



Council of the
European Union

Brussels, 6 June 2018
(OR. en)

Interinstitutional File:
2018/0203 (COD)

9620/18
ADD 3

JUSTCIV 132
EJUSTICE 65
COMER 50
CODEC 931

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	31 May 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SEC(2018) 271 final
Subject:	Regulatory Scrutiny Board Opinion Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1206/2001 of 18 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters)

Delegations will find attached document SEC(2018) 271 final.

Encl.: SEC(2018) 271 final



EUROPEAN COMMISSION

Brussels, 31.05.2018
SEC(2018) 271 final

REGULATORY SCRUTINY BOARD OPINION

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}

{SWD(2018) 284 final}

{SWD(2018) 285 final}



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2018)

Opinion

Title: Impact Assessment / Modernisation of judicial cooperation: taking of evidence

(version of 10 April 2018)*

Overall opinion: POSITIVE

(A) Context

Each year, millions of EU civil and commercial court proceedings have cross-border implications. The EU has a legal framework for judicial cooperation across borders.

The EU Justice Agenda for 2020 calls for examining how to strengthen civil procedural rights, e.g. when taking evidence. The Commission included this issue in its 2018 Work Programme. More efficient judicial cooperation is also consistent with the Commission's Digital Single Market Strategy.

Regulation 1206/2001 establishes a system of direct and rapid transmission of requests for the taking of evidence between courts in different Member States. It provides criteria for the requests' form and content. The Regulation also sets conditions for a court to take evidence directly in another Member State.

Courts often carry out cross-border taking of evidence without recourse to the Regulation. An evaluation of the Regulation identified some weaknesses. The present impact assessment examines ways to address these weaknesses, and to increase the Regulation's effectiveness and efficiency.

(B) Main considerations

The Board gives a positive opinion, with a recommendation to further improve the report with respect to the following key aspects:

- (1) The urgency and need for change do not come out clearly from the evaluation and the stakeholder consultations.
- (2) The presentation of the options is incomplete. It does not distinguish clearly enough between major and minor problems. It is not sufficiently clear how interventions would result in desired outcomes.
- (3) The report does not explain what a sound monitoring and evaluation framework would look like.

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(C) Further considerations and recommendations for improvement

(1) The report should better explain the relationship between this initiative and the closely related initiative on the service of documents. It should also better explain the context of the revision and the link with eCodex.

(2) The report should better build on the evaluations' conclusions and integrate the lessons learned into the problems section of the impact assessment. The evaluation should help identify which issues require further analysis in the impact assessment and which issues are more straightforward.

(3) The evaluation and the impact assessment should do more to present available evidence underlying the conclusions, e.g. on administrative burden. This includes more rigorous reporting on evaluation findings and stakeholder views, clearly indicating when stakeholder groups had mixed or diverging views.

(4) The report could restructure the policy options and present them in the main part of the report. The problem tree should show a direct link between the policy objectives and options. The report should distinguish between policy measures and policy options in line with the Better Regulation Guidelines, and explain the logic underlying the policy options. In line with the evaluation, it should focus on the main issues to assess.

(5) The impact analysis could more clearly present the costs and benefits of the policy options. It would be helpful to distinguish between the short term and the long term, including the costs of video-conferencing and of mandatory use of eCODEX. This also applies to REFIT considerations, i.e. estimates of administrative burden reductions.

(6) The report should clarify whether the preferred option only codifies CJEU case law or whether there are further changes. It should better explain what the envisaged codification covers in practice and substantiate any departure of the envisaged measures from the Court's rulings.

(7) The report should consider possible impacts on fundamental rights, and discuss any measures to ensure protection of electronically transmitted personal data.

(8) Regarding monitoring and evaluation, the report could clarify how the indicators it proposes would be used, what current values are and what future values would be evidence of success. It should indicate who would gather these data and how much this would cost.

The Board takes note of the quantification of the various costs and benefits associated to the preferred option(s) of this initiative, as assessed in the report considered by the Board and summarised in the attached quantification tables.

Some more technical comments have been transmitted directly to the author DG.

(D) RSB scrutiny process

The lead DG shall ensure that the recommendations of the Board are taken into account in the report prior to launching the interservice consultation.

The attached quantification tables may need to be adjusted to reflect any changes in the choice or the design of the preferred option in the final version of the report.

Full title	Impact assessment on the modernisation of judicial cooperation in civil and commercial matters in relation to the cooperation
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	between the courts of the Member States in the taking of evidence governed by Regulation (EC) No 1026/2001 of 28 May 2001
Reference number	2017/JUST/010
Date of RSB meeting	3 May 2018

ANNEX: Quantification tables extracted from the draft impact assessment report submitted to the Board on 16/04/2018

(N.B. The following tables present information on the costs and benefits of the initiative in question. These tables have been extracted from the draft impact assessment report submitted to the Regulatory Scrutiny Board on which the Board has given the opinion presented above. It is possible, therefore, that the content of the tables presented below are different from those in the final version of the impact assessment report published by the Commission as the draft report may have been revised in line with the Board's recommendations.)

I. Overview of Benefits (total for all provisions) – Preferred Option		Comments
Description	Amount	
Eliminate unnecessary costs for taking evidence	Direct benefits The preferred package of options will reduce 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, there have reportedly been cases where citizens wished or were requested to appear as witnesses in proceedings pending in another Member State, and where the court required their physical presence despite explicit requests of the citizens to be heard by distance means of communication (e.g. videoconferencing). This will also contribute to legal certainty for public authorities, legal professionals, citizens, and businesses and would reduce current unnecessary costs.

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<p>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.</p>	<p>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.</p> <p>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.</p>	<p>In reply to the public consultation, 44 % of the stakeholders responded that the option of using videoconferencing as part of the direct channel of taking evidence is appealing.</p>
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<p>By accepting electronic (digital) evidence produced or stored in another Member State</p>	<p>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.</p>
<p>By making e-Codex mandatory tool</p>	<p>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.</p>
<p>By replacing the notion 'taking of evidence' (Article 1) with 'other judicial acts'</p>	<p>The broadened scope increases access to justice and offers a freedom of choice concerning the most appropriate means to take evidence across borders.</p>
<p>By introducing a new definition of 'courts', other authorities should be able to benefit from the Regulation on taking of evidence.</p>	<p>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.</p>
<p>By defining other means of cross-border taking of evidence</p>	<p>This will reduce diverging interpretations as to what is considered "taking of evidence" within the meaning of the Regulation. An autonomous European meaning to the concept of "taking of evidence" will enhance the effectiveness of the Regulation.</p>

II. Overview of Costs – Preferred Option						
Objective/Policy option	Citizens		Courts/Authorities		Legal professions	
	One-off	Recurrent	One-off	One-off	One-Off	Recurrent
Eliminate unnecessary costs for taking evidence	n/a	n/a	Initial implementation costs for videoconferencing for Member States willing to use this method of taking of evidence	Training courses	Training courses	n/a
			1 court equipment=25000 Euro ¹	20 M€ ²	30000 €	n/a

¹ <https://www.videokonferenz.tv/videokonferenz-rate-ueber-kostenvergleich/>.

² Gross yearly salary of the professional judges (mean across the countries addressed in the report: between 36700 € (beginning career) and 65800€ (supreme judges) – using a hypothetical overall value of 45 K€ and assuming a single day of training is required and that 1 trainer also needs to be accounted for to train 10 judges, one gets to an initial one-off training cost of 20 M€ for judges (see attached spreadsheet).
<https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>.