

# Taking of Evidence

## Set of Case Studies<sup>1</sup>

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## Taking of Evidence

### A. Questions

#### I. Starting scenario

A court of the State where the seminar takes place decides to hear three persons as witnesses: A, B and C. A lives in Ireland, B in Denmark and C in Poland.

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

*Note for the trainers:* If the seminar takes place in Denmark, in Ireland, or in Poland, the scenario has to be adapted, and the forum must be placed in one of the other Member States.

#### II. Case study “expert witness”

A court of Member State 1 has appointed an expert. In order to finalise his 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 hear Mr. Y as a witness. Mr. Y is domiciled in Member State 2.

**Question 1:** How can the court proceed? Discuss the criteria for deciding which way to choose.

**Question 2:** As Mr. Y is not willing 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?

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**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 party to the proceedings. Ms A is domiciled in Member State 2, and she is not willing 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?

**Question 3:** Is the situation different if the document is not paper based but electronic?

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## B. Methodological advice

### I. General idea and core topics

The idea of this training package is to make the court staff of the Member States familiar with the European rules on the taking of evidence abroad. The following aspects are the core topics:

1. Scope of application of the 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).
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. Protection of the interests of third persons.
6. Cost issues.
7. 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. Working groups and structure of the seminar

At the beginning of the session, participants should be given approx. 10 minutes to solve the Starting scenario individually. Then the trainer should outline the main features of the Evidence Regulation and present the answers to the Starting scenario (approx. 30 minutes). After this, the case study “Expert witness” should be discussed with the whole seminar group. Following the discussion of the two questions of this case study, the trainer should introduce the integrated interactive exercises (see page 9). Solving these exercises in plenary has the advantage that only one electronic device with internet access is required – should the seminar organiser be in a position to provide participants with more devices, this is of course welcome. Approx. 75 minutes should be scheduled for solving the first case study including the exercises and sharing experience. After this, a short break is recommended. To deal with the remaining case studies (case study “Witness examination” and case study “Document production”), the seminar group should be divided into smaller working groups of 6-8 participants, who will have 60 minutes to go through all questions

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and exercises. Solutions and any remaining questions should finally be discussed in plenary (for approx. 45 minutes).

### III. Additional material

It seems helpful to summarise the key elements of each solution in a PowerPoint Presentation, to recommend the reading of the Practice Guide, which is available at [https://e-justice.europa.eu/content\\_taking\\_of\\_evidence-76-en.do](https://e-justice.europa.eu/content_taking_of_evidence-76-en.do), and to provide the participants with further reading recommendations in the language of the seminar.

In any case, all participants need access to 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. 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 hard copy of the instrument.

### IV. Recent developments

In May 2018, the Commission presented a proposal for a reform of the Evidence Regulation (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, COM(2018) 378)<sup>2</sup>. This proposal does not change the general character and structure of the instrument, but it concentrates on reforming technical aspects, such as the communication between the requesting and the requested courts and the use of video conference technique for the direct taking of evidence abroad under Article 17. In the European Parliament, the first reading took place on 19 February 2019.

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0378>.

### C. Solutions

#### I. Starting scenario

In the area of cross-border taking of evidence, the 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) has been adopted with the objective of making court proceedings in civil and commercial matters more efficient. Article 1 of this Regulation limits the scope of application to cross-border situations between Member States of the European Union with the exception of Denmark. Recital 22 explains the reasons: “Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.”<sup>3</sup> 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 between Denmark and the other Member States. The Service Regulation is one example (cf. the case studies concerning the Service Regulation). For the Evidence Regulation, there exists, however, no such agreement.

The situation for Ireland is laid down in recital 21: „The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community,<sup>4</sup> have given notice of their wish to take part in the adoption and application of this Regulation.“

For the other Member States, there is no special regime. They are all bound by regulations adopted by the European legislator under Article 81 TFEU. So, in the following, the term “Member State” is used in the sense of Art. 1(3) Evidence Regulation, which means all Member States of the European Union with the exception of Denmark.

Denmark is, however, Contracting State to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.<sup>5</sup> If the same is true for the other State concerned, the courts can rely on this Convention in order to proceed with the cross-border taking of evidence.

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<sup>3</sup> Cf. the Treaty of Amsterdam, page 101 ([https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)); due to this protocol on the position of Denmark, Denmark is not bound by regulations adopted in the area of judicial cooperation in civil matters. For the position of Denmark after the Lisbon Treaty, cf. the protocol No 22 to the Treaty on the Functioning of the European Union: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F22>.

<sup>4</sup> On the basis of this Protocol, Ireland has the possibility to declare an opt-in unilaterally.

<sup>5</sup> <https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence>.

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*Note for the trainers:* The participants are invited to check whether the Member State where the seminar takes place is a contracting party to the Hague Evidence Convention. The information about the current status of the Hague Evidence Convention can be found at <https://www.hcch.net/de/instruments/conventions/status-table/print/?cid=82>.

If the State where the seminar takes place 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.

### II. Case study “expert witness”

**Question 1:** Article 17(3) Evidence Regulation addresses the issue of expert witness. 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 this to be helpful. The European Court of Justice has decided that the Evidence Regulation does not have exclusive character:

CJEU Case C-332/11, Prorail, EU:C:2013:87

„ [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, 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 can choose between a request under the Evidence Regulation and a procedure under national law. In the latter case, the courts, certainly, have to respect the interests of sovereignty of the other States. 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

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examination of a construction site for preparing an expert opinion is not in conflict with the interests of sovereignty if the owner of the construction site cooperates. But, in case of doubts, national courts should opt for a request under the Evidence Regulation in order to avoid tensions between different Member States.

*Note for the trainers:* Participants should discuss which issues could cause conflicts of sovereignty.

**Question 2:** If the owner of the construction site is not 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 take evidence under Article 17. (2) A request for the taking of evidence under the Articles 10 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, i.e. the court travels to Member State 2 or uses technical means such as video conference 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 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 17(2) Evidence Regulation:

„Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.“

Additional information: This sentence shall be abolished by the reform of the Evidence Regulation (cf. COM(2018) 378).

In this respect, the Hague Evidence Convention is even more generous.<sup>6</sup> 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.

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<sup>6</sup> Cf. Article 18 of the Convention.



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*Note for the trainers:* 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>.

*Additional Information*, which should be given to the participants when they ask: Member State 2 has not made a declaration under Article 18 of the Hague Evidence Convention. Against this background, a request for the taking of evidence under the Articles 10 et s. Evidence Regulation is the only possibility to have recourse to coercive measures. If the court in the forum State 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 necessary in order to execute the request.

### 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://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* Amtsgericht Tübingen, Doblerstraße 14, 72074 Tübingen, Germany

Phone: +49 7071 200-0; Fax: +49 7071 200-2008

Email: [Poststelle@agtuebingen.justiz.bwl.de](mailto:Poststelle@agtuebingen.justiz.bwl.de)

(2) Find the correct form to be used in order to formulate the request and fill in the information about the requested court Tübingen; which language is to be used?

=> Read Article 5 Evidence Regulation

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* Form A; point 4; Germany only accepts requests in German.

(3) How should the form be sent to the requested court?

=> Read the Articles 2 and 6 Evidence Regulation

=> Read the Practice Guide which is available at

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

=> Check the information provided by Germany in the context of Article 6 at

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* Germany accepts postal service and fax for the request. For further informal communications, email and telephone are accepted as well. The relevant passage in the Practice Guide can be found on page 10, para. 19.

*Note for the trainers:* It might be interesting to add an overview of the situation in the country of the seminar.

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(4) How shall the requested court react?

=> Read the Articles 7 and 8 Evidence Regulation and consult

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

The relevant passage in the Practice Guide should also be read.

*Answer:* The requested court has to send an acknowledgment of receipt using Form B within 7 days and to ask for further information using Form C within 30 days if it needs further information in order to execute the request. If no further information is needed, the requested court has to execute the request within 90 days (cf. Article 10 Evidence Regulation). The relevant passage in the Practice Guide is on page 11, paras. 23 to 31.

### 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.“

The things are less clear for a witness examination by telephone or videoconference. In order to avoid any tensions between the Member States, it might be preferable to formulate a request under Article 17 Evidence Regulation. This way also has the advantage of getting technical support from the authorities of the requested State as Article 17(4) establishes the duty to give technical support. 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. The Evidence Regulation provides for the use of coercive measures only in this last scenario, cf. Article 13.

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 the forum state 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

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witness in order to evaluate the credibility; but as mentioned before: This depends on the national law of the forum State.

### Exercises:

Find the correct form for formulating a request under Article 17. Where is the form to be sent to and in which language is the form to be filled in if the witness is domiciled in France, Obernai, postal code 67120?

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* Form I is the correct form. The request is to be sent to the central body:

Ministère de la Justice

Direction des Affaires Civiles et du Sceau

Bureau du droit de l'Union, du droit international privé et de l'entraide civile (BDIP)

13 Place Vendôme

75042, PARIS Cedex 01

Tel.: 00 33 (0)1 44 77 61 05; Fax: 00 33 (0)1 44 77 61 22

E-mail address: [Entraide-civile-internationale@justice.gouv.fr](mailto:Entraide-civile-internationale@justice.gouv.fr)

France only accepts requests in French.

*Note for the trainers:* Participants could also discuss the content of their respective national law.

**Question 2:** Article 18(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 18(2) and (3).

### Exercise:

Going back to the first case study, is there any additional information in Article 18 for the discussion of this first case study “expert witness”?

=> Read Article 18(3) Evidence Regulation.

Consult the Practice Guide at

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* If the request concerns an expert opinion, the requested court is entitled to ask for an advance on costs before it executes the request. In order to ask for such an advance, the requested court shall use Form C (cf. Article 8(1) Evidence Regulation). When the payment has been made, the requested court has to confirm the payment using Form D (cf. Article 8(2) Evidence Regulation).

The relevant passage in the Practice Guide is page 12 point 28.

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**Question 3:** Article 10(2) Evidence Regulation states that the requested court shall execute the request in accordance with its own national procedural law, i.e. the law of Member State 2. Under this law, the right to refuse testimony which Mr. Y invokes does not exist. However, Art. 14(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.

**Exercise:** Check the form which the requesting court has to fill in for a request under Article 10 Evidence Regulation and try to find out which information the requesting court should provide about its own procedural law when it formulates its request.

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* The correct form is Form A. Under point 12.2.7, 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 12.2.7 exists. For this inquiry, the requested court can contact the requesting court by the informal, most efficient means accepted by the requesting court.

**Question 4:** Article 10(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 10(3) Evidence Regulation, however, gives the requesting court the possibility to ask for executing the request 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 a serious incompatibility with the legal system of Member State 2.

**Exercises:**

(1) How can the requesting court formulate such a request for respecting a special procedure provided for under the laws of the requesting State? Is there a possibility for the requesting court to participate actively via videoconference? How can the requesting court formulate such a request? How can the requesting court guarantee the parties right to follow the witness examination and to ask questions?

=> Read the Articles 10, 11 and 12 Evidence Regulation.

=> Consult the European e-justice portal and the Practice Guide at

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

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*Answer:* The requesting court has to describe the special procedure under point 13 of Form A. Under point 9 of this form, the court has to indicate whether the parties will be present and whether their participation is requested. Finally, at point 10 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 13.1 of the form. The relevant passage in the Practice Guide is on page 13, paras. 32, 33 and on page 14, paras. 35 – 41.

Additional information for the use of video conference in cross border cases can be found at: [https://e-justice.europa.eu/content\\_general\\_information-69-en.do](https://e-justice.europa.eu/content_general_information-69-en.do).

(2) Is an advance on costs due, or does the requesting court have to ensure the reimbursement of any costs?

=> Read Article 18 Evidence Regulation.

*Answer:* Article 18(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.

The relevant passage in the Practice Guide is on page 12, para. 28.

**Question 5:** Two issues are to be distinguished: First, the language of the request. Article 5 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.

**Exercise:** Find out in which language a request can be formulated if the witness is domiciled in Sweden.

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* 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, for example for Finland (Finish, Swedish and English), Germany (German), Poland (Polish), Portugal (Portuguese, Spanish), Spain (Spanish, Portuguese), Sweden (Swedish, English).

Second, the language in which the witness is heard needs to be determined. Here, the Evidence Regulation does not contain any specific rule. Article 10(2) Evidence Regulation sets out the general principle that the requested court executes the request in accordance with its own procedural law. Thus, it is the procedural rules of Member State 2 that decide about the language in which the witness is to be heard.

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### IV. Case study “document production”

**Question 1:** If Ms A is not willing 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 13 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?

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* Form A is to be used. Under point 12.3.1., 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 3<sup>rd</sup> August 2018”. 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?

=> Read Article 8 Evidence Regulation

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* The requested court has to ask for further details using Form C.

**Question 2:** Article 10(2) 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.

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**Exercise:** How does the requested court get the information about the procedural law of Member State 1 and the rights to refuse document production?

=> Consult the European e-justice portal

[https://beta.e-justice.europa.eu/374/EN/taking\\_evidence](https://beta.e-justice.europa.eu/374/EN/taking_evidence)

*Answer:* The requesting court has to indicate the information under point 12.2.7 of Form A. As it is, however, difficult to anticipate all the rights to refuse document production, the requested court must not rely on the exhaustive character of this information. If the third invokes a right which is not enumerated under 12.2.7 of Form A, the requested court has to inquire whether such a right exists under the laws of Member State 1. For this inquiry, the requested court can contact the requesting court by the most efficient, informal means accepted by the requesting court.

**Question 3:** Under the Evidence Regulation, there is no difference between paper based documents and electronic documents. How the courts have to deal with electronic documents is determined by the national laws of the different Member States. If under domestic law the court can issue a document production order for electronic documents, the court can also formulate a cross-border request for such a document production under the Evidence Regulation. If the requested court sends an electronic copy to the requesting court, the court has to use a system which guarantees a sufficient degree of security and data protection.

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### D. Annex

#### Taking of Evidence - Set of Case Studies<sup>7</sup>

##### I. Starting scenario

A court of the State where the seminar takes place decides to hear three persons as witnesses: A, B and C. A lives in Ireland, B in Denmark and C in Poland.

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

##### II. Case study “expert witness”

A court of Member State 1 has appointed an expert. In order to finalise his 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 in the information about the requested court Tübingen; which language is to be used?
- (3) How should the form be sent to the requested court?
- (4) How shall the requested court react?

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<sup>7</sup> Developed by Prof. Dr. Stefan Huber in the framework of the project “Better applying European cross-border procedures: legal and language training for court staff in Europe”, Grant Agreement number: 806998.



## Taking of Evidence

### III. Case study “witness examination”

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

**Question 1:** How can the court proceed? Discuss the criteria for deciding which way to choose.

**Exercises:** Find the correct form for formulating a request under Article 17. Where is the form to be sent to and in which language is the form to be filled in if the witness is domiciled in France, Obernai, postal code 67120?

**Question 2:** As Mr. Y is not willing 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 18 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 the form which the requesting court has to fill in for a request under Article 10 Evidence Regulation and try to find out which 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.

## Taking of Evidence

### Exercises:

(1) How can the requesting court formulate such a request for respecting a special procedure provided for under the laws of the requesting State? Is there a possibility for the requesting court to participate actively via videoconference? How can the requesting court formulate such a request? 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 which language 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 party to the proceedings. Ms A is domiciled in Member State 2, and she is not willing 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?

**Exercise:** How does the requested court get the information about the procedural law of Member State 1 and the rights to refuse document production?

**Question 3:** Is the situation different if the document is not paper based but electronic?