Taking of Evidence

Set of Case Studies[1]

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Table of contents

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A. Questions

I. Starting scenario

A Belgian court decides to hear three people as witnesses: A, B and C. A lives in Ireland, B in Denmark and C in Croatia.

Question 1: Is there any transnational instrument that might be of any help?

Question 2^{+}: What if the Belgian court needs to hear D, a witness who lives in the United Kingdom?

Question 3^{+}: How do both European Evidence Regulations compare?

Question 4^{+}**:** What is considered 'a court' under the Evidence Regulation?

II. Case study "expert witness"

A court of Member State 1 has appointed an expert. In order to finalise the report, the expert needs to examine a construction site in Member State 2.

Question 1: Is the court obliged to apply the Evidence Regulation?

Question 2: How can the court proceed if the owner of the construction site is not willing to cooperate?

III. Case study "witness examination"

A court of Member State 1 has decided to examine Mr. Y as a witness. Mr. Y is domiciled in Member State 2.

Question 1: How can the court proceed?

Question 2: As Mr. Y is unwilling to cooperate, the court of Member State 1 decides to request the courts of Member State 2 to hear Mr. Y as a witness in accordance with the rules of the Evidence Regulation. The requested court asks for payment of witness expenses, which are due under the procedural rules of Member State 2. Is the requesting court obliged

to make such a payment, either in the form of an advance or in the form of a reimbursement at a later stage of the proceedings?

Question 3: Before the requested court in Member State 2, Mr. Y invokes a particular right to refuse testimony under the procedural law of Member State 1. In Member State 2, such a right does not exist. How should the requested court in Member State 2 proceed?

Question 4^{+}: At the end, it turns out that even under the procedural law of Member State 1 Mr. Y does not have the right to refuse testimony. As the way of witness examination in Member State 2 is very different from the one practiced in the courts of Member State 1, the question arises whether the usual practice of the forum state (Member State 1) can influence the examination of witness Y in Member State 2.

Question 5: In Member State 1 the official language is different from the official language in Member State 2. What are the consequences?

IV. Case study "document production"

A court in Member State 1 comes to the conclusion that certain documents are to be produced. These documents are held by Ms. A, who is not a party to the proceedings. Ms. A is domiciled in Member State 2, and she is unwilling to cooperate.

Question 1: How can the court proceed?

Question 2^{+}: Ms. A invokes a right to refuse document production under the procedural rules of Member State 1. Is this of any relevance?

B. Methodological advice

I. General idea and core topics

The idea of this training package is on the one hand to make the court staff and bailiffs of the Member States familiar with the European rules on the taking of evidence abroad. On the other hand, it wants to provide more advanced questions to those that already have a basic comprehension of these European rules.[2] These advanced questions offer more in dept discussions about the application of the Evidence Regulation and the cooperation between Member States. The following aspects are the core topics:

1. Scope of application of the Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast)[3] (Evidence Regulation).
2. General structure of the Evidence Regulation.
3. Relationship between the Evidence Regulation and the national procedural laws of the Member States.
4. Flexible approach of the Evidence Regulation comprising different ways of cross-border taking of evidence.
5. Cost issues.
6. Administrative details: How should a court proceed in a particular situation? Where can a court find the electronic version of the forms which the court needs in order to formulate its request or its answer to a request? Which language is to be used? Where can the court find the institution where the request has to be addressed to?

II. Additional material

It seems helpful to summarise the key elements of each solution in a PowerPoint Presentation and to provide the participants with further reading recommendations.
In any case, all participants need access to the Evidence Regulation 2020/1783. Experience shows that participants who are not familiar with the instrument are much faster in understanding the structure and content of the instrument if they are provided with a copy of the instrument.

[2] The more advanced questions have a + sign.
[3] Official Journal of the European Union, 02.12.2020, L 405/1.

C. Solutions

I. Starting scenario

In the area of cross-border taking of evidence, the European legislator adopted the first Evidence Regulation in 2001 (n° 1206/2001)[4] which was applicable from 1 July 2001. In 2020, the European legislator deemed substantial amendments to the Evidence Regulation 1206/2001 necessary and made a recast in the interests of clarity. Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence – recast) is therefore the current relevant instrument. The Evidence Regulation 2020/1783 is applicable from 1 July 2022[5] and repealed and replaced the former Evidence Regulation.[6] In this document the term 'Evidence Regulation' means the Evidence Regulation 2020/1783.

Question 1: Article 1.1 states that the Evidence Regulation 'applies in civil or commercial matters[7] in which the court of a Member State, in accordance with the law of that Member State, requests: (a) the competent court of another Member State to take evidence; or (b) the taking of evidence directly in another Member State'. The Evidence Regulation thus provides rules on the cooperation between the courts of different Member States in relation to the taking of evidence. The scope of the Regulation is limited to cross-border situations between Member States of the European Union.
Moreover, the scope is also limited to the taking of evidence intended for use in judicial proceedings 'that have already commenced or are being contemplated'. The Evidence Regulation can therefore not be used in mere 'phishing expeditions' to obtain evidence on the off-chance that it may prove useful in the future. However, it can be used to collect evidence that otherwise would no longer be available. We can think of a witness who is seriously ill or elderly and would in the future be unable to give evidence.

1. Since both Belgium and Croatia are Member States, the Belgian court must use the Evidence Regulation to hear witness C.
2. Recital (37) discusses the position of Ireland. According to the text of the Regulation Ireland has 'notified its wish to take part in the adoption and application of this Regulation'. This means that the Belgian court can use the Evidence Regulation to

[4] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation), Official Journal of the European Union, 27.06.2001, L 174/1: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1206.
[5] Art. 35 Evidence Regulation.
[6] Art. 34 Evidence Regulation.
[7] On the notion of 'civil and commercial matters' see the Practice Guide for the application of the Regulation on the Taking of Evidence, https://e-justice.europa.eu/76/EN/taking_of_evidence, p. 4.

hear witness A, who lives in Ireland. Why should we examen the position of Ireland, a Member State of the EU? Ireland holds a particular position in the field of judicial cooperation in civil and commercial matters. Ireland has a flexible opt-out from legislation adopted in this area, which allows it to opt in or out of legislation and legislative initiatives on a case-by-case basis (Protocol no. 21 annexed to the Treaties[8]).

3. Recital (38) mentions the position of Denmark. It states that 'Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application'. Denmark has a more rigid opt-out from the area of freedom, security and justice, which means that it does not take part at all in this policy (Protocol no. 22 annexed to the Treaties[9]). For other instruments in the area of judicial cooperation in civil matters, Denmark and the EU have concluded an agreement in order to ensure their application. The Service Regulation is one example (cf. the case studies concerning the Service Regulation). For the Evidence Regulation, there exists, however, no such agreement. This means that to hear witness B, the Belgian court cannot use the European Regulation.

   However, Denmark is a Contracting State to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.[10] If the same is true for the other State concerned, the courts can rely on this Convention to proceed with the cross-border taking of evidence. (See *note for the trainers*)

In short, the Evidence Regulation applies between 26 Member States to cross-border taking of evidence in civil and commercial matters for use in judicial proceedings.

Question 2[+]: Recital (37) mentions the position of the United Kingdom and draws a parallel with Ireland. Just as Ireland holds a particular position in the field of judicial cooperation in civil and commercial matters, the UK also had a flexible opt-out from legislation adopted in this area. The UK applied the Evidence Regulation 1206/2001 until the end of the Brexit transition period on 31 December 2020.

This means that a court of a European Member State seeking to examine a witness living in the United Kingdom, can currently only use the Hague Evidence Regulation.

[8] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, Official Journal of the European Union, 07.06.2016, C 202/295: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F21.

[9] Protocol (No 22) on the position of Denmark, Official Journal of the European Union, 26.10.2012, C 326/299: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F22.

[10] https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence.

Note for the trainers: The participants are invited to check whether their own Member State is a contracting party to the Hague Evidence Convention. The information about the current status of this Convention can be found at: https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=82.

If the State is a contracting party, in the case at hand, the court of this State can rely on the Hague Evidence Convention in order to organise the hearing of the witness who is domiciled in Denmark and of the witness who lives in the United Kingdom.
However as of April 2023, out of the 27 EU Member States, only 24 are parties to the Convention. The Member States that are not part of the Hague Evidence Convention are Austria, Belgium and Ireland.
This means that a Belgian court who wants to examine a witness living in Denmark, has to fall back on an even older Convention: the Hague Convention of 1 March 1954 on civil procedure.[11] The UK is even not a part of this Convention, so a Belgian (or an Austrian or Irish) court who wants to gather evidence in the UK has to rely on national private international rules and national procedural law.

Exercise: Find the different Hague Conventions online. Invite the participants to read the legal texts and to compare them to the Evidence Regulation. Open discussion amongst the participants.

Question 3^{+}: This question draws participants' attention to the changes made by the European legislator to the Evidence Regulation 1206/2001. First, give participants time to read through both Regulations.

Note to the trainers: let the participants look up Evidence Regulation 1206/2001 and recommend the reading of the Practice Guide[12].

Although Recital (1) Evidence Regulation 2020/1783 states that a recast was necessary in the interests of clarity because of substantial amendments, participants will find that there are only four major changes made.

1. The European legislator further developed and put the emphasis on the use of more modern technology to obtain evidence. The Commission[13] concluded that the

[11] https://www.hcch.net/en/instruments/conventions/full-text/?cid=33.
[12] Practice Guide for the application of the Regulation on the Taking of Evidence, https://e-justice.europa.eu/76/EN/taking_of_evidence.
13 COM(2018) 378 final, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A0378%3AFIN.

obstacles in the effectiveness of the Evidence Regulation are linked to the failure to exploit the potential of modern technology. 'The most striking examples are failure to use electronic communication in exchanges between Member States' courts and authorities, which are still predominantly paper-based, and the marginal use of electronic communication, in particular videoconferencing, for the direct taking of evidence. The Regulation [1206/2001] does not currently require the uptake of modern technologies in the judiciary; the fact that this depends entirely on Member States' individual efforts and the overall move towards digitalisation has led to very slow progress, in absolute terms and also in comparison with the use of modern technologies in domestic settings.' On the European e-Justice Portal participants can find a Practical Guide on using videoconference to obtain evidence in civil and commercial matters.[14]

Articles 12 and 20 Regulation 2020/1783[15] now address the (direct) taking of evidence by videoconferencing. These Articles encourage courts to use videoconference whenever possible to examine a party, a witness or an expert, who is not in the territory of the requesting State.

2. Moreover, the recast installs in Article 7 the electronic 'transmission of requests and other communications'. Its aim is to digitalise the transmission of all communications and documents. Under the new Evidence Regulation all communications and exchange of documents between courts should be carried out through a decentralised IT system (see Article 2.2), based on an interoperable solution such as e-CODEX. The e-CODEX system enables communication between different IT systems used by the Member States, while ensuring secure and reliable transmission of information. This decentralised system enables each Member State to maintain control over its own IT infrastructure, while allowing for interoperability with other Member States. The e-CODEX system has already been used to connect the commercial registers of the Member States and in several pilot projects. The solution has been tested by a limited number of States in the application of the European Payment Order, Small Claims and European Account Preservation Order Regulation.[16] The use of this decentralised IT system between the Member States will become compulsory from 1 May 2025[17] on. According to Article 8, documents that are transmitted through the decentralised IT system 'shall not be denied legal

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[14] https://e-justice.europa.eu/76/EN/taking_of_evidence. See also the section *Taking evidence by videoconference*: https://e-justice.europa.eu/39432/EN/taking_evidence_by_videoconference?clang=en.

[15] See also Recitals (21) till (23) Evidence Regulation.

[16] See also Entry into force of the Evidence Regulation Recast, 2022, https://eapil.org/2022/08/30/entry-into-force-of-the-evidence-regulation-recast/ and M. REQUEJO ISIDRO, e-CODEX Regulation Published, 2022, https://eapil.org/2022/06/03/e-codex-regulation-published/.

[17] Art. 35.3 Evidence Regulation; Recitals (7) till (13); Commission Implementing Regulation (EU) 2022/423 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council, Official Journal of the European Union, 15.03.2022, L 87/5.

effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form.' Finally, the costs of the decentralised IT system are borne by the Member States.[18]

3. The direct taking of evidence is reinforced. Articles 19 Evidence Regulation prescribes that if the requesting court does not receive information within 30 days of acknowledgement of receipt of the request for the direct taking of evidence as to whether the request has been accepted, it may send a reminder to the central body or competent authority of the requested Member State. If the requesting court does not receive a reply within 15 days of the acknowledgement of receipt of the reminder, the request for the direct taking of evidence shall be considered accepted. The Regulation, therefore, provides that the silence of the central body is equivalent to implicit acceptance of the taking of evidence on its territory. Exceptionally, the central body may, however, still refuse the taking of evidence after the deadline until the moment of the actual direct taking of evidence.
4. In Section 4, Article 21, the taking of evidence by diplomatic agents or consular officers is included. This is a third way to take evidence, next to the taking of evidence through the requested court and the direct taking of evidence by the requesting court. Diplomatic agents and consular officers should be able to take evidence in the territory of another Member State and within the area in which they are accredited, without the need for a prior request. This way should in principal take place at the premises of the diplomatic mission or consulate.

These four amendments will affect the taking of evidence, as the emphasis is placed on electronic communication between the courts of the Member States. However, these changes do not alter the substance of Evidence Regulation 1206/2001. This means that case law and legal doctrine written under the Evidence Regulation 1206/2001 will remain valid.

Discussion: Have participants already used videoconference to obtain evidence in national or international proceedings? Which participant has knowledge of the mentioned decentralised IT system that is e-CODEX?
The goal of this discussion is to hear good practices amongst the participants and to encourage the use of modern technology in cross-border cases.
It is also possible to see on the European e-Justice Portal if Member States made a notification on the early use of the decentralised IT system. It seems that none have already installed the system.
Example: Sweden https://e-justice.europa.eu/38581/EN/taking_evidence_recast?SWEDEN&member=1#a_145

[18] Art. 28 Evidence Regulation.

Question 4[+]: According to Article 2.1 Evidence Regulation, a 'court' means 'courts and other authorities in Member States as communicated to the Commission under Article 31(3), that exercise judicial functions, that act pursuant to a delegation of power by a judicial authority or that act under the control of a judicial authority, and which are competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters'.[19]

Exercise: Find the communications made by the Member States on the European e-Justice Portal. Find the communications made by your own State and discuss with the other participants how Article 2.1 should be read under your own national law.
Example: Germany communicated to the Commission that court can only be understood as 'the judge'. Greece communicated that only the courts of first instance (Protodikeía) fall within the scope of Article 2 Evidence Regulation. Italy just said 'none' (https://e-justice.europa.eu/38581/EN/taking_evidence_recast?ITALY&member=1).

II. Case study "expert witness"

Question 1: Article 19.3 Evidence Regulation addresses the issue of an expert designated by the court to take evidence directly in another Member State. So, the question arises whether the court of Member State 1 has to proceed in accordance with this provision or whether the Court is also allowed to proceed on the basis of its own national procedural rules. In other words, is the Evidence Regulation a cross-border instrument of exclusive character or is it a complementary instrument, which the courts can apply whenever they consider it to be helpful. The Court of Justice of the European Union has decided that the Evidence Regulation does not have exclusive character:

CJEU Case C-332/11, Prorail, ECLI:EU:C:2013:87[20]
"[The] regulation does not restrict the options to take evidence situated in other Member States, but aims to increase those options by encouraging cooperation between the courts in that area. An interpretation of Articles 1(1)(b) and 17 of Regulation No 1206/2001 according to which the court of a Member State is obliged, for any expert investigation which must be carried out directly in another Member State, to take evidence according to the method laid down by those articles would not be consistent with those objectives. In certain circumstances, it may be simpler, more effective and quicker for the court ordering such an investigation, to take such evidence without having recourse to the regulation. […] [The] Regulation No 1206/2001 does not govern exhaustively the taking of cross-border evidence,

[19] Read also Recital (5) Evidence Regulation.
[20] Confirmed by CJEU Order C-188/22, VP, ECLI:EU:C:2022:678.

but simply aims to facilitate it, allowing use of other instruments having the same aim […] It is clear from the foregoing that a national court wishing to order an expert investigation which must be carried out in another Member State is not necessarily required to have recourse to the method of taking evidence laid down in Articles 1(1)(b) and 17 of Regulation No 1206/2001."

It follows from this decision that the national courts may choose between a request under the Evidence Regulation and a procedure under national law. As confirmed by the CJEU in its Order in Case C-188/22[21], the aim of the Regulation is to 'improve the effectiveness and speed of judicial proceedings by simplifying and streamlining the mechanisms for cooperation in the taking of evidence in cross-border proceedings, while at the same time helping to reduce delays and costs for individuals and businesses'.[22] A Regulation requiring that any direct taking of evidence in another Member State must be done according to the Regulation, would not achieve this goal. It would, in certain circumstances, even lengthen the duration of proceedings. The Regulation strengthens, but does not limit, the possibilities for obtaining cross-border evidence.
When courts choose to take evidence directly in another Member State according to national law, they must certainly respect the sovereignty of the other State. Whether the interests of sovereignty are concerned, is a question which is not governed by the Evidence Regulation. It is a question of public international law. It is widely accepted that the examination of a construction site for preparing an expert opinion is not in conflict with the sovereignty if the owner of the construction site cooperates. But, when in doubt, national courts should opt for a request under the Evidence Regulation in order to avoid tensions between the Member States.

Note for the trainers: Participants can discuss which issues could cause conflicts of sovereignty.
Example: see the Polish declaration in Order C-188/22, VP, ECLI:EU:C:2022:678, point 17 (translation).
"Indeed, it would appear from a letter from the Departament Współpracy Międzynarodowej i Praw Człowieka Ministerstwa Sprawedliwości (Department of International Cooperation and Human Rights of the Ministry of Justice, Poland), dated November 3, 2021, sent by the latter to all common law courts, that the taking of evidence with the participation of a person staying in the territory of a State other than the Republic of Poland is a matter of the sovereignty of that other State and requires the consent or lack of objection of a court or competent authority of that State, as would result, inter alia, from Article 17 of Regulation

[21] CJEU Order C-188/22, VP, ECLI:EU:C:2022:678.
[22] Recitals (2) and (3) Evidence Regulation.

No. 1206/2001 and Article 9, second sentence, of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, signed at The Hague on 18 March 1970."

Question 2: If the owner of the construction site is not a party to the proceedings and not willing to cooperate, coercive measures need to be applied. As the state powers of Member State 1 are limited to its own territory, the court of Member State 1 has to formulate a request under the regime of the Evidence Regulation in order to get an expert report about the construction site. The Evidence Regulation sets out two possibilities: (1) a request for the permission to directly take evidence under Article 19 and (2) a request for the taking of evidence under the Articles 12 et s. The difference between these two options is the following: in the first case, the requesting court itself proceeds with the taking of evidence abroad. This means that the court travels to Member State 2 or uses technical means such as videoconference and takes the evidence in accordance with its own procedural law. In the other scenario, it is the requested court of Member State 2 that has to take the evidence and has to send the results to the requesting court in Member State 1.
It is important to note that the direct taking of evidence abroad is only possible on a voluntary basis. Article 19.2 Evidence Regulation states that 'the direct taking of evidence may only take place if it can be carried out on a voluntary basis without the use of coercive measures. Where the direct taking of evidence implies that a person has to be examined, the requesting court shall inform that person that the taking of evidence shall take place on a voluntary basis.' In the case at hand, since the owner of the construction site is unwilling to cooperate, coercive measures can only be taken by Member State 2 (Article 15 Evidence Regulation). If the court in Member State 1 formulates such a request, the requested court has to proceed with the taking of evidence on the basis of its own law and to take the coercive measures which are provided for under this law and which are appropriate in order to execute the request.

For the advanced training events⁺: in this respect, the Hague Evidence Convention is even more generous.[23] Under this Convention, an authority that decides to proceed with the direct taking of evidence in another Contracting State, may have recourse to coercive measures of this State if this State has made a declaration under Article 18 of the Hague Convention. In all other cases, if coercive measures are needed, the courts of the forum State have to request the competent court of Member State 2 to take the evidence in accordance with the laws of Member State 2.
The information about the current status of the Hague Evidence Convention (Contracting States and opt-in concerning Article 18) can be found at https://www.hcch.net/de/instruments/conventions/status-table/print/?cid=82.

[23] Cf. Article 18 of the Hague Convention.

Exercises:
(1) Find the competent court to which the request is to be sent if the construction site is situated in Germany, Tübingen, postal code 72074. Consult the European e-Justice Portal: https://e-justice.europa.eu/38581/EN/taking_evidence_recast?clang=en.
Answer: Amtsgericht Tübingen, Doblerstraße 14, 72074 Tübingen, Germany
Phone: +49 7071 200-0; Fax: +49 7071 200-2008
Email: Poststelle@agtuebingen.justiz.bwl.de

(2) Find the correct form to be used in order to formulate the request and fill out the information about the requested court Tübingen. Which language is to be used?
Answer: read Article 5 Evidence Regulation. Requests shall be make using form A or, when appropriate, form L (direct taking of evidence). The Regulation provides for fourteen forms. Consult the European e-Justice Portal to find the forms: https://online-forms.e-justice.europa.eu/online-forms/taking-of-evidence-forms_en.
Form A (Request for the taking of evidence) is the correct form when the owner of the construction site refuses to cooperate. Advise participants to download form A to see the full document. In point 11.3.2 'Other taking of evidence' the court of Member State 1 must indicate the construction site to be examined.
Article 6 Evidence Regulation focusses on the language of the request. Germany only accepts requests in German. See the communications made by Germany on the European e-Justice Portal: https://e-justice.europa.eu/38581/EN/taking_evidence_recast?GERMANY&member=1#a_141.

(3) Before the deployment of the centralised IT system (1 May 2025), how should the form be sent to the requested court?
Answer: Read the Articles 3 and 7 Evidence Regulation: 'the transmission shall be carried out by the swiftest, most appropriate alternative means, taking into account the need to ensure reliability and security'.
Germany did not give an answer to the question which means it accepts for the transmission of requests. We can only rely on the communications made under the Evidence Regulation 1206/2001 (https://e-justice.europa.eu/374/EN/taking_evidence?GERMANY&member=1#a_65). Germany accepts postal service and fax for the request. For further informal communications, email and telephone are accepted as well.

III. Case study "witness examination"

Question 1: The court has the option to formulate a request under the Evidence Regulation or to proceed on the basis of its own procedural law respecting the interests of sovereignty of Member State 2. It is, for example, in accordance with the principles of public international law to inquire whether the witness domiciled in Member State 2 is willing to come to the court in Member State 1.

> Cf. the CJEU decision C-170/11, Lippens, EU:C:2012:540 for the particular case of a party to be heard as a witness:
> "[It] it is clear that, in certain circumstances, in particular if the party summoned as a witness is prepared to appear voluntarily, it may be simpler, more effective and quicker for the competent court to hear him in accordance with the provisions of its national law instead of using the means of taking evidence provided for by Regulation No 1206/2001."

Since the Evidence Regulation encourages the use of modern communication, videoconferencing should be considered to examine the witness. In order to avoid any tensions between the Member States, it might be preferable to formulate a request under Articles 19 and 20 Evidence Regulation. This way the court of Member State 1 can directly examine the witness in Member State 2 and receives practical technical assistance by the requested court.
Alternatively, the court of Member State 1 can request the competent court in Member State 2 to hear the witness Mr. Y and to send the results of this witness examination (Art. 5 Evidence Regulation). The Evidence Regulation provides for the use of coercive measures only in this last scenario, cf. Article 15.
To sum it up: There are three ways of cross-border witness examination. Which way to choose is a question that has to be decided on the basis of the national law of Member State 1 and in respect of the interests of sovereignty of Member State 2. One important criterion might be the question whether the court needs a personal impression of the witness in order to evaluate the creditability.

Exercises:
(1) Find the correct form to formulate a request under Article 20 Evidence Regulation. Where is the form to be sent to and in which language is the form to be filled out if the witness is domiciled in Spain, Madrid, postal code 28015?
Answer: Consult the European e-Justice Portal: https://e-justice.europa.eu/38581/EN/taking_evidence_recast?clang=en
- Form L is the correct form (Art. 19.1 Evidence Regulation).
- The request should be sent to the central body or the competent authority. The central body of Spain is:

Subdirección General de Cooperación Jurídica Internacional del Ministerio de Justicia
Ministerio de Justicia C/San Bernardo, 62
City / Municipality: Madrid
Postal code: 28015
(34) 913 90 44 57
The competent authority is:
Oficina de Registro y Reparto de Primera Instancia de Madrid
Calle DEL POETA JOAN MARAGALL 66
City / Municipality: Madrid
Postal code: 28020
- Spain accepts requests in Spanish and Portuguese.

(2) How does the communication between the Member States takes place to inform the requested court that videoconferencing should be used?
Answer: Form N (information on technical practicalities for holding a videoconference or using other distance communications technology) is used.

Question 2: Article 22.1 Evidence Regulation states very clearly that the requested court is not entitled to ask for any advance on costs or for any reimbursement. There are, however, certain exceptions enumerated exhaustively in Article 22.2 and 22.3 Evidence Regulation. These exceptions involve fees paid to experts and interpreters, as well as the costs occasioned by execution in accordance with a special procedure provided for by national law or by the use of distance communications technology, such as videoconferencing.[24]

Exercise:
Going back to the first case study, is there any additional information in Article 22 for the discussion of this first case study "expert witness"?
Answer: Article 22.3 Evidence Regulations states that when the opinion of an expert is required, the requested court may ask for an adequate deposit or advance towards the anticipated costs of the expert opinion. According to Article 10.2 form D is used to inform the requesting court about the deposit. If the advance is received, form E is filled out.
In the case at hand, however, the expert was appointed by the court in Member State 1. The costs for the expert witness are thus governed by its national procedure law.

Question 3: Article 12.2 Evidence Regulation states that the requested court shall execute the request in accordance with its national law. This is the national procedural law of Member State 2. Under this law, the right to refuse testimony which Mr. Y invokes does not

[24] Recital (26) Evidence Regulation.

exist. However, Article 16.1.b Evidence Regulation also refers to the law of the requesting court, i.e. Member State 1, in order to determine the rights to refuse testimony. As such, if Mr. Y invokes a right to refuse testimony under the law of Member State 1, the requested court has to contact the requesting court and to inquire whether the right invoked exists under the law of Member State 1. If the answer is positive, the requested court has to respect this right.

Advanced exercise^{+}: Check which form the requesting court has to fill out for a request under Article 12 Evidence Regulation and try to find out what information the requesting court should provide about its own procedural law when it formulates its request.
Answer: Consult the European e-Justice Portal: https://online-forms.e-justice.europa.eu/online-forms/taking-of-evidence-forms_en.
The correct form is Form A (See Article 5 Evidence Regulation). Under point 11.2.8, the requesting court has to specify the rights to refuse testimony which exist under its own procedural law. As it is, however, difficult to anticipate all the possible rights which might be invoked by the witness, the requested court must not rely on the exhaustive character of this information, but it has to inquire whether a right to refuse testimony which is invoked by the witness, but not enumerated under 11.2.8, exists. For this inquiry, the requested court can fill out form D (Request for additional information for the taking of evidence) or can fill out Form K (Information on the execution of the request for the taking of evidence). Form K informs the requesting court that the taking of evidence has been refused due to a right the witness invoked.
No form is provided for the requesting court to answer the question asked by Member State 2. So, it is unclear how to proceed.[25] As the idea is to use a decentralised IT system that connects all Member States, the communication should be done via electronical way. Maybe an informal way between courts is also possible? How would the participants handle this situation?

Question 4^{+}: Article 12.2 Evidence Regulation states that the requested court shall execute the request in accordance with its own procedural law, i.e. the law of Member State 2. Article 12.3 Evidence Regulation, however, gives the requesting court the possibility to ask for the request to be executed in accordance with specific procedural rules of Member State 1. The requested court has to comply with such a request unless this creates major practical difficulties or leads to an incompatibility with the legal system of Member State 2.

[25] See Recital (6) Evidence Regulation.

Exercises:
(1) How can the requesting court formulate such a request for respecting a special procedure provided for under its law? How can the requesting court guarantee the parties' right to follow the witness examination and to ask questions?
Answer: Read Articles 12, 13 and 14 and Recitals (18) and (19) Evidence Regulation. Consult the European e-Justice Portal (https://online-forms.e-justice.europa.eu/online-forms/taking-of-evidence-forms_en).
The requesting court has to describe the special procedure under point 12 of Form A. Under point 8 of this form, the court has to indicate whether the parties will be present and whether their participation is requested. Finally, at point 9 of Form A, the requesting court can ask for the participation of its own members.
If this should be organised via videoconference, the requesting court has to specify this under point 12.2 of the form.

(2) Is an advance on costs due, or does the requesting court have to ensure the reimbursement of any costs?
Answer: Article 22.2 Evidence Regulation states that the requesting court has to organise the reimbursement of the costs incurred due to respecting the special procedure and due to the use of videoconferencing if the requested court asks for such a reimbursement. The requesting court is, however, not obliged to pay an advance.

Question 5: Two issues are to be distinguished: the language of the request and the language in which the witness is heard. Article 6 Evidence Regulation states that the request has to be formulated in the official language of the requested court or in any other language which the requested State accepts. The witness must however be examined according to the national law of the requested State (Art. 12.2 Evidence Regulation). If necessary a certified interpreter must be present and the requesting State must, if necessary, help to find such an interpreter.[26]

Exercise: Find out in what languages a request can be formulated if the witness is domiciled in Sweden.
Answer: See the communications made by Sweden on the European e-Justice Portal: https://e-justice.europa.eu/38581/EN/taking_evidence_recast?SWEDEN&member=1.
Sweden accepts requests in Swedish and in English.

Note for the trainers: It might be interesting to do this exercise in several small groups for different countries.

[26] Art. 20.2 and Recital (22) Evidence Regulation. See also form N.

IV. Case study "document production"

Question 1: If Ms. A is unwilling to cooperate, the court of Member State 1 has to request the competent court of Member State 2 to issue a document production order. Article 15 Evidence Regulation makes clear that the requested court has to order coercive measures in the same way as for purely domestic production orders. When the requested court informs the requesting court about the result of the document production, it should provide a copy of the document.

Exercises:
(1) Which form is to be used in order to formulate the request for a document production order? How is the document to be described? Is it possible to ask for the production of all documents which are related to the dispute?
Answer: Consult the European e-Justice Portal (https://online-forms.e-justice.europa.eu/online-forms/taking-of-evidence-forms_en).
Form A is to be used. Under point 11.3.1, the document is to be described in such a way that the addressee of the document production order can easily identify the document without being familiar with the dispute. This means that objective criteria are to be used, e.g. "the letter of Ms. Who dated 3rd August 2022". A definition of the documents concerned by reference to the dispute is, as such, not sufficient.

(2) How shall the requested court react if the description is not sufficiently clear?
Answer: Article 10 Evidence Regulation provides a solution for 'incomplete requests' and states that the requested court should inform the requesting court 'without delay and within 30 days of receipt of the request'. The requested court should use form D to ask for the missing information 'as precisely as possible'.

Question 2+: Article 12.2 Evidence Regulation states that the requested court executes the request in accordance with its own national law. Article 14 also takes into account the procedural law of the requesting court. This provision, however, only deals with the right to refuse testimony. It does not concern document production orders. Nevertheless, it seems convincing to apply this provision by analogy. The situation of a third person being obliged to produce a document and the situation of a third party witness are very similar. It does not make sense to oblige a third person to produce a document that cannot be used as a means of proof in court proceedings in the State of the requesting court because they are covered by a privilege.

D. Annex

Taking of Evidence - Set of Case Studies

I. Starting scenario

A Belgian court decides to hear three people as witnesses: A, B and C. A lives in Ireland, B in Denmark and C in Croatia.

Question 1: Is there any transnational instrument that might be of any help?

Question 2^{+}: What if the Belgian court needs to hear D, a witness who lives in the United Kingdom?

Question 3^{+}: How do both European Evidence Regulations compare?

Question 4^{+}**:** What is considered 'a court' under the Evidence Regulation?

Exercise: Find the communications made by the Member States on the European e-Justice Portal. Find the communications made by your own State and discuss with the other participants how Article 2.1 should be read under your own national law.

II. Case study "expert witness"

A court of Member State 1 has appointed an expert. In order to finalise the report, the expert needs to examine a construction site in Member State 2.

Question 1: Is the court obliged to apply the Evidence Regulation?

Question 2: How can the court proceed if the owner of the construction site is not willing to cooperate?

Exercises:
(1) Find the competent court to which the request is to be sent if the construction site is situated in Germany, Tübingen, postal code 72074.
(2) Find the correct form to be used in order to formulate the request and fill out the information about the requested court Tübingen. Which language is to be used?
(3) Before the deployment of the centralised IT system (1 May 2025), how should the form be sent to the requested court?

III. Case study "witness examination"

A court of Member State 1 has decided to examine Mr. Y as a witness. Mr. Y is domiciled in Member State 2.

Question 1: How can the court proceed?

Exercises:
(1) Find the correct form to formulate a request under Article 20 Evidence Regulation. Where is the form to be sent to and in which language is the form to be filled out if the witness is domiciled in Spain, Madrid, postal code 28015?
(2) How does the communication between the Member States takes place to inform the requested court that videoconferencing should be used?

Question 2: As Mr. Y is unwilling to cooperate, the court of Member State 1 decides to request the courts of Member State 2 to hear Mr. Y as a witness in accordance with the rules of the Evidence Regulation. The requested court asks for payment of witness expenses, which are due under the procedural rules of Member State 2. Is the requesting court obliged to make such a payment, either in the form of an advance or in the form of a reimbursement at a later stage of the proceedings?

Exercise:
Going back to the first case study, is there any additional information in Article 22 for the discussion of this first case study "expert witness"?

Question 3: Before the requested court in Member State 2, Mr. Y invokes a particular right to refuse testimony under the procedural law of Member State 1. In Member State 2, such a right does not exist. How should the requested court in Member State 2 proceed?

Exercise^{+}: Check which form the requesting court has to fill out for a request under Article 12 Evidence Regulation and try to find out what information the requesting court should provide about its own procedural law when it formulates its request.

Question 4^{+}: At the end, it turns out that even under the procedural law of Member State 1 Mr. Y does not have the right to refuse testimony. As the way of witness examination in Member State 2 is very different from the one practiced in the courts of Member State 1, the question arises whether the usual practice of the forum state (Member State 1) can influence the examination of witness Y in Member State 2.

Exercises:
(1) How can the requesting court formulate such a request for respecting a special procedure provided for under its law? How can the requesting court guarantee the parties' right to follow the witness examination and to ask questions?
(2) Is an advance on costs due, or does the requesting court have to ensure the reimbursement of any costs?

Question 5: In Member State 1 the official language is different from the official language in Member State 2. What are the consequences?

Exercise: Find out in what languages a request can be formulated if the witness is domiciled in Sweden.

IV. Case study "document production"

A court in Member State 1 comes to the conclusion that certain documents are to be produced. These documents are held by Ms. A, who is not a party to the proceedings. Ms. A is domiciled in Member State 2, and she is unwilling to cooperate.

Question 1: How can the court proceed?

Exercises:
(1) Which form is to be used in order to formulate the request for a document production order? How is the document to be described? Is it possible to ask for the production of all documents which are related to the dispute?
(2) How shall the requested court react if the description is not sufficiently clear?

Question 2^{+}: Ms. A invokes a right to refuse document production under the procedural rules of Member State 1. Is this of any relevance?

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