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MODULE V

SUBJECT 15

REGULATION 1206/2001: COOPERATION BETWEEN COURTS OF THE MEMBER STATES IN THE TAKING OF EVIDENCE

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On the 28 May 2001, on the Federal Republic of Germany's initiative, the Council adopted Regulation 1206 on cooperation between the jurisdictions of Member States in obtaining evidence in civil and commercial matters.

Simplification of the procedures for judicial cooperation in obtaining evidence in Member States implements the project for removing obstacles to the free circulation of judgments in the European judicial area, as a measure to accompany [1] the provisions on the notification and service of documents, and was taken into consideration by the Council of Tampere of 15-16 October 1991, which had indicated the need to create new provisions for procedural law in cross border disputes, pursuant to article 65 of the EC Treaty.

In this respect, Whereas paragraph 7 recalls that *" as it is often essential for a decision in a civil or commercial matter pending before a Court in a Member State, the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents in civil or commercial matters which fall within the scope of Council Regulation (EC) no. 1348/20000 on the serving of judicial and extrajudicial documents in civil or commercial matters.*

Thus Regulation no. 1206/2001 covers this gap in the legislation by allowing direct intervention in the obtaining of evidence within the European judicial area.

The Regulation entered into force on 1 July 2001, however it has only been applicable since January 2004[2]. This considerable delay was intended to give Member States sufficient time to organise themselves to adapt to the new system of judicial assistance.

It is important to consider that in this matter bilateral conventions between Member States were already in place, as was the Hague Convention of 18 March 1970 on obtaining evidence abroad in civil or commercial matters, which entered into force on 7 October 1972, and which has been signed to date by 43 States most of which are Member States of the European Union[3].

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[1] An instrument on obtaining evidence had already been raised as an accompanying measure when the European Judiciary Network in civil and commercial matters was set up, by the Council Project for a draft programme on the measures for the implementation of the principle of mutual recognition of judgments in civil and commercial matters: Communication 2001/C 12 /01
http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_012/c_01220010115en00010009.pdf

[2] Article 24 contains on the date of entry into force (1 –7-2001) on the immediate applicability of articles 19, 21 22 relating to preparatory measures

[3] Only 11 of the 15 countries belonging to the European Union at the time the regulation was adopted were signatories to the Hague Convention. **Austria, Belgium, Greece** and **Ireland** were not signatories to the Convention.

There was therefore, even in some Member States, if they were not signatories to the Hague Convention or a bilateral convention, a lack of international regulations on obtaining evidence and this situation was at odds with the project for creating a European judicial area, for it appeared that in the absence of conventions, only national law could be applied and "cooperation" would have been left simply to the national provisions of international private law[4].

Contrary to the issue of notification and service of documents, there was not even any previous attempt to establish an international convention between Member States. [5]

Thus, since 1st January 2004, the European judicial area has a restrictive cooperation instrument for obtaining evidence in civil judgements.

The Regulation replaces the Hague Convention of 1970 for States of the European Union with the exception of Denmark.

The new regulation uses the experience of applying the Hague Convention, but acts within a framework of more direct cooperation between the judicial authorities of Member States[6].

The monopoly of central authority in ruling on the claim for the requesting authority is abandoned to the benefit of a **direct contact** between the requesting judicial authority and the judicial authority which is required to proceed to the act requested.

The Member States have their own material and formal legal rules on evidence and how it is obtained and more generally all the elements that the judge may take into consideration in delivering his/her judgment. Given the various legislations, the Regulation renders it possible to ensure that evidence is obtained in a member State other than that in which the court concerned sits as rapidly as possible and in a manner which enables it to be used by this jurisdiction.

SCOPE OF APPLICATION

The Regulation is applicable to *civil and commercial matters*.

This same expression is present in Regulation 44/2001, however Regulation 1206 has not covered the exclusion of special matters such as the state and the

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[4] It should be recalled that even the Rome Convention on the law applicable to contractual obligations of 18 June 1980, contains provisions on the charge and mentions article 14….*A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.*

[5] The Council, in an act of 26 May 1997, had adopted the text of a convention relating to the notification and service in Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, but the Convention was not in force

[6] for the text of the Convention http://www.hcch.net/index_en.php?act=conventions.text&cid=82
The Hague Conference on private international law web-site http://www.hcch.net/ contains updated studies on the application of the Convention which within the European Union is still applicable in the case of relations with Denmark and in relations with third countries.

capacity (others excluded from Regulation 44 concern the scope of application of other regulations and in particular 2201/2003 and 1346/2000).

The regulation on obtaining evidence is therefore one of general application.

With respect to the notion of «civil and commercial matters» in general, it derives from the constant case law of the Court of Justice of the European Community that the expression should be considered as an autonomous idea which would be interpreted by referring on one hand to the general principles arsing from national legal systems overall.

It would therefore be necessary to exclude criminal matters and situations in which the judgment concerned public authorities exercising their powers of authority. [7]

The Regulation applies to jurisdictions of the Member States.

For the concept of jurisdiction it will be useful to take note of the Court of Justice interpretation with respect to article 234 (formerly 177) of the EC Treaty, that is for the purposes of receivability in the proceedings of prejudicial dismissal of the interpretation, considering that it is a question of evidence which must be obtained or used by a judicial authority but not necessarily in a contentious administrative procedure[8].

Thus the regulation will be applicable to proceedings of voluntary jurisdiction which do not involve a declaration on a conflict between a claimant and respondent, however, in the absence of a conflict of interests, the judicial authority is dealing with a claim in which the law requires that a legal situation be subject to its control (for example proceedings heard by a guardianship judge).

Conversely, an arbitration commission shall not be permitted to use the procedures contained in Regulation 1206.

The notion of **evidence** includes hearing of witnesses, parties or experts, the production of documents, verifications, establishing the facts, consultation with experts or specialists, however these must be documents which are to be used in a judicial procedure which is either commenced **or contemplated**.

On this point the provision is not far from the Hague Convention of 1970 which expressly states in article 1. *A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.*

[7] The Court of Justice in case C-271/00- judgement on 14 112002, in its interpretation of article 1 section 1 of the Brussels Convention of 27 September 1968 indicated that the *concept of `civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in `civil matters'.*

[8] According to constant jurisprudence, the criteria for deciding whether the referral body has the nature of « jurisdiction » are the legal origin of the body, its permanence, the obligatory nature of its jurisdiction, the contradictory nature of the procedure, the application by the body of the rules of law and its independence.

The scope of application also includes acts of preventive instruction, urgent procedures, summary judgments, and in general all activities directly related to obtaining evidence, pursuant to the national law of the requesting State and in the very broad sense of acquiring elements for the judge's decision.

Thus, it enters the scope of application of judicial expertise even if in certain national rights of the Member States it is not considered a form of evidence in the strictest sense but as a basic act of instruction[9].

The term *contemplated procedure*, used in the Regulation rather than *future*, as used in the Hague Convention, has a clearer sense of inclusion in the acts of instruction prior to the opening of a procedure in which evidence must be used (for example if it is necessary to obtain evidence which might be inaccessible at a later date).

Country

The Regulation is applicable to Member States with the exception of Denmark[10].

Denmark is a signatory of the Hague Convention of 1970. It is therefore this international instrument which is employed in the case of requests concerning other Member States which are signatories to the Convention.

Relationship with other instruments

With respect to relations between Member States, the Regulation prevails over the national law, and other international instruments (multilateral or bilateral conventions).

However, This Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation.

It is therefore only possible to establish an even closer cooperation.

Article 21 also stipulates that the Member States shall submit to the Commission a copy of the agreements or arrangements concluded between the Member States referred to in paragraph 2, as well as drafts of such agreements or arrangements which they intend to adopt and which are applicable.

[9] Expertise exists in all countries as a means of proof or as an instrument used by the judge to clarify problems of evaluation the facts requiring scientific knowledge or specific techniques.
There are extremely different regimes with a basic distinction between the countries which retain the principle of judiciary experts appointed by the judge such as Belgium, France or Italy and those which adopted the principle of private experts considered as witnesses. However, often neither model operates in its purest state and tends to coexist in acknowledgment of the other model.

[10] Pursuant to the protocol on the position of Denmark with respect to the Regulations based on article 65 of the EC Treaty. However recently, with two agreements between the EU and the Kingdom of Denmark of 19 October 2005, has extended the application of the provisions of Regulation .44/001 and Regulation 1248/2000 on notification of acts and requests.

The provisions in article 21, with those of articles 19 and 20, which were as such preparatory, became applicable immediately on the Regulation's entry into force on 1 July 2001.

The period accorded to Member States to communicate their present situation expired on 31 July 2003 and they are requested to communicate all further changes or new agreements.[11]

PROCEDURES

The Regulation provides the possibility to a Member State **(requesting authority),** of either requesting the court of another Member State **(requested authority**) to proceed to execute a request or to proceed directly to executing a request in another State.

In the first case, requests are directly transmitted by the jurisdiction to the court of another Member State which is requested to act [12].

It is therefore a tremendous simplification compared to the Hague Convention according to which the Central Authority received letters rogatory and transmitted them to the competent authority for the purpose of enforcement.

Direct contact between the requesting and requested authorities conforms to the idea of a European judicial area where the judges of the European Union cooperate in the same way as national judges.

The central body designated by each Member State in contrast to the Hague Convention, is responsible for providing support and assistance and only receives requests of direct assumption by the requiring authority. In order to enable the requiring judge to communicate with the competent judicial authority of the Member State in which the act is to be carried out the Regulation establishes that each Member State shall draw up a list of the **courts competent** for the performance of taking of evidence.

This list can be found in the European Judicial Atlas

http://ec.europa.eu/justice_home/judicialatlascivil/html/cc_information_en.htm [13]

Central Body

According to article 3 of the Regulation, each Member State shall designate a central body responsible for:

[11] For information http://ec.europa.eu/justice_home/judicialatlascivil/html/te_information_en.htm

[12] This is the reason why article 22 requested by 1 July 2003 at the latest, that Member States provide a list indicating territorial competence and if appropriate special competence of jurisdictions .

[13]The list of competent jurisdictions as well as their territorial competence is contained in manuals which can be downloaded at the following address
http://ec.europa.eu/justice_home/judicialatlascivil/html/te_documents_en.htm ;
by clicking on Competent Authority which opens a search field
http://ec.europa.eu/justice_home/judicialatlascivil/html/te_competent_en.jsp#statePage0

(a) supplying information to the courts;

(b) seeking solutions to any difficulties which may arise in respect of a request;

It is only exceptionally that the Central body may be requested to forward to the competent court a request for an act or letter of instruction (for example, in the case of the authority encountering considerable difficulty in forwarding the request to the competent judge in the requested jurisdiction; which is also part of the central body's remit in resolving difficulties).

Conversely, in the direct **performance** of taking evidence by the requesting jurisdiction, it is the central body which is normally requested to receive and give a rule on requests. The Member State may designate for this purpose one or several other competent authorities[14].

Federal states or those having autonomous territorial units, or those which have several legal systems in force may designate several central bodies.

TRANSMISSION OF REQUESTS

Principles common to both procedures

Requests are made by completing the requisite form.

Examples of the forms are attached to the regulation

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_174/l_17420010627en00010024.pdf

It is possible to complete forms on-*line* at the following address

http://ec.europa.eu/justice_home/judicialatlascivil/html/fillinginformation_en.htm

[14] It is always possible to find all the information on the State concerned in the Atlas.

Forms considerably simplify the procedure, while at the same time ensuring that essential information is included.

Article 4 specifies that the request should include all the essential details on the requesting and the requested jurisdiction, the nature and subject matter of the case and a description of the taking of evidence to be performed.[15].

Completion of Form A is sufficient to provide the essential details for proceeding to a request for the taking of evidence.

Direct transmission is the simplest and quickest way to ensure cooperation between jurisdictions, and is the general rule employed when requesting the jurisdiction from another Member State to perform direct taking of evidence.

In the other procedure which is that of a request from the jurisdiction of a Member State to proceed directly to the performance of taking evidence in the territory of the Member State requested (for which form I should be used) it is the authority designated by the latter, in principle the central authority, which collects the requests.

The means of transmission should be both simple and rapid.

According to article 6, Requests and communications pursuant to this Regulation shall be transmitted *by the swiftest possible means, which the requested Member State has indicated it can accept. 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.* In principle it will be possible to use any means of immediate transmission such as fax or e-mail in order to ensure correct reception.

In the interest of simplifying the procedure, requests, as well as all attachments, require no legalisation or similar formality.

Language

Article 5 stipulates that the request and other communications are formulated in the official language of the requested Member State.

Each Member State shall indicate the official language other than its own which is or are acceptable.

[15] article 4 provides in general for the mention of the requesting jurisdiction and the requested jurisdiction, the names and addresses of the parties and if appropriate, their representatives, the nature and object of the case and a summary of the fact, and the act requested; in the case of a request for a person to be heard, the names and addresses of those to be heard, the questions to be posed to them or the facts on which they are to be heard, the mention of the right to refuse to testify according to the Member State of the requiring jurisdiction, the request for sworn testimony to be made and if appropriate the indication of any special form to be used, also any other information deemed necessary by the requiring jurisdiction.

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 (another official language shall be necessarily accepted).

RECEPTION OF REQUESTS

The requested jurisdiction sends the requesting jurisdiction by means of form B, an acknowledgment **of receipt** within a term of **7** days.

If the request does not comply with the provisions for language or transmission, the requested jurisdiction shall mention this in the acknowledgement of receipt.

If the execution is not within the competence of the jurisdiction to which the request has been transmitted, this shall be transmitted to the competent judge and the requesting jurisdiction shall be informed by completing section n.° 14 of form A.

Within the framework of effective cooperation, action shall be taken to forward the request to the competent authority.

If the request is incomplete (thus rendering its execution impossible) the requested jurisdiction informs the requesting party of this fact by means of a form (type C) indicating as precisely as possible, the information lacking (within a maximum term of 30 days).

Reception of requests for direct execution shall be examined having studied the complete procedure.

Costs

In accordance with article 18, execution of the request, shall not give rise to a claim for any reimbursement of taxes or costs, which means that any cooperation between Member States shall be free from costs [16].

Nevertheless, if the procedure gives rise to costs which are external to the actual jurisdictional activity such as - the fees paid to experts and interpreters, and the costs occasioned by execution of requests according to special methods or using new technologies, the requesting jurisdiction should ensure reimbursement by the parties who are requested to bear these fees or costs which shall be governed by the law of the Member State of the court.

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[16] A procedure which was in principle, free was already considered in article 14 of the Hague Convention according to which: *The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.*

In addition, where the opinion of an expert is requested, the requested court may, before executing the request, ask the court for an adequate deposit or advance towards the requested costs which condition the execution of the request, and the term for execution shall begin to run, according to article 9 section 2 when the deposit or the advance is made.

The requested authority shall inform the requesting jurisdiction that the request cannot be executed until the deposit or advance has been paid using for C n.6, and specifying the types of deposit or advance.

The requested jurisdiction shall acknowledge receipt using form D n.8 2

Data Protection

It is important to ensure that the information transmitted pursuant to the Regulation should be protected.
However, at a Community level, measures such as Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, already exist, and in addition, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerns the processing of personal data and the protection of privacy in the telecommunications sector and is also applicable.
The term for transposing these two directives to national legislations expired some time ago.
The Regulation draws attention to the two directives in Whereas clause 18.

EXECUTION

Up until now we have analysed the main principles common to the two procedures.

We now propose to consider the provisions relating to execution, which differs according to whether the request to the requested jurisdiction is the result of an act or an authorisation to proceed directly.

EXECUTION OF THE REQUEST FOR PERFORMANCE BY THE REQUESTED JURISDICTION

A request for the performance of the taking of evidence should be executed expeditiously by the requested jurisdicion, within a maximum term of 90 days of receipt of the request.

If the request is incomplete, the term will commence from the date of receipt of the supplementary information.

Nevertheless, if an advance or deposit is requested, in the cases indicated in article 18 (for example for the costs necessary for participation of an expert), the term will only begin to run from the moment that the deposit or advance is made.

If the requested jurisdiction is unable to execute the request within 90 days following receipt, it will inform the requesting jurisdiction by means of form G, detailing the reasons for delay and indicating the required term for executing the request.

The requested jurisdiction may refuse to execute the request for the performance of taking of evidence only if:

The request is not within the scope of application of the regulation (for example if the request does not derive from a civil or commercial matter) ;

Execution of the request does not enter into the competence of the judiciary power (for example, if the performance requested, according to the law of the State of the requested authority, cannot be accomplished by the jurisdiction);

The request is not complete (however we have seen that the requested authority must request supplementary information – the refusal may then occur when the requesting authority does not reply to this request or if it does not pay the deposit or advance requested within the scope of article 18);

A request for the hearing of a person shall not be executed when the person concerned claims the valid right to refuse to give evidence or to be prohibited from giving evidence.

In this case a witness, or in general the person who is to be heard, or if appropriate, a party to the process claims the right to refuse to give evidence or to be prohibited from giving evidence. The refusal or prohibition to give evidence arises either from the right of the requested jurisdiction or the requesting jurisdiction; from the right of the jurisdiction requested following the principle established in article 10 n.2 (*lex fori*)[17], which we shall examine in the next paragraph; from the right of the requesting jurisdiction because the hearing is destined to be used in the pending proceeding and it is important to prevent taking of evidence which could not be used according its law. However, the requested jurisdiction is not requested to know the law of the requesting jurisdiction; the right to refuse to give evidence should be indicated in the request or either confirmed by the requesting jurisdiction at the request of the jurisdiction which is to execute, when the person who is to be interrogated claims prohibition or his/her right to abstention.[18]

[17] It should be recalled that prohibitions or rights of refusal to testify derive from fundamental rights with consequences which also derive from criminal law

[18] The discipline is parallel to that of the Hague Convention, which in article 11 establishes that *In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –a) under the law of the State of execution; or b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.*

It is not possible for the requested jurisdiction to claim a conflict of competence in order to refuse execution, that is, even if the requested jurisdiction is deemed to have exclusive competence in the case it must still execute the act according to the request.

Any possible conflicts of jurisdiction of Member States should be resolved in a manner which cannot affect cooperation.

The requested jurisdiction cannot refuse to execute the request if it deems that the legislation does not admit the right to action required in the request.

The Regulation does not include as grounds for refusal reasons of public order or the fact that the State addressed considers that its sovereignty or security would be prejudiced thereby, indicated as a reason for preventing the execution of letters rogatory in the Hague Convention [19].

Such a provision would have been displaced, in a system of mutual trust between jurisdictions pursuant to article 65 TEC and in the union of States which are supposed to share fundamental common principles.

Coercive Measures

In the tradition of the principles already established by the Hague Convention article 13 of the Regulation states that the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of *a request made for the same purpose by its national authorities or one of the parties concerned* [20]

As a result, if the *lex fori* so stipulates, the requested jurisdiction shall require– for example – an order to accompany a witness who refuses to enter an appearance without providing any justification.

Applicable law

Execution is in accordance with the law of the State of the requested jurisdiction which proceeds with execution according to a principle of civil procedure common to most States (lex *fori*).

Nevertheless it was necessary to take into account the fact that an absolute application of this principle could have constituted an insurmountable obstacle in the event that the procedural rules of the State of the requesting authority had not permitted the use in the proceedings of the evidence thus obtained.

[19] Article 12 b)

[20] According to article 10 of the Hague Convention , *the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.*

Also according to paragraph 3 article 10, the court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State.

The court may ask the requested court to use modern communications technology such as videoconference and teleconference

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, however it shall inform the the court by completing point 13 of form A

The two jurisdictions may even agree on the use of these means.

The limits may thus simply be specific prohibitions of national law or major practical difficulties which give rise to objective difficulty, the simple difference with the domestic law is not in itself an obstacle.

Thus for example, if a United Kingdom Judge requests hearing the witnesses by means of *cross-examination from* a judicial authority in a country which does not use this form of interrogation, the request will nonetheless have to be executed.

Concerning the execution procedure, the Regulation takes up the principle of *lex fori,* that is - this time- that of the place where the act shall be accomplished with a provision identical to that of the Hague Convention[21]

In contrast to the Hague Convention, no limit is set for the procedure of *pre- trial discovery.* [22]

There is a need to be aware that contrary to the means of execution, which are governed by the law of the State of the requested jurisdiction, the substantial regime of the request is that from which it originates, that is, the proceedings heard by the requesting jurisdiction.

Execution in the presence and with the participation of the parties and the representatives of the requesting jurisdiction.

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[21] According to article 9 of the Hague Convention *The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.* A Letter of Request shall be executed expeditiously.

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[22] According to article 23 of the Convention, any Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining *pre-trial discovery of documents* as known in Common Law countries.
However, it should be borne in mind that in the Regulation problems cannot be posed which are posed for the Hague Convention to which countries outside Europe are signatories, in respect of the *pre-trial discovery of documents* procedure practised in the USA. The pre-trial discovery practised in the United Kingdom is far more restricted.

The law of the country of the authority determines whether the parties and their representatives may participate in the act of performance and the related conditions in order to follow the procedure in analogous conditions to those which would exist if the execution of the taking of evidence had taken place in the Member State of the requesting jurisdiction.

This participation should be indicated in form A, section 9.

The requested jurisdiction sets the conditions for participation and informs the parties and, if appropriate, their representatives, of the moment and the place of the procedure using form F (no.7)

The requested jurisdiction may even, pursuant to its domestic law, request the participation of the parties or their representatives.

The presence and the participation of representatives of the requesting jurisdiction are always possible according to the law of the Member State of origin.

This participation should be indicated in point 10 of form A and the requested jurisdiction may indicate the conditions of participation in point 8 of form F.

It should be mentioned that the participation of representatives of the requested jurisdiction is, in principle, passive; that is, that the judge or the judge's representative before whom the civil or commercial procedure is to be heard does not have the powers to process the request, but his/her participation may permit a better appreciation of the measure of the request and the consequences to be drawn from it for the judgment which is to be delivered. It may also provide the requested judicial authority which proceeds to the act of taking evidence with all the information on the national law from which the act derives.

When the requested jurisdiction has executed the request, it transmits without delay, accompanied by form H, the documents attesting to execution and returns if appropriate, those received.

DIRECT EXECUTION OF THE ACT BY THE REQUESTING JURISDICTION

The other procedure regulated by article 17, is the direct execution of the act to perform the taking of evidence by the requesting jurisdiction.

In this case, the requested cooperation is merely passive, because the requested authority is only required to permit the act, which is directly accomplished by the requesting jurisdiction according to its own law.

This time the requesting jurisdiction is required to address the request to the central body using form I.

Within a term of 30 days from the date of reception of the request, the central body indicates on form J, the conditions to which the request is subject.

The execution of the act is only possible on a voluntary basis, without the possibility of resorting to coercive measures, such as those contained in article

13, in the procedure examined above. The requesting jurisdiction should inform the person who is to be heard of this voluntary basis.

The reasons for this difference are evident.

Here the requesting jurisdiction is practically « guest-host » of the requested jurisdiction and thus cannot have powers of coercion outside its domain in another jurisdiction.

In principle, the request is executed by a judge magistrate, however, if the law of the Member State of the requesting jurisdiction so provides, it may be another designated person (for example directly by an expert appointed by the judge).

The central body may also require a jurisdiction of its state to supervise the request.

Grounds for refusal of the authorisation are limited.

Two are common to the execution procedure by the requested jurisdiction: the request is outside the scope of application of the Regulation; or the request does not contain all the requisite information. The third ground, that of the requested direct execution being contrary to the principles of the State, is only considered for the most delicate situation in which a foreign judge is required to act within the terms of a national jurisdiction, even if it is only to execute an act relevant to proceedings which form part of his/her jurisdiction[23].

The advantages of this procedure – which is moreover, more expensive, since the judge or his/her delegate is required to travel - are that the request, although it is outside the jurisdiction, is accomplished according to the same regime and system as if it had been carried out in the country of the requesting jurisdiction and where the proceedings are being heard.

Mention is also made – as in the procedure for execution by the requested jurisdiction - of recourse to modern communication technologies, in particular videoconference and teleconference, which should be encouraged by the central authority.

These new technologies may facilitate either the execution procedure for the act by the requested jurisdiction or the direct execution by the requesting jurisdiction.

The jurisdiction which is not required to execute the request - that is the requesting jurisdiction in the procedure described in article 10, and the requested jurisdiction in direct action according to article 17 – may intervene more easily according to the terms of article 12 for the former or article 17 section 4 for the latter.

[23] Article 17 does not repeat the prohibition on refusing execution on the ground that a Member State has exclusive jurisdiction over the subject matter of the action by the requested jurisdiction (art. 14 n.3). Similarly the refusal should be considered prohibited by the regulation given that it does not enter the provisions of paragraph .5 article 17. In particular it is not possible to consider in this case direct execution requested as contrary to *fundamental principles of law*.

In practice at present, most jurisdictions of the Member States are not equipped to execute requests using these means.

The list of jurisdictions which are provided with videoconference and teleconference facilities are available in the European Judicial Atlas.

Synthesis

The regulation applies to all **European Union countries with the exception of Denmark**

a) to the competent jurisdiction of another Member State to proceed with the request

Jurisdiction of a Member State

(requesting jurisdiction)

requests

b) to proceed directly with a request to act in another Member State

Cooperation is **free** – only costs not connected to the jurisdictions are charged to the parties according to the law of the requesting jurisdiction

PROCEDURE a) the request is transmitted **directly** by the jurisdiction in which the proceedings have commenced or are contemplated to the competent jurisdiction.

A list established by each State indicates the territorial competence.

Form A should be completed.

The requested jurisdiction acknowledges receipt (form B) within 7 days

The requested jurisdiction shall execute within 90 days of reception of the complete request the elements necessary for its execution.

If appropriate, it may require supplementary information or any advance costs necessary.

PROCEDURE b) the request is transmitted to the central authority (or to the competent authority designated by the State) using form I

Within a term of 30 days, the Central Body responds, using form J, if it is referred to the request and in what conditions

The requesting jurisdiction executes the request pursuant to the law of the Member State from which it derives.