Council of the European Union
General Secretariat

Interinstitutional files:
2018/0203(COD)

Brussels, 04 November 2019

WK 12364/2019 INIT

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From:	The Belgian delegation
To:	Working Party on Civil Law Matters (Service of documents/Taking of evidence)
Subject:	Belgian position on article 17b of the Taking of evidence proposal

In preparation of the Working Party on Civil Law Matters (Service of documents/Taking of evidence) meeting on 7th and 8th November 2019, delegations will find attached the Belgian considerations on article 17b of the Taking of evidence proposal.

Belgian position on article 17b of the Taking of evidence proposal

1. The link with, and differences with the 'The Hague Convention of 1970 on the taking of evidence abroad in civil or commercial matters

This article 17b, which isn't in the current ToE-regulation, seems to be loosely based on a similar article in the Hague convention of 1970 on the taking of evidence abroad in civil or commercial matters (https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf), and more precisely on article 15. This article 15, that gives State Parties the possibility to require the prior consent of the requested state party, should be read together with article 21 of that convention, to which France referred during our discussions last Monday. This article 21 contains a number of requirements the evidence seeking diplomatic or consular officer should satisfy when performing the ToE-exercise abroad.

Belgium is not a party to this Hague Convention of 1970, so we never agreed upon such a mechanism, even though it contains a number of safeguards not provided for in the proposed article 17b ToE.

On a sidenote, for Service of Documents abroad, Belgium always made clear that it is against the involvement of diplomatic and consular officers. See for example our notification in the European judicial atlas concerning the current EU SoD-regulation: *"Belgium is opposed to the exercise in its territory of the right conferred by Article 13(1)."*.

2. Questions raised by the proposed article 17b ToE, as it stands

a) Absence of the need for prior consent – justified?

In the proposed article 17b ToE, we're talking about the taking of evidence on the territory of another MS (that we will call here the 'host member state'), even though that taking of evidence can only concern nationals of the evidence seeking member state. The fact that the use of the mechanism for ToE provided for in the proposed article 17b ToE will not be imposed on MS, does not alter the fact that Member States will be obliged to accept ToE-activity performed by representatives of other MS in their territory, without their authorities being aware of it.

From a procedural point of view, the taking of evidence does seem more complex and may be more delicate than the service of documents. This may well explain why, under art. 17 of the ToE-regulation (current and future) on the direct taking of evidence by the requesting court, prior consent is needed for the direct taking of evidence, whereas that prior consent doesn't seem to be required under art. 15 (current and future) of the current SoD-regulation (on the direct service of documents).

We deliberately don't use the words 'requesting MS' here, because no prior request/consent at all will be needed under the proposed article 17b ToE. This means that, in practice, courts of other MS, benefiting from the principle of trust within the area of freedom, security and justice, will need approval/consent of the requested MS to directly gather evidence abroad, also when the subject of the ToE-exercise is a citizen of the requesting MS (art. 17). And rightly so, in our opinion. But diplomatic and consular officers would not need such prior consent? We think and feel there is some kind of an unbalance here in the proposal, between two mechanisms for the direct taking of evidence (since both art. 17 and 17b will be within section 4 of the ToE-regulation).

b) Potential problematic consequences of the absence of the need for prior consent

The fact that no prior request should be made to the host MS, and thus that no prior consent of that host MS is needed, **raises the question who should and will be able to verify whether there really was no 'compulsion', whether the subject in question of the ToE-exercise really cooperated voluntarily?**

- The host MS can't, because its authorities will be blissfully ignorant lacking the need for a request.
- Can the evidence seeking MS? We dare to doubt that:

  i. In the proposed article 17b ToE, and contrarily to what is provided in article 17, 3 (on the direct taking of evidence by the requesting court), we don't even say that there should be a designation by a court in accordance with the law of the evidence seeking MS. This creates a number of issues:

  - Firstly, this means that the court cannot exercise any control on who's designated to gather the evidence; although, as our Ministry of Foreign Affairs pointed out rightly, most diplomatic officers and consular agents didn't receive any (specific) formation to perform acts of taking of evidence, with the necessary respect for the right to a fair trial of the persons concerned.
  - Secondly, this could raise questions on separation of powers, since it will not be the court (judiciary) before which the procedure is pending, that will designate the person who should perform the ToE-exercise in the context of that procedure. It will (in essence) be the executive power.

ii. What's more, contrary to what's provided for in art. 17, 6 ToE for the direct taking of evidence by the requesting court, the proposed article 17b doesn't specify anywhere that these diplomatic or consular officers should respect the rules on taking of evidence of their own MS, supposed that these officers, often not specialised in taking of evidence, would know these rules. This could prove to be problematic.

iii. Since the execution of the ToE-exercise abroad will be performed without any involvement of the court or someone designated by it, the court will only have the possibility of an *a posteriori* control on the admissibility of the evidence gathered, and thus also on the fact whether there was compulsion or not. We wonder how the court will be able to verify such thing in practice *a posteriori*.

Moreover, as we already mentioned, article 17b would be inserted in section 4 of the current regulation, which is entitled *'direct taking of evidence by the requesting court'* (underlining added). If we are not mistaking, this title will not be modified by the current proposal, although:

– As explained above, in the context of the proposed art. 17b, no prior request is needed.

– And secondly, it will not be a real direct taking of evidence by a court.

In short, all the safeguards built in into art. 17 (direct taking of evidence by the requesting court) of the ToE-regulation, safeguards not modified by this proposal, or built in into art. 15 read together with art. 21 of the 1970 The Hague Convention on ToE, are for one reason or another thrown overboard in the proposed article 17b ToE. We wonder whether this is justified, and fear that this will create a number of practical and legal issues.

For all these reasons, we have strong doubts on the proposed art. 17b ToE.

We'd like to learn from the other delegations what's their view on the proposed article 17b ToE in the light of the aforementioned considerations; unless a majority would express its support for this article, we would propose to delete it from the proposal.