what is to be understood by civil or commercial matters for the purposes of the Regulation. The concept of civil and commercial matters is not new to Community law. The same concept was used, *inter alia*, by Regulation 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters¹⁹.

The Court of Justice of the European Communities has also pronounced on the scope of this concept on more than one occasion, ruling on those cases on the borderline between public and private law²⁰, and effectively defining it. For example, evidence to be taken in disputes in which the Administration or the State exercises *authority of supreme jurisdiction* is excluded.

The regulation applies to all civil and commercial proceedings irrespective of the nature of the court in which they are found. It shall apply to disputes based on civil and commercial law, consumer law, labour law and any legislation in the field of private law. It should be stressed that matters fall within the scope of Regulation 1206/2001 which are excluded from the scope of the Brussels I Regulation²¹, such as those related to the capacity of natural persons, marriage settlements, wills and successions, bankruptcy, agreements between bankrupt parties and creditors, or other similar proceedings.

4.1.13.3.1 Proposals

Since this concept is used in various Community legal instruments for judicial cooperation in civil matters, and has been interpreted on more than one occasion by the Court of Justice of the European Communities, and is thus increasingly frequently used in EU law, it should be defined. The decisions of the ECJECJ in the context of other Community instruments should be directly transposable to the field of Regulation 1206/2001.

In a review of the Regulation it would be advisable to set out more clearly the meaning and limits of the concept of “*civil and commercial matters*”.

Firstly, as stated in one of the comments received in the surveys conducted, and in line with the Brussels I regulation at the time, it would be desirable to specify which tax, customs and administrative matters are regarded as being covered by

¹⁹ EC Regulation No. 1348/2000 of 29 May 2000. OJEC L160, p. 37 *et seq.*

²⁰ 14 October 1976 29/76, *LTU v. Eurocontrol*, in ECR 1541; 16 December 1980 814/79 *Ruffer*, ECR, 3807; 21 April 1993, C-172/91 *Sontang*, ECR, I-1963; 14 November 2002, C-271/00, *Steenbergen v. Baten*.

²¹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgements and commercial matters.

Regulation 1206/2001, since national laws of the Member States differ on this subject.

Secondly, consideration could be given to the introduction of an independent concept specific to Community law – and not necessarily fixed – in the text of the Regulation, drawing on the experience of the previous Regulations in the field of judicial cooperation in civil matters and the decisions of the ECJECJ , dispelling the doubts for at least some of the problematic cases.

4.1.13.4 The concept of “evidence”

Unlike the term “civil or commercial matters”, the term “evidence” in the Regulation has not been used in other Community Regulations, and nor has it been the subject of any pronouncement on the part of the ECJ. Nor does the Regulation itself give any definition of the concept of evidence.

“Evidence” should be understood to refer to all material derived from agreed legal procedures for the purposes of providing information relating to the veracity of the allegations made by the parties in support of their case.

This includes the traditional means of proof with which all the Member States are familiar, such as examinations, witnesses’ statements, the submission and exhibition of public and private documents, the presentation and examination of experts’ reports, and the judicial verification of circumstances, persons, companies’ books or other material objects.

Judicial inference is not included, since it does not involve practical measures, but is merely an intellectual activity which rests solely with the judge in the main proceedings.

Faced with the lack of any definition and the possible classification problems which could logically result in there being as many concepts of evidence as there are legal systems in the Member States, the questionnaires made specific reference to the interpretation problems relating to the concept of evidence. The survey also asked whether the problems surrounding the concept of evidence had led to any request being rejected.

4.1.13.4.1 Conclusions

As far as the concept of “evidence” is concerned, an initial conclusion is that although there have been problems of interpretation, these have never led to a refusal to carry out a request for the taking of evidence under the Regulation.

Although the Regulation is a source of interpretative problems, the concept of evidence does not appear to be especially problematic.

Problems do arise on account of the differences between the Member States' national laws. One of the comments refers to the fact that the national laws differ as regards the people required to testify. An Irish court has held that some of the requests made are too generic, meaning they cannot deal with them. Finally, Slovakian legal practitioners felt that it would be useful to make a distinction on the request form to indicate whether it referred to a hearing of witnesses or the examination of a party, because there are differences in the instructions given to a witness as opposed to a party to the case.

4.1.13.4.2 Proposals

For a review of the Regulation, the introduction of an independent concept of evidence in the Regulation's text could be considered. The concept could include an open, non-exhaustive list of the procedural steps for the taking of evidence that are permitted under the Regulation, which would serve as a guide to those having to apply it.

The concept of evidence could also expressly include procedural steps other than those intended for the taking of evidence, such as "security measures".

4.1.13.5 The requesting party should be a "court"

The request for the taking of evidence should be made by a court. Therefore requests for judicial assistance or cooperation made by administrative bodies and arbitration boards are excluded.

On this point, the jurisprudence of the ECJ on the subject of "*standing*" should be taken into consideration, in order to present the interlocutory question of Article 24 of the Treaty establishing the European Community, which has made it possible to draw up a wide-ranging Community concept of the term "*court*". In accordance with this, this concept should be taken to encompass not only courts of justice and ordinary law courts included in the judiciary of each State, but also other bodies having certain characteristics²²: These should be bodies established in accordance with the rules of law, which carry out duties on a permanent and independent basis, which hand down binding final decisions on legal grounds, which respect the principle of hearing arguments for both sides in their proceedings, and whose jurisdiction is obligatory.

²² 30 June 1966, *G. Basen-Göbels v. Management of the Beambtenfonds voor het Mijnbedrijf*, case 61/65; 6 October 1981, *C. Borrelmeulen v. Huisarts Registratie Commissie*, case 246/80; 11 June 1987, *Pretore di Salò v. persons unknown*, case 14/86; 30 March 1993, *Pierre Corbiau v. Administration des Contributions*, case 24/92; 27 April 1994, *Municipality of Almelo and others v. NV Energiebedrijf IJsselmij*, case 393/92; 12 December 1996, *Criminal proceedings against X*, combined cases 74/95 and 129/95; 17 September 1997, *Dorscha Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, case 54/96; 16 October 1997, *Maria Antonella Garofalo, Giovanni Pagano, Rosa Bruna Vitale, Francesca Nuccio, Giacomo Cangialosi, Giacomina D'Amico, Giulia Lombardo, Emanuela Giovenco, Caterina Lo Gaglio; Daniela Guerrera and Cesare Di Marco, v. Ministero della Sanità and Unitàsanitaria locale (USL) n. 58 di Palermo*, combined cases 69/96 to 79/96; 4 November 1997, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, case 337/95.

The requesting body may be any competent court within the terms already analysed. However, the assisting body may only constitute those judges or magistrates selected for this purpose by each Member State. Thus Article 2(2) stipulates that each Member State shall draw up a list of the courts competent for the taking of evidence, with an indication of their territorial and, where appropriate, special jurisdiction.

4.1.13.6 The evidence must be intended for use in judicial proceedings, commenced or contemplated

Article 1(2) of the Regulation stipulates that requests shall be made to obtain evidence for use in judicial proceedings that have either already commenced or are contemplated.

The possibility of taking evidence to be used in proceedings that have not yet started opens the door to evidence being taken in advance, thereby avoiding the risk of a piece of evidence being lost before the actual start of proceedings.

In the comments on the problems of interpretation of the Regulation, one of those polled felt that an interpretation of the concept of “judicial proceedings, commenced or contemplated” was needed.

4.1.13.7 Temporal scope.

The application of the Regulation dates from 1 January 2004, with the exception of Articles 14 (grounds on which execution of the request is denied), 19 (preparation and updating of a manual with the information provided by the Member States and the updating and technical adaptation of the forms by the Commission), 21 (compatibility with existing or future agreements or arrangements between the Member States and the States’ obligation to notify the Commission thereof) and 22 (notification to the Commission by the Member States of the courts authorised to take evidence, the central bodies and competent authorities, the technical means available and the languages accepted for the requests). These four articles have been applicable since 1 July 2001.

The distinction between different dates of application is attributable, *inter alia*, to the need for the Member States to adapt to and prepare for the Regulation, so that, once applicable, it would be possible to apply it with genuine effectiveness. Moreover, if we consider the articles that have been applicable since 1 July 2001, it can be seen that it is precisely these that refer to preparatory requirements – appointment of competent bodies, accepted languages, etc. Without this preparation, it would have been difficult for the Regulation to take effect. Therefore these provisions called on the Commission and the Member States to perform certain duties aimed at ensuring effective application of the Regulation from the outset, i.e. from 1 January 2004 onwards.

These preliminary measures included the Commission being required to prepare a manual, which had to be available electronically, with the information supplied by the Member States under Article 22. The Commission has fulfilled the mission imposed by Article 19 and the manual is currently available on the European Judicial Atlas website:

http://europa.eu.int/comm/justice_home/judicialatlascivil/html/index_en.htm.

Article 21 sets out the Member States' obligation to submit a copy of the agreements or arrangements maintained or concluded between the Member States aimed at further facilitating the taking of evidence and which were compatible with the Regulation, as well as any amendments to or denunciation of these agreements or arrangements, to the Commission by 1 July 2003. As a result of this measure, some States have provided the information on said agreements or arrangements, which are mentioned in the manual.

Germany
No reference to other agreements or arrangements.
Austria
There is no plan to maintain bilateral agreements or arrangements.
Belgium
Belgium declares that, in its relations with the other Member States, and in matters falling within the scope of the Regulation, the latter shall take precedence over the following instruments: <ul style="list-style-type: none"> • Arrangement of 21 June 1922 between Belgium and Great Britain on the transmission of judicial and extrajudicial deeds and the establishment of evidence; • The Hague Convention of 1 March 1954 on Civil Procedure; • Arrangement of 1 March 1956 between Belgium and France on reciprocal assistance in civil and commercial matters; • New York Convention of 20 June 1956 on the obtaining of foodstuffs abroad; • Agreement of 25 April 1959 between the Belgian Government and the Government of the Federal Republic of Germany with a view to facilitating application of the Hague Convention of 1 March 1954 on Civil Procedure; • Arrangement of 23 October 1989 between Belgium and Austria on reciprocal assistance and legal cooperation, added to the Hague Convention of 1 March 1954 on Civil Procedure.
Bulgaria.
Member State since 1 January 2007
Cyprus
Information concerning bilateral agreements on the taking of evidence abroad in accordance with Article 21(2). The Republic of Cyprus has concluded bilateral agreements for legal/judicial cooperation, which are still in force, with the countries listed below: <ol style="list-style-type: none"> 1. Czechoslovakia, Law 68/82 2. Hungary, Law 7/83. 3. Bulgaria, Law 18/84 4. Greece, Law 55/84 5. Syria, Law 160/86 6. Soviet Union, Law 172/86 7. Yugoslavia, Law 179/86 8. Egypt, Law 32(111)/92 9. China, Law 19(...)/95 10. Poland, Law 10(...)/97 11. Ukraine, Law 8(111)/2005
Slovakia
Treaties in accordance with paragraph 3 of section 21: Treaty between the Slovakian Republic and the Czech Republic on reciprocal legal assistance between the judicial

authorities and on the regulation of certain legal relations in civil and criminal matters with Final Protocol (Prague, 29 October 1992).
Treaty between the Socialist Republic of Czechoslovakia and the People of the Republic of Hungary on reciprocal legal assistance and on the regulation of legal relations in civil matters, matters of family law and matters of criminal law (Bratislava, 28 March 1989).
Treaty between the Socialist Republic of Czechoslovakia and the People of the Republic of Poland on reciprocal legal assistance and on the regulation of legal relations in civil matters, matters of family law, labour matters and criminal matters (Warsaw, 21 December 1987).

Slovenia

Agreements or arrangements existing between the Republic of Slovenia and Member States:

- Treaty of 16 December 1954 on judicial assistance between the People's Federal Republic of Yugoslavia and the Austrian Republic.
- Agreement of 24 September 1971 on judicial assistance in civil and commercial matters between the Socialist Federal Republic of Yugoslavia and the Kingdom of Belgium.
- Agreement of 29 October 1969 on application of the Hague Convention on Civil Procedure between the Socialist Federal Republic of Yugoslavia and the French Republic.
- Arrangement of 3 December 1960 on judicial assistance in civil and administrative matters between the Socialist Federal Republic of Yugoslavia and the Italian Republic.
- Arrangement of 27 February 1936 on the regulation of judicial assistance as regards civil and commercial procedures pending before the competent judicial authorities between the Kingdom of Yugoslavia and the United Kingdom.

Agreements or arrangements existing between the Republic of Slovenia and the adhering countries:

- Treaty of 19 September 1984 on judicial assistance in civil and criminal matters between the Socialist Federal Republic of Yugoslavia and the Republic of Cyprus.
- Treaty of 20 January 1964 on the regulation of legal relations in civil matters, matters of family law and criminal matters, between the Socialist Federal Republic of Yugoslavia and the Socialist Republic of Czechoslovakia.
- Treaty of 7 March 1968 between the Socialist Federal Republic of Yugoslavia and the People's Republic of Hungary.
- Treaty of 25 April 1986 amending the Treaty of 7 March 1968 between the Socialist Federal Republic of Yugoslavia and the People's Republic of Hungary.
- Treaty of 6 February 1960 between the People's Federal Republic of Yugoslavia and the People's Republic of Poland.

Spain

No reference to other Agreements or Arrangements.

Estonia

No reference to other Agreements or Arrangements.

Finland

No reference to other Agreements or Arrangements.

France

• Article 21(3)(a): Agreements concluded by France with other Member States, aimed at further facilitating the taking of evidence and compatible with the Regulation, which will be maintained. The only such agreement to be maintained will be the Franco-British Convention of 2 February 1922 to facilitate the performance of procedural acts between persons resident in France and Great Britain. Indeed, this convention has been extended to include the countries of the Commonwealth and the United Kingdom's overseas territories, our relations with which are not governed by the Regulation of 28 May 2001.

• Article 21(3)(b): Agreements and other instruments concluded by France with other Member States, aimed at further facilitating the taking of evidence and compatible with the Regulation, which will subsequently be denounced. These agreements, the denunciation of which is planned, are as follows:

1. Agreement with Germany, of 6 May 1961, aimed at facilitating application of the Hague Convention of 1 March 1954 on Civil Procedure (Articles 4 to 7).
2. Arrangement with Austria, of 27 February 1979, on reciprocal assistance and judicial cooperation, additional to the Hague Convention of 1 March 1954 on Civil Procedure (chapter III).
3. Arrangement with Belgium on reciprocal judicial assistance in civil and commercial matters, amended by an

exchange of memoranda of 23 and 30 August 1969 (chapter II). 4. Arrangement with Spain of 19 February 1968, additional to the Hague Convention of 1 March 1954 on Civil Procedure. 5. Arrangement with Italy, of 12 January 1955, on reciprocal judicial assistance (title IV). 6. Exchange of memoranda with Luxembourg of 23 July 1956.
Greece
No reference to other Agreements or Arrangements.
Hungary
No reference to other Agreements or Arrangements.
Ireland
No reference to other Agreements or Arrangements.
Italy
Italy does not intend to make use of the option of maintaining agreements or arrangements with one or more EU Member States to facilitate the taking of evidence, since it feels that the provisions contained in Regulation (CE) No. 1206/2001 are adequate and sufficient.
Latvia
Latvia does not maintain any agreements or arrangements with Member States as referred to in Article 21(2) (agreements or arrangements maintained between two or more Member States to further facilitate the taking of evidence, provided these are compatible with the provisions of this Regulation 1206/2001, as well as drafts of such agreements or arrangements which they intend to adopt and any denunciation of or amendment to these agreements or arrangements).
Lithuania
1. Agreement on judicial assistance and legal relations in civil matters, matters of family law, labour matters and criminal matters, between the Republic of Lithuania and the Republic of Poland (1993), in Lithuanian and Polish. 2. Agreement on judicial assistance and legal relations between the Republic of Lithuania, the Republic of Estonia and the Republic of Latvia (1992), in Latvian, Lithuanian and Estonian.
Luxembourg
Pursuant to Article 21(2)(a), Luxembourg informs the Commission that the following agreements or arrangements are maintained: • European Convention on information on foreign law, signed in London on 7 June 1968, and additional Protocol to the European Convention on information on foreign law, signed in Strasbourg on 15 March 1978. • Vereinbarung vom 1. august 1909 zwischen Luxemburg und Deutschland, in Betreff der Anwendung des Haager Abkommens vom 17. Juli 1905, bei Zustellungen von gerichtlichen und aussergerichtlichen Urkunden. • Agreement of 17 March 1972 between the Grand Duchy of Luxembourg and the Austrian Republic, additional to the Hague Convention of 1 March 1954 on Civil Procedure. • Exchange of declarations of 23 July 1956 between France and Luxembourg on the transmission of rogatory commissions.
Malta
Agreements: None.
Netherlands
No reference to other Agreements or Arrangements.
Poland
No reference to other Agreements or Arrangements.
Portugal
For the purposes of the provisions of Article 21(3) of Regulation No. 1206/2001, a copy is attached of Decree No. 14/98 of 27 May, Notice 274/98 and List No. 73/2000, referring to the Agreement between the Portuguese Republic and the Kingdom of Spain on Judicial Cooperation in Criminal and Civil Matters.
United Kingdom
The United Kingdom does not intend to maintain any bilateral agreements with other Member States on the obtaining of evidence between the United Kingdom and the other Member States. However, it has informed those Member States with whom it has concluded agreements of its wish for those agreements to continue to apply to cases between said Member States and the United Kingdom's Overseas Territories that are not part of the European Union. The countries with which the United Kingdom has concluded agreements, and the dates of said agreements, are as follows: Austria 31/03/31

Greece 07/02/36 Belgium 21/06/22 Italy 17/12/30 Denmark 29/11/32 The Netherlands 31/05/32 Finland 11/08/33 Portugal 09/07/31 France 02/02/22 Spain 27/06/29 Germany 20/03/28 Sweden 28/08/30 The United Kingdom's Overseas Territories outside the European Union, to which said agreements will continue to apply, are: Channel Islands; Isle of Man; Anguilla; Bermuda; British Virgin Islands; Cayman Islands; Falkland Islands & Dependencies; Montserrat; Sovereign Base Areas of Akrotiri & Dhekelia (Cyprus); St Helena & Dependencies; Turks & Caicos Islands.
Czech Republic
The texts of the following treaties will be submitted to the Commission: <ul style="list-style-type: none"> • Treaty between the Socialist Republic of Czechoslovakia and the People's Republic of Poland on judicial assistance and conciliation of legal relations in civil matters, matters of family law, labour matters and criminal matters, signed in Warsaw on 21 December 1987, and still in force between the Czech Republic and Poland. • Treaty between the Socialist Republic of Czechoslovakia and the People's Republic of Hungary on judicial assistance and conciliation of legal relations in civil matters, matters of family law, and criminal matters, signed in Bratislava on 28 March 1989, and still in force between the Czech Republic and Hungary. • Treaty between the Czech Republic and the Republic of Slovakia on judicial assistance provided by judicial bodies and the conciliation of certain legal relations in civil and criminal matters, signed in Prague on 29 October 1992. • Treaty between the Czech Republic and Germany on the provision of free legal assistance based on the Hague Conventions on civil procedure, signed on 1 March 1954, the serving abroad of judicial and extrajudicial documents in civil or commercial matters, signed on 15 November 1965, and the taking of evidence abroad in civil or commercial matters, signed on 18 March 1970.
Romania
Member State since 1 January 2007
Sweden
There are no agreements.

In accordance with Article 22 of the Regulation, the EU Member States should have provided the Commission with:

- a.- the list of courts competent to take evidence, indicating the territorial and, where appropriate, special jurisdiction of those courts (as provided for in Article 2(2));
- b.- the name, address and territorial competence of the central bodies and competent authorities pursuant to Article 3 of the Regulation;
- c.- the technical means available to the competent courts on the list pursuant to Article 2(2));
- d.- the languages accepted for the requests as referred to in Article 5.

All this information has been communicated to the Commission, and is available on the aforementioned website of the European Judicial Atlas.

4.1.13.7.1 Conclusions

On this point, one of the study's main conclusions should be highlighted: the lack of practical knowledge and the limited use of the Regulation on the part of legal practitioners.

One of the most plausible explanations for this lack of knowledge is precisely that the Regulation did not take effect until 1 January 2004. Therefore, the review of the Regulation provided for in Article 23 does not in fact relate to a Regulation that has been operative for five years, but rather a relatively new legal instrument for legal practitioners.

The study focused on the practical application of the Regulation during 2005, i.e. the second year of application of the procedures for obtaining evidence provided for in the Regulation. This fact is one of the main reasons for the lack of knowledge of it and its limited use, as the survey shows.

4.1.13.8 Opinion and proposals

It might have been more appropriate to schedule this first study by counting from the date that the procedures for taking of evidence provided for in the Regulation came into force.

5 REFERENCES

5.1 REFERENCE MATERIALS FOR THIS STUDY

PUBLICATIONS OF EU CASE LAW

Electronic Sources

- Curia, the European Court of Justice Web site (<http://curia.eu.int>)
- LexisNexis, in EURCOM; ECJ database ;
- Westlaw, in EU-CS-ALL database
- CELEX contains judgments and orders since 1954, full-text opinions since 1987;
- Lawtel EU, Case Law database contains applications, judgments, and opinions full text since 1997, and also provides items prior to 1997 via a transcript service.

Print Sources

- *European Union Legal Materials 71 European Community Cases*. London: Sweet & Maxwell. This loose-leaf service publishes selected European Commission and European Court of Justice decisions, including opinions of advocates-general. Headnotes precede each case. This set includes a table of contents, a topical index, and a list of authorities cited. It is updated monthly. It also includes EU Focus, a newsletter on EU law and affairs.
- *Common Market Law Reports*. London: Sweet & Maxwell. This publication collects selected cases from both the European Court of Justice and the appellate courts of individual member nations that resolve questions of European Union law. This weekly publication includes a roundup of actions of the European Court of Justice.
- *C.M.L.R. Antitrust Reports*. London: Sweet & Maxwell. These reports focus on European Union documents dealing with mergers, acquisitions, and antitrust issues and includes a summary of European Commission actions, the status of cases before the European Commission and the European Court of Justice, and decisions of the European Court of Justice and the European Commission. Reference aids include a list of cases reported and a subject index.

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Journals and Periodicals

- *Legal Journals Index*. London: Sweet & Maxwell. On Westlaw: LJI. Indexes articles from legal journals in the United Kingdom and Europe on European Union law. This database is the electronic companion to the print indexes, European Legal Journals Index and Legal Journal Index, both of which ceased publication in print in 1999.
- *Lawtel EU, Articles Index*. London: Sweet & Maxwell. This fee-based database contains the full text of articles from several selected European law journals from January 1999.
- *ECLAS*, European Commission Libraries Catalogue (<http://europa.eu.int/eclas/>). This database of documents on European affairs includes the departmental collections of twenty directorates general. The catalogue also includes Web resources and secondary sources that were previously catalogued in SCAD, a now defunct database of EU documents.
- *The Economist*. London: The Economist Newspaper. This British weekly newsmagazine usually includes two to three articles in each issue related to EU affairs.
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