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THE TAKING OF EVIDENCE IN CIVIL PROCEEDINGS OF THE EUROPEAN UNION

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Summary. The article analyses the main provisions of 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. It grounds the need for its existence as well as the relation and advantages in comparison with the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Key words: evidence, civil proceedings, European Union

INTRODUCTION

In the civil procedure of the EU, the mutual legal aid between the courts of the Member States covers two fields – the serving of judicial and extrajudicial documents and the taking of evidence. Both fields are fundamental as one of them is directly related to the proper exercise of the State's right to be heard, and the other one is linked with the fair hearing of the case. The cooperation of the EU Member States in the field of the taking of evidence is fully governed by 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.[1] Another international document governing the taking of evidence abroad in civil or commercial matters is the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.[2]

In any case, it is worth mentioning that the Regulation in question is the first legal act of the European Union which directly regulates the process of the taking of evidence in relations between the EU Member States, except for Denmark which the Regulation is not applicable to. Several arguments are generally presented to answer the potential question as to why the adoption of that legal act was necessary and why the provisions of the said Hague Convention of 1970 did not suffice: a) the Hague Convention applied to part of the EU Member States only; b) the Convention is laced with the spirit of sovereignty of the States which is not appropriate in relations between the EU Member States; c) the Convention gives too large a role to the central bodies of the States, which in turn quite consi-

[1] O.J. EC L 174/1.
[2] Official Gazette, 31 May 2000, No 44. Law on the Ratification of the Convention on the Taking of Evidence in Civil or Commercial Matters of the Republic of Lithuania. No VIII – 1626.

derably delays the process of the taking of evidence abroad [Rauscher, Heiderhoff, et al. 2006, 1282].

The preparatory work for the Regulation commenced in November 2000, where Germany provided the first draft of the Regulation. This draft did not differ from the relevant provisions of the Hague Convention in terms of the fundamental aspects, therefore in light of the said drawbacks of the Convention, the draft was essentially amended and adopted as of 28 May 2001. To describe the fundamental difference between the Regulation and the Hague Convention, it may be concluded that the Regulation is characteristic of substantial limitation of the sovereignty of the Member States for the benefit of the principle of the immediacy in the field of the taking of evidence.

The preamble of the Regulation states that the efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member States' courts. Moreover, it draws attention to the fact that the European Council, during the meeting of 15 and 16 October 1999 in Tampere, reminded that new procedural legislation in cross-border cases should be adopted, in particular where it concerns the taking of evidence.

1. SUBJECT MATTER OF THE REGULATION

Inside the EU, there could have been two ways of regulating the taking of evidence. Firstly, the uniform regulation to the entire production of evidence could have been established which was to take place in the Member State other than the one where judicial procedure took place. Secondly, the regulation itself could have been restricted solely to the cooperation of the Member States in the field of the taking of evidence by further leaving the governance of the production of evidence to the national procedural law [Weitz 2005, 460]. It was namely the second alternative which was selected in the Regulation at issue, i.e. the taking of evidence basically takes place under the national procedural law of the Member State in whose territory the evidence should be taken (however, the requesting court may approach the requested court with a request for the performance of taking of evidence according to a special procedure which is not provided for in the legislation of the Member State of the requested court – Art. 10, sect. 3 of the Regulation. The requested court may refuse to uphold that request only if that procedure is not compliant with the national law or its execution is impossible due to major difficulties). Thus, the Regulation does not contain the provisions which aim at making the production of evidence in the Member States uniform. The title of the Regulation itself implies that the subject matter of the regulation entails the cooperation between the courts of the Member States when it is necessary to take evidence in the Member State other than the one where judicial procedure takes place. The Regulation establishes two alternatives for the taking of evidence: "ta-

king of evidence through active and passive legal aid." In the first case, evidence is taken by the court of the Member State which is approached for legal aid (requested court), in the second case, this is the court which hears the case (requesting court) with a respective consent from the court of another Member State [Hess 2010, 463]. It must be also noted that the first alternative is considered standard in the international civil matters and it means certain respect to the sovereignty of a respective country. This is why, even when taking evidence through passive requisition, the consent from the court of another Member State is required. Although the establishment of this alternative may be undoubtedly considered quite a considerable breakthrough in the field of the sovereignty of the State where it comes to the relations between the EU Member States.

When discussing the subject matter of the regulation it is essential to discuss the definition of the taking of evidence, which is the subject matter of an autonomous interpretation. Firstly, it must be noted that a method of a considerably extensive interpretation has been selected *vis-à-vis* this definition. The taking of evidence is read as any judicial method of receiving information, i.e. all activities are directed to the provision of information to the court [Schlosser 2009, 484]. Thus, information which is requested to be taken must be designed to administer justice. Thereby the Regulation is not applied in the cases where information is necessary for various non-judicial procedures of conciliation, mediation and similar nature.

In particular, the Regulation is applied in civil and commercial matters only. The definition of civil and commercial matters is the subject matter of an autonomous interpretation and it should be interpreted primarily on the basis of Regulation 44/2001 (Brussels I) and its recast 1215/2012 (Brussels I a). This interpretation alone, however, is too narrow, as this definition also covers the matters falling within the scope of the regulations governing the civil procedure of the EU (regulations governing the issues of family, award of maintenance, summary procedures and insolvency) [Rauscher 2015, 906]. The provisions of the Regulation apply irrespective of whether or not the civil matter is heard through the contentious or non-contentious proceedings. Although the Regulation does not contain the definition of the Court, neither the doctrine nor the case-law raise the disputes over the fact that the definition of the court should be read in the Regulation in a standard manner, i.e. as the State court [Fasching 2008, 1203]. The Regulation will not apply in the cases, where the request to take evidence in another Member State is provided not by the court but by the administrative body, or where the request is submitted by the arbitral tribunal (but the situation where the arbitral tribunal approaches the State court with a request to assist in taking evidence in another Member State is also feasible. In this case, the provisions of the Regulation will already apply to the approaching by the State court) [Fasching 2008, 1203]. It must be noted that Art. 1, sect. 2 of the Regulation provides for that a request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated (here, the discovery procedure

is in particular borne in mind which is characteristic to the common law countries). Moreover, it is also important that the Regulation will apply to preservation of evidence in the Member State other than the one where the proceedings take place. In this respect, the intensive disputes are undergoing, in theory, as to whether preservation of evidence should be attributed to provisional protective measures which is why it is carried out following Art. 31 of the Brussels I Regulation, or this field in the end falls within the scope of governance of the Regulation in question [Hess and Zhou 2007, 184]. The ECJ resolved this dispute in favour of the Regulation at issue reasoning that the application of provisional protective measures and preservation of evidence in the civil procedure have different objectives, and that preservation of evidence must be treated as a certain specific part of the taking of evidence [ibid.].

Based on the Regulation, the court of the Member State cannot request another Member to perform the taking of evidence which is required for the proceedings in the third country. As for the definition "commenced proceedings" used in the Regulation, it must be noted that it has not been interpreted. There are no grounds, however, for disagreeing with the position held in the literature that the provisions of Art. 30 of the Brussels I Regulation should be applied when interpreting that definition (when the document instituting the proceedings or an equivalent document is lodged with the court) [Rauscher, Heiderhoff, et al. 2006, 1305].

Art. 21, sect. 1 of the Regulation establishes the principle of its primacy over other international agreements (including the bilateral ones) and the Hague Convention. In compliance with Art. 21, sect. 2, however, the Regulation does not preclude Member States from concluding agreements or arrangements to further facilitate the taking of evidence, provided that they are compatible with this Regulation.

The Regulation applies to all Member States of the EU, except for Denmark (which is further applied the Hague Convention) where the Member States are both the requesting and requested countries. Similarly to the Regulation on the serving of procedural documents, in order to ensure its effective functioning, the Member States must notify the Commission of the central bodies, of the main judicial rules and competent authorities, technical means for the receipt of requests available to the courts and languages accepted for the requests. The Ministries of Justice are appointed as the central bodies in Lithuania and Poland. Any municipal or regional court of Lithuania and regional court of the Republic of Poland, within the territory of their operation, may act as the requested courts. The requests for taking of evidence may be submitted to the Lithuanian courts in the Lithuanian, English and French languages, and only the Polish language is accepted in Poland. In Lithuania, the requests may be submitted by mail or fax, and in Poland they can be submitted by mail only.

In terms of the Regulation, it is important to discuss the role of the central body in the taking of evidence, as one of the essential differences in the field of taking of evidence between the Regulation and the said Hague Convention can be

revealed in this way precisely. The competence of the central bodies is described in Art. 3, sect. 1 of the Regulation (supplying information to the courts; seeking solutions to any difficulties which may arise in respect of a request; forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court; the right of making a decision over the permission to take evidence through passive requisition). As for the competence of the central body, certain issues may be raised by its right to forward the requests to the competent court in exceptional cases. The literary sources recognise that the cases, where the judge exercising ordinary care, using the informer provided for in Art. 19 of the Regulation and assistance of the central body, and making sufficient effort, fails to determine the competent court, should be recognised as exceptional cases as well [Rauscher, Heiderhoff, et al. 2006, 1305]. In any case the central body is not an institution handling the complaints related to the inadequate application of the Regulation or providing information on the content of the foreign law. Generally, the central body, in accordance with the position held by the authors of the Regulation, must carry out the auxiliary function by ensuring potentially more effective direct cooperation between the requesting and requested courts.

One of the characteristics of the Regulation is the standardisation of the high-level request forms to ensure expedient, more uniform and common process in the field of the taking of evidence. This step is welcomed as before the adoption of the Regulation the attitude in the international civil procedure was prevailing: it stated that, contrary to the international serving of the procedural documents, the field of the taking of evidence considering the variety of the types of evidence is not adjusted to the standardisation of the procedural forms [ibid.]. Moreover, the standardisation of procedural forms in the Regulation significantly contributed to the fact that the central bodies were turned into the "assistant" bodies from the ones controlling the content of the forms of procedural documents and intermediate bodies as the Regulation ensures the direct communication between the courts.

2. TAKING OF EVIDENCE WHEN PERFORMED BY THE REQUESTED COURT

The Regulation establishes the principle of decentralisation whose implementation is grounded on the immediate communication between the requesting and requested courts.

The requirements for the form of a request are established in Art. 4, sect. 1 of the Regulation. The request must be completed by using unified form A in the Annex. The request must contain information on the witness's right to refuse to give evidence under the law of the Member State of the requesting court. The provision of that information as early as possible is highly important as it precludes the potential delay of the proceedings. It must be also noted that the requested court is not obliged to verify whether the information on the witness's right to re-

fuse to give evidence under the law of the Member State of the requesting court is actually existent. The requesting court is likewise not obliged to indicate information on the circumstances due to which the witness may not be examined as a witness under the law of the Member State of the requesting court in the request as this issue is to be attributed to the *lex fori* competence of the Member State of the requested court [Fasching 2008, 1217].

In compliance with the second paragraph of the Article in question, the request and all documents accompanying the request shall be exempted from authentication. The request and communications shall be drawn up in the official language of the requested Member State or one of the official languages. Where the requesting court does not comply with this requirement and the request is filled out in the language other than accepted by the requested Member State, the requested court shall enter a note to that effect in the acknowledgement of receipt by indicating the accepted languages (Art. 7, sect. 1). Until the request is drawn in the appropriate language, the requested court shall not be obliged to execute it, and the period of ninety days provided for in Art. 10, sect. 1 of the Regulation shall not start to run. The Regulation, however, does not provide for any period during which the requesting court must draw the request in the language accepted by the requesting Member State. In this case, the period of thirty days for adding missing information provided for in Art. 8, sect. 1 shall not apply. In this situation, the requested court should simply not execute that request until the requirement for the language is met. As for the taking of requested evidence, the process is carried out in the official language (language of the proceedings) of the Member State of the requested court but the requesting court, according to Art. 10, sect. 3 of the Regulation, may request that the taking of evidence is performed in the language of the requesting Member State. The requested court, however, has the right to refuse to uphold the request on the grounds that the execution of that request is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties (Art. 10, sect. 3). Apparently, the possibility to refuse to uphold the request is related not to the EU order public but rather to the incompatibility of the request with the fundamental principles of the law of the requested Member State [Krüger and Rauscher 2017, 917]. Thus, the fact alone that the procedural laws of the Member State do not provide for a certain form of the taking of evidence does not stand as the basis for applying the indicated grounds for refusal [Rauscher 2015, 984]. Where it comes to the definition of major practical difficulties, it is recognised that in order to use these grounds for refusal, the circumstance alone that in order to execute the request the requested court will need to put much additional effort does not suffice [ibid.].

As for the requirements for the content of the request for the performance of taking of evidence established in Art. 4, sect. 1 of the Regulation, it may be undoubtedly stated that it establishes the minimum requirements (order of the requesting and requested courts, nature and subject matter of the dispute, brief description of a statement of the facts, description of evidence to be taken, etc.). The re-

ference of the nature and subject matter of the dispute in the request are especially important as this helps the requested court to ascertain that the request falls within the scope of application of the Regulation. The description of evidence to be taken must be clear, accurate and complete. For instance, it must be clearly stated whether the person to be examined is to be examined as a party or a witness. It must be also noted that form A in the Annex contains more requirements for the content of the request than provided for in said Art. 4, sect. 1. For example, form A requests to indicate not only the addresses of the parties to the dispute and their representatives but also the telephone and fax numbers and e-mail address. Apparently, the indication of this additional information in particular serves the interests of the requesting court itself as it allows for the more expedient communication between the requested court and the parties. On the other hand, failure to indicate that information should not stand as the grounds for the requested court to set the time limit for rectifying deficiency following the procedure laid down in Art. 8 of the Regulation [Fasching 2008, 1211]. In this regard, it must be therefore emphasized that the possibility of applying Art. 8 of the Regulation emerges only in the case where the request does not comply with the requirements referred to in Art. 4, sect. 1 (it is namely this idea that is immediately pointed out in Art. 8, sect. 1 of the Regulation). The question may arise, whether the fact that Art. 4 of the Regulation establishes the requirements for the content of the request for the performance of taking of evidence makes the use of form A mandatory. When interpreting the wording of the Regulation in a consistent and systematic manner, the answer to that question should be undoubtedly affirmative, which means that the use of form A in the Annex is mandatory in all cases, without exceptions (this conclusion is also confirmed by the content of Art. 4, sect. 1 of the Regulation). It may be therefore stated that the non-compliance with form A should, in principle, lead to the legal consequences provided for in Art. 8 of the Regulation.

The procedure for submitting the request to the court of another Member State is governed in Art. 6 and 7 of the Regulation. Requests and communications are transmitted by the swiftest possible means, which the requested Member State has indicated it can accept (in Lithuania these are mail and fax, whereas it is mail in Poland). The transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible. The goal of these rules established in Art. 6 of the Regulation is to facilitate the maximum use of information technologies in order to accelerate the examination of the requests for the taking of evidence. Although the aim of this article is indeed advanced and just, it is obvious, however, that it has not been completely implemented in the Regulation, as the type of "means of transmission" which could be used in each specific case depends solely on the choice and will of the requested Member State. The said aim would undoubtedly be implemented more effectively if the definition of the "swiftest possible means" had been the subject matter of an autonomous interpretation. Moreover, it must be noted that if the request is transmitted by one of the

means accepted by the requested Member State, for example, by fax, the court of the requested Member State has no right to demand the use of any additional means for transmission of the documents (e.g. to require the transmission of original copies). In addition, the Regulation does not answer the question as to how the requested court should act if the request is submitted by means other than accepted by the requested Member State (e.g. mail and fax are accepted, whereas the request is submitted by e-mail). In this case, Art. 8 of the Regulation is not fully eligible for the application as it discusses the situation where the request does not contain necessary information required in Art. 4. Thus, it speaks of an incomplete request. Without any doubt, one of the alternatives for action is the application of analogy of Art. 8 but this path would hardly comply with the objective of the Regulation itself to examine the requests for the performance of taking of evidence as soon as possible thus ensuring the implementation of the principle of concentration of the proceedings. Therefore, in the situation where the request is transferred by means other than specified by the requested Member State but the requested court has received all necessary information, it should be accepted and examined under the established procedure. The inadequate means of transmission should be treated as a formal drawback which does not preclude from examination of the request if the information reaches the requested court by those means of transmission and the court has access to the technical means.

Within seven days of receipt of the request, the requested competent court shall send an acknowledgement of receipt to the requesting court using form B in the Annex (Art. 7, sect. 1). Where the request does not fall within the competence of the requested court, it shall forward the request to the competent court of the same Member State. Thus, according to Art. 7 of the Regulation, after receipt of the request by the requested court, it shall verify, within seven days of its receipt, if the requesting court has used the accepted language, if the request is legible and if it has been submitted to the competent court. In the absence of the said deficiencies after the verification of the request, form B is completed. If any of the said deficiencies are determined after the verification of the request, the requested court shall enter a note to that effect in the same form B. In any case, if it has been determined that the request has been submitted to the incompetent court, it may be forwarded within the competence only in the territory of the same Member State. In the event of forwarding the request, the provision of Art. 36, sect. 1 of the Code of Civil Procedure should still apply in Lithuania stating that no disputes over jurisdiction are allowed, thus no subsequent forwarding is possible, except for the cases provided for in the Code itself. Forwarding within the competence is not allowed to the court of another Member State as it already relates to the sovereign power of another Member State.

Also, Art. 8 of the Regulation discusses the cases where the court has been submitted the incomplete request, i.e. it does not contain all information referred to in Art. 4. In this case, the requested court shall immediately (not later than within 30 days) notify the requesting court thereof using form C in the Annex and

shall request to forward the missing information. Although the period of 30 days is provided for in the Regulation and it is mandatory, the compliance with that period is not ensured by any specific sanctions, etc. provided for in the Regulation. The only negative consequence of the material breach to that period could be the liability of a respective Member State for the breach of the agreement. It must be noted that this Article and the period of 30 days provided for therein will not apply to the failures to meet the requirements for the language and legibility as their presence is annotated accordingly in form B under the requirements laid down in Art. 7.

Where the requested court concludes that the request contains the deficiencies under Art. 7 or 8, the institute for rectifying deficiencies provided for in Art. 9 shall apply. The period of 90 days for execution of the request referred to in Art. 10 starts to run only after the requesting court has rectified the indicated deficiencies. If the deficiencies are not rectified, the court shall refuse to execute the request by completing form H in the Annex according to Art. 14, sect. 2 of the Regulation. Art. 14 discusses the grounds for refusal to execute the request. It must be noted that the grounds for refusal do not include the case of the request being contrary to public policy in the Regulation. Moreover, the third paragraph of the Article provides for that execution may not be refused by the requested court 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 action or that the law of that Member State would not admit the right of action on it. In addition, execution of the request may be refused if the person has been prohibited from giving evidence under the law of the Member State of the requested court. The requested court shall notify the requesting court of the refusal to execute the request not later than within 60 days of receipt of the request.

The rules for the execution of the request are established in Art. 10 to 13 and Art. 15 to 16. The requested court shall execute the request immediately but not later than within 90 days of receipt of the request by the requested court. If the request is to be forwarded under the rules of jurisdiction, the said period shall start to run following its receipt by the competent court. If the request cannot be executed within the set time limit, the requested court shall notify the requesting court by using the respective form in the Annex. It shall indicate the grounds for the delay as well as the estimated time that the requested court expects it will need to execute the request. In this case, however, the Regulation does not provide for any sanction for the breach to the period of 90 days, therefore we could raise the issue of the liability of the Member State for the breach of the agreement again, where the procedure is essentially delayed without any serious grounds [Rauscher, Heiderhoff, et al. 2006, 1351].

Art. 10, sect. 2 of the Regulation establishes the general rule under which the requested court executes the request under its national procedural law. We find the circumstance that the *lex fori* of the requested Member State is applied when identifying the persons who could act as witnesses and to the alternative of swea-

ring-in of the entities subject to evidence especially important. This rule, however, has certain exceptions to it. Art. 14, sect. 1 – the witness's right to refuse to give evidence under the law of both the Member State of the requesting court and of the Member State of the requested court (Art. 10, sect. 3). Art. 10, sect. 3 of the Regulation provides for an opportunity for the requesting court to call for the request to be executed in accordance with a special procedure provided for by the law of its Member State. The requesting court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. Thus, the requested court will need to apply the respective procedural laws of the requesting Member State, therefore the request should describe the method of the taking of evidence as well. The aim of this rule is to ensure a possibility of taking of evidence by means provided for in the law of the requesting Member State and thus facilitate both the assessment of evidence and examination of the facts.

Art. 10, sect. 4 also provides for that the requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference. The use of communications technology is an autonomous method of the performance of the taking of evidence established in the Regulation whose goal is to accelerate the provision of legal aid in the field of the taking of evidence. The requesting court itself may make such technology available to the requested court. The Regulation contains only an exemplary list of the means, therefore more means could be used (e.g. Skype); it is important that by such means the information could be presserved. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement, it shall inform the requesting court, using the form in the Annex. It must be also noted that the incompatibility with the law of the Member State of the requested court does not mean that the effective law of that Member State does not provide for the use of specific means. Such grounds for refusal could be also used where the law of the Member State of the requested court directly or indirectly prohibits the use of such means. Another interpretation of the said grounds would be contrary to the meaning of the rule itself.

Art. 11 is intended for the participation of the parties and informing them of the taking of evidence at the requested court. According to the first paragraph of this Article, if provided for in the law of the Member State of the requesting court, the parties and their representatives, if any, have the right to be present at the performance of the taking of evidence by the requested court. The requesting court shall indicate information on whether the parties will participate in the proceedings or that they have the right to be present in form A. It must be also noted that the request for the participation of the parties may be expressed both directly in the request for the performance of the taking of evidence and separately from the request. The wording of the Regulation demonstrates that the request may be

submitted if the participation of the parties or their representatives is provided for in the law of the requesting Member State. The objective of this rule is to ensure that the parties and their representatives have the same possibility to be present at the examination of evidence that they would have in the event where the evidence were examined in the requesting Member State. The requested court does not have the right to either verify if the law of the requesting Member State provides for that possibility [Schlosser 2009, 492] or refuse to uphold the expressed request by reasoning that the *lex fori* of the requested Member State does not provide for that right for the parties or their representatives. The requested court cannot refuse to apply that request by reasoning that it is contrary to public policy as well, since the Regulation does not provide for such grounds at all [Rauscher, Heiderhoff, et al. 2006, 1371]. The *lex fori* of the requested Member State applies to the notification of the parties and their representatives of the time and place of the performance of procedural actions and of their procedural rights and duties. Art. 11, sect. 4, however, provides for that the requested court shall notify the parties and, if any, their representatives, of the time when, the place where, the proceedings will take place, and, where appropriate, the conditions under which they may participate, using form F in the Annex. In compliance with Art. 11, sect. 5 at issue, the requested court may autonomously, irrespective of the request of the requesting court, decide to notify the parties and their representatives of the time and place of the taking of evidence and suggest them to be present at or to participate in the proceedings if that possibility for the parties (their representatives) is provided for by the *lex fori* of the requested Member State.

Art. 12 of the Regulation provides for the possibility of the performance of the taking of evidence with the presence and participation of not only the parties (their representatives) but also the representatives of the requesting court. The respective request of the requesting court may be filed immediately in the request for the performance of the taking of evidence, in form A or later. In any case, the requested court has the right to handle the issue regarding the participation of the representatives of the requesting court only with the respective request of the requesting court. The requested court may refuse to uphold that request only on the grounds referred to in Art. 10, sect. 3 of the Regulation. The judges appointed by the requesting court or other persons appointed under the law of the requesting Member State are recognised as the representatives of the court. The main goal of the regulation is to ensure the appropriate possibility to implement the principle of the immediacy in the taking of evidence. It must be also noted that the representative of the requesting court will not be the passive participant of the taking of evidence – that person may ask questions and otherwise participate in the proceedings. The representative of the requesting court participates in the taking of evidence under the procedural law of the requested Member State. In any case, in compliance with the Art. 12, sect. 4 of the Regulation, the requested court shall set the conditions under which they may be present or participate. We believe that the position held in the literary sources that participation of the representative of

the court by using videoconference will be recognised as appropriate within the meaning of Art. 12 is worth supporting [Fasching 2008, 1241]. The requested court may refuse the participation of the representatives of the requesting court in the performance of taking of evidence only on the grounds referred to in Art. 10, sect. 3 of the Regulation.

As for the application of coercive measures provided for in Art. 13 of the Regulation, it must be noted that only the coercive measures provided for in the *lex fori* of the requested Member State are referred to therein. The decision on whether the said measures will be applied in a specific case will be made exclusively by the requested court. In this case, by applying the respective coercive measures, the requested court shall refrain from verifying their admissibility under the national law of the requesting Member State as the Article in question contains the link exclusively to the *lex fori* of the Member State applying those measures.

A significant part of the Regulation is the grounds for refusal to execute the request for the performance of taking of evidence governed in Art. 14. It must be noted that the grounds for refusal no longer include the case of the request being contrary to public policy as the grounds for autonomous refusal to execute the request [Adolphsen 2007, 10]. It must be in particular emphasized that the Regulation, as is the case in the Hague Convention, continues to consistently implement the principle of the most favourable treatment as the person concerned (witnesses, parties and experts) is granted the right to refuse to give evidence not only when that right is granted by the *lex fori* of the Member State to the proceedings but also when that right is established in the law of the requested Member State. The implementation of this principle is primarily intended to avoid the "collision of duties," where, under the law of the requested Member State, more duties fall on the person concerned than provided for in the law of the Member State to the proceedings [Rauscher, Heiderhoff, et al. 2006, 1385]. At the same time, it is guaranteed that inadmissible evidence will not be produced in the main proceedings. As to the literal interpretation of Art. 14, sect. 1, we may conclude that it is not applied to producing written evidence as it entails the right of the "person concerned" to refuse to give evidence. On the other hand, it is worth agreeing with the opinion held in the literary sources that in this case, the analogy may be applied to giving written evidence and the possibility to ensure the taking of such evidence under the law of the requested Member State based on the provisions of Art. 13 of the Regulation is feasible [ibid., 1388].

The existence of the grounds for refusal to execute the request referred to in Art. 14 is controlled by the requested court [Hess 2009, 470]. The central bodies are not granted any competence by the Regulation in this field. The grounds for refusal to execute the request may be divided into the general and special ones. The complete list of general grounds is presented in Art. 14, sect. 1. This is the case where the right to refuse to give evidence is provided for by the law of the Member State of the requesting court or of the Member State of the requested court. The special grounds for refusal are provided in Art. 14, sect. 2. They may be

applied only when the general grounds may not be applied. The list of special grounds is also exhaustive and it may not be subject to a broad interpretation. Such grounds include the cases when the request does not fall within the scope of the Regulation, the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary, etc. It must be noted that Art. 14, sect. 3 of the Regulation provides for the prohibition from refusal to execute the request solely on the ground that under the law of the Member State of the requested court a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it. Basically, where it comes to the grounds for refusal, it may be concluded that their list is very limited. Art. 14, sect. 4 provides for the period of 60 days and use of form H to finalise the refusal, which applies only in the cases where execution of the request is refused on the special grounds referred to in para. 2 of the same Article. Where execution is refused on the general grounds referred to in para. 1, the general period of 90 days referred to in Art. 10, sect. 1 should apply. Since Art. 14 says nothing of the possibility to appeal against the refusal to execute the request by the court, this issue should be handled under the *lex fori* of the requested Member State.

Where the requested court is not able to execute the request within the general period of 90 days, it shall notify the requesting court thereof using form G in compliance with Art. 15 of the Regulation. In this case, the grounds for the delay and the estimated time for execution of the request must be indicated. Various technical difficulties could serve as the grounds for the delay: preparation for Videoconference, inability to contact a specific person, etc. The requested court shall send without delay to the requesting court the documents establishing the execution of the request (typically these are the records of the witness hearings) and the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using form H in the Annex. It must be noted that according to Art. 18 of the Regulation, execution of the request shall not give rise to a claim for any reimbursement of taxes or costs (exceptions to this rule are referred to in para. 2 and 3 of the Article in question).

3. DIRECT TAKING OF EVIDENCE BY THE REQUESTING COURT

A considerably significant innovation in the Regulation compared to the Hague Convention is established in Art. 17. It establishes the rule allowing the court of the main proceedings to directly take evidence in another Member State. By this step the cooperation between the courts was basically put before the sovereignty of the Member States, whereas it had been considered the fundamental value. Having established that possibility in the Regulation, it became an equivalent alternative of the taking of evidence to active legal aid. The possibility for the requesting court to directly take evidence provides more favourable presumptions for that court to look into the evidence significant for the case, implement the

principle of the immediacy and, finally, it guarantees the hearing of the case under the uniform procedure [Hess 2009, 472]. The implementation of this possibility, however, is not unlimited. The conditions which enable direct taking of evidence are established in Art. 17 of the Regulation. The request for the performance of direct taking of evidence shall be submitted to the central body of the relevant Member State. In accordance with Art. 17, sect. 2, direct evidence may be taken on a voluntary basis without the need for coercive measures. Therefore, the express consent of the person to be heard with regard to direct taking of evidence is required. Not only the express consent of the person, under para. 4 of the same Article, but also the consent of the Member State where evidence is intended to be taken is required. In this case, the responsibility falls upon the central body which may refuse to give that consent only on the grounds referred to in Art. 17, sect. 5 (the request does not fall within the scope of this Regulation; the request does not contain all of the necessary information pursuant to Art. 4; or the direct taking of evidence requested is contrary to fundamental principles of law in its Member State). When considering the conditions discussed, they do not seem to be completely correspondent with each other as we might quite logically ask why the consent of the Member State is required if everything is generally based on a voluntary basis. We would therefore assume that the assignment of certain auxiliary functions to the central bodies could be a more pragmatic solution, for that function has already been established in Art. 3 of the Regulation.

CONCLUSIONS

Regulation (EC) No 1206/2001 of 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is, without doubts, a serious step forward when creating a united area for administering justice in the European Union as its support does not only ensure the direct communication between the courts but also it ensures the possibility for the requesting court to directly take evidence in another Member State.

In comparison with the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, it is to be unequivocally concluded that the EU Member States gave up part of their sovereignty for the benefit of the adequate functioning of the internal market and simplification of civil dispute procedures by adopting the Regulation at issue.

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PRZEPROWADZENIE DOWODU W POSTĘPOWANIU CYWILNYM UNII EUROPEJSKIEJ

Streszczenie. W artykule poddano analizie główne regulacje Rozporządzenia Rady (WE) nr 1206/2001 z dnia 28 maja 2001 r. w sprawie współpracy między sądami Państw Członkowskich przy przeprowadzaniu dowodów w sprawach cywilnych lub handlowych. Ponadto uzasadniono potrzebę obowiązywania tego aktu oraz wskazano jego relację i zalety względem Konwencji o przeprowadzaniu dowodów za granicą w sprawach cywilnych lub handlowych, sporządzonej w Hadze dnia 18 marca 1970 r.

Słowa kluczowe: dowód, postępowanie cywilne, Unia Europejska

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