From the 2001 Evidence Regulation to its 2020 Recast: what does it remain and has it changed?

Del reglamento de obtención pruebas en material civil y mercantil del 2001 a su refundición del 2020: ¿qué permanece y qué ha cambiado?

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Abstract: When courts of EU Member States have to take evidence in other Member States in the context of a civil or commercial procedure, they can rely on the 2020 Evidence Regulation. This instrument is the recast of the 2001 Evidence Regulation, and it provides two different paths for courts to take evidence abroad. One consists of a court asking a court in another Member State to take evidence on its behalf. This is the so-called indirect taking of evidence system. Alternatively, courts also have the possibility of directly taking the evidence located in another Member State. In broad terms, the 2020 Evidence Regulation has retained the main structure and content of the 2001 Evidence Regulation. However, it has introduced some innovations, such as the future mandatory use of electronic communications between the courts and authorities involved in the application of this instrument.

Keywords: EU law, 2020 Evidence Regulation, 1970 Hague Convention on the Taking of Evidence civil judicial cooperation, civil and commercial matters, cross-border taking of evidence, digitalisation, e-Codex.

Resumen: Cuando los tribunales de los Estados miembros de la UE tienen que obtener pruebas en otros Estados miembros en el contexto de un procedimiento civil o mercantil, estos pueden apoyarse en el reglamento europeo de obtención de pruebas aprobado en el año 2020. Este instrumento ofrece dos vías diferentes para que los órganos jurisdiccionales obtengan pruebas en el extranjero. Una consiste en que un tribunal de un Estado miembro pida al tribunal de otro Estado miembro que obtenga pruebas en su lugar. Es el llamado sistema indirecto de obtención de pruebas. Alternativamente, los órganos jurisdiccionales también tienen la posibilidad de obtener directamente las pruebas situadas en otro Estado miembro. En términos generales, el reglamento de obtención de pruebas ha mantenido la estructura y el contenido principales del reglamento europeo de obtención de pruebas del año 2001. No obstante, también ha introducido algunas innovaciones, como el futuro uso obligatorio de las comunicaciones electrónicas entre los órganos jurisdiccionales y las autoridades implicadas en la aplicación de este instrumento.

Palabras clave: Derecho europeo, Reglamento europeo de obtención de pruebas, Convenio de La Haya de 1970 sobre obtención de pruebas, Cooperación judicial civil, Asuntos civiles y mercantiles, obtención transfronteriza de pruebas, digitalización, e-Codex.

I. The recast of the Evidence Regulation

1. On 1 July 2022, Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters became applicable except for Article 7.[1] The so-called 2020 Evidence Regulation is the recast of the 2001 Evidence Regulation,[2] one of the first EU civil procedural instruments created after the EU gained powers to legislate in the field of civil judicial cooperation.[3] Except for few changes, in broad terms, the 2020 Evidence Regulation reproduces the 2001 Evidence Regulation.[4] The main innovation brought by the 2020 Evidence is Article 7, which establishes the future mandatory use of electronic communications between authorities involved in the application of this instrument.[5] This article seeks to provide a general overview of the 2020 Evidence Regulation while highlighting what it has changed with respect to the 2001 Evidence Regulation, and taking into consideration the relevant case law of the Court of Justice of the European Union ('CJEU').

II. An alternative instrument to take evidence in other Member States

2. The very first remark that should be made about the 2020 Evidence Regulation is that this instrument is an optional tool.[6] This means that courts are not required to rely on the 2020 Evidence Regulation when they need to take evidence found in other Member States. While this optional nature is not self-evident from the text of the 2020 Evidence Regulation, this is something that the CJEU has acknowledged on two occasions.[7] First, in the CJEU, case C-170/11 C-170/11, *Lippens*.[8] In this decision, the CJEU stated that the 2001 Evidence Regulation did not govern 'exhaustively' the cross-border taking of evidence.[9] Courts could rely on their own domestic civil procedural rules to take evidence in other Member State.[10] In C-332/11, *ProRail*, the CJEU reiterated the non-exclusive character of the 2001 Evidence Regulation.[11] In this case, the CJEU stated 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 2001 Evidence Regulation.[12] While these two judgments were rendered the under 2001 Evidence Regulation, they remain relevant for the interpretation of the recast.[13]

It should be noted that the 2020 Evidence Regulation is not the only EU instrument that can be used to take evidence in other Member States. The Brussels I bis Regulation can also help in preserving evidence located in other Member States.[14] This instrument establishes a uniform set of 'predic-

[1] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) ('2020 Evidence Regulation').

[2] 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, OJ L 174, 27.6.2001, pp. 1-24 ('2001 Evidence Regulation').

[3] Article 81(2) of the Treaty on the Functioning of the European Union ('TFEU') expressly states that the EU legislator can approve, through the ordinary legislative procedure, rules concerning 'cooperation in the taking of evidence' in in civil matters having cross-border implications.

[4] V. Richard, "Entry into force of the Evidence Regulation Recast", *EAPIL blog*, 2022, <https://eapil.org/2022/08/30/entry-into-force-of-the-evidence-regulation-recast/> (visited 10.11.2024).

[5] In this regard, the Preamble of the 2020 Service Regulation is full of references concerning the importance of electronic communications and digital transmission documents, such as the one in Recital 7: "In order to ensure speedy transmission of requests and communications between Member States for the purposes of taking of evidence, any appropriate modern communications technology should be used".

[6] A. Zimmermann, "Art. 1 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck 2024, margin No 17.

[7] G. Cuniberti, "L'expertise judiciaire en droit judiciaire européen", *Revue critique de droit international privé*, 2015, p. 524.

[8] CJEU, 6 September 2012, C-170/11, *Lippens*, ECLI:EU:C:2012:540.

[9] CJEU, 6 September 2012, C-170/11, Lippens, ECLI:EU:C:2012:540, para. 31.

[10] CJEU, 6 September 2012, C-170/11, *Lippens*, ECLI:EU:C:2012:540, para. 31.

[11] CJEU, 21 February 2013, C-332/11, *ProRail*, ECLI:EU:C:2013:87, para. 44.

[12] CJEU, 21 February 2013, C-332/11, *ProRail*, ECLI:EU:C:2013:87, para. 49.

[13] A. Zimmermann, "Art. 1 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no 16.

[14] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1–32.

table' rules on jurisdiction to determine which Member State has jurisdiction in cross-border civil and commercial litigation in the EU.[15] Article 35 of the Brussels I bis Regulation, which contains a special jurisdictional rule on provisional measures, indicates that other courts with jurisdiction can also grant provisional measures. This provision does not establish an autonomous head of jurisdiction for provisional measures. It rather contains a reference to the domestic jurisdictional of the Member State.[16] In other words, courts have to check if, under domestic law, they have jurisdiction to grant provisional measures in support of a proceeding on the substance of the matter that takes place abroad.[17] Furthermore, the CJEU also determined that there has to be a real connecting link between the provisional measures requested and the Member State where those measures are requested.[18]

3. Recital 25 of the Brussels I bis Regulation clarifies that 'the notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence'.[19] It also states that this notion 'should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness'.[20] This means that Article 35 provides jurisdiction to grant measures to preserve evidence to courts which do not have jurisdiction to decide on the merits of the case.[21] There are three prerequisites that need to be satisfied for a court to take evidence relying on Article 35 of the Brussels I bis Regulation. First, the court needs to have jurisdiction on the basis of its domestic law to take the evidence. In this regard, it should be recalled that Article 35 does not establish autonomous jurisdictional fora. Secondly, there has to be a real connecting link between the measures to take evidence and the Member States where these are requested. This link exists when the evidence is located in the Member State where the measure to take evidence is requested.[22] Finally, the measures to take evidence need to have a protective element.[23] Such a protective nature exists when there is a risk the evidence might disappear unless the measure is adopted.[24]

III. Scope of application

4. The 2020 Evidence Regulation applies to all Member States but Denmark,[25] as it occurred with the 2001 Evidence Regulation.[26] This means that Danish courts cannot rely on the 2020 Evidence

[15] Recital 15 Brussels I bis Regulation.

[16] F. Garcimartín Alférez, "Provisional and Protective Measures in the Brussels I Regulation Recast", *Yearbook of Private International Law*, Vol. XVI, 2014/2015, p. 82.

[17] For instance, Article 722 of the Spanish Code of Civil Procedure states that Spanish courts can grant provisional measures in support proceedings on the substance of the matter that takes place before a foreign court.

[18] CJEU, 17 November 1998, C-391/95, *Van Uden*, ECLI:EU:C:1998:543, para. 40.

[19] It should be noted though that the Preamble does not have a binding character: See CJEU, 19 November 1998, C-162/97, *Nilsson*, ECLI:EU:C:1998:554, para. 54. The Commission Proposal of the Brussels I bis Regulation included a definition of 'provisional, including protective measures clarifying that these include 'protective orders aimed at obtaining information and evidence': Article 2 COM/2010/0748 final. However, this solution was eventually abandoned.

[20] It is questionable that hearing a witness does not have a protective nature under any circumstance. This could be the case when the witness is about to die and urges their hearing: Garcimartín Alférez (fn 16), p. 82.

[21] Across the national case law of the Member States there are examples of courts adopting measures to take evidence on the basis of Article 35 of the Brussels I bis Regulation. For instance, in Luxembourg, the Court of Appeal (Cour d'appel) determined that Luxembourgish courts had jurisdiction to adopt a measure of expertise on the basis of Article 35 of the Brussels I bis Regulation in cases where Belgian courts had jurisdiction to decide on the substance of the matter: Cour d'appel, 15.11.2017, Arrêt N° 164/17 – VII – REF. The French Court of Cassation (*Cour de cassation*) has acknowledged this possibility on several occasions: Cour de cassation, civile, Chambre civile 1, 4 mai 2011, 10-13.712; Cour de cassation, civile, Chambre civile 1, 14 mars 2018, 16-19.731; Cour de cassation, civile, Chambre civile 1, 27 janvier 2021, 19-16.917.

[22] C. Lenz, "L'exploitation du rapport d'expertise français par le juge allemand: la toute-puissance de l'article 35 du règlement Bruxelles I bis", Revue critique de droit international privé, 2020, pp. 478–479.

[23] In C-104/03, *St Paul Dairy*, the CJEU determined that hearing a witness with the sole purpose of deciding 'whether to bring proceedings on the substance' was a not provisional measure in the sense of Article 24 of the Brussels Convention (fnow Article 35 of the Brussels I bis Regulation): CJEU, 28 April 2005, C-104/03, *St Paul Dairy*, ECLI:EU:C:2005:255, para. 17.

[24] A. Nuyts, "La refonte du règlement Bruxelles I", Revue critique de droit international privé, 2013, p. 46.

[25] Recital 37, 2020 Evidence Regulation.

[26] Recital 22, 2001 Evidence Regulation.

Regulation to take evidence in other Member States and courts from other Member States cannot use the 2020 Evidence Regulation to take evidence in Denmark.[27] For those cases, the 1970 Hague Convention on Taking of Evidence applies instead.[28]

5. Concerning the material scope of the Evidence Regulation, this applies only in 'civil and commercial matters'.[29] The expression civil and commercial is an autonomous notion of EU law, that has to be interpreted independently from what it is understood by 'civil and commercial matters' under national law.[30] This is what the CJEU has determined in relation to the notion of 'civil and commercial' matters of the Brussels I bis Regulation.[31] While the CJEU has not provided a positive definition of what is meant by 'civil and commercial matters',[32] it has always interpreted it in a broad manner.[33] Unlike the Brussels I bis Regulation,[34] there are no excluded subject matters from the scope of the 2020 Evidence Regulation. This implies that this instrument applies to any area that falls within the scope of civil and commercial matters, such as family law or insolvency law-related cases.[35]

6. The notion of 'taking evidence' is also an autonomous concept of EU law.[36] This was implicitly confirmed by the CJEU when it established that 'seeking the address of a person on whom a judicial decision is to be served does not constitute taking evidence'.[37] In C-175/06, *Tedesco*, a case for which the CJEU did not arrive at rendering a judgment, Advocate General Kokott defined 'taking evidence' as 'the sensory perception and appraisal of an item capable of constituting evidence'.[38]

IV. The two paths to take evidence in other Member States

7. In broad terms, the 2020 Evidence Regulation contains two paths to take evidence in other Member States: the indirect and the direct taking of evidence.[39]

1. Indirect taking of evidence

8. The first method and more classic path to take evidence abroad is the indirect taking of evidence.[40] Through this procedure, a court of a Member State requests the court of another Member State to take evidence on its behalf.

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[27] A. Zimmermann (fn 13), margin no. 16.

[28] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970, entry into force 7 October 1972) ("1970 Hague Convention on Taking of Evidence"). In this sense, see: T. Rauscher, "Art. 1 EG-BewVO" in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung. Band 3,* C. H. Beck, 2022, margin no. 2.

[29] Article 1, 2020 Evidence Regulation.

[30] J. von Hein, "Art. 1 EG-BewVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II/I*, Otto Schmidt, 2022, margin no. 1 - 2.

[31] CJEU, 28 February 2019, C-579/17, *Gradbeništvo Korana*, EU:C:2019:162, paras. 46–47.

[32] G. Cuniberti and S. Migliorini, *The European Account Preservation Order Regulation: A Commentary*, Cambridge, 2018, p. 65.

[33] CJEU, 16 July 2020, C-73/19, *Movic BV and Others*, ECLI:EU:C:2020:568, para. 34.

[34] Article 1(2) Brussels I bis Regulation.

[35] von Hein (fn 30), margin no. 4.

[36] P. Schlosser, "Art. 1 EuBVO" in P. F. Schlosser and B. Hess (eds.), *EU-Zivilprozessrecht: EuZPR*, C. H. Beck 2021, para. 6; Zimmermann (fn 13), margin no 7.

[37] CJEU, 9 September 2021, Joined Cases C-208/20 and C-256/20, *Toplofikacia Sofia*, ECLI:EU:C:2021:719, para. 25

[38] Opinion Advocate General Kokott in C-175/06, *Tedesco*, ECLI:EU:C:2007:451, para. 55.

[39] R. Jansen, "Explaining the methods for taking evidence abroad within the EU and some first observations on the proposal for the Evidence Regulation (recast)" *Nederlands Internationaal Privaatrecht*, 2019, p. 757. These two methods are also referred to as passive and active taking of evidence: B. Hess, *Europäisches Zivilprozessrecht*, De Gruyter, 2020, paras. 8.36–8.37.

[40] Modelled on the system to take evidence through the 1970 Hague Convention on Taking of Evidence: J. von Hein, "Art. 12 EG-BewVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II/I*, Otto Schmidt, 2022, margin no. 1 - 3.

A) The 'courts' that submit a request to take evidence

The 2020 Evidence Regulation has introduced a definition of court with the aim to dissipate the doubts surrounding which authorities could submit request to take evidence under the 2001 Evidence Regulation.[41] In this regard, courts are defined 'courts and other authorities in Member States as communicated to the Commission under Article 31(3), that exercise judicial functions, that act pursuant to a delegation of power by a judicial authority or that act under the control of a judicial authority, and which are competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters'.[42] This means that the notion of court includes other authorities that, though not *stricto sensu* courts, might exercise judicial functions.[43] This is the case of Hungary, that notified the Commission that notaries are considered courts for the purpose of sending a request to take evidence 'in matters of succession and payment order procedures'.[44] Arbitration tribunals cannot rely on the 2020 Evidence Regulation because they are 'courts or authorities' of the Member States, but private bodies decide on a dispute.[45]

B) Identifying the requested court

One of the main difficulties courts might encounter when submitting a request to a court of another Member State to take evidence on their behalf is determining which court of the requested Member State has jurisdiction to do so.[46] This is something that depends on law of each Member State.[47] For example, in Germany, the competent court is the local court in whose district the procedural act of taking evidence is to be carried out.[48] The e-Justice portal contains an online guide with a list of all the courts per Member State that have jurisdiction to handle requests to take evidence.[49]

Requesting courts can be assisted by the central body of the requested Member State. The 2020 Evidence Regulation, in the same manner the 2001 Evidence Regulation,[50] requires Member States to appoint a central body.[51] Central bodies, among other tasks, are responsible for 'forwarding, in exceptional cases, a request to the competent court at the request of a requesting court'.[52] Romania opted for the department specialised in judicial cooperation of its Ministry of Justice for the role of central bodies, while in Germany there is not one single central body: each German State has to appoint a central body.[53]

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[41] The Commission Staff Working Document accompanying the Commission Proposal of the 2020 Evidence Regulation acknowledged the issues surrounding the absence of a clear notion of court: 'Another cause for legal uncertainty concerns the diverging interpretation of "courts" under the Regulation by the national authorities. The definition of requesting courts was reported to be interpreted very narrowly in some Member States. One stakeholder from Hungary explained that requests by notaries acting in a "court-like capacity" were not recognised in another Member State' (SWD(2018) 285 final, p. 16).

[42] Article 2(b) 2020 Evidence Regulation.

[43] A. Zimmermann, "Art. 2 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no. 2.

[44] <https://e-justice.europa.eu/38581/EN/taking_evidence_recast?HUNGARY&member=1> accessed on 10 November 2024.

[45] Zimmermann (fn 43), margin No 4. This limitation has been criticised by some scholars who consider that in the absence of a specific equivalent instrument for arbitral courts to take evidence abroad, they should be entitled to rely on the 2020 Evidence Regulation: B. Hess, *Europäisches Zivilprozessrecht*, De Gruyer, 2020, para. 8.40.

[46] T. Rauscher, "Art. 3 EG-BewVO" in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung. Band 3,* C. H. Beck, 2022, margin no. 4.

[47] T. Rauscher, "Art. 7 EG-BewVO" in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung. Band 3,* C. H. Beck, 2022, margin no. 2.

[48] Section 1074(1) German Code of Civil Procedure (*Zivilprozessordnung*).

[49] According to Article 31 of the 2020 Evidence Regulation, Member States are required to provide the Commission with a list of the competent courts that can take evidence 'indicating the territorial and, where applicable, the special jurisdiction of the courts'.

[50] Article 3(1) 2001 Evidence Regulation.

[51] Article 4(1) 2020 Evidence Regulation.

[52] Article 4(1)(c) 2020 Evidence Regulation.

[53] All this information can be found in the e-Justice portal: <https://e-justice.europa.eu/374/EN/taking_evidence> accessed on 10 November 2024.

C) The request to take evidence and its transmission

The request to take evidence is required to contain certain information.[54] This information includes 'the nature and subject matter of the case and a brief statement of the facts', and 'a description of the taking of evidence requested'.[55] In case the required information is not provided, the requested court will not proceed to take the evidence and will ask the requesting court to provide the missing information.[56] The request ha s to be submitted relying on a standard form that can be found in Annex I of the 2020 Evidence Regulation.[57]

The most significant change brought by the 2020 Evidence Regulation with respect to the 2001 Evidence Regulation is the mandatory use of electronic communications between courts and authorities during the procedure of taking evidence. This technological upgrade of the cross-border procedure to take evidence has to be understood in the context of the EU's broader efforts to digitalise judicial cooperation between Member States.[58] It is no coincidence that the 2020 Evidence Regulation was approved alongside the 2020 Service Regulation,[59] which also introduced the mandatory use of electronic communications and other digital upgrades in the cross-border service of documents. This was followed by the approval of Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters,[60] which introduced the mandatory use of electronic communications for all other EU civil procedural instruments.[61]

The 2020 Evidence Regulation indicates that electronic communications will have to be made through 'a secure and reliable decentralised IT system with due respect for fundamental rights and freedoms'.[62] A 'decentralised IT system' is defined as 'a network of national IT systems and interoperable access points operating under the individual responsibility and management of each Member State, that enables the secure and reliable cross-border exchange of information between the national IT systems'.[63] According to the Commission Implementing Regulation of the 2020 Evidence Regulation, this decentralised system will be the 'taking of evidence exchange system' which is based on the e-CODEX system.[64] The e-CODEX is a decentralised IT system that has been developed at the EU level for more than decade.[65]

Although the 2020 Evidence Regulation became applicable on 1 July 2022, the mandatory use of electronic communications has not become applicable yet. According to Article 35, this will only occur following the period of three years since the entry into force of the Commission's implementing acts establishing the decentralised IT system.[66] The Commission Implementing Regulation of the 2020

[54] Article 5(1) 2020 Evidence Regulation.

[55] Article 5(1)(c)(d) 2020 Evidence Regulation.

[56] Article 10 2020 Evidence Regulation.

[57] Form A, Annex I 2020 Evidence Regulation.

[58] European Commission, *Digitalisation of justice in the European Union. A toolbox of opportunities*, (COM/2020/710 final).

[59] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L 405, 2.12.2020, pp. 40–78.

[60] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, PE/50/2023/REV/1, OJ L, 2023/2844, 27.12.2023.

[61] Article 3 Regulation (EU) 2023/2844.

[62] Article 7(1) 2020 Evidence Regulation.

[63] Article 2(2) 2020 Evidence Regulation.

[64] Commission Implementing Regulation (EU) 2022/422 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council, C/2022/1451, OJ L 87, 15.3.2022, pp. 5–8 ('Commission Implementing Regulation (EU) 2022/422').

[65] On the origins of the e-CODEX system, see: M. Velicogna, "e-CODEX and the Italian Piloting Experience" IRSIG-CNR Working Paper V.1.0, 2015, pp. 3–8. One the legal basis of the e-CODEX system, see: Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance), PE/87/2021/REV/1, OJ L 150, 1.6.2022, pp. 1–19.

[66] 'The Commission shall adopt implementing acts establishing the decentralised IT system' (Article 25 2020 Evidence Regulation).

Evidence Regulation entered into force on 4 April 2022.[67] Therefore, the 'taking of evidence exchange system' should become operative on 4 April 2025. Meanwhile, transmission of the requests is done 'by the swiftest possible means, which the requested Member State has indicated it can accept'.[68]

The 2020 Evidence Regulation acknowledges certain situations in which courts will be entitled to use other means of communication than the 'taking of evidence exchange system'. This will be possible when there is a 'disruption of the decentralised IT system or to the nature of the evidence concerned, or due to exceptional circumstance'.[69] In these circumstances 'the transmission shall be carried out by the swiftest, most appropriate alternative means, taking into account the need to ensure reliability and security'.[70]

D) Grounds for refusal

The requested court can refuse to take evidence and it can be rejected under a limited number of grounds listed in Article 16.[71] One is if the request falls outside the material scope of the 2020 Evidence Regulation.[72] Another ground of refusal is 'the execution of the request does not fall within the functions of the judiciary under the law of the Member State of the requested court'.[73] Requests can also be rejected if the request was incomplete and the requesting court did not provide the missing information after being informed by the requested court.[74] In certain cases, the requesting court can be required to cover in advance the costs that taking evidence might entail (e.g. the fees paid to an expert).[75] If the requesting court does not provide the money in advance, the requested court can refuse to take the evidence.[76]

When taking of evidence consists of examining a person, such request to take evidence 'shall not be executed' when the person 'invokes the right to refuse to give evidence or is prohibited from giving evidence' under the law of the requesting or requested Member State.[77]

E) The execution of the request to take evidence

The request to take evidence will be executed in accordance with the law of the Member State of enforcement.[78] However, the requesting court can ask to execute the request to take evidence 'in accordance with a special procedure provided for in its national law' or using 'specific communications technology in the taking of evidence'.[79] The requested court can rely on coercive measures to take the evidence.[80] Representatives of the parties and the requesting court can also be present during the execution of the request to take evidence if this is allowed by the law of the requesting Member State.[81] The requested court has a 90 days deadline to take the evidence.[82] Once the execution has occurred, the requesting court has to be informed.[83]

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[67] Annex, point 1 Commission Implementing Regulation (EU) 2022/422.

[68] Article 6 2001 Evidence Regulation.

[69] Article 7(4) 2020 Evidence Regulation.

[70] Article 7(4) 2020 Evidence Regulation.

[71] No other grounds than those listed in Article 16 can be invoked to refuse to execute a request to take evidence: P. Schlosser, "Art. 1 EuBVO" in P. F. Schlosser and B. Hess (eds.), *EU-Zivilprozessrecht: EuZPR*, C. H. Beck 2021, para. 3.

[72] Article 16(2)(a) 2020 Evidence Regulation.

[73] Article 16(2)(b) 2020 Evidence Regulation.

[74] Article 16(2)(c) 2020 Evidence Regulation.

[75] Article 16(2)(d) 2020 Evidence Regulation.

[76] Article 16(2)(d) 2020 Evidence Regulation.

[77] It applies the most favoured nation principle: A. Zimmermann, "Art. 16 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no. 1.

[78] Article 12(2) 2020 Evidence Regulation.

[79] Article 12(3)(4) 2020 Evidence Regulation.

[80] Article 15 2020 Evidence Regulation.

[81] Articles 13 and 14 2020 Evidence Regulation.

[82] Article 12(1) 2020 Evidence Regulation. The existence of a deadline contrasts with the 1970 Hague Convention on Taking of Evidence which only indicates that a request to take evidence 'shall be executed expeditiously' (Article 9).

[83] Article 18 2020 Evidence Regulation.

2. Direct taking of evidence

The second path to take evidence in other Member States is the direct taking of evidence.[84] Through this procedure to take evidence, the court of a Member State directly takes the evidence in another Member State without the intermediation of a local court.[85]

A) The approval of the request by a 'central body or competent authority'

However, this requires the prior approval of the Member State where the evidence is to be taken. Member States are required to designate a 'central body or competent authority' responsible for examining such requests.[86] Several Member States, such as Romania or Sweden, have opted for their Ministries of Justice as their 'central body or competent authority'.[87] This centralised solution contrasts with the case of Spain, where the judges or magistrates with territorial jurisdiction in the place where the evidence to be taken is located are the competent authority that can authorise the direct taking of evidence.[88]

To the present day, courts have to send the request to the 'central body or competent authority' by the swiftest possible means, which the requested Member State has indicated it can accept'.[89] However, in 2025, the request to direct taking of evidence will have to be sent via the 'taking of evidence exchange system',[90] as it has been already explained concerning the indirect taking of evidence.

The 'central body or competent authority' can reject the direct request to take evidence on three different grounds:[91]

- if the request to take does not fall within the scope of the 2020 Evidence Regulation;
- if the request does not contain all the necessary information required;
- if the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.[92]

The list of grounds is exhaustive, which means that no other grounds than those listed in the 2020 Evidence Regulation could be invoked to refuse a direct request to take evidence.[93]

B) Deadlines

One of the few innovations brought by the 2020 Evidence Regulation concerns the deadlines for the 'central body or competent authority' to decide on the request. Both the 2001 and 2020 Evidence

[84] Article 20 2020 Evidence Regulation.

[85] The fact that a foreign court directly takes evidence in the territory of a State defies its sovereignty in a traditional sense. This is why this is one of the main innovations that the 2001 Evidence Regulation brought with respect more pre-existing mechanisms to take evidence abroad, such as the 1970 Hague Convention. In this sense, see: J. von Hein, "Einleitung EG-BewVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II/I*, Otto Schmidt, 2022, margin no. 1.

[86] Article 19(1) 2020 Evidence Regulation. Member States are required to inform the Commission about which national authority is responsible for deciding on the direct requests to take evidence (Article 31(3) 2020 Evidence Regulation). The Commission is required to elaborate a manual containing, among other information, the name of the authority or authorities in each Member State that are competent to approve the direct request to take evidence. This information had to be made available in the e-Justice Portal (Article 23(1) 2020 Evidence Regulation).

[87] <https://e-justice.europa.eu/38581/EN/taking_evidence_recast?SPAIN&member=1> accessed on 15 November 2024.

[88] <https://e-justice.europa.eu/38581/EN/taking_evidence_recast?SPAIN&member=1> accessed on 15 November 2024.

[89] Article 6 2001 Evidence Regulation.

[90] Article 7(1) 2020 Evidence Regulation and Annex, point 1 Commission Implementing Regulation (EU) 2022/422.

[91] Article 19(7) 2020 Evidence Regulation.

[92] This ground corresponds to the violation of the public policy of the requested Member State: M. L. Villamarín López, "Obtención de pruebas en otros estados de la Unión Europea" in A. de la Oliva Santos (ed), *Derecho procesal civil europeo*, Thomson Reuters, 2011, p. 362.

[93] J. von Hein, "Artikel 19 EG-BewVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II/I*, Otto Schmidt, 2022, margin no. 3.

Regulations establish that 'within 30 days of receiving the request for the direct taking of evidence, the central body or the competent authority of the requested Member State shall inform the requesting court as to whether the request has been accepted'.[94]

In case no answer is provided within 30 days, both regulations establish as well that the requesting court can send a reminder, and the 'central body or the competent authority' has 15 days to react to the request.[95] This is the point where the 2020 Evidence Regulation differs from the 2001 Evidence Regulation.[96] The 2020 Evidence Regulation establishes that if after the 15 days mentioned the 'central body or the competent authority' does not reply, 'the request for the direct taking of evidence shall be considered accepted'.[97] Still, 'in extraordinary circumstances where the central body or competent authority was prevented from reacting to the request within the deadline following the reminder', the 'central body or the competent authority' could still invoke one of the grounds to refuse the direct taking of evidence.[98]

C) Execution of the request to take evidence

The requesting court will take the evidence in accordance with its national civil procedural law.[99] However, the 'central body or competent authority' can be required to take the evidence in accordance with certain conditions of the law of the requested Member State.[100] Unlike for the indirect taking of evidence, the use of coercive measures is not permitted.[101] If the taking of evidence consists of examining a person, it has to be informed 'that the taking of evidence shall take place on a voluntary basis'.[102]

D) Special cases of direct taking of evidence

The 2020 Evidence Regulation contains two subcategories of direct taking of evidence. The first one is the examination of a person through videoconferencing. While the 2001 Evidence Regulation acknowledged the possibility of using videoconferencing,[103] the 2020 Evidence Regulation has introduced a specific provision.[104] The 2020 Evidence Regulation has made the use of videoconferencing to examine a person in another Member State the general rule.[105] Courts can only refuse the use of videoconferencing if the technology to use it is not available or 'the court considers the use of such technology to be inappropriate in the specific circumstances of the case'.[106] Therefore, the use of videoconferencing depends very much whether courts have the necessary technical infrastructure to rely on it, and the case.[107]

[94] Article 19(4) 2020 Evidence Regulation.
[95] Article 19(5) 2020 Evidence Regulation.
[96] Article 19(5) 2020 Evidence Regulation.
[97] Article 19(5) 2020 Evidence Regulation.
[98] Article 19(5) 2020 Evidence Regulation.
[99] Article 19(8) 2020 Evidence Regulation.
[100] Article 19(4) 2020 Evidence Regulation.
[101] Article 19(2) 2020 Evidence Regulation.
[102] Article 19(2) 2020 Evidence Regulation.
[103] Article 17(4) 2001 Evidence Regulation.
[104] The referred Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation (see note 59) also contains specific measures aimed at fostering the use of videoconferencing in the EU civil procedural instruments: 'In order to facilitate oral hearings in proceedings in civil and commercial matters with cross-border implications, this Regulation should provide for the optional use of videoconferencing or other distance communication technology for the participation of the parties or their representatives in such hearings, subject to the availability of the relevant technology, the possibility for the parties to submit an opinion on the use of such technology and the appropriateness of the use of such technology in the specific circumstances of the case' (Recital 35).
[105] However, some authors have sustained that it can be used not only to examine persons in another Member State, but also to examine other kinds of evidence: A. Zimmermann, "Art. 20 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no. 2.
[106] Article 20(1) 2020 Evidence Regulation.
[107] These two prerequisites also condition the use of videoconferencing in other EU civil procedural instruments. For instance, the European Small Claims Procedure establishes the mandatory use of 'videoconference or teleconference' in the oral

The request to examine through videoconferencing also requires the approval by the 'central body or competent authority' of the requested Member State.[108] This can 'provide practical assistance in the direct taking of evidence and shall agree on the practical arrangements for the examination'.[109] The person who is examined does not have to be present during the videoconference at the premises of a court of the requested Member State.[110]

The other special case of direct taking of evidence is the taking of evidence through diplomatic agents or consular officers of the requesting Member State, who are appointed to the requested Member State.[111] This option was not foreseen in the 2001 Evidence Regulation.[112] It can be used only for examining persons on a voluntary basis, such as witnesses or experts.[113] The examined persons have to be nationals of the Member State that diplomatic agents or consular officers represent,[114] and the examination has to be made 'in the context of proceedings pending in the courts' of the requesting Member State.[115] The hearing of the person has to take place at the premises of the diplomatic or consular mission.[116] Only under exceptional circumstances can it take place outside those premises.[117] For instance, if 'the person to be heard is unable to come to the premises because of a serious illness'.[118]

V. The costs of taking evidence

In principle, the execution of a request to take evidence 'shall not give rise to a claim for any reimbursement of taxes or costs'.[119] There three cases in which the requested court can require the requesting court to cover the costs of taking evidence:[120]

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hearings 'unless the use of such technology, on account of the particular circumstances of the case, is not appropriate for the fair conduct of the proceedings': Article 8(1) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, pp. 1–22. Similarly, the Preamble of the Brussels II ter Regulation states that 'where it is not possible to hear a party or a child in person, and where the technical means are available, the court might consider holding a hearing through videoconference or by means of any other communication technology unless, on account of the particular circumstances of the case, the use of such technology would not be appropriate for the fair conduct of the proceedings': Recital 53 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT OJ L 178, 2.7.2019, pp. 1-115.

[108] Article 20(2) 2020 Evidence Regulation. However, it should be remembered that the 2020 Evidence Regulation is an optional tool, as the CJEU determined. This means courts can rely on their own national procedural rules to examine a person who is in another Member State through videoconferencing: W. Voss, "Grenzüberschreitende Videoverhandlungen jenseits des Rechtshilfewegs – Wunsch oder Wirklichkeit?", in B. Windau and P. Reuss (eds.), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts – Tagungsband zum Sommersemester 2021*, Göttinger Juristische Schriften, 2022, pp. 46–47.

[109] Article 20(2) 2020 Evidence Regulation.

[110] Conversely, the Commission Proposal of the 2020 Evidence Regulation required that when a request for 'direct taking of evidence via videoconference is made, the hearing shall be held in the premises of a court' (Article 17(a) COM(2018) 378 final). This reference to the 'premises of the court' was withdrawn from the final text of the 2020 Evidence Regulation, which implies that the EU legislator opted for a more flexible approach. In this sense, see: O. L. Knöfel, "Die Neufassung der Europäischen Beweisaufnahmeverordnung (EuBewVO)", *Recht der internationalen Wirtschaft*, 2021, p. 251; Zimmermann (fn 105), margin no. 7.

[111] Article 21 2020 Evidence Regulation.

[112] A. Zimmermann, "Art. 21 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no 1. This solution is inspired by Article 15 of the 1970 Hague Convention on taking of evidence, which establishes the possibility of taking evidence through consular and diplomatic agents: J. von Hein, "Artikel 21 EG-BewVO" in T. Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II/I*, Otto Schmidt, 2022, margin no. 1.

[113] Zimmermann (fn 112), margin no. 3. Examination of documentary evidence or taking blood samples would not be allowed through diplomatic agents or consular officers: Knöfel (fn 110), p. 256.

[114] Article 21 2020 Evidence Regulation.

[115] Member States can introduce additional conditions to examine a person through diplomatic agents or consular officers: Zimmermann (fn 112), margin No. 8. For instance, the German legislator established that taking evidence through diplomatic agents or consular officers is only possible in exceptional circumstances: Section 1071(3) German Code of Civil Procedure (*Zivilprozessordnung*).

[116] Article 21 2020 Evidence Regulation.

[117] Article 21 2020 Evidence Regulation.

[118] Recital 25 2020 Evidence Regulation.

[119] Article. 22 2020 Evidence Regulation.

[120] Article 22(2) 2020 Evidence Regulation.

– the payment of a fee to an expert;
– the payment of a fee the interpreters used when examining a person;
– the costs which the requested courts might incur when taking evidence in accordance with 'special procedure' of the law of the requesting Member State or using videoconferencing when the requesting court asked for it.

The CJEU has clarified that the requested court cannot ask for the reimbursement of other costs than those listed above.[121] In C-283/09, *Weryński*, the payment of the expenses of witnesses foreseen under Irish law did not fall within the categories of 'taxes' or 'costs' under the 2001 Evidence Regulation.[122] Additionally, the CJEU stated that the 'the concept of costs must be defined autonomously under European Union law and does not depend on the classification under national law'.[123]

The law of the requesting Member State determines which of the parties shall bear the costs.[124] When taking evidence consists of an opinion of an expert, the requesting court can be asked 'for an adequate deposit or advance towards the anticipated costs of the expert opinion'.[125]

VI. A reform awaiting to bear fruit

While the 2020 Evidence Regulation has been in force for more than two years, it is still not possible to evaluate the impact of the reform. Its key innovation, the electronic transmission of requests and communications through the e-CODEX system, has not been implemented yet. Therefore, the arrival of the 2020 Evidence Regulation has, so far, had little impact on how courts can take evidence in other Member States. The experience is almost identical to the one of taking evidence with the 2001 Evidence Regulation, an instrument that was not very popular among courts.[126] The CJEU even acknowledged that courts might find easier to rely on the domestic procedural rules to take evidence in the other Member States than with the 2001 Evidence Regulation.[127] Statistics also reflect the poor performance of the 2001 Evidence Regulation.[128] For instance, in 2021, Spanish courts received only 163 requests to take evidence from courts of other Member States.[129] In 2023, under the already applicable 2020 Evidence Regulation, Spanish courts received even fewer requests: only 71.[130] It remains to be seen whether, once the 2020 Evidence Regulation becomes fully applicable, those numbers will improve.

[121] A. Zimmermann, "Art. 22 EuBVO" in V. Vorwerk and C. Wolf (eds.), *BeckOK ZPO*, C. H. Beck, 2024, margin no. 3.
[122] CJEU, 17 February 2011, C-283/09, *Weryński*, ECLI:EU:C:2011:85, paras. 64–69.
[123] CJEU, 17 February 2011, C-283/09, *Weryński*, ECLI:EU:C:2011:85, para. 58.
[124] Article 22(2) 2020 Evidence Regulation.
[125] Article 22(3) 2020 Evidence Regulation.
[126] F. Gascón Inchausti, B. Hess, G. Cuniberti, P. Oberhammer et al, *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law – Strand 1 – Mutual trust and free circulation of judgments*, EU Publications Office, 2017, para. 257.
[127] CJEU, 6 September 2012, C-170/11, *Lippens*, ECLI:EU:C:2012:540, para. 31.
[128] Article 32(3) of the 2020 Evidence Regulation requires Member States to collect statistical data on the application of this instrument by their national courts.
[129] The data have been obtained from the Online Judicial Statistics Database (PC-AXIS) (*Base de Datos de la Estadística Judicial Online (PC-AXIS)*) of the Spanish General Council of the Judiciary: <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Base-de-datos-de-la-estadistica-judicial--PC-AXIS-/> accessed on 10 November 2024.
[130] *Ibid*.