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Section I

INTERNATIONAL PRIVATE AND PROCEDURAL LAW

Introduction and practical cases on Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

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A. Introduction

General part

1. An effective and easily accessible procedure in civil matters is an element that ensures the right of EU citizens to free movement and residence within the territory of the Member States (Articles 18 and 61 of the Treaty establishing the European Community – hereinafter the EC Treaty) and effective exercise of the right to judicial protection. The national principle as the traditional starting-point of legal assistance among the States was in the EU replaced by two complementary principles: the EU Member States are in the framework of the rights and obligations determined in the EC Treaty obliged to offer legal assistance to each other;[1] they must also ensure the right to judicial protection to which they are already obliged by Article 6 of the European Convention on Human Rights in conjunction with Article 6(2) of the Treaty on European Union (hereinafter TEU). Concerning law on evidence, the right to evidence is ensured by cross-border legal assistance.[2]

The Treaty of Amsterdam, which began to apply on 1 May 1999, opened the gate for the legislative powers of the EC in the procedure of taking evidence (Article 65(a) of the EC Treaty). Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,[3] which regarding its operative part began to apply on 1 January 2004, has in the legal environment of the EU replaced the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter the Hague Convention), which was not ratified by all Member States.[4] As far as the relation between both acts is concerned Article 21 of the Regulation on Evidence provides that in relation to the matters which it regulates the Regulation on Evidence prevails over other provisions contained in bilateral or multilateral agreements between the Member States, i.e. also over the provisions of the Hague Convention.[5] The Regulation on Evidence, however, does 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 such agreements are compatible with the Regulation on Evidence (Article 21(2) of the Regulation on Evidence).

As it follows in the continuation, this general act entails a step forward towards the forming of a uniform European civil procedure. The Regulation has general application, is binding in its entirety, and directly applicable in all Member States (Article 249(2) of the EC Treaty).

The subject matter of the Regulation on Evidence

2. The subject matter of the application of the Regulation on Evidence includes the cross-border taking of evidence; certainly not the entire procedure but only (direct) transmission

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1 Such conclusion follows from the provisions of Articles 10, 61, and 65 of the EC Treaty.

2 *B. Hess*, Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland, Europäisches Zivilverfahrensrecht – Einführung und Grundlagen, ERA, Trier (DE) 2005, at 2.

3 OJ 2001, L 174, at 27 – hereinafter the Regulation on Evidence.

4 Until 2001 the Convention was not ratified by Belgium, Greece, Ireland, and Austria.

5 The practical meaning of this provision finds expression in particular in connection with the taking of evidence through consular representatives, which the Regulation on Evidence no longer provides.

between the courts.[6] The aim of the European legislature is to achieve as high as possible coordination of guarantees in the procedure of providing evidence, however, not by unifying the rights but by means of providing standardised forms.[7] As the concepts of civil and commercial matters[8] determined in Article 1(1) of the Regulation must be interpreted autonomously, independently from legal orders of the Member States, the definition of these concepts in the national law of the State which transmitted a request, or the requested State, is not important.

Concerning the territorial validity of the Regulation on Evidence, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, Denmark is not bound by it or subject to its application.[9]

The taking of evidence

3. The Regulation on the taking of evidence envisages two routes for taking evidence: active and passive judicial assistance. The concept of taking evidence must equally, as the entire Regulation on Evidence, be interpreted autonomously. Certain points of support for its proper understanding are contained in the Statute of the ECJ and the Rules of Procedure of the ECJ.[10]

Contrary to Article 1(1) of the Hague Convention the Regulation on Evidence does not mention "other activities within judicial proceedings".[11] Irrespective of that, stemming from the purpose of the Regulation on Evidence in order to facilitate the procedure of taking evidence, legal theory strives for broad interpretation of the concept of taking of evidence. In this sense every judicial measure with the purpose of acquiring information, which enables the judges to create their opinion regarding legally relevant facts can be considered as taking of evidence.[12] However, in the event of the service of judicial writings the Regulation on Service must be applied and in the event of temporary measures including the measure of securing of claims the Regulation Brussels I must be applied. The taking of evidence by means of judicial assistance is a classical way of taking evidence in disputes involving an international element. The Regulation on Evidence in this part (Articles 2, 4-16, and 18 of the Rules on Evidence) strives for faster transmission of information, greater possibilities for parties to participate in proceedings, and reduction of the grounds for refusal to execute the request by the requested court. Direct transmission between the courts determined in Article 2 entails important acceleration of the procedure and a novelty in comparison with the Hague Convention. The time consuming acceptance of the request by the central body and its sending to the body responsible for its execution (compare with Article 2 of the Hague Convention) are thereby omitted. In accordance with Article 3(1) of the Regulation on Evidence, the central body remains responsible only for supplying information to the courts and seeking solutions to any difficulties which may arise in respect of a request, and also decides on requests for direct taking of evidence (Article 17(1) of the Regulation on Evidence).[13] The search for a competent requested court is facilitated by the list of requested courts contained in a manual drawn up by the Commission, which can also be found on the website in the framework of the European map of civil matters judiciary.[14] The requested court must execute the request without delay and, at the latest, within 90 days of receipt of the request (Article 10(1) of the Regulation on Evidence). Communication between the courts is carried out by means of standardised forms in all languages of the Member States. Direct transmission between the courts is regulated in the provisions of Articles 4 to 9 of the Regulation on Evidence. Communication between the courts is facilitated by the possibility that a request for the taking of evidence is, in addition to the official language of the requested State,[15] also drawn up in another language[16] that the requested State indicated as acceptable for it. Such language must also be an official language of the institutions of the European Community.[17] Documents, which the requesting court encloses with the request must be translated into the language in which the request was written (Article 4(3) of the Regulation on Evidence).

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6 The Regulation does not give a direct answer to the question when it concerns a judicial authority of a Member State in the sense of Article 1(1). The "judicial authority" determined in Article 1(1) of the Hague Convention is, according to legal theory, an authority which in the role of a neutral body takes binding decisions, or has authority to resolve concrete legal issues in a manner that is binding for participants in the procedure. The Court of Justice of the European Communities (hereinafter the ECJ) has hitherto dealt with the delineation of judicial and administrative competence in the framework of preliminary rulings according to Article 234 of the EC Treaty.

7 The annex to the Regulation on Evidence contains 10 standardised forms.

8 In civil and commercial matters the following legal acts are also applied: Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, at 1 – hereinafter the Brussels I Regulation), Council Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2001, L 298, at 37 – hereinafter the Regulation on Service), and the Hague Convention. It is necessary to emphasise, however, that the application of the provisions of the Brussels I Regulation is in certain cases excluded (Article 1(2) of the Brussels I Regulation). According to the argument from the contrary, this limitation of subject matter validity does not apply concerning the Regulation on Evidence. Despite the lack of an explicit provision its application, in the same manner as provided in Article 1(1) of the Brussels I Regulation, should be excluded in taxation, customs, and administrative matters. See *T. Rauscher*, Europäisches Zivilprozessrecht, Sellier, München (DE) 2004, at 867.

9 In relation to Denmark, for the time being only the conclusion of a multilateral international act in the form of a convention is relevant. In accordance with Article 7 of the Protocol, Denmark could have renounced the application of the Protocol provisions, which it has not done so far.

10 OJ 2001, C80, at 53. The version of the Rules of Procedure of the ECJ of 1 June 2001 is available at the following web site: http://www.curia.eu.int.

11 As examples of such other types of judicial activities, in connection with Article 1(1) of the Hague Convention, the literature mentions a request for inquiry at a certain authority or for the sending of documents; activities by which the requested court provides evidence for the requesting court, e.g. the taking of blood in paternity disputes. See more on that in *T. Rauscher*, *ibid.*, at 872.

12 *T. Rauscher*, *ibid.*, at 873.

13 In Slovenia the central body is the Ministry of Justice.

14 In Slovenia requested courts are district courts.

15 If there are several official languages the selection of an appropriate language relates to the language, which is officially used by the concrete requested court.

16 In Slovenia this "other language" is English.

17 Irish and Luxemburgish are at present the only national languages, which are not recognised as official languages of the EU. The status of the Irish language will change on 1 January 2007, when it becomes an official language of the EU.

4. The requested court executes the request in accordance with the law of its Member State (Article 10(2) of the Regulation on Evidence).[18] This, however, does not entail that the completeness of the request, as far as the statements regarding the means of evidence and the subject of evidence are concerned (Article 4 of the Regulation on Evidence), is evaluated according to the national law of the requested court. The question of (in)completeness of the request must be resolved by virtue of an autonomous interpretation, as legal theory is persuaded that the Regulation on Evidence itself contains the rules on the completeness of a request and the remedying of formal deficiencies, and that it therefore does not refer to lex fori.[19]

Exceptions to the lex fori principle established in procedural law are the provisions of Article 10(3) and Article 14(1) of the Regulation on Evidence. It is ideal that for the taking of evidence as well as for their evaluation the same procedural law applies. Thus, in Article 10(3) the possibility is envisaged that the requesting court demands that the request is executed in accordance with its law. The purpose of the provision is in conformity with the principle of efficient proceedings to ensure greater usefulness of evidence received from the requested court or prevent the taking of redundant evidence, which would not have any useful value according to the law of the Member State of the requesting court. The requested court must thus execute such request,[20] unless this would be contrary to the basic procedural rules of its Member State or cause major practical difficulties.[21] The position according to which the court must narrowly interpret the inconsistency of the request with the domestic law is convincing;[22] e.g., if it is allowed in accordance with the domestic law that parties examine witnesses there is no reason why the requested court would refuse the requested cross-examination of a witness. Article 14(1) of the Regulation on Evidence includes the principle of the greatest benefits, in accordance with which the court does not execute a request for the examination of a person who asserts that he or she has the right or obligation to refuse to testify[23] according to the law of the Member State of the requested court or pursuant to the law of the Member State of the requesting court.[24] Similarly as in the event of Article 10(3) the purpose of this provision is to avoid the taking of evidence, which due to their incompatibility with the law of the Member State of the requesting court would not have any useful value. In addition to that, by providing the cumulative application of the provisions of two legal systems the principle of the greatest benefits prevents parties from taking the advantage of the gap in the European legal environment concerning witness protection (the forum shopping of the evidence court).

5. While according to the Hague Convention parties and their representatives only had the right to be present at proceedings (Article 7 of the Hague Convention), the Regulation on Evidence enables them under certain conditions to participate in proceedings actively. The law of the Member State of the requesting court is decisive for the evaluation of the right to be present at the performance of the taking of evidence. If this right is regulated in the domestic law of the requesting court the court must inform of this the requested court, which may in no respect limit or condition the right of parties to be present. While Article 11(1) of the Regulation on Evidence refers to the (passive) presence of parties or their representatives at the taking of evidence, (active) participation (which, e.g., includes the right of parties to raise questions) is regulated by Article 11(2) to (5) of the Regulation on Evidence. In order to understand Article 11(2) and (3) it is essential to differentiate between the communication of the requesting court regarding the presence of parties *(présence, Anwesenheit)* and the request for participation *(Beteiligung)*.[25] In contrast to mere presence, which the requested court may not limit, the determination of conditions for participation falls within its jurisdiction (Article 11(3) of the Regulation on Evidence).[26] Only given such interpretation can the aim of the regulation be realised (as follows from the preamble of the Regulation on Evidence; reason for adoption No 13): "to enable the parties and their representatives to be present at the performance of the taking of evidence, if that is provided for by the law of the Member State of the requesting court, in order to be able to follow the proceedings in a comparable way as if evidence were taken in the Member State of the requesting court."

If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court also have the right to be present at the performance of the taking of evidence (Article 12 of the Regulation on Evidence).[27] The purpose of the provision is to facilitate the evaluation of evidence[28] by the court before which the proceedings are carried out, and to ensure "quasi directness" in the proceedings of the taking of evidence in the narrow sense. The requesting court only informs the requested court of the presence of its representatives; in contradistinction with the Hague Convention (Article 8(2) of the Hague Convention) preliminary permission by a competent authority in the Member State of the requested court is not needed. What is new in comparison with

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18 E.g., the capability of being a witness is evaluated according to the domestic law.

19 *T. Rauscher*, *ibid.,* at 907 and 925.

20 Such a person can be a witness or a party.

21 The grounds for refusal are narrower than similar grounds according to the Hague Convention (Article 9(2) of the Hague Convention), according to which the execution of such request can also be refused if it is contrary to the internal case law.

22 *B. Hess*, *ibid.*, p. 10.

23 From the grounds for refusal by a witness the concept of capacity to be a witness differs, which is evaluated according to the lex fori principle.

24 Such right of a person whose examination is requested must be defined in the request or confirmed by the requesting court. The referring of the person whose examination is requested to their personal law is not relevant in accordance with the Regulation on Evidence.

25 See *G. Schulze*, Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr, Praxis des Internationalen Privat- und Verfahrensrecht, 2001, at 531.

26 Article 11(3) of the Regulation on Evidence determines that if the participation (author's note: non presence) of the parties and, if any, their representatives is requested at the performance of the taking of evidence, the requested court determines, in accordance with Article 10, the conditions under which they may participate (author's note: not being present).

27 The expression representatives includes judges, but also experts.

28 From the preamble to the Regulation on Evidence, reason for adoption No 14, it follows that the representatives of the requesting court must be able to be present at the performance of the taking of evidence "in order to have an improved possibility of evaluation of evidence".

the Hague Convention is also the possibility (Article 12(3) to (5) of the Regulation on Evidence) that representatives of the requesting court participate in the taking of evidence, e.g. by raising questions to experts and witnesses.[29]

6. The degree and scope of coercive measures that the court may use concerning the execution of a request depend on the law of the Member State of the requested court (Article 13 of the Regulation on Evidence).[30] E.g., if a party in Slovenia refuses to testify, no coercive measures are allowed against him or her (Article 262, Section 1 of the Civil Procedure Act,[31] irrespective of possibly different regulation in the law of the Member State of the court before which the proceedings are carried out. It is the matter for the latter in conformity with its internal procedural law to evaluate which consequences result from the fact that the party refused to testify. It is disputable whether and to which extent Article 13 of the Regulation on Evidence applies when the court, in accordance with Article 10(3) of the Regulation on Evidence, requests the execution of a request in conformity with its internal law. It is a uniform opinion that the coercive measures, which are alien to the law of the Member State of the requested court, are not admissible;[32] there is no agreement, however, concerning the question whether it is allowed to use the coercive measures envisaged in the law of the Member State of the requested court. A part of German legal theory legitimately points to the need to differentiate between coercive measures that directly affect the duty of witnesses with regard to examination (e.g. swearing) and those which do not have such effect (e.g., simultaneous recording of a procedural activity is required instead of the envisaged resume of a record determined in Article 123, Section 2 of the CPA).[33]

7. Grounds for refusal are regulated in Article 14 of the Regulation on Evidence. These grounds also include, which from a systematical point of view is perhaps not completely consistent, the right of a person to refuse to testify (Article 14(1) of the Regulation on Evidence, see above). The "real" grounds for refusal are enumeratively stated in Article 14(2) of the Regulation on Evidence. The execution of a request may be refused: if it does not fall within the scope of the Regulation on Evidence, as determined in its Article 1;[34] if the execution of a request under the law of the Member State of the requested court does not fall within the functions of the judiciary; if the requesting court which submitted a formally deficient request does not remedy the deficiency within the time limit of 30 days from the call of the requested court; if within 60 days after the requesting court asked for a deposit or advance the requesting court does not comply with this request. We can establish that in the defining of the grounds for refusal the legislature renounced to the institution of public order as determined in the Hague Convention.[35] This novelty, which has no important practical meaning,[36] is nevertheless to be appraised from the viewpoint of legal policy as it expresses the readiness of the Member States to mutually cooperate in the area of taking of evidence, and demonstrates their mutual confidence. Although the requested court may not refuse execution solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the case (Article 14(3) of the Regulation on Evidence), this does not affect subsequent non-recognition of a judgment in accordance with Article 35 of the Brussels I Regulation.

8. Direct taking of evidence by the requesting court is a new achievement, which could not be imagined according to the classical international civil procedural law, based on the prohibition of carrying out official activities within the territory of a foreign State. In the European legal environment cooperation between the courts and effective legal protection must prevail over the sovereign rights of the Member States.[37]

The origin of the present regulation of passive judicial assistance was already contained in Article 17 of the Hague Convention, which envisaged the possibility of direct taking of evidence by "commissioners," however, it was not an equivalent alternative to active judicial assistance but concession made to the States of the common law system, particularly the U.S.A., where the taking of evidence by the so-called "commissioners" is more important than active judicial assistance.[38] Since in this context the possibilities of making reservation to such by individual States were broadly envisaged the provision has only had a marginal role.[39]

Direct taking of evidence has two advantages: the principle of directness is respected; the same procedural law applies to the taking and evaluating of evidence. On the other hand, the deficiency of such is that it can only be performed on a voluntary basis, without coercive measures (Article 17(2) of the Regulation on Evidence);[40] besides that it is subject to acceptance by the central body in the requested State (Article 17(1) of the Regulation on Evidence).[41]

The central body may refuse direct taking of evidence only on the grounds enumeratively stated in Article 17(5): if the re-

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29 The requesting court must request participation separately (Article 12(3) of the Regulation on Evidence). The conditions under which the representatives of the requesting court participate in the performance of the taking of evidence are determined by the requested court (Article 12(4) of the Regulation on Evidence).

30 The prevailing opinion is that the requested court is not obliged to make cumulative evaluation whether the coercive measures are consistent with the law of the Member State of the requesting court, but only the law of the State of the requested court is decisive. See more *T. Rauscher*, *ibid.,* at 954.

31 Off. Gaz. RS, Nos. 26/99 – 69/05 – hereinafter the CPA.

32 Although, e.g., there is no reason why a requested Slovenian court should not take evidence by cross-examination, in this regard it should not take measures against witnesses in the sense of contempt of court as regulated in the legal systems of common law.

33 *T. Rauscher*, *ibid.,* at 957.

34 See *supra*, para. 2.

35 The requested State could in accordance with Article 12(1)(b) of the Hague Convention refuse the execution of a request if this had detrimental effects on its sovereignty and security.

36 In practice Member States of the Hague Convention have made no reference to the institution of public order.

37 *B. Hess*, *ibid.,* at 16.

38 *T. Rauscher*, *ibid.,* at 970.

39 *B. Hess*, *ibid.*, at 17.

40 With regard to this aspect the Hague Convention goes even further as the possibility of coercive measures follows from its Article 18.

41 No later than 1 January 2007 the Commission must present to the European Parliament and the Economic and Social Committee a report on the application of Article 17 of the Regulation on Evidence (Article 23 of the Regulation on Evidence).

quest does not fall within the scope of the Regulation of Evidence as set out in Article 1; if the request does not contain all of the necessary information pursuant to Article 4; if the direct taking of evidence requested is contrary to fundamental principles of law in the Member State of the central body. If the application is incomplete the central body, contrary to the requested court (Article 14(2)(b) and (c) of the Regulation on Evidence), is not obliged to give the opportunity to the requesting court to complete the request. The provisions of Section 2 (Articles 7 to 9 of the Regulation on Evidence) only refer to the requested court as the addressee of the request, not to the central body. The question remains how the central body should act when the request is incomplete for another reason (if it is submitted in an erroneous language contrary to the provision of Article 5, or is illegible contrary to the provision of Article 6), and not when it does not contain the information according to Article 4 of the Regulation on Evidence. The gap in the law can be filled by broad interpretation of Article 17(5)(b) of the Regulation on Evidence or, what seems more acceptable for the purpose and goal of the Regulation on Evidence,[42] by analogous application of Article 7(1) of the Regulation on Evidence.[43] Although the requesting court executes the request in accordance with the law of its Member State (Article 17(6) of the Regulation on Evidence), the central body may refuse the request if the taking of evidence is contrary to the legal order of its Member State. In defining the concept of legal order the central body is not completely independent since autonomous interpretation is to be made by the ECJ. In this regard, the case law of the ECJ in connection with Article 34 of the Brussels I Regulation can be of assistance,[44] however, legal theory legitimately warns that there is a greater danger of conflict with the domestic legal order when the court before which the proceedings are carried out wants to take evidence directly within the territory of a foreign State than when the recognition of a judgment that is based on the evidence taken abroad is requested.[45] The authors criticise the provision of Article 17(5)(c) of the Regulation on Evidence as unnecessary. They are of the opinion that the interests of the Member State in which evidence are taken are sufficiently protected by the prohibition against coercive measures and the possibility (Article 17(4) of the Regulation on Evidence) that in the taking of evidence the court of the requested State participate.[46] This is undoubtedly true when the purpose of the norm is the protection of a person that is to be examined, however, but not when the purpose of the regulation is different – the protection of the interest of a third party or the general interest. When the central body accepts a request it may, if needed, determine the conditions under which the request will be executed; it may particularly assign a court of its Member State to take part in the performance of the taking of evidence (Article 17(4) of the Regulation on Evidence). The determination of conditions for the execution of the request is required when this is necessary for the protection of the legal order of the Member State in which evidence is directly taken. Such, e.g., include the following conditions:[47] the right to be represented by a lawyer; the right to have an interpreter; the duty of the requesting court to inform of the voluntary character of participation not only the person who is to be examined but also the person who is to submit documents, or is the holder of an object to be inspected; the right for the witness to have his costs reimbursed; the use of the language of the requested state (if a judge of the requested State takes part). On the basis of Article 17(4) of the Regulation on Evidence, which imposes on the central body the obligation to use communications technology, it is possible to conclude that the use of communications technology, e.g. video and teleconferences, also deals with the direct taking of evidence that is subject to preliminary acceptance by the central body.

9. In the selection of both possibilities the court before which the proceedings are carried out must weigh the advantages and disadvantages of both routs for taking of evidence. The main advantage of passive judicial assistance, which can be decisive, e.g., regarding the examination of a certain witness or the inspecting of a place, is the assurance of directness in the taking of evidence. The fact that evidence is taken before the court, which conducts the proceedings is a guarantee for quality evaluation of evidence. In the framework of the direct taking of evidence abroad the court uses its language and the procedural regulations of its Member State so that the same procedural order applies to the entire procedure of taking of evidence. On the contrary, the disadvantage of direct taking of evidence is that it is solely possible on a voluntary basis without coercive measures. Proceeding according to Article 17 of the Regulation on Evidence is thus excluded when voluntary cooperation of a foreign natural or legal person is not possible.

The improved regulation of classical international judicial assistance through a requested court remains an alternative to the direct taking of evidence. It enables the participation of parties, their authorised persons, and representatives of the requesting court, and thereby quasi directness with regard to the taking of evidence. The possibility of using coercive measures can in some cases decisively affect the selection of this method in the procedure of taking evidence.

Despite the differences we can establish that both routes for the taking of evidence, as regulated in the Regulation on Evidence, are close to each other; on the one hand this is a consequence of greater entitlements of subjects to participate in the procedure of active judicial assistance, and on the other hand a consequence of still existing reservations in the procedure of passive judicial assistance. Thus, the determination for one of the two possibilities is not possible at the level of principle, but the decision depends on the circumstances of a concrete case. In practice, an important factor will certainly be the ex-

[42] See also *T. Rauscher*, *ibid.*, at 971.

[43] The provision of Article 7(1) of the Regulation on Evidence imposes on the requested court the obligation to add in the acknowledgement of receipt of the request a note on illegibility or on the use of an erroneous language.

[44] In the cases of *Krombach v. Bamberski,* C-7/98, and *Maxicar. v. Renault,* C-38/98, it, e.g., decided that Member States in principle decide themselves which requirements are made by their internal legal order, however, the determination of the limits of this concept is part of the interpretation of the predecessor to the Brussels I Regulation, i.e. the Convention on international jurisdiction and recognition and enforcement of decisions in civil and commercial matters of 1968.

[45] *T. Rauscher*, *ibid.,* at 973.

[46] See, e.g., *B. Hess*, *ibid.,* at 18.

[47] Cited from *T. Rauscher*, *ibid.,* at 974.

tent to which individual central bodies, which are bound to mutually cooperate already on the basis of Article 10 of the EC Treaty, will be inclined to acceptances.

Special part

The uniformity of case law is the responsibility of the ECJ, however, hitherto there has been no relevant case law. Measures within the area of judicial cooperation (Article 65 of the EC Treaty) fall within Title IV of the EC Treaty: Visas, asylum, immigration, and other policies related to free movement of persons. The procedure of preliminary ruling determined in Article 234 of the EC Treaty is applied to this title only if the question of the interpretation of a treaty, the validity and interpretation of Community acts is raised before the court against which decisions there is no legal remedy in accordance with the national law, and which requests that the ECJ decides on such a question. Therefore the special part of this article deals with some hypothetical problems that could arise in practice.

The scope of application of the Regulation on Evidence

1. A German court, which has jurisdiction to decide on entry into the court register, submits to a Spanish court a request that certain inquiries be made regarding the status of a limited liability company, which is registered in the court register of the German court, and which wants to transfer its main office to Spain. May the Spanish court refuse the request for judicial assistance?

In connection with the concept of "court" determined in Article 1 of the Regulation on Evidence we can partially rely on the case law of the ECJ in connection with Article 234 of the EC Treaty.[48] In conformity with the case law of the ECJ, the decisive criterion is the functional criterion, not the definition of a "court" according to the national law. An authority, which is empowered for entry into the court register does not perform the judicial function, but its powers are closer to the powers of administrative authorities.[49] This entails that the German court in this function is not a court in the sense of Article 1 of the Regulation on Evidence, and the Spanish court may refuse the request for judicial assistance.

2. A Slovenian citizen files an action with a Slovenian court concerning property relations between the spouses. The defendant is an Italian citizen who lives in Italy. The Slovenian court submits its request to the Italian court in order to examine the defendant. Is the Regulation on Evidence applied in this dispute?

As the Regulation on Evidence concerning property relations between spouses does not have such limitation as contained in Article 1(2)(a) of the Brussels I Regulation there is no reason why the Regulation should not be applied in this case.

3. A Slovenian court conducts criminal proceedings. The injured party claims damages on which the court decides within an adhesive procedure. In connection with the amount of property damage it is necessary to examine a witness in Germany, where the injured party was employed prior to the occurrence of the damaging event. Can the Regulation on Evidence be applied concerning the taking of this evidence?

In criminal matters the application of the Regulation on Evidence is as a principle excluded. However, if within criminal proceedings a civil claim (for damages) is decided on, the Regulation on Evidence can nevertheless be applied. What is decisive is the substantive character of a disputed legal relation, not the character of the proceedings within which a claim is determined.[50]

The relation between national law and the Regulation on Evidence

4. A Slovenian court adopts a ruling on the examination of a witness who lives in Italy, not far from the Slovenian border. The conditions under which such evidence can be taken so that the evidence is taken by the court, which conducts the proceedings, that is the Slovenian court, are determined in Article 17 of the Regulation on Evidence. In this concrete case the Slovenian court adopts the ruling that the witness (from Italy) is summoned to appear in Slovenia to be examined before the Slovenian court which decides on the case. Is this contrary to the provisions of the Regulation on Evidence? Can any coercive measures be used against the witness, e.g. if they refuse to testify?

The summoning of the witness in this case is not contrary to the Regulation on Evidence. It is generally accepted that in the taking of evidence the principle of exclusive application of the Regulation on Evidence does not apply. The court, which conducts the proceedings independently and in accordance with its internal law decides whether and when it will request active or passive judicial assistance. In addition to that, Member States may still reach agreements with each other to facilitate the taking of evidence (Article 21(2) of the Regulation on Evidence). But in every respect the conduct of the court, which conducts the proceedings may not be contrary to the Regulation on Evidence. Thus, if it summons a witness and examines such, no coercive measures may be used against the witness (e.g. a fine when they refuse to testify) as this would be contrary to Article 17(2) of the Regulation on Evidence, which provides that direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

5. A German court wishes to examine a witness in the Netherlands. As technical conditions enable such and the use of communications technology is also provided by German civil

[48] A question is in the procedure of preliminary ruling raised by a national court.

[49] In the case of C-86/00 *HSB Wohnbau*, dated 10 July 2001, the ECJ wrote: "In the present case, it is apparent from the order for reference that the Amtsgericht made the reference to the Court in its capacity as authority responsible for keeping the commercial register, in a case concerning an entry in that register. There is nothing in the case-file to indicate that there is a dispute pending before the Amtsgericht between HSB Wohnbau and any defendant."

[50] Article 1(1) of the Brussels I Regulation determines that it is applied in civil and commercial matters regardless of the character of a court or tribunal.

procedural law,[51] *it wishes to examine the witness by means of a teleconference. Does this case concern a method of taking evidence, which falls within the scope of the Regulation on Evidence?*

When the court which conducts the proceedings examines a witness in another Member State by means of a video or teleconference it does not only concern the taking of evidence as such but also, in accordance with the Regulation on Evidence, the direct taking of evidence abroad. This is only admissible under the conditions determined in Article 17 of the Regulation on Evidence. This entails that the German court must in the concrete case submit a request for the holding of a teleconference to the central body in the Netherlands (form I is to be filled out).

6. A Swedish court wishes to examine a witness in another Member State. It would examine the witness regarding the facts he knows on the telephone while others would be listening to the testimony through a phone-speaker. This is in conformity with their internal civil procedural law. Does this case concern a method of taking evidence that falls within the scope of the Regulation on Evidence?

In accordance with the general opinion, the examination of a witness by means of a telephone conversation is not a method of taking evidence that would be regulated by the Regulation on Evidence. The Swedish court can in this way examine the witness if this is in accordance with the law of its State. There is, thus, a difference between the use of communications technology (a video and teleconference), which falls within the scope of the Regulation on Evidence, and an ordinary telephone conversation.

7. A German court having its main establishment near the German-Polish border has in a claim-for-damages case appointed an expert in road traffic. The damaging event – a traffic accident – occurred in Poland only 50 km away from the main establishment of the court. In order to elaborate an expert opinion the expert must inspect the place of the damaging event. Must the German court previously carry out a procedure pursuant to the Regulation on Evidence, precisely according to Article 17 of the Regulation, or may the expert inspect the place without a prior request by the court, which conducts the proceedings?

It is most important in this case to answer the question of whether an expert when gathering information abroad in order to elaborate an expert opinion is an assistant of the court or whether he takes part in that as a natural person. On the basis of the text of Article 17(3) of the Regulation on Evidence, which provides that direct taking of evidence is performed by a member of the judicial personnel or by any other person such as an expert, we can conclude that the Regulation considers an expert as an "arm of the court", therefore, the German court must submit a request that the expert inspects the place of the traffic accident in Poland in order to elaborate the expert opinion.[52]

8. A Slovenian court adopts a ruling by which a third person (not a party) who is domiciled in another Member State is imposed the obligation to submit certain documents. May this be required directly from the party or must assistance be requested from the competent court of the Member State in which the person who is to submit the documents is present? If the answer is affirmative, may any coercive measures be used?

It does not concern a question which would be regulated directly by the Regulation on Evidence, thus the court which conducts the proceedings may directly impose on the person possessing the documents the obligation to submit the documents, without requesting assistance from the competent court in the Member State in which such person lives. In this regard, it may not use any coercive measures as this would be contrary to the Regulation on Evidence or to the principles on the use of coercive measures expressed thereof.

Evidence to be used in commenced or contemplated judicial proceedings (Article 1(2) of the Regulation on Evidence)

9. According to Dutch law a witness can be examined prior to the commencement of judicial proceedings in order for a party to decide on this basis whether to file an action, or not. In the concrete case the witness is domiciled in Germany, thus the Dutch court requests that the German court examines the witness. May the German court refuse the request and, if so, why?

The party in this case proposed the examination of the witness domiciled in another Member State, in order to enable appropriate evaluation regarding the possible action or the preparation of its grounds ("fishing expedition"), thus it cannot be concerned as a temporary measure or securing of evidence in the sense of Article 31 of the Brussels I Regulation[53] (The Regulation on Evidence is otherwise applied in procedures of securing). The German court may refuse the request of the Dutch court.

The execution of a request

10. A Slovenian court, which conducts the proceedings, sends a request to an Italian court in order to examine a witness. The Italian court is convinced that the Slovenian court has no jurisdiction to decide since the Italian court has jurisdiction in such case. May it refuse to execute the request?

The Italian court may not refuse to execute the request. The court, which has jurisdiction to transmit a request, is, in accordance with Article 1(2) of the Regulation on Evidence, a court before which judicial proceedings are commenced or contemplated. The question of jurisdiction of the requesting court is not subject to examination to be made by the requested court (Article 14(3) of the Regulation on Evidence).

11. In accordance with Dutch law, a party is treated as a witness. A Slovenian court (Slovenian law differentiates between the examination of a witness and the examination of a party) has received a request by a Dutch court to examine a

[51] Section 128(a) ZPO (German Code of Civil Procedure).

[52] This is also a majority view held in theory, however, certain authors represent also the position that acceptance in such a case is not necessary.

[53] See ECJ 28 April 2005 – C-104/03 – *St. Paul Industries v. Unibel Exser*, [2005] ECR I-3497 = [2005] EuLF I-71, II-65.

plaintiff who is domiciled in Slovenia. Is the plaintiff examined as a party or as a witness and may he or she be brought to the court forcibly if he or she refuses to respond to the summons?

The requested court executes a request pursuant to the law of its Member State (Article 10(2) of the Regulation on Evidence), therefore, the plaintiff may be examined before the Slovenian court as a party, not as a witness. Coercive measures against him are not permitted (Article 13 of the Regulation on Evidence).

12. The Slovenian court executes the request by the Dutch court from the previous case. In which language is the plaintiff to be examined?

The Slovenian court examines the party in the Slovenian language. Also, the record is drawn up in the Slovenian language. In accordance with Slovenian civil procedural law, the party has the right to use his or her own language. Oral translation (by aid of interpreters) of what is translated at a hearing, and of documents, must be provided for at his or her request.

13. Who covers the costs of translation in the previous case?

The basic principle of the Regulation on Evidence is the principle of free judicial assistance. This, however, includes certain exceptions (Article 18(2) of the Regulation on Evidence). If the requested court so requires, the requesting court (the Dutch court) must ensure the reimbursement of fees paid to interpreters. The duty of the party to cover these costs is regulated by the law of the Member State of the requesting court, i.e. Dutch law.

14. The proceedings are carried out before an English court. The latter submits a request for the examination of a witness to an Austrian court, and requires the execution of the request in accordance with English law (Article 10(3) of the Regulation on Evidence), so that the witness be examined in a manner such that a simultaneous record54 is drawn up, not merely a resume of the record which is envisaged according to Austrian civil procedural law. May the Austrian court refuse such request?

The requested court must comply with the request of the court which conducts the proceedings so that the request is executed in accordance with the law of its Member State unless this procedure is incompatible with the law of the Member States of the requested court or by reason of major practical difficulties (Article 10(3) of the Regulation on Evidence). In order to conclude that a procedure is not compatible with the law of the Member State of the requested court it does not suffice that such is not envisaged in the domestic law or that this law is silent with regard to a specific procedure, but the domestic law must contain explicit prohibition against a certain procedure, which must also be reflected in procedures of judicial assistance (e.g. a procedure that would entail an interference with basic human rights). The request of the English court that a simultaneous record is drawn up is not of such type and, therefore, the Austrian court may not refuse it.

15. The proceedings are carried out before a German court, which adopts a ruling on the examination of a witness who is domiciled in Slovenia. The German court wishes that the requested Slovenian court executes the request in such a way that a videoconference is held concerning the examination (Article 10(4) of the Regulation on Evidence), however, Slovenian civil procedural laws do not provide for the use of communications technology means within a civil procedure, thus the question may be raised as to the compatibility of such proposal with Slovenian law. Is there any other possibility for the German court, which wishes to avoid making a trip to Slovenia?

The other possibility is that the German court requests from the Slovenian central body (direct taking of evidence, Article 17 of the Regulation on Evidence) that the witness is examined by means of a videoconference. In such an event the German court examines the witness in accordance with German law (Article 17(6) of the Regulation on Evidence).

16. Article 11 of the Regulation on Evidence determines that parties have the right to be present at the taking of evidence and to participate. The court of a Member State adopts a ruling on the examination of a witness in another Member State. In connection with the mentioned right of parties, what should the court be particularly aware of when or before it makes a request to the requested court?

The court, which conducts the proceedings, must obtain the statements of parties whether they wish to be present at the taking of evidence or to participate in the proceedings. If they wish so the requesting court must include this information in form A. The requested court must serve form F on parties (Information by the requested court on the date, time, and place of the taking of evidence and on the conditions for participation).

17. When the court, which conducts the proceedings directly, takes evidence in another Member State, coercive measures are not allowed. A Slovenian court examines a witness in Italy. Must the court warn the witness of the consequences of perjury, and may the witness be prosecuted due to the criminal offence of perjury? Does the fact that the summoned witness does not respond to the summons have any consequences for the evaluation of evidence by the Slovenian court?

The prohibition against coercive measures does not entail that a witness cannot be found guilty of the criminal offence of perjury. Non-participation by the witness, against whom no coercive measures may otherwise be used, can affect the evaluation of evidence by the Slovenian court (it will, e.g., consider that a relevant fact was not proved).

18. The proceedings are carried out before a Slovenian court. A party was examined by the requested court which regarding the use of coercive measures proceeded according to Article 13 of the Regulation on Evidence, which has in connection with this question introduced the principle that the law of the requested court is applicable. The law of the Member State of the requested court does not make a distinction between the examination of a witness or of a party, thus the party was examined as a witness, whereby also coercive measures were used. May the Slovenian court use such "coerced" evidence?

The Slovenian court may not use the "coerced" evidence in this case, as in Slovenia no coercive measures against a party are allowed.

54 In English law the following principle applies: "evidence given by the witness is recorded in full."