ALEŠ GALIČ

THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE ON CROSS-BORDER TAKING OF EVIDENCE

Judicial Training on Service of documents & taking evidence abroad (CI/2016/06); EJTN Civil Law Project; 17–18 November 2016; Academy of European Law (ERA), Trier, Germany

1. INTRODUCTION

The objective 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 (European Evidence Regulation; hereinafter: EER) is to enable a court of a Member State to take evidence in a simple, effective and swift manner in another Member State through direct contact with judicial authorities of the latter. This is not supposed to be achieved through unification (or even harmonisation) of law of evidence, which would be very difficult because of ground-breaking conceptual differences between law of civil procedure and law of evidence in particular of Member States, but by encouraging judicial cooperation. Concerning structure, definitions, scope of application, rules on costs as well as the method of taking evidence through requested court the EER is inspired by the Hague Evidence Convention of 1970. Clarification of certain concepts concerning the Hague Convention can, as the European Court of Justice (now: Court of Justice of the European Union; hereinafter CJEU) confirmed in Werynski, therefore also be used in order to clarify identical issues in the framework of the EER. Nevertheless the EER departs from the system established by the Hague Convention in many aspects. To start with, the EER is modernised as it relies heavily on use of standard forms and promotes the use of modern technologies. More importantly, it amounts to a clear paradigm shift. It is not the protection of national sovereignty which is the major concern in regard to cross border legal assistance. Rather, the major goal is to protect interests of individual litigants - their right of access to court and the rights of defense. Cross-border taking of evidence should be organised in such manner as to save cost and time, but also to ensure adequate results on the merits. In line with these principles, the EER promotes a direct cooperation between courts of EU member states (rather than rely on the system of “central authorities”, as set out in the Hague Convention) and it also allows direct taking of evidence by the court of origin.

2. BINDING OR NON-BINDING CHARACTER OF THE EER

Case No. 1

The proceedings are brought in the German court. The court should hear 5 witnesses, residing either in Romania or Italy and appoint an expert, whose remit includes the carrying out of investigations, including entry into business premises, inspection of premises and public spaces and registers; and obtaining of evidence in Romania. May the Court Instead of applying methods, provided for in the Evidence Regulation, simply (1) summon the witnesses to appear

* Professor of Civil Procedure and International Private Law, University of Ljubljana, Slovenia.
Ales.galic@pf.uni-lj.si
in the evidentiary hearing in the German court in accordance with its national law (and serve the summons pursuant to the Cross-border Service of Documents Regulation) and (2) appoint a German expert and instruct him to perform his tasks in Romania.

The claimant objected the chosen method concerning the examination of witnesses. He argued that the Evidence Regulation prevails over the national law; i.e. the court could only choose between the option of direct taking of evidence (in Poland, Romania and Italy) or the option of taking evidence through the requested court. In addition, even if the Evidence Regulation does not enjoy exclusivity, constitutional procedural guarantees should be respected and the method, which is the most effective, should be chosen. Here, it cannot be realistically expected that most of the foreign witnesses will indeed come to Germany to give evidence. Consequently, the claimant argues that his constitutional right of effective access to court and right to be heard would be violated.

On the other hand, the defendant objected the appointment of the German expert. He argued that the expert is perceived as an »officer of the court« (»an extended arm of the judge«) and it would thus violate sovereignty of the Italian state if »officers of the court« of one member state would, except by methods provided for in the Evidence Regulation, perform official acts in another MS.

Are the claimant’s and the defendant’s objections well-founded.

The court nevertheless decides to proceed in the described manner. However, 3 out of 5 witnesses do not appear at the evidentiary hearing. On the other hand, the German expert, while being able to perform some of its tasks in Romania, is faced with the problem that the owner of one of the warehouses, where the defendant’s products are stored, denies him access.

May the court apply coercive measures – e.g. impose fines – against foreign witnesses who failed to appear in the German court? If yes, can these fines be enforced in another MS pursuant to the Brussels I Regulation?

Is there any possibility to overcome the problem of the denied access for the expert?

One of the Italian witnesses, while refusing to attend a hearing in Germany, informed the German court that they would be willing to testify via video-link. The German court (and the parties as well) agree with the idea. The court, now encouraged by the CJEU’s position in Lippens, believes that also a videoconference can be conducted without any use of the Evidence Regulation, thus excluding any involvement of the Italian courts. It is agreed that during the videoconference the witness will be in the conference room of the company, where she is employed and which is equipped with all necessary facilities for a videoconference.

Can the court proceed in the suggested manner?

2.1 Witnesses

The most important issue in regard to the EER, which the CJEU has so far been addressed to clarify, concerns the question whether the EER is of a binding (mandatory) or non-binding (optional) nature. The question is whether the judge, when e.g. a witness lives abroad is restricted to applying one of the methods provided by the EER (either direct taking of evidence or taking of evidence through the requested court) or may it rely on rules on summoning and examining witnesses as provided in national law? The CJEU - first (for
witnesses) in *Lippens*\(^4\) and later (for expert evidence) in *Pro Rail*\(^5\) - answered this question in affirmative.

From the CJEU’s judgments in both cases, it follows that the EER is only to be used when the court of the first Member State *decides* to take evidence in one of the two ways provided by the EER. Art. 1 EER provides that »Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests< taking evidence in another Member State. The Regulation does not determine when taking of evidence abroad must be taken in the first place. It is thus left to the national law of each contracting state to define when evidence needs to be taken abroad. Thus, as the CJEU confirmed in *Lippens*, a judge may summon the witness who lives abroad to appear at an evidentiary hearing in his court. Of course, the summons needs to be served on the witness abroad pursuant to the EU Cross-border Service Regulation.\(^6\) But once the summons is properly served, the position of that witness is no different from any other witness living within the country where proceedings are pending. However the problem of enforcement of coercive measures against uncooperative foreign witnesses remains.

The CJEU explained that the EER does not contain any provision governing or excluding the possibility of summoning, by the court of a Member State, a party residing in another Member State to appear and make a witness statement directly before it. As a rule, the EER shall be applied only if the court of a Member State *decides* to take evidence according to one of the methods provided for by the EER. The Court noted that in certain circumstances it might be simpler, more effective and quicker to hear a party in accordance with the provisions of its national law instead of using the means of taking of evidence provided for by the EER. This method based on the application of national law may give the court a possibility to question the party directly, to confront him with statements of other parties or witnesses present at the hearing and to verify itself a credibility of his statement. According to recitals of the Preamble to the EER, the aim of this instrument is to make taking of evidence in a cross-border context simple, effective and swift. The taking of evidence must not lead to the lengthening of national legal proceedings and the EER removes obstacles, which may arise in this respect. Consequently, the interpretation of the provisions of the EER which prohibits the court from summoning as a witness a party residing in another Member State and hearing that party under the national law of that court, having the jurisdiction as to the substance of the matter, would be contrary to the above-mentioned purpose of the EER. It would also limit the possibilities for the court to hear that party. The EER therefore does not govern taking of evidence exclusively or exhaustively. Its aim is to facilitate taking of evidence, even by allowing use of other instruments having the same purpose. If the party fails to appear as a witness without a legitimate reason, the court remains free to take any measures available under the national law of its Member State, if the measures are applied in accordance with the EU law rules.

Indeed, it can be added that often where the party is to be heard as a witness, it is easier, more efficient and faster for the court with jurisdiction to hear the party in accordance with provisions of its national law instead of applying the method of obtaining evidence with legal

\(^4\) Judgment of the Court (First Chamber) of 6 September 2012. Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others. Case C-170/11.

\(^5\) Judgment of the Court (First Chamber) of 21 February 2013. ProRail BV v Xpedys NV and Others. Case C-332/11.

assistance. Differently to the separate hearing by the requested court, the litigating court at the main hearing also has an option to present the party with statements of other parties or witnesses, and to verify the credibility of his or her testimony with possible additional questions, with consideration of all the factual and legal aspects of the case.

2.2 Experts

In *Pro Rail* the CJEU extended its position of a non-binding character of the EER to expert evidence. Thus the court may appoint an expert pursuant rules of its national law although (a part of) the expert’s work would need to be accomplished abroad. The appointed expert is not prevented from accomplishing a part of its task (e.g. inspections, measurements, examinations, interviews) abroad and there is no need to seek approval of foreign authorities. This decision came as a surprise for many civil lawyers who perceive a court-appointed expert to be an “extended hand” or an “officer” of the court and concerns were raised that the sovereignty of a foreign state is breached in case of such activities of an expert, appointed by a foreign court. Indeed, before the CJEU’s decision in Pro Rail this seems to have been a majority view at least in Germany. However, the CJEU – in its euroautonomous construction – does not share this view. Only if in order to carry out the investigation directly, the expert would in certain circumstances affect the powers of the Member State in which it takes place, especially where the investigation is carried out in places connected to the exercise of such powers or in places to which access or other action is prohibited or restricted under the law of the Member State, then the method from the EER is the only one possible. The requesting court can also apply rules for direct taking of evidence and arrange formalities to be carried out by the expert investigation directly in another Member State.7

2.3 Evidence and service of documents: same dilemma – different solution

It is interesting to note that in the other area of traditional international judicial assistance - cross-border service of documents - the approach of the CJEU is exactly the opposite. In *Alder*8 the CJEU held that the use of the EU Cross Border Service Regulation is binding if the addressee resides abroad. Therefore rules of domestic laws, which enable for avoiding service in other states, are not compatible with Art. 1 of the Regulation (it should be noted that numerous legal systems have successfully invented ways of avoiding service abroad by providing for different – essentially fictitious – methods of service within their own jurisdiction). On the face of it is difficult to see why the approach as to the relation between the EU Regulation and the national law concerning two related issues (cross-border service and cross-border taking of evidence) is exactly the opposite: for cross-border service of documents the judge is precluded from relying on his national law and must use the methods provided in the EU Regulation, whereas for cross-border taking of evidence, the judge is still free to apply its national law and make the EU Regulation effectively inoperable.

A closer look at the arguments offered by the CJEU however reveals that the approach is consistent and logical. Concerning both Regulations the main concern of the CJEU was to ensure the maximum possible respect for fundamental procedural guarantees. Use of fictitious methods of service (in order to avoid the need to serve documents abroad) jeopardizes the party’s right to be heard and therefore it cannot be regretted that such methods are no longer admissible. On the contrary the possibility of continued use of methods of e.g. summoning

---

7 ProRail BV v Xpedys NV and Others. Case C-332/11.
8 Judgment of the Court (First Chamber) of 19 December 2012. Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski. Case C-325/11.
foreign witnesses to appear in an evidentiary hearing in the court of origin, as the CJEU convincingly explains, can add to the effectiveness of taking of evidence and to a better procedural position of the parties.

2.4 Circumventing the EER with use of modern technologies?

Since the CJEU confirmed that the national court can simply circumvent the EER and avail itself to the methods of summoning e.g. witnesses by its national law, the question is put whether this applies to organising cross-border video-conferences as well. May the court in one member state (which national law enables for participating in hearings via video-conference) organise a video conference (e.g. for examination of a foreign witness) with a person physically present in another member state without any reference to and procedures under the EER? The answer to this question, in my opinion (there is no explicit position taken by the CJEU yet), should be negative. True, the EER is – as discussed above – non binding and it does not prevent the court to take evidence pursuant to its national law (e.g. by summoning the foreign witness to appear at the evidentiary hearing). But this of course does not mean that the judge from one member state can carry out procedural acts in the territory of another member state. This can only be done if conditions for direct taking of evidence under Art. 17 EER are met. Concerning cross-border video conference it should be taken into account that they take place in the territory of two countries; thus not only is the witness via video link “present” in the country where proceedings are pending, but also vice versa: the judge conducting the hearing is also “present” in the country where the witness is situated. This however – as it clearly follows from Art. 17 EER is only permissible if conditions for direct taking of evidence are fulfilled. In conclusion, cross-border video conferences (or phone conferences) for purposes of taking of evidence cannot be organised unless one of the methods, set out in the EER is used. It should be noted that pursuant to the EER a videoconference can be organised both as direct taking of evidence as well as via the requested court. The method chosen will determine, which judge – the one from the requesting or the one from the requested court – will be the dominus litis of the evidentiary hearing.

2.5 Coercive measures

If a court decides that it will apply its national law and summon the witness, residing abroad, a question arises how to proceed if the summoned foreign witness does not appear. The experience shows that persons residing abroad often ignore courts’ orders to provide evidence. Although the CJEU – rightfully - confirmed in Lippens that coercive measures may be used against foreign witnesses as well, it should be noted that these are necessarily of only limited use. Of course, measures of physical coercion in a territory of a foreign state are not an option. What remains is the imposition of fines, but also these can only be effective if the foreign witness possesses assets (or is – at some stage in the future - physically present) within jurisdiction. The court orders imposing fines on witnesses are not civil in nature and cannot be enforced abroad pursuant to the Brussels I Regulation. And of course, a foreign witness has to be properly served abroad (pursuant to the EU Cross Border Service Regulation) which can often take long time and is not necessarily efficient in all cases.

Concerns that imposing coercive sanctions against uncooperative foreign witnesses violates national sovereignty of a foreign state are in my opinion clearly unfounded. The court order relates to a required act in the country of this court (attending a hearing). If coercive measures have no cross border effects, the issue of national sovereignty cannot play any role either. In
any case it has to be borne in mind that the requirement for the witnesses to attend the hearing in a civil case is not for the benefit of the court, organising that hearing, but for the benefit of effective access to justice for individual litigants in that court. This should be the main concern when setting standards of taking of evidence having cross border implications.

2.6 What if the person, summoned pursuant to the national law, does not attend: “failed evidence” or application of the EER?

Bringing witnesses to the court of origin is often combined with time and cost consuming efforts. The question therefore arises whether in case when the summoned foreign witness does not appear at the evidentiary hearing and neither provides any excuse, a judge may state that taking of evidence was not successful (to the burden of a party which relied on this witness’s testimony). Or does the judge in such case need finally to resort to the use of the EER? Whereas the EER does not address this issue courts in different member states have come to divergent solutions.

In Slovenia an appellate court quashed the judgment of the first instance court which, after a witness living in Italy did not comply with the court's order to appear at the main hearing (thus after the attempt to take evidence pursuant to the national law failed), did not apply the EER. Thus, in the appellate court’s view, when the judge's efforts to take evidence without use of EER remained unsuccessful, he should apply to the EER. If the court, when the foreign witness fails to appear, “takes the easy way out” and immediately applies rules on burden of proof, without first trying to take evidence by methods provided for in the EER, the party’s right to be heard is breached. On the contrary, the German Bundesgerichtshof (BGH) has confirmed the first court's decision that the hearing of the witness in the Netherlands shall be omitted for the reason that the witness located abroad was properly summoned to appear at the court and did not comply with this order without justifiable reasons. The BGH accepted the reasoning that the way of legal assistance was out of the question due to complicated factual issues. For this reason, the judge should not have ignored the need to acquire his personal impression of the testimony.

There is no clear-cut answer to the discussed question. It all depends on the circumstances of the given case. Elements which should be considered are e.g. the value of claim, the urgency of deciding the dispute, whether the witness is under control of the party and could thus be expected from that party to ensure his presence and drive adverse consequences if it fails to do so, the possible effectiveness of coercive measures (i.e. whether the witness has assets within the jurisdiction, so that the imposed fine could be enforced), the complexity of the issues and whether the foreign judge (if the method of active judicial assistance is chosen) can be expected to effectively conduct the examination; the cooperativeness of the witness (in case direct taking of evidence is contemplated; this can namely only be done on a voluntary basis). Surely the fact that the EER does not specifically regulate the issue does not mean that there are no restrictions in this regard. Above all, the guarantees of the fair trial have to be observed. In principle it is thus necessary for the court to genuinely try to obtain evidence by all reasonably available means (thus if the attempt pursuant to the national law failed, one or both methods provided for in the EER should be used). However, the principle of proportionality applies as well and a proper balance must be struck between the resources (both the court’s and of the parties) and time spent and the goal of achieving the adequate

10 Bundesgerichtshof BGH, Beschluss vom 24. 7. 2013 - IV ZR 110/12; OLG München (lexetius.com/2013,3107) Der IV. Zivilsenat des Bundesgerichtshofs
results on the merits. Therefore it cannot be automatically excluded that in certain cases the proper way to proceed is not to try to apply the EER even if the attempt to take evidence pursuant to the national law failed. After all, similar dilemmas arise within the system of the EER as well: if the chosen option is not successful (e.g. direct taking of evidence), should the other one (taking of evidence through the requested judge) be attempted as well. The possibility that the judge can adapt the way of unfolding of proceedings to the circumstances of particular case is a positive development. The judges in the EU member states should be expected that they will proceed in a manner that ensures the proper protection of fundamental guarantees and a sound administration of justice.

The CJEU hasn’t yet had the opportunity to address these issues directly. In *Aguirre Zarraga* it however at least mentioned the EER in a very controversial case concerning the hearing of a child (and the parent abductor) in the context of a cross-border child abduction. The case concerned the child abduction (precisely: unlawful retention of the child in Germany instead of bringing him back to Spain). Pursuant to Art. 10 of the Brussels II Regulation the Spanish court (as the court of the child's habitual residence before the act of child-abduction took place) retained jurisdiction to decide matters concerning parental responsibility. It however had to ensure that both the abducting parent as well as the child – who in relevant time were physically in Germany - were given the opportunity to be heard in these proceedings. Nevertheless instead of availing itself to mechanisms provided by the Evidence Regulation the Spanish court summoned the child and the abducting mother to appear at the court hearing in Spain. Thereby it imposed a condition upon them that they would not be free to leave Spain after the hearing. In consequence they failed to attend court in Spain (and were also denied permission to be heard via videoconference). Thus this case shows the possible consequences of the court's decision to summon a witness (or a party) living abroad pursuant to its national law instead of availing itself to methods of taking of evidence provided by the Evidence Regulation.

The Spanish court (Juzgado de Primera Instancia e Instrucción No 5 de Bilbao) held that the child’s (and the abductor's – but this was not in focus in the case) right to be heard was not breached, as the Court has provided the child with the opportunity to be heard. For that reason it had no troubles in certifying the return order, issued pursuant to Art. 11/8 of the Brussels IIbis to be directly enforceable pursuant to Art. 42 of the Brussels IIbis (In view of the German court (Oberlandesgericht Celle) the actions of the Spanish court however amounted to a »serious infringements of fundamental rights« and it indicated that the position of the Spanish court (i.e. the certificate that the right of the child to be heard was respected) was »manifestly incorrect«. The CJEU did not settle the issue – what was in focus in Luxembourg was whether the court in a country of enforcement may, in exceptional cases of human rights infringements, review the certificate issued by the court in the country of origin (and answered in negative; assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin). It however indicated that, taking account of all circumstances of the case, the decision must be made with »due regard to the child’s right freely to express his or her views and that a genuine and

---

11 Judgment of the Court of 22 December 2010, C- 491/10 Joseba Andoni Aguirre Zarraga v Simone Pelz.
12 Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Child Abduction Convention (in casu: issued by a German court), any subsequent judgment which requires the return of the child issued by a court having jurisdiction on the merits under the Brussels II Regulation (in casu: Spanish court) is directly enforceable, without any possibility to object enforcement in the country of enforcement (Art. 11). Nevertheless the court of origin must, prior of issuing the certificate of direct enforceability examine whether certain conditions have been met – in particular whether the child had an opportunity to be heard (Art. 42).
effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation.

It should be stressed that cases concerning child abduction are specific. Here the decision whether to summon a person (the abducting parent and the child) to appear at the court hearing in the country of origin or to use methods given by the Evidence Regulation is particularly crucial. Such person is namely most often unwilling to appear in the court of origin, fearing criminal prosecution and/or confiscation of his/her and the child's travel documents.

Another specific aspect of these cases is that the hearing of the child (and of the abducted parent) is not exactly evidence (as means of establishing disputed facts), but (at least in the same time) a method of ensuring the parties’ right to be heard). It however seems that in the view of the CJEU the Evidence Regulation may be used for such purposes as well. The question remains whether this applies for the hearing of the child in proceedings concerned with child abduction or generally. For example, if a hearing takes place in Slovenia, witnesses are present in person, but one of the parties, residing in another member state wishes to attend a hearing via videoconference (in order to put questions to the witnesses or to offer oral arguments on points of law).

3. **PROVISIONAL / PROTECTIVE MEASURES OR TAKING OF EVIDENCE?**

<table>
<thead>
<tr>
<th>Case No. 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Slovenian company wishes to bring a lawsuit in the German court against a German company, for the alleged patent infringement. The prospective claimant (the holder of the right) wishes to obtain a search warrant allowing the to enter without warning the production facilities and warehouses of the alleged infringer in Romania and seize the infringing goods, also to allow the nominated experts of the prospective claimant to inspect the equipment used to carry out the tests even before the commencement of the procedure on the merits. In addition it wants to obtain a »preliminary hearing” of a witness, residing in Italy, prior to the bringing of proceedings.</td>
</tr>
</tbody>
</table>

*Can the prospective claimant ask for a preliminary and protective measure pursuant to the Brussels I Regulation or does this matter concern cross-border taking of evidence?*

When legal proceedings are only planned or contemplated, (Art. 1 EER) the question is put whether measures aimed at preserving evidence constitute a provisional or a protective measure within the meaning of the Brussels I Regulation or does it amount to cross-border taking of evidence and thus fails within the scope of the EER. This issue was analysed by the CJEU in *St Paul Dairy* case. It held that the concept of interim measures as referred to in the Brussels I Regulation must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of “provisional, including protective, measures”. According to the CJEU, the provision of Art. 24 is of an exceptional character and shall be interpreted strictly.

13 Judgment of the Court (First Chamber) of 28 April 2005. St. Paul Dairy Industries NV v Unibel Exser BVBA. Case C-104/03.
The term “provisional and protective measures” is to be understood as referring to measures, which are intended to preserve a factual or legal situation to safeguard rights a recognition of which is sought from the court having jurisdiction as to the substance of the case. The notion includes measures, which are intended to preserve a substantive claim in law, and does not include measures intended to preserve evidence. The purpose of the preliminary taking of evidence prior to the commencement of proceedings is different as it aims to establish or determine relevant factual circumstances, which may be decisive for a future resolution of a dispute in issue or may support an interested party as regards his position in future judicial proceedings. In view of the CJEU, uniform rules on judicial co-operation in the taking of evidence set out in the EER could be circumvented if measures for the taking of evidence could be sought directly before a court not having jurisdiction on the substance of the case in the manner the provisional or protective measures are supposed to be sought by Brussels I Regulation.

The CJEU’s ruling in *St Paul Dairy* was subject to criticism. Opinions were raised that the scope of the concept of provisional and protective measures within the meaning of the Brussels I Regulation includes also measures concerning the preservation of evidence and that, consequently, such measures could benefit from the favourable enforcement regime of the Brussels I Regulation. Indeed it is difficult to draw a sharp distinction between “preserving a substantive claim in law” and “preserving evidence”. Indeed, these criticisms were partially accepted in the new Brussels I (Recast) Regulation (Regulation No. 1215/2012). According to Recital No. 25 the notion of provisional, including protective, measures (now Article 35 of the Brussels I Regulation) should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (1). It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness (such was the case in *St Paul Dairy*). The clarification, in fact a partial overruling of the reasoning in St Paul Diary, is certainly valuable, especially for intellectual property rights infringement litigation, where such protective measures (e.g. search orders) are extremely valuable.

### 4. RECOVERY OF COSTS RELATING TO EXAMINATION OF A WITNESS?

**Case No. 3**

The Polish court, where proceedings on merits are pending, requested the Irish court to examine a witness. Under Irish law a witness is obliged to appear before a court only if he has first received payment for his travel expenses ("a viaticum").

*Who is obliged to pay the costs incurred by the witness examined by the requested court?*
*Can the Irish court require the Polish court to provide advance for this costs?*
*Can it at least subsequently reimburse costs from the Polish court?*
*How should the court proceed concerning costs if the witness did not speak English or Irish and thus the Irish court would have to engage an interpreter?*

Pursuant to Art. 18 EER the execution of the request for taking of evidence through the requested court “shall not give rise to a claim for any reimbursement of taxes or costs”. The
requesting court shall however ensure the reimbursement of “the fees paid to experts and interpreters”, and the costs occasioned by the application of Article 10(3) (which is a request for a special procedure) and Article 10(4), which relates to the use of modern technologies. The duty for the parties to bear these fees or costs shall be governed by the law of the member state of the requesting court. In addition, it is provided that where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request. If the requirement is not met, the request for taking of evidence may be rejected (Art. 14(2)d).

Costs relating to witness evidence (most typically: reimbursement of travel expenses, possibly also lost income) are thus not expressly included in the wording of the Regulation. Nevertheless, in Werynski14 the CJEU was faced with the question whether provisions of Arts. 10 and 18 can be construed so as to include, by analogy also such costs, at least for a reimbursement after the event. It would be possible to reach such conclusion if “costs and taxes” referred to in Art. 18 EER could be construed as relating only to institutional costs (costs of the court itself) and thus a contrario the reimbursement of costs of private persons involved was not excluded in this provision. The CJEU did not share this view. It clarified that the notion of “taxes and costs” should be construed in euroautonomous manner. Within the meaning of the Regulation ‘taxes’ should be understood as meaning sums received by the court for carrying out its functions, whereas ‘costs’ are to be understood as the sums paid by the court to third parties in the course of proceedings, in particular to experts or witnesses. The CJEU further invokes a systemic argument: if Article 18(1) concerned only institutional costs it would not then be necessary to provide in Article 18(2), by way of exception to the prohibition laid down in Article 18(1), for a reimbursement of experts’ costs. Since experts’ costs cannot be classified as institutional costs they would, as the CJEU explains, be excluded from that prohibition from the outset. It therefore follows that expenses paid to a witness examined by the requested court are costs within the meaning of Article 18(1) of Regulation No 1206/2001. Consequently, they are not reimbursable. The CJEU comes to this conclusion not merely by a clear grammatical interpretation of the Regulation’s provisions, but invokes a teleological and historical argument as well. Namely, the Regulation’s “predecessor” – the Hague 1970 Convention – deliberately reduced (compared to its further “predecessor” – The Hague 1954 Convention) the number of instances in which costs were to be reimbursable. The reimbursement of fees paid to witnesses, precisely because of the small amount typically involved, was deliberately dropped. Put simply, there is just too much bureaucratic hassle and possible complications involved that it would pay off to insist on country-to-country reimbursing amounts which are typically very small relating to costs for witness travel expenses. Thus, a requesting court is not obliged to pay an advance to the requested court for the expenses of a witness or to reimburse the expenses paid to the witness examined.

The pragmatic approach of the CJEU (in fact: already of the drafters of the Regulation and the Hague Convention as its predecessor) when it comes to expenses, relating to witness evidence, is sound. It should nevertheless be noted that travel expenses are – when the EER is applied – not necessarily that small, at least in the countries which adhere to a (semi-)centralised network of requested courts (and if a witness cannot be examined via videoconference).15 In addition, it cannot be excluded that the lost income that a witness who had to come to a court, can be quite high as well.

14 Judgment of the Court of 17 February 2011, C-283/09.
15 E.g. the only court in Ireland, which acts in authority of a requested court is a District Court in Dublin, in Scotland, the court acting as a requested court, for outlying Shetland and Orkney islands is in Aberdeen.
5. Final remarks

So far, the CJEU has had surprisingly few opportunities to clarify issues concerning application of the EER. According to the optimistic viewpoint this is an indication that the system established by the Regulation functions smoothly. The pessimistic standpoint however would be that this is an indication that the Regulation is either rarely used (which it is not) or that numerous controversial issues have simply been overlooked by the courts (and perhaps thus the application of the Regulation in member states is far from being uniform).

While Werynski relates to a rather minor and technical point and St Paul Dairy has to be assessed in light of the later adopted Brussels I Recast (and its Recital 25), the judgments in Lippens and Pro Rail are true landmark decisions. In my opinion they are both and regarding both the question of non-mandatory nature of the EER as well as coercive measures, a very convincing and welcome contribution to the development of the EU law in the field of judicial cooperation as well as to a proper understanding what the national sovereignty really means. True, as seen in Aguirre Zarraga, the discretion of the judge in the court of origin whether to apply regulation or simply summon persons, residing abroad, to appear in his court, is not without dangers. But it remains – as with all other cases of exercising a judicial discretion - a task of the judge to strike a proper balance between the competing interests involved and to ensure that fundamental guarantees are not breached. Numerous controversial questions concerning construction and application of EER however remain. Due to the existing profound differences in law of evidence (and general law of civil procedure) of the member states, controversies and difficulties with cross-border taking of evidence are inevitable. In the future there shall surely be ample opportunity for submitting such questions for a preliminary ruling to the CJEU.