

PRACTICE GUIDE

**FOR THE APPLICATION OF THE
REGULATION ON THE TAKING OF EVIDENCE**

**(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)**

**This document has been drawn up by the Commission Services in
consultation with the European Judicial Network in Civil and
Commercial Matters (<http://europa.eu.int/civiljustice>)**

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I. Introduction

1. Often it is not sufficient to have a claim against another party for actually winning a case because the other party contests the facts on which the claim is based. Therefore it is usually crucial to present evidence to the court to prove a claim. To do so, it may be necessary to take evidence in a Member State other than the one in which judicial proceedings are or can be brought. For example, it may be necessary to hear witnesses in other Member States, or the court may have to visit a scene of occurrence situated in another Member State.

2. Before 2004, there was no binding instrument between all Member States concerning the taking of evidence. In 2001 the Council of the European Union adopted Regulation (EC) No 1206/2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the “Regulation”) which lays down procedural rules to make it easier to take evidence in another Member State. The Regulation is applicable throughout the Union with the exception of Denmark since 1 January 2004. Between the Member States concerned, it replaces the Hague Convention of 1970.

The Regulation and all information relevant for its application is available in the European Judicial Atlas in Civil Matters at:

http://europa.eu.int/comm/justice_home/judicialatlascivil/html/takingevinformation_en.htm

II. Objectives of the Regulation

3. It is often necessary for a court in a Member State asked to render a decision in a civil or commercial matter to take evidence in another Member State.

4. The primary objective of the Regulation is that requests for the performance of the taking of evidence are executed expeditiously. 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 made directly and by the most rapid means possible between the courts of the Member States. In order to facilitate the taking of evidence, the Regulation provides also for the possibility that the court of a Member State takes evidence directly in another Member State.

III. Substantive Scope of the Regulation and Relationship to International Agreements

5. Pursuant to Article 1(1), the Regulation applies in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

- the competent court of another Member State to take evidence; or
- to take evidence directly in another Member State.

Article 1(2) of the Regulation provides that a request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

6. Consequently, there are four conditions for the application of the Regulation. It applies to:

- requests for the taking of evidence
- evidence intended for use in judicial proceedings, commenced or contemplated
- in civil or commercial matters
- by the court of a Member State

7. The notion of “civil and commercial matters” is an autonomous concept of Community law which is to be interpreted in the light of the objectives of the Regulation and of the EC Treaty and in particular in accordance with its Article 65. The European Court of Justice has at different occasions given interpretations of it.¹ The Regulation applies to all civil and commercial proceedings whatever the nature of the court or tribunal in which they are taking place. It will for instance apply to litigation

¹ See e.g. 14. October 1976, 29/76, *LTU v. Eurocontrol*, in *ECR*, 1541; 16. December 1980, 814/79, *Ruffler*, *ECR*, 3807; 21 April 1993, C-172/91 *Sontag*, *ECR*, I-1963; 14. November 2002, C-271/00, *Steenbergen v. Baten*

based on civil and commercial law, consumer law, employment law and even competition law as far as private proceedings are concerned. Moreover, it should be stressed that the scope of application of the Regulation includes matters which are excluded from the scope of application of the Brussels I Regulation²) such as in matters relating to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.

8. The concept of “evidence” is not defined in the regulation. It includes for instance hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, expertise on family or child welfare.

9. There is no definition of the concept of “court” in the Regulation. It should, however, given a broad interpretation, thus including all authorities in the Member States with jurisdiction in the matters falling within the scope of the Regulation.³ The concept of “court” does not cover arbitral tribunals.

10. The request shall be made only to obtain evidence which is intended for use in judicial proceedings, commenced or contemplated. This includes the taking of evidence before the actual filing of the proceedings in which evidence is to be used, for instance if there is a need to take evidence which would not be available later.

11. The Regulation provides in Article 21 (1) that it shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by the Member States and especially over the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations between the Member States party thereto.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³ See in this regard as an example the definition of “court” in Article 2 Nr. 1 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of

12. The Regulation does, however, not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation (Article 21 (2)).

IV. Courts and Authorities

13. The Regulation provides for different courts and authorities:

- The **requesting court** (Article 2) is the court before which proceedings are commenced or contemplated.
- The **requested court** (Article 2) is the competent court of another Member State for the performance of the taking of evidence.
- The **central body** (Article 3 (1)) supplies information to courts and seeks solutions to difficulties which may arise in respect of a request. The central body forwards - in exceptional cases - at the request of a requesting court, a request to the competent court. As stated above (§ 4), 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 made directly and by the most rapid means possible between the courts of the Member States. Consequently, a request is transmitted by the central body only exceptionally.
- The **competent authority** (Article 3 (3)) takes the decisions on requests to take evidence directly pursuant to Article 17. The central body can be designated as the competent authority.

V. Methods of Taking Evidence

judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC)

A. *The two methods*

14. Chapter II of the Regulation contains the rules concerning the transmission and the execution of requests. As explained above, the Regulation provides for two methods of taking of evidence (see Annex I):

- the taking of evidence by the requested court, following a request transmitted directly from the requesting court to the requested court (see B. below)
- the direct taking of evidence by the requesting court (see C. below)

The two methods can be distinguished with regard to the fact which court has the responsibility over the taking of the evidence procedure (in the first case it is the requested court, in the second case the requesting court). A further difference lies in the fact that in the case of direct taking of evidence an authorization by the Member State in which the evidence is to be taken is required. In both cases evidence can be taken through local and distant means (such as through a videoconference). When e.g. a witness is heard, the relevant factor to distinguish the two methods is which court is responsible for taking the evidence. It should be noted that in both cases the Regulation provides for the possibility that the court which does not have the responsibility over the taking of evidence nevertheless participates in it (see Articles 12 and 17(4)). This can even mean that the court which does not have the responsibility over the taking of evidence, but participates in it, could ask questions to a witness in a hearing if the court with the responsibility over the taking of evidence agrees.

B. *Request by the requesting court to the competent court (Articles 4 – 16)*

a) *Transmission of requests*

a1) *Form and content*

15. Article 4 (1) lays down the rules relating to the form and the content for the transmission of the request (see also Annex II). The request shall be made using *Form A*. The form can be filled in online in the Atlas at:

http://europa.eu.int/comm/justice_home/judicialatlascivil/html/te_filling_en.htm.

It shall contain the following details:

- (a) the requesting and, where appropriate, the requested court;
The list of the competent courts as well as their territorial competence is available in a manual in the European Judicial Atlas for Civil Matters:
http://europa.eu.int/comm/justice_home/judicialatlascivil/html/te_documents_en.htm
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature and subject matter of the case and a brief statement of the facts;
In completing this provision, it may be useful to include with the summary of facts, the legal basis of the claim, a short description of the issues in the case and the relevance of the evidence to those issues (paragraph 11 of *Form A*).
- (d) a description of the taking of evidence to be performed;
- (e) where the request is for the examination of a person:
- the name(s) and address(es) of the person(s) to be examined,
 - the questions to be put to the person(s) to be examined or a statement of the facts about which he is (they are) to be examined,
 - where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court,
 - any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used,
 - where appropriate, any other information that the requesting court deems necessary.

a2) Special requests

16. Article 4(1) (f) provides that where the request is for the production of documents or for the inspection of objects, it shall contain their details.

17. If the requesting court has called for the request to be executed in accordance with a special procedure provided for by its own law, it shall use *Form A* with this indication (Article 4 (1) (g)). As set out in paragraph 13 of *Form A*, the details and an explanation of the special procedure should be described in an annex to the Form. The special procedure could e.g. cover the manner in which the evidence is to be recorded or the way a witness is to be examined or the parties are heard or an expert is appointed and heard or documents are produced etc.

18. If the requesting court has asked the requested court to use communications technology for the performance of the taking of evidence, in particular by using videoconference and teleconference, Article 4 (1) (g) provides that the request shall contain this demand (using *Form A*).

a3) *Expeditious means of transmission of requests and other communications*

19. According to Article 6 of the Regulation, all requests and communications have to be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept. The related communications of the Member States are available in the European Judicial Atlas in Civil Matters.

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.

a4) *Languages*

20. According to Article 5 of the Regulation, the request and any further correspondence have to be drawn up

- in the official language of the requested Member State;
- or, if there are several official languages in that Member State, in the official

language or one of the official languages of the place where the requested taking of evidence is to be performed,

- or in another language which the requested Member State has indicated it accepts.

Documents which the requesting court deems it necessary to enclose for the execution of the request shall be accompanied by a translation into the language in which the request was written.

21. The list of the official language or languages other than their own that the Members States have accepted pursuant to Articles 5 and 22 (4) for the completion of the forms is available in the Atlas.

a5) Exemption of the requests from authentication

22. The request and all documents accompanying the request shall be exempted from authentication or any equivalent formality (Article 4 (2)).

b) Receipt of requests

b1) Acknowledgement

23. The requested court shall send an acknowledgement of receipt to the requesting court - using *Form B* in the Annex - within seven days of receipt of the request (Article 7 (1)).

24. If the request does not comply with the language (Article 5) or transmission rules (Article 6), the requested court shall enter a note to that effect in the acknowledgement of receipt.

25. If the execution of a request which complies with the language rules does not fall within the jurisdiction of the court to which it was transmitted, this court shall forward the request to the competent court of its Member State and shall inform the requesting court thereof (using paragraph 14 of *Form A*).

b2) Incomplete request

26. There are two cases in which a request cannot be executed because it is incomplete:

27. Firstly, if the request does not contain all of the necessary information pursuant to Article 4 (Article 8 (1)). In this case, the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using *Form C*, and shall request it to send the missing information, which should be indicated as precisely as possible.

28. Secondly, if a deposit or an advance is necessary (Article 8(2)).

- The execution of a request in accordance with Article 10 shall not give rise to a claim for any reimbursement of taxes or costs (Article 18 (1)). There is an exception concerning the fees paid to experts and interpreters, and the costs occasioned by the application of Article 10 (3) and (4).
- If the opinion of an expert is required, the requested court may, before executing the request, in addition ask the requesting court for an adequate deposit or advance towards the requested costs (Article 18 (3)). In all other cases, a deposit or advance shall not be a condition for the execution of a request.
- If a deposit or advance is necessary, the requested court shall inform the requesting court thereof without delay (at the latest within 30 days of receipt of the request) using *Form C* and inform the requesting court how the deposit or advance should be made. The requested court shall acknowledge receipt of the deposit or advance without delay (at the latest within 10 days of receipt of the deposit or the advance) using *Form D* (Article 8 (2)).

c) Taking of evidence by the requested court

c1) Time limits

29. If the request is complete and can be executed, Article 10(1) stipulates that the requested court shall execute it without delay and, at the latest, within 90 days of its receipt.

30. In case the request cannot be executed because it does not contain all the necessary information pursuant to Article 4 or does not comply with the conditions laid down in Articles 5 and 6, the time limit indicated in Article 10 shall begin to run only when the requested court received the request duly completed (Article 9).

31. If the requested court, before executing the request, has asked the requesting court for an adequate deposit or advance towards the requested costs, in accordance with Article 18(3), this time limit shall begin to run only when the deposit or the advance is made.

c2) Law applicable to the performance of the requests

32. In general, the requested court executes the request in accordance with its own law (Article 10(2)). It may, however, execute the request pursuant to a special procedure provided for by the law of the Member State of the requesting court, if the latter so asks in accordance with paragraph 13 of *Form A* (see § 15 above). If the requested court is in any doubt about the special procedure requested, additional information may be sought using *Form C*.

33. However, if this procedure of the Member State of the requesting court is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties, the requested court can refuse to comply with such a requirement (Article 10(3)). A procedure can be considered as incompatible with the law of the Member State of the requested court if it is in conflict with fundamental principles of that law. In both cases, the requested court shall inform the requesting court using *Form E*.

c3) Coercive measures

34. The applicable law to coercive measures for executing a request is determined in accordance with the law of the Member State of the requested court to the extent that it provides for the execution of a request made for the same purpose by the national authorities of that Member State or one of the parties concerned (Article 13). It should be emphasized that the direct taking of evidence (see §§ 50 - 55) may only take place if it can be performed on a voluntary basis without the need for coercive measures (Article 17 (2)).

c4) Performance of the request with the presence and participation of the parties or of representatives of the requesting court

35. If it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present at the performance of the taking of evidence by the requested court (Article 11 (1)).

36. Representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court, if this is compatible with the law of the Member State of the requesting court (Article 12 (1)).

37. The term “representative” of the requesting court means members of the judicial personnel designated by this court, in accordance with the law of its Member State, or any other person, such as an expert designated by this court.

38. The requesting court shall, in its request (*Form A*), inform the requested court that the parties and, if any, their representatives, will be present and, where appropriate, that their participation is requested, or that its representatives will be present and, where appropriate, that their participation is requested. This information may also be given at any other appropriate time (Article 11(2) and 12 (3)).

39. If this participation of the parties or, if any of their representatives or of the representatives of the requesting court is requested at the performance of the taking of evidence, the requested court determines the conditions under which they may

participate, unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties (Articles 11 (3), 12 (4) and 10 (3)).

40. In case of an acceptance of this procedure, the requested court informs the parties and, if any, their representatives, or the requesting court of the time when, and the place where, the proceedings will take place, and, where appropriate, the conditions under which they may participate, using *Forms E* and *F* (Article 11 (4) and (12 (5))).

41. If that possibility is provided for by the law of its Member State, the requested court has in any case the possibility of asking the presence and participation of the parties and, if any their representatives, in the performance of the taking of evidence (Article 11 (5)).

d) Refusal of execution of a request

d1) Right or duty of a person to refuse to give evidence

42. Article 14 provides that a request for the hearing of a person shall not be executed when the person concerned claims

- the right to refuse to give evidence or
- to be prohibited from giving evidence.

The person may invoke

- the law of the Member State of the requested court; or
- the law of the Member State of the requesting court. In that case, the right must have been specified in the request, or, if necessary, been confirmed by the requesting court at the instance of the requested court.

d2) Miscellaneous grounds for refusal

43. Since the Regulation aims at facilitating the taking of evidence in cross-border cases, the refusal of a request should be absolutely exceptional. Whether or not there is

an appeal against a refusal is a matter of national law. The grounds for refusal are strictly limited. The execution of a request may be refused only if:

- the request does not fall within the scope of the Regulation (Article 1); or
- the requested court does not have the power to instruct the requested measure (Article 14 (2) b)); or
- the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 within 30 days after the requested court asked it to do so; or
- a deposit or advance asked for in accordance with Article 18(3) is not made within 60 days after the requested court asked for such a deposit or advance.

44. It should be noted that the performance of a request may not be refused solely on the ground that under the law of the requested court a court of the same 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 (Article 14(3)).

d3) No public policy exception

45. Apart from the above exceptions, no public policy (“*ordre public*”) exception can be invoked to justify the refusal of the taking of evidence by the requested court.

d4) Consequences of refusal

46. If the execution of the request is refused by the requested court on one of the grounds referred to in Article 14 (2), the requested court shall notify the requesting court thereof within 60 days of receipt of the request using *Form H* (Article 14(4)).

e) Notification of delay or of refusal by the requested court

47. If the requested court is not in a position to execute the request within 90 days of receipt, it shall inform the requesting court thereof, using *Form G*. When doing so, the grounds for the delay shall be given as well as the estimated time that the requested

court expects it will need to execute the request (Article 15).

48. If the requested court has been asked to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference in accordance with Article 10 (4), and if the requested court cannot comply with the demand for one of the reasons provided for in Article 10 (4) second indent, it informs the requesting court, using *Form E*.

f) Procedure after the execution of the request

49. When the requested court has executed the request, it sends the documents establishing the execution without delay to the requesting court and, where appropriate, returns the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using *Form H* (Article 16).

C. Direct taking of evidence by the requesting court (Article 17)

50. The Regulation allows the court of a Member State to take evidence directly in another Member State. Article 17 of the Regulation indicates the conditions and the limits of this method of taking evidence (see Annex III).

51. The procedure to be applied is the following: The court which requests to take evidence directly in another Member State submits its request to the Central Body or the Competent Authority referred to in Article 3(3) of that Member State, using *Form I* (Article 17 (1)). Within 30 days of receiving the request, that central Body or the Competent Authority shall inform the requesting court if its request is accepted and, if necessary, under what conditions according to its law such performance is to be carried out, using *Form J* (Article 17 (4)).

52. In particular, these authorities may assign a court of their Member State to take part in the performance of the taking of evidence in order to ensure the proper application of Article 17 and in particular the conditions in Article 17 (4).

53. The Central Body or the Competent Authority of the requested State may refuse the direct taking of evidence only if (Article 17 (5)):

- the request does not contain all of the necessary information pursuant to Article 4 (*Form A*);
- the request does not fall within the scope of the Regulation (Article 1);
- the direct taking of evidence requested is contrary to fundamental principles of law in its Member State. The Regulation does not define those principles.

54. The direct taking of evidence by the requesting court is only possible if it can be performed on a voluntary basis without the need for coercive measures (Article 17 (2)). Consequently, where the direct taking of evidence involves the hearing of a person, the requesting court shall inform that person that the performance shall take place on a voluntary basis.

55. Without prejudice to the conditions in accordance with the law of the requested Member State (see Article 17 (4)), the requesting court shall execute the request in accordance with its own law (Article 17 (6)). The taking of evidence is to be performed by a member of the judicial personnel or by any other person such as an expert, consular or diplomatic officer or commissioner, who will be designated, in accordance with the law of the Member State of the requesting court.

D. Rules on the application of modern means of communication

56. Modern means of communication are of considerable importance for the smooth application of the Regulation in order to attain its objective to guarantee a speedy and efficient taking of evidence in the European Union. The Regulation provides that the requesting court may ask the requested court to use communications technology for the performance of the taking of evidence, in particular by using videoconference and teleconference (Article 10 (4)). If, however, the requesting court wishes to have the responsibility over the taking of evidence, the rules in Article 17 on direct taking of evidence apply and an authorization by the requested Member State is required. The

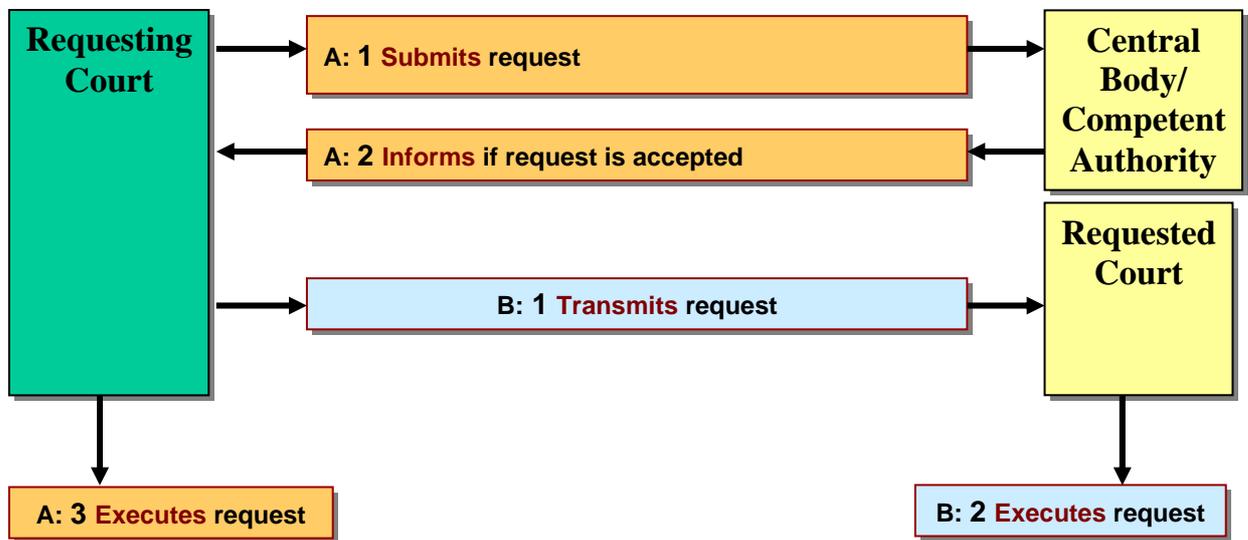
Regulation provides that the central body or the competent authority shall encourage the use of communications technology (Article 17 (4)).

57. For example, in the case of a hearing of a witness, communications technology can be used by the court which has the responsibility over the taking of evidence (i.e. by the requested court in accordance with Article 10(4) or by the requesting court in accordance with Article 17). In that case, another court which does not have the responsibility over the taking of evidence (i.e. the requesting court in accordance with Article 12(3) or the court assigned by the central body or the competent authority in accordance with Article 17(4)) may participate in the hearing by means of communications technology. As stated above (§14), this could also mean that the court which does not have the responsibility over the taking of evidence asks questions to the witness if the court with the responsibility over the taking of evidence agrees.

58. Member States will in the future provide information in which courts video- and teleconference can be used. This information will be made available in the Atlas.

59. The requested court has to comply with a demand to use communications technology unless it is incompatible with its own law or by reason of major practical difficulties. The second ground for refusal is in practice the more relevant because most of the courts in the Member States have not yet obtained facilities to take evidence by modern means of communication, especially by videoconference or teleconference. The Regulation provides, however, that if there is no access to these technical means in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.

Annex I: Methods of Taking Evidence

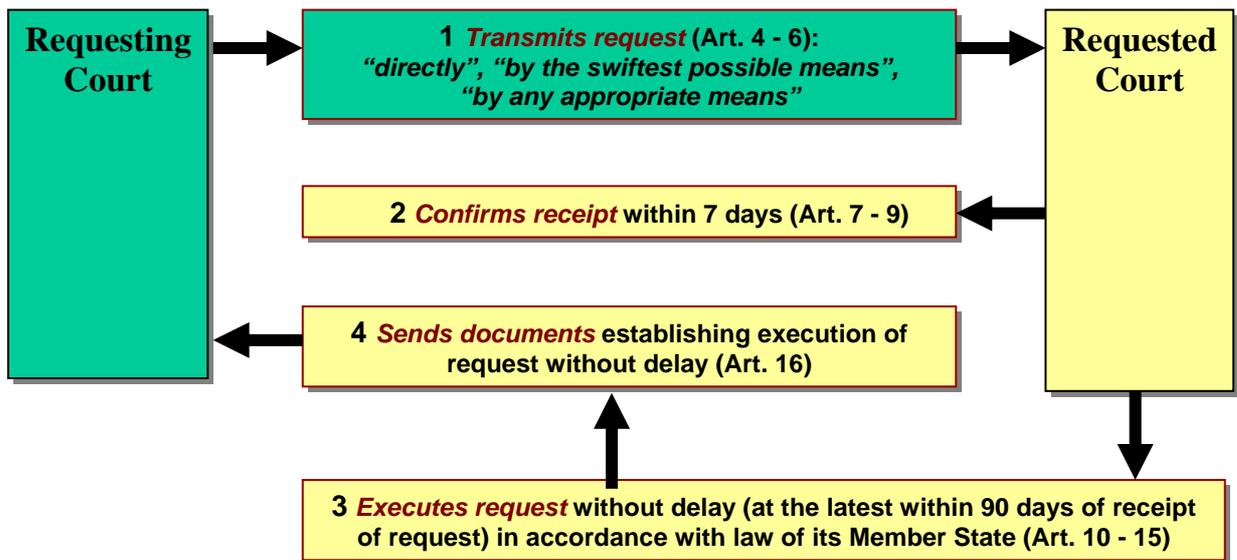


Explanation:

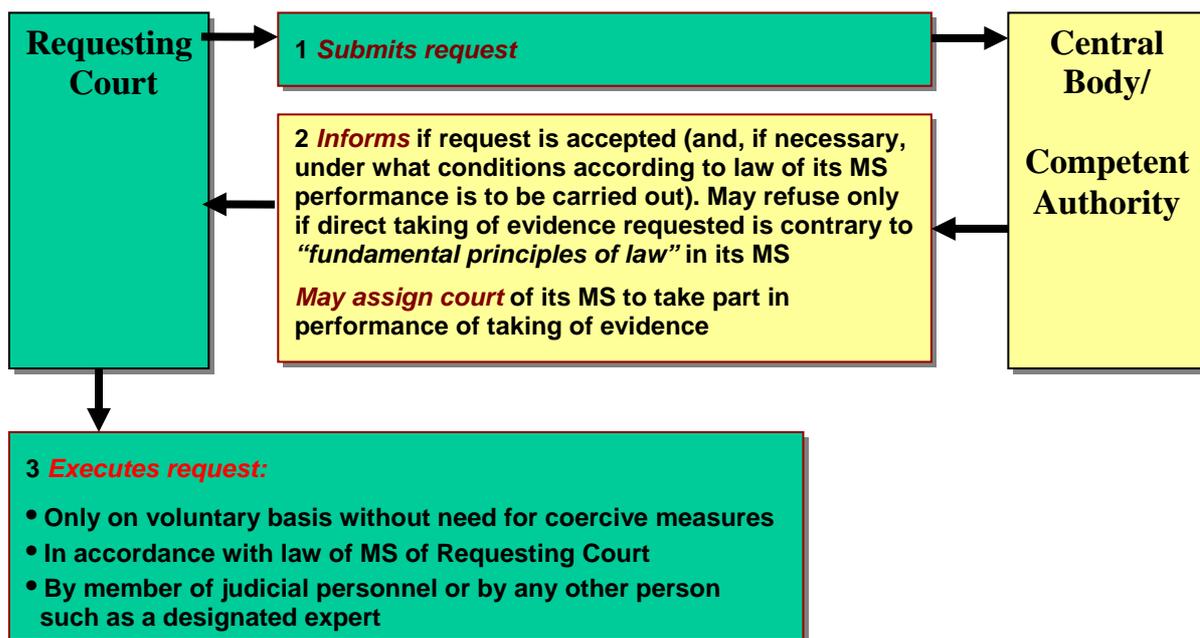
A: Direct Taking of Evidence (Article 17)

B: Taking of evidence by the requested court (Articles 4 – 16)

Annex II: Request to Competent Court



Annex III: Direct Taking of Evidence (Article 17)



Annex IV: Standard Forms (Annex)

A: Request for the taking of evidence

B: Acknowledgement of receipt of request

C: Request for additional information for taking of evidence

D: Acknowledgement of receipt of deposit or advance

E: Notification concerning request for special procedures and/or for use of communications technologies

F: Notification of date, time, place of performance of taking of evidence and conditions for participation

G: Notification of delay

H: Information on outcome of request

I: Request for direct taking of evidence

J: Information from central body/competent authority