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TAKING OF EVIDENCE

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ÁLLAM- ÉS JOGTUDOMÁNYI KAR

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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The place of the regulation on taking of
evidence in the international civil
procedure law

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Before the regulation entered into force, due to the barriers arises from the sovereignty, the system of international legal assistance was based on bilateral and multilateral international treaties.

In this area there were two major international conventions:

- the 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.

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The previous system of international treaties did not provide an adequate basis for the entire European Union to taking of evidence.

The Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applied between only 11 Member States of the European Union

Therefore the legislator of the European Union created the Regulation No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

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This regulation is directly applicable in the Member States and it prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope concluded by the Member States.

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The scope of the regulation

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Subject matter - Article 1

The EuToER 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:
 - the competent court of another Member State to take evidence; or
 - to take evidence directly in another Member State

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Concept of civil and commercial matters

Concept of civil and commercial matters was defined in
the case law of the ECJ
(concerning the Brussels I Regulation).

However the scope of the EuToER is wider than the Brussels I Regulation (e.g. proceedings concerning the status or legal capacity of natural persons, bankruptcy, etc.)

It shall **not extend** in particular to:

- revenue, customs or administrative matters or
- to liability of the State for actions or omissions in the exercise of state authority (acta iure imperii).

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The regulations scope does not extend to the arbitration procedure, because a request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The arbitral tribunal is able to overcome this by requesting assistance from the national courts under national rules, which are already subject to the regulation

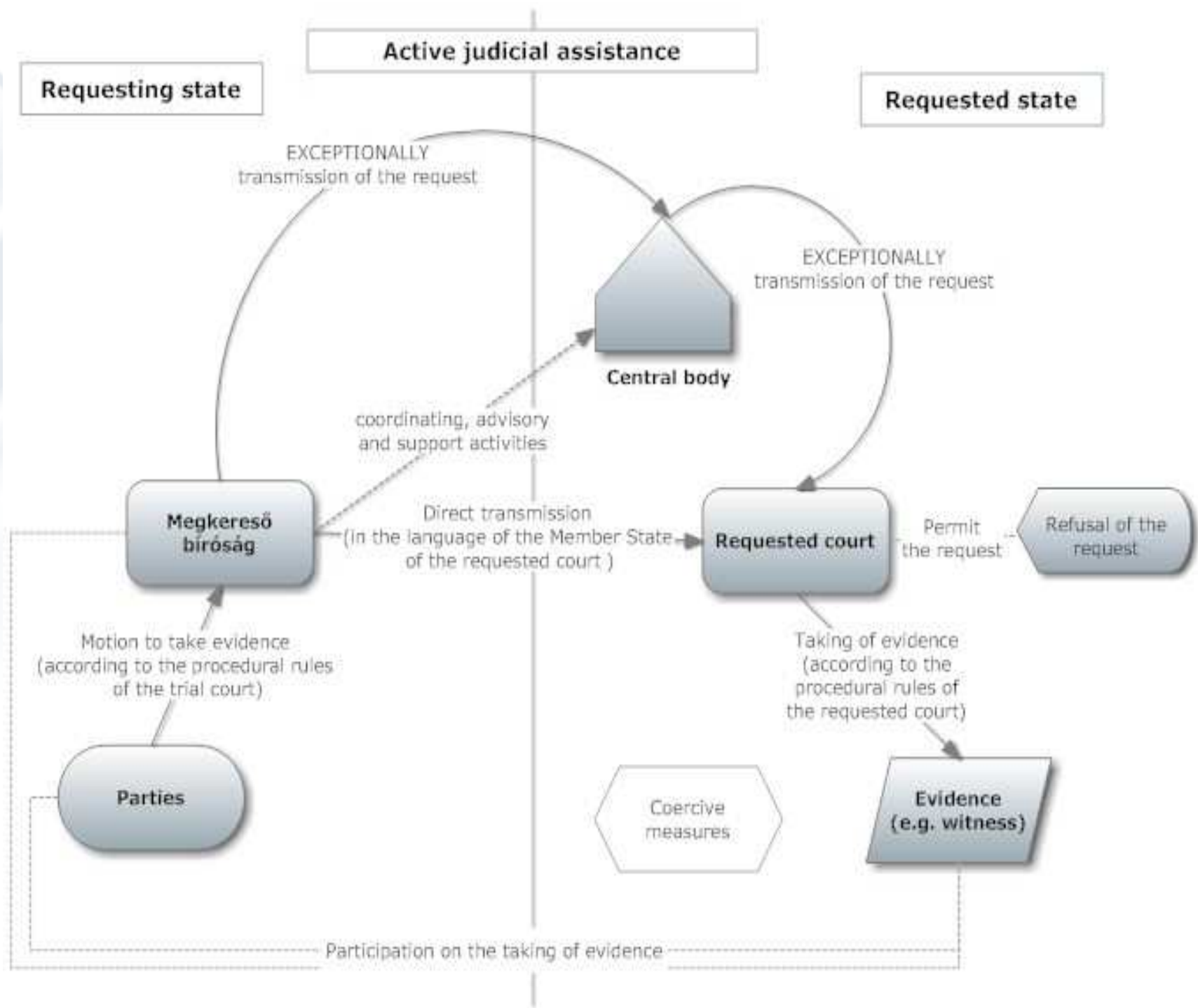
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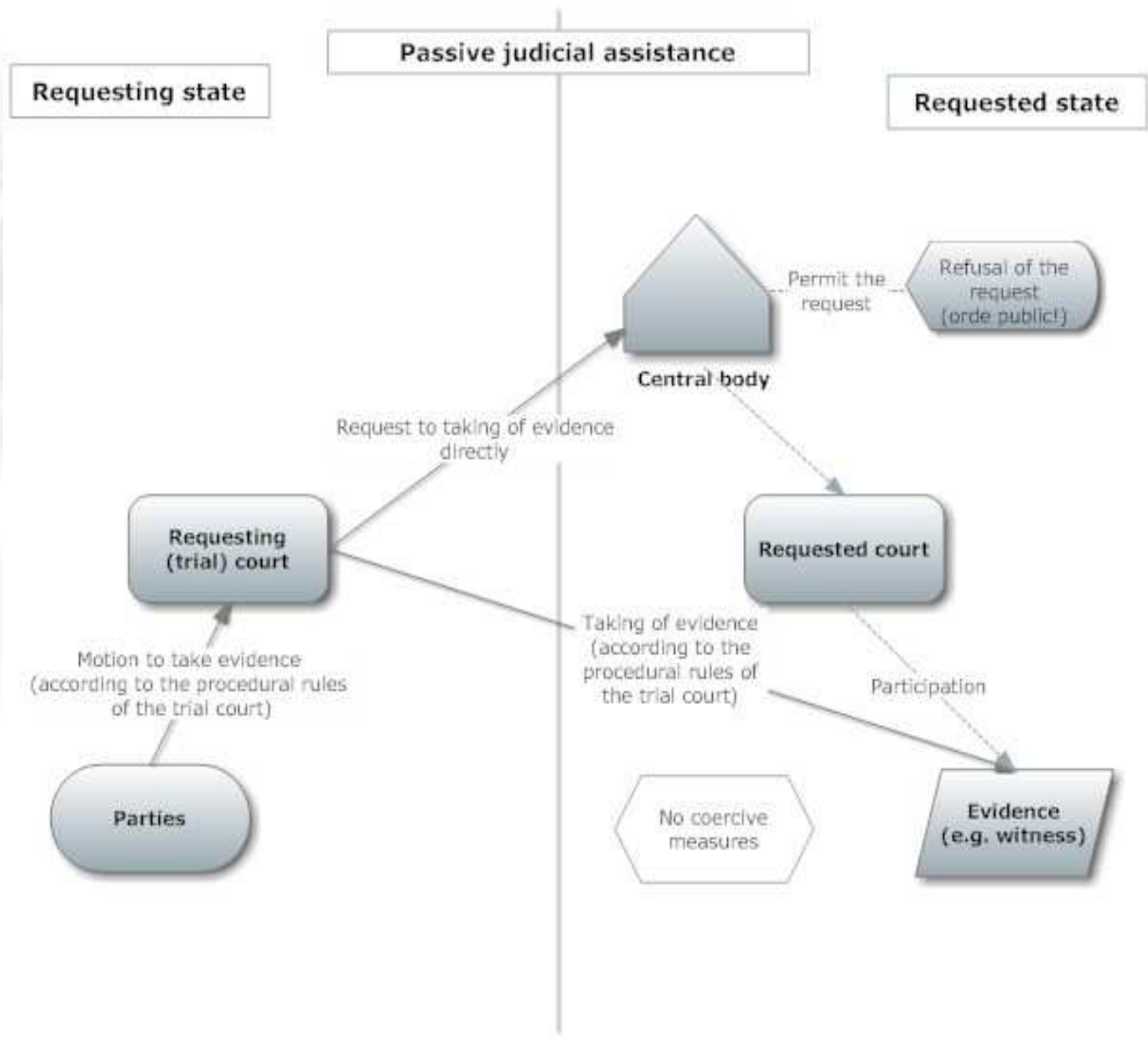


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The regulatory structure of the EuToER





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Extraterritorial taking of evidence

In the above mentioned cases the evidence is abroad and the trial court takes evidence abroad - by requesting another court, or directly - so the location of the evidence do not change.

The legal literature knows another method to take foreign evidence. In that case the trial court takes evidence in his Member State by transporting the evidence to there .

This case is called by the legal literature, “extraterritorial taking of evidence”.

Requesting state

Extraterritorial taking of evidence

Requested state

KAR



Central body



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The regulatory technique of the EuToER

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Direct transmission between the courts

The EuToER regulates direct transmission of requests between the courts using standard forms.

Method - transmission and execution of requests is to be made directly and by the most rapid means possible

Form – standard forms, in the Annex of the Regulation there are standard forms for the main issues

Language - the request and communications shall be drawn up in the official language of the requested Member State

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The role of central bodies

Central bodies are responsible for:

- (a) supplying information to the courts;
 - (b) seeking solutions to any difficulties which may arise in respect of a request;
 - (c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court
-
- In addition, the central bodies are authorized to permit requests concerning taking of evidence directly in another Member State.

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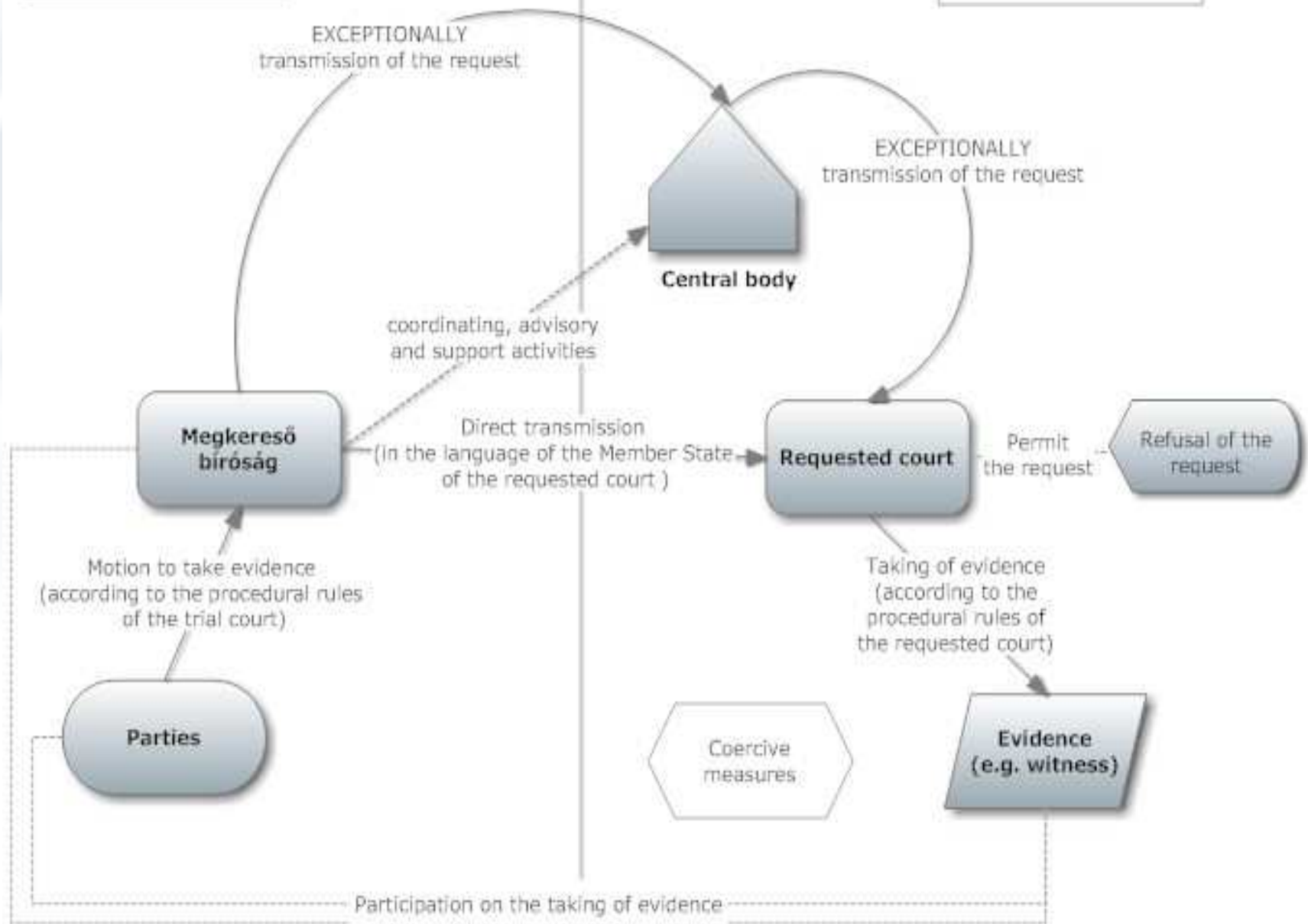
Active judicial assistance

Active judicial assistance

Requesting state

Requested state

KAR



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The trial court requests a court in another Member State to give judicial assistance in taking of evidence.

In this case the requested court does an **active judicial assistance**.

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Applicable rules

The requested court shall execute the request in accordance with the law of its Member State (**lex fori**).

The *lex fori* prevails as general rule, but the EuToER gives exceptions to this rule . Under Article 10 the requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State

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The procedural rules of the trial court should be applied in two situations, even if there was no request for special procedure :

If it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, **have the right to be present at the performance** of the taking of evidence by the requested court.

A request for the hearing of a person shall not be executed when the person concerned claims **the right to refuse to give evidence or to be prohibited from giving evidence**, under the law of the Member State of the requesting court.

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Reimbursement of taxes and costs

The EuToER states as a general rule, that the execution of the request shall not give rise to a claim for any reimbursement of taxes or costs.

Exceptions:

- the fees paid to experts and interpreters
- the costs occasioned by the compliance of request for special procedure

However the EuToER did not defined the concepts of the taxes and costs, so the ECJ did it in the Weryński case.

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The concepts of taxes and costs

Case C-283/09. Artur Weryński v Mediatel 4B spółka z o.o.:

- autonomous interpretation, it does not depend on the classification of national law.
- ‘taxes’ should be understood as meaning sums received by the court for carrying out its functions,
- ‘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.

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The refusal of the request

A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

- (a) under the law of the Member State of the requested court; or
- (b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court

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In addition, the execution of a request may be refused only if:

- (a) the request does not fall within the scope of this Regulation;
- (b) the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary;
- (c) the requesting court does not comply with the request of the requested court to complete the request pursuant to Article 8 (Incomplete request) within 30 days after the requested court asked it to do so; or
- (d) a deposit or advance asked for in accordance with Article 18(3) (Cost of experts) is not made within 60 days after the requested court asked for such a deposit or advance

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The exhaustive nature of the rule

Case C-283/09. Artur Weryński v Mediatel 4B spółka z o.o..

In this case the requesting court was not willing to hear the witness until the trial court does not advance the witness expenses which are granted under the rules of the requesting court.

The ECJ noted that the grounds on which execution of such a request may be refused are those **exhaustively listed** in Article 14 of the regulation. The requested court was not therefore entitled to make the examination of a witness conditional on prior payment of an advance covering his witness expenses.

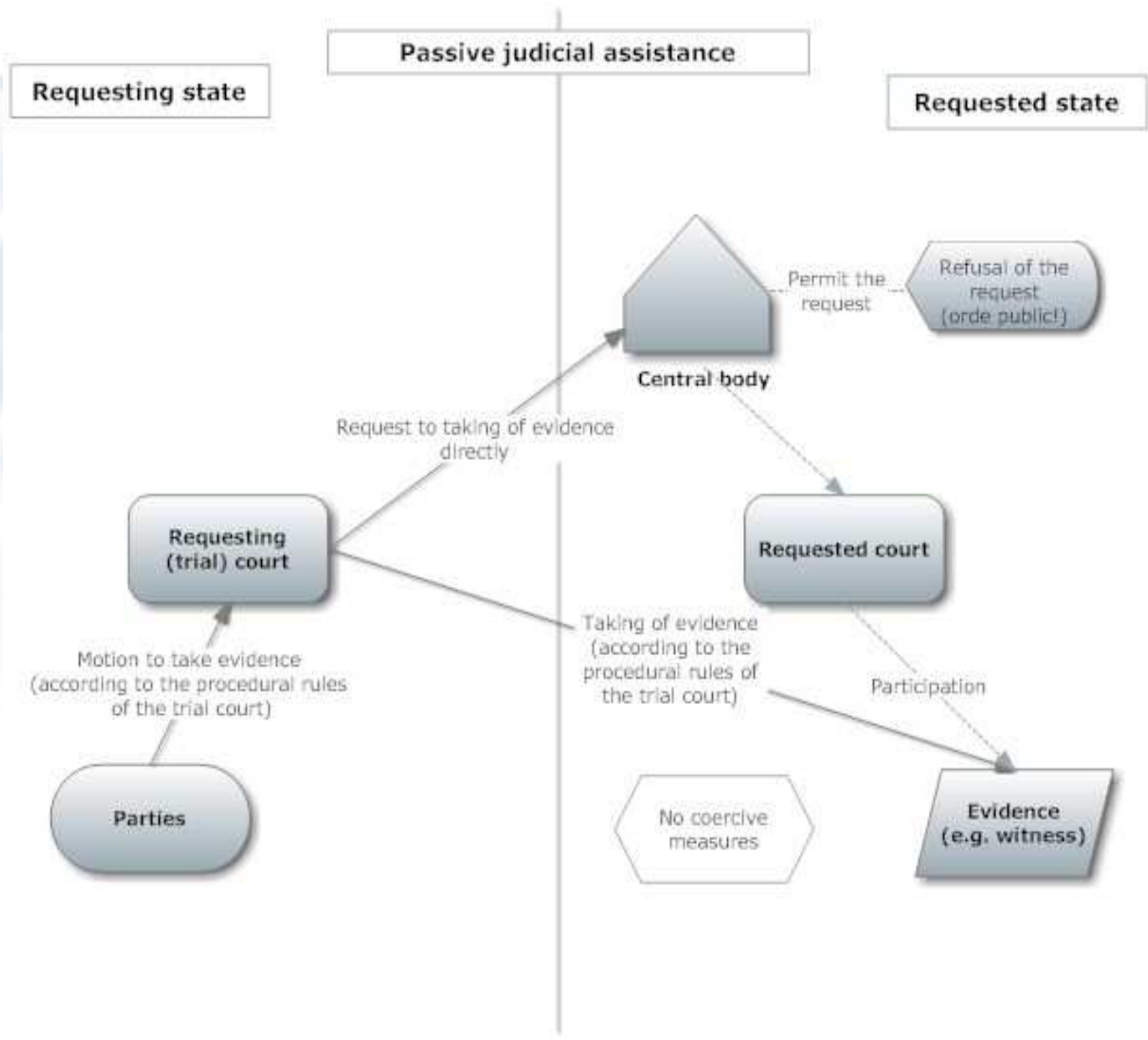
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Passive judicial assistance



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Where a court requests to take evidence directly in another Member State, it shall submit a request to the central body or the competent authority.

Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures.

In particular, the central body or the competent authority may assign a court of its Member State to take part in the performance of the taking of evidence in order to ensure the proper application of this Article and the conditions that have been set out

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The refusal of the request

When the regulation was adopted the aim was to narrow the grounds for refusal.

However, a **special procedural orde public regulation** – as “remains of the sovereignty” - has been included into the grounds for refusal , which gives a wide range of discretion to the central body.

The central body or the competent authority may refuse the request if the request of direct taking of evidence is contrary to fundamental principles of law in its Member State.