

Brussels, 28 February 2001

OPINION

of the

Economic and Social Committee

on the

**Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation
on cooperation between the courts of the Member States
in the taking of evidence in civil and commercial matters**

(11808/00 - 2000/823 (CNS))

On 11 October 2000 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters
(11808/00 - 2000/823 (CNS)).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 7 February 2001. The rapporteur was **Mr Hernández Bataller**.

At its 379th plenary session of 28 February and 1 March 2001 (meeting of 28 February 2001), the Economic and Social Committee adopted the following opinion by 117 votes to one, with one abstention.

1. Introduction

1.1 The purpose of international legal assistance is to offset the difficulties which arise in proceedings as a result of the inability to exercise powers of jurisdiction outside national territory in order to execute specific procedural documents.

1.2 In order to complete proceedings involving external legal transactions, a number of procedural steps, such as service of notifications, notice of proceedings or taking of evidence, must be executed in another State.

1.3 The system of evidence and its admissibility is usually subject to procedural factors. Consequently, the *lex fori* determines:

- the general arrangements for evidence: whether a *numerus apertus* or *clausus* applies, and in the latter case, which evidence is admissible,
- under what conditions documents granted by a foreign authority may be used.

1.4 The origin of the problems posed by international evidence largely lies in the differences between national legal systems regarding evidence. The most significant differences arise in relation to three aspects:

- a) the greater or lesser role of judges in evidential proceedings: while in some systems these are largely conducted by judges, in others they are carried out by the parties themselves;
- b) the "*pre-procedural*" or *procedural* character of giving evidence: while in some systems, the period in which evidence may be submitted is basically concurrent with the proceedings which

are already under way, and hence when the claims have been clearly defined, in others it runs mostly prior to the opening of proceedings and before the claims have been exactly defined;

- c) the degree to which individual parties are subject to the investigating authority; while in some systems third parties are obliged to give evidence but not the parties to the case, in others both the parties to the case and third parties are obliged to provide evidence.

2. Solutions under international private law

2.1 Two options are available when State A considers that investigations are required within the territory of State B:

- if the law of State B so permits, the party in question may request the authorities of that State to take evidence and may then use it in the primary proceedings in State A;
- the second option is to request the legal authorities in State A to take evidence. The party in question may approach the judge primarily responsible for dealing with the dispute and request him to order investigations to be carried out in State B. In this case, two further options arise:
 - a) for the investigations to be carried out by *diplomatic* or *consular* means, in which case the evidence is taken by the diplomatic or consular representative of State A in State B (passive cooperation);
 - b) the second possibility is for the investigations to be carried out by a State B authority. Cooperation of this kind is requested through mutual legal assistance channels, according to which the State A judge contacts the relevant authority in State B, where the evidence is located, and asks that authority to carry out the necessary investigations (active cooperation).

2.2 International legal assistance channels are used to request the authority of another State to carry out investigations, and specifically to take evidence; the request leads to the preparation of "letters of request"¹ through which the request is dealt with.

2.3 The question of obtaining evidence in other States by letters of request is governed by the 1954 Hague Convention on civil procedure and, more specifically, by the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters. Its main features are as follows:

- The convention applies to civil and commercial matters.
- Requests for cooperation are expressed through letters of request and through a system of central authorities.

¹

The instrument by which the judicial authority of one State requests the appropriate authority of another State to carry out specific investigatory acts or other judicial acts within its territory: this basically means carrying out enquiries.

- Letters of request must contain sufficient information for the enquiry to be executed usefully and effectively and, in principle, must be drawn up in the language of the requested State or accompanied by a translation.
- The authorities competent to execute the enquiry sought in the letter of request, the way it is executed and the available measures of compulsion are determined by the law of the requested State.
- The taking of evidence is communicated to the parties to facilitate their attendance: if authorised by the requested State, a judge from the requesting State may also be present.
- Grounds for refusing cooperation are highly restricted: when the requested State considers that it may prejudice its sovereignty or security, or when the requested act does not fall within the functions of the judiciary of the requested State.

2.4 The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applies in eleven of the EU Member States: it has not been ratified by Austria, Belgium, Greece or Ireland.

2.5 In the interests of compliance with the principle of legal certainty, however, relations between Member States which have ratified the Hague Convention of 18 March 1970, and to whom the present regulation applies, and the remaining Member States should be governed by a legal instrument which reflects as fully as possible the spirit and content of this regulation.

3. **The proposed regulation**

3.1 The Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

3.2 At its meeting in Tampere on 15 and 16 October 1999, the European Council recalled that new procedural legislation in cross-border cases, in particular in the taking of evidence, should be prepared under Article 65 of the Treaty.

3.3 It is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence or perform other judicial acts in another Member State. It is therefore proposed to apply the principles governing Council Regulation (EC) No. 1348/2000 of 29 May 2000² on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

² OJ L 160 of 30.6.2000, p.37.

3.4 It was decided to exclude from the scope of the proposed regulation measures for assistance in enforcement which fall within the scope of:

- the regulation on insolvency procedures, and
- the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters.

3.5 Although it is based on the principle that the transmission and execution of requests for the performance of a judicial act be made directly and by the most rapid means possible between Member States' courts, it is explicitly provided that it must be possible for Member States to indicate their intention of designating only one transmitting or receiving agency or one agency to perform both functions for a period of five years.

3.6 So as to ensure the utmost clarity and legal certainty, the request for the performance of a judicial act must be transmitted on a form to be completed in the language of the Member State of the requested court or in another language accepted for administrative or legal purposes within the territory of that State.

3.7 A request for the performance of a judicial act must be executed within two months: if this is not possible, the requested court must inform the requesting court of the reasons preventing the request from being executed swiftly.

3.8 The possibility of refusing to execute a request for the performance of a judicial act is confined to strictly limited exceptional situations.

3.9 Member States which are parties to the international Hague Conventions shall be free to adopt agreements or arrangements to expedite or simplify cooperation in the taking of evidence, provided that such agreements are compatible with the regulation.

3.10 In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty, these countries take no part in the adoption of the proposal, although they may do so if they so wish. According to Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty, this country shall take no part in the adoption of the regulation.

4. General comments

4.1 The Committee agrees with:

- the choice of a regulation as the appropriate legal instrument, on account of its value-added, since it is binding in full and directly applicable to each Member State, and
- the content of the proposed regulation, as submitted for consultation, subject to the present comments.

4.1.1 The ESC supports the development of an area of freedom, security and justice in the European Union. This includes adopting the necessary measures in the field of legal cooperation in civil matters so that individuals and businesses are not hampered or discouraged in the exercise of their rights because of the incompatibility or complexity of legal and administrative arrangements in the Member States.

4.2 Building a European legal area is absolutely dependent upon improving cooperation between courts and, consequently, upon simplifying and streamlining procedures in order to remove malfunctions and delays.

4.3 The Committee has previously expressed its support³ for abolishing the transitional period in the progressive establishment of the "area of freedom, security and justice" referred to in the Treaty of Amsterdam, given the non-implementation or non-uniform implementation of the acts adopted by the representatives of the Member State governments in this field prior to this Treaty being concluded.

4.4 It would be appropriate for the text of the proposal to mention its impact in terms of increasing or enhancing the rights of the parties involved, and in particular of citizens of the Member States. The ESC believes legal texts should be understandable and should facilitate access to justice as a public service.

4.4.1 The Committee believes that the opinion of different sectoral bodies on the draft regulation should be known: the proposal should, for example, be forwarded to the relevant national parliaments and judicial authorities to maximise dissemination, discussion and awareness of it.

4.5 The risk of conflict between the laws of different Member States, particularly with regard to the burden of proof, or the admissibility or otherwise of certain evidence, is a matter of concern to the Committee. Adoption of the regulation must not be accompanied by any erosion of the level of safeguards offered by laws of a protective nature for all citizens, especially the most vulnerable.

4.5.1 The possibility of changing the rules on the burden of proof should be considered where the plaintiff alleges acts of discrimination, where evidence is available to only one of the parties and relates to the substance of the proceedings, or where the legal effect of evidence may be affected.

4.5.2 The ESC considers that the law of the requesting Member State should be applicable where laws conflict. In this respect, the case-law of the Court of Justice of the European Communities should be extended to such circumstances. In a dispute between parties of different nationalities, which falls within the jurisdiction of a court of a country which is a contracting party to the 1968 Brussels

³ ESC Opinion on the Proposal for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; OJ C 368 of 20.12.1999, p.47.

Convention, this case-law gives precedence to the legislation governing conflict of laws in the competent court⁴.

4.6 The ESC believes the transmitting and receiving agencies described in Article 3 of the proposal as a derogation nullify the general principle of direct transmission between the courts: the regulation is incompatible with the criteria of simplification and Community harmonisation.

5. Specific comments

5.1 The territorial scope of the proposal may give rise to confusion when applied. The specific nature of certain territories, as reflected in Article 299 of the Treaty establishing the European Community, and the responsibilities certain Member States have assumed regarding them should be borne in mind. It should be pointed out in this regard that independently of how evidence is actually taken, the bodies competent to perform this task must be designated by the national authority bearing the State's external responsibility, thereby guaranteeing the authenticity of the acts of these bodies. The Member States must establish the proper legal and administrative channels for this purpose.

5.2 The Committee strongly believes that the proposal should accord secondary status to the procedural provisions it contains for areas covered by the Insolvency Regulation⁵, excluding only specific cases (e.g. credit institutions and other financial intermediaries) from its scope.

5.3 Article 11(3) of the proposal could run counter to internal Member State arrangements regarding protection of fundamental rights, in keeping with the spirit of the Charter of fundamental rights for EU citizens. An explicit reservation regarding implementation should be introduced incorporating compliance with such rights, without prejudice to the continuation of the relevant system of guarantees under Member State legislation or case-law.

5.3.1 With regard to fundamental rights, the ESC advocates a high level of protection, as expressed in the Charter of Fundamental Rights, and in particular respect of the rights under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee equality of arms between the parties involved in proceedings.

5.3.2 A new point 5 should be added to Article 11 as follows: "National authorities must accord the same probative value to admissible certificates of civil status (or any such documents which may serve as evidence within the scope of the present regulation) issued by the authorities of another Member State as they do to such certificates issued by themselves, insofar as they are eligible". This is more in keeping with the case-law of the Court of Justice of the European Communities⁶.

⁴ Judgement of the Court of Justice of the European Communities of 9.11.2000, Coreck Maritime, C-387/98.

⁵ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30.6.2000, p.1-19.

⁶ Judgement of the Court of Justice of the European Communities of 2.12.1997, case of Eftalia Dafeki, C-336/94, in which the German authorities refused to accept the probative value of the date of documents issued by the Greek registry office.

5.3.3 In any case, the ESC believes that with regard to certificates issued by a Member State body, principles similar to those of "mutual recognition" in the single market should apply, without prejudice to public policy.

5.4 Explicit provision should be made for a judge to refuse to execute a request on the grounds of *force majeure* under circumstances which are not covered by Article 11(2), which appears to refer only to "special procedures".

5.4.1 An ad-hoc means of settling disputes should be introduced with regard to Article 13(3) of the proposal. Accepting the wording of the proposal as it stands would imply submission by the court of the Member State claiming competence in the dispute to the Member State requesting that evidence be taken.

5.4.2 For this reason, the ESC considers the powers granted to the central authority of each Member State for "seeking solutions to any difficulties which may arise in respect of a request" (Article 4(1)(b)) to be insufficient, and is concerned at the possibility which may arise of justice being denied: this must be avoided at all costs.

5.5 It should be made clear that the parties involved must not have to bear disproportionate or discriminatory costs on the grounds of their nationality. The Committee is concerned that Article 16(2) not only provides for reimbursement of costs, but constitutes a "*cautio iudicatum solvi*"⁷ (deposit of security for costs) for Member State nationals not resident in the State in which the evidence is being taken, which would be discriminatory.

5.5.1 In obtaining evidence from the parties involved, however, deposit of securities on a discriminatory basis must not be accepted under any circumstances.

5.6 The ESC is of the view that personal data used in obtaining evidence in civil matters must be handled with due regard and only for the original specific purpose, in keeping with legislation on personal privacy.

5.6.1 The collection, processing and use of personal data must be carried out in accordance with the principles laid down by the Council of Europe Convention of 28 January 1981 and Recommendation No. R(87)15 of the Committee of Ministers of the Council of Europe of 17 September 1987.

5.7 The claim in Article 19(1) of prevalence over conventions entered into by Member States in this field may conflict with Court of Justice case-law⁸. The Committee believes that the wording could be amended in order to guarantee the primacy of the regulation over the conventions in

⁷ Repeatedly condemned by the Court of Justice: case C-43/95, *Data Delecta*, judgement of 26.9.1996; *Hayes* judgement of 20.3.1997; *Austin* judgement of 10.2.1997.

⁸ *Levy* judgement of 2.8.1993, case C.158; *Evans Medical* judgement of 28.3.1995, case C-324/93.

relations between Member States, while complying with agreements between the Member States and third countries. This would in any case appear more in keeping with the hierarchy of laws in relations between international and Community law as laid down in Article 307 of the EC Treaty. Agreements concluded between Member States and third countries in this sphere should be designed to flesh out the system established by the draft regulation. "Mixed" agreements represent the most suitable legal form for achieving this.

5.7.1 The Committee particularly welcomes Article 19(2) as it furthers one of the Union's objectives, provides for the adoption of measures between Member States facilitating the taking of evidence and may ensure rapid cross-border investigations. Such agreements must however comply with the *acquis communautaire* and be open to the other Member States.

5.8 The Committee would recall⁹ the need for simple and rapid redress procedures. It therefore calls upon both the Commission and the Council to consider formulating legislative

⁹ ESC Opinion CES 233/2000 on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, rapporteur: **Mr Malosse**, in OJ C 117 of 26.4.2000, p.6.

proposals standardising procedural aspects in order to speed up proceedings (e.g. preparing a European instrument of enforcement).

Brussels, 28 February 2001.

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of the
Economic and Social Committee

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of the
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