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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

***Accompanying the document***

**Proposal for a**

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending 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**

{COM(2018) 378 final} - {SEC(2018) 271 final} - {SWD(2018) 284 final}

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## 1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

The EU has the task to develop the European area of justice in civil matters based on principle of mutual trust and mutual recognition of judgements. The area of justice requires judicial cooperation over the borders. For this purpose, and for the proper functioning of the internal market, the EU has adopted legislation on cross-border service of judicial documents[1] and on cooperation in taking of evidence[2]. These are crucial instruments to regulate judicial assistance in civil and commercial matters between the Member States. Their common purpose is to provide an efficient framework for cross-border judicial cooperation. They have replaced the earlier international, more cumbersome system of Hague conventions[3] between the Member States[4].

This legislation on judicial cooperation has a substantial impact on the everyday lives of EU citizens in their private capacity or business activity. It is applied in judicial proceeding having cross-border implications; its proper functioning in these concrete cases is indispensable for ensuring access to justice and a fair trial for the parties to the proceedings (e.g. the lack of proper service of the document initiating proceedings is by far the most often used ground for refusing the recognition and enforcement of judgments[5]). The efficiency of the framework of international judicial assistance has, therefore, a direct impact on the perception of the citizens involved in such cross-border disputes on the function of the judiciary and the state of the rule of law in the Member States.

Smooth cooperation between courts is also a necessary ingredient for the proper functioning of the internal market. In 2018, there are in the European Union approximately 3.4 million civil and commercial court proceedings with cross-border implications.[6] In many of these proceedings, the taking of evidence and service of documents in another Member State are of high importance for ensuring a proper administration of justice. The following numbers demonstrate the relevance of the Regulations: in the area of commercial law, the number of problematic transactions in business to consumer relations within the EU amounts to 18.6 million per year, whereas the number of cross-border disputes between EU businesses reaches a 1.2 million annually. In the area of family law, available figures relating to cross-

1 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, pp. 79-120.

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, 27.06.2001, pp. 1-24.

3 The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

4 The Regulations apply to all EU countries except Denmark. Denmark has concluded a parallel agreement on 19 October 2005 with the European Community on the service of judicial and extrajudicial documents in civil or commercial matters, which extends the provisions of the Regulation on service of documents and its implementing measures to Denmark. The agreement entered into force on 1 July 2007.

5 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 (carried out by a consortium led by MPI Luxembourg), final report, June 2017, pp.60-61 (not published yet).

6 2018 Deloitte study.

border legal situations are also high: yearly 250.000 to 310.000 new international marriages are concluded in the EU, whereas the number of international divorces is between 100.000 and 140.000 . Up to 230.000 children are born every year to international couples within the EU and there are up to 588.000 successions with cross-border elements .

This shows the importance of constant improvements in this area to make it easier for citizens and businesses to enforce their rights throughout the EU.

The EU Justice Agenda for 2020 stressed that, in order to enhance mutual trust between the justice systems of the Member States of the EU, the need to reinforce civil procedural rights should be examined, for example as regards the taking of evidence.[7] The aim of improving the framework of judicial cooperation within the EU is also in line with the objectives of the Commission set by the Digital Single Market Strategy[8]: in the context of e-Government, the Strategy expresses the need for more actions to modernise public (including judicial) administration, achieve cross-border interoperability and facilitate easy interaction with citizens.

In its Political Guidelines, President Juncker has defined the need for a better judicial cooperation among one of the 10 priorities of the Commission: "as citizens increasingly study, work, do business, get married and have children across the Union, judicial cooperation among EU Member States must be improved step by step... so that citizens and companies can more easily exercise their rights across the Union".

In line with this, the Commission has committed in its work programme for 2018 to prepare proposals revising the Regulation on taking of evidence and the Regulation on service of documents.[9]

Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is an important instrument for the European judicial cooperation given that it is often crucial to present sufficient evidence to the court to prove a claim. Regulation (EC) 1206/2001 establishes an EU-wide system of direct and rapid transmission of requests for the taking and execution of evidence between courts and establishes precise criteria as to the form and content of the request. In particular, the Regulation represents a big step forward to

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This latter is a multilateral treaty signed in The Hague on 18 March 1970, which establishes methods for provision of testimony and documents between a signatory state where evidence

[7] The EU Justice Agenda for 2020 Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, p. 8.

[8] COM(2015) 192 final of 6.5.2015, p. 16.

[9] Commission Work Programme 2018 – An agenda for a more united, stronger and more democratic Europe, COM(2017) 650 final of 24.10.2017, Annex II points 10 and 11.

is sought and another signatory state where evidence is located, for use in judicial proceedings in the requesting state. The Convention provides for the taking of evidence by means of: letters of request and diplomatic or consular agents and commissioners. Evidence is obtained by issuing a letter of request to the designated central authority of the signatory state where the evidence is located. In contrast with this system, the Regulation -put in place a modern and efficient system of direct dealings between courts (transmission of requests and of re-transmission of the evidence taken), and replaced between Member States the cumbersome Hague system in which requests were transmitted from the court in Member State A to the central body in Member State A, then to the central body in Member State B and finally to the court in Member State B (and the same way back). It furthermore allows for the direct taking of evidence by courts in other Member States.

This Impact Assessment was developed on the basis of the findings of the retrospective evaluation of Regulation (EC) 1206/2001 (with which it was developed back to back) – whose results are included in Annex E.

It is also closely linked to the back to back Evaluation and Impact Assessment of Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) which was developed in parallel. The two initiatives are closely interlinked between themselves as they suggest similar options in relation to digitalisation for service of documents and taking of evidence as the two main pillars of judicial cooperation. They are also both closely linked to the overall Commission priority of digitalization and e-Justice and builds upon and benefits of already existing EU outputs and legal standards (e-CODEX, eIDAS Reg etc.). They further follow the suit of parallel work in the field of criminal justice in order to create a level playing field in the areas of criminal and civil justice alike. The Commission has recently adopted a proposal providing for a *legislative framework on e-evidence*, based on the Council's request in its June 2016 conclusions, for the Commission to develop a platform with a secure communication channel for digital exchanges of requests for electronic evidence under the Directive on the European Investigation Order. This initiative is also closely interlinked with e-CODEX, since Member State experts participating in the development of the platform reached the conclusion, after considering different options, that the e-CODEX system would be the most suitable system to be used for such an exchange of electronic evidence.

A series of activities were launched to help evaluate the Regulation, through Commission studies and reports, as well as discussions within the European Judicial Network in civil and commercial matters (EJN):

2012:

- Study on the application of articles 3(1)(C) and 3, and articles 17 and 18 of the 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

(launched by the Commission, carried out by Mainstrat and the University of the Basque Country) – final report adopted in June 2012[10];

2013:

- 20 November 2013: meeting of the EJN dedicated to the evaluation of the application of the Regulation on taking of evidence;

2014:

- Extensive questionnaire (containing more than 50 questions, prepared in collaboration with the EJN) to the Member States concerning the practical operation of the Regulation on taking of evidence.

2016:

- Study from a consortium led by University of Maribor (SI) which delivered a comparative analysis of the law of evidence in 26 Member States (through an action grant under the EU Justice Programme, finished in spring 2016[11])
- 14-15 November 2016: dedicated meeting of the EJN addressing practical problems and possible improvements of the Regulation;

2017:

- A Commission study evaluating 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 (carried out by a consortium led by MPI Luxembourg, whose final report was delivered in June 2017[12]).
- 30 November – 1 December 2017, Tallinn: dedicated meeting of the EJN addressing practical problems and possible improvements of the Regulation.

2018:

- Broad scale on-line public consultation conducted by the Commission which received 131 replies.

This list of evaluative activities was complemented by research and work carried out by the other institutions of the EU, as well as by external actors. In this respect, an own-initiative report was adopted by the European Parliament on 4 July 2017 on common minimum standards of civil procedure in the EU which contains provisions related to the acceptance of modern communication technology both for service of documents and for taking of evidence Overall, Parliament stressed the need for legislation to provide for a set of procedural standards applicable to civil proceedings which would serve as a first step for convergence of national regulations concerning civil procedure in general and called on the Commission to proceed with the delivery of its action plan for the implementation of the Stockholm

[10] Available at http://ec.europa.eu/justice/civil/files/final_report_1206_en.pdf.

[11] See project website: http://www.acj.si/en/presentation-evidence.

[12] Available at https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en.

programme adopted by the European Council in the area of freedom, security and justice.The European Parliament's report contains provisions related to the acceptance of modern communication technology both for service of documents and for taking of evidence; furthermore it proposes common minimum rules e.g. on the eligible means of substituted service of documents or on evidence taking through videoconferencing, or by court appointed experts.

Demand for improvements, in particular in relation to digitalisation, has also been formulated by Member States in the evaluation of the Directive, amongst others in discussions in the European Judicial Network for civil and commercial matters but also in other for a. In particular, the Council Working Party on E-Law set up an expert group assessing issues of electronic service under the existing legal framework. The Working Party on e-Law led by FR has just finished its work and presented a draft report to the CWP. This document (WK 4519 2018 REV 1 of 24 April 2018) confirms in several points the existing obstacles to cross-border electronic service of documents under the current Regulation.

It is also worth mentioning the ongoing ELI (European Law Institute) and Unidroit (International Institute for the Unification of Private Law) project "From Transnational Principles to European Rules of Civil Procedure" which involves specific work on service of documents and taking of evidence. [13]

## 2. PROBLEM DEFINITION

### 2.1. Problem tree

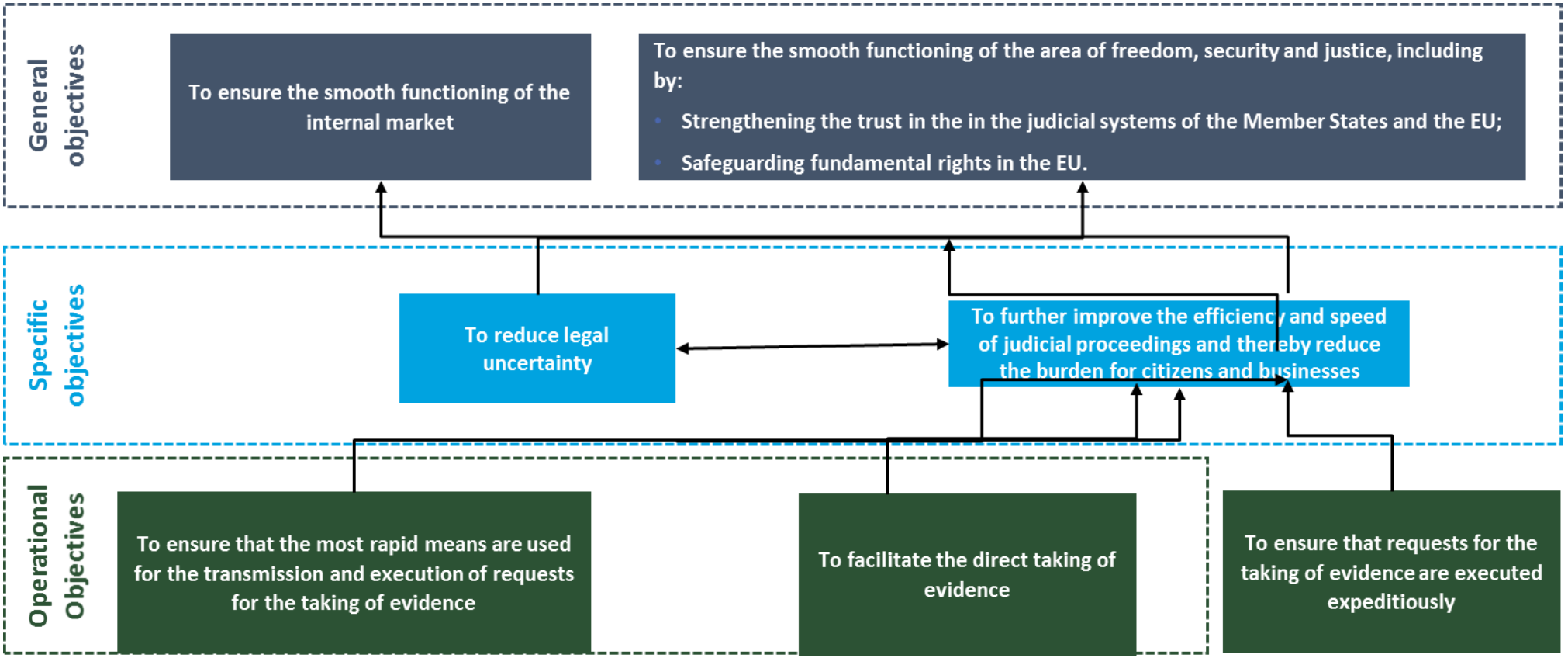
The problems, their causes and effects are presented below by means of a problem tree, which serves to illustrate the problems faced by EU citizens and businesses due to current limitations or shortcomings in the Regulation, the causes of these problems and their effects.

The issues identified at the bottom of the so-called 'problem tree' are considered to be the root causes/drivers of the problems that ensue for citizens. Ultimately, the problems have effects at the level of overarching EU objectives. The figure should thus be read from the bottom to the top.

In the following sub-sections, each element of the problem tree is examined in further detail, starting with the causes/drivers of the problem and the resulting problems for citizens. It should be noted that the problems identified in this section are those which were evidenced in the parallel evaluation report on this Regulation. Both the evaluation and the impact assessment reports are based on data collected for both reports.

[13] Related documents are available here: http://www.unidroit.org/work-in-progress-eli-unidroit-european-rules

**Figure 1: Problem Tree**




*Source: Deloitte*

## 2.2. What are the problems?

The main problems identified are shortcomings in the protection of rights of defence, legal uncertainty, and delays and undue costs for citizens and business. The identified shortcomings also lead to delays and undue costs for public administrations.

### *2.2.1. Shortcomings in the protection of rights of defence and legal uncertainty*

Legal uncertainty can be caused by diverging interpretations if and when the Regulation or other means in national law may be used in the current situation where the Regulation and national law sit alongside one another and courts can choose between them when they have to take evidence abroad[14]. Legal certainty can also derive from diverging interpretations by national authorities of the terms "courts" under the Regulation and of what kind of judicial actions constitute "taking of evidence" under the Regulation. Currently, there is no streamlined interpretation of this concept among the Member States: some of them only consider traditional tribunals as covered, whereas others accept a more open approach and accept and execute requests coming from judicial authorities other than courts (notary publics, social welfare or guardianship authorities, enforcement authorities), if these are empowered by law to proceed in civil or judicial matters

In practice, these aspects may also cause stress, costs and delays for citizens, businesses, and public administrations. It is expected that this burden will increase in line with the expected increase of courts' case load under Regulation (EC) 1206/2001 until 2030.[15]

### *2.2.2. Delays and undue costs for citizens, businesses and public administrations*

All types of legal proceedings – in one form or another – put a burden on the parties involved, such as:

- Time taken to conclude the case;
- Court fees;
- Costs for legal advice;
- Travel costs and time taken to travel (e.g. to travel to a hearing);
- Fees for expert judgment;
- Costs for the translation of requests and/or evidence (e.g. testimonies) as well as interpretation;
- Stress related to the taking of evidence (including e.g. based on delays).

Since all types of legal proceedings put a burden on the involved parties and stakeholders, it is important to avoid undue costs and delays. Hence, citizens and businesses do not suffer particularly from the problem of high costs and long delays per se – but from costs and delays that could have been avoided (and thus can actively be reduced).

[14] The evaluation provides detailed information on the relationship between the Regulation and national law and the resulting significant but limited uptake of the Regulation.

[15] See for more detail point 3. of the evaluation report.

The evaluation has shown that there is room for improvement regarding the efficiency of the processes provided for under the Regulation (i.e. the relationship between its benefits and the burden it puts on stakeholders) to remove undue costs and delays within different types of legal proceedings. According to the most of the stakeholders consulted, most national courts in cross-border cases still avoid resorting to the Regulation and summon the witness or other person to be heard directly to the court. This predilection is caused not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of the evidence. Furthermore, the language issue appears recurrently: The need to translate the form (and the questions) into a language accepted by the requested Member States raises problems with the accuracy of the translation itself and with the costs. It has also demonstrated that the absence of the use of modern technology in the communication between entities is a key component of the problems in this area and stronger use holds significant potential for improvements.

The length of the procedure is perceived to be a problem for citizens, businesses, and the public administration. More specifically, there is room for improvement with regard to delays and costs in relation to:

- Respecting the time limits of the Regulation;
- Using the means to conduct a hearing that are most suitable for each hearing under EU and domestic procedural law; and
- Use of paper-based communication outside of hearings.

The extent to which these aspects are actual problems depends, however, on the specific legal proceedings at hand and can hardly be assessed across the board. The reason for this is that each legal proceeding is different and factors that may cause detriment in one legal proceeding may be perceived as irrelevant in another or even as positive at best (e.g. depending on the point of view of the involved parties).

The time limits provided for under the Regulation are often not respected. This is something the European Commission already identified as an issue it its 2007 report on the application of the Regulation. Stakeholders, the online survey and (to some extent) also the open public consultation have reaffirmed that there is still room for improvement with regard to respecting the time limits today. 6 out of 7 stakeholders indicated in the online survey that civil or commercial cases involving the taking of evidence in other EU Member States take longer than six months (4 respondents indicated that the average length exceeds 12 months). This can be compared to the 90 days limit set by the Regulation.

The current differences regarding delays of and costs for legal proceedings between Member States are due to the different domestic procedural law and administrative capacity.

Whereas in some Member States witnesses can be questioned (with prior consent) via tools such as Skype or even email, other Member States require that persons are physically present in the court. There are advantages and disadvantages to both approaches and neither one can be regarded as better than the other:

The physical hearings can often be challenging to organise, as schedules of different stakeholders need to be aligned, court rooms need to be available, and the witness (or his / her representatives) need to show up in court. This may be a source of delays and costs within the process itself.

However, physical hearings – compared to e.g. Skype hearings or even videoconferencing – can guarantee that the witness is (at least physically) free to give the testimony while the judge or judicial officers can connect to the person emotionally, better observe gestures and other non-verbal communication in order to steer the hearing within an appropriate direction.

In that sense, it is important that judges and judicial officers need to use the means appropriate for a specific legal proceeding and find the appropriate balance between the two alternatives – especially since evidence may be harder to obtain in some cases than in others (e.g. in cases involving children or high profile commercial cases).

Overall, the problems that the time limits of the Regulation are not respected, and that there are means to conduct a hearing that are more suitable for particular hearings than those covered by the Regulation are expected to remain relevant in the future. In addition, paper-based communication outside of hearings is also expected to remain of relevance. These problems are expected to cause citizens and businesses stress, delays, and costs in the future.

Furthermore, there are differences between Member States with regard to the availability, and the potential and actual use of videoconferencing in courts. The use of videoconferencing has increased over the last years across Member States, in particular in Member States such as Portugal or Sweden. It has been estimated that between 2001 and 2017, on average, up to 3,600 hearings were held per annum via videoconference with videoconferencing being far less frequent in the early 2000s than today. The number of videoconferences is expected to increase until 2030 to up to 4,600 hearings per year on average (again, videoconferencing is expected to be more frequent in 2030 than today).[16]

It is also perceived as a problem that Member States are using different types of videoconferencing systems that are not necessarily interoperable from a technical and legal perspective today. These differences are expected to scale up until 2030. The costs for videoconferencing are expected to decrease incrementally over the next years – both in relation to one-off costs to procure the facilities, as well as in relation to recurrent costs to operate them (e.g. based on the costs incurred for sufficiently fast internet connections). It is, however, not clear how they will develop realistically. However, costs related to interpreting videoconferences, transcribing them, and translating the transcripts are not necessarily expected to decrease in the future compared to today. This will largely depend on the take-up and use by courts of Artificial Intelligence that can simultaneously translate and record oral speech.

The increased take-up of videoconferencing is expected to increase challenges and practical problems to organisation and scheduling as it is already today a problem that

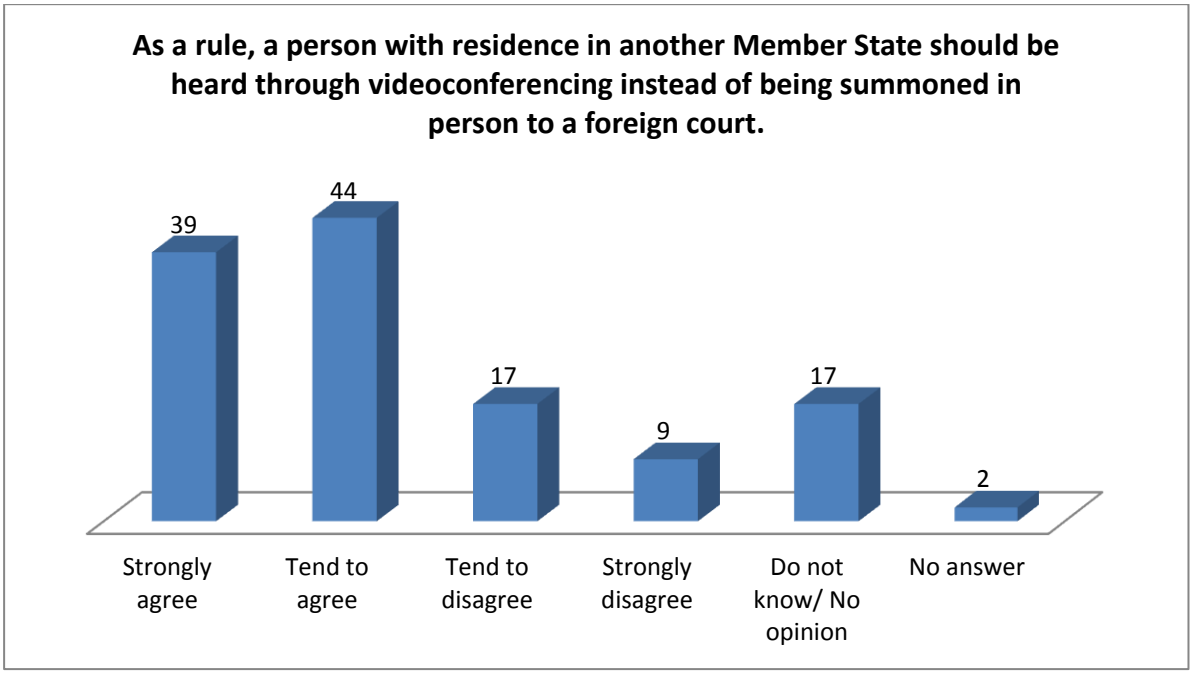
[16] Source: Deloitte study.

videoconferencing facilities are largely pre-booked in advance and there is no capacity to take evidence on comparatively short notice.

Thus, without the use of a smart booking system (at the national) level, challenges for the organisation of videoconferences will remain.

The public consultation conducted by the Commission shows significant support for an increased use of video-conferencing:

**Figure 1:**




*Source: Public consultation conducted by the Commission.*

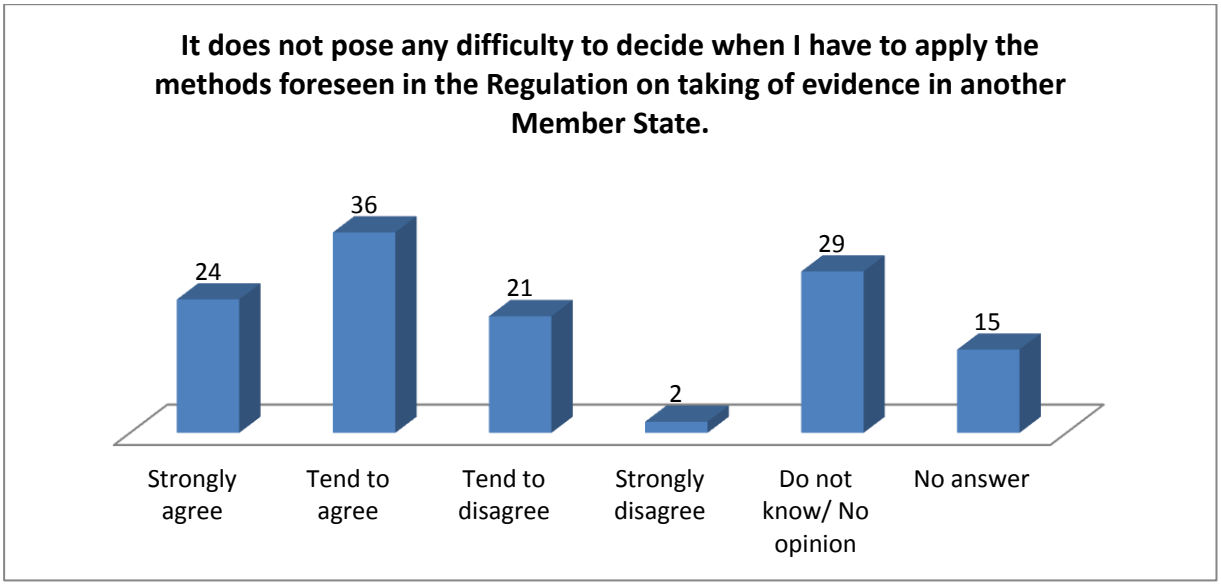
## 2.3. What are the problem drivers?

### *2.3.1. Preparation of the request and taking of evidence and transmission of the request*

The public consultation conducted by the Commission has shown that the Regulation which is used in a lot of cases with a substantial growth rate is considered a success by stakeholders and has provided EU added value. Only a minority of stakeholders considered the channels for taking evidence under the Regulation too cumbersome. A large majority of stakeholders stated that it does not pose any difficulty to decide when they apply the Regulation, as the figure below shows.[17]

[17] Most answers to the public consultation cam from courts, national representative organisations or representations of legal professions and national public authorities.

**Figure 2**




*Source: Public consultation conducted by the Commission*

There is, however, room for improvement with regard to several aspects:

A cause of delays or additional costs is that **communication between competent courts and authorities is to a large extent non-electronic**. A majority of courts only accept paper-based requests via post or fax. Only six Member States accept requests via email in general and another five Member States accept emails for certain types of requests or communications. According to interviewees, email addresses are frequently not provided by the requesting court and may not be found by the requested court. Since this form of communication is not widely accepted, the process to rectify requests was reported to be time-consuming and "very frustrating" (as one central body explained). The only option in these cases is to return the request, which is seen as ineffective and considered a waste of time and resources. The **European Union of Judicial Officers** (UEHJ) admitted that e-Codex is an excellent tool for communication and it should be promoted. The **Chamber Européen des Huissiers de Justice** (CEHJ) supported the move towards electronic transmission of documents to be served or evidence, as it will allow rapid management of judicial cooperation. The Council of Bars and Law Societies of Europe stresses that in order to avoid different models being developed that it would like to see the e-CODEX infrastructure being used only in cross-border e-justice initiatives based on interconnection of judicial systems as well as communications by stakeholders in justice, such as servicing of documents or exchanging evidence. It also underlined that it would be very useful to have EU-wide minimum standards to ensure that national e-justice systems are able to guarantee rights to a fair trial.

The public consultation of the Commission confirmed these findings, and the need for improvement:

**Figure 3**

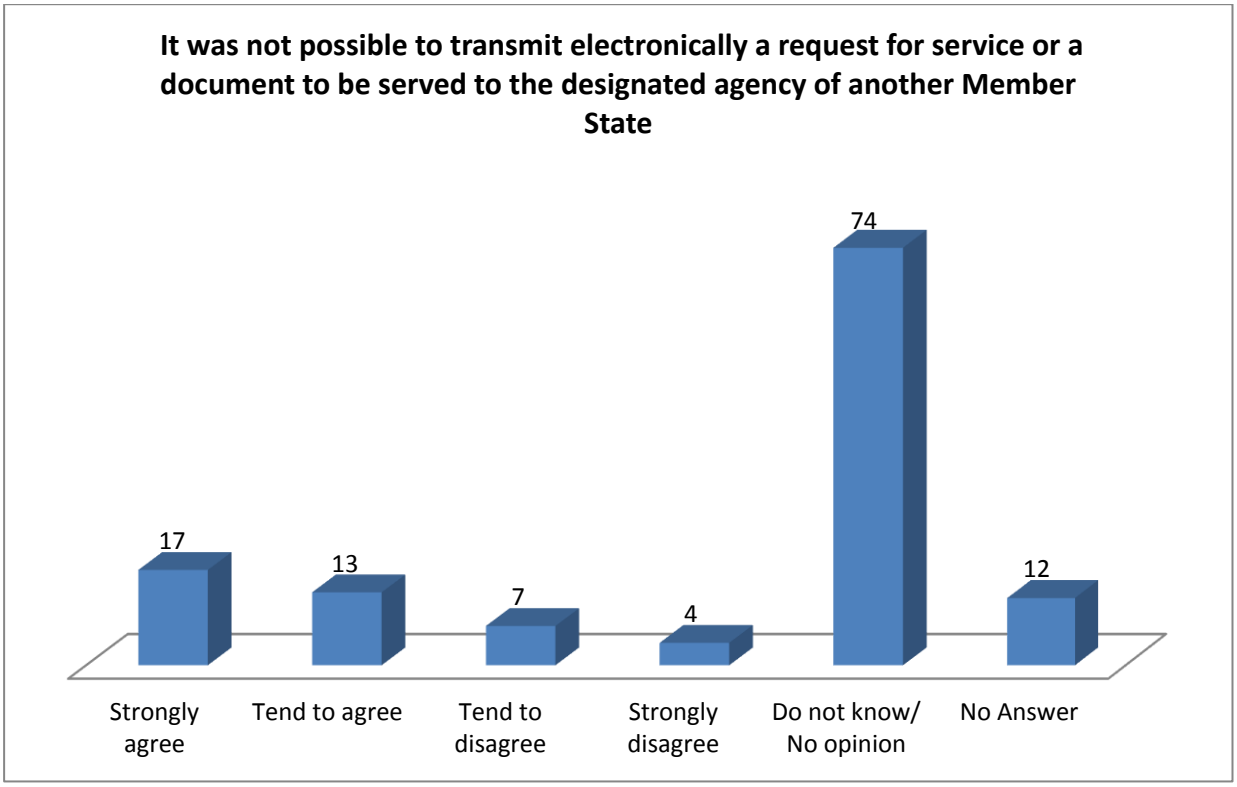



**Figure 4**

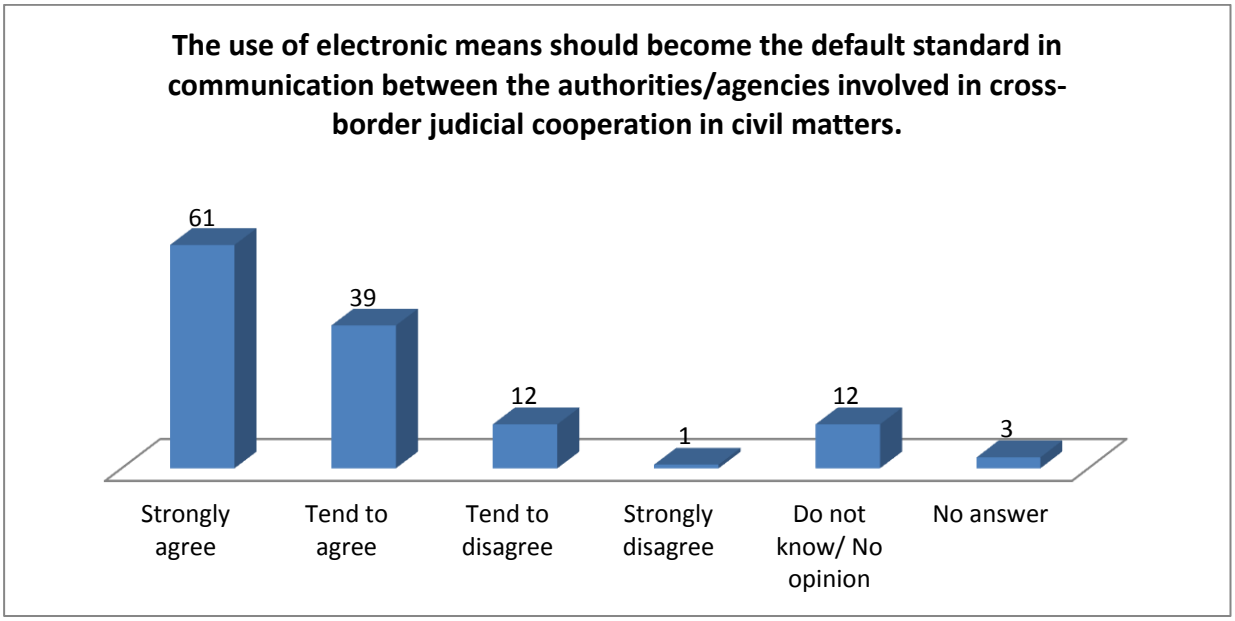
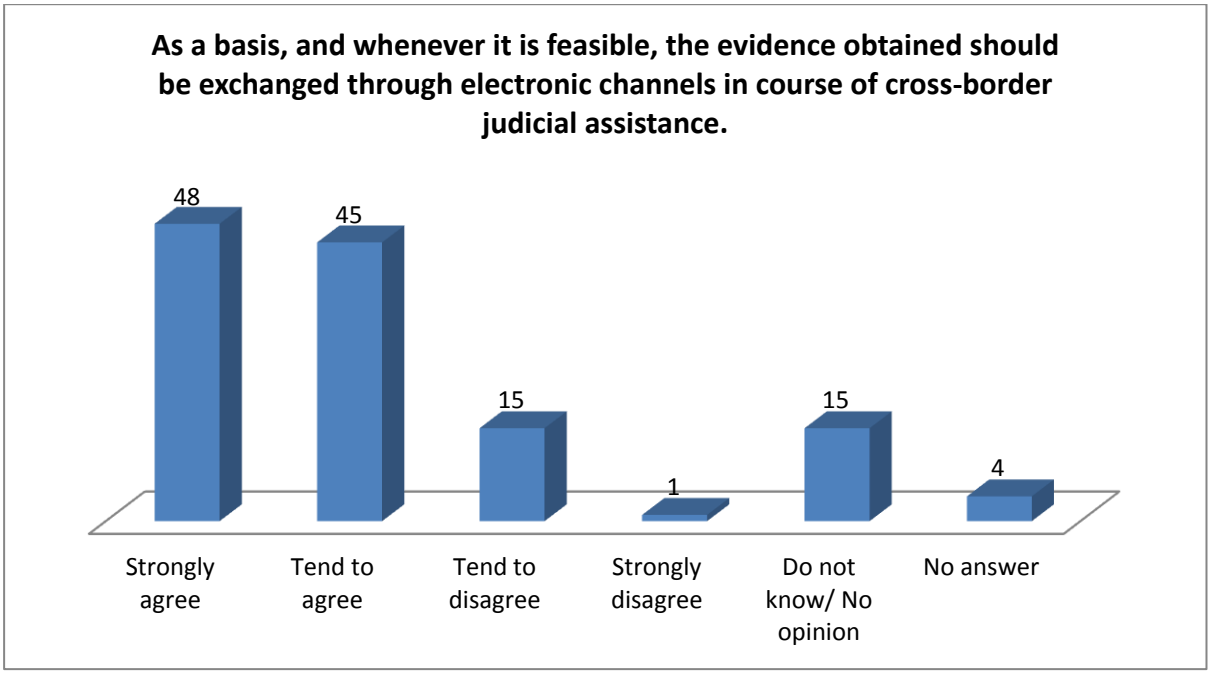


**Figure 5**




*Source: Public consultation conducted by the Commission*

Some experienced **uncertainty whether the Regulation or other means in national law may be used.** For instance, interviewees stated that its content and scope or the relationship to other instruments is not always clear, which contributes to legal uncertainty or delays. For example, the question has been raised by courts in Estonia when national methods for the takings of evidence may be used instead of those prescribed in the Regulation. A study carried out by the Max-Planck Institute Luxembourg in 2017 found that differences in national procedural rules on the taking of evidence may have led to refusals of requests to take evidence under the Regulation.[18] Furthermore, such differences may have led to the non-recognition of judgments in the past, as courts used the possibility to object judgments based on public policy, if the standards of taking evidence were not in line with requirements under national law.[19] This would be in conflict with the aim of facilitating smooth cross-border proceedings and a smooth recognition of judgments.

Several judges stated that their motivation to remain aware about the Regulation is low, given their high workload in domestic cases and the irregular occurrence of cross-border cases. This leads to a preference to apply other, more familiar instruments available under national procedural law also in cross-border cases.

[18] European Commission (2017), 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 (JUST/2014/RCON/PR/CIVI/0082), Strand 1: Mutual Trust and Free Circulation of Judgments, mn. 244-245, https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

[19] *Ibid.*, mn. 256.

At the same time, a number of frequently used channels, such as taking of evidence through consular agents, or diplomatic officers are not explicitly acknowledged by the Regulation itself. However, methods under national procedural law were considered by some stakeholders to be "just as effective" in most cases. In addition, interviewees considered them at times more efficient to obtain the desired results.

These findings tend to confirm that although the non-mandatory nature of the Regulation and the availability of national law as an alternative avenue for taking evidence abroad is not per se an obstacle to the efficiency of the overall system of cross-border taking of evidence in the EU and may even contribute to better performance by making available more efficient methods not included in the Regulation, this parallel structure also creates a number of problems.

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.[20] A related cause of legal uncertainty and delays is the possibly diverging understanding of what kind of judicial actions constitute "taking of evidence" under the Regulation. For instance, the definition of the term "evidence" was raised as one of the main issues in the Commission's report on the application of the Regulation.[21]

### *2.3.2. Decision about the validity of a request*

One cause for delays (and ensuing costs for parties involved in proceedings) may be that no acknowledgement of receipt of a request from the requested court is received (or only with a delay). This concerns cases in which the taking of evidence through a competent court is requested and an acknowledgement of the receipt (using Form B) needs to be provided. According to interviewees, it is rarely returned within seven days, as stipulated by the Regulation. On the one hand, interviewees explained that this, for instance, is due to the time required for postal delivery – here again the lack of electronic communication has adverse impacts. On the other hand, interviewees mentioned instances where the internal processing of requests was not possible within the given time-frame. In cases, where direct taking of evidence is requested, no such confirmation of receipt is required. Instead, the central authority has to communicate within 30 days whether the request is accepted or refused. The obligation to obtain a prior authorisation of direct taking of evidence by the central authority was considered a potential cause of delays by some interviewees.[22] Regardless of the channel

[20] As a result, a standard letter explaining the status of notaries in the Hungarian legal system is attached to requests to take evidence, which has helped to facilitate the process.

[21] Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 2.

[22] In any case, the coordination of hearings and other forms of direct taking of evidence abroad was already considered to be potentially more demanding and time consuming for a requesting court.

for which the request was specified, the requesting courts can do nothing to ensure an effective and expedite processing (and execution) of requests, according to the interviewees. The Regulation specifies no consequences or further means to address this type of situations.

#### *2.3.3. Taking of evidence*

Concerning the procedures, stakeholders often cited the example of direct taking of evidence via telephone or videoconferencing. In some Member States, these procedures are either not permitted or significant administrative or technical obstacles may cause delays.[23] For instance, the availability of videoconferencing facilities or technical staff may be the bottleneck preventing a swift hearing.

Delays or additional costs after a request were also caused if the requested method of taking evidence is not available in the requested Member State. This concerns contents and formats as well as the procedures to obtain evidence. For instance, several courts cited examples in which evidence in the form of social welfare reports could not be obtained in custody cases. Here, the need to find and prepare an adequate substitute (e.g. reformulate information needs into questions for a physical hearing) was mentioned as a cause of delays and additional costs.

#### *2.3.4. Confirmation*

The use of modern technologies to communicate or exchange evidence electronically is still only permitted in few Member States. Likewise, interviewees reported legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State. On the one hand, the concept of "electronic evidence" is not defined at all or defined in different ways in different Member States. On the other hand, the transmission of evidence in electronic forms is not always permitted, i.a. because methods to verify digital signatures are not yet known or used by most requesting or requested courts. In addition, some Member States may not accept electronic evidence based on security concerns, as data storage mediums from external sources could contain viruses or other harmful software.

## 3. WHY SHOULD THE EU ACT?

### 3.1. Legal basis

The legal basis is Article 81 TFEU (judicial cooperation in civil matters having cross-border implications).Subparagraphs (b) and (d) of paragraph (2) of this Article grants the EU the power to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring the cross-border service of judicial and extrajudicial documents and the cooperation in taking of evidence.

[23] For instance, Swedish courts frequently use telephone conferences to hear witnesses or parties involved. This is rarely permitted in cross-border contexts.

### 3.2. Subsidiarity

The aim of the policy area concerning judicial cooperation in civil matters has been always be to establish a genuine area of justice, where judicial decisions circulate and legal situations acquired under one legal system are acknowledged within the EU across borders without unnecessary obstacles. This approach is based on the conviction that without a genuine judicial area the underlying freedoms of the single market cannot be fully exploited.

The problems to be tackled by the initiative arise in cross-border judicial proceedings which by definition transcend the reach of national legal systems and stem either from the insufficient level of cooperation between the authorities and officers of the Member States, or from the lack of interoperability and coherence of the existing domestic systems and legal environment. Rules in the area of private international law are laid down in Regulations because that is the only way to ensure the desired uniformity of rules. While nothing prevents Member States in principle from digitalising the way they communicate, past experience and the projection of what will happen without EU action shows that progress be very slow and that even where Member States take action, inter-operability cannot be ensured without a framework under EU law. The objective of the proposal cannot be sufficiently accomplished by the Member States themselves and can therefore be only achieved at Union level. The EU added value lies in further improving the efficiency and speed of judicial procedures, by simplifying and accelerating the cooperation mechanisms with regard to the taking of evidence and thus improving the administration of justice in cases with cross-border implications. Comparing with the Hague system, that provides for the taking of evidence by means of: letters of request and diplomatic or consular agents and commissioners, the Regulation put in place a modern and efficient system of direct dealings between courts (transmission of requests and of re-transmission of the evidence taken).

## 4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

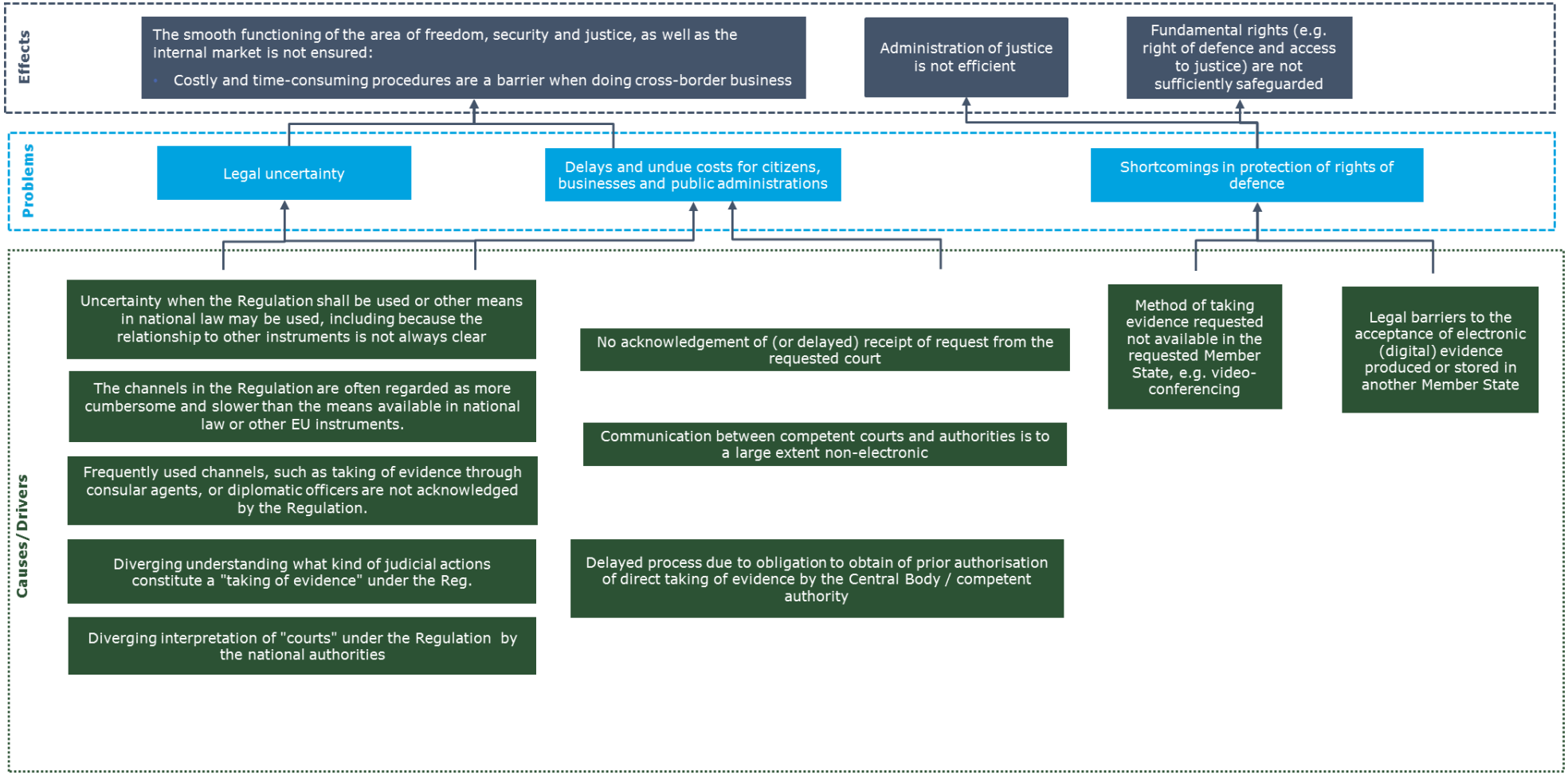
The policy objectives set out the political priorities and aims for action in the relevant field. They are an essential step of every impact assessment, including because they support the creation of a logical link between the identified problems and the solutions considered.

Policy objectives are normally identified at the following levels:

- **Operational objectives** concern deliverables or objectives of actions;
- **Specific objectives** relate to the specific domain and set out what the Commission wants to achieve with the intervention in detail; and
- **General objectives** refer to Treaty-based goals and constitute a link with the existing policy setting.

The following figure presents the policy objectives:

**Figure 6: Objectives Tree**




*Source: Deloitte*

• The **general objectives** are to ensure the smooth functioning of the area of freedom, security and justice by strengthening the trust in the judicial systems of the Member States and the EU and safeguarding the fundamental rights in the EU, and. •

The **specific objectives** are to further improve the efficiency and speed of judicial proceedings. The intervention should also reduce the burden for citizens and businesses involved in cross-border proceedings resulting from undue costs and delays, and reduce the level of legal uncertainty identified in course of evaluation of the Regulation.

• The **operational objectives** are

- to ensure that the most rapid means are used for the transmission and execution of requests for the taking of evidence, including modern technologies;
- to ensure that requests for the taking of evidence are executed expeditiously;
- to facilitate the direct taking of evidence.

## 5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

For each problem driver, a range of options from non-legislative to different levels of ambition of legislation has been identified. Because of the multiplicity of issues and options this assessment is based on a distinction between the core options as the most important building blocks of an initiative and other less central options. To focus this document on the most essential elements the core options, the use of the e-codex and the use of videoconferencing are shown in the table and fully assessed below. The other options are entirely dealt with in AnnexV.

**Overview of the core options and options for each sub-problem identified**

| *Baseline*<br>*Option 0* | *Non-Legislative*<br>*Option 1* | *Legislative*<br>*Option 2* | |
|---|---|---|---|
| | *Options* | *Options* | |
| **1. Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing** | | | |
| No policy change apart from what is already underway or currently planned | 1.1. Awareness raising of courts on existing ways and procedures and examples of the benefits of using and accepting digital methods, as well as the adoption of electronic systems in courts | ***Mixed legislative and non-legislative option***[24]<br>***1.2 (a) Using VC, telephone-conferencing or other means of distant communication, as a rule, if a person needs to be heard from another MS (subject to availability of equipment at the court), 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. National law on the taking of evidence through VC in purely internal situations remains untouched.***<br>**+**<br>***1.2 (b) Incentivise Member States to equip courts with VC facilities by co-financing some national projects for furnishing courts with equipment from EU programmes.***[25] | |
| **2. Paper-based communication between courts is time-consuming and costly, and**<br>**3. Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State** | | | |
| No policy change apart from what is already underway or currently planned | 2.1. Sharing of best practices between MS (designated authorities) on e-communication and electronic exchange of documents under the Regulation | ***2.2 (a) CEF eDelivery (eCodex) should be the default channel for electronic communication and document exchanges between the agencies/courts designated under Regulation (EC) 1206/2001 (as well as the Service Regulation). E-communication should replace, as a general rule, paper workflows.*** | 6.3 Obliging designated authorities/courts under the Regulation to use certified e-mails (furnished with qualified e-signatures) for their communications and exchange of the documents. |

[24] Sub-option 4.2. is assessed as a hybrid option, as financing national projects requires legislation to design and execute a financial programme. Thus, it combines elements of a non-legislative and legislative option.

[25] Possibly, this sub-option might be complemented with the following point, which would then also need to be assessed: *4.2 (c). Detailed provisions on the procedure for arranging a cross-border VC, in line with the criminal EIO Regulation.*

| *Baseline*<br>*Option 0* | *Non-Legislative*<br>*Option 1* | *Legislative*<br>*Option 2* | |
|---|---|---|---|
| | *Options* | *Options* | |
| | | ***2.2 (c) Specify in the Regulation that:***<br>***(i) an evidence (e.g. declaration, testimony, authentic instrument) which is transmitted in form of electronic document through the appropriate communication system (see point 6)) should be considered as if it was transmitted in original (paper) version***<br>***(ii) the quality of evidence may not be denied in a civil proceedings from a digital evidence which is produced and preserved (stored) in another MS in accordance with the laws of that MS*** | |
| | 2.3. Obliging designated authorities/courts under the Regulation to use certified e-mails (furnished with qualified e-signatures) for their communications and exchange of the documents. | | |

*Source: Deloitte*

## 6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

This chapter presents the assessment of impacts of the individual options. It starts with an assessment of the options proposed for all high-priority issues. The preferred options are then combined into a "Preferred Policy Option", which is assessed against the baseline scenario (Option 1).

This section includes the assessment of the options proposed for all problems identified in the problem assessment. The different options are assessed using the following common assessment criteria:

***Assessment Criteria for assessment of the options***

| Criterion | Examples of elements to consider |
|---|---|
| **Effectiveness:** (i.e. extent to which the options address the policy objectives) | • Potential of the options to achieve the key policy objectives, in particular:<br>○ *To reduce legal uncertainty*<br>○ *To further improve the efficiency and speed of judicial proceedings*<br>○ *To improve access to justice and the protection of the procedural rights of parties to the proceedings*<br>○ *To reduce the burden from undue costs and delays for citizens and businesses involved in cross-border proceedings.* |
| **Efficiency** (i.e. cost-benefit balance) | • Main cost factors for various (public and private) stakeholders<br>• Main benefits for various stakeholders |
| **Proportionality** (i.e. extent to which the options are in line with what is needed to achieve the policy objectives) | • Assessment of whether the option goes further than what is needed, based on:<br>○ Scope of the option<br>○ Type of instrument proposed (e.g. hard law vs. soft measures) |

The assessment tables, organised per problem to be addressed, are presented in Annex A.

As a consequence of this "high-level" assessment, for all specific problems we retain one option which received the highest ranking among the options addressing the same problem. The combination of these retained options will compose the preferred "Policy Package", for which a detailed assessment (including a cost-benefit analysis, and analysis of various other impacts) will be carried out, in line with the Better Regulation Guidelines of the Commission.

The results of the assessment for the Preferred Policy Package can be summarised as follows:

| Problems | Option |
|---|---|
| **1. Uncertainty when the** | 1.3 (a)Defining other means of cross-border taking of evidence in the Regulation in addition to the existing two ways: acknowledging the |

| Problems | Option |
|---|---|
| **Regulation shall be used or other means in national or European law may be used (non-mandatory application of the Evidence Regulation) and**<br><br>**5. The ways of cross-border taking of evidence in the Regulation are often more cumbersome and slower than the means available in national law or other EU instruments** | ways supported by the CJEU as legitimate means under the Reg.:<br><br>(i) direct examination of facts in MS B by experts appointed by courts in MS A in accordance with the procedural rules of MS A, insofar this activity does not affect the sovereign powers of MS B > see C-332/11 ProRail<br><br>(ii) summoning foreign persons directly to the trial court (but whenever possible, VC should have priority) > see C-170/11 Lippens and others<br><br>+<br><br>1.3 (b) Regulate the taking of evidence through diplomatic officer or consular agent as a specific way of taking of evidence under the Reg., in line with relevant provision of the 1970 Hague Convention |
| **2. Diverging interpretation of "courts" under the Regulation by the national authorities** | 2.4. (a) Replacing 'courts' in Art 1 with 'judicial authorities'<br><br>+<br><br>2.4. (b) Providing a general definition of 'judicial authorities' (similarly to the Succession Regulation or the Maintenance Regulation) |
| **3. Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation** | 3.2 (a) Completing Art 1 'taking of evidence' with 'and other judicial acts' |
| **4. Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing** | 4.2 (a) Using VC, telephone-conferencing or other means of distant communication, as a rule, if a person needs to be heard from another MS (exceptions possible, including subject to availability of equipment at the court), 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. National law on the taking of evidence through VC in purely internal situations remains untouched.<br><br>+<br><br>4.2 (b) Incentivise Member States to equip courts with VC facilities through financing national projects for furnishing courts with |

| Problems | Option |
|---|---|
| | equipment from EU programmes. |
| **5. The ways of cross-border taking of evidence in the Regulation are often more cumbersome and slower than the means available in national law or other EU instruments** | 5.1 (a) Communicating the importance of the uniform standards provided by the Regulation (streamlined procedures, equal standard of protection of the right of the parties involved).<br>+<br>5.1 (b) Best practices for competent courts to help them to apply the procedures properly and without delay.<br>+<br>5.1 (c) Awareness raising to courts and other legal professionals of the availability of the direct channel of taking evidence under Art. 17. |
| **6. Paper-based communication between courts is time-consuming and costly, and**<br>**7. Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State** | 6.2 (a) CEF eDelivery (eCodex) should be the default channel for electronic communication and document exchanges between the agencies/courts designated under the Evidence Regulation (as well as the Service Regulation). E-communication should replace, as a general rule, paper workflows.<br>+<br>6.2 (c) Specify in the Regulation that:<br>(i) an evidence (e.g. declaration, testimony, authentic instrument) which is transmitted in form of electronic document through the appropriate communication system (see point 6)) should be considered as it was transmitted in original (paper) version<br>(ii) the quality of evidence may not be denied in a civil proceedings from a digital evidence which is produced and preserved (stored) in another MS in accordance with the laws of that MSs |
| **8. Delays in the execution of a request by the requested court** | 8.2 (b) Implementing technical measures ensuring automatic and/or manual logging of the steps of the workflow. |
| ***Horizontal*** | Updating of existing guidance material and awareness raising of the changes. |

### 6.1. Assessment of the core options

In order to focus this document on the most essential elements, respectively the use of the e-codex and the use of videoconferencing, they will be assessed below.

#### 6.1.1. Assessment of the options for the problem 'method of taking evidence requested not available in the requested Member State', e.g. video-conferencing'

As it was stressed by the evaluation report, the use of videoconferencing can simplify the interactions in cross-border judicial cooperation. Videoconferencing facilities can, for instance, be used to find the right balance between the challenges to organise a physical hearing and being able to safeguard the freedom of the witness's testimony (e.g. if an official in-court videoconferencing system is used). However, the evaluation report concluded that there are differences between the Member States with regard to the availability, potential, and actual use of such systems in courts:

##### 6.1.1.1. Option 1.1

Option 1.1. Awareness raising of courts on existing ways and procedures and examples of the benefits of using and accepting digital methods, as well as the adoption of electronic systems in courts

*Effectiveness*

Awareness raising of courts could include the development of printed material (i.e. flyers) and digital content (Word and Power Point, as well as website content) that could be published physically, via the eJustice portal, or e.g. as part of larger communication packages to courts.Raising the awareness of courts of digital tools to take evidence across borders is expected to contribute to the improvement of the efficiency and speed of judicial proceedings.

Increased awareness could, for example, have a positive effect on the supply and demand of digital tools such as VC, which, in turn, is expected to lead to an increased take-up of such facilities in practice. Courts that are already in possession of VC facilities are expected to use them increasingly frequent and courts that do not yet possess VC facilities are expected to be more likely to invest in the necessary technical equipment.

Hence, the extent of the benefits would be dependent on the take-up by courts, including the possibility for the courts to set aside a budget to acquire the relevant equipment. Depending on the number of courts that actually invest in VC facilities and its actual use in practice, this could result in reduced costs and delays for citizens and businesses.It should be kept in mind, however, that supply and demand are not the only determinants of VC use in legal proceedings. Although VC facilities may be available for use in a specific legal proceeding, it may not necessarily be the most fitting solution for every case or all stakeholders directly involved in the case to actually use it.

*Efficiency*

Overall, raising courts' awareness is considered a pragmatic way to improve the take-up of VC compared to the Baseline Scenario. There are, however, constraints of time, resource and reach. The costs for the awareness raising activities are dependent on the exact scope, means and target groups of the activities. It can be expected that the organisation of these activities would be procured by the Commission. Experience-based estimates show that the implementation of awareness raising activities targeting a comparatively limited audience can at least cost one million Euro if implemented in all 28 Member States (depending of course on the types of channels, frequency of communication, level of information etc.).

Considering that there are approx. 82,000 professional judges in the EU , which could all be handling a cross-border case, costs could be up to around 2 million Euro, if each individual would be targeted directly .In addition, courts are expected to invest in VC facilities as a result to the awareness raising activities. Interviewees indicated that the acquisition, implementation, and operation of professional, high-end VC equipment (e.g. similar to those used by the Commission in their larger conference rooms) could cost as much as 90,000 Euro – depending on the type of systems and its functionalities (e.g. number of microphones, cameras, extent to which the system is smart and can track conversations by zooming in on attendees that currently use the microphone). This estimate seems to be very high. Prices available online show that approx. 3,000 Euro per month could be a more realistic estimate. This means that annual costs per court could be in the range of 36,000 Euro. According to CEPEJ 2014, there are 6,000 courts in the EU of which a limited number already has VC facilities. Thus, if all courts were to be equipped with one VC facility – which is still unlikely – costs could be as high as 216 million Euro across all Member States, i.e. on average 8 million Euro per Member State. There could be similarly high costs for the replacement of the current system after a couple of years of maintenance.Thus, the extent to which this option is efficient overall (i.e. across all stakeholders, incl. public authorities) depends on the extent to which costs and delays that can be saved in legal proceedings exceed the overall costs of the implementation of awareness raising regarding digital tools.

Moreover, it depends on the extent to which costs and delays can be saved in comparison to domestic means to take evidence across borders that often include costs to travel to the court in another Member State. Thus, awareness raising is not necessarily an efficient option for public authorities. However, it is expected that awareness activities raising is an efficient option to reduce the costs and delays for citizens and businesses.

*Proportionality*

The option is overall proportionate. However, this option is not considered to go beyond what is needed to achieve the policy objectives. It is, however, not fully clear at this stage to what extent the Member States are not better equipped to promote the use of VC facilities compared to the Commission. They have a better understanding about their national systems, the availability of VC facilities, as well as their practical functioning than the Commission. This is of particular importance for larger Member States such as Germany in which VC is not even used to the full extent possible in domestic procedures. Therefore, it is considered proportionate for the Commission to act in unison with the Member States. The option may

impose a relatively small budgetary burden on the Commission for (procuring) the development and implementation of the awareness raising activities. Secondary costs, born by the Member States, however, could be significant. The take-up is, however, voluntary and the VC equipment acquired could also be used for domestic cases. To conclude, while the type of action does not go beyond what is necessary to address the problem. It would, however, not fully address the problem and the Member States could be better placed to lead the activities.

*Conclusion*

Awareness raising activities are expected to provide a limited improvement compared to the Baseline Scenario. Although the awareness raising activities are expected to contribute to achieving the policy objectives, the extent to which the benefits exceed the costs is ambiguous. Moreover, Member States may be better equipped than the Commission to

#### 6.1.1.2 Options 1.2 (a) and 1.2 (b)

Options 1.2 (a) and 1.2 (b) : Using VC, telephone-conferencing or other means of distant communication, as a rule, if a person needs to be heard from another Member State (subject to availability of equipment at the court), 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. National law on the taking of evidence through VC in purely internal situations remains untouched + 1.2 (b) Incentivise Member States to equip courts with VC facilities by co-financing some national projects for furnishing courts with equipment from EU programmes

*Effectiveness*

The availability of technical infrastructure is the backbone of effectively using VC facilities across borders. This could lead to an increased take-up of direct methods to take evidence across borders under the Regulation. Moreover, incentivising Member States to equip courts, e.g. through funding from the EU budget for national projects, can be – given appropriate procedural flexibility – an effective option to further improve the efficiency and speed of judicial proceedings, as well as to reduce the burden from undue costs and delays for citizens and businesses involved in cross-border proceedings.

This is in particular valid as costs to equip courts with high-end VC facilities could be around 8 million Euro on average per Member State (see option 4.1 under efficiency).

At this stage, it is not clear what the hearing of a person in another Member State through "VC, telephone-conferencing or other means of distant communication means as a rule" entails and to what extent this is flexible (e.g. to adapt it to the circumstances of a specific case). This would need to be specified further with the Commission, e.g. in relation to:

- Definition of "other means distance communication means" apart from VC and telephone-conferencing (e.g. email, Skype, WhatsApp, Facebook);
- Definition of "as a rule" and the notable exceptions, which would need to allow courts to adapt the proceeding to the specifics of a case (e.g. lack of consent, cases in border regions, or hearing of small children)

- Administrative processes through which deviations can be justified and the associated burden for courts.

*Efficiency*

Incentives for Member States, e.g. through funding national projects from the EU budget, is a proven and efficient means to accelerate the take-up of technical solutions in the Member States.For instance, eCODEX was funded over six years with an EU budget of 12 million Euro. An additional 12 million Euro was made available by the Member States.It is expected that the funding for VC equipment would cost considerably less than the funding for eCODEX.The use of VC or other distance communication systems by default is considered to be less costly per case than e.g. travelling abroad. While cross-border travel can be around 20% more expensive than domestic travel based on research, the absolute amount of costs associated with operating VC facilities is expected to be marginal.

There can, however, considerable one-off costs associated with VC which, in turn, could balance the efficiency of VC compared to travel, depending of course on the specific circumstances of the legal proceedings.

Moreover, the efficiency of this option depends on the extent to which the "rule" of VC and telephone-conferencing is flexible and can be adapted to the circumstances of each case (e.g. involving children), as well as the extent to which courts have a burden to justify the grounds based on which the deviate from the rule and e.g. still summon a person to court

*Proportionality*

Option 1.2 (b) is not considered to go beyond what is needed to achieve the policy objectives and is considered to be proportionate. Some questions, however, need to be clarified with regard to option 1.2 (a). More specifically, the specific grounds based on which a justified deviation from the rule to use distant communication is possible would need to be clarified. It seems at this stage that deviation is only possible in case appropriate equipment is not available in court.

In this regard, legal professionals consulted have commented that VC and other distance communication means are not necessarily most appropriate under the specific circumstances of each legal proceeding or, for instance if in particular VC equipment is available within reasonable time in order not to delay a proceeding.

Both options create a financial and administrative cost for the national governments, as well as regional or local authorities. It is not fully clear that these costs will be commensurated with the objectives to be achieved.

*Conclusion*

This option addresses the lack of VC equipment by means of providing for funding for Member States. This is a crucial prerequisite to improve the take-up direct methods to take evidence across borders, e.g. by using VC in legal proceedings.There are, however, costs associated with this option for the EU as well national, regional, and local

authorities.Moreover, the use of VC may not always be the most appropriate solution in all cases.At this stage, it is not clear if the option to use VC, telephone-conferencing or other means of distant communication as a rule is appropriate for *all* legal proceedings and an efficient / proportionate approach.

#### 6.1.2. Assessment of the options for the problems ‘‘Paper-based communication between courts is time-consuming and costly’, and ‘Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State’

As is was stressed in the evaluation report, there are obstacles related to delays and costs for businesses and citizens caused by the failure to exploit the potential of modern technologies for speedier communication and direct taking of evidence. The most striking examples in that regard are the lack of use of electronic communication in exchanges between the authorities and courts of Member States which are still very predominantly paper-based on the one hand and the only marginal use of electronic communication for the direct taking of evidence, in particular videoconferencing. The uptake of modern technologies is not currently an obligation under the Regulation itself, but depends entirely on individual efforts in Member States to introduce modern technologies in the judiciary and the overall move towards digitisation, and this has led to very slow progress in absolute terms but also in comparison to the use of modern technologies in domestic settings.

##### 6.1.2.1 Option 2.1

Option 2.1: Sharing of best practices between MS (designated authorities) on e-communication and electronic exchange of documents under the Regulation

*Effectiveness*

The option is expected to be effective in addressing the problem, however only to a very limited extent. While the sharing of best practices in theory bears the potential for improving and standardising procedures for communication and exchange of documents, the effect may only be achieved with considerable delay (as e-communication systems need to be updated, adapted or procured). In addition, procedural law and court infrastructures differ at the national level and legal barriers or data security concerns may nevertheless inhibit voluntary action based on best practices. As a result, this option may lead to adoption of best practices in some cases but not on a large scale. The option is therefore not effective in improving the overall speed and efficiency of procedures under the Regulation. Likewise, competing systems (paper-based and electronic) could increase legal uncertainty. The burden for citizens and businesses are not expected to decrease significantly.

The option is efficient, since collecting and presenting best practices could be facilitated via existing repositories of information and communication (e.g. the eJustice portal). However, several aspects might lower the efficiency of this option in the short run, as costs for changing systems are borne by competent courts and legal practitioners, who might pass on part of the costs via fees. In the end, if Member States choose to act based on best practice examples,

benefits for citizens and businesses include timesavings, while courts are likely to recover initial investments at least partially.

*Proportionality*

The option is proportionate. It does not go beyond what is needed to address the problems and as simple as possible to address the problems at hand. It leaves scope for national decisions on whether to update systems and how

*Conclusion*

The option is effective to a limited extent, depending on whether best practices lead to changes in communication between courts and increased acceptance of electronic evidence in practice. The option is efficient, as the costs to share best practices are likely to be low, compared to potential benefits from courts adopting and integrating best practices to communicate using electronic means and accept digital evidence.At the same time, it is proportionate, as the proposed instrument is simple and does not go beyond what is needed to address the problems.

#### 6.1.2.2 Option 2.2 (a) and 2.2 (b)

Option 2.2 (a) and 2.2 (b) CEF eDelivery (eCodex) should be the default channel for electronic communication and document exchanges between the agencies/courts designated under Regulation (EC) 1206/2001 (as well as the Service Regulation). E-communication should replace, as a general rule, paper workflows. +2.2 (b) Specify in the Regulation that: (i) an evidence (e.g. declaration, testimony, authentic instrument) which is transmitted in form of electronic document through the appropriate communication system (see point 6)) should be considered as it was transmitted in original (paper) version and (ii) the quality of evidence may not be denied in a civil proceedings from a digital evidence which is produced and preserved (stored) in another MS in accordance with the laws of that MSs.

*Effectiveness*

The option would be effective in addressing the problem compared to the situation under baseline. Establishing the CEF eDelivery as the default channel for electronic communication ensures the use of electronic communication to coordinate ToE or transmit evidence obtained under the Regulation. This would increase the speed and efficiency of services. At the same time, this could reduce the burden for citizens and businesses in proceedings (e.g. costs due to delays). Ensuring the equal treatment and evidentiary value of electronic evidence (and electronic communication overall) to the paper-based system expected under the baseline scenario is an important pre-condition for effectiveness. Legal certainty, speed and efficiency of judicial proceedings increase if the content of communication (i.e. electronic evidence), and not just the act of communicating is to be electronic.

*Efficiency*

The efficiency of this options is moderate to high, depending on the time-horizon of the assessment. The initial, one-off investment costs for the system can be regarded as high. However, apart from maintenance and updates, the marginal cost for each instance of communication is negligible and faster than the use of postal services (likely to be used under the baseline scenario). Using postal services, the costs are incurred at every instance of communication, and likely to increase in line with the number of cross-border cases. Thus, costs and benefits of this option have to be have to be weighted. In the long run, benefits. Whereas the costs for costs for postal services are incurred by courts in the Member States, the new portal would be to a large extend be developed at the EU-level. It needs to be clarified further, who finances the tool and its maintenance. Given the use of existing portals and depending on the complexity of the tool, the development costs will likely to be lower than the development of the e-Codex portal itself (24 Mil. EUR). In any case, costs at the national level may be expected for staff training and adapting of institutional routines to use the new tool.

It is important to note, that the cost in operation would be largely determined by the extent, to which the tool would be integrated into existing systems. At the national level, efficiency gains may be reduced, if existing IT systems need to be adapted or the time required to transfer communication between the newly established tool and any existing national tools. At the EU level, the costs It is assumed that the tool could also be used for other EU instruments (such as the Service Regulation), which has positive implications for the efficiency.

*Proportionality*

The option is proportionate, but a final assessment would depend on the clarification on the financing of the tool. The scope of the initiative is limited to what Member States could not achieve themselves, implementing a new EU-wide tool. It does not go beyond what is needed to address the problem, as it only concerns communication under the Regulation.However, the principle of accepting electronic forms of evidence limits the room for national decisions on matters of procedural law. Overall, there is a justification for the option if as paper-based communication.

*Conclusion*

The option would be effective in addressing the problem compared to the baseline scenario. It would reduce paper-based communication, increasing speed and efficiency of legal proceedings in which the Regulation is applied. At the same time, excluding the possibility to reject evidence on the basis that it is electronic could greatly reduce the burden for citizens and businesses to provide requested evidence. The efficiency of this options is moderate to high, depending on the time-horizon of the assessment. While initial one-off costs are high and implementation is expected to take time, the marginal cost for transmitting requests and documents would be negligible. In addition, the tool could be adopted in further EU-instruments, which would increase its efficiency. The option is proportionate, but a final assessment would depend on the clarification on the financing of the tool.

#### 6.1.2.3 Option 2.3

Option 2.3: Obliging designated authorities/courts under the Regulation to use certified e-mails (furnished with qualified e-signatures) for their communications and exchange of the documents.

*Effectiveness*

The option will reduce paper-based communication, including related costs for postage or printing. This could speed up communication and efficiency of judicial proceedings under the Regulation. As a result, the overall duration of proceedings under the Regulation and ensuing burdens for citizens and businesses is likely to decrease.

*Efficiency*

The option is considered to be moderately efficient. While the use of email was reported to be widespread among courts, in particular for informal communication, the use of qualified e-signatures is not yet common. Thus, even if electronic identification frameworks, such as eIDAS, are currently developed by the European Union, few Member States have the infrastructures or experience in place to facilitate qualified e-signatures within public administration and the judiciary. Thus, the costs to implement the technical infrastructure in courts are likely to be high and would be borne by the Member States. Benefits for courts include decentralised network of identification among legal professionals.

*Proportionality*

The option is not proportionate. While the cases in which the Regulation is applied only constitute a small share of all cases, the courts would have to adapt their existing IT systems and communication procedures to comply with the option. This would greatly influence the room for national solutions for overall communication within the judicial system.

Thus, although the option would effectively address the problem identified for the procedures under the Regulation, it would go beyond what is needed to address it.

*Conclusion*

The option would be effective in reducing paper-based communication and thereby help to speed up legal proceedings. This could lead to decreasing burdens for citizens and businesses. At the same time, the option is only moderately efficient. The one-off cost to implement an interconnected system facilitating electronic signatures at every competent court is considered high, compared to the number of cases in which the regulation is applied. Likewise, the option is not considered proportionate, as it goes beyond what is needed to address the problem while the costs are borne by the Member States alone.

## 7. COMBINED EFFECTS OF THE PREFERRED OPTIONS AS A PACKAGE

As a next step, first the baseline scenario and then the preferred policy package are assessed in relation to the following five criteria:

- Effectiveness;
- Efficiency;
- Coherence;
- Impacts on fundamental rights and the protection of personal data;
- Environmental impacts.

### 7.1. Baseline scenario

First, the baseline scenario is assessed in relation to these five criteria (in the next sub-section, the policy package selected is in turn assessed).

The detailed assessment is included in Annex B.

The results of the assessment can be summarised as follows:

| Criteria | Assessment | |
|---|---|---|
| | Rating | Summary |
| **Effectiveness** | 0 | The effectiveness would be limited as the challenges identified in relation to the application of the Regulation are likely to continue to exist. On this basis, problems for citizens and businesses will persist, which limits the achievement of the policy objectives. In particular, there will still be uncertainty on when to apply the Regulation and concerning the concepts of courts and taking of evidence. Delays and costs (e.g. based on failure to keep the time limits or to choose the most appropriate means to take evidence) are expected to remain at an equal level per case and increase at an overall level in line with the overall increase of cases. |
| **Efficiency, incl. impacts on national judicial systems** | 0 | From a more narrow perspective, in the baseline scenario the Regulation is expected to increase the efficiency of legal proceedings as taking of evidence is governed by a flexible regime under which the most appropriate means to take evidence in each specific legal proceedings can be used. Some room for improvement, however, remains e.g. with regard to the share in which the Regulation will be used in the future. Although this does not necessarily mean that other cross-border legal proceedings in which the Regulation will not be applied are expected to be inefficient, the non-mandatory nature will arguably contribute to legal uncertainty for public authorities, legal professionals, citizens, and businesses. |

| | | |
|---|---|---|
| **Coherence** | 0 | The Regulation is largely coherent internally, as well as with other EU policy instruments, which have similar objectives, and national law. Small challenges, including based on overlaps with the Brussels IIa Regulation and difficulties relating to the relationship to national law, would persist without any policy action. |
| **Impacts on fundamental rights and the protection of personal data** | 0 | The evaluation revealed that legal practitioners, citizens and businesses currently face legal uncertainty and delays in proceedings when the Regulation is applied. As a result, the current Regulation does not fully ensure access to justice and the use of the most effective remedy in judicial proceedings, when it comes to ToE across borders. These issues are expected to persist under the baseline scenario in the future. At the same time, it is not expected to exert any impacts on the future protection of personal data. |
| **Environmental impacts** | 0 | Environmental impacts of the Regulation under the baseline scenario are mainly related to paper-based communication or effects from travelling to attend physical hearings/summons. The magnitude of this impact per case is expected to remain roughly stable (depending on innovations in communication via postal services or passenger travel). The overall environmental impact of the Regulation is expected to increase in line with the projected number of cases in which it is applied. |
| **Average rating and conclusion** | 0 | Under the baseline scenario, the problems identified in the problem assessment, including in relation to costs and delays, would be likely to continue where the Regulation is applied.. |

### 7.2. Policy Package

Next, the policy package is first assessed in relation to the five criteria.

The detailed assessment is to be found in Annex C.

The results of the assessment can be summarised as follows:

| **Criteria** | **Assessment** | |
|---|---|---|
| | **Rating** | **Summary** |
| **Effectiveness** | +2 | Under the policy package, the effectiveness in achieving the policy objectives would increase compared to the baseline scenario: |

| | | |
|---|---|---|
| | | • Legal uncertainty would be reduced through a number of clarifications and additions (e.g. the definition of additional channels to take evidence and clarification of the concepts of court and taking of evidence), as well as through new awareness raising and guidance material.<br>• The efficiency of cross-border judicial proceedings would be improved, which would lead to a lower burden for citizens and businesses. A number of measures would help to reduce delays, including certain clarifications, the strengthening of electronic communication and videoconferencing as well as additional guidance and awareness raising.<br>• Access to justice and the protection of the rights of the parties would be improved, including through the reduction of delays and because the number of cases in which the Regulation would be applied is expected to increase. Risks relating to electronic communications and videoconferencing, e.g. relating to confidentiality, would need to be addressed. |
| **Efficiency, incl. impacts on national judicial systems** | +2 | The implementation of the policy package is considered to be more efficient than the baseline scenario:<br>• The implementation of the policy package is associated with comparatively high initial investments (i.e. capital investments, CAPEX) for public authorities that could be co-financed by the European Commission. Moreover, recurring operational expenditures (OPEX) are expected to be incurred by public authorities for the maintenance of the necessary hard- and software. Detailed information in this regard is available in section 2.1.1 of Annex C. As regards the annual costs per court for the acquisition, implementation, and operation of professional, high-end VC equipment (which is the largest part of the costs), costs are estimated to be in the range of 36,000 Euro. There are about 6,000 courts in the EU, of which a limited number has already VC facilities. If all courts were to be equipped with one VC facility which appears unlikely, costs could amount to 216 million Euro in the EU.<br>• The investment into technical infrastructure and processes is expected to make legal proceedings more efficient, which is expected to decrease necessary labour costs. This could mean that more legal proceedings could be handled by the same staff within the given time. In addition, the necessary investments are balanced by decreased costs for postal service providers, paper and office supplies, as well as archiving costs that would have to be invested in the future under the baseline scenario. |

| | | |
|---|---|---|
| | | • The implementation of the policy package is expected to be a benefit for legal professionals, in particular lawyers. Although they would incur costs in relation to understanding the legislation and checking the extent to which and how the legislation would apply to a specific legal case, this is not considered to differ from the baseline scenario. The reason for this is that most lawyers do not have to deal with Regulation (EC) 1206/2001 on a case-by-case basis. Therefore, the time they would have to invest are considered business-as-usual costs. However, the policy package is expected to reduce legal ambiguities compared to the baseline scenario.<br>• Citizens and businesses are expected to benefit from the implementation of the policy package. In particular non-monetary benefits such as increased access to justice, freedom of choice (concerning the means to take evidence across borders that is most suitable for them), and decreased levels of stress within legal proceedings are important in this regard – especially in relation to vulnerable persons.<br>• Neither negative nor positive effects are expected in relation to the economy overall. It is, however, expected that positive economic effects of the policy package for specific types of businesses are negative effects for other types of businesses. For instance, the revenue generated for IT consulting service providers, as well as internet and telecom providers through the implementation of the policy package can also be regarded as a loss for postal service providers and office supply providers. Thus, the economic effect is regarded as neutral overall. |
| **Coherence** | +1 | The coherence of the Regulation with EU and national law would be slightly improved compared to the baseline scenario.<br><br>The Regulation would continue to be largely coherent internally, in relation to EU law, national law and bilateral agreements. In addition, some of the options would contribute positively to the coherence of the Regulation. In particular, the introduction of a tool for electronic communications and the recognition of digital evidence (option 6.2) as well as the encouragement of videoconferencing (option 4.2) are in line with and support the current strategies of the EU Commission in the context of the Digital agenda and the e-justice strategy.<br><br>However, the small uncertainties identified in the evaluation would persist. Notably, the use of 'request' and potential overlaps with the Brussels IIa Regulation would not be clarified. |

| | | |
|---|---|---|
| **Impacts on fundamental rights and the protection of personal data** | +1 | The policy package addresses several issues which cause legal uncertainty and delays under the baseline scenario. At the same time, the policy package increases access to justice by promoting the use of distance communication to hear witnesses and affected parties. However, the effect of the policy package on the protection of personal data is ambiguous and will largely depend on the implementation at the Member State level. |
| **Environmental impacts** | +2 | The environmental impacts of the Regulation under the policy package scenario are mainly related proposed changes to adopt electronic means of communication via CEF eDelivery (compared to paper-based communication under the baseline scenario) and to increase the use of videoconferencing and distance communication (instead of physical summons). While both channels of communication consume energy in operation and resources to produce the equipment, the overall impact on the environment is positive. Based on secondary sources, videoconferencing (and other means of distance communication) may only produce 7% of carbon emissions of physical meetings. At the same time, electronic communication has a smaller carbon footprint than equivalent standard mail (50% to 90% per unit). |
| **Average rating and conclusion** | +1.6 | The policy package performs better than the baseline scenario in relation to all of the assessment criteria. It brings benefits in particular by reducing costs and delays (e.g. through introducing an electronic communication system and encouraging the use of videoconferencing). In addition, negative environmental impacts are reduced and coherence with other legal instruments continues to be ensured. |

### 7.3. Impacts on fundamental rights and the protection of personal data

The possibilities created by the e-CODEX electronic system would have a positive impact on the ability to exercise the right to an effective judicial remedy, and are therefore in conformity with Article 47 of the Charter of Fundamental Rights since electronic communication and document transmission enhances and reduces the time of the court proceedings. Stakeholders have pointed out that Article 47 also guarantees the right to an impartial and independent tribunal, and that in order be in conformity with that Article, future governance and coordination of e-CODEX and e-CODEX-related activities need to ensure that the system does not interfere with the functioning of the judiciary is guaranteed[26]. Moreover, the electronic method of service together with the proposed 'digital by default' principle is

[26] https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3600084/feedback/F2268_en

expected to not only have a positive effect on access to justice, but also contribute to faster proceedings. Furthermore, it reduces costs or failures of service of documents experienced otherwise, where an inefficient method to effect service would have been chosen due to a lack of options under the baseline scenario. Moreover, citizens will have an increased access to justice, freedom of choice (concerning the means to take evidence across borders that is most suitable for them), and decreased levels of stress within legal proceedings are important in this regard – especially in relation to vulnerable persons.

Likewise, the clarification provided by the proposal on the definitions and concepts (i.e. 'court') would reduce legal uncertainty and speed up procedures under the Regulation in practice.

Next under the baseline scenario, the protection of personal data is not considered to be affected by the current Regulation. External factors influencing data protection and privacy are the General Data Protection Regulation (GDPR) and the growing threats to cybersecurity (also affecting public authorities). After entering into force in May 2018, the GDPR is expected to increase awareness on the issue, prompt actions to ensure security and integrity of databases and swift reactions to breaches of privacy in the judiciary. However, data protection in the judiciary will continue to be largely determined by national decisions and the integrity of postal services or the agencies/authorities involved in the process of cross-border service under the Regulation. At the same time, the incidence of attempted attacks on public IT infrastructure is expected to increase until 2030. This will also affect the judiciary in the Member States, depending on the proliferation of electronic communication, court IT systems and the interconnectedness with other IT systems or databases. Lastly, the wide variety of potential uses for social media corresponds to an equally broad range of legal issues relating to these communication channels. However, it should be noticed that documents will not be sent via social media, but these networks will be only used to sent information notice.

## 8. CONCLUSION AND EVALUATION AND MONITORING FRAMEWORK

Based on the assessment and ratings provided in the previous section, the policy package performs better than the baseline scenario in relation to all of the assessment criteria. Thus, it is proposed to amend the current Regulation.

For this purpose, a sound monitoring system of the Regulation should be put in place, including a comprehensive set of qualitative and quantitative indicators, and a clear and structured reporting and monitoring process. This is important to ensure that the amendments are implemented efficiently in the Member States and to verify if the Regulation is successful in achieving its specific objectives.

It should be stressed out the importance of the European Judicial Network in civil and commercial matters (EJN civil) in the implementation and application of the Regulation on Tacking of Evidence. This forum is a key factor in getting relevant feedback from Member States (from the field) on the application of the various instruments and in identifying the real practical problems as it brings together national ministries as well as the central authorities and agencies dealing with the implementation of the Regulations. In the past, the EJN

organized annual dedicated meetings on the analysis of the application of the Regulations on service of documents and taking of evidence. This practice will be continued in the future as well.

The EJN also created a working group on assessing options of accurate data collection with regard to the application of the instruments, this forum could contribute further work to analysing possibilities of collecting data on the Regulations.

The model of bilateral (peer to peer) meetings between central bodies of the Member States in the margins of the EJN contact point meetings, discussing and finding solutions to difficult cases, that has been established for other EU instruments, could be extended to the Regulations on Service of Documents and Taking of Evidence (this has been in fact proposed by some of the Member States in the latest meeting dedicated to the service of documents, in December 2017, in Tallinn).

| Assessment criterion | Indicator | Frequency |
|---|---|---|
| ***Horizontal aspects*** | Estimated no. of cases in which the Regulation has been applied | Once a year |
| | Estimated proportion of cross-border cases in which the Regulation is applied | At least for every evaluation, i.e. every 3-5 years |
| | Estimated no. of citizens and legal persons affected by the Regulation in practice per Member State and year, based on the estimated no. of cases in which the Regulations are applied | At least for every evaluation, i.e. every 3-5 years |
| **To reduce legal uncertainty** | Case law at national level pointing to uncertainties (e.g. ambiguity on certain concepts) | / |
| | Case law at EU level pointing to uncertainties (e.g. lack of clarity on certain concepts) | / |
| **To further improve the efficiency and speed of judicial proceedings and reduce the burden for citizens and businesses** | Number of cases in which direct taking of evidence is applied | Once a year |
| | Number of cases in which videoconferencing is applied | Once a year |
| | Number of cases in which evidence is submitted in electronic formats | Once a year |
| | Quantitative information on (electronic) communication under the communication, incl.:<br>- Number of interactions needed to execute and complete a request (using the CEF eDelivery tool and other channels used for communication attempts);<br>- Frequency of cases, in which the rectification procedure is (necessary following a request);<br>- Frequency of communications needed to rectify a | At least for every evaluation, i.e. every 3-5 years |

| Assessment criterion | Indicator | Frequency |
|---|---|---|
| | request; | |
| | Data on the duration of requests under Regulation (EC) 1206/2001<br>[*It should be possible to prepare this based on the new tool for electronic communications, which contains automatic/manual logging of all steps for individual cases (at least for the procedure via competent courts and the procedure according to Article 17). It would be useful to facilitate the generation of case statistics in this tool.*] | Once a year |
| | Data on costs of proceedings in civil and commercial matters, including:<br>- Cost for set-up and maintenance of the tool for electronic communication<br>- Compliance costs, incl. administrative burden and technical systems cost:<br>o Filing forms for requests for cooperation in taking of evidence (e.g. printing costs);<br>o Translation costs;<br>- Citizens/businesses involved in legal proceedings:<br>o Costs for legal advice;<br>o Time spent on the taking of evidence (incl. hassle costs e.g. delays). | At least for every evaluation, i.e. every 3-5 years |
| | Reasons for delays and undue costs (including the extent to which these are related to the functioning of the Regulation and their workflows)<br>[*This could also be supported by the new tool for electronic communication, which is expected to contain e.g. the number of correspondences per case. The latter indicates whether requests can be dealt with in a straightforward manner or whether clarifications are needed between the courts.*] | At least for every evaluation, i.e. every 3-5 years |
| **To improve access to justice and protection of procedural rights of parties to the proceedings** | No. and % of complaints of citizens relating to access to justice and procedural rights | / |
| | No. and % of final court rulings (at EU and national level) establishing breaches of the Regulations | / |

## 9. REFIT (SIMPLIFICATION AND IMPROVED EFFICIENCY)

| REFIT Cost Savings – Preferred Option(s) | | |
|---|---|---|
| Description | Amount | Comments |
| Costs savings related to the mandatory application of the Regulation | • Reduce time spent on the taking of evidence, reduce costs for legal advice;<br>• Reduce legal uncertainty about the use of regulation | Beneficiaries: citizens |
| Reduced costs by defining other means of cross-border taking of evidence | • Reduce delays and costs<br>• Reduce time-cost for legal professions | Beneficiaries: citizens, public authorities, |
| Costs savings by making the use of videoconferencing mandatory if a person needs to be heard from another Member State | 216 million Euro across the EU/8 milion Euro per Member State | Beneficiaries: citizens |
| Annual cost savings for the use of e-CODEX as a mandatory channel for transmitting and receiving agencies/courts | Global costs: Approx.. 6 to 15 million Euro/year across the EU<br><br>Costs savings for public authorities: 300.00 EUR across the EU | Beneficiaries: public authorities and citizens<br><br>Public authorities are expected to save costs in relation to labour costs, paper, envelopes, printer cartridges, shelves, archiving material, and archiving space. |
| Reduced costs by accepting electronic (digital) evidence produced stored in another Member State | • Reduced costs related to paper-based communication<br>• Avoid costs using postal service<br>• Decrease labour costs | Beneficiaries: public authorities and citizens |

| | | |
|---|---|---|
| Costs savings by new definition of ‘courts’ | • Low costs (for drafting of the text and raisining awareness of legal proffessions | Beneficiaries: public authorities and citizens |

| | | |
|---|---|---|
| Costs savings by replacing the notion 'taking of evidece'(Article 1) with 'other judicial acts' | • Low costs (for drafting of the text and raisining awareness of legal proffessions | Beneficiaries: public authorities and citizens |

The initiative is included in the Commission Work Programme 2018 under the REFIT initiatives in the Area of Justice and Fundamental Rights Based on Mutual Trust[27]. The Commission also looked at opportunities to simply and reduce burdens in relation to taking of evidence in particular at the level of the citizens and businesses involved in cross-border civil judicial proceedings. The nature of this legislation means that it applies to all cross-border civil proceedings. The beneficiaries of this proposal range from citizens to legal professions and public administration.

In the framework of the REFIT Platform, stakeholders recommended to the Commission to explore possibilities for reducing time in taking of evidence in other EU Member States. It was also observed that numbers of frequently used channels, such as taking of evidence through consular agents, or diplomatic officers are not acknowledged by the Regulation.

The proposal will bring clarification in respect with the (mandatory) nature of the regulation, which will make it clear when the regulation is to be applied. The proposal will also establish other means of taking of evidence in addition to the existing two ways which will enrich the tools available under the regulation and will also stimulate its application. It will also improve the definition of 'courts' under the regulation, which will expand the number of authorities that can use the tools of the regulation. The proposal establishes a broader set of judicial actions which can constitute a 'taking of evidence' under the Regulation, which will lead to a higher number of cases in which citizens/business can benefit from the application of the Regulation.

The impact assessment estimated annual cost savings of approx.. EUR 6 to 15 million Euro per year across the EU generated by the transmission of documents via eCodex. Citizens, business and public administration will also benefit from reduced hassle costs through transmission of the evidence through electronic channels between the designed authorities.

[27] Commission Work Programme 2018 – An agenda for a more united, stronger and more democratic Europe, COM(2017) 650 final of 24.10.2017, Annex II point 10, p.4.

The regulation will also make it clear that evidence which is transmitted in form of electronic document trough the appropriate communication system would be considered as it was transmitted in original (paper) and will provide mutual recognition of digital evidence which is produced and stored in another Member State. This will not only reduce the burden for citizens and business in proceedings but will also limit the instances where electronic proof is denied and will also be facilitating cooperation between national courts across the EU. The proposal establishes also the default rule of use of videoconferencing in cross-border taking of evidence (hearing a person in another Member State). The impact assessment estimated that this lead to savings of 216 million Euro across the EU/8 milion Euro per Member State.

All these proposals will make the legal framework more likely to be applied and more coherent.

## ANNEX 1: PROCEDURAL INFORMATION

### 1. Lead DG, agenda planning and work programme

This impact assessment and the related initiatives are a responsibility of the Directorate-General for Justice and Consumers (JUST).

The project has been added to the 2018 European Commission work programme[28] under the section 'An Area of Justice and Fundamental Rights Based on Mutual Trust' as well as to the Regulatory Fitness and Performance Programme under 'Priority 7 – Simplification and Burden Reduction for upholding the rule of law and linking up Europe's Justice Systems'. It envisages "to address issues of keeping up with digitalisation, using of the method of 'direct taking of evidence', which ensures that the courts take evidence directly in the territory of another Member State, ensuring legal certainty for courts, parties and lawyers, and clarify the grounds for refusing the execution of cooperation requests"[29].

The aim to improve the framework of judicial cooperation within the EU is also in line with the objectives of the Commission set by the Digital Single Market Strategy[30]. In the context of e-Government the Strategy expresses the need for more actions to modernise public (including judicial) administration, achieve cross-border interoperability and facilitate easy interaction with citizens.

### 2. Organisation and timing

Work on the preparation of this initiative started on 24 October 2017 with the 2018 European Commission work programme. The impact assessment was prepared with the involvement of JUST C.3 (Data protection) as well as the following Services through an Inter-Service Steering Group (ISG) chaired by the Secretariat General:

the Commission's Legal Service;

Directorate-General for Informatics;

Directorate-General for Communications Networks, Content;

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs;

Directorate-General for Communication;

Directorate-General for Employment;

Directorate-General for Economic and Financial Affairs;

Directorate-General for Migration and Home Affairs;

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28 COM(2017) 650 final, Annex II.

29 Regulatory Fitness and Performance Programme - REFIT Scoreboard Summary of 24 October 2017, p. 29.

30 COM(2015) 192 final, p. 16.

Directorate-General for Research and Innovation;

Directorate-General for Taxation and Customs Union and

Directorate-General for Competition.

The Steering Group foresaw three meetings. A first meeting took place on 24 October 2017. The following ISG meetings were also scheduled:

- 6 April 2018: 2nd meeting on the draft evaluation reports and draft impact assessments
- Beginning of May 2018: 3rd meeting on the draft legislative proposals.

On each occasion, the members of the Steering Group are given the opportunity to provide comments orally and/or in writing on the draft versions of the documents presented.

**3.Consultation of the Regulatory Scrutiny Board**

The impact assessment report was submitted to the Regulatory Scrutiny Board on 9 April 2018. The Regulatory Scrutiny Board reviewed the draft impact assessment at its meeting of 3 May 2018 and delivered a positive opinion with comments on 7 May 2018. DG Just took into account the Boards recommendations and the report explains better the relationship between the two initiatives (Service of Documents Regulation) for judicial cooperation and the wider context. The impact assessment explains better why the Regulation represents a big step forward to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The major problems and the baseline are now better identified and explained. The explanation of subsidiarity of the instrument and of the EU value added was enhanced. Moreover, the conclusions of the evaluation regarding the effectiveness have been further developed and the policy options now focus on the main elements (electronic communication and the use of video-conferencing) and the assessment of these main issues has been developed in the main text..

**4.Evidence, sources and quality**

The Commission consulted widely and received input from various sources for this impact assessment work.

Evidence used in this impact assessment was gathered following a consultation strategy, which included an external study, a consultation with renowned experts in the field (practitioners as well as members of academia) through the Expert group on Modernisation of Judicial Cooperation in Civil and Commercial Matters[31] and a public consultation through an

[31] More information on the Expert group on Modernisation of Judicial Cooperation in Civil and Commercial Matters (E03561) can be found under http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3561&news=1

online questionnaire accompanied by a consultation document[32]. The public consultation strategy is described in detail in Annex 2.

A workshop with Stakeholders will be held on 16 April 2018 for further consultation on expected impacts.

On 4 May 2018 the Commission will also hold a meeting with Member States' experts on international civil procedure to inform them of the planned initiative and the options envisaged.

Furthermore, the following discussions took place within the framework of the European Judicial Network in civil and commercial matters (EJN):

- 30 November–1 December 2017, Tallinn: dedicated meeting of the EJN addressing practical problems and possible improvements of the Regulation.
- 14–15 November 2016: dedicated meeting of the EJN addressing practical problems and possible improvements of the Regulation
- 20 November 2013: meeting of the EJN dedicated to the evaluation of the application of the Regulation on taking of evidence

In addition, the following studies and reports haven been taken into consideration:

**2017:**

• European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)

• 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 (launched by the Commission, carried out by a consortium led by MPI Luxembourg) – final report delivered in June 2017.

**2016:**

• Study prepared by a consortium led by University of Maribor (SI) delivering a comparative analysis of the law of evidence in 26 Member States – this study was carried out in the context of an action grant under the EU Justice Programme, the project was finished in spring 2016.

**2014:**

• A large-scale questionnaire (containing more than 50 questions) was drawn up together with the EJN and answered by the Member States concerning the practical operation of the Regulation on taking of evidence.

[32] Responses to the public consultation and consultation document available here: https://ec.europa.eu/eusurvey/Service_and_Evidence/management/results

**2012:**

• Study on the application of articles 3(1)(C) and 3, and articles 17 and 18 of the 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 (launched by the Commission, carried out by Mainstrat and the University of the Basque Country) – final report adopted in June 2012.

The Commission services have taken into account the observations from all the above-mentioned sources in the impact assessment.

## ANNEX 2: STAKEHOLDER CONSULTATION

(including the outcome of the public consultation on Council Regulation (EC) no 1206/2001[33])

**The Commission consultation strategy included many different and complementary ways of consulting stakeholders:**

- Member States gave their opinion within two dedicated meetings of the European Judicial Network addressing practical problems and possible improvements of the two EU Regulations (14-15 November 2016, Bratislava and 30 November – 1 December 2017, Tallinn). In addition, a dedicated meeting with the representatives of the Member States was organized on 3 April 2018.

- Dedicated meeting with stakeholders (on 16 April 2018). A workshop composed of selected stakeholders with particular interest in issues relating cross border legal proceedings. Industry and business organisations, Trade Unions, consumer organisations, professionals' associations and academic institutions and think tanks with the widest possible representation across EU or worldwide were invited with a view to share their views on the initiative.

- Expert group meetings (on 8-9 January 2018, 6 March 2018, 27-28 March 2018 and 24 April 2018). The Expert group on Modernisation of Judicial Cooperation in Civil and Commercial Matters was created in the end of December 2017 (the detailed list of experts is available in the Register of Commission expert groups accessible on http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3561&news).

- Publication of the Inception Impact Assessment (on 5th December 2017) brought about 2 replies, both giving positive feedback in support of the objectives of this regulation and of its intended review (albeit in ways fully safeguarding the right to be heard).

- A single public consultation was launched to address both Regulation 1393/2007 on service of documents and Regulation 1206/2001 in order to receive input from all the concerned stakeholders, and in particular, those which are engaged in cross border legal proceedings. Members States were also invited to provide their input. The public consultation was launched on 8 December 2017 and ended on 2 March 2018 (which complies with the minimum standard of 12 weeks for public consultations of the European Commission). 131 contributions from 27 MS were submitted and the

[33] Council Regulation (EC) no 1206/2001[33] of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

country with the largest overall contributions was Poland, followed by Germany, Hungary and Greece. Approximately 64% of replies were made on behalf of the judiciary, while the rest were mainly from associations of legal professions at a national level or European lever, notaries, bailiffs, NGOs, academics. In addition, 13 replies were received from the public authorities of 9 Member States (Austria, Czech Republic Estonia, Finland, France, Germany, Latvia, Poland and UK).

- A Commission study providing a comparative legal analysis of laws and practices of the Member States on service of documents was carried out by a consortium (University Firenze, University Uppsala and DMI) – published in November 2016[34];

- 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 was launched by the Commission (carried out by a consortium led by MPI Luxembourg) – final report delivered in June 2017[35].

Most of the stakeholders supported the idea of amending as well as the Council Regulation (EC) no 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

**1. Application of the Regulation**

In general, when asked whether they have been involved in cross-border judicial proceedings, 73 % of the stakeholders responded affirmatively. However, the Regulation (EC) 1206/2001 has only been applied by 20 % of the respondents.

According to the MPI study, the national reports and interviews showed a clear tendency to by-pass the provisions of the Evidence Regulation, which are very frequently considered as cumbersome, bureaucratic and time-consuming. With the background of the ECJ Decision in ProRail,109 direct taking of evidence in a different Member State tends to be performed outside the boundaries of the Regulation (EC) 1206/2001.[36]

However, currently there is no provision which clearly expresses that the Regulation (EC) 1206/2001 is mandatory whenever the evidence to be assessed in a legal proceedings is in another Member State.

Within the MPI study, when asked to evaluate the optional nature of the Regulation (EC) 1206/2001 40.38% of the stakeholders consulted stated that it is 'Counterproductive as it creates too much uncertainty in respect of the procedure that should be used', while 59.62%

[34] Available at http://collections.internetmemory.org/haeu/20171122154227/http://ec.europa.eu/justice/civil/files/studies/service_docs_en.pdf

[35] Available at https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en.

[36] Study of MPI Luxembourg, paragraphe 242, p. 114.

answered that it is 'Welcome as it allows for the use of the most efficient tool for the case at hand'[37].

Some stakeholders reported that, especially in relevant cross-border cases, they still prefer to avoid resorting to the ER and to summon the witness directly to the court. This predilection is determined not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of evidence. A judge from Romania additionally reports that parties are always willing to share the expenses necessary for keeping the gathering of evidence 'local', as far as concretely feasible (e.g. to cover the costs necessary for a local expert to carry out the technical investigation abroad, to pay for the witness's travel/accommodation expenses).

In the public consultation, when asked if Regulation (EC) 1206/2001 should comprehensively and exhaustively govern the taking of evidence from another Member State in civil and commercial matters, unless there is a specific EU instrument which regulates cooperation separately taking into account the specificities of its particular field, 44 % of the stakeholder strongly agreed with this proposal, another 42 % tended to agree with it. On the contrary, 8 % of them tended to disagree with this proposal and 5 % strongly disagreed. The overwhelming majority of the respondents stating an opinion supported the comprehensive and exhaustive application of the Taking of Evidence Regulation.

## 2. Difficulties in the application of the Regulation

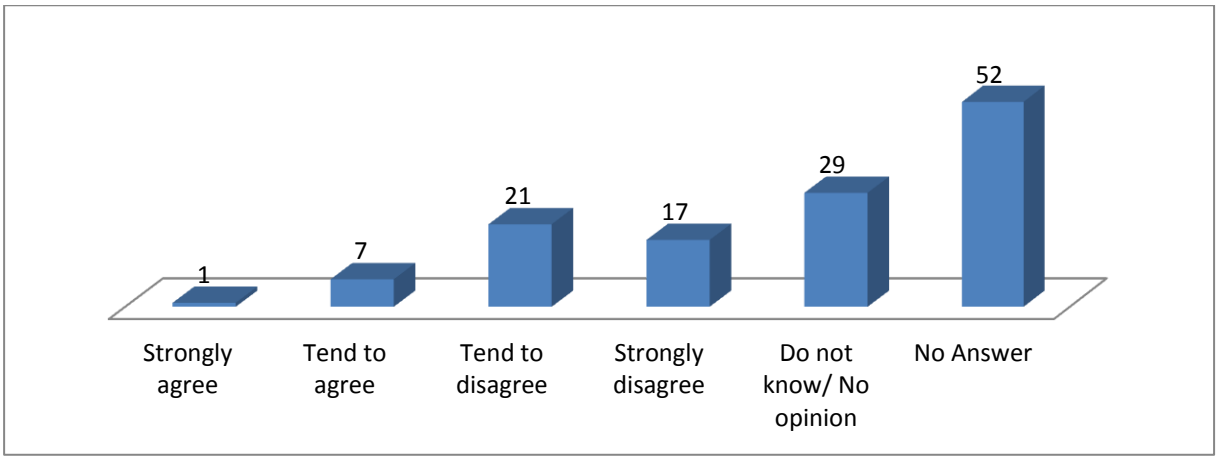
### 2.1. Costs

In general terms, the costs of litigation are considered one of the main hurdles to cross-border litigation. It may indeed not impact on the recognition or enforcement of a decision (very few cases have been reported in this sense), but it certainly deters parties from litigating cross-border; one step backwards, it prevents entering into cross-border commercial relations.

According to the MPI Study, most national courts in cross-border cases still avoid resorting to the Regulation because the taking of evidence in another Members state generates costs. This predilection is caused not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of the evidence.

When asked if taking of evidence in another Member State generated disproportionate costs, 52% of the stakeholders did not respond while 29% do not have an opinion.

[37] Study of MPI Luxembourg, paragraphe 257, p. 122.

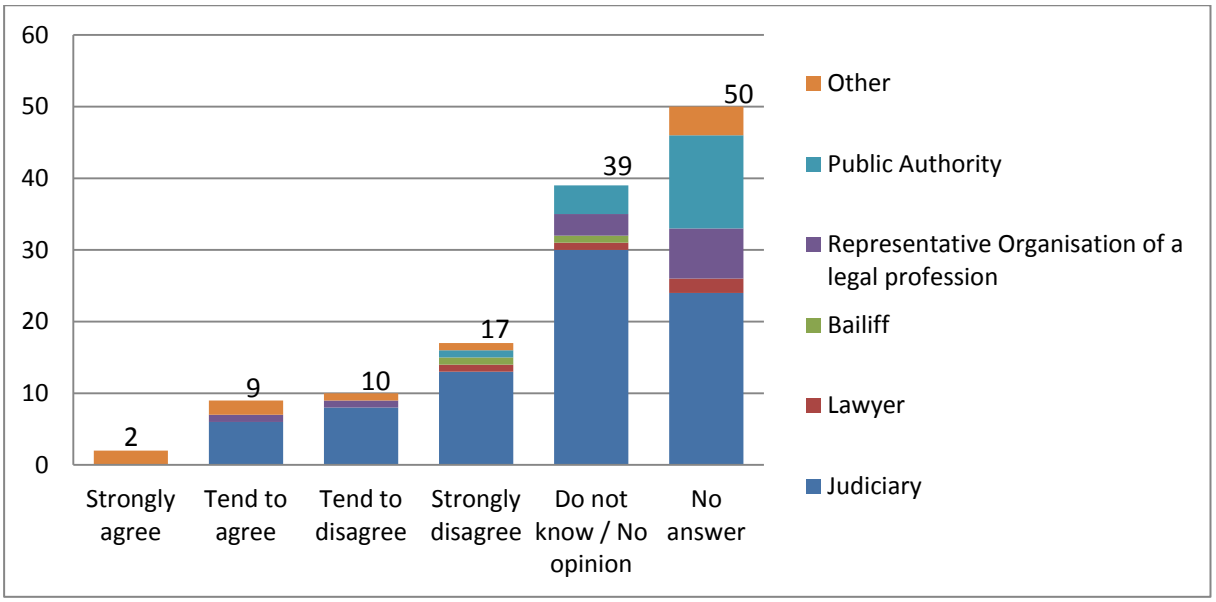



### 2.2. Language

The stakeholders consulted in the MPI study stated that the language issue appears recurrently: the need to translate the form (and the questions) into a language accepted by the requested Member States raises problems with the accuracy of the translation itself and with the costs[38]. Some Member States accept the possibility of not using translations or interpreters if the language of the person is sufficiently mastered by the court and the parties (France, Germany), but this still seems to be exceptional. In practice, it is normally the court system that will pay the interpreter; however, in some Member State it is the parties who shall bear the costs (Latvia) and with difficulties finding interpreters (in some cases, as reported for Greece, due to the low fees they are allowed to charge)[39].

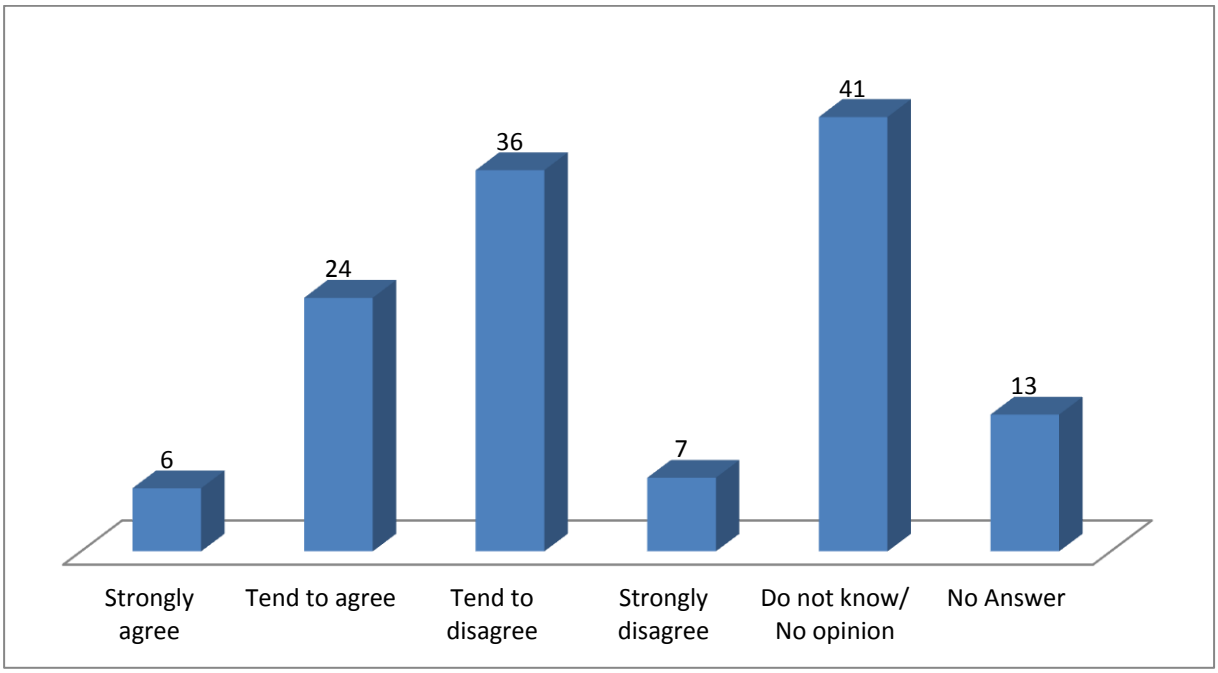
Within the public consultation, stakeholders were asked to react to the statement if the person involved in cross border proceedings encountered difficulties because of the fact that the language of the proceedings was a foreign language (especially he/she had to bear disproportionate costs):

[38] As criticised by a Belgian academic and 2 Belgian judges, a Bulgarian lawyer, a Bulgarian judge, a Croatian judge, a French lawyer, a Finnish judge, an Italian lawyer, a Latvian ministerial officer, and a Spanish court clerk. [38] Study of MPI Luxembourg, paragraph 251, p. 119.
[39] Study of MPI Luxembourg, paragraph 247, p. 116.




### 2.3.Delays

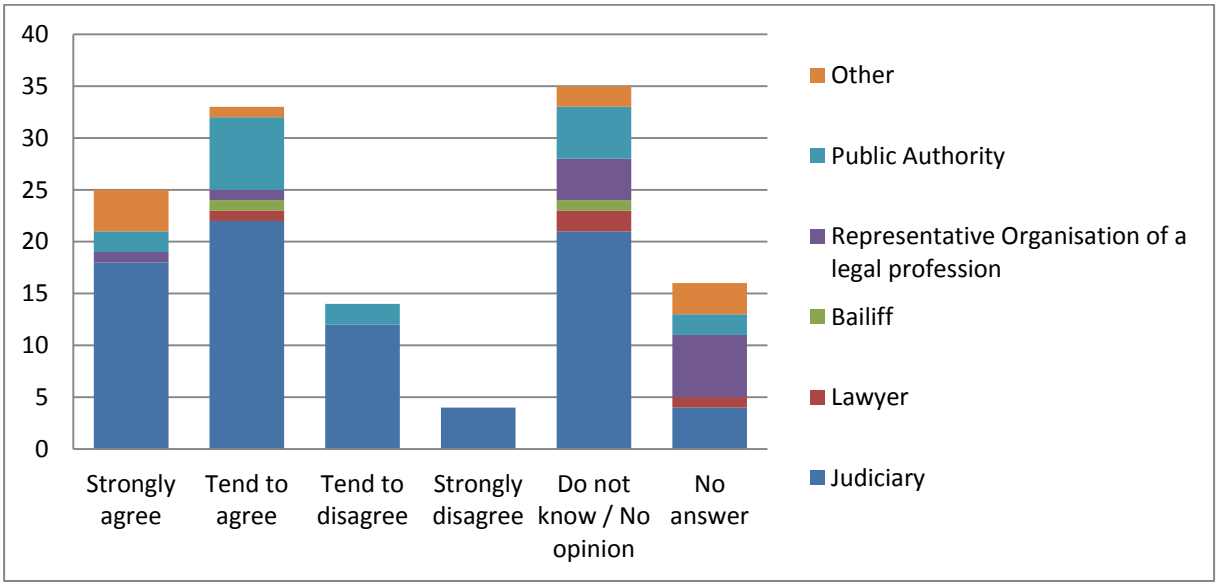
When asked if the taking of evidence in another Member State caused a disproportionate delay in the judicial proceedings, almost half of the respondents giving an opinion tended to disagree with this statement, around 10 % strongly disagreed:



## 3. Use of the means of taking of evidence under the Regulation

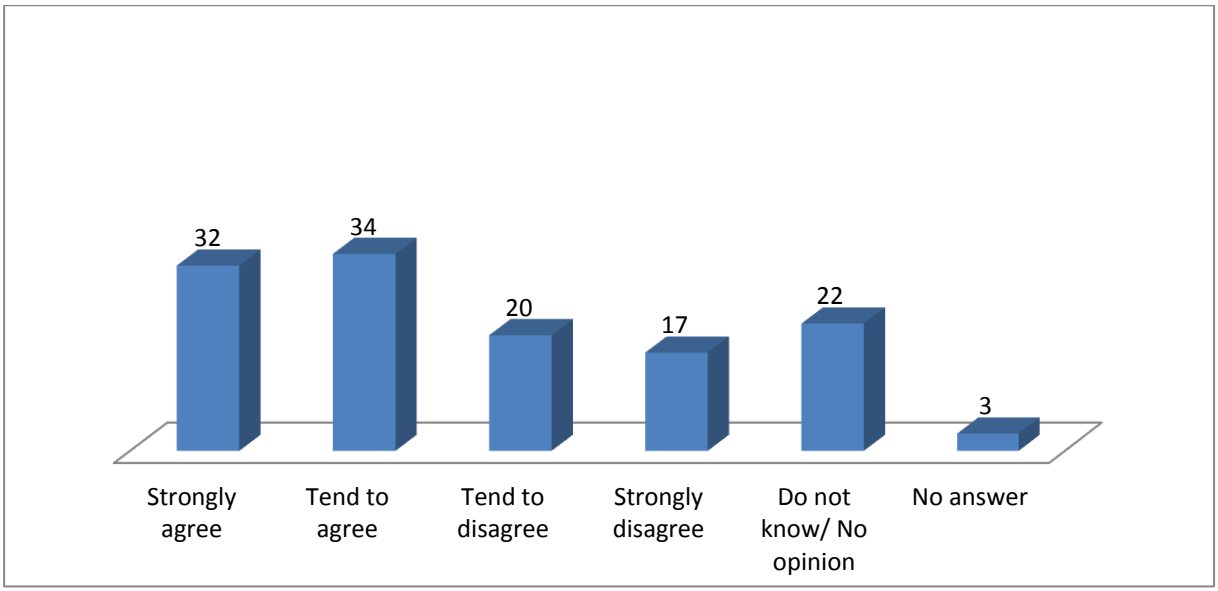
### 3.1. The traditional method through requesting – requested courts (Article 2)

The public consultation asked the stakeholders if they prefer taking of evidence through a requested court in another Member State, pursuant to Article 2 of Regulation (EC) 1206/2001, to the direct method of taking of evidence (as foreseen in Article 17 of the Regulation). The answers to this question were quite balanced: 43 % of the respondents stating an opinion tended to prefer taking evidence through a requested court, 33 % strongly preferred it. 18 % tended preferring the direct method of taking evidence, while only 5 % strongly preferred the latter.




### 3.2. Direct taking of evidence (Article 17)

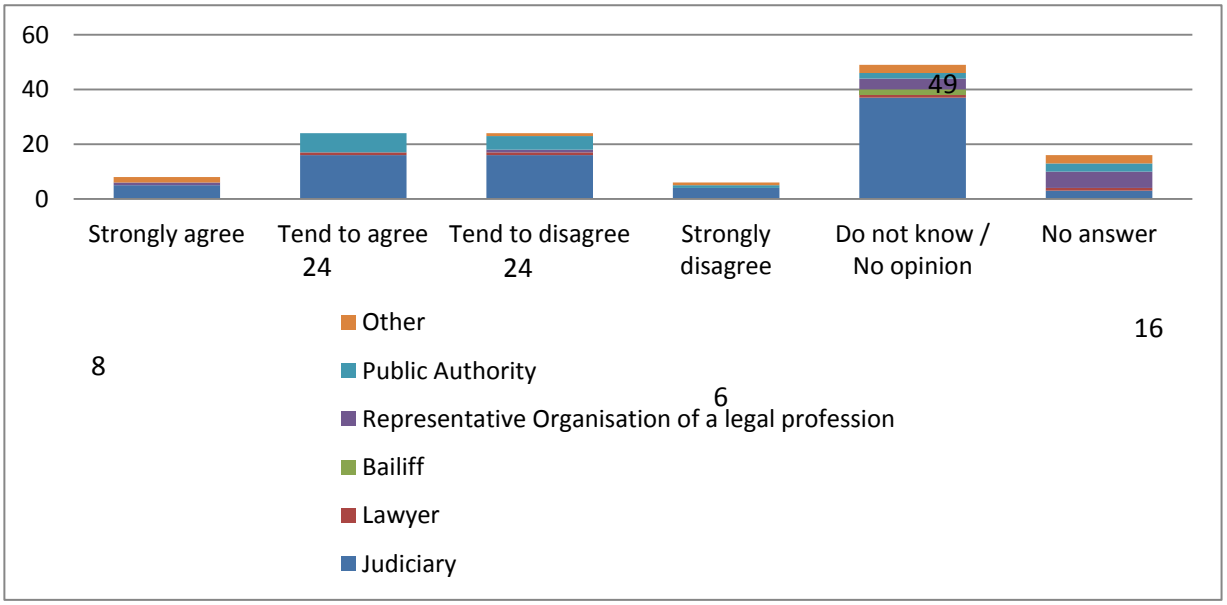
When asked if it should be generally permitted to a court from a Member State to take evidence in the territory of another Member State directly and without prior consent of that Member State, provided that no compulsion is applied, Out of the respondents stating their opinion, 31 % strongly agreed with this proposal, 33 % tended to agree. On the contrary, 19 % tended to disagree, while 17 % of them strongly disagreed:




### 3.3. Alternative methods

3.3.1. Methods outside the scope of the Regulation

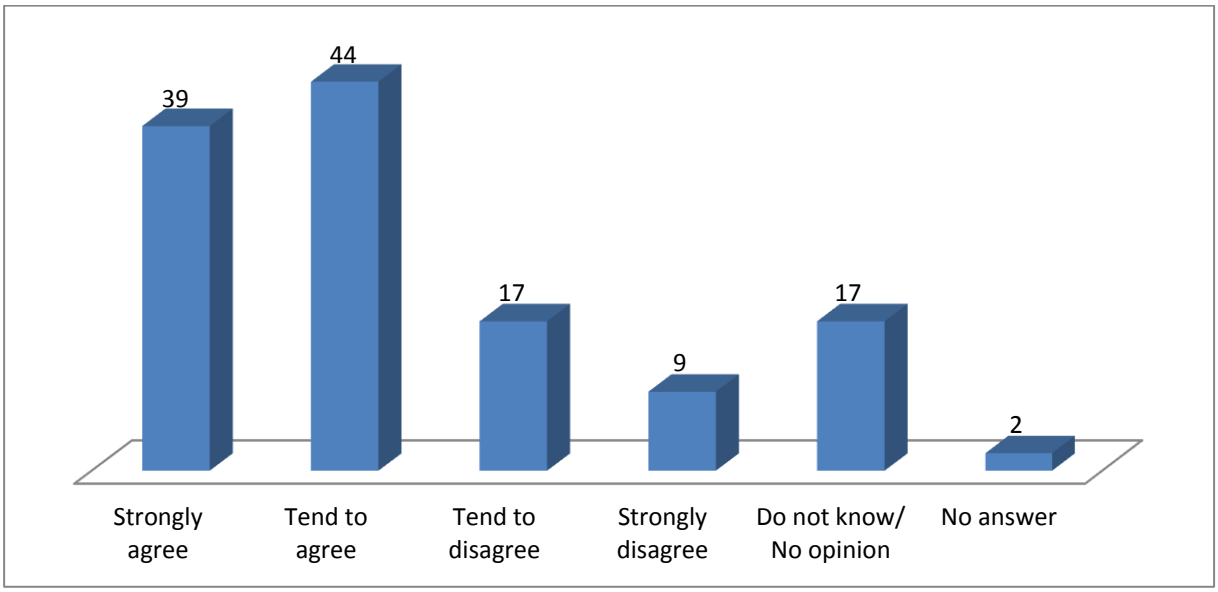
When asked about whether the ways of taking evidence abroad regulated in the Regulation (EC) 1206/2001 are not attractive if there is the opportunity to use methods outside of the scope of the Regulation (e.g. summoning a witness or party directly to the court or instructing an expert to carry out investigations abroad), most of the stakeholders did not have an opinion:




3.3.2. Videoconferencing

In the MPI study, stakeholders indicated that there are technical problems to carry out videoconferences, since not all involved authorities have the same IT infrastructure (a lawyer from Cyprus, a Finnish judge, an Hungarian court clerk, a Maltese registrar, a Romanian lawyer); they are also time-consuming for judges, parties and witnesses (a Finnish judge, a judge and a court clerk from Spain). Nonetheless some interviewees argue in favour of the use of new technologies and advice a more intensive promotion thereof (a German lawyer)[40].

However, in the public consultation, most of the stakeholders indicated that as a rule, a person with residence in another Member State should be heard through videoconferencing instead of being summoned in person to a foreign court:

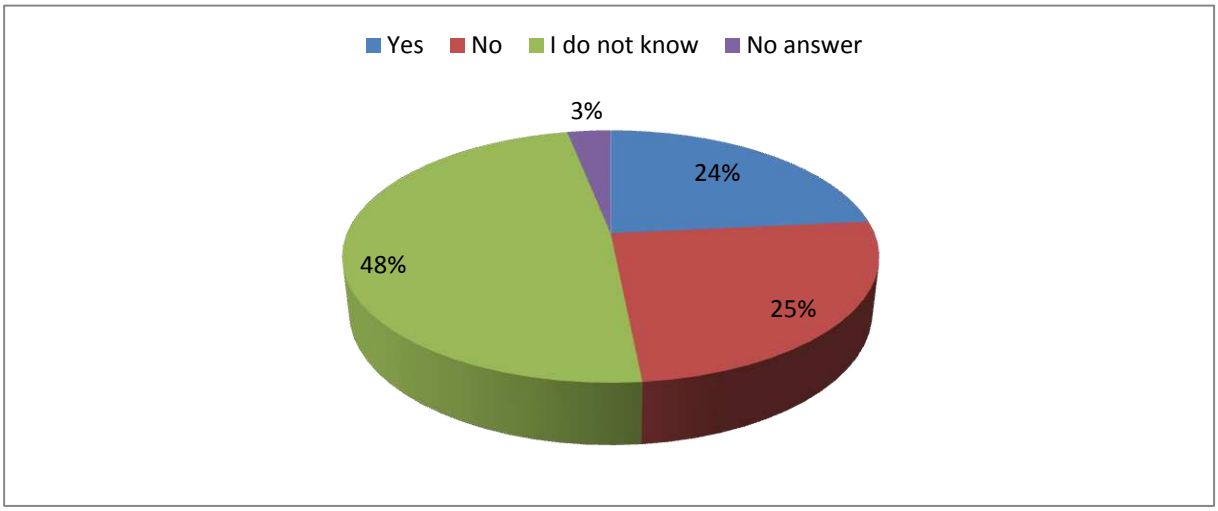



In this respect, the The Council of Bars and Law Societies of Europe pointed out that is important that the EU develops mandatory minimum standards as to the technical arrangements that should be in place for the use of videoconferencing to ensure as much as possible a true-to-life hearing experience including full communication/interaction of all the parties to the procedure with the examined person.

**4. Additional procedural standards in areas beyond and taking of evidence**

When asked whether they are in favour of introduction additional procedural standards in areas beyond taking of evidence, most of stakeholder did not give an opinion. and only 24% expressed in favour of this proposal:

[40] Study of MPI Luxembourg, paragraphe 251, p. 119.




However, three national authority participating to the public consultation underlined that the harmonisation or approximation of generally applicable national procedural legislation by way of additional procedural standards, even if only concerning certain details, is not supported. Such harmonisation would obviously interfere with national procedural systems in a way that is not justified. Legislation on court proceedings is an integrated whole, which has developed to its present form over centuries. Legal traditions in different EU-states differ sometimes considerably and changes to certain details through harmonisation would have undesirable repercussions. Procedural details are not self-standing. Harmonisation would cause imbalance and such measures would not fulfil the principle of proportionality. It is important to maintain a balance between national procedures and international co-operation. This balance is successfully struck by legislating common EU-instruments applicable in cross-border situations.

## ANNEX 3: WHO IS AFFECTED AND HOW?

**Practical implications of the initiative**

### 1.1 IMPACT ON PUBLIC AUTHORITIES

National authorities will have a balanced approach taking into account the efficiency under the Regulation and related costs. Certainly, general awareness-raising of courts implies the necessity to promote such new technologies in the Member States. These costs will depend on the scope, content, layout, means and the target group of such activities. Moreover, publications of the best practices guides would also require financing from national public authorities as well as from the European Commission.

Consequently, such activities will increase the demand of VC technologies and will require additional funding. Moreover, new equipment will need special assistance for maintenance and its proper operation. Nevertheless, VC technologies can also be efficient at national level saving costs for some internal cases.

Additionally, the establishment of electronic evidences and reducing the usage of paper-based communication would lead to the creation of the unique EU-tool for electronic evidence system through CEF eDelivery. Thus, its development, implementation and further maintenance would also require funding from national public authorities. Furthermore, the personnel shall be trained sufficiently in order to be able to operate these mechanisms, understand the methodology, standards and provide technical support.

Notwithstanding, there are many advantages for using both of these electronic tools as the need to use postal service, paper, envelopes, printer cartridges and paper-based archiving materials will be reduced. According to the level of implementation of these new technologies, the reduced level will defers. Moreover, there would be no need for labour costs dealing with communication and with the travel reimbursement for stakeholders. Accordingly, it saves time and makes the proceedings more efficient.

### 1.2 IMPACT ON LEGAL PROFESSIONALS

Legal professionals are going to incur costs by understanding the new legislation in order to analyse the most appropriate mean to take evidence. Therefore, lawyers will not be able to spend time on other cases facing financial losses. However, some costs are expected to be forwarded to clients. The judges would also need time to get familiar with new rules. Nevertheless, for both groups, when they managing cases under the Regulation frequently, the proceedings are expected to become more efficient and less time consuming.

Additionally, legal persons are going to have some administrative burden for the organisation of VC and other distance communication methods. Thus, such necessities would also require time for understanding the mechanisms and its performance.

As a consequence, legal persons will benefit from increasing legal certainty as they will obtain the needed knowledge of when and how the Regulation applies. Such factor positively implies on the court proceedings in general. Moreover, electronic systems allow gaining extra time for legal professionals, which could be used for other cases.

### 1.3 IMPACT ON JUDICIAL SYSTEM

The overall clarification in the legal text of the nature of the Regulation and situations when it shall apply would definitely benefit the system as such. It allows reducing delays in court proceedings and increasing legal certainty. Furthermore, replacing the category of "courts" with "judicial authorities" and establishing definition of such authorities will harmonise national legislation and it will improve cross-border communication and a link between notions in different Member States.

Specifically, baseline scenario to the Regulation, would not have a high impact as paper-based approach will remain the main way of communication, VC equipment would not be located in all judicial authorities. Therefore, cross-border cases are expected to be slower and exceed the 90 days period mentioned in the Regulation. Nevertheless, general awareness-raising of courts would emphasize on the importance of using modern technologies, f.i. video-conferencing, in cross-border cases. Thus, such process will have a positive effect on demanding new mechanisms and/or increase the frequency of its usage.

Nevertheless, the implementation of policy package implies co-financing from the European Commission in order to provide all necessary changes for establishing CEF eDevilery and VC equipment. Consequently, it will decrease labour costs as more legal proceedings could be handled by the same staff within the given time. Additionally, the uniform system of taking of evidence would enable harmonisation in this field.

### 1.4 IMPACT ON BUSINESS AS SERVICE PROVIDERS

Different businesses are going to get diverse consequences on the application of the Regulation. Some traditional means of communication are going to be used less frequently in the future. Therefore, the targeted providers will get primarily negative impacts. In particular, postal service providers are expected to have less income due to the number of evidences taken using electronic means of communication. Additionally, paper and office supply providers will reduce the number items provided for day-to-day paper-based approach. Furthermore, transport service providers will suffer from the reduced quantity of customers on cross-border travels with long distance busses, trains and aircrafts.

Meanwhile, some businesses would benefit from the implementation of the policy package. First of all, providers of IT consulting services could gain profit of around 1 million Euros for implementation of CEF eDelivery system whereas manufactures of VC and other distance communication equipment would gain advantages of promoting such direct mean to take evidence among Member States. Consequently, such judicial authorities, which will establish new technologies, would also require services of internet and telecommunication providers, cloud storage service providers and archiving service providers. All these different businesses would get a possibility to gain income under the Regulation. Furthermore, the maintenance of these new technologies will also require assistance from businesses in order to operate the system and provide all necessary maintenance supply.

## 1.5 IMPACT FOR CITIZENS AND BUSINESS (STAKEHOLDERS)

Overall citizens and business as parties of legal proceedings will get a positive impact. Replacing the category of "courts" with "judicial authorities" and establishing the definition of such authorities will broaden the scope of the regulation, which will allow citizens to use Regulation for more diverse cases. Moreover, the same consequence shall apply due to the changes in the notion of "taking of evidence" by adding "and other judicial acts". Additionally, the broaden scope increases access to justice and offers a freedom of choice concerning the most appropriate means to take evidence across borders. Nevertheless, such changes may create misunderstandings for citizens and business in order to clearly estimate the scope of these notions.

The establishment of electronic means for taking of evidence and reducing the usage of paper-based communication would save time and costs for ordinary citizens. Generally, VC would allow decreasing legal fees for lawyers, make the legal proceeding more efficient and less stressful. Furthermore, different means of distance communication are especially important for certain categories of persons, such as eldery, children, persons with physical or mental disabilities or anxiety disorders, persons who suffered physical or psychological damage, etc. They will be able to avoid less convenient means of communication by providing evidences using digitalise systems.

## 1.6 IMPACT ON ENVIRONMENT

The positive environment impact will be gained even under the baseline scenario. The necessity to use paper-based means of communication and obtain cross-border evidences by traveling to another county will be reduced.

Modern electronic communication would lead to the savings by reducing the costs of paper, toner or ink. Moreover, it will not require additional materials, such as envelops in the post office, fuel for transportation. Consequently, less gas emission will be produced by deliveries. Furthermore, the policy package imposes the creation of the CEF eDelivery portal, which

would become a wide EU-tool among the Member States. Such option impacts on the usage of toner or ink and creation of non-renewable resources (diminish the necessity to create special booklets for guidance on how to fill in special forms).Additionally, stakeholders mention that reprinted and duplicated prints often happens. Thus, the probability to waste such resources is reduced.

Concerning cross-border evidences, The Regulation provides with the possibility to summon a person directly on the trial41. Such factor saves costs on the postal deliveries. Moreover, the promotion of videoconferencing and other means of distance communication for the direct taking of evidence would mainly reduce the need to have a cross-border travel. Therefore, it decreases unnecessary pollution and gas emission of the transport.

[41] C-170/11 Lippens and others

| *I. Overview of Benefits (total for all provisions) – Preferred Option* | | |
|---|---|---|
| ***Description*** | ***Amount*** | ***Comments*** |
| | ***Direct benefits*** | |
| **Eliminate unnecessary costs for taking evidence** | The preferred package of options will very much decrease the number of cases in which the Regulation is not applied. | Making mandatory the application of Taking of Evidence Regulation will reduce obstacles to an efficient overall system of cross-border taking of evidence in the EU. |
| | The public consultation indicated that only 50% of the cases where the evidence was taking abroad. | CJEU rulings have created some legal uncertainty and may in certain cases lead to undesirable results. For instance, cases have been reported by citizens who wished or were requested to appear as a witness in proceedings pending in another Member State and where the court seized required their physical presence before the court despite the explicit request of the citizens to be heard by distance means of communication (e.g. videoconferencing).<br><br>This will also contribute to legal certainty for public authorities, legal professionals, citizens, and businesses and would reduce current unnecessary costs. |

| | | |
|---|---|---|
| | Making the use of videoconferencing mandatory if a person needs to be heard from another Member State will reduce the number of cases in which national courts in cross-border cases avoid resorting to the Regulation and instead summon to the court the witness or other person to be heard directly.<br><br>Most national courts in cross-border cases still avoid resorting to the Regulation and summon the witness or other person to be heard directly to the court. This predilection is caused not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of the evidence. | Using videoconferencing in a cross-border case will reduce travel time and costs including increased risks from long trips, meeting time and costs, revenue loss during the working time, lawyer cost if the person wishes to be accompanied. |
| | In reply to the Public consultation, 44 % of the stakeholders emphasised that the option of using videoconferencing as part of the direct channel | |

| | | |
|---|---|---|
| | of taking evidence is appealing. | |
| | By accepting electronic (digital) evidence produced stored in another Member State | The introduction of a tool for electronic communications and the recognition of digital as well as the encouragement of videoconferencing are in line with and support the current strategies of the EU Commission in the context of the Digital agenda and the e-justice strategy. |
| | By making e-Codex mandatory tool | This solution would ensure a safe electronic communication and exchange of documents between the users of the system, and it would provide for automatic recording of all steps of the workflow, as well as would ensure the genuine identity of the participants. |
| | By replacing the notion 'taking of evidence' (Article 1) with 'other judicial acts' | The broadened scope increases access to justice and offers a freedom of choice concerning the most appropriate means to take evidence across borders. |
| | By introducing a new definition of ‘courts’, other authorities should be able to benefit from the Regulation on taking of evidence. | Replacing the category of "courts" with "judicial authorities" and establishing definition of such authorities will harmonise national legislation and it will improve cross-border communication and a link between notions in different Member States. |

| | | |
|---|---|---|
| | By defining other means of cross-border taking of evidence | This will reduce diverging interpretations as to what is considered "taking of evidence" within the meaning of the Regulation.<br><br>An autonomous European meaning to the concept of "taking of evidence" will enhance the effectiveness of the Regulation. |

## ANNEX 4: ANALYTICAL METHODS

In order to estimate the quantitative aspects of current and future application of the Regulation (EC) 1206/2001, it is necessary to have an overview on the **number of legal proceedings** in which it was applied, as well as on the **use of different channels for taking evidence** under the Regulation. For this purpose, a model has been prepared by Deloitte which includes calculations and projections on these aspects. The model is based on primary and secondary data, which have been combined in order to build robust estimates on the application of the Regulation.

### BRIEF DESCRIPTION OF THE MODEL

The main **purpose** of the model is to estimate the number of legal proceedings in which the Regulation (EC) 1206/2001 is applied or will be applied in the future, both under the baseline scenario and the policy package. In addition, it serves to estimate the share of the different channels under the Regulation.

**Primary data (i.e. statistics)** concerning the number of legal proceedings in which the Regulation (EC) 1206/2001 has been applied is not readily available. Therefore, **estimates** have been made **based on secondary information available** for the timeframe 2000-2017, as well as expert assumptions, which feed into the model. These concern the following types of legal proceedings:

- Divorces, legal separations, and parental responsibility proceedings;
- Insolvencies, e.g. relevant in relation to B2B or B2C claims;
- Successions and wills;
- Property transactions, e.g. immovable property in B2B, B2C, and C2C constellations;
- Contractual obligations, e.g. liability in B2B or B2C contracts;
- Administrative cases, e.g. concerning disputes between citizens and authorities; and
- Compensation for damages, e.g. subsequent to criminal cases or as part of liability proceedings.

Both a **bottom-up and a top-down approach** have been used to estimate the respective data. In this case, a bottom-up approach means that the estimates are largely based on available Eurostat data or data from national statistical offices, as well as qualitative / quantitative information available in secondary sources. The number of legal proceedings was estimated based on this data and respective assumptions. In contrast, the top-down approach uses quantitative information available through the CEPEJ database on the overall number of legal proceedings and attributes the individual case load to specific types of legal proceedings based on assumptions.

The following table indicates the main data source for the estimates, as well as the type of approach used per type of legal proceeding.

*Table 1: Types of legal proceedings, respective data sources, and approach used*

| Type of legal proceeding | Source for estimate | Approach used for estimate | |
|---|---|---|---|
| | | Bottom-up | Top-down |
| **Divorces, legal separations, and parental responsibility** | • Eurostat, e.g. concerning the overall number of divorces<br>• Brussels IIa Impact Assessment[42], e.g. concerning the number of cross-border divorces and legal separations between 2008 and 2012 | X | |
| **Insolvencies** | • Eurostat, e.g. concerning the number of businesses in the EU<br>• Insolvency Impact Assessment[43], e.g. concerning the share of insolvencies with cross-border elements | X | |
| **Successions and wills** | • Eurostat, e.g. concerning the number of deaths<br>• Successions & Wills Impact Assessment[44], e.g. concerning the share of deaths with an "international component" | X | |
| **Property transactions** | • CEPEJ data[45] on the caseload of Member States' courts in 2014 concerning land register cases<br>• Eurostat data concerning the population in EU Member States | | X |
| **Contractual obligations** | • CEPEJ data on the caseload of Member States' courts in 2014 concerning litigious & non-litigious civil & commercial cases<br>• Eurostat data concerning the population in EU Member States | | X |
| **Administrative cases** | • CEPEJ data on the caseload of Member States' courts in 2014 concerning | | X |

[42] See: Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment. See: http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/15/bxl_iia_final_report_analtical_annexes.pdf

[43] SWD(2012) 416 final. Impact Assessment accompanying the document "Revision of Regulation (EC) No 1346/2000 on insolvency proceedings". See: http://insreg.mpi.lu/Impact%20assessment.pdf

[44] SEC(2009) 410 final. Impact Assessment accompanying the Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Inheritance. See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0410&from=EN

[45] Council of Europe (2016): Evaluation of European Judicial Systems. Dynamic data set concerning civil and commercial matters. See: https://public.tableau.com/views/2010-2012-2014Data/Tables?:embed=y&:display_count=yes&:toolbar=no&:showVizHome=no

| Type of legal proceeding | Source for estimate | Approach used for estimate | |
|---|---|---|---|
| | | Bottom-up | Top-down |
| | administrative cases<br>• Eurostat data concerning the population in EU Member States | | |
| **Compensation for damages** | • CEPEJ data on the total caseload of Member States' courts in 2014 | | X |

*Source: Deloitte*

In addition to the sources identified above, the estimates draw on expert assumptions, e.g. in relation to the share of legal proceedings that relate to cross-border cases, or qualitative information gathered as part of the interviews, e.g. approximate share of cases in which the Regulation (EC) 1206/2001 was applied. A detailed description on the assumptions is provided in the next section *Underlying assumptions and data input*.

The assumptions were inserted in a **complex Excel model developed by Deloitte** in which different types of data from various sources have been linked and extrapolated. The following graph visualises the high-level approach used for the development of the estimates and indicates illustrative types of data, the level of detail at which they are available, the respective sources, as well as specific examples of indicators that have been used.

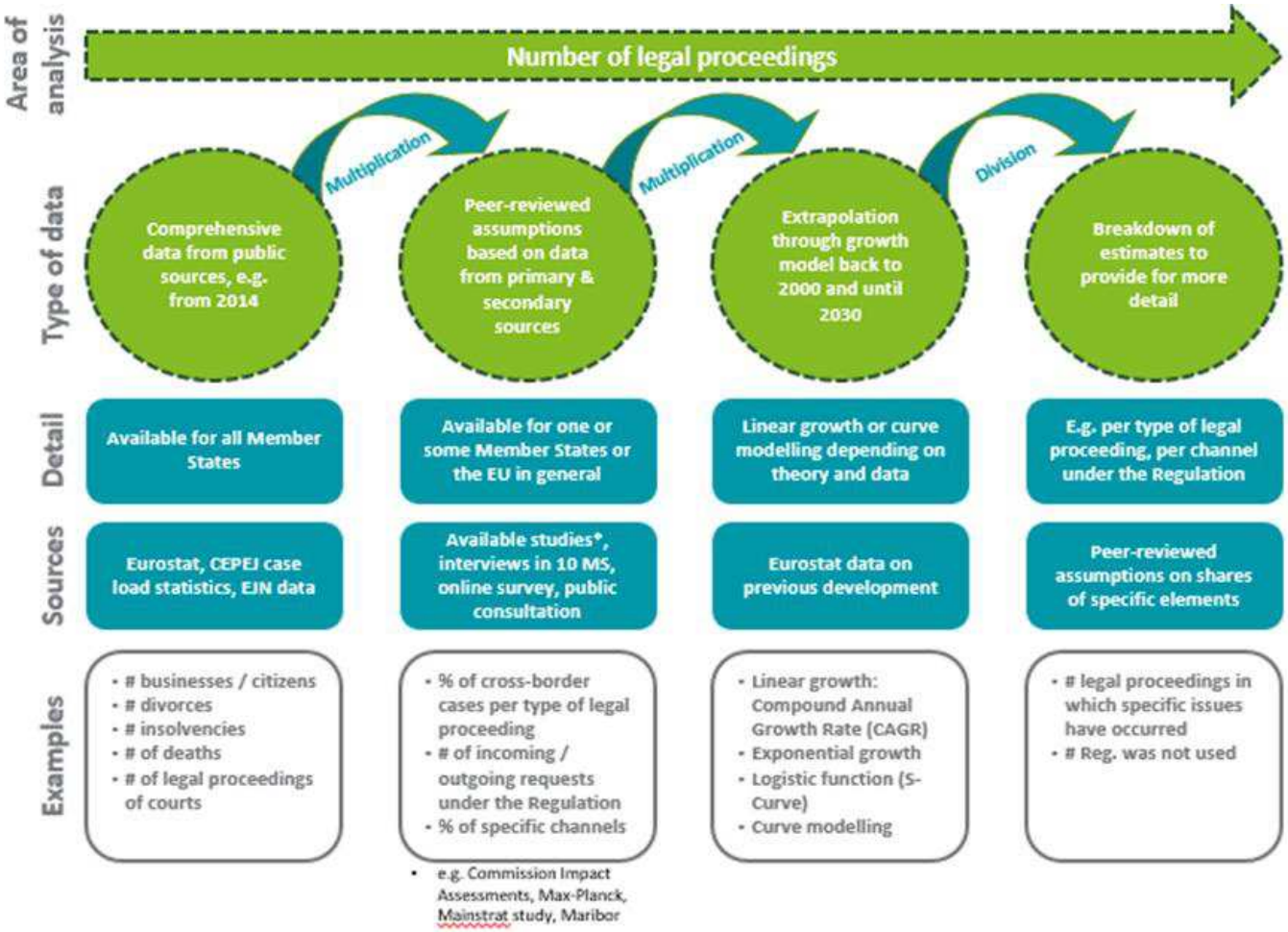



*Figure 1: High-level approach used to develop the estimates*

*Source: Deloitte*

The assumptions were subject to an **internal, in-depth peer review process**. As part of this process, different assumptions were introduced in the model to compare the different outcomes. The result of this **sensitivity analysis** was that the assumptions provided in the table below seem to be, at this stage, the most reasonable and pragmatic based on the best data available in relation to this specific subject.

## UNDERLYING ASSUMPTIONS AND DATA INPUT

a) Baseline and key assumptions

As previously explained, the model works with different assumptions indicated in the table below.

*Table 2: Key assumption used in the model*

| Type of estimate | Assum | Sources |
|---|---|---|

| | | p-tion | Commis-sion | Interviews | Expert assump-tion | Other |
|---|---|---|---|---|---|---|
| **Basic statistical estimates** | | | | | | |
| Share of divorces accompanied by a parental responsibility proceeding | | 25% | | | X | |
| Additional parental responsibility proceedings per divorce | | 25% | | | X | |
| Share of businesses that go insolvent | | 1% | X | | | |
| Share of cross-border insolvencies | | 25% | X | | | |
| Average number of legal proceedings per insolvency | | 1.0 | | | X | |
| Share of cross-border cases of all incoming cases | Minimum | 4% | X | | | |
| | Maximum | 15% | X | | | |
| Speed of growth of "cross-border CAGR" | | 1.5 | | | X | |
| Share of deaths with an "international component" | Minimum | 1% | X | | | |
| | Maximum | 25% | X | | | |
| | Average | 13% | | | | |
| Share of "international deaths" for which a will is available and can be contested in court | | 60.4% | X | | | |
| Share of property transactions with "international component" | | 1% | | | X | |
| Share of contractual obligations with an "international component" | | 9.3% | X | | | |
| **Taking of evidence** | | | | | | |
| **Shares of cases** | | | | | | |
| Share of cases in which VC is used | Minimum | 10% | | | X | |
| | Maximum | 40% | | | X | |
| | Average | 25% | | | | |
| Share of cases in which direct ToE was performed | Minimum | 5% | | X | | |
| | Typical | 20% | | X | | |
| | Maximum | 80% | | X | | |
| | Average | 35% | | | | |

| Type of estimate | | Assump-tion | Sources | | | |
|---|---|---|---|---|---|---|
| | | | Commis-sion | Interviews | Expert assump-tion | Other |
| **Delays** | | | | | | |
| Number of months it takes to take evidence across borders | Minimum | 2 | | | | |
| | Maximum | 12 | | X | | |
| | Average | 7 | | | | |
| **Costs** | | | | | | |
| Share of paper based communication | | 80% | | X | | |
| Cost of VC equipment | | 90,000 € | | X | | |
| Transcript of recording | | 270 € | | | | |
| Translation costs | Minimum | 500 € | | | | |
| | Maximum | 1,000 € | | X | | |
| | Average | 750 € | | | | |

*Source: Deloitte*

b) Key sources

The assumptions were built on the data gathered during the **interviews with practitioners** both at EU and national level carried out as part of this study, **desk research** as well as the expertise of the Deloitte study team and the external legal expert.

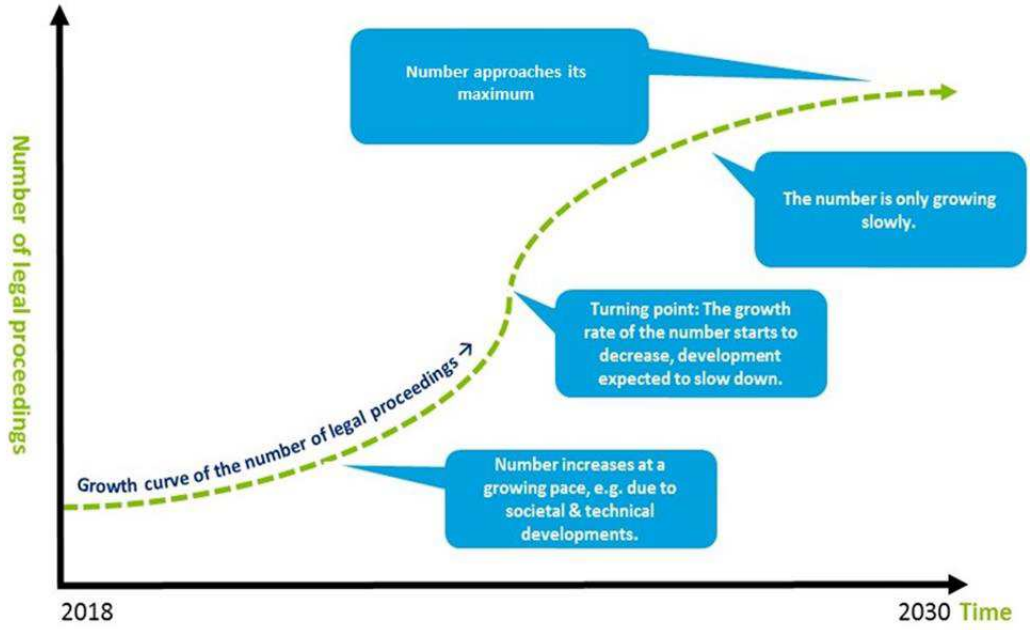
c) Construction of the baseline and core policy simulations

Based on the assumptions and key sources previously explained, the number of legal proceedings in which the Regulation was and was not (but could have been) applied was estimated for the period 2000-2017 (i.e. the baseline).

In addition to the construction of the baseline, the Deloitte study team has developed the quantitative estimates in terms of the number of legal proceedings in which the Regulation is expected to be applied between 2017 and 2030, as well as the use of different channels under the Regulation.

The projections are based on the same data and assumptions than for the baseline. A growth model has been developed based on which the expected development of the estimates in the future is projected. The model used in this study is based on the S-curve concept which is widely applied in macro-economic modelling. The concept is visualised below.

*Table 3: Illustrative S-curve development of the number of legal proceedings in which the Regulation was applied*




*Source: Deloitte*

Within this concept, the growth of a certain set of data over time, e.g. the number of legal proceedings in which the Regulation (EC) 1206/2001 was applied, increases over time up to a point at which the growth rate eventually declines and the data only grows marginally (the curve "flattens out").

Such a curve can be modelled with a **logistic function**. The general formula used for the logistic function is the following.

$$P(t) = \frac{P_0 * e^{r-t}}{1 + P_0(e^{r-t} - 1)/P_{MAX}}$$

The formula contains the following elements:

- $P$ represents the data point at a given time $t$;
- $P_0$ represents the data point today;
- $P_{MAX}$ represents the data point that can reasonably be achieved until 2030; and
- $r$ represents the parameter by means of which the data point is expected to increase annually; and
- $e$ is the mathematical that is the base for the natural logarithm ('Euler's number').

The curve can be modelled in such a way that it does, however, not resemble the S-curve in a given period of time, e.g. by mathematically stretching its development over a timeframe that exceeds the scope of this study (i.e. the flat part of the curve will not be reached by 2030). This has been used within this study as it can reasonably be expected that societal trends and increasing judicial cooperation will remain over the next twelve years until 2030. Thus, the

graphs depicted in this section do not encompass the typical "flattening out" part of the S-curve.

This has been the basis for **estimates on the application of the revised Regulation under the selected policy package**. The values applied to the baseline scenario have been used as the start value for the modelling of the application of the revised Regulation. It was assumed that there would not be any significant changes in the first two years at least, as the legislative changes would first need to be adopted and implemented.

For the time after that, the assumptions concerning the speed of growth have been adjusted based on the qualitative assessment of the selected policy options. For every aspect of the policy option, it was assessed how and to what extent it would impact on the number of cases in which the Regulation (or specific channels) have been applied, based on expert judgment.

Overall, it was assumed that the application of the Regulation would increase based on the envisaged policy changes. Again, it was assumed that the development would be S-curve shaped.

Assumptions have been made for the overall application of the revised Regulation in the future as well as the application of individual channels, as follows:

- **Overall application of the revised Regulation (including the new channels added)**: 67.5 – 90% of all cross-border cases in civil and commercial matters;
- **Application of the channels that exist currently under the Regulation (Art. 10ff and Art. 17)**: 15 – 20% of all cross-border cases in civil and commercial matters;
- **Application of direct Taking of Evidence under Art. 17 of the Regulation**: up to 40% of all cases in which the Regulation is applied;
- **Use of videoconferencing under Art. 17**: up to 70% of all cases in which Article 17 of the Regulation is applied.

The estimates in the graphs provided should not be read as concrete projections but rather as 'corridors of estimates' in which the 'actual' concrete number of legal proceedings is likely to be.

d) Sensitivity of model results and likely robustness to changes in the underlying assumptions and/or data input

As previously explained, as part of the in-depth peer review of the model, assumptions were introduced to compare the different outcomes. These assumptions were based on the expertise and judgement of the Deloitte study team. In addition, the estimations were provided in corridors in the graphs in order to take into account possible variations that might occur.

## ANNEX 5: TABLES WITH ASSESSMENT OF OPTIONS FOR PROBLEMS

*Assessment of options for problem 1 "Uncertainty when the Regulation shall be used or other means in national or European law may be used"*

| ***Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| 1.1. Best practice guide for legal professionals on the parallel use of the various channels of obtaining information or evidence in cross-border cases, for example to be distributed via the e-Justice Portal | Small increase of legal certainty and resulting reduction of delays and costs for public administrations, businesses and citizens to a small degree dependent on the uptake of the practice guide.<br><br>It is questionable to what extent legal professionals (in particular those who do not regularly work on cross-border cases) are aware of and use such a practice guide. | Medium.<br><br>Limited positive impacts in achieving the objectives but also rather low costs. The guidance could be developed within the existing structure of the EJN network.<br><br>Visualisation, layout etc. of the practice guide could be done at a cost of between 15,000 and 30,000 Euro.<br><br>The guide could be mainly distributed via the e-justice portal at no additional costs<br><br>Printed material, e.g. flyers, brochures etc. (e.g. for training | No binding effect, easy development and distribution at very low costs. However, this option would address the problem only to a very limited extent. | +1 | Small positive impact at low costs.<br><br>Limited positive benefits in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders . The exact extent of the benefits would be dependent on the uptake of the information in the new practice guide.<br><br>The costs for procuring the drafting of this practice guide would likely be between 15,000 and 30,000 Euro.<br><br>The option is proportionate, but |

| *Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | sessions or as take-away at conferences), costs would range from 1 to 5 Euro per print.If one practice guide was printed per court (i.e. 6,000 in the EU), this would amount to max. 30,000 Euro. | | | would not fully address the problem at hand. |
| 1.2 (a) Clarifying the relationship of the Regulation with other instruments, including national law, by stating explicitly that other means to take evidence may be used (following the CJEU) and providing examples (summoning of experts etc.)<br>+<br>1.2 (b) Clarifying in a provision the subsidiary nature of the Regulation to further means in other EU instruments where | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a medium degree.<br>However, the effects would be limited by the fact that the option merely codifies existing case law (point a) or legal principles (point b), which normally should already be followed and thus be part of the baseline scenario. Nevertheless, clarity would be enhanced by including these aspects directly in the Regulation. Thus, there | The efficiency of this option would be medium.<br>While the option would have some limited positive impacts in achieving the objectives, the costs for this option would also be rather low. They would be limited to the drafting of the new legislative text and awareness raising / training of legal professionals on the amendment.<br>At the same time, legal professionals (e.g. | The option is proportionate.<br>The option codifies existing case law and legal principles and thus does not go beyond what is necessary and this type of action could not be taken at the Member State level. | +2 | The option would have a medium positive impact at low costs.<br>Some limited positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to drafting the amendment and awareness raising / training of legal professionals on the |

| *Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| the scopes of these means overlap. | would time savings for legal professionals who might otherwise need to check the case law, possibly translating into slightly lower costs for legal advice for citizens and businesses. In addition, an increasing number of legal professionals may become aware of this relationship.<br><br>Thus, there would be fewer instances in which it is not clear whether or not the Regulation may or should be applied. On this basis, there would be a higher share of cases in which an informed decision about the method for cross-border taking of evidence is taken. On this basis, it can be expected that the most efficient methods are chosen in a higher share of cases. | lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) once.<br><br>Such costs are, however, regarded as out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | | | amendment.<br><br>The option is proportionate. |
| **1.3 (a) Defining other** | This option would increase | The efficiency of this | The option is | +3 | The option would have |

| *Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **means of cross-border taking of evidence in the Regulation in addition to the existing two ways: acknowledging the ways supported by the CJEU as legitimate means under the Reg.:**<br><br>**(i) Direct examination of facts in MS B by experts appointed by courts in MS A in accordance with the procedural rules of MS A, insofar that this activity does not affect the sovereign powers of MS B > see C-332/11 ProRail**<br><br>**(ii) Summoning foreign persons directly to the trial court (but whenever possible, VC should** | legal certainty and reduce delays and costs for public administrations, businesses and citizens to a medium degree.<br><br>The option codifies existing case law and specifically acknowledges additional ways of taking evidence, also specifying how or under which law such ways are to be executed.<br><br>Thus, there would be fewer instances in which it is not clear whether or not the Regulation should be applied. With the broadened scope, the Regulation would likely be applied in a higher number of cases, which may also help to increase knowledge about it and possibly increase the awareness of legal professionals about alternative methods.<br><br>Clarity would be enhanced | option would be high.<br><br>While the option would have medium positive impacts in achieving the objectives, the costs for this option would also be rather low. They would be limited to the drafting of the new legislative text and awareness raising / training of legal professionals on the amendment.<br><br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) | proportionate.<br><br>The option codifies existing case law and includes methods for the taking of evidence in the Regulation, which are currently already used. It thus does not go beyond what is necessary and this type of action could not be taken at the Member State level. | | a medium positive impact at low costs.<br><br>Some medium positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to drafting the amendment and awareness raising / training of legal professionals on the amendment.<br><br>The option is proportionate. |

| *Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **have priority) > see C-170/11 Lippens and others**<br><br>**+**<br><br>**1.3 (b) Regulating the taking of evidence through diplomatic officer or consular agent as a specific way of taking of evidence under the Reg., in line with relevant provision of the 1970 Hague Convention** | by including these aspects directly in the Regulation. Thus, there would time savings for legal professionals who might otherwise need to check the case law and increased legal certainty for citizens and businesses.<br><br>It would be even more useful, if it was specifically stated in the Regulation that other methods, e.g. based on national law, could be used if they would be more efficient than those in the Regulation. This would add clarity and make sure that courts can always use the methods most suitable to the case.<br><br>Nevertheless, the positive effects would depend on the extent to which the Regulation is actually known and used by legal professionals. | once.<br><br>Such costs are regarded as out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | | | |

| *Problem 1: Uncertainty when the Regulation shall be used or other means in national or European law may be used* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **Preferred option** | The preferred option is 1.3. This option would add most clarity and thus it would also reduce costs and delays to the highest degree. There are low costs associated with the implementation of the option (related to the drafting of the new legislative text and raising awareness of / training legal professionals on the amendment) and it is proportionate. It would be even more useful, if it was specifically stated in the Regulation that other methods, e.g. based on national law, could be used if they would be more efficient than those in the Regulation. This would add clarity and make sure that courts can always use the methods most suitable to the case.<br><br>In addition, it would be useful to combine this with awareness raising, a new guidance document (cf. option 1.1) and/or an update of the existing EJN Practice Guide. | | | | |

### 1.1.1 Options addressing the diverging interpretation of "courts" under the Regulation by the national authorities

*Assessment of options for problem 2 "Diverging interpretation of "courts" under the Regulation by the national authorities"*

| ***Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **2.1 Upgrading the 2006 EJN Practice Guide to include guidance on the interpretation of "courts"** | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a small degree. The exact extent of the benefits would be dependent on the uptake of the information in the EJN practice guide.<br><br>There would be fewer instances in which it is not clear whether or not the Regulation may be applied. Thus, there would be fewer exchanges between courts / other authorities to clarify whether or not the requesting authority / institution is actually a court under the Regulation. In turn, this is expected to reduce the overall time of the proceedings to a small | The efficiency of this option would be medium.<br><br>While the option would have some limited positive impacts in achieving the objectives, the costs for this option would also be rather low. It would be necessary to come to an agreement on how the guidance should be phrased. This could, for example, be done within the EJN network, possibly in the context of existing meetings.<br><br>Efforts are likely to be limited, as examples can be found in existing EU instruments (e.g. the Maintenance Regulation) and the EJN | The option is proportionate.<br><br>The option does not have any binding effect and the information would be included in a document that already exists. Hence, the option does not go beyond what is necessary to address the problem and the type of action is as simple as possible. Furthermore, this type of action could not be taken by individual Member States. Finally, the costs are minimal. This said, the option would not fully address the problem. | +1 | The option would have a small positive impact at low costs.<br><br>Some limited positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. The exact extent of the benefits would be dependent on the uptake of the information in the EJN practice guide.<br><br>The costs for procuring an update of the EJN Practice Guide are likely to be limited. |

| *Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | degree.<br>However, it questionable to what extent legal professionals (in particular those who do not regularly work on cross-border cases) are aware of and use the EJN Practice Guide. Thus, it would still be possible that uncertainty in relation to the meaning of this term arises. | Practice Guide is currently drafted in a simple format (so no additional costs for layout or design would be expected).[46]<br>The Guide exists as a digital guide, so it can be assumed that there would no costs associated with the distribution of the new guide.[47] | | | The option is proportionate, but would not fully address the problem at hand. |
| 2.2. Replacing 'courts' in Art 1 with 'judicial authorities' | This option would broaden the scope of the Regulation, as the concept of judicial authorities is wider than the concept of courts.<br>Thus, there may be fewer cases in which the application of Regulation is denied. This could also lead | The efficiency of this option would be medium, as some limited positive effects could be achieved at low costs.<br>The option is expected to have a limited positive impact in | The option is proportionate.<br>The concept of court would be broadened, leaving flexibility to Member States to decide which types of bodies may pose requests under the Regulation. | +2 | The option would have a small positive impact at low costs.<br>Some limited positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and |

[46] If the update of the Guide was to be contracted, additional costs may be incurred. However, this would likely be done for all necessary updates together. Therefore, these costs are calculated at the level of the preferred policy package.

[47] It is possible that courts would print a new version of the guide. This would then be based on all updates relating to all sub-options. Therefore, these costs are calculated at the level of the preferred policy package.

| *Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | to a small reduction of the burden for citizens, as they may benefit from the application of the Regulation in more cases.<br><br>However, the option would not necessarily have any major positive impact in terms of increasing legal certainty, as different interpretations in relation to the concept of "judicial authorities" may arise, similar to the current issues relating to the concept "court". This said, the amendment would ensure further clarity in those countries where the relevant case(s) is not handled by courts in the strict sense. Again, this could lead to a small reduction of the burden for citizens and businesses. | achieving the objectives. At the same the costs for this option would be low, as they would be limited to the drafting of the new legislative text and raising awareness of / training legal professionals on the amendment.<br><br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) once.<br><br>Such costs are regarded as out-of-pocket costs or | The option does not go beyond what is necessary and this type of action could not be taken at the Member State level. | | costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to legislative drafting, awareness raising and time for legal professionals to familiarise themselves with the new rules.<br><br>The option is proportionate, but would not fully address the problem at hand. |

| *Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | business as usual and not as additional costs compared to the baseline scenario. | | | |
| 2.3. Stating that all authorities labelled as courts in other EU civil judicial instruments may use the Regulation | This option would increase legal certainty to a small degree.<br>While the definition would be clearer, the solution of referring to other legal instruments makes it more difficult for legal professionals to apply the Regulation. They would need to know or check the definitions in other legal instruments.<br>On this basis, the positive impacts, including on legal certainty and the burden of citizens / businesses are expected to be limited. | The efficiency of this option would be low.<br>The costs for this option would be low (cf. description under option 2.2). However, the benefits would also be limited. | The option is proportionate.<br>The definition would follow definitions already agreed in other EU instruments. | +1 | The option would have limited positive impacts at low costs.<br>Some very limited positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to legislative drafting, awareness raising and time for legal professionals to familiarise themselves with the new rules.<br>The option is proportionate, but would not fully address |

| *Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | | | | the problem at hand. |
| **2.4. (a) Replacing 'courts' in Art 1 with 'judicial authorities'**<br>**+**<br>**2.4. (b) Providing a general definition of 'judicial authorities' (similarly to the Succession Regulation or the Maintenance Regulation)** | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a medium degree.<br>There would be fewer instances in which it is not clear whether or not the Regulation may be applied. Thus, there would be fewer exchanges between courts to clarify whether or not the requesting authority / institution is actually a court under the Regulation, also reducing the overall time of the proceedings to a small degree.<br>The scope of the Regulation is slightly broadened, possibly leading to a higher number of cases in which citizens / businesses can benefit from the application of the Regulation. | The efficiency of this option would be high.<br>The high positive benefits described under "effectiveness" could be achieved at low costs.<br>Costs would be limited to the drafting of the new legislative text and raising awareness of / training legal professionals on the amendment.<br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little | The option is proportionate.<br>The concept of court would be broadened, leaving flexibility to Member States to decide which types of bodies may pose requests under the Regulation.<br>The option does not go beyond what is necessary and this type of action could not be taken at the Member State level. | +3 | The option would have a positive impact at low costs.<br>There would be positive benefits in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to legislative drafting, awareness raising and time for legal professionals to familiarise themselves with the new rules.<br>The option is proportionate. |

| *Problem 2: Diverging interpretation of "courts" under the Regulation by the national authorities* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | time (e.g. half an hour) once.<br><br>Such costs are regarded as out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | | | |
| **Preferred option** | The preferred option is 2.4. This option would add most clarity and thus it would also reduce costs and delays to the highest degree. There are low costs associated with the implementation of the option (related to the drafting of the new legislative text and raising awareness of / training legal professionals on the amendment) and it is proportionate. It would be useful to combine this with an update of the EJN guidance documents (option 2.1) or any other new guidance document. | | | | |

### 1.1.2 Options addressing the diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation

*Assessment of options for problem 3 "Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation"*

| ***Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **3.1 Upgrading the 2006 EJN Practice Guide to include guidance on which kind of judicial actions constitute a "taking of evidence" under the Regulation** | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a small degree. The exact extent of the benefits would be dependent on the uptake of the information in the EJN practice guide.<br><br>There would be fewer instances in which it is not clear whether or not the Regulation may be applied. Thus, there would be fewer exchanges between courts to clarify whether or not a request actually falls under the Regulation or not, also reducing the overall time of the proceedings to a small degree. | The efficiency of this option would be medium.<br><br>While the option would have some limited positive impacts in achieving the objectives, the costs for this option would also be rather low. It would be necessary to come to an agreement on how the guidance should be phrased. This could, for example, be done within the EJN network, possibly in the context of existing meetings.<br><br>Efforts are likely to be limited, as the EJN | The option is proportionate.<br><br>The option does not have any binding effect and the information would be included in a document that already exists. Hence, the option does not go beyond what is necessary to address the problem and the type of action is as simple as possible. Furthermore, this type of action could not be taken by individual Member States. Finally, the costs are minimal. This said, the option would not fully address the problem. | +1 | The option would have a small positive impact at low costs.<br><br>Some limited positive benefits are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. The exact extent of the benefits would be dependent on the uptake of the information in the EJN practice guide.<br><br>The costs for procuring an update of the EJN |

| *Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | However, it questionable to what extent legal professionals (in particular those who do not regularly work on cross-border cases) are aware of and use the EJN Practice Guide. Thus, it would still be possible that uncertainty in relation to the meaning of this term arises.<br><br>However, it questionable to what extent legal professionals (in particular those who do not regularly work on cross-border cases) are aware of and use the EJN Practice Guide. Thus, it would still be possible that invalid requests are sent under the Regulation or that valid requests are denied. | Practice Guide is currently drafted in a simple format (so no additional costs for layout or design would be expected).[48]<br><br>The Guide exists as a digital guide, so it can be assumed that there would be no costs associated with the distribution of the new guide.[49] | | | Practice Guide are likely to be limited.<br><br>The option is proportionate, but would not fully address the problem at hand. |

[48] If the update of the Guide was to be contracted, additional costs may be incurred. However, this would likely be done for all necessary updates together. Therefore, these costs are calculated at the level of the preferred policy package.

[49] It is possible that courts would print a new version of the guide. This would then be based on all updates relating to all sub-options. Therefore, these costs are calculated at the level of the preferred policy package.

| *Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | In addition, it would still be defined based on national law what types of actions are actually allowed. Thus, it would still be possible that requests that are considered to be included in the concept "taking of evidence" are denied based on national law. | | | | |
| **3.2 (a) Completing Art 1 'taking of evidence' with 'and other judicial acts'** | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a medium degree.<br><br>The scope of the Regulation is slightly broadened by adding "other judicial acts". Thus, the Regulation could apply in relation to a higher number of actions, possibly leading to a higher number of cases in which citizens / businesses can benefit from the application of the Regulation. | The efficiency of this option would be high.<br><br>The costs for this option would be low, as they would be limited to the drafting of the new legislative text and awareness raising / training of legal professionals on the amendment.<br><br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. | The option is proportionate.<br><br>A definition is added to the Regulation, which is suitable to address a lack of clarity. In addition, the concept is broadened, leaving flexibility to Member States.<br><br>Action at the Member State level would not solve this problem. | +3 | The option would have a positive impact at low costs.<br><br>There would be positive benefits in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to legislative drafting, awareness raising and time for legal |

| *Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | There would be fewer instances in which it is not clear whether or not the Regulation may be applied. Thus, there would be fewer exchanges between courts to clarify whether or not a request actually falls under the Regulation or not, also reducing the overall time of the proceedings to a small degree.<br>However, it would still be defined based on national law what types of actions are actually allowed. Thus, it would still be possible that requests that are considered to be included in the concept "taking of evidence" are denied based on national law. | These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) once.<br>Such costs are regarded as out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | | | professionals to familiarise themselves with the new rules.<br>The option is proportionate. |
| 3.3. Creating a "conflict of laws" solution: i.e. subjecting the interpretation of the concept of "taking of | This option would solve the issue of diverging interpretations of the concept "taking of evidence" by subjecting the interpretation to only one | The efficiency of this option would be limited.<br>The costs for this option would be low, as they | The proportionality of this option is questionable.<br>Under this option, it is possible that Member States would have to | -1 | This option would entail low costs (mainly related to legislative drafting, awareness raising) but the positive benefits would also be |

| *Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| evidence" to the law of either the requesting or the requested MS | Member State per case.<br><br>Nevertheless, there would still be legal uncertainty, in particular because there would be no common definition. For example, if the definition would be subject to the law of the requested Member State, it would still be possible that legal professionals in the requesting Member States are not aware of that definition. They might thus pose requests for actions that do not fall under the concept "taking of evidence" in the requested Member State, which could lead to additional exchanges between courts and potentially to delays in the proceedings.<br><br>If the interpretation was subject to the requesting Member State, it would be possible that courts intend to collect evidence in ways | would be limited to the drafting of the new legislative text and awareness raising / training of legal professionals on the amendment.<br><br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) once.<br><br>Such costs are regarded as out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | accept that evidence is taken in their territory in ways that are not allowed based on their national law. This would compare to very limited benefits. | | very limited.<br><br>The main draw-back of this option is its proportionality, which is questionable based on the limited positive benefits in comparison to potential effects on Member States. |

| *Problem 3: Diverging understanding what kind of judicial actions constitute a "taking of evidence" under the Regulation* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | that are not accepted in the requested Member State. This would then lead to questions and probably delays. | | | | |
| **Preferred option** | The preferred option is 3.2. This option would add most clarity and thus it would also reduce costs and delays to the highest degree. There are low costs involved and it is proportionate. It would be possible to combine this with an update of the EJN guidance documents. | | | | |

### 1.1.3 Options addressing the method of taking evidence requested not available in the requested Member State, e.g. video-conferencing

*Assessment of options for problem 4 "Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing"*

| ***Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)*** | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| 4.1. Awareness raising of courts[50] of existing ways, procedures and examples of the benefits of using and accepting digital methods, as well as the adoption of electronic systems in courts | Awareness raising of courts could include the development of printed material (i.e. flyers) and digital content (Word and Power Point, as well as website content) that could be published physically, via the eJustice portal, or e.g. as part of larger communication packages to courts.<br><br>Raising the awareness of courts of digital tools to take evidence across borders is expected to contribute to the improvement of the | Overall, raising courts' awareness is considered a pragmatic way to improve the take-up of VC compared to the Baseline Scenario. There are, however, constraints of time, resource and reach.<br><br>The costs for the awareness raising activities are dependent on the exact scope, means and target groups of the activities. It can be expected that the organisation of these activities would be | The option is overall proportionate.<br><br>This option is not considered to go beyond what is needed to achieve the policy objectives.<br><br>It is, however, not fully clear at this stage to what extent the Member States are not better equipped to promote the use of VC facilities compared to the Commission. They have a better understanding about their national systems, the availability of VC facilities, as well as their | +1 | Awareness raising activities are expected to provide a limited improvement compared to the Baseline Scenario.<br><br>Although the awareness raising activities are expected to contribute to achieving the policy objectives, the extent to which the benefits exceed the costs is ambiguous. Moreover, Member States may be better equipped than the Commission to promote the use of VC facilities, |

[50] In a previous version of this policy option, the awareness raising activities also targeted citizens. The benefits of targeting citizens is not clear, in view of that the importance of the Evidence Regulation and in particular the availability of VC facilities in courts is not a topic of general interest, but rather those that actually have to deal with legal proceedings (i.e. professionally). This said, instead of reaching out to them directly, citizens could anyway be addressed by providing relevant information on the eJustice portal.

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | efficiency and speed of judicial proceedings.<br><br>Increased awareness could, for example, have a positive effect on the supply and demand of digital tools such as VC which, in turn, is expected to lead to an increased take-up of such facilities in practice.<br>• Courts that are already in possession of VC facilities are expected to use them increasingly frequent; and<br>• Courts that do not yet possess VC facilities are expected to be more likely to invest in the necessary technical equipment.<br><br>Hence, the extent of the benefits would be dependent on the take-up by courts, incl. the possibility | procured by the Commission.<br><br>Experience-based estimates show that the implementation of awareness raising activities targeting a comparatively limited audience can at least cost one million Euro if implemented in all 28 Member States (depending of course on the types of channels, frequency of communication, level of information etc.).<br><br>Considering that there are approx. 82,000 professional judges in the EU[51], which could all be handling a cross-border case, costs could be up to around 2 million Euro, if each | practical functioning than the Commission. This is of particular importance for larger Member States such as Germany in which VC is not even used to the full extent possible in domestic procedures.<br><br>Therefore, it is considered proportionate for the Commission to act in unison with the Member States.<br><br>The option may impose a relatively small budgetary burden on the Commission for (procuring) the development and implementation of the awareness raising activities.<br><br>Secondary costs, born by the Member States, however, could be significant. The take-up is, | | at least in larger Member States. |

[51] Based on the Council of Europe's 2014 CEPEJ database.

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | for the courts to set aside a budget to acquire the relevant equipment.<br><br>Depending on the number of courts that actually invest in VC facilities and its actual use in practice, this could result in reduced costs and delays for citizens and businesses.<br><br>It should be kept in mind, however, that supply and demand are not the only determinants of VC use in legal proceedings.<br><br>Although VC facilities may be available for use in a specific legal proceeding, it may not necessarily be the most fitting solution for every case or all stakeholders directly involved in the case to actually use it. | individual would be targeted directly[52].<br><br>In addition, courts are expected to invest in VC facilities as a result to the awareness raising activities.<br><br>Interviewees indicated that the acquisition, implementation, and operation of professional, high-end VC equipment (e.g. similar to those used by the Commission in their larger conference rooms) could cost as much as 90,000 Euro – depending on the type of systems and its functionalities (e.g. number of microphones, cameras, extent to which the system is smart and can track | however, voluntary and the VC equipment acquired could also be used for domestic cases.<br><br>To conclude, while the type of action does not go beyond what is necessary to address the problem. It would, however, not fully address the problem and the Member States could be better placed to lead the activities. | | |

[52] Based on the assumption of 25 Euro per person targeted.

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | conversations by zooming in on attendees that currently use the microphone).<br><br>This estimate seems to be very high. Prices available online show that approx. 3,000 Euro per month could be a more realistic estimate.[53]<br><br>This means that annual costs per court could be in the range of 36,000 Euro.<br><br>According to CEPEJ 2014, there are 6,000 courts in the EU of which a limited number already has VC facilities. Thus, if all courts were to be equipped with one VC facility – which is still unlikely – costs could | | | |

[53] See, for instance, the following website: https://www.videokonferenz.tv/videokonferenz-ratgeber/kostenvergleich/

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | be as high as 216 million Euro across all Member States, i.e. on average 8 million Euro per Member State.<br><br>There could be similarly high costs for the replacement of the current system after a couple of years of maintenance.<br><br>Thus, the extent to which this option is efficient overall (i.e. across all stakeholders, incl. public authorities) depends on the extent to which costs and delays that can be saved in legal proceedings exceed the overall costs of the implementation of awareness raising regarding digital tools.<br><br>Moreover, it depends on the extent to which costs and delays can be saved in comparison to | | | |

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | domestic means to take evidence across borders that often include costs to travel to the court in another Member State.<br><br>Thus, awareness raising is not necessarily an efficient option for public authorities.<br><br>However, it is expected that awareness activities raising is an efficient option to reduce the costs and delays for citizens and businesses. | | | |
| *4.2 (a) Using VC, telephone-conferencing or other means of distant communication, as a rule, if a person should be heard from another MS (subject to availability of equipment at the court)*<br><br>**+** | The availability of technical infrastructure is the backbone of effectively using VC facilities across borders.<br><br>This could lead to an increased take-up of direct methods to take evidence across borders under the Regulation.<br><br>Moreover, incentivising Member States to equip | Incentives for Member States, e.g. through funding national projects from the EU budget, is a proven and efficient means to accelerate the take-up of technical solutions in the Member States.<br><br>For instance, eCODEX was funded over six years with an EU | Option 4.2 (b) is not considered to go beyond what is needed to achieve the policy objectives and is considered to be proportionate.<br><br>Some questions, however, need to be clarified with regard to option 4.2 (a).<br><br>More specifically, the specific grounds based on which a justified deviation | +2 | This option addresses the lack of VC equipment by means of providing for funding for Member States.<br><br>This is a crucial prerequisite to improve the take-up direct methods to take evidence across borders, e.g. by using VC in legal |

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| ***4.2 (b) Incentivise MS to equip courts with VC facilities through funding*** | courts, e.g. through funding from the EU budget for national projects, can be – given appropriate procedural flexibility – an effective option to further improve the efficiency and speed of judicial proceedings, as well as to reduce the burden from undue costs and delays for citizens and businesses involved in cross-border proceedings.<br><br>This is in particular valid as costs to equip courts with high-end VC facilities could be around 8 million Euro on average per Member State (see option 4.1 under efficiency).<br><br>At this stage, it is not clear what the hearing of a person in another Member State through "VC, telephone-conferencing or other means of distant communication means as a | budget of 12 million Euro. An additional 12 million Euro was made available by the Member States.<br><br>It is expected that the funding for VC equipment would cost considerably less than the funding for eCODEX.<br><br>The use of VC or other distance communication systems by default is considered to be less costly per case than e.g. travelling abroad. While cross-border travel can be around 20% more expensive than domestic travel based on research, the absolute amount of costs associated with operating VC facilities is expected to be marginal.<br><br>There can, however, | from the rule to use distant communication is possible would need to be clarified.<br><br>It seems at this stage that deviation is only possible in case appropriate equipment is not available in court.<br><br>In this regard, legal professionals consulted have commented that VC and other distance communication means are not necessarily most appropriate under the specific circumstances of each legal proceeding or, for instance if in particular VC equipment is available within reasonable time in order not to delay a proceeding.<br><br>Both options create a financial and administrative cost for the national governments, as well as regional or local authorities. It is not fully | | proceedings.<br><br>There are, however, costs associated with this option for the EU as well national, regional, and local authorities.<br><br>Moreover, the use of VC may not always be the most appropriate solution in all cases.<br><br>At this stage, it is not clear if the option to use VC, telephone-conferencing or other means of distant communication as a rule is appropriate for *all* legal proceedings and an efficient / proportionate approach. |

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | rule" entails and to what extent this is flexible (e.g. to adapt it to the circumstances of a specific case). This would need to be specified further with the Commission, e.g. in relation to:<br>• Definition of "other means distance communication means" apart from VC and telephone-conferencing (e.g. email, Skype, WhatsApp, Facebook);<br>• Definition of "as a rule" and the notable exceptions, which would need to allow courts to adapt the proceeding to the specifics of a case (e.g. lack of consent, cases in border regions, or hearing of small children)<br>• Administrative processes through which deviations can be justified and the associated burden for | considerable one-off costs associated with VC which, in turn, could balance the efficiency of VC compared to travel, depending of course on the specific circumstances of the legal proceedings.<br><br>Moreover, the efficiency of this option depends on the extent to which the "rule" of VC and telephone-conferencing is flexible and can be adapted to the circumstances of each case (e.g. involving children), as well as the extent to which courts have a burden to justify the grounds based on which the deviate from the rule and e.g. still summon a person to court | clear that these costs will be commensurated with the objectives to be achieved. | | |

| *Problem 4: Method of taking evidence requested not available in the requested Member State, e.g. video-conferencing (VC)* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | courts. | | | | |
| **Preferred option** | Options 4.1 and 4.2 (b) are considered to be the preferred options It remains to be seen at this stage to what extent option 4.2 (a) should also be included in the combined preferred policy option. It would certainly need to include a broader exception than only availability, to account for other potentially valid reasons why videoconferencing may be the preferred method (e.g. lack of consent, close distance to travel to the court in border regions, hearing of small children). | | | | |

*Source: Deloitte*

1.1.4 Options addressing that means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments

*Assessment of options for problem 5 "Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments"*

| ***Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **5.1 (a) Communicating the importance of the uniform standards provided by the Regulation (streamlined procedures, equal standard of protection of the right of the parties involved).**<br>**+**<br>**5.1 (b) Best practices for competent courts to help them to apply the procedures properly and without delay.** | The effectiveness of this option to address the problem moderate.<br>Communicating the importance of the Regulation contributes to legal certainty and efficient processing of requests which are presently often perceived as an additional burden or not important.<br>Likewise, best practices contribute to improving and possibly streamlining procedures under the Regulation, if Member States take them into account. This may also increase the speed and efficiency of judicial | The option is considered to be efficient.<br>In terms of costs, the option is expected to mainly affect the time required for competent courts and legal professionals to inform themselves about how to apply procedures properly and without delay.<br>These costs are, however, not regarded as additional costs compared to the baseline scenario, but rather as business as usual (e.g. similar to the argumentation outlined for option 2.2). | The option is proportionate.<br>It does not have any binding effect, is relatively simple to implement and thus does not go beyond what is necessary to address the problem.<br>While the option would not fully address the problem, the actions described could not be effectively taken by Member States themselves. | +3 | The option is moderately effective in addressing the problem and achieving the objectives. In particular, 5.1 (a) and (b) contribute to reducing legal uncertainty and may increase the efficiency and speed of judicial proceedings under the Regulation. If requests are seen as important, they are likely to be addressed faster and best practice examples help competent courts to improve procedures.<br>At the same time, the option is efficient and |

| *Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| **+**<br><br>**5.1 (c) Awareness raising of courts and other legal professionals of the availability of the direct channel of taking evidence under Art. 17.** | proceedings (based on a common understanding). Nevertheless, means available under national law may still be more effective in terms of obtaining evidence.<br><br>However, a lack of awareness about the direct channel of taking of evidence was not cited as a major source of delays. Here, communication and coordination efforts were identified as the main source of delays. Hence, while 5.1 (c) and 5.1(b) could raise the attractiveness of direct ToE, their effectiveness in terms of speeding up judicial proceedings is limited. | Overall, however, if information and guidance is available more readily and in an accessible manner, search costs are reduced. Best practice examples contribute to establishing standardised solutions for recurring problems, which in turn increase the speed of proceedings.<br><br>The level of efficiency of the option to some degree depends on the channels used for awareness raising (i.e. whether information can be accessed easily via existing information sources) and the scale of information campaigns. | | | proportionate, since additional costs are unlikely to be high compared to the benefits of faster and more efficient provision of evidence. |
| *5.2 (a) Defining other means of cross-border taking of evidence in the Regulation in* | This option would increase legal certainty and reduce delays and costs for public administrations, businesses and citizens to a medium | While the option would have medium positive impacts in achieving the objectives, the direct costs for this option | The option is proportionate.<br><br>The option codifies existing case law and | +2 | The option would have a medium positive impact at a low cost.<br><br>Some positive benefits |

| *Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| *addition to the existing two ways: acknowledging the ways sup-ported by the CJEU as legitimate means under the Reg.:*<br><br>*(i) Direct examination of facts in MS B by experts appointed by courts in MS A in accordance with the procedural rules of MS A, insofar this activity does not affect the sovereign powers of MS B*<br><br>*(ii) Summoning foreign persons directly to the trial court (but whenever possible, VC should have priority) Defining other means of cross-border ToE, acknowledging the ways supported in the* | degree.<br><br>The option would be effective in reducing legal uncertainty, as existing case law and is collected and codified in one document and the use of videoconferencing encouraged. In addition, the ToE through diplomatic officers or consular agents, often perceived as an effective channel by stakeholders, is recognised by the Regulation. Legal practitioners who do not use the channels under the Regulation often, would be able to access new information faster than referring to individual CJEU decisions.<br><br>As a result, instances in which it is not clear whether the Regulation shall be applied or not are reduced. On this basis, there would be a higher share of cases in | would also be rather low. They would be limited to the drafting of the new legislative text and awareness raising / training of legal professionals on the amendment. This said, the mapping of existing national means of cross-border ToE could entail a significant burden or obstacle to the legislator.<br><br>While the mapping and acknowledging of ways supported in the CJEU as legitimate means under the Regulation could add to the complexity of the Regulation as such, search costs of courts and lawyers for adequate means could be significantly reduced.<br><br>However, courts and lawyers would still have to check and understand if, in a given legal | includes additional methods for the taking of evidence in the Regulation, which are currently already used based on domestic law. It thus does not go beyond what is needed to address the problem, as it simply acknowledges existing means already in use. At the same time, this type of action could not be taken at the Member State level. | | are expected in relation to the objectives of increased legal certainty and in reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. Low costs would be incurred in relation to drafting the amendment and awareness raising / training of legal professionals on the amendment.<br><br>The option is proportionate. |

| *Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments* | | | | | |
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| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| *CJEU as legitimate means under the Regulation.*<br>+<br>*5.2 (b) Regulating the taking of evidence through diplomatic officer or consular agent as a specific way of taking of evidence under the Reg., in line with relevant provision of the 1970 Hague Convention-Regulate the ToE through diplomatic officer or consular agent as a specific way of taking of evidence under the Regulation.* | which an informed decision about the method for cross-border taking of evidence is taken. The decision for an adequate means may, however, in some instance be more time consuming. Still, on this basis, it can be expected that the most efficient method suitable to the situation at hand is chosen in a higher share of cases. This would overall lead to time savings for businesses and citizens as parties in proceedings.<br>The effectiveness of the option would be increased if accompanied by providing additional guidance and awareness-raising (see 5.1). | proceeding, the Regulation could be or even would have to be applied, or if further domestic means could be used.<br>The option could thus still lead to delays in legal proceedings if, for instance, they can only be commenced later (e.g. in case ambiguities exist if the Regulation is applicable or not). Nevertheless, the increased clarity of available means is expected to reduce these instances. | | | |
| 5.3. Adapt/improve the procedures of taking of evidence in the Regulation (both the one through requested courts and | The effectiveness of this option is moderate, as communication by electronic means could speed up and increase efficiency of | The efficiency of this option would be low.<br>Using an additional e-tool for communication would create additional, one-off costs for courts and legal | The option is not considered proportionate as establishing an e-tool creates additional financial and administrative costs for | 0 | The effectiveness of the option is moderate, as legal uncertainty is not reduced and improvements with regard to speed and |

| *Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| the direct taking of evidence):<br><br>5.3 (i) Include a provision on the establishing of a tool for e-communication and secure transmission of docs between the designated authorities (e.g. eCODEX, eJustice Portal) and making its use mandatory.<br><br>+<br><br>5.3 (ii) Ensure automatic logging of the steps of the workflow using the tool specified in 5.3. (a).<br><br>+<br><br>5.3 (iii) Reshape the uniform procedure of direct taking of evidence by removing the requirement of | communication procedures, in particular if forms and documents are already digital.<br><br>Increased efficiency and speed of procedures may also reduce the burden for citizens, if the duration of proceedings is reduced. However, the option does not contribute to legal certainty.<br><br>At the same time, effectiveness crucially depends on the usability and design of the e-tool. Based on stakeholder assessments, automatic logging of steps under the workflow may not be feasible in the relevant systems. In addition, the concept of "logging of work steps" would require a precise definition of these work steps, to ensure that information reaches the relevant persons and | professionals (e.g. via the need for training or connecting existing systems to the e-tool).<br><br>This is expected to increase the workload of courts and lawyers which, in turn, has an effect on the fees paid by citizens and businesses.<br><br>While automated logging of steps under the workflow could lead to benefits in some instances (in terms of providing and incentive for faster processing of requests), the set-up costs for this system are high if it is to be integrated with court systems to facilitate automatic logging of steps in the workflow. | courts to maintain another tool of communication.<br><br>At the same time, the option goes beyond what would be needed to address the problem. In addition, removing the requirement of authorisation for direct taking of evidence would possibly conflict with national procedural laws in the Member States.<br><br>Likewise, well-established national arrangements and special circumstances (i.e. existing procedures to process requests) would not be respected by the introduction of the tool and abolishing the requirement for authorisation concerning direct ToE. | | efficiency of proceedings remain ambiguous.<br><br>The efficiency of this option is low, since an additional system would have to be established and maintained for a limited number of cases (overall).<br><br>The option is not proportionate. |

| *Problem 5: Means under the Regulation are cumbersome and slower than the means available in national law or other EU instruments* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| authorisation. | triggers actions.<br><br>Removing the requirement for authorisation for direct ToE could increase efficiency and speed of procedures. However, the effect is likely to be small.<br><br>It would be even more useful, if it was specifically stated in the Regulation that other methods, e.g. based on national law, could be used if they would be more efficient than those in the Regulation. This would add clarity and make sure that courts can always use the methods most suitable to the case. | | | | |
| **Preferred option** | The preferred options are 5.1 and 5.,2. The options would be moderately effective in addressing the problem, at the same time being efficient and proportionate. The effect of option 5.2 in reducing legal uncertainty and increasing the speed and efficiency of proceedings could be increased if accompanied by awareness raising and examples for improved way to make use of the means available under the Regulation could be positively affected by combining it with option 5.1. | | | | |

*Source:* *Deloitte*

1.1.5 Options addressing costly and time consuming paper-based communication and barriers to the acceptance of electronic evidence produced or stored in another Member State

*Assessment of options for problem 6 "Uncertainty when the Regulation shall be used or other means in national or European law may be used"*

| ***Problems 6: Paper-based communication between courts is time-consuming and costly, and 7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| 6.1. Sharing of best practices between MS (designated authorities) on e-communication and electronic exchange of documents under the Regulation | The option is expected to be effective in addressing the problem, however only to a very limited extent.<br><br>While the sharing of best practices in theory bears the potential for improving and standardising procedures for communication and exchange of documents, the effect may only be achieved with considerable delay (as e-communication systems need to be updated, adapted or procured).<br><br>In addition, procedural law and court infrastructures differ at the national level and legal barriers or data security concerns may nevertheless inhibit | The option is efficient, since collecting and presenting best practices could be facilitated via existing repositories of information and communication (e.g. the eJustice portal).<br><br>However, several aspects might lower the efficiency of this option in the short run, as costs for changing systems are borne by competent courts and legal practitioners, who might pass on part of the costs via fees.<br><br>In the long run, if Member States choose to act based on best | The option is proportionate. It does not go beyond what is needed to address the problems and as simple as possible to address the problems at hand.<br><br>It leaves scope for national decisions on whether to update systems and how. | +1 | The option is effective to a limited extent, depending on whether best practices lead to changes in communication between courts and increased acceptance of electronic evidence in practice.<br><br>The option is efficient, as the costs to share best practices are likely to be low, compared to potential benefits from courts adopting and integrating best practices to communicate using electronic means and accept digital evidence. |

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and 7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | voluntary action based on best practices.<br>As a result, this option may lead to adoption of best practices in some cases but not on a large scale. The option is therefore not effective in improving the overall speed and efficiency of procedures under the Regulation. Likewise, competing systems (paper-based and electronic) could increase legal uncertainty. The burden for citizens and businesses are not expected to decrease significantly. | practice examples, benefits for citizens and businesses include time savings, while courts are likely to recover initial investments at least partially. | | | At the same time, it is proportionate, as the proposed instrument is simple and does not go beyond what is needed to address the problems. |
| ***6.2 (a) CEF eDelivery (eCodex) should be the default channel for electronic communication and*** | The option would be effective in addressing the problem compared to the situation under baseline.<br>Establishing the CEF eDelivery as the default | The efficiency of this options is moderate to high, depending on the time-horizon of the assessment.<br>The initial, one-off | The option is proportionate, but a final assessment would depend on the clarification on the financing of the tool.[54]<br>The scope of the initiative | +2 | The option would be effective in addressing the problem compared to the baseline scenario. It would reduce paper-based communication, |

[54] It is assumed that development would be largely carried out using EU funds, as part of the CEF eDelivery / eCodex project.

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and 7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| ***document exchanges between the agencies/courts designated under Regulation (EC) 1206/2001 (as well as the Service Regulation). E-communication should replace, as a general rule, paper workflows.***<br>**+**<br>***6.2 (b) Specify in the Regulation that:***<br>***(i) an evidence (e.g. declaration, testimony, authentic instrument) which is transmitted in form of electronic document through the appropriate communication system (see point 6)) should be considered*** | channel for electronic communication ensures the use of electronic communication to coordinate ToE or transmit evidence obtained under the Regulation. This would increase the speed and efficiency of services.<br>At the same time, this could reduce the burden for citizens and businesses in proceedings (e.g. costs due to delays).<br>Ensuring the equal treatment and evidentiary value of electronic evidence (and electronic communication overall) to the paper-based system expected under the baseline scenario is an important pre-condition for effectiveness. Legal certainty, speed and efficiency of judicial proceedings increase if the | investment costs for the system can be regarded as high. However, apart from maintenance and updates, the marginal cost for each instance of communication is negligible and faster than the use of postal services (likely to be used under the baseline scenario). Using postal services, the costs are incurred at every instance of communication, and likely to increase in line with the number of cross-border cases. Thus, costs and benefits of this option have to be have to be weighted In the long run, benefits<br>Whereas the costs for costs for postal services are incurred by courts in the Member States, the | is limited to what Member States could not achieve themselves, implementing a new EU-wide tool. It does not go beyond what is needed to address the problem, as it only concerns communication under the Regulation.<br>However, the principle of accepting electronic forms of evidence limits the room for national decisions on matters of procedural law.<br>Overall, there is a justification for the option if as paper-based communication | | increasing speed and efficiency of legal proceedings in which the Regulation is applied. At the same time, excluding the possibility to reject evidence on the basis that it is electronic could greatly reduce the burden for citizens and businesses to provide requested evidence.<br>The efficiency of this options is moderate to high, depending on the time-horizon of the assessment. While initial one-off costs are high and implementation is expected to take time, the marginal cost for transmitting requests and documents would be negligible. In addition, the tool could |

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and*<br>*7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| ***as it was transmitted in original (paper) version***<br>***(ii) the quality of evidence may not be denied in a civil proceedings from a digital evidence which is produced and preserved (stored) in another MS in accordance with the laws of that MSs*** | content of communication (i.e. electronic evidence), and not just the act of communicating is to be electronic. | new portal would be to a large extend be developed at the EU-level. It needs to be clarified further, who finances the tool and its maintenance.<br>Given the use of existing portals and depending on the complexity of the tool, the development costs will likely to be lower than the development of the eCodex portal itself (24 Mio. EUR). In any case, costs at the national level may be expected for staff training and adapting of institutional routines to use the new tool.<br>It is important to note, | | | be adopted in further EU-instruments, which would increase its efficiency.<br>The option is proportionate, but a final assessment would depend on the clarification on the financing of the tool.[55] |

[55] It is assumed that development would be largely carried out using EU funds, as part of the eJustice portal or eCodex project.

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and 7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | that the cost in operation would be largely determined by the extent, to which the tool would be integrated into existing systems. At the national level, efficiency gains may be reduced, if existing IT systems need to be adapted or the time required to transfer communication between the newly established tool and any existing national tools. At the EU level, the costs<br><br>It is assumed that the tool could also be used for other EU instruments (such as the Service Regulation), which has positive implications for the efficiency. | | | |
| 6.3 Obliging designated | The option will reduce paper-based | The option is considered to be moderately | The option is not proportionate. While the | -1 | The option would be effective in reducing |

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and 7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| authorities/courts under the Regulation to use certified e-mails (furnished with qualified e-signatures) for their communications and exchange of the documents. | communication, including related costs for postage or printing. This could speed up communication and efficiency of judicial proceedings under the Regulation.<br><br>As a result, the overall duration of proceedings under the Regulation and ensuing burdens for citizens and businesses is likely to decrease. | efficient.<br><br>While the use of email was reported to be widespread among courts, in particular for informal communication, the use of qualified e-signatures is not yet common.<br><br>Thus, even if electronic identification frameworks, such as eIDAS, are currently developed by the European Union, few Member States have the infrastructures or experience in place to facilitate qualified e-signatures within public administration and the judiciary.<br><br>Thus, the costs to implement the technical infrastructure in courts are likely to be high and | cases in which the Regulation is applied only constitute a small share of all cases, the courts would have to adapt their existing IT systems and communication procedures to comply with the option. This would greatly influence the room for national solutions for overall communication within the judicial system.<br><br>Thus, although the option would effectively address the problem identified for the procedures under the Regulation, it would go beyond what is needed to address it. | | paper-based communication and thereby help to speed up legal proceedings. This could lead to decreasing burdens for citizens and businesses.<br><br>At the same time, the option is only moderately efficient. The one-off cost to implement an interconnected system facilitating electronic signatures at every competent court is considered high, compared to the number of cases in which the regulation is applied.<br><br>Likewise, the option is not considered proportionate, as it goes beyond what is needed to address the problem while the costs are |

| *Problems 6: Paper-based communication between courts is time-consuming and costly, and*<br>*7: Legal barriers to the acceptance of electronic (digital) evidence produced or stored in another Member State* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | would be borne by the Member States. Benefits for courts include decentralised network of identification among legal professionals. | | | borne by the Member States alone. |
| **Preferred option** | Option 6.2 is the preferred option, as it would achieve the highest benefits. While it would also entail additional costs, these would be acceptable, considering also that the tool could be used for other EU instruments, too. By laying the foundation for the acceptance of evidence in electronic forms, the option addresses two possible delays in cross-border ToE – namely communication itself and delays from the actual transmission of evidence obtained.<br>It is important to note, however, that this assessment depends on the further clarification on financing the e-tool. Given the possible EU-wide application in other contexts, financing at the EU-level could be a preferred way to implement the system and increase acceptance of Member States and the inclination to actively support the development. | | | | |

### 1.1.6 Options addressing the delays in the execution of a request by the requested court

*Assessment of options for problem 8 "delays in the execution of a request by the requested court"*

| ***Problem 8: Delays in the execution of a request by the requested court*** | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| 8.1 Best practice guide addressed to courts on how to ensure speedy handling of cases | This option could potentially help to reduce delays and costs for public administrations, businesses and citizens to a small degree. The exact extent of the benefits would be dependent on the content of and uptake of the information in this practice guide.<br>Courts may find useful tips on how case handling can be improved or may use it to clarify certain aspects of the procedure.<br>Nevertheless, the positive effects are expected to be limited. It is not clear to what extent delays are actually based | The efficiency of this option would be medium.<br>While the option would have some limited positive impacts in achieving the objectives, the costs for this option would also be rather low. It would be necessary to come to an agreement on how the guidance should be phrased and what type of best practices would be presented. This could, for example, be done within the EJN network, possibly in the context of existing meetings.<br>The actual drafting, visualisation, layout etc. of the practice | The option is proportionate.<br>The option does not have any binding effect. Hence, the option does not go beyond what is necessary to address the problem and the type of action is as simple as possible. Furthermore, this type of action could not be taken by individual Member States. Finally, the costs are minimal. This said, the option would not fully address the problem. | +1 | The option would have a small positive impact at low costs.<br>Some limited positive benefits are expected in relation to the objectives of reducing delays and costs for stakeholders involved in the cases as part of which evidence is taken across borders. The exact extent of the benefits would be dependent on the content and uptake of the information in the new practice guide.<br>The costs for procuring |

| *Problem 8: Delays in the execution of a request by the requested court* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | on a lack of knowledge of appropriate procedures. Based on the evidence collected it rather seems that delays are either based on the situation of the case (e.g. sometimes it takes longer to obtain an expert opinion or a witness cannot be found) or on a lack of resources. | guide could be procured as a contract. Depending on the extent to which the EJN is able to prepare the substance of the guide within their meetings (or if additional research has to be done by the contractor), this could cost between 15,000 and 30,000 Euro. The more research would need to be done by the contractor, the more expensive the development of the practice guide would be.<br>If printed material, e.g. flyers, brochures etc. would need to be prepared (e.g. for training sessions or as take-away at conferences), additional printing costs would be | | | the drafting of this practice guide would likely be between 15,000 and 30,000 Euro.<br>The option is proportionate, but would not fully address the problem at hand. |

| *Problem 8: Delays in the execution of a request by the requested court* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | incurred. The exact costs depend on the number of prints, their paper and print quality, the number of pages etc. but could range from 1.0 to 5.0 Euro per print.<br>If one practice guide was printed per court (i.e. 6,000 in the EU), this could amount to 30,000 Euro. | | | |
| ***8.2 (a) CEF eDelivery (eCodex) should be the default channel for electronic communication and document exchanges between the agencies/courts designated under Regulation (EC) 1206/2001 (as well as the*** | The option would help to reduce delays.<br>By introducing an electronic communication system to be used as a rule for requests and communication, time in relation to sending requests and other communications via post | The efficiency of this options is moderate to high, depending on the time-horizon of the assessment.<br>The initial, off-off investment costs for the system can be regarded as high. However, apart from maintenance and updates, | The option is proportionate, but a final assessment would depend on the clarification on the financing of the tool.[56]<br>The scope of the initiative is limited to what Member States could not achieve themselves, implementing a new EU- | +2 | The option would help to reduce delays at moderate to high costs.<br>It is considered to be proportionate. |

[56] It is assumed that development would be largely carried out using EU funds, similar to the eJustice portal or eCodex project.

| *Problem 8: Delays in the execution of a request by the requested court* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| ***Service Regulation). E-communication should replace, as a general rule, paper workflows.***<br>**+**<br>***8.2 (b) Implementing technical measures ensuring automatic and/or manual logging of the steps of the workflow.*** | (e.g. around 5 working days per request, depending on the number of communications and channels used).<br>In addition, the possibility to log the steps of the work flow would increase transparency for the requesting court that could check the status of the request.<br>This might reduce the number of status requests, which are currently sometimes sent even before the 90 day period is over.<br>In addition, such a tool would facilitate the preparation of statistics, e.g. to check which courts and/or Member | the marginal cost for each instance of communication is negligible and faster than the use of postal services (likely to be used under the baseline scenario).<br>Using postal services, the costs are incurred at every instance of communication, and likely to increase in line with the number of cross-border cases. Thus, costs and benefits of this option have to be have to be weighted.<br>Whereas the costs for postal services are incurred by courts in the Member States, the new portal would be to a large extent be developed at the EU-level. It needs to be clarified further, who | wide tool. It does not go beyond what is needed to address the problem, as it only concerns communication under the Regulation.<br>However, the introduction of the tool limits the room for national decisions on how to structure internal procedures to some extent.<br>Overall, there is a justification for the option. | | |

| *Problem 8: Delays in the execution of a request by the requested court* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | States have systematic difficulties in meetings the deadlines. It would then be possible to target support, e.g. training. | finances the tool and its maintenance.<br>Given the use of existing portals and depending on the complexity of the tool, the development costs will likely to be lower than the development of the eCodex portal itself (24 Mio. EUR). In any case, costs at the national level may be expected for staff training and adapting of institutional routines to use the new tool.<br>It is important to note, that the cost in operation would be largely determined by the extent, to which the tool would be integrated into existing systems. At the national level, efficiency gains may be reduced, if | | | |

| *Problem 8: Delays in the execution of a request by the requested court* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | existing IT systems need to be adapted or the time required to transfer communication between the newly established tool and any existing national tools.<br>It is assumed that the tool could also be used for other EU instruments (such as the Service Regulation), which has positive implications for the efficiency. | | | |
| **Preferred option** | Option 8.2 is the preferred option, as it would achieve the highest benefits. While it would also entail additional costs, these would be acceptable, considering also that the tool could be used for other EU instruments, too. | | | | |

*Source: Deloitte*

### 1.1.7 Options addressing the limited uptake of direct taking of evidence

*Assessment of options for problem 9 "limited uptake of direct taking of evidence"*

| *Problem: 9: Limited uptake of direct taking of evidence* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| 9.1 Reshape the uniform procedure for direct | This option would reduce delays in | The efficiency of this option is medium.<br>While it would | Proportionality of this option is questionable, as evidence did | 0 | This option would increase effectiveness, |

| *Problem: 9: Limited uptake of direct taking of evidence* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| taking of evidence replacing the requirement of individual prior authorisation with a system based on automatic authorisation by law (and the option of opposing it within a set timeframe) | cross-border proceedings which exist due to the time it takes to grant authorisation for the direct taking of evidence.<br>The actual extent to which delays could be reduced depends on the time-frame given to object authorisation. Currently, the time frame for accepting requests is 30 days. If the new time frame for opposing would be the same, the effects would be limited. Cases would then only be faster to the extent Member States currently do not adhere to the time frame. In case of a shorter time | bring some limited positive benefits, there would also be cost savings.<br>Currently, for every request relating to the direct taking of evidence, a reply has to be sent (either including the acceptance or refusal). This is normally sent by post (although in some urgent cases informal notices are sent via email or fax). Under this option, the number of correspondences would be decreased to only the number of refusals, leading to costs savings of printing costs and postage.<br>These cost savings would not be significant, as the current number of requests is very small.<br>The resources needed by | not point to any significant difficulties relating to the requirement of authorisation.<br>The option would bring small benefits and would still provide Member States the option of refusing requests. Nevertheless, their possibility to refuse requests would be reduced, as they would not have the option of refusing requests once the time frame has passed. | | as it has the potential to reduce delays. The exact benefits depend on the time frame set for the refusal.<br>There would be low costs for the legislative drafting as well awareness raising and small cost savings relating to the application of the new option, including costs relating to resources, printing and postage.<br>Proportionality of this option may be questioned. |

| *Problem: 9: Limited uptake of direct taking of evidence* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | frame, e.g. 2 weeks, delays could be reduced.<br>In addition, it is possible that the direct taking of evidence would be used more frequently, as the burden / waiting time would be lower / shorter. | national authorising institutions (central bodies or courts) would not change significantly, as every request would still need to be checked.<br>Low additional costs would be incurred in relation to the legislative drafting and awareness raising.<br>At the same time, legal professionals (e.g. lawyers and court staff) would need to familiarise themselves with the new rules. These costs are not expected to be significant and would not be passed on to citizens / businesses, as every legal professional would only spend little time (e.g. half an hour) once.<br>Such costs are regarded as | | | |

| *Problem: 9: Limited uptake of direct taking of evidence* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | | out-of-pocket costs or business as usual and not as additional costs compared to the baseline scenario. | | | |
| 9.2 Reshape the uniform procedure of direct taking of evidence by removing the requirement of authorisation | This option would reduce delays in cross-border proceedings which exist due to the time it takes to grant authorisation for the direct taking of evidence.<br>Currently, the time-frame for accepting requests is 30 days. Thus, this time could be saved, as courts could take evidence directly without having to wait for the acceptance of the requested Member State.<br>In addition, it is possible | The efficiency of this option is high.<br>It would bring positive benefits and there would also be cost savings for public administrations in requesting and requested Member States.<br>Requesting Member States would have to spend less time on requests (and potential inquiries in cases of lack of reply) and could directly take evidence.<br>There would not need to be any checking of the requests, thus officials would spend less time in the requested Member State.<br>In addition, postage and | The option is not fully proportional, as evidence did not point to any significant difficulties relating to the requirement of authorisation. In addition, removing authorisation completely goes further than what is needed and would mean that Member States would no longer have the option of opposing to certain actions being carried out on their territory. | -2 | This option would have positive effects relating to the achievement of the objectives to reduce costs and delays. It would score positively on efficiency, as the benefits would come at low costs or even cost savings (relating to resources, printing costs, postage).<br>Nevertheless, the option goes further than what is needed, in particular as Member States would no longer have the option of opposing to certain actions being carried out on their territory. |

| *Problem: 9: Limited uptake of direct taking of evidence* | | | | | |
|---|---|---|---|---|---|
| **Option** | **Effectiveness** | **Efficiency** | **Proportionality** | **Rating** | **Conclusion** |
| | that the direct taking of evidence would be used more frequently, as the burden / waiting time would be lower / shorter. | printing costs would be saved equal to the number of requests. Currently, for every request relating to the direct taking of evidence, a reply has to be sent (either including the acceptance or refusal). This is normally sent by post (although in some urgent cases informal notices are sent via Email or fax).<br>Additional costs would be incurred in relation to the legislative drafting and awareness raising as well as for legal professionals to familiarise themselves with the new rules (cf. argumentation for 9.1). | | | |
| **Preferred option** | The status quo is the preferred option. While option 9.1 would also bring some positive effects, the effects are limited and depend on the time frame set for refusals. In addition, there would also be costs and proportionality of the option may be questioned. On this basis, the overall effects would not be better compared to the baseline scenario. | | | | |

## ANNEX 6: ASSESSMENT OF IMPACTS OF BASELINE SCENARIO

### 1. Effectiveness

Under effectiveness, the achievement of the specific objectives of the Regulation is assessed.

It has been estimated that the number of cases in which Regulation (EC) 1206/2001 is applied will increase by around 30% between 2017 and 2030.[57] This increase is mainly due to the following factors (which are interconnected):

- Increased cross-border activity of businesses and citizens / consumers; and
- Increased knowledge of the Regulation by legal professionals[58].

However, compared to the overall number of cross-border cases, it is expected that the Regulation will continue to play a minor role. While it is possible that there is a slight increase in the share of cross-border cases in which the Regulation will be applied, it is not expected that the share will be larger than 5%. Thus, although the total number of cases in which the Regulation is applied will increase by 28%, the share of cross-border cases will not rise significantly.

At the same time, the challenges identified in relation to the application of the Regulation are likely to continue to exist. On this basis, problems for citizens and businesses will persist, which limits the achievement of the policy objectives. In particular, there will still be uncertainty in relation to when to apply the Regulation and concerning certain concepts. Delays and costs (e.g. based on failure to keep the stipulated time limits or to choose the most appropriate means to take evidence) are expected to remain at an equal level per case and increase at an overall level in line with the overall increase of cases.

#### 1.1 To reduce legal uncertainty

Without any action, the achievement of this objective would continue to be limited by the lack of clarity identified in relation the application of the Regulation.

At the operational level, legal uncertainty can be caused by diverging interpretations if and when the Regulation or other means in national law may be used, as well as diverging interpretation of "courts" under the Regulation by national authorities. In practice, there is also a diverging understanding of what kind of judicial actions constitute "taking of evidence" under the Regulation.

[57] From 164,000 cases in 2017 up to around 214,000 in 2030.
[58] This may also have a slight positive impact on the development of the problems, which is explained further below.

Without any action, CJEU case law will continue to be relevant to take into account for the interpretation of the Regulation. Currently, a number of CJEU judgments have been rendered to clarify the relationship of the Regulation to national law. While the existing case law does not address all unclear aspects identified, it is possible that additional decisions would be givne.

1.2 To further improve the efficiency and speed of judicial proceedings and reduce the burden for citizens and businesses

Under the baseline scenario, the Regulation would continue to have a limited positive effect on the efficiency and speed of judicial proceedings. Delays based on uncertainties and practical challenges would persist:

- Taking evidence via a competent court in another Member State is perceived to be a slow method, including because the time limits are often not kept; and
- Videoconferencing systems are not always available in all courts, which can delay the process to take evidence.

However, due to the dynamically increasing number of legal proceedings in which Regulation (EC) 1206/2001 is expected to be applied per year until 2030[59], the challenges are expected to affect an increasingly large amount of citizens/consumers and businesses. Thus, costs and delays associated with the application of the Regulation are expected to increase over time.

Factors that currently lead to undue delays are presented in the following table.

*Factors that lead to delays and examples of their effect*

| Factor | Effects on the length of the proceedings |
|---|---|
| Failure to respect the time limits of the Regulation | 2 weeks to 9 months |
| Not using the means to conduct a hearing that are most suitable for each hearing under EU and domestic procedural law and limited uptake of the direct taking of evidence | Up to 2 months (e.g. if the procedure via the competent court is used although direct taking of evidence via videoconferencing could also be used) |
| Limited use of electronic solutions for the taking of evidence, e.g. conducting hearings via VC | |
| Difficulties relating to the coordination of taking of evidence (e.g. organising hearings in person or via videoconferencing) | 1 week or longer |
| Use of paper-based communication outside of hearings | Around 8 days on average |

*Source: Deloitte*

[59] As explained in the introduction to this section.

These factors are likely to continue to cause delays also until 2030.

Overall, small improvements are possible based on an increased number of cases in which the Regulation is expected to be applied. On this basis, it is possible that legal professionals gain more practice in applying the Regulation.

In addition, it is possible that electronic means for the communication between courts and the taking of evidence (e.g. videoconferencing) would slightly increase based on an increased overall use of electronic means for communication. It can be expected that the availability and quality of videoconferencing will improve, which may encourage legal professionals to use it in civil legal proceedings. Communication may also slowly become less paper-based, as several Member States currently have ongoing projects to find solutions for electronic communications in the judicial sector. However, it is not clear to what extent (new) videoconferencing and/or communication systems will be interoperable across Member States, as these developments are largely separate.

1.3 To improve access to justice and the protection of the procedural rights of parties to the proceedings

The Regulation currently achieves this objective to a large extent and would continue to do so. Limitations are mainly due to the fact that the Regulation is only rarely applied.

More specifically, the Regulation contributes to making sure that all relevant evidence necessary for the claim and/or defence may be gathered in an efficient way, by introducing common channels that may be used for this purpose. It also facilitates the participation of the parties in the taking of evidence (Article 11). On this basis, the right of access to justice and the right to be heard are strengthened in the cases in which the Regulation is applied.

However, while the overall *number* of cases in which the Regulation will be applied is expected to increase by 28%, it can be expected that the *share* of cases in which the Regulation is applied compared to the overall number of cross-border cases will not increase beyond 5% until 2030. On this basis, the number of citizens benefitting from the Regulation will increase. Nevertheless, compared to the overall number of cross-border cases, the impact of the Regulation will remain limited based on the small proportion of cases in which it is applied. Thus, the Regulation only contributes and is expected to continue to contribute to the protection of the rights of citizens and businesses in a small proportion of cases.

Furthermore, the achievement of this objective is impaired by potential costs and delays arising from difficulties relating to the design of the Regulation and its application. On this basis, it may be more cumbersome for businesses and citizens to make use of these rights when the Regulation is applied rather than methods of national procedural law.

Finally, the share of cases in which videoconferencing is used and the conditions under which it is used also impacts on this objective. While physical hearings can guarantee that the witness is (at least physically) free to give the testimony, it is more difficult to ensure this in the context of videoconferencing.

## 2. Efficiency, incl. impacts on national judicial systems

The assessment criterion efficiency relates to the *relationship* between costs and benefits – neither the absolute costs nor benefits. This means that efficiency concerns the extent to which the objectives of the Regulation are achieved at a *reasonable* cost.

At the moment, the application of Regulation (EC) 1206/2001 does not require capital expenditures (CAPEX) and operational expenditures (OPEX) by public authorities that are significantly higher than those related to cross-border cases that are being dealt with under domestic procedural law or domestic legal proceedings. This is expected to remain valid in the baseline scenario.

Since the communication between public authorities under the Regulation is largely paper-based or conducted via email, and VC is only used to a limited extent, it can be argued that public authorities do not have to invest into a dedicated technical infrastructure by means of which legal proceedings under the Regulation would be handled.

Moreover, due to its non-mandatory nature and its limited practical application, the labour costs that can be associated with the Regulation are insignificant in view of the labour costs for cross-border cases that are being dealt with under domestic procedural law (left alone the costs related to purely domestic legal proceedings). At the operational level, central bodies' staff is often not only responsible for cross-border proceedings under the Regulation but also for proceedings under the Hague Convention, other matters of judicial cooperation within the EU, as well as purely domestic legal proceedings. Thus, the workload related to the Regulation is expected to concern only a fraction of central bodies' staff in the Member States.

The adoption and implementation of the Regulation provides stakeholders with the possibility to use an EU legal instrument to take evidence across borders in legal proceedings in civil and commercial matters. This is considered to be a benefit as such. In particular the possibility to directly take evidence in other Member States under Art. 17 of the Regulation could be a benefit if were applied more frequently.

According to the evaluation results and the problem assessment, at present the Regulation only makes a limited contribution to enhancing the overall efficiency of the processes to take evidence across borders, notably due to its limited use (it has been estimated that the Regulation is currently applied in max. 5% of the cross-border cases). This situation is not expected to change over the next years. The Regulation is expected to continue to be

applied only in a minority of the legal proceedings in cross-border civil and commercial matters. It is estimated that the Regulation would be applied in around 185,000 legal proceedings per year on average across the EU until 2030 in the baseline scenario.

Since the application of the Regulation is not mandatory in the baseline scenario, the use of domestic means to take evidence across borders is expected to guarantee a reasonably efficient overall system to take evidence across borders.

There is, however, room for improvement with regard to the efficiency of some of the processes that the Regulation did not sufficiently address yet. For the largest part, this concerns the speed of procedures in order to avoid undue delays for businesses and citizens. The main challenges identified in the evaluation and the problem assessment in this regard are expected to remain in the baseline scenario:

- Taking evidence via a competent court in another Member State is perceived to be a slow method, including because the time limits are often not kept; and
- Videoconferencing systems are not always available in all courts, which can delay the process to take evidence, result in additional travel etc.

These challenges cause undue delays in the legal proceedings, which are expected to persist in the baseline scenario.

For instance, taking of evidence across borders under the Regulation may often take as long as six months in practice instead of the 90 days stipulated in the Regulation. While parts of this problem e.g. may have to do with practical difficulties to organise hearings, differences between the national procedural laws of the Member States are considered to be an important contributing factor to inefficient proceedings, as well as the use of paper-based communication by Member States. Indeed, while transmission per email or via other electronic systems is instant, sending documents across borders by post can be estimated to take between one and three working days for every submission. Costs for sending information by post will also continue to be incurred by the relevant authorities in the baseline scenario.

Moreover, the take-up of VC as a solution to find the right balance between the challenges to organise a physical hearing and being able to safeguard the freedom of the witness testimony leaves some room for improvement. Although Member States are expected to increase the take-up of VC in the baseline scenario due to increased experience with and availability of the necessary equipment, this is expected to continue to be an issue in the baseline scenario.

As a consequence, legal proceedings could be more costly and could also take longer than they could if the take-up of VC would be higher. Legal uncertainty with regard to some of the concepts of the Regulation also has a negative impact on the speed of the procedures.

Due to the dynamically increasing number of legal proceedings in which Regulation (EC) 1206/2001 is expected to be applied per year until 2030, the challenges are expected to affect an increasingly large amount of citizens and businesses.

From a more narrow perspective, in the baseline scenario the Regulation is therefore expected to increase the efficiency of legal proceedings as taking of evidence is governed by a flexible regime under which the most appropriate means to take evidence in each specific legal proceedings can be used. Some room for improvement, however, remains e.g. with regard to the share in which the Regulation will be used in the future. Although this does not necessarily mean that other cross-border legal proceedings in which the Regulation will not be applied are expected to be inefficient, the non-mandatory nature will arguably contribute to legal uncertainty for public authorities, legal professionals, citizens, and businesses.

## 3. Coherence

The evaluation found that the Regulation is largely coherent internally, as well as with other EU policies, which have similar objectives, and national law.

Only few issues relating to the coherence of the Regulation with other legal instruments and internally have been identified as part of the present assignment. A small inconsistency in relation to the internal coherence was identified, notably in relation to the use of the term 'request'.[60] In addition, certain overlaps may exist with the Brussels IIa and Maintenance Regulations, notably as concerns the tasks of the Central Bodies to collect information concerning the situation of the child. With respect to Brussels IIa, this has led to a lack of clarity as to whether Regulation (EC) 1206/2001 also applies to such situations. These challenges would persist without any action.

Some of the EU instruments in the field of civil justice have recently been reviewed or are planned to be reviewed in the future. To name a few examples, a proposal for the Brussels IIa Regulation is currently under discussion and a new Regulation on property regimes for registered partnerships has been adopted and will apply in 18 Member States[61] as of 2019.[62] It also planned to further strengthen the work of the EJN, e.g. by

[60] Article 2(1) stipulates that the term "requests" in the Regulation refers to requests under Article 1(1)(a), i.e. requests asking the competent court in another Member State to take evidence. Nevertheless, Article 4(1) indicates that form I could be used for posing 'requests', although form I concerns direct taking of evidence. On this basis, it may not be entirely clear which requests are concerned by the rules laid down in Articles 10 ff. In addition, the term "request" is being used with regard to the direct taking of evidence in Article 17.

[61] Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

[62] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L183, 8.7.2016, p. 30.

increasing visibility and resources, which may have positive effects on the application of the Regulation.[63]

## 4. Impacts on fundamental rights and the protection of personal data

In particular, three elements may cause stress, costs and delays for citizens, businesses, and public administrations under the baseline scenario. First, legal uncertainty and diverging understandings of what constitutes taking of evidence and the format it may take (including electronic formats) is expected to continuously pose problems in practice. As a result, legal professionals are not fully able to choose an effective method for obtaining evidence in cross-border proceedings as a result. This negatively affects the right to an effective remedy in proceedings[64]. Second, and related, access to justice may not be guaranteed for some persons. For instance, where means of distance communication are not permitted or allowed, persons who are not able or willing to travel in response to summons may not be heard. Third, the evaluation identified problems based on the completeness or quality of translation (e.g. in forms and documents) or interpretation. Under the baseline scenario, these problems are expected to persist.

Based on the problem assessment, it is expected that the abovementioned burdens will increase in line with the expected increase of courts' case load under Regulation (EC) 1206/2001 until 2030.

Under the baseline scenario, the protection of personal data is not considered to be affected by the current Regulation. External factors influencing data protection and privacy are the General Data Protection Regulation (GDPR) and the growing threats to cybersecurity (also affecting public authorities). After entering into force in May 2018, the GDPR is expected to increase awareness on the issue, prompt actions to ensure security and integrity of databases and swift reactions to breaches of privacy in the judiciary. However, data protection in the judiciary will continue to be largely determined by national decisions and the integrity of postal services (as the main form of communication under the Regulation). At the same time, the incidence of attacks on public IT infrastructure has increased in recent years[65] and there is no reason to assume this to change until 2030. This will also affect the judiciary in the Member States, depending on the proliferation of electronic communication, court IT systems and the interconnectedness with other IT systems or databases.

[63] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the activities of the European Judicial Network in civil and commercial matters, COM(2016) 129 final.

[64] Article 47, 2012/C 326/02, Charter of Fundamental Rights of the European Union

[65] Deloitte (25.07.2016): Government's cyber challenge. Protecting sensitive data for the public good. Deloitte Review issue 19; Source: https://www2.deloitte.com/content/dam/insights/us/articles/protecting-sensitive-data-government-cybersecurity/DR19_GovernmentsCyberChallenge.pdf

Overall, the issues identified above are expected to remain and the likelihood of their occurrence to increase in line with the projected number of cross-border proceedings (applying the Regulation) until 2030.

## 5. Environmental impacts

Under the baseline scenario, the main environmental impacts of Regulation (EC) 1206/2001 concern the use of (non-)renewable resources due to paper-based communication and the transport of letters (or parcels) on the one hand and persons complying with court summons on the other. The environmental impacts of both elements are expected to increase under the baseline scenario in line with the projected increase of cross-border proceedings and ensuing instances in which the Regulation is applied.

A majority of competent courts only allow paper-based communication (for requests and submission of evidence) via post or fax. Only six Member States accept requests via email in general and another five Member States accept emails for certain types of requests or communications.[66] Apart from the negative impacts in terms of costs for paper, toner or ink and postage on efficiency, paper-based communication also has implications for the environment. Presently, forms under the Regulation are often printed on paper whose production requires renewable resources (such as wood), consumes water and involves chemicals (e.g. brightening agents). Likewise, the production of toner requires (non-renewable) raw materials, e.g. plastic particles and other chemical products produced using mineral oil. Both paper and toner need to be packaged and shipped to end-users, leading to emissions from transport and handling. Both the production and use of these materials produce waste which may only be partially recycled (again requiring energy).

According to interviewed stakeholders, another important source of waste are printing errors or duplicate prints due to confusions about which forms have to be used. There are no reliable estimates on how often these occur. Nevertheless, it does seem likely that this problem will remain or only slightly decrease under the baseline scenario. While individuals might learn from mistakes, no policy change will also not address the overall causes for confusion or technical mistakes.

Finally, communication on paper is usually transmitted via postal services under the present Regulation, which:

- Require further material for processing (e.g. envelopes, wrapping, etc.);
- Consume additional resources for transport (e.g. fuel in transport); and
- Produce greenhouse gas emissions (e.g. in transport via trucks and delivery vehicles).

[66] In 24 of 26 Member States, postal service (including couriers) is accepted, whereas 23 Member States accept requests via fax machine.

The environmental impact of cross-border travel is expected to increase under the baseline scenario as well. Currently, persons involved in cross-border proceedings may have to travel to enable the taking of evidence. For instance, a competent court may summon a person (e.g. witnesses or experts) directly to the trial using the means of the Regulation[67] or means available under national law. This may occur if means of distance communication are not allowed under procedural law or simply not available at courts. In these cases, the person in question has to travel across border, e.g. using a car, plane, bus or train. While the distance to be covered and the environmental impact of different modes of travel varies, they are a direct result of the summons.

[67] C-170/11 Lippens and others

## ANNEX 7: ASSESSMENT OF IMPACTS OF POLICY PACKAGE

# 1. Effectiveness

Under the policy package, the effectiveness in achieving the policy objectives would increase in the following ways:

- Legal uncertainty would be reduced through the foreseen clarifications and additions (e.g. the definition of additional channels to take evidence and clarification of the concepts of court and taking of evidence) as well as new awareness raising and guidance material.
- The efficiency of cross-border judicial proceedings would be improved, which would lead to a lower burden for citizens and businesses. A number of measures would help to reduce delays, including the clarifications identified above, the strengthening of electronic communication and increased use of videoconferencing, as well as additional guidance and awareness raising.
- Access to justice and the protection of the rights of the parties would be improved, including through the reduction of delays and because the number of cases in which the Regulation would be applied is expected to increase. Risks relating to electronic communications and videoconferencing, e.g. relating to confidentiality, would need to be addressed.

The estimates on the future application of the Regulation under the policy package are presented below.

## 1.1 Reducing legal uncertainty

Under the policy package, legal certainty would increase, in particular through the following measures:

- Defining other means of cross-border taking of evidence and stating that they will be applied based on national procedural law and including a possibility to take evidence using consular channels (option 1.3);
- Clarifying the relation of the Regulation to other EU measures that contain rules on the taking of evidence (option 1.3);
- Broadening and clarifying the concepts of “courts” and “taking of evidence” (options 2.4 and 3.2);
- Including rules on the acceptance of evidence submitted in digital form (option 6.2); and
- Updating of existing guidance material and awareness raising.

On this basis, aspects that are currently clarified in the form of case law or not at all will be made clear in the Regulation. This is expected to contribute to a more equal application of the Regulation and will make it easier for legal professionals, citizens and businesses to anticipate whether or not the Regulation will be applied.

It is also possible that the definition of alternative means in the Regulation may cause additional uncertainties. For example, in case of expert judgements to be carried out, it may be difficult for legal professionals to decide between the procedure for direct taking of evidence under Article 17 and the direct examination of facts by an expert in another Member States (as added by option 1.3 following *ProRail*). While it would be clarified that the latter may only be used as long as such examination does not affect the sovereign powers of the Member State in which it is to be carried out, it is possible that questions may arise as to when that is the case. Nevertheless, such questions may also arise in the current situation, where the same rule applies based on the CJEU case law. On this basis, the uncertainty under the policy package is estimated to be smaller compared to the baseline scenario, as the rules would be summarised and added directly to the Regulation, which will make it easier for legal professionals to understand them.

In this context, it would be even more useful if it was specifically stated in the Regulation that other methods, e.g. based on national law, could be used if they would be more efficient than those in the Regulation. This would add clarity and make sure that courts can always use the methods most suitable to the case.

Finally, with the broadened scope (based on options 1.3, 2.4 and 3.2), the Regulation would likely be applied in a higher number of cases, which may also help to increase knowledge about it and possibly increase the awareness of legal professionals about alternative methods.

1.2 Further improving the efficiency and speed of judicial proceedings and reduce the burden for citizens and businesses

As indicated under the previous heading, there are several options that would contribute to decreasing uncertainty. On this basis, delays that exist based on current uncertainties could be reduced. For example, there would be time savings for legal professionals who might under the baseline scenario need to check the case law and increased legal certainty for citizens and businesses. In addition, there would be fewer cases in which exchanges would be needed to decide whether the Regulation is applicable, e.g. based on diverging interpretations of the concepts of “courts” or “taking of evidence”. On this basis, delays of e.g. one or several weeks could be avoided, thereby reducing the burden for citizens and businesses.

The scope of the Regulation is slightly broadened (options 1.3, 2.4 and 3.2), possibly leading to a higher number of cases in which citizens and businesses can benefit from the application of the Regulation.

The policy package would help to encourage courts to use videoconferencing facilities for the taking of evidence across borders by supporting funding and by specifically mentioning that videoconferencing should be used by default (option 4.2).

This is expected to lead to an increased availability of videoconferencing facilities and to an increased awareness of legal professionals of this possibility. On this basis, there could be an increased take-up of direct methods to take evidence across borders under the Regulation. This way, the efficiency and speed of judicial proceedings could be increased and the burden for citizens and businesses involved in cross-border proceedings be reduced. For example, it is possible that courts who plan a hearing of a person living abroad would currently rather tend to use the procedure via a competent court of another Member State. This could take around 2-4 months on average. Under the new rules, a higher number of courts is expected to conduct the hearing directly using videoconferencing. Instead of 2-4 months this would typically rather take 3-6 weeks, thus saving up to around two months.

It would be important to ensure that the new instrument is sufficiently flexible, allowing for exceptions to the general rule of using videoconferencing. There may be cases in which the use of videoconferencing would put an additional burden on citizens, including potentially delays as well as stress. For example, if the closest videoconferencing facilities for the witness are far away, e.g. more than one hour's drive, it may be easier for the witness to come to a court that is closer. In addition, it may not be suitable to conduct a hearing via videoconferencing for small children or people with disabilities. This might cause additional stress compared to a physical hearing through a competent court.

By introducing an electronic communication system (option 6.2) to be used as a rule for requests and communication, time in relation to sending requests and other communications via post (e.g. around 8 working days per request, depending on the number of communications and channels used). In addition, the possibility to log the steps of the work flow (option 8.2) would increase the transparency for the requesting court that could check the status of the request. This might reduce the number of status requests, which are currently sometimes sent even before the 90 day period is over. In addition, such a tool would facilitate the preparation of statistics, e.g. to check which courts and/or Member States have systematic difficulties in meetings the deadlines. It would then be possible to target support, e.g. training, which could lead to improvements in the medium term.

Ensuring the equal treatment and evidentiary value of electronic evidence (option 6.2) would also reduce delays and the burden for businesses. Currently, it is possible that parties produce and/or present evidence in digital format and it is not clear to what extent it may be accepted in another Member State. It is possible that it is refused, e.g. because the court in question is not allowed to open external USB sticks. In such cases, delays would occur and the parties may need to go through additional efforts to produce the evidence in a different format.

Finally, additional efforts on awareness raising, guidance and the sharing of good practices (option 5.1 and horizontally) would also help to further speed up the procedures and thus reduce the burden for citizens and businesses. In particular, the sharing of best practices is expected to contribute to improving and possibly streamlining procedures

under the Regulation, if legal professionals take them into account. This may also increase the speed and efficiency of judicial proceedings (based on a common understanding).

Nevertheless, the positive effects would depend on the extent to which the Regulation and the additional material for awareness raising/guidance is actually known and used by legal professionals.

### 1.3 Improving access to justice and the protection of the procedural rights of parties to the proceedings

Due to the reduction of the burden for citizens and businesses (e.g. reduction of delays and stress as discussed under the previous heading), it becomes easier for businesses and citizens to participate in cross-border legal proceedings. On this basis, access to justice is also improved.

Per case, the protection of the rights of the parties to the proceedings remains at a similar level. The Regulation still contributes to making sure that all relevant evidence necessary for the claim and/or defence may be gathered in an efficient way, by introducing common channels that may be used for this purpose. It is positive that the number of potential channels to be used under the Regulation is increased. This way, citizens and businesses would benefit from the Regulation in a higher number of cases. The new instrument would also still facilitate the participation of the parties in the taking of evidence (Article 11). On this basis, the right of access to justice and the right to be heard are strengthened in the cases in which the Regulation is applied.

Risks may arise based on the potential increased use of electronic communications and videoconferencing. It is important in this respect to implement these measures in a way that does not infringe e.g. the confidentiality of communications. Specifically with respect to videoconferencing, it would be important to ensure that the witness is (at least physically) free to give the testimony, which is more difficult in the context of videoconferencing.

## 2. Efficiency, incl. impacts on national judicial systems

The assessment of efficiency concerns the extent to which the objectives of the Regulation are achieved at a *reasonable* cost. In that sense, the implementation of the policy package is considered to be more efficient than the baseline scenario:

- The implementation of the policy package is associated with comparatively high initial investments (i.e. capital investments, CAPEX) for public authorities that could be co-financed by the European Commission. Moreover, recurring operational

expenditures (OPEX) are expected to be incurred by public authorities for the maintenance of the necessary hard- and software.

- The investment in technical infrastructure and processes is expected to make legal proceedings more efficient, which is expected to decrease necessary labour costs. This could mean that more legal proceedings could be handled by the same staff within the given time. In addition, the necessary investments are balanced by decreased costs for postal services, paper and office supplies, as well as archiving costs that would be incurred in the future under the baseline scenario.
- The implementation of the policy package is expected to be a benefit for legal professionals, in particular lawyers. Although they would incur costs in relation to understanding the amendments of Regulation (EC) 1206/2001 and checking the extent to which and how the legislation would apply to a specific legal case, this is not considered to differ from the baseline scenario. The reason for this is that most lawyers do not have to deal with the Regulation on a case-by-case basis. Therefore, the time they would have to invest are considered business-as-usual costs and is assumed to be charged to their clients. However, the policy package is expected to reduce legal ambiguities compared to the baseline scenario.
- Citizens and businesses are expected to benefit from the implementation of the policy package. In particular non-monetary benefits such as increased access to justice, freedom of choice, and decreased levels of stress within legal proceedings are important in this regard – especially in relation to vulnerable persons. It is also expected that the policy package could have some positive effects on the time taken to close a case.
- No major effects are expected in relation to the economy overall. It is, however, expected that positive economic effects of the policy package for specific types of businesses would lead to negative effects for other types of businesses. For instance, the revenue generated for IT consulting service providers, as well as internet and telecom providers through the implementation of the policy package can also be regarded as a loss for postal service providers and office supply providers. Thus, the economic effect is regarded as neutral overall.

Thus, the policy package has received an overall rating of +2 compared to the baseline scenario.

For the assessment, it is crucial to differentiate between the costs and benefits for different types of stakeholders in a qualitative and quantitative way.

The impacts on the following types of stakeholders are discussed within this section:

- European Commission and Member States' public authorities, incl. impacts on national judicial systems;
- Legal professionals (in particular judges and lawyers);
- Businesses as service providers, e.g. in relation to postal services or IT consulting; and
- Citizens and businesses as stakeholders in legal proceedings.

An assessment of cost and benefits is provided below.

## 2.1 European Commission and Member States' public authorities

This section provides an assessment of the cost and benefits for Member States' public authorities due to the implementation of the policy package.

### 2.1.1 Costs of the policy package for public authorities

Under the preferred policy package, the European Commission and Member States' public authorities are expected to incur costs compared to the baseline scenario in relation to:

- Awareness-raising and the development and publication of best practice guides at the level of the European Commission;
- Development, implementation, and maintenance of (both at the Commission and Member State levels):
  - CEF eDelivery (eCodex) as the default channel for electronic communication and document exchanges;
  - Videoconferencing facilities, telephone-conferencing, and equipment for other distance communication means; and
- Administrative burden for Member States in relation to the organisation of videoconferences and long distance communication.

These are mostly costs that the European Commission and Member States' public authorities are not expected to incur under the baseline scenario. Although public authorities are also expected to incur costs with regard to administrative burden (e.g. to organise physical meetings) in the baseline scenario, the magnitude of burden is expected to be higher under the policy package. The reason for this is that using VC necessitates the alignment of schedules and the availability of facilities not only of a court and judicial officers in one Member State but in two.

The costs for the awareness raising activities are dependent on the exact scope, means and target groups of the activities. It can be expected that the organisation of these activities would be procured by the Commission.

Experience-based estimates show that the implementation of awareness raising activities targeting a comparatively limited audience can at least cost one million Euro if implemented in all 28 Member States (depending of course on the types of channels, frequency of communication, level of information etc.).

Considering that there are approx. 82,000 professional judges in the EU, which could all be handling a cross-border case, costs could be up to around 2 million Euro, if each individual would be targeted directly.

The costs for the development and publication of best practice guides is expected to be rather low and shared by the European Commission and the Member States within the EJN network. The costs would only be incurred once over the next couple of years as the practice guide would remain relevant for practitioners.

The actual content could be prepared during the EJN meetings which are largely financed by the network's national contact points.

The actual drafting, visualisation, layout etc. of the practice guide could be procured as a contract by the European Commission. Depending on the extent to which the EJN is able to prepare the substance of the guide within their meetings (or if additional research has to be done by the contractor), this could cost between 15,000 and 30,000 Euro. The estimate includes updates of other aspects related to the Regulation, covered under the other options. The more research would need to be done by the contractor, the more expensive the development of the practice guide would be.

As it would be planned to distribute the guide via the e-justice portal, thus in digital format, it can be assumed that there would be no costs associated with the distribution of the new guide.

If printed material, e.g. flyers, brochures etc. would need to be prepared (e.g. for training sessions or as take-away at conferences), additional printing costs would be incurred. The exact costs depend on the number of prints, their paper and print quality, the number of pages etc. but could range from 1.0 to 5.0 Euro per print. If one practice guide was printed per court (i.e. 6,000 in the EU), this could amount to 30,000 Euro.

Costs related to the development, implementation, and maintenance of CEF eDelivery as the default channel for electronic communication and document exchanges would be shared by the European Commission and the Member States[68], e.g. through co-financing.

It is expected that CEF eDelivery (e-CODEX) would necessitate both one-off capital expenditures (CAPEX), e.g. for the development and acquisition of respective technology, as well as recurring operational expenditures (OPEX) for its implementation and maintenance. The annual OPEX is expected to decrease incrementally over time due to public authorities gaining experience and expertise regarding eDelivery. This means that public authorities are expected to become more efficient over time.

Costs related to the implementation and maintenance of CEF eDelivery could be within the range of those estimated for the implementation and maintenance of eCODEX.

The e-CODEX draft Impact Assessment indicates that acquisition costs for the e-CODEX hardware are marginal at one-off costs of approx. EUR 15 000 (CAPEX) and approx. EUR 2 000 (OPEX) annually for hardware maintenance. This cost concerns the deployment of the national connector and gateway which are the components of the e-CODEX enabling the interactions between the relevant national IT systems of the various Member States. Of course, Member States have to ensure that all their national transmitting and receiving agencies (and central bodies) at local level will be connected to their national gateway, so that all of these local agencies serve as e-CODEX access points in the national system. Nevertheless, we do not calculate with additional hardware

[68] For instance, costs could be split 50/50.

acquisition costs in this context, because we assume that all agencies and bodies designated under the Regulation (courts, bailiffs, governmental authorities) have internet connection and, at least, one PC point.

In addition to the estimate above, the e-CODEX Impact Assessment mentions that costs related to installation, integration (into the national systems), and testing of the eCODEX infrastructure could add up to around 76 person days (relevant costs are mainly driven by the human resource cost of personnel needed).

It is to be mentioned that even these costs falling to a Member State under the proposed policy option may not incur, since those Member States (and there are many of them) who have already deployed the necessary infrastructure in the context of the previous e-CODEX pilot projects may choose to reuse this infrastructure (national connector and gateway) for purposes of the communication system to be established under the Service Regulation.

Overall, the associated OPEX is, however, not expected to be larger than the expenditures associated with postal services, as well as the costs for paper, archiving, and the rent related to archive space.

For the sake of completeness, it should be noted that the e-CODEX draft Impact Assessment also gives estimates on the costs needed for the implementation and maintenance of the entire e-CODEX community at EU level, the financing of which will be considered under other initiatives and from other resources, consequently these costs are not to be regarded in our assessment.

In addition, Member States are also expected to incur costs with regard to the development, implementation, and maintenance of videoconferencing (VC) facilities, as well as other distance communication equipment.

The acquisition, implementation, and operation of professional, high-end VC equipment (e.g. similar to those used by the Commission in their larger conference rooms) could cost as much as 90,000 Euro – depending on the type of systems and its functionalities (e.g. number of microphones, cameras, extent to which the system is smart and can track conversations by zooming in on attendees that currently use the microphone).

This estimate seems to be very high. Prices available online show that approx. 3,000 Euro per month could be a more realistic estimate.

This means that annual costs per court could be in the range of 36,000 Euro.

According to CEPEJ 2014, there are 6,000 courts in the EU, of which a limited number already has VC facilities. If all courts were to be equipped with one VC facility – which is still unlikely – costs could be as high as 216 million Euro across all Member States, i.e. on average 8 million Euro per Member State.

There could be similarly high costs for the replacement of the current system after a couple of years of maintenance.

Similar to eDelivery, the implementation of VC and other distance communication means are expected to necessitate both one-off capital expenditures (CAPEX), e.g. purchasing the necessary hardware, as well as recurring operational expenditures (OPEX) for its maintenance. The annual OPEX is expected to decrease incrementally over time due to public authorities gaining experience and expertise regarding eDelivery. This means that public authorities are expected to become more efficient over time.

The benefits of videoconferencing compared to face-to-face meetings are, however, being debated. A study carried out in 2014 by Dennis Ong, Tim Moors, and Vijay Sivaraman on the *comparison of the energy, carbon and time costs of videoconferencing and in-person meetings*[69] showed that if time costs are taken into account, videoconferencing might become a less attractive meeting mode than in-person meetings. The study argues that the "main cause of this is the lower task efficacy of videoconferencing, which makes the meeting unnecessarily longer and therefore incurs a higher time cost for participants. Therefore, for the common case where the efficacy of videoconferencing is lower than an in-person meeting, our results show that it is important to evaluate the meeting versus the total participants' travel time required for in-person meeting. Longer travel time does not necessarily translate into a higher overall cost, especially if the meeting duration is long."

Furthermore, there could be costs for stakeholders in the future regarding the interoperability (or lack thereof) between competing VC and distance communication systems deployed by the Member States (e.g. domestic vs. cross-border systems or non-interoperable cross-border systems in different Member States).

In addition to CAPEX and OPEX, Member States' public authorities are expected to face an administrative burden in relation to the organisation of VC and other long-distance communication.

More specifically, this involves aligning the schedules of the different parties involved in the proceeding that would need to be present in a videoconference, as well as the availability of facilities not only in one Member State but in two.

As only a limited number of VC facilities is likely to be available (e.g. one per court or even less), the possibility of organising a hearing is also subject to the availability of the relevant equipment. As a consequence, VC hearings may have to be postponed until the VC facility of the court (or another in close proximity) is available. This can lead to undue delays of legal proceedings.

These undue delays may cause public authorities to deviate from the rule to use VC or other distance communication means to take evidence across borders.

Costs in relation to administrative burden would solely be incurred by public authorities. It is expected that the magnitude of the costs decreases over time as public authorities

[69] See: https://www.sciencedirect.com/science/article/pii/S0140366414000620

become more acquainted and experienced with the rules and procedures. Moreover, VC in particular is expected to become more prominent and user-friendly in the future. Therefore, deviations from the rule to use VC or other distance communication means are expected to become less frequent over time. This will contribute to a decrease in administrative burden in the long run.

### 2.1.2 Benefits of the policy package for public authorities

Under the preferred policy package, Member States' public authorities are expected to benefit from reduced costs compared to the baseline scenario in relation to:

- Postal services;
- Paper, envelopes, and printer cartridges;
- Shelfs, archiving material (e.g. folders, clips), and space (i.e. office rent);
- Labour, e.g. communication and archiving tasks; and
- Administrative burden, e.g. in relation to travel reimbursements[70] for stakeholders.

Moreover, public authorities also benefit from time savings due to more efficient legal proceedings. This leads to a situation in which more legal proceedings can be handled within the same time, given constant staffing.[71]

Moreover, public authorities are expected to benefit from increased legal certainty when and how to apply the Regulation, as well as mutual trust between Member States. This is expected to have a positive impact on the Member States' national judicial systems.

With the implementation of CEF eDelivery, public authorities are expected to incur less costs with regard to postal services in the future. The eCODEX Impact Assessment, for instance, argues that the replacement of postal services with digital communication generates potential savings of between 8 Euro and 21 Euro per legal proceeding.

The estimates developed as part of this study show that it can be expected that Regulation (EC) 1206/2001 would be applied in around 700,000 cases per year on average until 2030, meaning that this could amount to potential savings of approx. 6 to 15 million Euro per year across the entire EU.

In addition, public authorities are expected to save costs in relation to paper, envelopes, and printer cartridges. Based on the following assumptions, potential costs savings can be

[70] The actual reimbursement of travel costs, as well as of lost professional income, e.g. during the travel to and the time of a hearing, are not considered to be a benefit for businesses and citizens as they would be reimbursed by public authorities under the baseline scenario and the policy package either way.

[71] Efficiency gains in legal proceedings could, however, also lead to budget and staff cuts in practice. This would then imply that the number of legal proceedings that can be handled within a given time would remain constant while the necessary staff would decrease.

estimated to be approx. 300,000 Euro across the EU per year, according to the following logic:[72]

- 700,000 legal proceedings per year on average;
- 4 documents (with at least one page) are exchanged between authorities per legal proceeding on average;
- 500 sheets of paper costs around 2 Euro on average;
- 500 envelopes could cost around 15 Euro on average; and
- Printer cartridges cost about 100 Euro on average and last for approx. 1,400 pages.

Moreover, public authorities are also expected to incur less costs for shelfs, archiving material, and archiving space. A German service provider[73], for instance, charges the archiving of a running meter of folders (i.e. approx. 20 folders) with 25 Euro per meter as one-off cost, plus 1.25 Euro as monthly fee. Assuming that the postal communication (i.e. 4 documents on average with at least one page) concerning each of the approx. 700,000 legal proceedings per year is stored in a separate folder in two Member States for at least five years, this could amount up to 11 million Euro per year across all EU Member States of potential savings through the implementation of CEF eDelivery.[74] Since this estimate is based on the charges used by a German service provider, the actual cost savings are very likely to be lower across the EU.

Public authorities are also expected to benefit from decreasing labour costs regarding in particular communication, both in monetary (i.e. less staff costs) and temporal (i.e. less delays) terms. It can be assumed that each communication by post takes between 1 and 3 working days from the day the document is submitted until it is delivered by post. This means that if authorities communicate four times with each other on average by post, communication-related delays can amount to 4 to 12 days (i.e. 8 days on average). Thus, if all 700,000 legal proceedings are delayed by 8 days on average, the implementation of CEF eDelivery could potentially save up to 5.6 million working days per year across the EU from the overall length of all legal procedures taken together.

Data from Germany also shows that there could be time savings with regard to the processing of a case in the range of 5 to 10 minutes per case as data would no longer have to be entered manually into courts' case management system.

The time and efficiency gained through this could be used to either handle:

- More legal proceedings within the given time by the same staff;
- The same number of legal proceedings within the given time by less staff; or
- The same number of legal proceedings with the given staff in less time.

[72] The formula for this is: (((700,000 legal proceedings * 4 documents) / 500 papers) * 2 Euro) + (((700,000 legal proceedings * 4 documents) / 500 envelopes) * 15 Euro) + (((700,000 legal proceedings * 4 documents) / 1,400 prints) * 100 Euro) = 295,200 Euro.

[73] See: http://www.aktenfarm.de/index.php?id=15

[74] The formula for this is: (700,000 legal proceedings * 2 Member States * 4 documents / 20 folders per meter * 25 Euro) + (700,000 legal proceedings * 2 Member States * 4 documents / 20 folders per meter * 12 months * 1.25 Euro) = 11,200,000 Euro

These types of benefits are directly linked to benefits for legal professionals, businesses and citizens.

Finally, the implementation of VC and other distance communication could save public authorities administrative burden in relation to the reimbursement of travel costs for stakeholders and parties involved in a legal proceeding. This could e.g. save 2 to 4 hours of work per legal proceeding depending on how many persons' travel costs have to be reimbursed. The average hourly wage in the EU is approx. 25 Euro. Thus, between 35 million Euro and 70 million Euro could be saved.

## 2.2 Legal professionals

Legal professionals, in particular judges and lawyers, are expected to incur costs with regard to the following aspects:

- Understanding the new legislation and checking which means to take evidence can be applied in a specific case and are most appropriate;
- Administrative burden regarding the organisation of VC and other distance communication as a rule.

Due to the implementation of the policy package compared to the baseline scenario, legal professionals (in particular judges and lawyers) will have to invest time into understanding the new legislation and its practical implications. With respect to judges, this means that less time can be spent on other cases, as well as the administration of their work. It is not expected that this would lead to a financial detriment for judges as they are, as public officials, not paid on an hourly or daily basis but through regular monthly wages.

For lawyers, especially those working independent of larger law firms, corporations, or legal networks, however, having to analyse and digest a new set of legislative rules can be time-consuming (depending on the complexity of legislation), and thus factor in negatively on the revenue they are able to generate within a given time because they cannot spend this time on billable client work – especially since most lawyers do not have to deal with Regulation (EC) 1206/2001 or cross-border cases on a day-by-day basis. An individual lawyer could, for instance, lose around 50 Euro to 100 Euro if it takes the person one hour to check the legislation. Assuming that approx. half a million lawyers across the EU handle the 700,000 annual legal proceedings, this could lead to one-off costs of 25 million Euro to 50 million Euro. It is not expected that such an amount would be incurred by different lawyers each year as most lawyers deal with cross-border cases only once (most of them never do), while others deal with it on a more frequent basis. On an individual basis, costs would, of course, only be incurred once for those that deal with the Regulation (EC) 1206/2001 on a more frequent basis.

In addition, lawyers could incur costs in relation to understanding which means to take evidence across borders can be applied in a specific case or are most appropriate given

the specific circumstances. Although VC and other distance communication should be used as a rule under the Regulation, there is no obligation to use it and there may be circumstances under which Member States' national procedural law does not allow for the taking of evidence by means of VC or other distance communication means. Those circumstances may not be clear a priori so that legal professionals do not necessarily know in advance. However, at some point during the legal proceeding, lawyers would need to check which means are applicable under the given circumstances of the legal proceeding and to what extent and how the Regulation can be applied in order not to delay the legal proceeding and to cause clients undue costs. It is not fully clear to what extent lawyers would forward these costs to citizens and businesses via their fees.

These costs are, however, not specific to this policy package, but could be incurred under any configuration of options compared to the baseline scenario. Rather than actual losses to lawyers, the costs could also be seen as investments that lawyers would have to make in order to generate new business – in particular if a lawyer is located close to a border or if the person would like to specialise on cross-border cases.

Similar to public authorities, legal professionals are also expected to face administrative burden in relation to the organisation of VC and other long-distance communication.

However, legal professionals also benefit from the implementation of the policy package. In line with the argumentation and estimates outlined above concerning the implementation of CEF eDelivery and VC facilities, legal proceedings are expected to become more efficient and less time consuming. Lawyers, for instance, benefit from this development as it could be possible for them to handle more cases within the same time.

Although this could lead to lower revenue on a case by case basis, it could be argued that lawyers' overall revenue could increase through the increased number of cases – at least for the most efficient lawyers.

Moreover, lawyers are expected to benefit from increased legal certainty when and how to apply the Regulation, as well as mutual trust between Member States. This is expected to be have a positive impact on the take-up of Regulation (EC) 1206/2001 by lawyers, as well as the use of VC or other distance communication. Moreover, increased legal certainty is expected to have a positive impact on Member States' national judicial systems.

### 2.3 Businesses as service providers

The implementation of the policy package is expected to have positive and negative economic impacts compared to the baseline scenario on service-providing businesses in different industries.

Negative economic impacts are expected for the following types of businesses:

- Postal service providers;

- Paper and office supply providers;
- Providers of archiving shelfs; and
- Transport service providers.[75]

Through the implementation of CEF eDelivery, as well as VC and other distance communication means, the revenue of the abovementioned types of businesses is expected to decrease marginally as these firms' core businesses is not service provision related to judicial cooperation but is much wider than that.

As concerns transport service provides, a comparison of three (Austria, Lithuania, and Spain) Member States' prices for domestic and cross-border travel with long distance bus, train, and aircraft showed that cross-border travel is around 17% more expensive than domestic travel.[76] Thus, transport service providers are expected to lose revenue in case stakeholders only have to travel in their Member State to attend a hearing (e.g. to use a VC facility in another court) or if they do not have to travel at all.

In contrast, a small part of businesses' revenue would be shifted from the abovementioned to other types of businesses. The types of businesses that would benefit from the implementation of the policy package compared to the baseline scenario are:

- Providers of IT consulting services;
- Manufacturers of VC and other distance communication equipment, as well as related service providers;
- Internet and telecommunication service providers;
- Cloud storage service providers; and
- Archiving service providers.

The revenue of these types of businesses is expected to increase marginally as these firms' core businesses is not service provision related to judicial cooperation but is much wider than that.

In line with the analysis contained in the eCODEX Impact Assessment, IT consulting service providers could gain around 1 million Euro per year for the implementation of CEF eDelivery.

Available estimates suggest that courts would have to spend approx. 36,000 Euro per year on VC. As there are approx. 6,000 courts in the EU according to CEPEJ 2014 (of which a limited number already has VC facilities), manufacturers and service providers in the area of VC could gain as much as 216 million Euro across all Member States

[75] For instance airlines, train service providers, or long distance bus lines that would be used if stakeholders were summoned to court in another Member State.

[76] A quick online search of travel costs for different types of modes (aircraft, bus, train) for domestic and cross-border travel in three Member States (Austria, Lithuania, Spain) showed that domestic travel can be around 58 Euro on average whereas cross-border travel can be around 68 Euro on average. In particular flights can, of course, be much more expensive than 68 Euro however – both domestic, as well as across borders.

through the implementation of the policy package compared to the baseline scenario – if all courts were to be equipped with at least one VC facility.

The overall economic impact on service providers is, however, expected to remain neutral as the negative and positive impacts on different types of businesses are expected to equalise themselves. From an economic perspective, the implementation of the policy package is considered to be a "zero-sum game".

### 2.4 Citizens and businesses as stakeholders in legal proceedings

Citizens and businesses as stakeholders in legal proceedings are not expected to incur major costs through the implementation of the policy package compared to the baseline scenario.

Similar to public authorities and legal professionals, there could be costs related to administrative burden in relation to the organisation of VC and other long-distance communication. The costs would stem from efforts to indicate to public authorities when citizens and businesses would be available for VC or other distance communication, as well as the possibly undue delays. These are, however, expected to be marginal.

The policy package is, however, expected to bring benefits compared to the baseline scenario such as:

- Time savings due to more efficient procedures; and
- Decreased legal fees for lawyers.

If public authorities communicate four times with each other on average by post within a given legal proceeding, communication related delays can amount to 4 to 12 days (i.e. 8 days on average). The implementation of CEF eDelivery could save this time for citizens and businesses.

This is of particular importance for businesses in the context of cross-border trade as the timely completion of a legal proceeding without undue delays can e.g. have implications in cases around financial or maintenance claims. If legal proceedings are delayed, businesses may not be paid or supplied on time which could lead to detriment for clients.

Moreover, citizens and businesses are expected to benefit from decreased legal fees. Through the implementation of CEF eDelivery and increased uptake of VC and other distance communication means, legal proceedings are expected to become more efficient.

Through the implementation of VC and other distance communication means, citizens and business are expected to benefit from increased access to justice, as well as freedom of choice concerning the most appropriate means to take evidence across borders (depending on the legal proceeding, it could be that there are means to take evidence that are more appropriate than VC or other distance communication). This means that vulnerable citizens such as elderly, persons that suffered physical or psychological

damage (e.g. due to an accident), persons with physical or mental disabilities or anxiety disorders (incl. aviatophobia), children, economically disadvantaged persons, and also persons that have legitimate reason not to travel (e.g. job-related duties) can still be heard in a legal proceeding and decide what the most appropriate means to take evidence for them is (e.g. a spouse may want to be present in court to testify, or a creditor may want to physically meet debtors).

Decreased travel costs (and possibly the loss of professional income), e.g. during the travel to and the time of a hearing, are not considered to be a benefit for businesses and citizens as they would be reimbursed by public authorities under the baseline scenario and the policy package either way.

Finally, the implementation of the policy package is expected to lead to less stressful legal proceedings compared to the baseline scenario. This is considered to be an important non-monetary benefit for citizens.

## 3. Coherence

The coherence of the Regulation to EU and national law would be slightly improved compared to the baseline scenario.

The Regulation would continue to be largely coherent internally, in relation to EU law, national law and bilateral agreements. In addition, some of the options would contribute positively to the coherence of the Regulation.

The clarification of the relationship to other EU rules and the mentioning of additional channels to take evidence (option 1.3) would be helpful in increasing clarity on the relationship with other instruments. However, the small uncertainties identified in the evaluations would persist. Notably, the use of 'request'[77] and potential overlaps with the Brussels IIa Regulation would not be clarified.[78]

The codification of CJEU case law (option 1.3) would be coherent with the general EU policy objectives. The new rules on the taking of evidence through diplomatic officers or consular agents would follow the rules of the 1970 Hague Convention and would thus be coherent with it.

[77] Article 2(1) stipulates that the term "requests" in the Regulation refers to requests under Article 1(1)(a), i.e. requests asking the competent court in another Member State to take evidence. Nevertheless, Article 4(1) indicates that form I could be used for posing 'requests', although form I concerns direct taking of evidence. On this basis, it may not be entirely clear which requests are concerned by the rules laid down in Articles 10 ff. In addition, the term "request" is being used with regard to the direct taking of evidence in Article 17.

[78] Certain overlaps may exist with the Brussels IIa and Maintenance Regulations, notably as concerns the tasks of the Central Bodies to collect information concerning the situation of the child. With respect to Brussels IIa, this has led to a lack of clarity as to whether the Evidence Regulation also applies to such situations.

With the definition of "judicial authorities" (option 2.4), a similar approach to the Maintenance Regulation would be taken, although the Maintenance Regulation speaks of courts.

The encouragement of the use of videoconferencing (option 4.2) is in line with the recast of the Small Claims Regulation[79], which also explicitly refers to videoconferencing.

The introduction of a tool for electronic communications and the recognition of digital evidence (option 6.2) as well as the encouragement of videoconferencing (option 4.2) are in line with and support the current strategies of the EU Commission in the context of the e-justice strategy[80]. It is also in line with ongoing projects in many Member States to increase the use of electronic communications in the area of justice.

With respect to the introduction of the tool for electronic communications, we note that it aims at building on existing standards and platforms and that it is planned to use the same tool for the Service Regulation.[81]

Finally, it is noted that negotiations with the Lugano countries[82] on the service of documents and taking of evidence, once the changes currently under discussion are implemented.[83] This is expected to have positive effects on the coherence with the Lugano Convention.

## 4. Impacts on fundamental rights and the protection of personal data

The policy package addresses several issues which cause legal uncertainty and delays under the baseline scenario. At the same time, the policy package increases access to justice by promoting the use of distance communication to hear witnesses and affected parties. The effect of the policy package on the protection of personal data will largely depend on the implementation at the Member State level.

First, option 1.3 clarifies the existing means for taking of evidence available under the Regulation and national procedural law and their relationship, contributing to the fundamental right to an effective judicial remedy. This way, the efficient methods to obtain evidence are acknowledged and promoted under the Regulation. While the same methods would be available under the baseline scenario, awareness-raising (contained in

[79] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure (OJ L 341, 24.12.2015, pp. 1-13).
[80] Multiannual European e-Justice Action Plan 2014-2018, OJ C 182, 14.6.2014, p. 2-13.
[81] See the separate volume on the Service Regulation produced under this assignment.
[82] Denmark, Iceland, Norway, Switzerland.
[83] DG JUST Management Plan 2018, p. 26, see: https://ec.europa.eu/info/sites/info/files/management-plan-just-2018_en_0.pdf

option 5.1), together with the additional clarifications in option 1.3 are expected to have a positive effect on the access to justice and contribute to faster proceedings.

Likewise, clarifying definitions and concepts (options 2.4 and 3.2) is expected to reduce legal uncertainty and speed up procedures under the Regulation in practice. Together, these options will be to the benefit of vulnerable persons. They potentially reduce stress for parties in the proceedings by addressing causes for delays. Furthermore, they reduce costs or failures to obtain evidence experienced otherwise, where an inefficient method to take evidence would have been chosen due to a lack of information under the baseline scenario.

Through the implementation of videoconferencing and other distance communication means, citizens and business are expected to benefit from increased access to justice, as well as freedom of choice concerning the most appropriate means to take evidence across borders. This means that vulnerable citizens such as elderly, persons that suffered physical or psychological damage (e.g. due to an accident) or persons with physical or mental disabilities, children, economically disadvantaged person can still be heard in a legal proceeding.

Third, the proposed change towards using electronic communication under the Regulation (i.e. through the use of video-conferencing in option 4.2 or the CEF eDelivery infrastructure in option 6.2 and 8.2) is expected to exert effects on the protection of personal data.

In both cases, the technical implementation and operation will be determined and controlled by Member States themselves, even if the infrastructure is partially developed and financed at the EU level. On the one hand, the Regulation does not explicitly mention requirements for security of transmissions in distance communication (or related safeguards to protect personal information). This could, however, be made a precondition to obtain the funding mentioned in option 4.2 (b). On the other hand, the CEF eDelivery infrastructure is based on a decentralised architecture. As a result, data will not be stored or processed by the organisation responsible for maintaining the CEF components in the e-CODEX project. Data protection requirements will therefore apply exclusively at national level for the different procedures where e-CODEX is implemented.

Important external factors with regard to the protection of personal data that also affect the proposed policy package are the GDPR and the persistent threats to cybersecurity in the public sector. On the one hand, after entering into force in May 2018, the GDPR is expected to prompt actions to ensure security and integrity of databases and swift reactions to breaches of privacy in the judiciary. On the other hand, the incidence of attacks on public IT infrastructure is expected to increase with their proliferation until 2030. These are expected to also affect the judiciary in the Member States, and their impact could be potentially be aggravated because of the growing interconnectedness of IT systems (nationally and at the EU level). Thus, the impact of options 6.2 and 8.2 on the protection of personal data will crucially depend on the actions at the Member State level.

## 5. Environmental impacts

Compared to the baseline scenario, the policy package is expected to have a number of potential positive impacts on the environment. This impact is driven by two elements in particular, namely:

- The promotion of videoconferencing and other means of distance communication for the (direct) taking of evidence (options 1.3(ii) and 4.2) ; and
- The plan to replace paper-based communication by electronic means using CEF eDelivery (eCodex) (options 6.2 and 8.2)

As part of the preferred policy package, videoconferencing should replace instances of physical summons (e.g. of witnesses, experts, etc.) to court (options 4.2). This way, the need to travel across borders to participate in proceedings is reduced, which in turn is assumed to affect pollution and/or carbon emissions from passenger transport. Indeed, a number of past studies have estimated a positive impact on the environment due to increased meetings via distance communication (including videoconferencing) and reduced air travel in business contexts.[84] According to a 2014 study, videoconferencing was estimated to take up at most 7% of the energy and carbon emission of an in-person meeting.[85] Therefore, reducing instances in which experts and witnesses travel across borders due to the use of distance communication (including videoconferencing) is expected to have a positive effect on the environment.[86]

This said, technology has its own carbon footprint as it consumes energy in production and operation.[87] In addition, its production requires non-renewable (and possibly scarce) resources and produces waste after being decommissioned. As a result, the final impact of the policy package depends to a large extent on the life-cycle of existing and future equipment itself, as well as the developments in energy-efficiency of the IT infrastructure in which they are embedded.

The intended replacement of paper-based communication with electronic communication via CEF eDelivery (options 6.2 and 8.2) is also expected to have a positive environmental impact. As a paperless system, CEF eDelivery would reduce the use of resources (e.g. water and wood used for paper production), environmental impacts of

[84] See for instance Econometrica (2008) Video Conferencing and Business Travel. https://ecometrica.com/assets/vc_businesstravel_factsheet.pdf or Carbon Disclosure Project (2010): The Telepresence Revolution. https://www.att.com/Common/about_us/files/pdf/Telepresence/CDP_Telepresence_Report_Final.pdf

[85] Ong, D. et al. (2014): Comparison of the energy, carbon and time costs of videoconferencing and in-person meetings. In: Computer Communications. 50. Doi: 10.1016/j.comcom.2014.02.009.

[86] However, the precise gains are difficult to estimate, since cross-border proceedings do not always entail summons to competent courts.

[87] Vandromme N. et al. (2014): Life cycle assessment of videoconferencing with call management servers relying on virtualization. In: ICT for Sustainability 2014, p. 281-289

their production (e.g. from the use of chemicals in paper production) and transporting paper to the buyer. In addition, the use of toner and ink is expected to be reduced.[88]

According to interviewed stakeholders, one important source of waste are printing errors or duplicate prints due to confusions about which forms have to be used. Electronic communication through the CEF eDelivery platform could address this cause of waste by implementing checks and guidance on how to fill in forms directly on the user interface. This way, even if a paperless administration within a competent court is not yet feasible (or desirable), waste of paper and toner could be reduced.

Finally, electronic communication is expected to reduce the emissions from transport in postal services. Overall, it is reasonable to assume that modernisation of the judiciary in the EU Member States will increase the amount of hardware and server infrastructure used on a daily basis until 2030 – independently of any amendments to Regulation (EC) 1206/2001. Thus, overall energy consumption of IT infrastructure is expected to increase regardless of the preferred policy package. Additional electronic communication is expected to have an impact on energy consumption (due to increased network traffic). Compared to paper-based communication, however, the carbon footprint is expected smaller under the proposed changes in the policy packages (illustrated in the text box below).

[88] While this impact may not affect production and the supply chain for both goods presently, reductions in demand are likely to have an impact on production and transport these products in the long run.

## ANNEX 8: CONCLUSIONS OF THE EVALUATION OF REGULATION (EC) 1206/2001

Overall, Regulation (EC) 1206/2001 has made a contribution to achieving its general as well as specific and operational objectives. The introduction of common methods for taking evidence has been welcomed by practitioners. The introduction of standard forms and communication channels has facilitated communication. The Regulation has increased the efficiency of legal proceedings– both compared to the Hague Convention and over time between 2001 and 2017. The Regulation thus contributes to an area of freedom, security and justice and a smooth functioning of the internal market. It increases mutual trust between courts and helps to reduce the burden for citizens and businesses engaged in cross-border proceedings.

It should, however, be noted that the Regulation is applied for the purpose of cross-border taking of evidence only to a certain extent. Cross-border taking of evidence is carried out outside the Regulation in a significant number of cases. The added value of the Regulation is therefore limited to those cases in which the Regulation is applied.

There is room for improvement based on a number of obstacles identified. These concern in particular the expedited execution of requests in order to avoid undue delays for businesses and citizens and a fuller exploitation of the potential of modern technologies for speedier communication and direct taking of evidence, in particular through videoconferencing. Also the legal uncertainty cause by the parallel application of the Regulation and channels under national law can be regarded as a possible area in which improvements could be made.

# ANNEX 9: EVALUATION REPORT

EUROPEAN
COMMISSION

Brussels, XXX
[…](2018) XXX draft

**COMMISSION STAFF WORKING DOCUMENT**

**EVALUATION**

***Accompanying the document***

**Proposal for a**

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending 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**

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## 1. INTRODUCTION

The objective of this evaluation is to carry out an ex-post evaluation of Council Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters and its practical application.

Regulation (EC) 1206/2001 establishes an EU-wide system of direct and rapid transmission of requests for the taking and execution of evidence between courts in different Member States, and provides criteria regarding the form and content of the request. The evaluation includes the different procedures laid down in the Regulation.

Regarding the temporal scope, the evaluation covers the period from 2001 until 2017. As concerns the geographical scope, all EU Member States are covered, with the exception of Denmark.[89] For the purpose of the data collection activities, all EU Member States were considered insofar as information was available via secondary sources (e.g. existing EU studies). In addition, fieldwork has been carried out in ten selected Member States: Belgium, France, Hungary, Ireland, Italy, Estonia, Germany, Greece, Romania and Sweden.[90]

In line with the Better Regulation guidelines, the evaluation will examine the 5 key mandatory evaluation criteria of effectiveness, efficiency, relevance, coherence and EU added value, in order to examine issues which have already been identified in the Inception Impact Assessment[91]. The evaluation's findings will feed into an impact assessment of the policy options which could address the problems identified.

## 2. BACKGROUND TO THE INTERVENTION

### 2.1 Objectives and Intervention Logic of the Regulation

In cross-border civil or commercial proceedings pending in one Member State, the taking of evidence in another Member State is often of high importance. As it is often crucial to present sufficient evidence to the court to prove a claim, Regulation (EC) 1206/2001 is an important instrument for the European judicial cooperation.

The Regulation plays an important role in the EU´s task to develop the European area of justice in civil matters based on principle of mutual trust and mutual recognition of judgements. This area of justice requires judicial cooperation over the borders. For this purpose, and for the proper functioning of the internal market, the EU has adopted legislation on cooperation in taking of evidence. It is a crucial instrument to regulate judicial assistance in civil and commercial matters between the Member States. Its purpose is to provide an

[89] Denmark does not take part in the adoption and application of EU actions taken under Article 81 of the TFEU.
[90] This selection covered: Different geographical areas of the EU; Larger and smaller, Western and Central, Nordic and Southern EU Member States; Member States at different stages of economic development; 58% of the EU's overall GDP; 52% of all EU businesses (incl. SMEs); 62% of the EU's overall population.
[91]

efficient framework for cross-border judicial cooperation. It has replaced the earlier international, more cumbersome system of the Hague convention of 18 March 1970 on the taking of evidence abroad in civil and commercial matters[92] between the Member States.

The Regulation applies in all Member States with the exception of Denmark. As regards Denmark, the Hague Convention is applicable. However, not all Member States have (yet) ratified or acceded to this Convention.

The core objective of Regulation (EC) 1206/2001 is thus to facilitate the process of taking of evidence in another Member State.

According to Art. 1, the Regulation applies in civil or commercial matters, where a court in one Member State:

- Requests the competent court of another Member State to take evidence, or
- Requests to obtain evidence directly in another Member State.

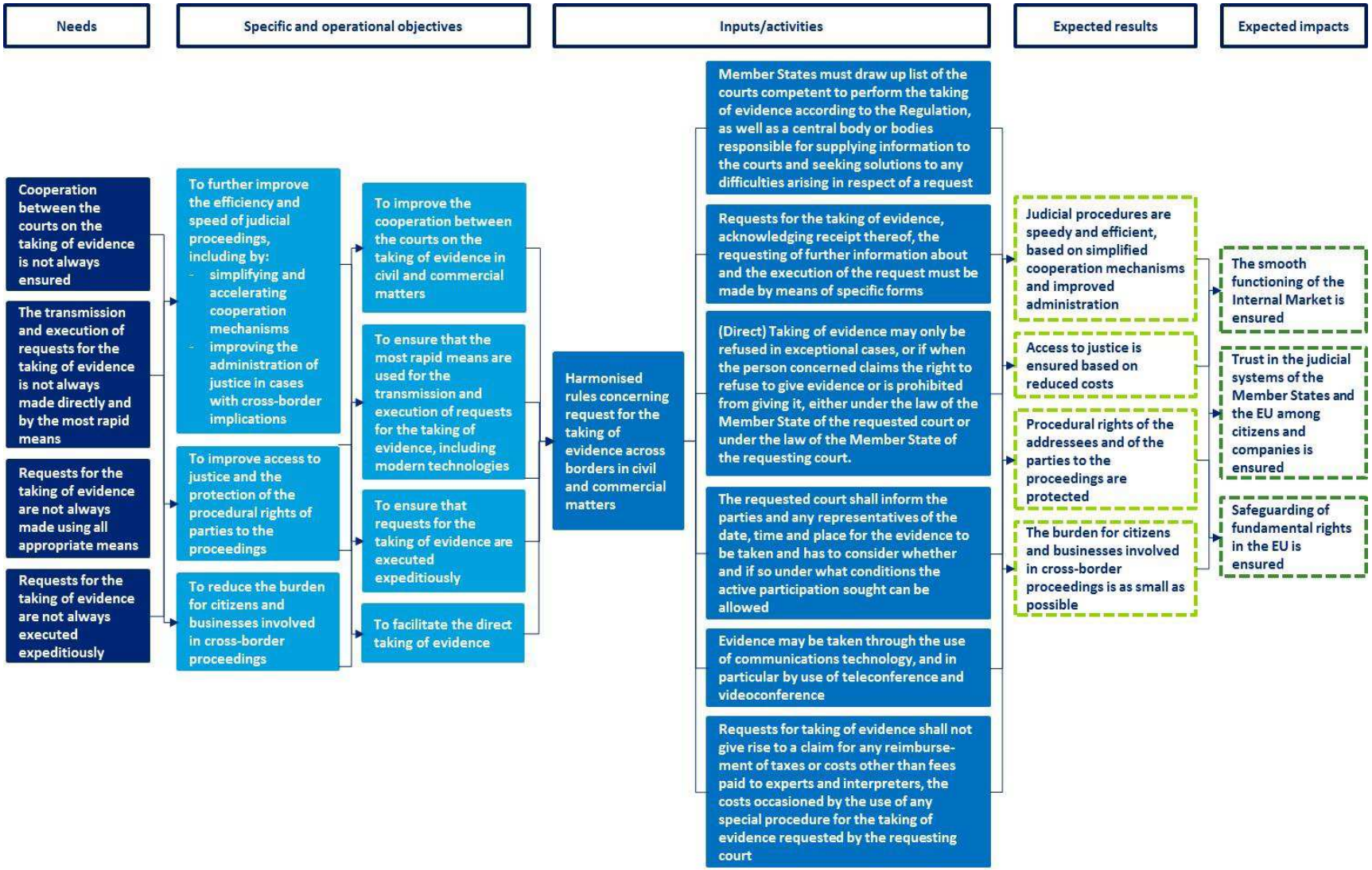
The Regulation only applies if the evidence is intended for use in judicial proceedings already initiated or contemplated. This includes the taking of evidence before the actual submission of the case in which the evidence is to be used, e. g. where evidence is needed that would not be available at a later date.

The Regulation does not prevent agreements from being maintained or concluded between two or more Member States with a view to further accelerating or simplifying the processing of requests for judicial documents (Art. 21). More specifically, the application of the Regulation is not mandatory. National legislation can be applied if this is expected to be a faster or simpler way to obtain the relevant evidence. Evidence can also be taken through diplomatic channels. Compared to the Hague Convention, the system of transmission of requests established in the Regulation is faster and more efficient because requests are transmitted directly between courts, and do not involve central bodies like in the Hague Convention. Furthermore, the Regulation (Article 17) foresees also the direct taking of evidence abroad, a possibility not existing under the Hague system. It should be noted that this evaluation only refers to the cross-border taking of evidence under the Regulation, and not under the Hague Convention or national law.

In Figure 1 below the intervention logic of Regulation (EC) 1206/2001 is presented. The outline of the intervention logic serves to identify and link the needs/problems the Regulation set out to address at the time of its adoption with general, specific and operational objectives, as well as inputs and activities foreseen under the Regulation. It also identifies the expected results and impacts.

[92] The Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

**Figure 1: Evidence Regulation – Intervention Logic**



## 2.2 Functioning of the Regulation

The Member States must draw up a list of the courts that are competent for taking evidence in accordance with the Regulation (Art. 2). This list also specifies the local jurisdiction. In addition, it is stipulated in Art. 3 that each Member State should designate one or more central authorities to provide the courts with information and to seek solutions if there are any difficulties with a request. In exceptional cases, the central authority is also competent to forward a request to the competent court. [93]

The Regulation provides for two different procedures on how evidence can be taken, which are presented in Figure 2:

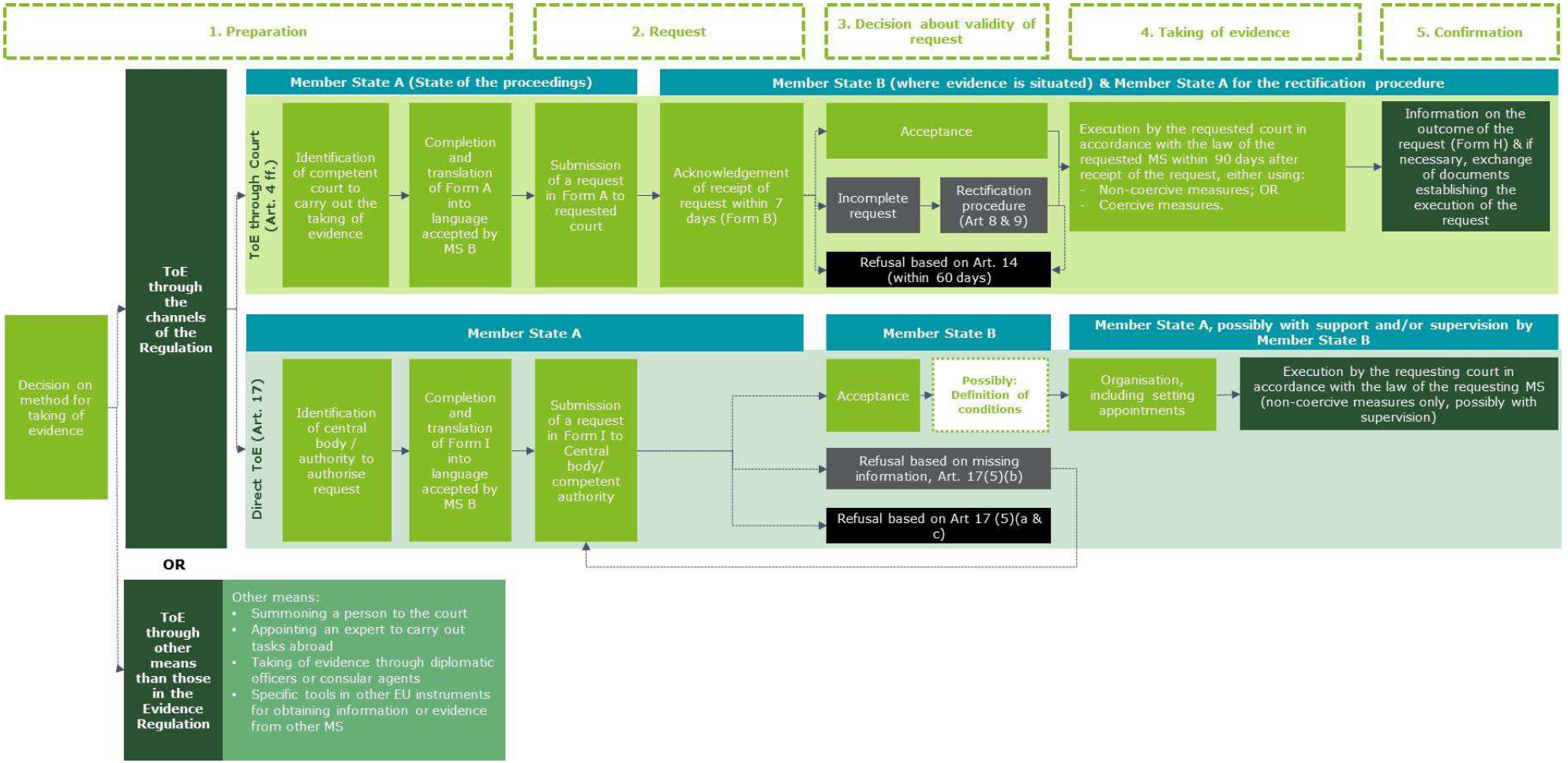
- The court of one Member State requests a court of another Member State to take evidence; or
- Direct taking of evidence.

In both cases, the Regulation provides for the possibility that the court which is not competent to take evidence may nevertheless be involved in the taking of evidence (Art. 12 and 17). This may even mean that the court, which is not competent to take evidence but participates, may ask questions to a witness in an oral hearing if the competent court assents.

Since the Regulation is meant to facilitate the taking of evidence and does not exclude the use of other channels it is also possible for courts to take evidence outside the framework of the Regulation on the basis of national law.

[93] Member States with autonomous territorial units, with a federal system, or with several legal systems can set up more than just one such competent authority.

**Figure 2: Workflow of Regulation (EC) 1206/2001**



### 2.3 Request to a court of another Member State to obtain evidence

The Regulation is based on the general principle of direct transmission between courts. This means that the request for the taking of evidence is to be sent directly by the requesting court (the court before which the proceedings are conducted or planned) to the requested court (the court of the Member State which collects evidence).

According to Art. 4, the request must meet certain criteria with regard to its form and content. For this purpose, the Regulation provides forms[94] for:

- Acknowledging receipt of the request,
- Requesting additional information about the request, and
- Executing the request.

Art. 5 of the Regulation requires that the request is made in the official language of the requested court or in another language accepted by the requested Member State. Documents which, in the opinion of the requesting court, are to be annexed to the request must therefore be accompanied by a translation into the language in which the request is drawn up.

To ensure swift communication between the courts, Art. 6 stipulates that all appropriate means are permitted which are in accordance with the law of the requested Member State. According to Art. 7, the requested competent court is obliged to send an acknowledgement of receipt to the requesting court within seven days of the receipt of a request [95].

The requested evidence then has to be obtained by the requested court at latest within 90 days of receipt. If this is not possible, the requested court has to inform the requesting court and give the reasons (Art. 10).

According to Art. 14, the execution of a request can only be refused if:

- It does not fall within the scope of the Regulation (e.g. if criminal proceedings are concerned and not civil or commercial proceedings);
- The execution of the request does not fall within the jurisdiction of the court;
- The request is incomplete;
- If the person to be heard invokes his/her right to refuse to testify or a valid prohibition of making statements;
- The deposit has not been deposited or the advance has not been paid.

If the execution of the request is refused, the requested court must inform the requesting court thereof within 60 days of receipt of the request.

As provided for in Art. 10, the Regulation allows evidence to be obtained by using modern communications technologies, especially such as video- or teleconferences. The requested court must comply with such a request, unless it is (a) incompatible with the law of the

[94] The forms can be found in the Annex of the Regulation.
[95] The requested court shall use form B in the Annex of the Regulation.

Member State of the requested court or (b) impossible because of serious technical difficulties. If one of the courts concerned does not have access to the above-mentioned technical means, they may be made available by the courts by mutual agreement.

To the extent permitted by the law of the Member State of the requesting court, the representatives of the requesting court have the right to be present when the requested court carries out the requested act. The parties and, where appropriate, their representatives may also be present. The requested court must inform the parties and any representatives of the date, time and place of the taking of evidence and is also to examine under what conditions the participation is admissible (Art.11).

### 2.4 Direct taking of evidence

A court can also request to take the evidence directly in another Member State. This request is to be transmitted to the central or competent authority of the requested Member State (Art. 17). This authority then decides whether it grants or denies the requested authorisation. The request for the direct taking of evidence is only admissible if it can be carried out on a voluntary basis without coercive measures.

The central or competent authority of the requested Member State must, within 30 days of receipt of the request, indicate whether the request can be granted and, if necessary, under what conditions the request can be dealt with in accordance with the law of its Member State.

The evidence must be gathered by a competent judicial officer or by other competent persons, in accordance with the law of the Member State of the requesting court.

### 2.5 Costs relating to the taking of evidence

According to Art. 18, it is not allowed to require reimbursement of fees or expenses for the execution of a request as such. However, if the requested court so requests, the requesting court must ensure that certain types of expenses are provided without delay:

- Expenses for experts and interpreters, and
- Expenses incurred for special procedures for the taking of evidence requested by the requesting court (Art. 10)

Only in cases where an expert opinion is required can the requested court ask for an advance payment of the expert's costs.

## 3. IMPLEMENTATION / STATE OF PLAY

The study[96] described under point 4. made the below estimations concerning the implementation of the Regulation in quantitative terms. Both a bottom-up and a top-down approach were used to estimate the respective data. A bottom-up approach means that the estimates are largely based on available Eurostat data or data from national statistical offices, as well as qualitative/quantitative information available in secondary sources. The number of legal proceedings has been estimated based on this data and respective assumptions. In contrast, the top-down approach uses quantitative information available through the CEPEJ database on the overall number of legal proceedings and attributes the individual case load to specific types of legal proceedings based on assumptions. In addition to these sources, the estimates draw on expert assumptions, e.g. in relation to the share of legal proceedings that relate to cross-border cases, or qualitative information gathered as part of the interviews, e.g. approx. share of cases in which Regulation (EC) 1206/2001 was applied.

- **Application of the Regulation:**

    - It is estimated that in the year 200 there were up to 145,000 legal proceedings across all EU Member States in which the Regulation was applied;[97]

    - Until 2017, this number is expected to have increased to up to 168,000 per annum (i.e. +16%);

    - It is estimated on that basis that Regulation (EC) 1206/2001 was applied in 0.5% to 5% of **all** cross-border legal proceedings in civil and commercial matters between 2001 and 2017.This needs to be put in perspective as in the vast majority of civil and commercial proceedings no evidence needs to be taken, e.g. because these are summary proceedings, the defendant does not enter an appearance and a default judgment can be issues, because parties decide to settle or because a decision can be made without investigating disputes on facts. Thus, with the assumption[98] that evidence needs to be taken in no more than around 10 % of civil cases as a general rule,[99] the Regulation would be estimated to be used in 5 - 50% of cross-border cases where evidence is taken. It also needs to be taken into account however that even in cross-border litigation, i.e. where the parties are in different Member States the

[96] JUST/2017/JCOO/FW/CIVI/0087 (2017/07).

[97] This estimate of the Deloitte study is based on available Eurostat data, data from national statistical offices, qualitative/quantitative information available in secondary sources, quantitative information available through the CEPEJ database on the overall number of legal proceedings, expert assumptions in relation to the share of legal proceedings that relate to cross-border cases, and qualitative information gathered as part of the interviews. See for more detail point 3. of the evaluation report.

[98] This assumption was considered realistic by experts in the Commission's expert group.

[99] Estimation of a member of the Expert Group on Modernisation of Judicial Cooperation in Civil and Commercial Matters. In this context, it should be noted that in approximately 70 % of all cases, default judgements are delivered (see Evaluation of Service of Documents Regulation, p. 37).

necessary evidence can be taken in the Member State where the proceedings are pending (e.g. the witness is domiciled in the Member State where proceedings are pending) so that the taking of evidence is not of a cross-border nature and does not fall within the scope of the Regulation. This would advocate in favour of the assumption that the cases in which evidence has to be taken across borders is in the upper area of the range indicated above, being closer to the 50% mark than to the 5% mark. As stated earlier, even in a cross-border context the Regulation is not exclusive but optional and allows the taking of evidence by channels other than those of the Regulation on the basis of national law where the court considers that a simpler or more efficient solution[100]. The remaining cases of cross-border taking of evidence not processed under the Regulation are therefore assumed to be dealt with under national law which is often more convenient for courts to apply but has significant shortcomings as it is usually limited to voluntary cooperation (as no enforcement measures can be taken against a witness abroad who does not appear in a court hearing).

- **Types of cases in which the Regulation was applied (2001-2017):**
  - Approximately half of the cases in which the Regulation was applied related to legal proceedings concerning contractual obligations in B2B/B2C contexts (e.g. payments and claims, product liability, conformity with contract, contract terms);
  - Cross-border successions and wills account for about 13%;
  - Property transactions and legal proceedings concerning the compensation for damages relate to about 13%;
  - Legal proceedings concerning divorces, legal separations, and parental responsibility account for approximately 6% of the cases in which the Regulation was applied;
  - About 2% of all legal proceedings in which the Regulation was applied concerned insolvencies of businesses with cross-border elements.
- **Methods of taking of evidence:**
  - It is estimated that the method of direct taking of evidence was used in 5%-20% (i.e. on average 12.5%) of all cases in which the Regulation was applied.
  - In 80% to 95% (i.e. on average 87.5%) the courts of another Member State were requested to obtain the evidence.

[100] There are no reliable figures available on the percentage of cases out of all cases in which evidence is taken or on the number of cases in which the taking of evidence in a cross-border scenario is based on national law rather than on the Regulation.

## 4. METHOD

This evaluation is based on a study to support the preparation of an evaluation and impact assessment for the modernisation of the judicial cooperation in civil and commercial matters prepared by Deloitte. This study in particular takes into account the answers to a broad scale on-line public consultation conducted by the Commission which received 131 replies.[101]

For the study, the following other data collection tools were used:

- Desk research
- Strategic interviews
- Online surveys
- Fieldwork in 10 Member States
  - Telephone interviews in 5 Member States
  - Face-to-face interviews in 5 Member States.

Strategic interviews were conducted with staff at several European Commission's DGs, as well as EU-level organisations and forua representing judicial professionals.

The online surveys carried out by the contractor were distributed among the following stakeholder groups:

- Central bodies: E.g. ministries at the federal (where relevant) and state levels;
- Requested courts and other public bodies under Regulation (EC) 1206/2001;
- Personnel directly involved in the cases: Judges, prosecutors, clerks, diplomatic or consular agents, lawyers, legal counsels/aids, bailiffs (and their professional organisations).

In total, 33 answers were received to the surveys, spread over these stakeholder groups and 13 Member States. More than one third of the responses, however, came from Germany whereas no other Member State exceeded three individual responses (apart from Portugal with five). Responses were received from stakeholders in the following Member States: Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Portugal, Romania, and Sweden. Feedback was obtained from Central Bodies, competent courts, and legal professionals in rather equal proportions.

Fieldwork was carried out in the following ten Member States: Belgium, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Romania and Sweden.[102] In these countries,

[101] https://ec.europa.eu/info/consultations/public-consultation-modernisation-judicial-cooperation-civil-and-commercial-matters-eu_en

[102] The Member States were selected based on the following criteria: Legal traditions in the Member States; no. of estimated incoming civil and commercial cases; no of judgements concerning the Regulation in the Unalex database; differences in relation to the national organisational and procedural set-ups, e.g. in relation to which types of stakeholders are able to serve documents under national law; Take-up of ICT / availability of electronic means in courts according to the 2017 EU Justice Scoreboard; Geographical

interviews with central bodies, judicial staff (including bailiffs), lawyers and ICT entities were conducted. In total, 65 interviews were carried out.

Stakeholder consultations focused on the collection of new data. Existing data were leveraged as relevant. Based on the limitedt timeframe and in order not to overburden the stakeholders involved, individual stakeholders were only interviewed once: i.e. they were asked to provide information relating to both the evaluation and the impact assessment at the same time. An ongoing gap analysis was carried out towards our Analytical Framework and impact assessment methodology, so as to ensure that mitigation action could be taken in time and where needed.

The preparation of the evaluation involved:

- Gathering evidence on the application of the Regulation;
- Assessing the performance of the entire Regulation.

As concerns the first point, in line with the Better Regulation Guidelines[103], the starting point was to examine the status quo, including how the intervention has been implemented, which serves as a background to the evaluation. In this context, implementing legislation adopted by the Member States, Member States' notifications on how the Regulation is applied (including e.g. the designation of relevant bodies) as well as which technological tools are permitted and used by the Member States in relation to the Regulation were considered.

For the purpose of the assessment of the performance of the Regulation and in order to provide a comprehensive picture of the situation, the evaluation took a broad view. This included among others looking at the changes the Regulation has brought about, whether these changes were those intended, and whether in relation to related initiatives, the Regulation met its objectives and if these are still relevant.

## 5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS

This section presents the answers to the evaluation questions, i.e. effectiveness, efficiency, relevance, coherence and EU added value of the Regulation.

Effectiveness analysis considers how successful EU action has been in achieving or progressing towards its objectives. The evaluation should form an opinion on the progress made to date and the role of the EU action in delivering the observed changes.

Efficiency considers the relationship between the resources used by an intervention and the changes generated by the intervention (which may be positive or negative). Differences in the way an intervention is approached and conducted can have a significant influence on the

balance; and Economic representativeness in terms of the EU's overall GDP, number of businesses (especially SMEs), and population.

[103] See p. 59.

effects, making it interesting to consider whether other choices (e.g. as demonstrated via different Member States) achieved the same benefits at less cost (or greater benefits at the same cost).

Relevance looks at the relationship between the needs and problems in society and the objectives of the intervention and hence touches on aspects of design. Relevance analysis also requires a consideration of how the objectives of an EU intervention (legislative or spending measure) correspond to wider EU policy goals and priorities. Analysis should identify if there is any mismatch between the objectives of the intervention and the (current) needs or problems.

The evaluation of coherence involves looking at a how well or not different actions work together. It may highlight areas where there are synergies which improve overall performance or which were perhaps not possible if introduced at national level; or it may point to tensions e.g. objectives which are potentially contradictory, or approaches which are causing inefficiencies.

EU-added value looks for changes which it can reasonably be argued are due to the EU intervention, over and above what could reasonably have been expected from national actions by the Member States.

### 5.1 Effectiveness

The evaluation of the effectiveness of Regulation (EC) 1206/2001 concerns the degree to which the objectives of the Regulation have been achieved. This analysis considers the operational, specific and general objectives of the Regulation as outlined in the intervention logic.

- Operational objectives are defined in terms of the actions of an intervention and are measured through the output of the Regulation. In this regard, indicators measuring the quantity/quality of what has been produced by the Regulation are assessed (e.g. the efficiency of service across borders, use of rapid means for service and security levels of service methods).

- Specific objectives are defined in terms of the concrete achievements of the intervention within the specific policy domain and are measured in terms of outcome indicators. In this regard, indicators measuring the outcome of the Regulation in terms of the impact on cross-border civil and commercial proceedings are assessed.

- General objectives are Treaty-based goals which the policy aims to contribute to and looks at “the bigger picture”. To assess the achievement of these goals impact indicators are used (e.g. extent to which the Regulation contributes to the Internal Market objectives, trust across EU in judicial systems and fundamental rights in the EU).

Overall, it can be concluded that the implementation of Regulation (EC) 1206/2001 has resulted in some clear improvements concerning the efficacy of cross-border taking of evidence. This said, according to the evidence gathered, the Regulation has only been applied in a limited proportion of cross-border cases (as it is non-mandatory in nature and its use is not necessary in all cases) and has therefore achieved its general, specific and operational objectives only partly.

By means of summary, Table 1 provides the main findings concerning the effectiveness of the Regulation in achieving each of the three types of objectives.

**Table 1: Summary of the assessment of effectiveness by objective**

| Level | Objective | Assessment of the effectiveness of the Regulation |
|---|---|---|
| General | To ensure the smooth functioning of the Internal Market | Regulation (EC) 1206/2001 has contributed to the smooth functioning of the internal market by establishing common procedures for taking evidence in cross-border proceedings and facilitating cross-border judicial proceedings, thus contributing to ensuring a level playing field for citizens and businesses in different Member States. The burden for citizens and businesses, including costs and delays associated with cross-border proceedings, has also been reduced this way. |
| | To ensure trust in the judicial systems of the Member States and the EU | The application of Regulation (EC) 1206/2001 has contributed to building and ensuring trust of citizens, businesses and legal practitioners in the judicial systems of the Member States and the EU. Based on the free movement of persons, goods, services and capital, cross-border transactions between citizens and businesses increase, also possibly leading to cross-border judicial proceedings in case of difficulties. The Regulation helps ensuring that such proceedings can be handled with a limited burden for citizens or businesses, be it as a witness or a party. |
| | To ensure that fundamental rights are safeguarded in the EU | The Regulation facilitates the participation of the parties in the taking of evidence, access to justice and the right to be heard. |
| Specific | To further improve the efficiency and speed of judicial procedures, | Regulation (EC) 1206/2001 has contributed to more efficient cross-border proceedings. It has stipulated deadlines and workflows for communication and execution of requests. In addition, direct court-to-court |

| Level | Objective | Assessment of the effectiveness of the Regulation |
|---|---|---|
| | including by:<br>- Simplifying and accelerating cooperation mechanisms<br>- Improving the administration of justice in cases with cross-border implications | communication has helped to improve the administration of cases with cross-border implications. |
| | To improve access to justice by reducing costs of the judicial procedures | The right of access to justice and the right to be heard are strengthened in the cases in which the Regulation is applied successfully. It facilitates the participation of the parties in the taking of evidence. In addition, common approaches to the taking of evidence may contribute to a larger likelihood for mutual recognition of judgments within the EU. |
| | To improve the protection of the procedural rights of the addressees and of the parties to the proceedings | The Regulation contributed to the protection of the procedural rights of citizens and businesses. Room for improvement was reported concerning delays and potential costs currently arising from difficulties relating to the design of the Regulation and its application |
| | To reduce the burden for citizens and businesses involved in cross-border proceedings | The Regulation has reduced the burden for citizens and businesses when applied successfully. However, this effect is limited if delays occur (leading to additional costs or burdens for citizens and businesses). |
| Operatio-nal | To improve the cooperation between the courts on the taking of evidence in civil and commercial matters | The Regulation has established common channels and standardised procedures that help to obtain evidence in cross-border cases. However, delays and language barriers reduce the effective application of the Regulation. Hence, while some improvements have been evidenced, the full potential of the Regulation has not yet been achieved. |
| | To ensure that the most rapid means are used for the transmission and execution of | The use of modern technologies under the Regulation is possible in principle, but depends on the technical feasibility and availability in the Member States, as well as provisions under national procedural law. Therefore, the effect of the Regulation on the uptake of modern |

| Level | Objective | Assessment of the effectiveness of the Regulation |
|---|---|---|
| | requests for the taking of evidence, including modern technologies | technologies is neutral. |
| | To ensure that requests for the taking of evidence are executed expeditiously | The Regulation introduced standard forms so that requests can be decided upon and executed faster. These forms are welcomed by practitioners and considered very useful. Some limitations in the practical use of the forms have, however, been identified, e.g. due to the use of translation tools without a proper review process. The Regulation further specifies deadlines for the processing and execution of requests. In practice, delays in communication and execution of requests were reported. Thus despite some progress there is room for improvement as concerns the expeditious execution of requests. |
| | To facilitate the direct taking of evidence | The Regulation introduced a standardised procedure for taking evidence directly in another Member State. Stakeholders emphasised the attractiveness of direct taking of evidence, e.g. via videoconferencing. |

### 5.1.1 Achievement of the general objectives of the Regulation

The Regulation was adopted to:

- Ensure the smooth functioning of the area of freedom, security and justice, including by:
  - Strengthening the trust in the in the judicial systems of the Member States and the EU;
  - Safeguarding fundamental rights in the EU.

- Ensuring the smooth functioning of the internal market.

While there is still room for improvement, the Regulation does contribute to an area of freedom, security and justice and a smooth functioning of the internal market. When applied successfully, it increases mutual trust between courts and helps to reduce the burden for citizens and businesses engaged in cross-border proceedings.

It does so by introducing useful means for the taking of evidence in cross-border cases. It helps to make communication between courts more efficient in cases evidence has to be taken by a competent in another Member State and facilitates the direct taking of evidence, which can be a very efficient channel in certain situations. If carried out smoothly, both these methods also help to increase mutual trust between courts, as courts communicate more directly and work together. In addition, trust by citizens and businesses in the legal systems

of the Member States may be improved if they have positive experiences with cross-border taking of evidence.

This way, the functioning of cross-border proceedings is improved, which has positive effects on the area of freedom, security and justice, because, for instance, access to justice and the protection of the rights of the parties are improved.

In addition, the burden for citizens and businesses, including costs and delays associated with cross-border proceedings, is reduced. This has positive impacts on both the area of freedom, security and justice and the internal market. Based on the free movement of persons, goods, services and capital, cross-border transactions between citizens and businesses increase, also possibly leading to cross-border judicial proceedings in case of difficulties. The Regulation helps ensuring that such proceedings can be handled with a limited burden for businesses or citizens, be it as a witness or party.

However, the Regulation has not yet reached its full potential in terms of achieving these objectives, including due to some of the practical and legal issues identified as well as the somewhat limited uptake.

### 5.1.2 Achievement of the operational objectives

This chapter assesses in more detail the degree to which the following operational objectives of Regulation (EC) 1206/2001 have been achieved:

- To improve the cooperation between the courts on the taking of evidence in civil and ecommercial matters;
- To ensure that the most rapid means are used for the transmission and execution of requests for the taking of evidence, including modern technologies;
- To ensure that requests for the taking of evidence are executed expeditiously;
- To facilitate the direct taking of evidence.

The evaluation of the achievement of the operational objectives is structured in line with the workflow of the Regulation.

#### 5.1.2.1 Preparation of the request and the taking of evidence

Stakeholders deciding on the most efficient method for taking evidence across borders have three options. They can use:

(1) Taking of evidence through a competent court in another Member State ("indirect" taking of evidence; Articles 10-16)
(2) Direct taking of evidence (Article 17); and
(3) Other means for taking evidence (applying either national law or other EU rules).

The Regulation does not contain any provision governing or excluding the possibility for the court in one Member State to summon a party residing in another Member State to appear and make a witness statement directly before it. Therefore, the Regulation applies only if the court of a Member State decides to take evidence according to one of the two methods provided for in the Regulation. The competent court of a Member State can also summon as a witness a party residing in another Member State and to hear him in accordance with its national law.[104] Under certain circumstances, in particular if the party summoned as a witness is prepared to appear voluntarily, it may be simpler, more effective and quicker for the competent court to hear him in accordance with the provisions of its national law instead of using the means of taking evidence provided for by the Regulation, as stakeholders report.

The results of the open public consultation carried out by the European Commission indicate that the scope of the Regulation is not always clear (see Table 2 below). Almost half of the respondents (45%) confirmed that it is not difficult to determine what methods to use. However, around a quarter (26%) found this difficult. Close to 30% of the respondents did not provide an answer.

**Table 2: Reported difficulties to determine when the Regulation and its channels have to be applied**

| Statement: It does not pose any difficulty to decide when I have to apply the methods foreseen in the Regulation on taking of evidence in another Member State. | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 13 | 14.8% |
| Tend to agree | 27 | 30.7% |
| Tend to disagree | 21 | 23.9% |
| Strongly disagree | 2 | 2.3% |
| Do not know/ No opinion | 25 | 28.4% |
| Total | 88 | 100% |

*Source: Open public consultation by the European Commission*

The interviewees consulted frequently cited several potential sources of confusion. First, the concept of "civil and commercial matters" specified in Article 1 is being interpreted autonomously and in a wide sense.[105] Second, and in line with the somewhat limited uptake of the Regulation, legal practitioners reported limited experience in using the Regulation. Moreover, the limited use of the Regulation can be viewed to have a "snowball effect", in that several practitioners consulted stated that they consider it to be complicated and cumbersome to recall the requirements and provisions of the Regulation and be aware of the

[104] CJEU 06.09.2012 - C-170/11 - Lippens/Kortekaas, unalex EU-532

[105] However, as this concept is being used in many other Regulations in the field of judicial cooperation in the EU and extensive case law of the CJEU as concerns its interpretation exists, it has not caused particular difficulties so far.

recent relevant case law, which leads to a preference to take evidence under national law outside the Regulation. While sustained training and additional guidance has helped legal practitioners (e.g. in Estonia), the general workload was stated to reduce the motivation to follow developments surrounding Regulation (EC) 1206/2001.

Additional deterrents cited by interviewees were concerns that communication with central bodies and competent courts may be more complicated than using existing consular channels or relying on voluntary provision of written testimonies in form of affidavits by the parties involved. Overall, national means were reported to be "just as effective" and sometimes more efficient to obtain the results.

In those cases where Regulation (EC) 1206/2001 is applied, interviewees welcome it as one option to take evidence across borders and appreciate the standardised procedures it provides. For citizens and businesses involved in cross-border proceedings, these standardised procedures have made it more likely that the taking of evidence can be handled in an efficient manner.

The objective to promote direct taking of evidence was partially achieved. Estimates suggest that courts use the channel of direct taking of evidence (Article 17) in 12% of the cases where Regulation (EC) 1206/2001 was applied.[106] The possibility to take evidence directly in other Member States guarantees courts' freedom of choice in relation to the most appropriate means to take evidence across borders. Direct taking of evidence in cross-border cases is strongly favoured in Member States such as Sweden, Portugal and Austria. However, most other Member States prefer the indirect method of taking evidence through requested courts in another Member State. The stakeholders consulted provided three recurring reasons why legal practitioners decide against using the direct method of taking evidence.

First, interviewees stated that effectiveness is undermined because the procedure is necessarily non-coercive. It is dependent on the voluntary participation of those who provide the evidence, which is not always assumed to be given. Second, the expected coordination efforts required to plan the process of direct taking of evidence were cited as a deterrent. Stakeholders explained that the process is seen as burdensome and possibly complicated. For instance, the requesting court has to coordinate appointments for hearings, and reimburse witnesses abroad. Interviewees commonly shared the view that requested courts in other Member States are better placed to organise the taking of evidence. Third, stakeholders expressed concerns about possible additional costs if witnesses fail to appear for a physical appointment or a hearing via video-conferencing. Stakeholders were in particular concerned about additional costs for unnecessary travel expenses, fees for interpreters and video-conferencing facilities or simply delays as a result. In case evidence is taken by a requested court, on the other hand, the requesting court only has to file the request and wait for the reply but not engage with parties affected in other Member States.

[106] The estimates made as part of the present assignment suggest that direct taking of evidence was used in less than 1% of all cross-border proceedings in the EU during the timeframe assessed as part of the Evaluation.

The results of the European Commissions' open public consultation confirmed these findings; a majority of stakeholder expressed a preference to take evidence through a competent court in another Member State (Articles 10-16), as illustrated in 3.

**Table 3: Preference for using Articles 10-16 for the taking of evidence by legal professionals**

| Statement: I prefer taking of evidence through a requested court in another Member State, pursuant to Article 2 of Regulation (EC) 1206/2001, to the direct method of taking of evidence (as foreseen in Article 17 of the Regulation). | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 21 | 24.1% |
| Tend to agree | 26 | 29.9% |
| Tend to disagree | 11 | 12.6% |
| Strongly disagree | 4 | 4.6% |
| Do not know/ No opinion | 25 | 28.7% |
| Total | 87 | 100.0% |

*Source: Open public consultation by the European Commission*

Following the decision on the method to use in order to take evidence, the requesting court has to identify the competent court for taking evidence in accordance with Article 2. The findings from the open public consultation suggest that identifying the competent court does not constitute a challenge. The vast majority of respondents agreed or strongly agreed (overall 70%) with the statement that finding a competent court is easy (see Table 4 below). The stakeholders consulted as part of interviews explained that the available lists of competent courts and central authorities (drawn up by the Member States) and the eJustice Portal are useful sources in this process. The European Judicial Network in civil and commercial matters (EJN) was named as a further, more informal source of information for judicial staff by legal practitioners.

**Table 4: Findability of authorities competent for taking of evidence in another Member State**

| Statement: It is easy to identify the agency (court) or the competent authority in another Member State which is designated to provide judicial assistance in taking evidence. | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 23 | 26.1% |
| Tend to agree | 38 | 43.2% |
| Tend to disagree | 10 | 11.4% |
| Strongly disagree | 0 | 0.0% |
| Do not know/ No opinion | 17 | 19.3% |
| Total | 88 | 100.0% |

*Source: Open public consultation by the European Commission*

Some of the interviewees pointed out problems identifying the competent court. Significant challenges were stated to have been encountered by stakeholders in Belgium and Hungary. For instance, the lists of competent courts provided by the Member States were sometimes not clear and understandable. Furthermore, 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. As a result, a standard letter explaining the status of notaries in the Hungarian legal system is attached to requests, which has helped to facilitate the process. In both cases (lists of competent courts and definition of requesting courts), the definitions and information requirements specified in the Regulation were not considered as clear, reducing its effectiveness.

Overall, the introduction of standard forms has been beneficial, as they enable the stakeholders to file requests that are complete and to the point, and help to limit efforts for drafting and translating requests. However, interviewees shared the view that stakeholders in some Member States seem to face challenges in completing and translating the forms for requests. For instance, the use of online translation tools without any further check of correct translations was repeatedly cited as a problem by interviewees. In addition, instances were reported in which requests were short and/or imprecise. These challenges may ultimately reduce the effectiveness (as well as efficiency) of procedures, as requests may be misunderstood and wrongly executed.

#### 5.1.2.2 The request

After deciding on the method of taking evidence and making a request, the request has to be communicated to the requested court (using Form A) or the central body (using Form I).

Interviewees repeatedly mentioned that the possibility of court-to-court communication under the Regulation is considered to be an improvement compared to the Hague Convention or in relation to third countries. However, the objective to use the most rapid means for the transmission and execution of requests (including modern technologies) is at best partially achieved.

Table 5 provides an overview of the permitted means of communication to transmit requests. A majority of courts only allow paper-based requests via post or fax: In 24 of 26 Member States, postal service (including couriers) is accepted, whereas 23 Member States accept requests via fax machine. Only six Member States accept requests via email in general and another five Member States accept emails for certain types of requests or communications. Other means of communication, such as telephone, are hardly accepted. While requests by postal service may be effectively transmitted to the requested court, postal services are neither the fastest method available nor contributing to the uptake of modern technologies.

**Table 5: Overview of means for transmission of requests and other communications accepted (or partially accepted) in different Member States (Art. 6)**

| Member State | Postal service (incl. couriers) | Fax | Email | Telephone | Other |
|---|---|---|---|---|---|
| Belgium | X | X | | | |
| Bulgaria | X | X | | | |
| Croatia | X | (x) | (x) | | |
| Cyprus | X | X | | | |
| Czech Republic | X | X | x | | |
| Estonia | X | X | x | | |
| Finland | X | X | x | | |
| France | X | X | (x) | | |
| Germany | X | X | (x) | (x) | |
| Greece | X | X | (x) | | |
| Hungary | X | X | x | | |
| Ireland | X | X | x | | |
| Italy | X | X | | | |
| Latvia | X | X | x | | |
| Lithuania | X | X | | | |
| Luxembourg | X | X | | | |
| Malta | X | X | | | |
| Netherlands | | X | | | |
| Poland | X | | | | |
| Portugal | X | X | | (x) | (x) |
| Romania | X | X | | | |
| Slovakia | X | (x) | | | |
| Slovenia | n/a | n/a | n/a | n/a | n/a |
| Spain | X | | | | |
| Sweden | X | X | | | (x) |

| Member State | Postal service (incl. couriers) | Fax | Email | Telephone | Other |
|---|---|---|---|---|---|
| United Kingdom | X | (x) | (x) | | |
| Total | 24 | 20 / (3) | 6 / (5) | (2) | (2) |

*Source: e-Justice Portal / Judicial Atlas. For the countries marked (x), limitations to the use of the relevant means for transmission have been identified.* [107]

Table 6 below shows that stakeholders have had different experiences as concerns the possibility to send documents related to the taking of evidence using electronic means of communications. The same share of respondents stated that it was possible to use electronic means to send documents as the share that stated the opposite (16% and 14% respectively). It can be noted that the vast majority of respondents (70%) did not provide their opinion on this question. A majority of respondents to the open public consultation also indicated that they are members of the judiciary or courts. Consequently, this number suggests that practitioners overall have limited experience in communicating with courts in other Member States via electronic means.

**Table 6: Reported ability to use electronic means of communication**

| Statement: It was not possible to send documents related to taking of evidence to the designated agency of another Member State via electronic means of communication. | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 7 | 8.0% |
| Tend to agree | 7 | 8.0% |
| Tend to disagree | 8 | 9.1% |
| Strongly disagree | 4 | 4.5% |
| Do not know/ No opinion | 62 | 70.5% |
| Total | 88 | 100.0% |

*Source: European Commission open public consultation*

Furthermore, the acknowledgement of receipt of a request (Form B) is not always available within seven days, as stipulated by the Regulation. On the one hand, interviewees explained this is e.g. due to the time required for postage. On the other hand, interviewees alluded to instances where the internal processing of requests within the given time-frame was not possible.

[107] Crosses in brackets indicate that the channel of communication is only partially accepted in the Member States. For instance, a given channel may only be used to request certain acts of taking of evidence or to communicate about incomplete or missing information.

#### 5.1.2.3 Decision about the validity of a request

Following the acknowledgment of receipt, the requested court or central authority in the requested Member State has to decide upon the validity of the request.

For both channels (direct and indirect) of taking of evidence, interviewees reported that neither the deadlines for the decision about the validity of requests nor for the execution of requests are usually respected. In addition, coordination of hearings and procedures is considered time consuming.

In case the request concerns taking of evidence through a competent court in another Member State (Articles 10-16), the requested court has to carry out the accepted request within 90 days or refuse it within 60 days, based on Article 14. As noted above, the introduction of standardised forms under Regulation (EC) 1206/2001 has facilitated a common and more effective approach to deciding about the validity of a request. Still, interviewees reported that in some cases decisions are not taken and communicated in a timely manner.[108] This prevents an effective taking of evidence within the timeframe specified in the Regulation.

In case of incomplete requests, the requested court shall inform the requesting court and request the missing information to be supplied (following the rectification procedure specified in Articles 8 and 9). This procedure offers an effective way of correcting errors and facilitating effective execution of requests in a timely manner (i.e. without the need for a new request). As concerns the frequency of such situations, interviewees reported that requests are often incomplete or translations incomprehensible. A judge specialised in carrying out requests under the Regulation in Germany stated that it is sometimes not entirely clear what the other court needs. In other cases, the purpose of the request itself is not clear or it is not clear what exactly a hearing should be about. Furthermore, numerous interviewees suggested that the use of online translation tools without a proper review process has led to confusing or contradictory statements in the request. Moreover, the interviewees indicated that a number of Member States do no provide a translation for the requests at all.

The use of electronic means of communication is not officially accepted in a majority of Member States. In fact, email addresses are frequently not provided by the requesting court and may not be found by the requested court. However, several interviewees from Nordic and Baltic countries emphasised the potential role of email to accelerate the process of rectification. Even if requests via email are not permitted, requesting and requested courts currently use emails for informal inquiries and follow-up communication. When requests are incomplete, email is widely reported to offer a fast and straightforward method to ask for

[108] A number of interviewees from different Member States cited examples where no answer was received at all or at least not before the request had already been carried out.

clarification and additional information.[109] Ultimately, this informal use of email has increased the effective application of the Regulation. [110]

According to the stakeholders consulted, decisions on the validity of requests for direct taking of evidence were in most cases accepted. Here, the requested court has to inform the requesting court within 30 days about the acceptance and specify the means by which the evidence may be obtained. Again, interviewees reported that decisions concerning the validity of requests are frequently not reached and communicated in a timely manner.

Refusals based on incomplete information (Article 17(5)(b)) are made for the same reasons as described above. Again, incomplete or incomprehensible requests are cited as a problem and the rectification procedure is experienced as time-consuming and complicated.

In addition, interviewees stated that refusals had been made based on considerations of the scope of the Regulation (Article 17(5)(a)) or incompatibility of national procedural law (Article 17 (5)(c)). For instance, refusals have referred to attempts to hear witnesses via telephone or video-conferencing facilities if this is not permitted under the procedural of the requested Member State.

#### 5.1.2.4 The taking of evidence

Both of the standardised procedures under Regulation (EC) 1206/2001 to take evidence in another Member State (i.e. directly taking evidence or requesting the competent court in another Member State to take evidence) were welcomed by the interviewees. Almost half of the respondents to public consultation (45%) confirmed that evidence was obtained from another Member State without major difficulties when using the Regulation (see Table 7). Of the remaining respondents, 17% disagreed and 38% did not provide an answer.

[109] This approach was for instance reported by stakeholders in Germany, Italy, or Estonia.

[110] For the opposite case, the central body in a Southern European Member State explained the frustration surrounding incomplete requests: If the requesting court does not provide an email or phone number, central authorities and competent courts are only able to send back incomplete requests. This is seen as ineffective and considered a waste of time and resources. If electronic communication is possible, the persons involved could solve the problem in a more effective and efficient manner.

**Table 7: Reported difficulty to obtain evidence from another Member State**

| Statement: The evidence was obtained from the other Member State without major difficulties | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 10 | 15.9% |
| Tend to agree | 18 | 28.6% |
| Tend to disagree | 9 | 14.3% |
| Strongly disagree | 2 | 3.2% |
| Do not know/ No opinion | 24 | 38.1% |
| Total | 63 | 100.0% |

*Source: European Commission open public consultation*

Interviewees stated that they were generally able to use Regulation (EC) 1206/2001 to effectively obtain evidence in different formats. However, at the same time, they mentioned areas for possible improvements.

Following the acceptance of the request for taking of evidence through a competent court in another Member State (Articles 10-16), the requested court executes the request in accordance with the law of the requested Member State (either using non-coercive or coercive measures).

Requests for the taking of evidence are not always executed expeditiously in practice. On the one hand, the possibility of direct communication between the requesting and requested court was reported to have made procedures more effective. On the other hand, interviewees provided examples of delays encountered when using the evidence to be taken by courts in another Member State under the Regulation. The timeframes specified in the Regulation are often surpassed in the process of obtaining evidence from other Member States. In some cases, additional efforts are required to identify and locate witnesses or parties to be heard. For these cases, interviewees cited examples that requested courts were either inactive or unwilling to locate the person in question. According to the interviewees, the requesting courts can do nothing to ensure an effective and expedite execution of requests, as the Regulation specifies no consequences or further means to address this type of situations.

The duration of the procedures depend on the form of evidence requested, according to the stakeholders consulted.[111] For instance, obtaining social welfare reports in family law cases was reported to be cumbersome or even impossible in certain Member States.[112] A Romanian court cited an example in which they had to reformulate a request for a social welfare report

[111] For instance, a German court stated that 90 days are usually enough to carry out a request to hear a witness, while obtaining expert opinions often takes longer. The interviewee explained that in some cases, the number of knowledgeable persons is small and they need time to gain an understanding of the case and documents or objects involved.

[112] See in more detail below chapter 5.4.3 on the relationship between Regulation (EC) 1206/2001 and the Brussels IIa Regulation.

into a list of questions (which could then be asked during a hearing). A stakeholder provided a similar example, in which Irish courts were not able to provide a social welfare report in a custody case. A substitute for the report was only obtained after several years upon a mediation by the local EJN contact point. These examples illustrate that external factors may also determine whether requests for the taking of evidence may be executed in an expedite fashion.

If a request to take evidence directly (Article 17) is accepted, the first step is to organise the procedure and coordinate appointments. Here, several factors limit the effective application of the Regulation. On the one hand, the availability of video-conferencing facilities in courts is not always transparent and scheduling is needed in advance. For instance, most interviewees using videoconferencing equipment stated that a technical test has to be carried out one day prior to the actual hearing. As a result, facilities and technicians have to be available on several occasions.

Interviewees also reported that some requesting courts schedule hearings in advance without communicating appointments to the court in another Member State (where direct taking of evidence has to be carried out), sometimes leading to problems at the time of the hearings (e.g. due to technical interoperability issues). Similarly, scheduled appointments are not always observed, if there are delays during hearings in the requesting Member States. In these cases, interviewees reported that witnesses, technicians and judicial staff had to wait or hearings had to be rescheduled. Finally, coordinating procedures was reported to be difficult if there are language barriers or challenges to locate witnesses or relevant parties in another Member State.

Once the procedures are agreed, the requesting court may execute the request in accordance with the law of the requesting Member State. The direct method introduced by the Regulation was partially successful in practice, offering an additional channel for legal practitioners to take evidence directly across borders. However, interviewees identify room for improvement to increase the attractiveness of the method and successful execution.

Firstly, interviewees stated that the non-coercive measures permitted for direct taking of evidence may in some cases reduce the attractiveness of direct taking of evidence. Secondly, the requesting courts are sometimes not allowed to obtain certain information admissible under their procedural law in another Member State. Thirdly, the availability of interpreters and the quality of their interpretation is crucial to obtain the required evidence in an effective way. In some cases, requesting courts reported reluctance or doubt whether they were always able to ensure the quality of interpretation themselves. Finally, it is not always transparent for legal practitioners and courts which costs have to be expected, reimbursed and how reimbursements are carried out in practice.

In general, interviewees stated that the uptake of modern technologies makes direct taking of evidence under the Regulation more effective. The uptake of modern technologies is not an obligation under the Regulation itself, but depends entirely on individual efforts in Member

States to introduce modern technologies in the judiciary and the overall move towards digitisation.

Stakeholders frequently identified room for improvement concerning the use of modern technologies under the Regulation. Most examples of practical application were provided in relation to videoconferencing. Interviewees emphasised that this instrument would be the preferred method for hearing witnesses in other Member States in theory (when permitted).[113] However, interviewees repeatedly stressed that it had not always been technically feasible in previous cases (e.g. when the use of existing equipment was only permitted for domestic purposes). Likewise, it was not always legally feasible, i.e. permitted under national procedural laws. For instance, Swedish courts frequently use telephone conferences to hear witnesses or parties involved. This is rarely permitted in cross-border contexts. Overall, interviewees stated that technical difficulties and barriers were experienced in the past. However, the lack of availability of facilities in the first place and lack of permissions to use modern technologies was more frequently considered a problem reducing effectiveness of requests.

As a result, the evidence is mixed, whether the direct method of taking evidence is more attractive compared to the method of taking evidence through a competent court in another Member State. The share of cases in which the former channel is used is much lower than the share of cases where requested courts in other Member States take evidence under the Regulation. Based on the statements by interviewees described above, it may be more complicated and less effective to use the direct method for taking of evidence. The effort required to coordinate a hearing and communicate directly with possible language barriers may prevent evidence to be obtained effectively this way. Nevertheless, interviewees emphasised that the option to use videoconferencing as part of the direct channel of taking evidence remains appealing in principle. The reason for this was that it can be more successful to engage directly with witnesses or experts, travel costs are reduced and barriers to participate are often perceived to be lower.

Overall, it is relevant to note that, based on their personal experience in applying the Regulation, interviewees from courts seem to have formed strong opinions about the possibility to take evidence directly in other Member States. In case a court has faced challenges in relation to obtaining evidence in another Member State on previous occasions, interviewees reported a reduced interest or willingness to (attempt to) take evidence directly in this country again. Therefore, negative experiences may shape the willingness to cooperate in the future, for incoming and outgoing requests.

#### 5.1.2.5 Confirmation

[113] According to interviewees, videoconferencing systems were often used by Swedish, Portuguese or Austrian courts, for instance in cases with Poland, the Baltic countries and Eastern European countries.

Once the process of indirect taking of evidence via a requested court is completed, information on the outcome of the request is shared (using Form H) and (if necessary), documents establishing the execution of the request are exchanged. Few problems were reported by the interviewees for these steps.

However, as described above, confirmations on the execution of requests are often not received within the timeframe of 90 days specified under the Regulation. Likewise, requesting courts are not always able to obtain evidence in the intended way, e.g. if a certain format or method of obtaining information is not allowed under the procedural law of another Member States. Alternative methods used to obtain information may not yield the intended outcome.

As concerns the effectiveness of taking evidence through a competent court in another Member State, the objective to use modern technologies – which may accelerate judicial proceedings – is not always reached. This concerns both the communication between the requesting and requested courts, as well as the transmission of evidence in electronic form.

As indicated above, the use of modern technologies to communicate or exchange evidence electronically is still only permitted in few Member States. Several interviewees stated that "electronic evidence" is not defined under the procedural law of their Member State.[114] The transmission of evidence in electronic forms is not always permitted, because methods to verify digital signatures are not yet known or used by most requesting or requested courts. A judicial officer in Germany also cited restrictions for accepting electronic evidence based on security concerns. Data storage mediums from external sources may not be connected to court IT infrastructures networks, as they may contain viruses or other harmful software.

#### 5.1.2.6 Conclusion

Overall, Regulation (EC) 1206/2001 has made a contribution to achieving the operational objectives. The introduction of a framework for cooperation for taking evidence is welcomed by practitioners. The introduction of standard forms and communication channels has facilitated communication. Nevertheless, there is room for improvement based on a number of hurdles identified.

First, as regards to the definition of the concepts of the Regulation, there are still diverging interpretations as to what is considered "taking of evidence" within the meaning of the Regulation. Such interpretations provide a justification for requested courts to refuse the execution of incoming requests (Article 14(2)(a) of the Regulation) and thereby lead to a 'variable geometry' in terms of the scope of application of the Regulation.

[114] One notable exception is Estonia, where a digital and physical files share the same status and evidence may not be refused based on the fact that it is presented in electronic form, see: §57 Code of Civil Procedure, https://www.riigiteataja.ee/en/eli/513122013001/consolide

The Regulation is applicable to judicial cooperation between "courts" of the Member States. However, there is no streamlined interpretation of this concept among the Member States: some of them only consider traditional tribunals as covered, whereas others accept a more open approach and accept and execute requests coming from judicial authorities other than courts (notary publics, social welfare or guardianship authorities, enforcement authorities), if these are empowered by law to proceed in civil or judicial matters.

Furthermore, recent case-law of the CJEU reflects a consistent approach in favour of the non-mandatory character of the Regulation. As it is reiterated in the relevant decisions, *"the Regulation does not govern exhaustively the taking of cross-border evidence, but simply aims to facilitate it, allowing the use of other instruments having the same aim".* Consequently, Member States' courts may continue to use national procedures which for the purposes of internal taking of evidence allow them access to evidence situated in other Member States. For instance, the Court held that the application of the Regulation is not obligatory in the case of hearing of a party residing in another Member State as a witness (C-170/11, *Lippens and Others*) or if an expert investigation shall be carried out on the territory of another Member State provided that this investigation does not affect the powers of that Member State (C-332/11, *ProRail).* At the same time the Court also held that the use of such national methods is not without limits. E.g. in the *ProRail* judgment, the Court ruled that under certain circumstances, where the investigation to be carried out by the designated expert might affect the powers of the Member State in which it takes place, in particular where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is prohibited or restricted to certain persons under the law of the Member State in which the investigation is carried out, the requesting court shall resort to the methods provided by the Regulation.[115]

While the objectives pursued by the Court in eliminating unnecessary bureaucracy may be supported, these judgments have nevertheless created some legal uncertainty and may in certain cases lead to undesirable results. For instance, cases have been reported by citizens who wished or were requested to appear as a witness in proceedings pending in another Member State and where the court seised required their physical presence before the court despite the explicit request of the citizens to be heard by distance means of communication (e.g. videoconferencing).

Furthermore, some key emerging trends, such as digitalization, have been identified as posing challenges to the relevance of the Regulation, which hence could no longer be regarded fully future-proof. At the national level, some Member States already include electronic service in their legal systems, while others are investing efforts to do so.[116] At EU level, the increased use of digital solutions (through e.g. eID and trust services) is encouraged and is being explored in all types of sectors and business processes, including in legal proceedings. The framework set up by the eIDAS Regulation allows for interoperability of more digital solutions and thus opens the door for potential growth in use of eID and trust services, or that of the CEF e-Delivery building block (which is used by e-CODEX) to enhance the service of documents in cross-border proceedings. The Regulation does not accept the (direct) electronic service of documents from one Member State to another as a valid means of

[115] Case C-332/11 *ProRail BV* ECLI:EU:C:2013:87, paragraph 47.
[116] See state of play in relevant chapter of the 2016 Study Firenze

serving documents, whereas electronic communication between the transmitting and receiving agencies designated under the Regulation is a rare exception. Moreover, the Regulation does not provide that digital evidence taken in accordance with the law of a Member State is recognized in another Member State. The Regulation therefore falls behind these technological developments.

Lastly, according to the most of the stakeholders consulted, most national courts in cross-border cases still avoid resorting to the Regulation and summon the witness or other person to be heard directly to the court. This predilection is caused not only by the sometimes difficult practical coordination between the courts involved, but also by concerns about the preservation of the principle of immediacy in the assessment of the evidence. Furthermore, the language issue appears recurrently: The need to translate the form (and the questions) into a language accepted by the requested Member States raises problems with the accuracy of the translation itself and with the costs. Additionally, technical problems to carry out videoconferences seem to be frequent, since not all involved authorities have the same IT infrastructure.

### 5.1.3 Achievement of the specific objectives of the Regulation

#### 5.1.3.1 To further improve the efficiency and speed of judicial proceedings

The Regulation has contributed to more efficient cross-border proceedings, but there is room for improvement.

Stakeholders consulted particularly highlighted the possibility of court-to-court communication as supporting this objective. Compared to procedures under the previous Hague Conventions or agreements with third countries, the possibility to request a court in another Member State to take evidence and directly communicate with that court significantly helps speeding up such processes.[117] In addition, the introduction of standard forms for such communication is considered by legal practitioners as significantly speeding up the process. The forms help ensuring that requests are complete and to the point and help to limit efforts for drafting and translating requests. Finally, the possibility for direct taking of evidence is in

[117] This was also the finding of the 2007 Commission's report on the application of the Regulation, which indicates that the foreseen time of 90 days is faster than before the entry into force of the Regulation: Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 3.

principle appreciated by stakeholders as a possibility which may be more efficient than other methods in certain cases.[118]

Nevertheless, as indicated above, the Regulation is applied only to a certain extent in cross-border cases in which evidence needs to be taken abroad. One of the reasons highlighted by stakeholders is that, in many cases, taking of evidence outside the framework of the Regulation is considered more efficient for taking evidence, e.g. directly summoning a person or consular channels.

On the one hand, this is due to the fact that there are certain weaknesses in relation to the methods covered by the Regulation. Taking evidence via a competent court in another Member State (Articles 10 ff.) is still perceived to be a slow method, because the time limits are often not kept.[119] In addition, many stakeholders voiced concerns concerning the practicalities of direct taking of evidence (Article 17) because no coercive means may be used or due to expected coordination efforts as well as potential undue costs in case witnesses fail to appear.[120]

These limitations were also identified in a 2016 study commissioned by the European Commission. The study found that a majority of practitioners still considered the taking of evidence abroad to be a "significant" or "very significant obstacle".[121] This implies that the current framework has not yet fully succeeded in removing obstacles relating to the cross-border taking of evidence.

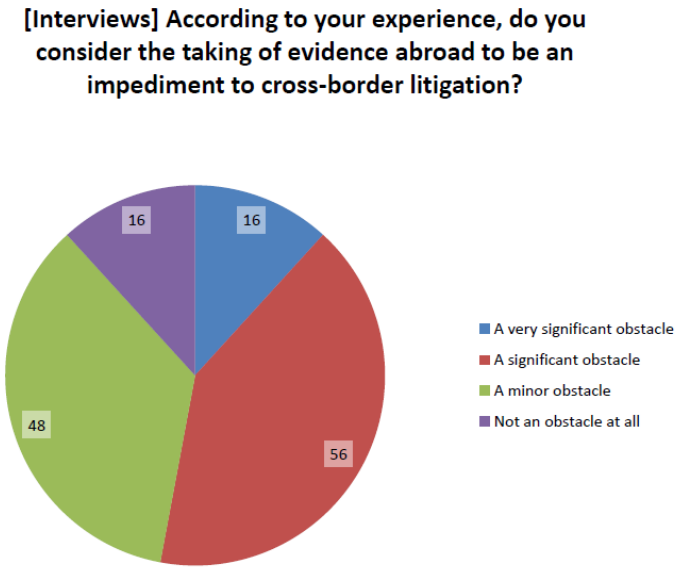
[118] These points were raised in the interviews conducted as part of this study as well as in the following sources: Report from the Commission on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 5.12.2007, COM(2007) 769 final, p. 5; Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter, pp. 7, 8 available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

[119] This was raised by many of the interviewees and confirms the finding of the 2007 report on the application of the Regulation, which indicates that the foreseen time of 90 days is faster than before the entry into force of the Regulation: Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 3.

[120] This is also reflected in the results of the open public consultation: the majority of respondents indicated that they prefer taking evidence through the competent court in another Member State rather than directly through Article 17.

[121] European Commission, 2016, JUST/2014/RCON/PR/CIVI/0082, p.118 Source: https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

**Figure 3: Extent to which taking of evidence in cross-border litigation is perceived to pose obstacles**




*Source: European Commission, MPI Luxembourg (2016)*

### 5.1.3.2 To improve access to justice and the protection of the procedural rights of the parties

The Regulation achieved this objective to a large extent. Limitations are mainly due to the fact that the Regulation is applied only to a limited extent.

More specifically, the Regulation contributes to making sure that all relevant evidence necessary for the claim and/or defence may be gathered in an efficient way, by introducing common channels that may be used for this purpose. It also facilitates the participation of the parties in the taking of evidence (Article 11). In addition, common approaches to the taking of evidence may contribute to a larger likelihood for mutual recognition of judgments taken within the EU. On this basis, the right of access to justice and the right to be heard are strengthened in the cases in which the Regulation is applied.

However, as mentioned, the Regulation is only applied to a certain extent in civil and commercial cases in which evidence is collected in another Member State. The provisions in the Regulation can contribute to the protection of the rights of citizens and businesses only in those cases where the Regulation is actually applied.

Furthermore, the achievement of this objective is impaired by potential costs and delays arising from difficulties relating to the design of the Regulation and its application. On this basis, it may be more cumbersome for businesses and citizens to make use of these rights when the Regulation is applied rather than methods of the national procedural law. For instance, the non-coercive nature of the direct method for taking evidence in another Member

State may be delayed for technical reasons, or differences in national procedural law may allocate costs to obtain evidence in a different way than expected.

Another potential difficulty relates to the possibility of a person who is heard to challenge measures or actions by the agencies/courts involved. The majority of the respondents of the public consultation indicated that this is not always easy.

**Table 8: Opinion of respondents to the public consultation concerning the right of the person heard in another Member State**

| Statement: The person heard in another Member State could easily challenge a measure or an action of the agencies/courts involved during the taking of evidence. | | |
|---|---|---|
| Response | Count | Percentage |
| Strongly agree | 1 | 1.6% |
| Tend to agree | 8 | 12.9% |
| Tend to disagree | 12 | 19.4% |
| Strongly disagree | 4 | 6.5% |
| Do not know/ No opinion | 37 | 59.7% |
| Total | 62 | 100.0% |

*Source: Open public consultation by the European Commission*

#### 5.1.3.3 To reduce the burden for citizens and businesses involved in cross-border proceedings

The main burdens for businesses and citizens involved in legal proceedings are:

- Time taken to conclude the case;
- Court fees;
- Costs for legal advice;
- Travel costs and time taken to travel (e.g. to travel to a hearing);
- Fees for expert opinions;
- Costs for the translation of requests and/or evidence (e.g. testimonies) as well as interpretation;
- Stress related to the taking of evidence (including e.g. based on delays).

The Regulation contributes to reducing these types of burdens to some degree, although some limitations have been observed.

As concerns the time taken to conclude a case, the Regulation has contributed to facilitating efficient taking of evidence in cross-border cases to some degree. For citizens and businesses involved in cross-border proceedings, this means that it is likely that the taking of evidence can be handled in an efficient manner. Thus, when a court makes use of the available means of the Regulation, taking of evidence is likely to be carried out in an efficient manner.

Nevertheless, some delays still exist, due to the design of the procedures (e.g. the need to ask for authorisation for the direct taking of evidence every time), as well as due to their practical application (e.g. mistakes in filling in the forms, not adhering to deadlines).[122] For citizens and businesses, this means that the judicial proceedings they are involved in may take longer than necessary, potentially also leading to additional costs (e.g. more need for legal representation).

In the case of direct taking of evidence, it is also possible that witnesses have to spend undue time or face additional burdens due to inadequate coordination/planning or technical difficulties.

Finally, the achievement of this objective is hindered by the somewhat limited application of the Regulation. As mentioned, the Regulation is only applied to a certain extent in civil and commercial cases in which evidence is collected in another Member State. Thus, the Regulation only contributed to reducing the burden of citizens and businesses in these cases. In other cases, it is possible that citizens are e.g. summoned directly by courts for a hearing, which may involve considerable travelling and thus the loss of time and money, depending on the situation.

Overall, while there is still room for improvement, the Regulation has improved the efficiency and speed of judicial proceedings and thereby also contributes to ensuring the right to access to justice and the protection of the rights of the parties as well as reduces the burden for citizens and businesses involved in cross-border proceedings.

#### 5.1.3.4 Conclusion

Overall, Regulation (EC) 1206/2001 has contributed to achieving the specific objectives. Judicial staff in different Member States stated that Regulation (EC) 1206/2001 has contributed to facilitating court-to-court communication and enabled the use of direct taking of evidence across borders. In this way, it has contributed to the efficiency and speed of judicial proceedings. Nevertheless, there is room for improvement based on a number of hurdles identified, which limit the achievement of the specific objectives. Methods not covered by the Regulation may be faster and more efficient in some cases. Delays in communication and authorisation of requests may cause burdens and undue costs on the side of witnesses, citizens and businesses (in particular when direct taking of evidence is used).

### 5.2 Efficiency

[122] This was raised by the stakeholders consulted as part of this study and in the Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final.

The assessment of efficiency considers the relationship between the resources exhausted by the intervention and the achievements of the intervention.

This chapter contains the assessment of the efficiency of the Regulation, considered from a wider and a more narrow perspective.

The effects of the Regulation were achieved at a reasonable cost.

However, since the application of the Regulation is not mandatory, and channels for taking evidence under national law can be applied as an alternative, its objective to facilitate the taking of evidence across borders can – theoretically – also be achieved through the application of procedures outside the scope of the Regulation, e.g. directly summoning a person or consular channels.

Therefore, two streams of argumentation are crucial for the assessment of the efficiency of the Regulation, depending on the scope and point of view of the assessment:

- Wider perspective: The Regulation is applied in only a limited number and share of legal proceedings in cross-border civil and commercial matters. Therefore, its contribution to an efficient system of taking of evidence across borders is limited. However, directly summoning a person or the use of consular channels to take evidence contribute to maintaining the overall efficiency of the system although those channels fall outside the scope of the Regulation; and

- More narrow perspective: In legal proceedings in which the Regulation was applied, its channels and procedures seem to have worked reasonably efficiently – although there is room for improvement.

The following sections provide an assessment of the efficiency of the Regulation from both the wider and more narrow perspectives.

### 5.2.1 Efficiency from the wider perspective

It is estimated that the Regulation was applied in around 150,000 legal proceedings on average per year between 2001 and 2017. However, estimates also show that Regulation (EC) 1206/2001 is only applied in the upper range of a proportion of 5 to 50% of all cross-border legal proceedings in civil and commercial matters in which evidence is taken[123]. Whilst this figure reflects that in a very large number of cases no evidence needs to be taken at all or it can be taken in the Member States where the case is pending it also reflects that in some cases the cross-border taking of evidence takes place outside the framework of a Regulation and courts simply apply their national laws, for example by directly summoning a person from abroad to testify in court or by the use of consular channels to hear witnesses. This

[123] See point 3 above.

situation does not, however, per se point to an inefficiency of the Regulation. To some extent, it could rather be argued that it is a strength of the Regulation contributing to the overall efficiency of cross-border taking of evidence that the Regulation is not exclusive but allows courts to use other methods where they are considered more efficient depending on the specific circumstances of each legal proceeding. For instance, although directly summoning a person to court from abroad under national law (as opposed to a request to a foreign court to hear that person under the Regulation or as opposed to a request for the authorisation of a hearing by videoconference under the Regulation) may very well cause higher costs or burden for the person summoned, it may be that legal proceedings in which evidence is taken directly in another Member State or a court is requested to do so under the Regulation take longer, involve more organisational effort, consume a higher travel budget, or ultimately fail to take the necessary evidence since the request was not entirely clear, as stakeholders report.

From this point of view, the non-mandatory nature of the Regulation and the flexibility it implies may be seen to some extent rather as a contributing factor to the system's overall efficiency than a detriment.

This is also supported by the Commission's 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.[124] As part of this study, approx. 60% (31 out of 52) of the respondents indicated that the non-mandatory nature of the Regulation is appreciated as "it allows for the use of the most efficient tool for the case at hand."

Thus, from the wider perspective, the non-mandatory nature of the Regulation, giving courts the freedom of choice to directly summon a person or to use of consular channels, is in principle a strength. Not forcing courts to apply the direct taking of evidence or requesting a court in another Member State to take the evidence through the channels foreseen by the Regulation can leave courts the necessary leeway to identify the most suitable procedures and channels for their specific legal proceeding at the operational level.

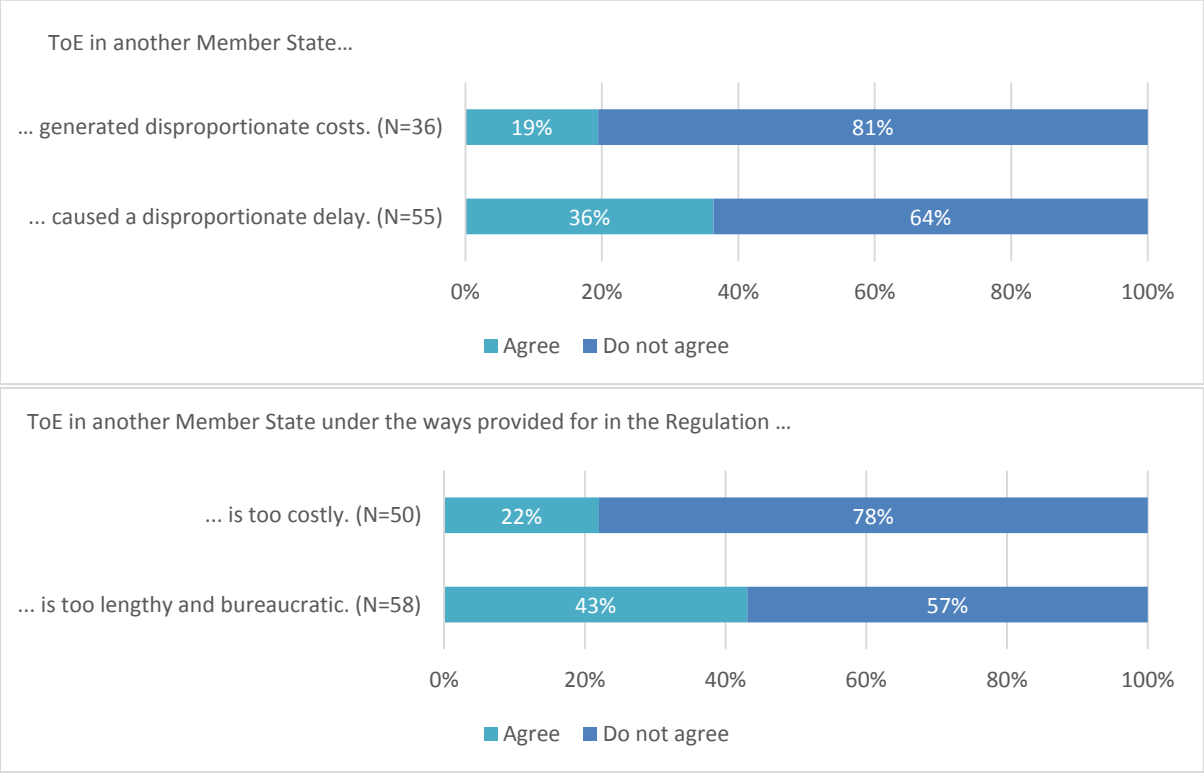
On the other hand, the parallel application of the Regulation and other channels under national law can cause a certain extent of confusion and legal uncertainty. In order to find the suitable channel for taking evidence across borders, courts always need to take two different legal regimes (European and national) into account. Since many courts and practitioners are still relatively unfamiliar with the cross-border taking of evidence which is needed only in a very limited number of cases, finding out about the legal situation, the availability of the Regulation or channels under national law, and taking the decision on the most appropriate way to go imply some burdens and delays.

[124] European Commission, 2016, JUST/2014/RCON/PR/CIVI/0082, p.118 Source: https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en

Therefore, costs associated with the application of the Regulation are also expected to vary between Member States and even between courts. The differences are caused by the specific types of cases they are dealing with at their operational level and the extent to which it is appropriate for (the outcome of) the proceedings to use the Regulation or other domestic means to take evidence across borders.

Although, as identified as part of the online survey, 8 out of 14 respondents agreed that direct taking of evidence is not very attractive, the majority of respondents to the open public consultation (for the specific question) did not agree that the taking of evidence across borders[125] contributed to generate disproportionate costs or were too costly/delays or were too lengthy and bureaucratic.

**Figure 5: Extent to which taking of evidence across borders generates costs and delays**




*Source: European Commission's open public consultation. The item 'Agree' encompasses the answer alternatives 'strongly agree' and 'tend to agree'. The item 'Do not agree' encompasses the answer alternatives 'tend to disagree' and 'strongly disagree'.*

The figure above shows that:

- In relation to the general taking of evidence across borders:

[125] In general and specifically by means of the channels provided for in the Regulation.

- Around eight out of ten respondents (81%, 29 out of 36 respondents) indicated that they did not consider that the taking of evidence in another Member State caused disproportionate costs for them;
- Almost two thirds of the respondents (64%, 35 out of 55 respondents) indicated that they did not consider that the taking of evidence in another Member State caused a disproportionate delay in the judicial proceedings.
- Therefore, length and bureaucracy are perceived as a problem by twice as many stakeholders than costs.

- In relation to the taking of evidence by means of the channels foreseen in the Regulation:
  - More than three quarters of the respondents (78%, 39 out of 50 respondents) indicated that they did not consider that the taking of evidence in another Member State under the methods provided for in the Regulation is too costly;
  - The majority of respondents (57%, 33 out of 58 respondents) indicated that they did not consider that the methods to take evidence across border provided for in the Regulations is too cumbersome, lengthy, and bureaucratic.

### 5.2.2 Efficiency from the more narrow perspective

Although the taking of evidence under the Regulation may often take up to six months (compared to the 90 days foreseen by the Regulation), and thus exceed the stipulated deadlines, stakeholders' feedback received as part of this study shows that the procedures work reasonably efficient with room for improvement in specific areas.

This is supported by the data obtained by the EJN in its 2014 survey on the Regulation in which all Member States that responded to the survey indicated that the Regulation improved cross-border judicial cooperation – including in relation to the time taken for and the efficiency of executing requests.

All 17 respondents that provided an answer to the respective question in the online survey carried out during the study indicated that the Regulation had accelerated the taking of evidence across borders. Moreover, 13 of 14 respondents indicated that the Regulation had lowered the costs involved in obtaining evidence across borders, whereas 14 of 18 respondents indicated that the Regulation ensures that evidence is obtained in other EU Member States by the swiftest possible means.

As part of the interviews, the following points were repeatedly mentioned by stakeholders as particular strengths of the Regulation:

- The possibility of court-to-court communication is considered to be an improvement compared to the Hague Convention or in relation to third countries;

- The introduction of standard forms enables the stakeholders to lodge requests that are complete and to the point and help to limit efforts for drafting and translating requests;
- The possibility to take evidence directly in other Member States guarantees courts' freedom of choice in relation to the most appropriate means to take evidence across borders.

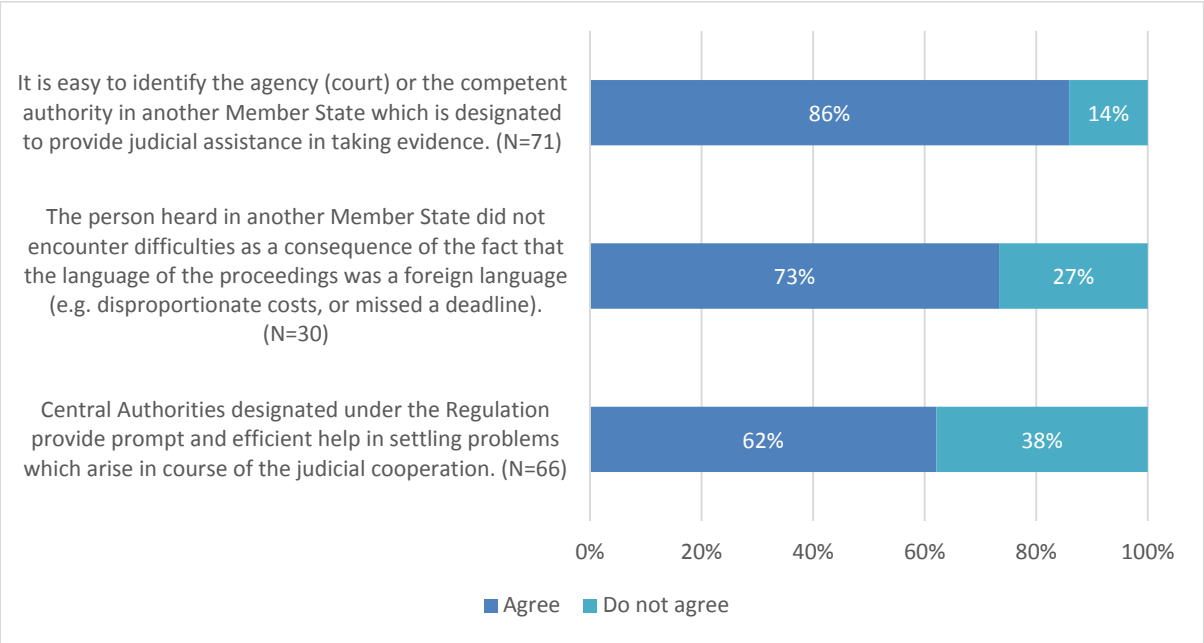
In particular with regard to the first aspect, one German interviewee indicated that, under the Hague Convention, requests for clarifications to a country outside the EU are usually not answered. Therefore, the possibility under the Regulation to communicate directly between courts (i.e. no prior contacting of ministries/consulates is necessary) is a real added value compared to the situation before the Regulation was in place.

Concerning the second aspect, the regulation has already simplified the administrative burden for judicial authorities and parties to the proceedings. However, according to interviewees, there is still room for improvement with regard to stakeholders' awareness of and knowledge concerning how to complete the forms, in what language, and the level of detail to be specified.

As part of the Commission's open public consultation, stakeholders also indicated that it is easy to identify the agency (court) or the competent authority in another Member State, which is designated to provide judicial assistance in taking evidence. In addition, central authorities of the Member States designated under the Regulation generally provide prompt and efficient help in settling problems arising in the course of judicial cooperation. Finally, based on the feedback received, it seems that persons heard in another Member State do not encounter inappropriate difficulties (such as disproportionate costs, or missed a deadlines) as a consequence of the fact that the language of the proceedings was a foreign language.

This is also visualised below.

**Figure 6: Strengths of the Regulation according to respondents to the open public consultation**




*Source: European Commission's open public consultation. The item 'Agree' encompasses the answer alternatives 'strongly agree' and 'tend to agree'. The item 'Do not agree' encompasses the answer alternatives 'tend to disagree' and 'strongly disagree'.*

In contrast, however, stakeholders also indicated that there is room for improvement with regard to the following issues:

- Taking evidence via a competent court in another Member State is perceived to be a slow method, i.a. because the time limits are often not kept;
- Videoconferencing systems are not always available in all courts, which can delay the process to take evidence.

These aspects are further discussed below.

### 5.2.3 Speed of procedure

The time limits provided for under the Regulation (i.e. 30 days for a competent authority to indicate whether the request can be granted and 90 days to obtain the requested evidence) are often not respected in practice according to stakeholders from multiple Member States interviewed as part of the study.

This finding is not new. The European Commission's 2007 report on the application of the Regulation already indicated that "most requests for the taking of evidence are executed

within 90 days […]. However, there is also a significant number of cases in which the 90 days limit is exceeded. In some cases even more than 6 months are required. Moreover, the amount of time required for the execution of requests varies to a significant extent between Member States.

As part of the online survey, 9 of 15 respondents indicated that it happens more often than not that their requests are not completed within 90 days. 2 of 7 respondents indicated that the average duration for a civil or commercial case involving the taking of evidence in other EU Member States is 6-12 months, whereas 4 respondents indicated that the duration exceeds 12 months.

According to the stakeholders interviewed for the study, this not always due to stakeholders' limited awareness of the time limits, but also the practical difficulties to:

- Work with the limits being specified as days and not as dates (for instance, courts may need the evidence for a hearing already before the end of the 90 day period or only after it); and

- Identify, locate, and contact the witnesses, as well as to organise and actually hold the hearing. Moreover, there are types of evidence for which it naturally just takes time to obtain it due to their complex nature (e.g. DNA tests).

As part of the study, interviewees from several Member States indicated that taking evidence across borders often takes three to four months. A Romanian interviewee portrayed a cross-border commercial case in which there were three witnesses: Two from Germany and one from Italy. The hearing was conducted by courts in Germany and Italy with statements having to be translated after the hearing. The overall process to collect the witnesses' statements took around six months.

There are differences between the Member States with regard to the efficiency of this process. Whereas in some Member States witnesses can be questioned (with prior consent) via tools such as Skype or even email, other Member States question the person physically in court. This physical questioning has advantages and disadvantages:

- On the one hand, it guarantees that the witness is (at least physically) free to give the testimony while the judge or judicial officers can connect to the person emotionally, observe gestures and other non-verbal communication in order to steer the hearing within an appropriate direction.

- On the other hand, the physical hearing is often challenging to organise as schedules of different stakeholders need to be aligned, court rooms need to be available, and the witness (or his representatives) need to appear in court. This may cause delays within the process, as well as costs for the parties involved.

It is, however, important to keep in mind that neither of the above are mutually exclusive alternatives. In fact, judges and judicial officers need to use the means appropriate for a specific legal proceeding and find the appropriate balance between the two alternatives –

especially since evidence may be harder to obtain in some cases than in others (e.g. in cases involving children or high profile commercial cases).

Differences regarding the efficiency of the processes also stem from the extent to which Member States rely on paper-based communication. Whereas an interviewee from France indicated that up to 80% of all communication between courts, central bodies, and stakeholders in legal proceedings is paper-based, other Member States seem to be much less reliant on such communication. In Estonia, for instance, courts and the central body usually exchange (internal) e-signed documents via their eFile system. Such a system is, however, not available in other Member States and can therefore not be applied for cross-border proceedings. As a workaround, a German official explained official requests and confirmations are sent by post while in very urgent cases, they already inform the requesting court via email or fax that a confirmation will be sent, so that they can go ahead with taking the evidence.

### 5.2.4 Videoconferencing

The use of videoconferencing can simplify the interactions in cross-border judicial cooperation. In fact, the use of videoconferencing has increased over the last couple of years according to interviewed stakeholders, in particular in Member States such as Portugal or Sweden. This is driven by a general increase in awareness of, knowledge about, and comfort in using these types of communication systems, as well as the benefits for stakeholders associated with it.

Videoconferencing facilities can, for instance, be used to find the right balance between the challenges to organise a physical hearing and being able to safeguard the freedom of the witness's testimony (e.g. if an official in-court videoconferencing system is used).

This also relates to the question concerning the extent to which the cooperation mechanisms in the Regulations are designed in an efficient way or to what extent other methods could deliver better results at lower cost.

Although there is a (non-binding) EJN guide on videoconferencing, there are differences between the Member States with regard to the availability, potential, and actual use of such systems in courts:

- All Estonian courts are equipped with videoconferencing facilities and they are used frequently. However, interviewees also indicated that the organisation of a videoconference is often more complicated than filling in the forms provided for under the Regulation and to request another court to take the evidence;

- In Sweden, videoconferencing as a communication channel for the taking of evidence seems to be used comparatively often in cross-border cases, e.g. in relation to cases concerning Germany, France, Spain, and the United Kingdom. One interviewee

indicated that the availability of interpreters is a key enabler for the use of videoconferencing;

- In Belgium, only some courts possess videoconferencing equipment. Furthermore, the system only enables domestic calls. Thus, under this Regulation, the central body has to use the equipment of the Prosecutor-General;

- An interviewee from Hungary indicated that it would be too expensive to equip all courts with videoconferencing facilities. Therefore, such systems are only available in selected courts.

Moreover, there are differences with regard to the type of videoconferencing system Member States have in place. The use of Skype by some Member States is, for instance, not necessarily compatible from a legal perspective and technically interoperable with the systems used by other Member States.

Assuming that videoconferencing has been used in around 10% to 25% of all legal proceedings in which direct taking of evidence was applied, it could be estimated that, on average, up to 3,600 hearings via videoconference were held in 2017. However, videoconferencing is expected to have been far less frequently in the early 2000s than today.

An interviewee from Belgium indicated that the acquisition and set up of, as well as the training in relation to videoconferencing equipment costs around 90,000 Euro per system. In a similar vein, an Italian interviewee estimated that the use of videoconference is roughly 500 Euro per connection. A Swedish interviewee mentioned that an important part of the costs related to videoconferencing relates to transcribing the recording. In Sweden, such costs could amount to around 270 Euro per hour of recording. [126]

Thus, the cost for one hour videoconferencing is estimated at around 770 Euro.

Based on the estimates and the assumptions provided above, it could be expected that in 2017, courts spent approx. 2.8 million Euro for videoconferencing, split across the different types of cases falling under the Regulation.[127]

**Table 9: Costs incurred for videoconferencing (per type of proceeding, at EU level, 2017)**

| Type of legal proceeding | Costs in Euro |
|---|---|
| Contractual obligations | 1,279,000 € |
| Compensation for damages | 521,000 € |

[126] The costs for videoconferencing facilities and per connection are very likely to be (significantly) lower in other Member States.

[127] The estimate is derived from the following calculation: Individual estimates per type of legal proceeding multiplied with 500 Euro + 270 Euro.

| Type of legal proceeding | Costs in Euro |
|---|---|
| Successions & Wills | 356,000 € |
| Property transactions | 316,000 € |
| Administrative cases | 112,000 € |
| Divorces | 82,000 € |
| Insolvencies | 49,000 € |
| Parental responsibility | 44,000 € |
| Legal separations | 5,000 € |
| Total | 2,764,000 |

*Source: Estimates by Deloitte based on Eurostat, CEPEJ, European Commission, and information gathered as part of the interviews*

The costs incurred for videoconferencing are expected to vary over time. They are not only subject to variances in the number of cases in which videoconferencing was used, but also to pricing changes.

With regard to the costs of videoconferencing, it has also been reported that it is a practical problem to decide on who has to cover the cost for using videoconferencing facilities, paying interpreters and the drafting of protocols.

While videoconferencing may, in theory, contribute to reducing delays in legal procedures, some interviewees stated that videoconferencing facilities are largely pre-booked in advance so that there is no capacity to take evidence on comparatively short notice. On the contrary, having to wait for a videoconferencing system to be available may actually increase delays compared to other procedures provided for under the Regulation or outside of its scope (e.g. to summon the person to court or to use consular channels). Several interviewees, for instance, stated that the waiting time for a hearing via videoconference can be 5-6 weeks, depending on the availability of a videoconferencing facility on the spot and the case load of the court.

As part of the online survey, however, 9 out of 15 respondents indicated that taking of evidence via videoconferencing can easily be arranged under the Regulation.

### 5.2.5 Other challenges

It has been reported that some courts abstain from the use of electronic evidence due to technical reasons, such as the risk of virus-infected hardware that may be sent by other courts accidentally. This was, for example, mentioned by an interviewee from Germany who indicated that although electronic evidence may be available, they typically ask for print-outs since they are not allowed to use non-certified data carriers in order not to jeopardise the

function of their systems. If applicable to a larger number of courts or even Member States, this would be expected to contribute to further delays and costs in the legal proceedings.

Stakeholders' feedback was mixed with regard to some areas in relation to the efficiency of taking of evidence across borders. As part of the online survey carried out within this study, for instance, the limited number of respondents that provided an answer to the relevant question (18 in total) were almost equally split in relation to whether or not paper-based communication and exchange of documents among the competent agencies and authorities under the Regulation hampers the speed of judicial proceedings (compared to the use of modern communication technologies).

A majority of the online survey respondents indicated that the (lack of) equipment of courts with appropriate technology and the knowledge about ICT solutions is an important barrier for the more common use of ICT for the taking of evidence. It was also emphasised that issues with the interoperability of ICT solutions between courts in different Member States are important, whereas legal barriers to sharing evidence through digital means were seen as less important for an increased uptake of ICT.

### 5.2.6 Conclusion

Based on the argumentation, data, and assumptions outlined above, the Regulation in and of itself was not able to fully exploit its potential to contribute to the overall efficiency of the processes to take evidence across borders. However, within the framework of its non-mandatory nature thus admitting the use of means to take evidence across borders under national law where considered preferable the Regulation guaranteed a reasonably efficient overall system to take evidence across borders. On the other hand, the parallel applicability of the Regulation and other channels under national law causes some legal uncertainty because courts must always take two different legal regimes (European and national) into account when deciding on the most appropriate channel for taking evidence abroad.

From a more narrow perspective, the Regulation has increased the efficiency of the legal proceedings in which it was applied – both compared to the Hague Convention and over time between 2001and 2017. There is, however, room for improvement with regard to some processes' efficiency that the Regulation did not sufficiently address (yet). This concerns in particular the speed of procedures (e.g. using videoconferencing) in order to avoid undue delays for businesses and citizens.

## 5.3 Relevance

As part of the analysis of the relevance of the Regulation, its initial objectives and their correspondence to the needs in the EU as well as the extent to which the Regulation is adapted to technological progress were assessed.

The original overall rationale of Regulation (EC) 1206/2001, i.e. to facilitate the taking of evidence across borders with a view to ensure speedy handling of international cases, remains relevant. However, the relevance of the Regulation in practice has proven to be limited due to weaknesses and gaps of the procedures that it establishes for the taking of evidence.

Overall, the number of cross-border cases concerning civil and commercial matters has increased in recent years. In the context of the objectives of the EU to ensure the smooth functioning of an internal market and an area of freedom, security and justice, it is important that such cases can be resolved as quickly as possible and without undue costs for businesses and citizens.

Against this background, Regulation (EC) 1206/2001 was welcomed by the stakeholders consulted. Indeed, several interviewees confirmed its importance and indicated that Regulation (EC) 1206/2001 has contributed to both simplifying and speeding up evidence-taking in cross-border situations.[128] The procedures introduced by Regulation (EC) 1206/2001 were highlighted as useful by numerous interviewees, including from central bodies and legal professionals. Its most relevant features, including compared to the previous Hague Conventions, as identified by these stakeholders include:

- Introduction of direct court-to-court communication;
- The use of standard forms;
- The possibility of direct taking of evidence.[129]

The relevance of the Regulation and in particular the direct taking of evidence increased due to the spread of modern communication technologies. Indeed, in case of hearings, direct taking of evidence is mostly conducted using videoconferencing. Several legal professionals indicated that it would not be as relevant if direct taking of evidence involved traveling of the judge to hear a party in person.

Nevertheless, as et out in more detail above evidence suggests that the Regulation is used only to a limited extent compared to the overall number of cross-border cases. As the Regulation is not mandatory, courts apply domestic procedural law instead.

This was already concluded in the evaluation of the Regulation that was carried out in 2007. At that time, its limited use was explained by a lack of familiarity with the Regulation and difficulty of changing habits – both possibly based on the novelty of the Regulation.[130]

[128] This was also the finding of: Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter, available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

[129] These points were raised in the interviews conducted as part of this study as well as in the following sources: Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 5; Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter, pp. 7, 8 available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

When asked about the reasons for not applying the Regulation in cross-border cases that involve the taking of evidence and instead use other instruments of domestic procedural law, interviewees mentioned:

- The lack of knowledge about the Regulation; and
- Some means/channels that are currently not covered by the Regulation are considered more efficient for taking evidence, e.g. directly summoning a person or consular channels.

The scope of the Regulation, including the definition of the term "evidence" was raised as one of the main issues in the Commission's report on the application of the Regulation.[131] This concerns in particular DNA and blood samples, e.g. in the context of paternity tests.

Considering the extent to which the Regulation is adapted to technological progress, the conclusion is neutral. On the one hand, the Regulation stipulates that requests and communications pursuant to the Regulation shall be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept. Thus, it is flexible in relation to technical progress, as Member States can choose, which communication means are most suitable. At the same time, the use of electronic means of communication and videoconferencing is still very limited. Thus, the rules in the Regulation did not yet manage to promote the use of electronic means of communication in cross-border proceedings in line with the technical progress. In fact, stakeholders from some Member States regretted that electronic means may in fact be used less compared to national cases.

## 5.4 Coherence

The overall coherence of the Regulation was assessed both internally, and externally. For the internal coherence, the consistency of the different provisions within the Regulation was analysed. As far as the external coherence is concerned, it was assessed how well the Regulation operates with other legal instruments.

Similar to the findings of previous reports and studies,[132] only few issues relating to the coherence of the Regulation with other legal instruments and internally were identified in the study. In fact, most interviewees did not mention any issues in this respect and the analysis of the Regulation in the study and its relations with other instruments has not brought to light

[130] Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter, p. 6 available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

[131] Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 2.

[132] Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, pp. 6, 18.

any serious issues in this respects. However, some overlaps may exist in relation to the Brussels IIa Regulation and the relationship with national law has caused practical difficulties.[133]

The internal coherence of the Regulation as well as its relationship to the different policies, including the Treaty objectives, EU instruments in the field of judicial cooperation and national law and bilateral/multilateral agreements, is presented in detail below.

### 5.4.1 Internal coherence

A legal analysis of the internal coherence of the Regulation and other sources, including the consultations carried out, suggest that the Regulation is internally coherent. The academic literature and the case law as well as prior evaluations and the consultations carried out to underpin this evaluation have not produced any evidence of internal contradictions or incoherence.

### 5.4.2 General Treaty objectives

The objectives of Regulation (EC) 1206/2001 are coherent with the EU Treaty framework.

Regulation (EC) 1206/2001 is part of the EU framework on judicial cooperation in civil and commercial matters and contributes to the EU objective to establish an area of freedom, security and justice, as defined in Article 3(2) of the Treaty on European Union (TEU) and Article 67 of the Treaty on the Functioning of the European Union (TFEU). In this context, the EU is to develop judicial cooperation in civil and commercial matters with cross-border implications based on the principle of mutual recognition of judgments and decisions, as stipulated in Article 81 TFEU. Furthermore, the Regulation contributes to the EU objective of establishing an internal market (Article 26 TFEU).

Regulation (EC) 1206/2001 contributes to the area of freedom, security and justice and the functioning of the internal market by facilitating the taking of evidence in the context of cross-border legal proceedings. No evidence has been identified that points to issues in this respect.

### 5.4.3 Relevant EU instruments in the field of judicial cooperation

The other EU instruments/policies in the field of judicial cooperation generally complement Regulation (EC) 1206/2001, including, for example, by providing rules on the jurisdiction

[133] See below table 10.

and recognition of judgements in civil and commercial matters (Brussels Ia, Brussels IIa and the Maintenance Regulations). No contradictions or other serious hurdles have been identified.

Certain overlaps may exist with the Brussels IIa and Maintenance Regulations, notably as concerns the tasks of the Central Bodies to collect information concerning the situation of the child. With respect to Brussels IIa, this led to a lack of clarity as to whether Regulation (EC) 1206/2001 also applies to such situations. This aspect is a potential area of improvement in order to provide clarification.

An overview of the most relevant instruments or policies,[134] their main contents, as well as their relationship to Regulation (EC) 1206/2001 including potential difficulties is provided in the following table.

[134] The list is not exhaustive. The focus is on the most relevant instruments, in particular those that have direct links or in relation to which problems have arisen.

**Table 10: EU instruments in the field of judicial cooperation and their relationship to Regulation (EC) 1206/2001**

| Instrument | Main contents | Relationship |
|---|---|---|
| Service Regulation | - Common rules on the serving of documents in cross-border proceedings in civil and commercial matters. | - The two Regulations have the same aims and are complementary. Both legal instruments are applied in proceedings in cross-border proceedings in civil or commercial matters, but cover different procedural aspects. |
| Brussels Ia Regulation[135] | - Harmonised rules on international jurisdiction in civil and commercial matters.<br>- Recognition and enforcement of judgments. | - Complements Regulation (EC) 1206/2001 in proceedings concerning civil and commercial matters (excluding family matters).<br>- A problem concerning the relation between the Brussels Ia Regulation and Regulation (EC) 1206/2001 exists with regard to provisional measures in the meaning of Article 35 Brussels Ia Regulation.[136] |
| Brussels IIa Regulation[137] | - Harmonised rules on international jurisdiction in family matters.<br>- Recognition and enforcement of judgments. | - Complements Regulation (EC) 1206/2001 in proceedings concerning family matters. It is stated in recital (20) of the Brussels IIa Regulation that the hearing of the child in parental responsibility cases may take place under Regulation (EC) 1206/2001.<br>- Interviewees highlighted that there may be confusion in practice concerning the relationship between the two instruments, based on an overlap. Article 55 of the Brussels IIa Regulation indicates that central authorities under the Brussels IIa Regulation may "collect and exchange information: (i) on the situation of the child; (ii) on any procedures under way; or (iii) on decisions taken concerning the child". On this basis, interviewees highlighted cases in which courts have denied applying Regulation (EC) 1206/2001, stating that the Brussels IIa Regulation should be used instead. |
| Maintenance Regulation[138] | - Harmonised rules on international jurisdiction in matters relating to maintenance obligations. | - Complements Regulation (EC) 1206/2001 in proceedings concerning maintenance obligations.<br>- Similar to the Brussels IIa Regulation, the Maintenance Regulation includes tasks for the |

[135] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

[136] The CJEU has decided in the case St. Paul Dairy Industries NV (C-104/03 (2005) ECR I-3481) that the provisional hearing of a witness under Dutch law is not a provisional measure in the meaning of Article 24 Brussels Convention (the predecessor provision to Article 35 Brussels Ia Regulation) but is governed by Regulation (EC) 1206/2001. See also Consideration 25 Sentence 2 to the Brussels Ia Regulation.

[137] Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

[138] Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1.

| | | |
|---|---|---|
| | - Recognition and enforcement of judgments. | Central Authorities that may overlap with Regulation (EC) 1206/2001 (Article 51). However, it explicitly states that such tasks should be carried out without prejudice to Regulation (EC) 1206/2001 (Article 51(2)(g)). This was welcomed by one of the interviewees. |
| Other specific instruments relating to cross-border cases in civil and commercial matters, including relating to successions and wills[139] and insolvency[140]. | - Harmonised rules on international jurisdiction, for example concerning successions and wills and insolvency.<br>- Recognition and enforcement of judgments. | - Complement Regulation (EC) 1206/2001 in the proceedings these instruments apply to.<br>- No issues have been identified. |
| Small claims Regulation[141] and the European Order for Payment Regulation[142] for uncontested pecuniary claims | - Common procedural rules for simplified and accelerated cross-border litigation in civil and commercial disputes concerning small sums or undisputed claims. | - Similar to Regulation (EC) 1206/2001, these two Regulations also contain rules on the taking of evidence. The provisions, however, differ from and complement those in Regulation (EC) 1206/2001. For example, under the Small Claims Regulation, the court shall use the simplest and least burdensome method of taking evidence.(Article 9 of the Small Claims Regulation[143]). These rules are suitable to the specific procedures governed in these instruments.<br>- No issues have been reported by any of the interviewees. However, it was highlighted that attention should be paid to the relationship between Regulation (EC) 1206/2001 and the Small Claims Regulation. |

[139] Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107.

[140] Regulation (EU) 2015/848 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19.

[141] Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1.

[142] Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1.

[143] The Small Claims Regulation, however, does only deal with the taking of evidence by a court within its own territory. If it is necessary to take evidence in another Member State (for example by hearing a witness residing there by tele- or videoconference) Article 8(2) of the revised text of the Small Claims Regulation, as applicable since 14 July 2017, expressly refers to Regulation (EC) 1206/2001.

### 5.4.4 National law

Generally, there are no frictions in the interplay between the Regulation and national law except the two following issues:

- Scope of the Regulation in relation to national law;
- Use of national law for the taking of evidence.

The scope *ratione materiae* of Regulation (EC) 1206/2001, as defined by Article 1(1), is limited to two methods of taking evidence, namely the taking of evidence by the requested court (Article 10-16) following a request from the requesting court of another Member State, and the taking of evidence directly by the requesting court in another Member State (Article 17).

However, the Regulation does not contain any provision governing or excluding the possibility for EU courts to collect evidence by other methods than those prescribed by the Regulation, such as summoning a witness in line with its national law. On this basis, the Regulation only applies if the court of a Member State decides to take evidence according to one of the two methods provided for in the Regulation.[144]

The fact that the Regulation exists alongside with other potential methods to collect evidence does not appear to be a major hurdle. On the contrary, interviewees appreciated the fact that other methods may be used in addition to those specified in the Regulation, depending on what is considered most efficient in the case at hand. This is thus coherent with the objective of the Regulation to ensure efficient and speedy taking of evidence.[145] On the other hand, the parallel application of the Regulation and other channels under national law causes, however, legal uncertainty because courts must always take two different legal regimes (European and national) into account when deciding on the most appropriate channel for taking evidence abroad. In fact, the relationship of Regulation (EC) 1206/2001 with national law is not entirely clear for all professionals applying the Regulation. For example, the question has been raised by courts in Estonia when national methods for the takings of evidence may be used instead of those prescribed in the Regulation.

For requests under Regulation (EC) 1206/2001, the evidence is either taken under the law of the requested Member State (Article 10 ff.) or the requesting Member State (Article 17).

### 5.4.5 The Hague Conventions and other bilateral or multilateral agreements

[144] This is supported by the CJEU's interpretation of the Regulation: CJEU 06.09.2012 - C-170/11 - Lippens/Kortekaas, unalex EU-532; CJEU 21.02.2013 - C-332/11 - ProRail BV/Xpedys NV et.al., unalex EU-546.

[145] This was also the finding of the Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 17.

Regulation (EC) 1206/2001 is coherent with the Hague Conventions and other bilateral or multilateral agreements.

Article 21(1) of Regulation (EC) 1206/2001 stipulates that the Regulation prevails over other bilateral of multilateral agreements or arrangements of the Member States, in particular the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. These continue to apply in cases outside the scope of the Regulation where all Member States concerned are a party to the Hague Conventions.[146]

In addition, Member States are free to maintain or conclude bilateral or multilateral agreements or arrangements to further facilitate the taking of evidence in cross-border civil and commercial cases, as long as these are compatible with Regulation (EC) 1206/2001 (Art. 21(2)). Based on the information available on the e-Justice portal, at least nine Member States have one or more agreements relating to the taking of evidence in place.[147]

No difficulties in relation to the coherence of the Regulation with the Hague Conventions and other bilateral or multilateral agreements were identified based on the research and consultations carried out by the study.

### 5.4.6 Conclusion

The Regulation is largely coherent internally, as well as with other EU policies, which have similar objectives, and national law.

## 5.5 EU added value

The EU added value test is performed on the basis of the effectiveness and efficiency evaluation criteria. The following section presents the main benefits of the EU intervention, and explains to what extent the positive effects could not have been achieved at national level.

In areas which do not fall within the EU's exclusive competence, the Union should act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States alone (Article 5 TEU). Thus, it is necessary to determine whether the objectives of Regulation (EC) 1206/2001 could also be achieved without EU action.

[146] Cf. Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matters, pp. 15-16, available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

[147] Nine Member States indicated that they do not currently have such agreements in place. For the other Member States, the information is not available on the English version of the e-Justice portal.

The objective of Regulation (EC) 1206/2001 is to facilitate the taking of evidence in cross-border cases. Before the Regulation was in place, this was done by means of bilateral and multilateral agreements or on the basis of national law (e.g. summoning witnesses directly to the court in which the proceedings are held). The main benefits of the Regulation according to the stakeholders consulted as part of the study and other sources include the introduction of standard methods for the taking of evidence that are used in the whole EU, including based on court-to-court communication and standard forms.[148] While it would also be possible for Member States to establish court-to-court communication and standard forms on a bilateral or multilateral basis,[149] it is unlikely that a common approach within the EU would develop that way. In addition, a clear improvement compared to the previous system could be identified.[150]

Nevertheless, as pointed out above, where taking of evidence abroad is necessary it is often effected outside the Regulation in accordance with national law. This is not necessarily a problem since the Regulation by its current design is non-mandatory and admits the taking of evidence under national law where considered preferable. But the parallel applicability of the Regulation and other channels under national law causes some legal uncertainty because courts must always take two different legal regimes (European and national) into account when deciding on the most appropriate channel for taking evidence abroad. Measures addressing the reasons that make the application of national law outside the Regulation attractive or possibly bringing effective and efficient methods existing under national law within the scope of the Regulation could further improve the situations.

This leads to the conclusion that the added value brought by the EU action is displayed in particular in those cases in which the Regulation is applied by courts, while cross-border taking of evidence also works without the Regulation in many other cases due to its specific non-mandatory character. This flexibility was appreciated by stakeholders, who indicated that the method for taking of evidence always depends on the specific situation. In addition, the non-application of the Regulation even in cases where that would be advantageous can partially also be explained by a lack of awareness of legal professionals, specifically against the background of its non-mandatory nature, which makes it tempting for courts to stick to methods under their national law they are more familiar with. Thus, it is possible that the Regulation might bring additional added-value if it was applied in a higher share of cases than it is today.

Therefore, in spite of the limitations, action at EU level was able to provide a clear added-value in those cases the Regulation was applied, as EU action contributed to

[148] These points were raised in the interviews conducted as part of this study as well as in the following sources: Report from the Commission on the application of the Council Regulation (EC) 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, 5.12.2007, COM(2007) 769 final, p. 5; Mainstrat (2007), Study on the application of Council Regulation (EC) No 1206/2001 on the taking of evidence in civil or commercial matter, pp. 7, 8 available: http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf

[149] Developed based on the forms included in the Hague Convention.

[150] *Ibid.*

achieving the relevant objectives in a way not possible at national level because judicial cooperation mechanism cannot be put in place by Member States alone.

## 6. CONCLUSIONS

Overall, Regulation (EC) 1206/2001 has made a contribution to achieving its general as well as specific and operational objectives. The introduction of common methods for taking evidence has been welcomed by practitioners. The introduction of standard forms and communication channels has facilitated communication. The Regulation has increased the efficiency of legal proceedings– both compared to the Hague Convention and over time between 2001 and 2017. The Regulation thus contributes to an area of freedom, security and justice and a smooth functioning of the internal market. It increases mutual trust between courts and helps to reduce the burden for citizens and businesses engaged in cross-border proceedings.

There is room for improvement based on a number of obstacles identified. These obstacles are to a very significant extent related to delays and costs for businesses and citizens caused by the failure to exploit the potential of modern technologies for speedier communication and direct taking of evidence. The most striking examples in that regard are the lack of use of electronic communication in exchanges between the authorities and courts of Member States which are still very predominantly paper-based on the one hand and the only marginal use of electronic communication for the direct taking of evidence, in particular videoconferencing. The uptake of modern technologies is not currently an obligation under the Regulation itself, but depends entirely on individual efforts in Member States to introduce modern technologies in the judiciary and the overall move towards digitisation, and this has led to very slow progress in absolute terms but also in comparison to the use of modern technologies in domestic settings.

The Regulation by its design is not mandatory and leaves courts the possibility to take evidence abroad either under the Regulation or on the basis of their national law where perceived preferable or more efficient. This has led to a significant but limited uptake of the Regulation in practice. The flexibility and a bigger range of options to choose from is not a problem per se and may actually contribute to the overall efficiency of the system of cross-border taking of evidence but it has also led some legal uncertainty caused by the parallel application of the Regulation and channels under national law and could be regarded as a potential area for improvements in terms of providing greater legal clarity whilst keeping the potential for efficiency gains afforded by the current situation.