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REPORT

on the initiative of the Federal Republic of Germany with a view to the adoption of a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (11808/2000 – C5-0519/2000 – 2000/0823(CNS))

Committee on Legal Affairs and the Internal Market

Rapporteur: Luís Marinho

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

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PROCEDURAL PAGE

By letter of 18 October 2000 the Council consulted Parliament, pursuant to Article 67 of the EC Treaty, on the initiative of the Federal Republic of Germany with a view to the adoption of a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (11808/2000 - 2000/0823 (CNS)).

At the sitting of 27 October 2000 the President of Parliament announced that she had referred this initiative to the Committee on Legal Affairs and the Internal Market as the committee responsible and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for its opinion (C5-0519/2000).

At its meeting of 22 November 2000 Committee on Legal Affairs and the Internal Market appointed Luís Marinho rapporteur.

It considered the Federal Republic of Germany's initiative and the draft report at its meetings of 6 February 2001 and 27 February 2001.

At the latter meeting it adopted the draft legislative resolution by 15 votes to 1 with 0 abstention.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Luís Marinho, rapporteur; Bert Doorn, Francesco Fiori (for Antonio Tajani, pursuant to Rule 153(2)), Marie-Françoise Garaud, Gerhard Hager, Malcolm Harbour, The Lord Inglewood, Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Hans-Peter Mayer, Manuel Medina Ortega, Joachim Wuermeling, Matti Wuori (for Heidi Anneli Hautala) and Stefano Zappalà.

The Committee on Legal Affairs and the Internal Market decided on 16 January 2001 not to deliver an opinion.

The report was tabled on 27 February 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

on the initiative of the Federal Republic of Germany with a view to the adoption of a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (11808/2000 – C5-0519/2000 – 2000/0823(CNS))

The proposal is approved with the following amendments:

Text proposed by the Federal Republic of
Germany¹

Amendments by Parliament

(Amendment 1)
Article 3(2)

Where a transmitting or receiving agency has been designated, the communications pursuant to Article 8(1), Article 9, Article 10(1), Article 11(2), Article 13(4) and Article 14(1) and (2) shall nevertheless be transmitted directly between the requesting and requested courts.

Where a transmitting or receiving agency has been designated, the communications pursuant to Article 8(1), Article 9, Article 10(1), Article 11(2), Article 13(4) and Article 14(1) and (2) shall nevertheless ***always*** be transmitted directly between the requesting and requested courts.

Justification:

In order to ensure that full use is made of the procedure for direct transmission, it should be made clear that such transmission between the requesting and the requested courts must always take place.

(Amendment 2)
Article 4(1)(ca) (new)

(ca) ***providing assistance, in particular by supplying information regarding the languages which may be used for the purpose of completing forms and regarding the possibility of obtaining translations.***

Justification:

¹ OJ C 314, 3.11.2000, p. 1.

The purpose of Amendment 2 is to allocate further tasks to the central authority with a view to increasing the effectiveness of requests for the performance of judicial acts.

(Amendment 3)
Article 16(2)

2. *Nevertheless*, the requested court shall have the right to claim that the requesting court reimburse the costs occasioned by the use of a special procedure requested by the requesting court under Article 11(2).

2. ***If the laws of the requested Member State so provide***, the requested court shall *nevertheless* have the right to claim that the requesting court reimburse the costs occasioned by the use of a special procedure requested by the requesting court under Article 11(2).

Justification:

This condition limits the scope of the provision and is intended to bring it into line with the rules laid down in Article 11 (Execution of the request), Article 12 (Coercive measures) and Article 13 (Refusal to execute), which establish the principle whereby the law of the Member State in which the requested court is located applies.

(Amendment 4)
Article 22

No later than three years after the date of entry into force of this Regulation, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the bodies designated pursuant to Article 3 and to the practical application of Article 4(1)(c).

No later than three years after the date of entry into force of this Regulation, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation, paying special attention to the effectiveness of the bodies designated pursuant to Article 3 and to the practical application of Article 4(1)(c). ***The report shall also mention aspects of the communications sent between courts and between transmitting and receiving agencies via trans-European networks for the electronic exchange of data between administrations.***

Justification:

The purpose of this amendment is to adapt the text to new technologies and to the need for information to be exchanged between, and processed by, courts and transmitting and receiving agencies, a matter in respect of which there exists a Community framework established by means of European Parliament and Council Decisions Nos 1719/1999/EC and 1720/1999/EC of 12 July 1999.

(Amendment 5)
Annex, Form A, Item 8

8. *Requested judicial act*

8.1. Taking of evidence

8.1.1. Examination of witnesses

8.1.1.1. First names and surnames/Title

8.1.1.2. Address

8. *Requested judicial act*

8.1. Taking of evidence

8.1.1. Examination of witnesses

8.1.1.1. First names and surnames/Title

8.1.1.2. Address

8.1.1.2.a Tel.

8.1.1.2.b Fax

8.1.1.2.c E-mail

Justification:

The purpose of this amendment is to bring the text into line with the text of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters¹.

¹ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L160, 30.6.2000, p. 37.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative of the Federal Republic of Germany with a view to the adoption of a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (11808/2000 – C5-0519/2000 – 2000/0823(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Federal Republic of Germany (11808/2000)¹
 - having regard to Article 61(c) of the EC Treaty,
 - having been consulted by the Council pursuant to Article 67 of the EC Treaty (C5-0519/2000),
 - having regard to the report of the Committee on Legal Affairs and the Internal Market Affairs (A5-0073/2001),
1. Approves the initiative of the Federal Republic of Germany as amended;
 2. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 3. Asks to be consulted again if the Council intends to amend the initiative of the Federal Republic of Germany substantially;
 4. Instructs its President to forward its position to the Council and Commission and to the Government of the Federal Republic of Germany.

¹ OJ C 314, 3.11.2000, p.1

EXPLANATORY STATEMENT

1. Introduction

1.1. Some remarks concerning the area of freedom, justice and security

The area of freedom, justice and security, which began to take shape in 1991 following the adoption of the Treaty on European Union, is a response to one of the main concerns of the general public and it comprises a genuine area without internal borders, which is a requirement for establishing Union citizenship and a necessary condition for legitimising the process of European integration. For this reason, Article 2 of the Amsterdam Treaty establishes as one of the Union's objectives the maintenance and development of 'an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.

The actual form which such measures take is laid down in Title IV of the EC Treaty on visas, asylum, immigration and other policies relating to the free movement of persons. That Title, together with Title VI of the Treaty on European Union (police and judicial cooperation in criminal matters), establishes a set of rules which constitute a genuine legal and political challenge to the Community institutions and to the Member States. The concept of a European judicial area began to take shape with the signing of the Single European Act and the emergence of the concept of a European Community without internal borders. Accordingly, in 1993 the Treaty on European Union incorporated judicial cooperation in civil matters into Title VI as a matter of common interest to the Member States, whilst the Amsterdam Treaty brought together within the EC Treaty (new Article 65 thereof) judicial cooperation in civil matters and the free movement of persons.

1.2. Specific issues relating to a European area of justice

The establishment of an area of freedom, justice and security confers on members of the judiciary an essential role to play in the process of European integration. Over a period of forty years, that process has brought an internal market and a European currency. However, although persons, goods and capital move freely within the Community, the activities of the judiciary are confined within national frontiers which increasingly diminish the effectiveness of judicial action. It is impossible to create an area of freedom (i.e. an area without internal borders within which people can move without let or hindrance) unless a judicial dimension is established which is suited to the requirements of an area of freedom, justice and security. Freedom can be enjoyed only in a genuine area of justice, within which individuals may appeal to the courts and the authorities of any Member State as easily as they would do so in their own country (at least until they can do so under Community law, by appealing to the Court of Justice of the European Communities).

The differences between the legal and judicial traditions and cultures of the various Member States may create obstacles in the lives of ordinary people and prevent them from exercising their rights. One glaring example in the area of legal proceedings is that of cooperation between the Member States' courts in the taking of evidence in cases held before civil and

commercial tribunals. Substantive differences between the legal systems of the Member States make mutual recognition of legal decisions essential, whilst procedural rules, which vary significantly from one Member State to another, need to be harmonised. The taking of evidence in other States is currently regulated solely by the Hague Convention of 18 March 1970, the rules of which are inadequate since they apply only to eleven Member States. These days, civil courts have to deal with an ever-growing number of cross-border civil and commercial cases, the trans-national nature of which needs to be dealt with appropriately.

This means that the legal systems of the individual Member States need to develop their ability to work together and to make provision for judicial cooperation, the main thing being to facilitate the everyday lives of ordinary people by granting them easier access to justice. Individuals and companies must not be discouraged from exercising their rights by the complexity and diversity of the Member States' legal and administrative systems, although these days their expectation of a speedy completion in court cases involving civil and commercial matters is frequently thwarted whenever such cases involve the performance of legal acts in other Member States. It must be ensured that members of the general public have access to justice on equal terms.

The German initiative fills a huge legal void which causes unacceptable damage to, and discriminates against, the thousands of ordinary people who, despite moving freely within the European Union, run the risk of being denied prompt access to justice and are confronted with the existence of fifteen civil and commercial borders which, in practice, have proved incapable of protecting their rights but which, on the other hand, remain open to the free movement of persons, services and capital.

1.3. What follows is a summary of the most important aspects of the initiative put forward by the Federal Republic of Germany.

1.3.1. Scope

The Regulation (Article 1) is applicable solely in civil and commercial matters where a court in one Member State requests the competent court of another Member State to obtain evidence or perform judicial acts. Excluded are extrajudicial acts and the service of judicial or extrajudicial documents¹ and measures for the preservation of evidence or enforcement. Such acts or documents should be defined in accordance with the law of the requesting or the requested Member State and by reference to any Court of Justice interpretation of the matter.

Article 1(3) provides that the Regulation shall not apply in cases where the court of a Member State wishes inquiries to be conducted by an expert, in which case the court of that Member State may appoint the expert directly, with no authorisation being required.

¹ The service of judicial and extrajudicial documents in civil and commercial matters is regulated by means of Regulation (EC) No 1348/2000 (see footnote on p. 8).

1.3.2. Communication between courts

1.3.2.1. Mechanism for the transmission of requests for the performance of judicial acts

Article 2 lays down the principle of the direct transmission of documents between competent courts when a case is *sub judice*. This is an attempt to eliminate any intermediate stages which could complicate and delay the forwarding of the request to obtain evidence or perform other judicial acts to the competent court in the requested Member State.

1.3.2.1.1. Transmitting and receiving agencies

By way of derogation from the principle of decentralisation, Article 3 provides that the Member States may declare that they have designated for their entire territory a single agency – a court or some other authority – to act as a transmitting agency and a single body to act as receiving agency, or may confer both tasks on one and the same agency.

Federal States and States with autonomous territorial entities may designate more than one transmitting or receiving agency.

1.3.2.1.2. Central authorities

The Regulation (Article 4 thereof) also provides for the establishment of central authorities which are not responsible for the actual transmission process but have the job of supplying information to the requesting and requested agencies and resolving difficulties concerning transmission requests.

In exceptional cases (Article 4(1)(c)) the central authority may forward a request to a competent court when asked to do so by a requesting court or a transmitting agency. However, the Regulation does not describe cases which may be regarded as exceptional.

1.3.2.2. Transmission of documents

Transmission between the competent courts of the Member States shall be carried out directly, as quickly as possible and by any appropriate means (Article 7). The Regulation does not list means of transmission and each body involved may select any of the procedures allowed under the laws of its Member State. The forwarded request shall be accompanied by the appropriate form (Article 5), completed in the official language (or one of the official languages) of the requested Member State or in some other EU language which the requested State has indicated it can accept (Article 6)). The text of the form does not require translation.

No legalisation procedure is required as regards requests for transmission and the documents accompanying them.

However, the flexibility of the procedure (freedom of choice as regards means of transmission) must not cause any inconvenience to the person to whom the request is addressed. Hence the means of transmission used must ensure that the document received accurately reflects the content of the document forwarded and that all information in it is

legible (Article 7(1)).

Article 19 allows for judicial acts to be performed by diplomatic officers or consular agents under agreements between the Member States.

1.3.2.3. Receipt of the request

1.3.2.3.1. Requirement for prompt action

The requested court shall send an acknowledgement of receipt to the requesting court within seven days of receipt of the request (Article 8).

1.3.2.3.2. Failure to comply with the terms and conditions of transmission and content

If the request is drawn up in a language other than the official language (or one of the official languages) of the requested Member State or in a language which the addressee does not understand, or if the request does not accurately reflect the content of the document forwarded or is not legible, the requested court may point out in its acknowledgement of receipt the fact that the request does not comply with the required conditions (Article 8(1)).

Where the execution of the request does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the competent court of its Member State and shall inform the requesting court or, where appropriate, the transmitting agency, using the form contained in the Annex.

If a request cannot be executed because it does not contain all of the necessary information, the requested court shall inform the requesting court thereof within two weeks of receipt of a request (once again by using a form contained in the Annex) and shall ask it to send the missing information (Article 9).

1.3.2.4. Execution of the request

1.3.2.4.1. Requirement for prompt action

As in the case of the acknowledgement of receipt, the requested court is required to execute the request as quickly as possible. If the request cannot be executed within two months (Article 10(1)) the requested court is required to inform the requesting court of this delay in the execution thereof and to indicate both the reasons for the delay and the amount of time needed for the request to be executed.

1.3.2.4.2. Principle of the applicability of the law of the Member State within which the requested court is located.

The Regulation stipulates that the law applicable to the execution of the request by the requested court shall be the law of that court's Member State (Article 11). The requesting court may call for the request to be executed in a particular way, including sound and image recordings made using modern communications technology.

The principle of *lex fori* is also established as regards the use of coercive measures (Article 12) and any refusal to execute the request (Article 13).

1.3.2.4.3. Costs

The principle is applied whereby the services provided by the authorities of the requested State shall be free of charge (Article 16). On the other hand the requested court has the right to claim reimbursement from the requesting court of the costs occasioned by the use of a special procedure called for in the request.

1.3.3. Final provisions

1.3.3.1. Implementation of the regulation

1.3.3.1.1. Monitoring role to be played by the Commission

The Commission's role is to perform the practical tasks which are essential to the implementation of the Regulation, namely (Article 17):

- drawing up and updating a manual to be made available to courts;
- drafting any amendments to be made to the various forms used.

In the performance of these tasks the Commission shall be assisted by an advisory committee (Article 18).

1.3.3.1.2. Review of the Regulation

Three years after the Regulation comes into force and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application thereof (Article 22).

1.3.3.2. Agreements between Member States and transitional arrangements

1.3.3.2.1. Agreements between Member States

The Regulation takes precedence over provisions laid down in international agreements and conventions to which the Member States are party, in particular the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters. However it does not prevent the Member States from adopting or retaining specific provisions designed to simplify or speed up the execution of requests for the performance of judicial acts, provided that those provisions are compatible with the Regulation.

1.3.3.2.2. Temporary or specific arrangements

Unlike the Hague Convention and Council Regulation (EC) No 348/2000¹, this Regulation does not allow any derogations other than a temporary or specific arrangement which must be notified to the Commission and which allows a single court or other authority to be designated as transmitting and/or receiving agency (Article 3(1)(a)).

¹ see footnote on p. 8

1.3.3.3. Data protection

The purpose of Article 20 is to ensure that personal data are used exclusively for the purpose for which they were transmitted, and also to ensure that such information remains confidential and that the persons concerned are entitled to be informed of the use made of such data.

1.3.4. Conclusions

1.3.4.1. The initiative put forward by the Federal Republic of Germany represents a significant advance over the 1970 Hague Convention. The proposed system for the transmission of judicial documents between courts in the requesting and the requested Member States should make it possible to speed up the procedure for the execution of requests from courts in other Member States (thanks to the obligation to acknowledge receipt of the request within seven days or the requirement to execute it within two months).

The system is also a simpler one which cuts out costs. One improvement over the Hague Convention is that the interests of the requested court are protected (the content of the transmitted request must be accurately conveyed). In addition, the system has a number of very useful practical features (such as a manual for use by interested parties), and the way in which it functions will be monitored and updated by the Commission.

1.3.4.2. However, certain provisions contained in the Regulation are open to criticism insofar as they restrict or pointlessly hamper the application of the system proposed for the transmission of requests. For example, the need to continue to allow judicial acts to be performed in other Member States by consular or diplomatic agents may be questioned. Such provisions may slow down the transmission of requests for judicial acts to be performed in other Member States, which is the exact opposite of what the Regulation is principally intended to do.

1.3.4.3. Lastly, there is insufficient coordination with Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters¹, particularly in situations in which a court requires testimony to be given in the court of another Member State. In such cases it is not clear whether or not it will be possible to use the simple, speedy service procedure provided for in the above regulation or, should the latter not be applicable, what law *is* applicable to the service documents (the law of the requesting court's Member State or the law of the requested court's Member State).

¹ see footnote on p. 8