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NOTE

from :	General Secretariat of the Council
to :	Committee on Civil Law Matters (general questions)
No. prev. doc. :	10650/00 JUSTCIV 84
Subject :	Questionnaire on a possible EU instrument for improving the cooperation between Member States on the taking of evidence abroad in civil or commercial matters - Summary of delegations' replies

1. The Vienna Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice provides for measures to improve and simplify cooperation between courts in the taking of evidence to be adopted within five years of the entry into force of the Treaty.

2. The Tampere European Council on 15 and 16 October 1999 recalled the need to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial cooperation and to enhanced access to law, notably with regard to the taking of evidence.

3. Within the framework of those proceedings and in the context of an initiative to be presented by Germany, delegations were asked to reply to the questionnaire set out in Telex No 2142 of 19 May 2000 before 21 June 2000. [1]

4. Delegations will find attached a summary of Member States' replies to the questionnaire on a possible EU instrument on the taking of evidence. A compilation of the replies can be found in 10650/00 JUSTCIV 84.

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[1] The General Secretariat of the Council has received replies from eleven delegations.

SUMMARY OF DELEGATIONS' REPLIES TO THE QUESTIONNAIRE ON A POSSIBLE EU INSTRUMENT FOR IMPROVING THE COOPERATION BETWEEN MEMBER STATES ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

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1. Legal grounds for execution of a letter of request

The legal grounds used by the Member States are mainly international conventions and, in particular, the Hague Convention of 1 March 1954 relating to Civil Procedure [1] and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters [2].

In addition to these multilateral instruments there are also supplementary bilateral agreements concluded by the Member States.

The other legal grounds are to be found in provisions of national decisional and procedural law which determine, for instance, the arrangements for the execution and sending of letters of request. Some of these national provisions transpose the rules of international conventions into national procedural law.

2. Definition of a letter of request

(a) Are the terms "taking evidence" or "perform some other judicial act" legally defined?

In most of the Member States (France, Belgium, Denmark, Germany, Luxembourg, Austria, Portugal, Finland, United Kingdom) the expressions are not legally defined.

Italian law seems to use and define the phrase "perform other judicial acts" while the 1946 Swedish law on judicial assistance enumerates the types of action which may be requested by a foreign court.

(b) Need for a definition of a letter of request

Some Member States do not consider such a definition necessary (Belgium, Denmark, majority of the German *Länder*, Portugal, Finland, United Kingdom). Others consider it useful (Luxembourg), very desirable (France), even essential (Austria).

(c) Is the term "measure of inquiry" (taking of evidence) defined?

Most national legal systems do not give a legal definition of "measure of inquiry" (Belgium, Denmark, Germany, Italy, Luxembourg, Austria, Finland, Sweden, United Kingdom).

In French law, conducting an inquiry means preparing a case for trial, and investigative measures ("mesures d'instruction") are judicial administrative measures relating to the evidence ordered by the court either at the request of the parties or automatically to establish the facts which hold the key to resolving a dispute.

Portuguese procedural law merely defines the subject matter of the inquiry, stating that its purpose should be to establish facts which are relevant to the examination of and decision on the case which are considered controversial or requiring proof.

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[1] This Convention has been ratified by all Member States apart from IRL, EL and UK.

[2] This Convention has been ratified by all Member States apart from A, B, EL and IRL.

3. Content and form of a letter of request (information, language, forms, formalities)

(a) Information

In general the delegations consider that the request should contain the information specified in Article 3 of the Hague Convention of 18 March 1970 on theTaking of Evidence Abroad in Civil or Commercial Matters, namely:

- the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- the names and addresses of the parties to the proceedings and their representatives, if any;
- the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- the evidence to be obtained or other judicial act to be performed.

Where appropriate:

- the names and addresses of the persons to be examined;
- the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- the documents or other property, real or personal, to be inspected;
- any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- any special method or procedure to be followed.

If necessary:

- information concerning any privilege or duty to refuse to give the evidence under the law of the requesting or requested State.

The Finnish delegation suggests adding the telephone number, fax number and e-mail address of the person in charge of the case in the requesting authority.

(b) Language used

Since as a general rule the legal basis for the taking of evidence is Article 4 of the Hague Convention of 18 March 1970, the request must be written in the official language (or one of the official languages) of the requested country or must be accompanied by a translation into that language.

However, exceptions are possible under bilateral mutual assistance agreements in certain Member States (e.g. Denmark, Belgium, Austria).

Some Member States accept letters written in other languages (English in Luxembourg, English or Swedish in Denmark and Finland).

Portugal has explicitly precluded the application of the second paragraph of Article 4 of the Hague Convention.

(c) Use of forms

In general the Member States do not use forms. In Finland the optional model form provided for in the Hague Convention is used occasionally.

(d) Usefulness of multilingual forms

Most of the delegations (in particular France, Italy, Luxembourg, Finland, Sweden and the United Kingdom) think that the use of multilingual forms could speed up the execution of letters of request. The Finnish delegation suggests using electronic forms on the Internet.

However, some delegations feel that their benefits might be limited and would depend on the nature of the measure requested (Belgium, Austria, Portugal). The Danish delegation has its doubts about introducing such forms.

The views of the German Länder differ on this point.

(e) Formalities necessary to ensure the validity of the evidence obtained

All of the delegations think that the requesting State could ask the requested State to follow a special procedure provided it is compatible with the law of the requested State. This rule is laid down in the Hague Conventions (Article 14 of the Convention of 1 March 1954 relating to Civil Procedure and Article 9 of the Convention of 18 March 1970 on the Taking of Evidence Abroad) and in the national provisions of certain Member States (Austria, Portugal).

Some delegations add that such a request cannot be executed when it is impossible to carry out the special formalities because of practical difficulties.

4. Authorities receiving and executing letters of request

In most cases the authorities that receive letters of request from another State are not the same as those that execute them. Requests are sent in some cases through diplomatic channels to the Ministry of Foreign Affairs (Denmark, Austria, Portugal, Finland, Sweden) or to a central authority, the Ministry of Justice (Belgium, Denmark, Germany, France, Austria, Finland, and in the United Kingdom to the Treasury Solicitor after having been sent to the Senior Master of the Queen's Bench Division of the High Court) and are executed by the competent courts.

However, there are bilateral agreements between certain Member States providing for direct communication between the courts in the contracting States (Denmark, Germany, France, Italy, Austria and Finland).

5. Direct transmission of letters of request

(a) Direct transmission of outgoing letters of request

Direct transmission without the intervention of a central authority is often possible (Belgium, Sweden) but rarely practised (Luxembourg, United Kingdom). It is expressly provided for in bilateral agreements (Germany, France, Italy, Austria, Denmark and Finland).

Under Portuguese procedural law, letters of request are sent directly to the foreign authority or court, unless a treaty or convention provides otherwise.

(b) Direct transmission of incoming letters of request

In certain Member States direct transmission of incoming letters is only possible under a bilateral agreement (Germany, France, Italy, Austria, Denmark and Finland) or if it authorised by the central authority (Belgium, Sweden).

This option is not provided for in Luxembourg and the United Kingdom, while in Portugal procedural law provides that letters of request may in principle be sent directly via any channel unless a convention, treaty or agreement provides otherwise.

6. Refusal to execute a letter of request

(a) Grounds for refusal to execute

On the whole the Member States mention the grounds provided for in the Hague Conventions, which may be summed up as follows:

- the authenticity of the document is not established (Article 11 of the Convention of 1 March 1954);
- execution of the request does not fall within the powers of the court or the requested State considers that it would prejudice its national sovereignty or security (Article 11 of the same Convention, Article 12 of the Convention of 18 March 1970);
- incompatibility, in general, with public policy in the requested State is a ground for refusal frequently provided for in national law (Belgium, Denmark, Italy, Austria, Portugal) or bilateral conventions (Belgium) or multilateral conventions (Article 11 of the Hague Convention of 18 March 1970 in the case of a privilege or duty to refuse to give evidence).

Some delegations mention other grounds for refusing to execute requests:

- insufficient information included in the request (Denmark, France, United Kingdom);
- the request falls outside the material scope of the Convention (Finland);
- failure to observe other provisions of the Conventions (Italy);
- legal impediments (Sweden).

(b) Appeal against decisions to refuse to execute

Apart from Luxembourg and Scotland, it is formally possible in all of the Member States to appeal against a decision to refuse to execute a request in accordance with national legal procedures. However, such appeals are infrequent in Denmark and Finland.

7. Presence of a member of the requesting court at the execution of a letter of request

(a) Possible presence of a member of the requesting court or a lawyer at the execution of the letter of request

The presence of a member of the requesting court and a lawyer is generally authorised by international conventions and national law.

(b) Prior authorisation for the presence of a member of the requesting court

In some Member States no prior authorisation is required (Denmark, France, Italy, Luxembourg, Sweden, Scotland).

In others (Germany, Austria, Finland, England and Wales), the presence of a member of the requesting court is subject to prior authorisation from the requested State's Ministry of Justice or the requested court (Portugal).

(c) Express request for the presence of a member of the requesting court

According to the Member States' replies, it is sufficient for the requesting court to include its request for the presence of a member of the requesting court in the letter of request.

8. Contracting Parties to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

(a) Declaration under the second sentence of Article 8 [1]

Under Article 8 of the Hague Convention any Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a letter of request. Prior authorisation by the competent authority designated by the declaring State may be required.

Some Member States (Germany, Italy, Denmark, Finland, Sweden and the United Kingdom) have made a declaration under Article 8 of the Convention. France, Luxembourg and Portugal have not.

[1] This Convention has not been ratified by AUT, B, GR and IR.

(b) Reasons for the declaration by certain Member States

The reasons mentioned by some States which have made a declaration under Article 8 may be summed up as follows:

- Germany wants to be able to check that the participation of foreign magistrates does not violate the principles of the taking of evidence and does not encroach on its sovereignty.

- Italy made the declaration in order to protect the independence of the judiciary and national sovereignty.

- Finland encourages the presence of a member of the requesting court to help the procedure run smoothly.

- Sweden considers that the right to be present is particularly important if the proceedings are held *in camera*.

- The United Kingdom thinks it likely that the declaration was made in order that as much help as possible should be provided to the requesting court, and that proper effect should be given to the relevant procedural law applied by that court.

9. Active participation by a member of the requesting court in the taking of evidence (for instance, questioning witnesses or experts)

In some Member States (Italy, Luxembourg and Sweden) a member of the requesting court may not participate actively in the taking of evidence.

In several Member States (France, Finland, Denmark, Germany, Austria, Portugal and the United Kingdom), the requesting court has the right to participate, although in some of these States it is for the judge of the requested State to authorise the active participation of the judge from the requesting court.[1]

10. Information on the place and date of execution of the letter of request

(a) Is information provided?

In most Member States the competent authority informs the requesting court or the party or its representative of the date and place of the execution of the letter of request.

Luxembourg law does not require such information to be provided.

[1] In France national law allows such presence only in the case of the parties and their representatives.

(b) Is information provided automatically or only on request?

In some Member States (Denmark, France, Italy, Luxembourg, Portugal, Finland, some German *Länder*) information is only provided if expressly requested, while in others (Belgium, Austria, Sweden, some German *Länder,* United Kingdom) it is provided automatically.[1]

(c) Active participation of the parties or their representatives in the taking of evidence

Only Italian law does not allow the parties or their representatives to participate actively in the taking of evidence, for instance by asking questions.

However, in some Member States this possibility sometimes depends on authorisation by the judge in the requested State (Denmark, Germany, Portugal, United Kingdom).

11. Use of modern communications technology

(a) Authorisation of video-taping of the questioning of witnesses

The examination of witnesses may be video-taped under some national legislation (Belgium, Luxembourg, Portugal, United Kingdom, in Germany solely for the purposes of the court and in Italy only for criminal proceedings) or may be authorised by the judge in Austria and Finland.

This right is not provided for in other countries (Denmark, Austria, France, Finland, Sweden).

In fact, video-taping does not seem to be permitted in France and Sweden.

(b) Execution of a letter of request by remote (live) testimony (video-conference, telephone conference or any other similar technological means)

The courts of certain Member States (Belgium, France, Luxembourg, Denmark and Scotland) do not use remote techniques or have never been asked to do so (Austria).

In other Member States, as in the United Kingdom, the courts may use technological means to execute a letter of request, subject to certain conditions:

- in Germany, if all concerned agree;
- in Portugal and Finland, if the technological means are available;
- in Sweden, on an experimental basis and under certain circumstances (transmission of testimony by video-conference, but without any recording).

In Italy such procedures can only be used in criminal proceedings and on condition that the Italian court authorises it and that the requesting State bears the costs.

[1] The information is not provided when the requesting authority has waived it (Austria) or stated that it does not wish to be informed (Sweden).

(c) Taking of evidence by video- or audio-taped deposition or any other similar deposition

Positions on this point vary considerably from one Member State to another. In some Member States such procedures are not applied or have never been requested (Belgium, Denmark, Germany and Austria). In other Member States a request for this procedure may be executed subject to certain conditions:

- in Italy, the procedure must be authorised by the court of the requested State;
- in Luxembourg, the judge may make sound, visual or audio-visual recordings of the taking of evidence;
- in France and Sweden, only sound recordings are permitted;
- in Portugal and Finland, the technical equipment must be available;
- the procedure is authorised in the United Kingdom.

12. Taking of evidence by a commissioner

(a) Possibility of appointing a commissioner

According to the replies from the Member States apart from Denmark and Italy, a commissioner may be appointed by the requesting court for the purposes of proceedings before that court in order to take evidence in another Member State. This possibility is provided for in international conventions (bilateral agreements and Articles 17 to 22 of the Hague Convention of 18 March 1970).

France has made a declaration concerning the application of Articles 16 and 17 of the Hague Convention and Portugal has precluded application of Chapter II of the Convention, with the exception of Article 15.

(b) Conditions for appointing a commissioner

In many Member States the conditions of appointment are those referred to in Article 17 of the Hague Convention of 18 March 1970.

In addition, some Member States have stipulated that the central authority must be given reasonable advance notice of the time, date and place of the taking of evidence and that the persons concerned by the taking of evidence must be duly summoned by an official act drawn up in or accompanied by a translation into the official language of those Member States and containing certain information specified in those Member States' declarations.

(c) Request for appointment of a commissioner

The requesting court where the case is pending may not request the appointment of a commissioner by a court in Belgium, Denmark, Luxembourg, Austria, Finland, Sweden and the United Kingdom.

In Italy and France and, in certain cases, Germany, this option does seem to be allowed.

13. Taking of evidence by diplomatic or consular representatives

Except in Denmark and Sweden, the Member States' courts may ask diplomatic or consular representatives to take evidence in another country. However, in practice this procedure is only rarely used in certain Member States (Germany when a State is slow to execute a request, Finland when the Hague Convention does not apply, Luxembourg, Austria, United Kingdom) or even never used (Luxembourg).

In contrast, this procedure is regularly used by French courts because, for instance, it means the letter of request does not have to be translated. However, the procedure is subject to the consent of the requested country.

14. Estimated number of letters of request and response times

(a) Number of requests for the taking of evidence, in particular between the Member States.

(see Annexes A and B)

(b) Time needed to reply to letters of request

No information is available from Belgium. Response times vary, depending on the courts' workloads (France) and the difficulties encountered by the judges, for instance when faced with recalcitrant witnesses (France).

However, the average time taken to respond is between one and six months:

Portugal	France Denmark	Sweden Luxembourg United Kingdom Germany	Finland Austria
1 to 2 months	max 3 months	max 4 months	max 6 months

(c) Fixed time limits

Only in Portugal does procedural law impose a maximum period of two months to execute letters of request. However, depending on the circumstances the judge may shorten, extend or renew the deadline. There is no statutory time limit in any of the other countries. In France and Austria, however, requests must in principle be executed immediately.

(d) Experience of response times

Denmark, Belgium and Italy do not have any information on the average time taken by Member States to reply to letters of request. The times given by the Member States vary. They range from a few months to over a year.

15. Ratification of the 1970 Hague Convention on the taking of evidence

All but four of the Member States (Austria, Belgium, Greece and Ireland) have ratified the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Belgium is planning to ratify the Convention. Austria does not think ratification is necessary as its network of bilateral agreements supplementing to the 1954 Hague Convention relating to Civil Procedure functions satisfactorily. [1]

16. Payment of the costs of executing letters of request

(a) Obligation to pay

In principle the execution of letters of request does not give rise to any reimbursement of costs (first paragraph of Article 16 of the 1954 Hague Convention and first paragraph of Article 14 of the 1970 Hague Convention).

However, some Member States (Belgium, Denmark, Germany, Luxembourg, Austria, Portugal, Finland [2]) specify that they may require the requesting State to reimburse compensation paid to witnesses or experts as well as the costs incurred by the enforced intervention of a law officer because the witnesses would not appear of their own free will, or expenses arising from the use of a special method or procedure for execution (second paragraph of Article 16 of the 1954 Hague Convention and second paragraph of Article 14 of the 1970 Hague Convention, bilateral Austro-British agreement).

In France the execution of a measure involving expert examinations may lead to the payment of certain costs.

(b) Calculation of costs

In Germany, the costs are calculated on the basis of the Law on Compensation for Witnesses and Experts and in Austria in accordance with the 1975 Fees Law. In Italy they are calculated with reference to current rates.

In France, the expert's fees are fixed in a report drawn up by the expert and in Portugal the calculation varies according to the nature of the measure involved.

In Austria experts are paid according to the nature and scope of their activity, while witnesses are reimbursed for travel and loss of earnings.

[1] There are no replies from Greece and Ireland on this point.

[2] To date no requests received or sent by Finland have given rise to the payment of costs.

(c) Cost of executing a letter of request from an EU Member State

Italy and Austria are not able to assess the costs, which depend on the circumstances of the case.

In France and Luxembourg only postage costs are involved. Information received from three German *Länder* indicates that the cost of taking evidence from witnesses is DEM 200, while expert advice costs much more.

England and Wales estimate costs at GBP 1 200 and Scotland at GBP 1 500.

(d) Cost of sending a letter of request to another EU Member State

Italy and Austria cannot quote figures.

The German and Luxembourg delegations mention translation costs (between DEM 300 and 500 in Germany).

There are also postage fees, which vary according to the letter of request (Luxembourg, France, United Kingdom).

(e) Method of payment

The situation is as follows:

- In Germany payment is made by transfer to a foreign bank or by non-negotiable cheque.
- In Portugal payment is made through a bank, the Caixa Geral de Depósitos, by cheque, cash or debit card once the form has been obtained from the creditor court.
- In the United Kingdom the Embassy pays by cheque.
- In France the costs incurred lead to reimbursement by the requesting authority.
- In Austria the costs are reimbursed by the central authorities involved.
- In Italy the method indicated by the foreign authorities is followed.

(f) Who is responsible for payment?

- In Germany it is the requested authority or court which makes or is responsible for payment.

- In the United Kingdom it is the Embassy.

- In France the requesting State makes the payment and in Luxembourg the Ministry of Justice.

- In Italy it is the party concerned, by order of the court.

- In Portugal the costs are generally borne by the beneficiary of the taking of evidence, in other words, the requesting party.

17. Obstacles to the execution and transmission of letters of request

(a) Obstacles to the execution of letters of request

Some Member States (Belgium, Denmark, Austria, Portugal, Finland, Sweden, United Kingdom) mainly encounter obstacles relating to the contents of the request (incomplete information concerning the name and address of the addressee, parties or witnesses, the object of the request is not precisely described, the statement of the facts of the case is not clear, the questions to be put to the witnesses are not specified).

Several Member States also sometimes encounter translation problems (Denmark, Germany, Luxembourg, Finland).

The Luxembourg delegation sometimes receives requests for procedural steps which its law does not regard as an investigative act (e.g. a request for an inventory to be drawn up by a notary).

The French delegation says that in the case of direct transmission, the requested courts have no way of knowing which court has territorial jurisdiction. It also mentions problems arising from experts' fees (guarantee of remuneration). The Italian delegation mentions the courts' workloads.

(b) Obstacles when sending letters of request

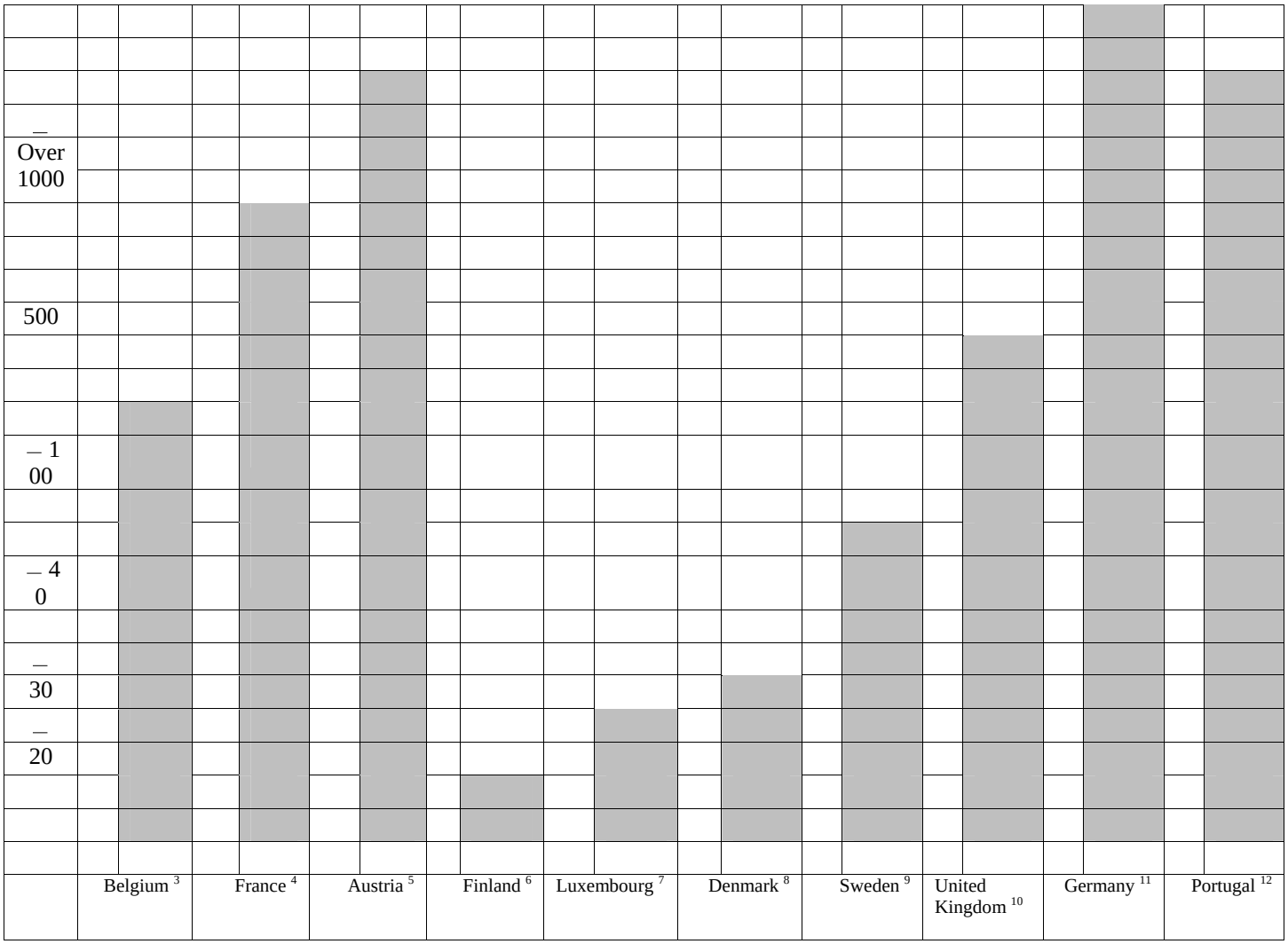
Some delegations (Italy, Luxembourg, Austria) do not think there are any major problems in sending letters of request.

However, most of the Member States (Denmark, Germany, Austria, Portugal, Finland, Sweden) complain about long delays in executing requests, which should be shortened considerably. Furthermore, certain delegations point to more specific problems:

- determining the language in which the request must be drafted (Belgium);
- determining which international instrument should apply (France);
- participation of a member of the requesting court in the taking of evidence (Austria);
- partial refusal to execute a request (Finland);
- identifying the addressee of the measure (Belgium, Portugal).

ANNEX A

Number of incoming requests [1] [2]



[1] in particular between Member States

[2] the figures are purely indicative

[3] 199 a year (average over last five years) with a sharp increase in 1999 (250)

[4] 800 cases dealt with by the central authority and many, exact figure not known, are sent by the courts

[5] approx. 2580: possible estimate, also including requests sent

[6] 15 to 20 per year. Requests made between Nordic States are not included in these figures

[7] estimated 25 per year (around twenty from another Member State)

[8] 30 requests

[9] around fifty

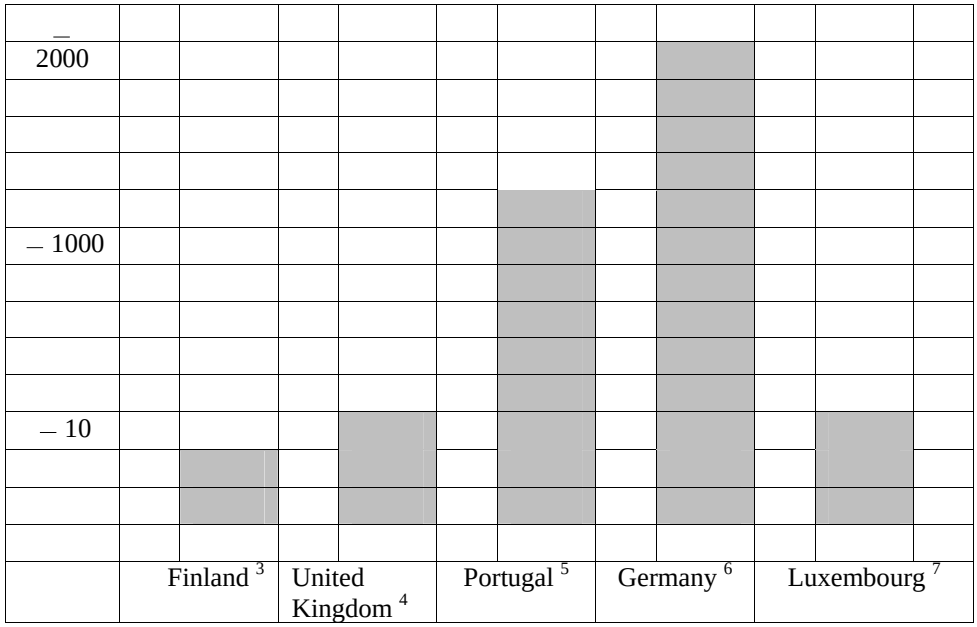
[10] 366 requests received (155 from the EC in England and Wales, and 36 in Scotland (all from the EC)

[11] 3600 in Germany

[12] 2656 in Portugal

ANNEX B

Number of outgoing requests [1] [2]



[1] in particular between Member States
[2] the figures are purely indicative
[3] 5 to 7
[4] 10, 2 of which sent to EC Member States
[5] 1200
[6] 2000
[7] 10