

DIGITAL TOOLS FOR JUDICIAL COOPERATION ACROSS THE EU - THE BENEFITS OF DIGITAL TECHNOLOGIES IN JUDICIAL PROCEEDINGS

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Abstract

Digital technologies have great potential to improve efficiency and access to justice, with the European Commission and the EU Council collaborating on a number of cross-border digital justice initiatives as a result of the political commitment to make national and European e-Justice more accessible. The COVID-19 crisis posed a serious challenge to the smooth functioning of justice systems, confirming that digital technologies are essential to ensure seamless and timely access to justice for citizens and businesses, thus contributing to building resilient national systems. The Joint Roadmap for Recovery¹, endorsed by the European Council on 23 April 2020, recognises digital transformation, alongside the green transition, as having a central and priority role in re-launching and modernising the EU economy. As underlined in the Council Conclusions „Access to Justice – Seizing the Opportunities of Digitalisation”¹¹ adopted in 2020, access to justice is a fundamental right and a central element of the rule of law, which is one of the core values on which the European Union is founded under art. 2 of the Treaty on European Union and which are common to the Member States. The document also reaffirms that the digital development of the justice sector should be human-centred and should always be guided by the fundamental principles of judicial systems concerning the independence and impartiality of the courts, the guarantee of effective judicial protection and the right to a fair and public trial within a reasonable time.

Keywords: cross-border justice initiatives, access to justice, digitalisation of judicial cooperation, digital by default, fundamental rights.

1. Introduction

The topic of digitalisation of the area of justice is a priority at EU level, with the European Commission Communication of 27 May 2020 "Europe's moment: Repair and Prepare for the Next Generation"¹ highlighting that digitalisation of justice systems can improve access to justice and the functioning of the business environment. The European Commission's 2021 Rule of Law Report of 20.07.2021² also underlined that strengthening the resilience of judicial systems through structural reforms and digitalisation is a priority under the Recovery and Resilience Mechanism, and a number of Member States have included this in their national recovery and resilience plans.

It should be noted that efforts on accessibility of justice systems are not a recent development. A first result of the political commitment to make access to national and European e-Justice easier and more

accessible was the adoption of the first multi-annual e-Justice Action Plan 2009-2013. This first instrument identified a series of priority actions for joint activities. Following its finalisation, an e-Justice Strategy and Action Plan for 2014-2018 was adopted. These ended in 2018 and were in turn replaced by the e-Justice Strategy³ and Action Plan 2019-2023⁴. One of the most tangible results towards digitalisation of justice so far is the European e-Justice Portal, a one-stop-shop for all aspects of justice in the Member States of the Union, including a number of online tools. The EU Council conclusions "Access to justice - seizing the opportunities of digitalisation" set out ambitious directions inviting the European Commission to assess possible actions in the area of judicial cooperation in civil and commercial matters, building on the progress already made towards modernising cross-border exchanges between authorities through digitalisation and the use of information technology, as in the context of the regulations on service of documents and taking of evidence⁵, and going on to examine the potential for

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¹ roadmap-for-recovery-final-21-04-2020.pdf (europa.eu).

¹¹ <https://data.consilium.europa.eu/doc/document/ST-11599-2020-INIT/en/pdf>.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590732521013&uri=COM:2020:456:FIN>.

² <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52021DC0700&from=EN>.

³ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01)).

⁴ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(02)).

⁵ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) and Regulation (EU) 2020/1783 of the

modernisation in line with the "digital by default" principle. In criminal matters, the focus should have been on the analysis of judicial cooperation tools to which the electronic digital exchange of evidence system (eEDES), which already supports procedures relating to European investigation orders and mutual legal assistance between Member States, could be extended. For both strands of reflection, e-CODEX (e-Justice communication via online data exchange) is the preferred tool whose use was encouraged.

A crucial aspect for the success of these policies will also be determined by the approach to user panels. Promoting digital competences in the justice sector is of paramount importance. Also, initiatives to raise awareness and increase digital literacy among citizens will provide the opening to use the benefits of implementing these strategies. The use of digital technologies in justice systems will not diminish procedural safeguards for those who do not have access to such technologies.

As pointed in one of the studies⁶ dedicated to different aspects related to the digitalisation of communication between courts/competent authorities of Member States and between those authorities and the parties to the proceedings in the areas of EU civil, commercial and criminal law, including the possibility for using videoconferencing systems in cross-border proceedings, individuals and legal entities can easily find themselves in litigation before a court in another EU country. Access to justice across borders is also particularly problematic for victims of crimes and defendants. Victims may be discouraged to file a complaint in another country by the fact that they do not know the legal system of that country. Access to justice across borders is challenging also for defendants who are unfamiliar with the legal system of another Member State. It is known that the threshold of accessing a court by individuals and legal entities is high, due to complexity and costs.

2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Digitalisation of justice in the European Union. A toolbox of opportunities

A first response from the European Commission has been provided in the text of its Communication **Digitalisation of justice in the European Union A toolbox of opportunities**⁷, launched on 2.12.2020, in which it carried out an in-depth analysis and mapping of the digitalisation of justice in all Member States. Of interest for the proposed presentation are the intentions to promote legislative initiatives requiring Member States to implicitly use digital channels for cross-border communication and data exchange between competent national authorities; the application of the principle that an electronic document is not denied legal effect and the possibility to be accepted as evidence in legal proceedings solely on the grounds that it is in electronic format; the exploitation of the possibilities offered by electronic identification and electronic signatures / stamps. In addition, the modernisation of digital tools for judicial cooperation and information exchange in criminal investigations and proceedings within the EU was also indicated as essential in view of security threats and technological developments. In non-legislative matters, one of the most important initiatives foreshadowed by the European Commission's Communication (to be completed by 2023) is the posting on the eJustice Portal of a collection of links aimed at facilitating access to available electronic services provided by the judiciary and relevant public authorities, through an access point entitled "My eJustice Space". This should also facilitate access to justice in EU cross-border proceedings, in particular the European Small Claims Procedure⁸ and the European order for payment procedure.⁹

3. Legislative initiatives launched by the European Commission in the field of judicial cooperation in criminal matters

In anticipation of the legislative intervention in the text of the Communication on the digitalisation of justice (2020), the European Commission launched on 1st of December 2021 a legislative package whose

European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

⁶ European Commission, Directorate-General for Justice and Consumers, *Study on the digitalisation of cross-border judicial cooperation in the EU: final report*, 2022, <https://data.europa.eu/doi/10.2838/174474>.

⁷ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>.

⁸ Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing an European Small Claims Procedure (OJ L 199, 31.07.2007, p. 1).

⁹ Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating an European order for payment procedure (OJ L 399, 30.12.2006, p. 1).

components dealing with judicial cooperation in criminal matters will be briefly presented in this section.

3.1. Proposal for a Regulation of the European Parliament and of the Council establishing a collaboration platform to support the functioning of Joint Investigation Teams and amending Regulation (EU) 2018/1726¹⁰

Joint Investigation Teams (JITs) are teams set up for specific criminal investigations and for a limited period of time, established by the competent authorities of two or more Member States and possibly non-EU countries (third countries). The legal basis for setting up a JIT is art. 13 of the European Union (EU) Convention on Mutual Assistance in Criminal Matters¹¹ and Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams¹². The main difficulties faced by these structures relate to the secure electronic exchange of information and evidence (including large files), the secure electronic communication with other members of the joint investigation team and with the competent bodies, offices and agencies of the Union, such as Eurojust, Europol and the European Anti-Fraud Office (OLAF), and the joint day-to-day management of such a team. The overall objective of the proposal is to provide technological support to those involved in joint investigation teams in order to increase the efficiency and effectiveness of their cross-border investigations and prosecutions. The legal basis for the proposal is art. 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU), which gives the EU the power to adopt measures to facilitate cooperation between judicial or equivalent authorities of the Member States in criminal matters. In order to achieve these objectives, a dedicated IT platform is proposed, consisting of both centralised and decentralised components, accessible to all actors involved in JIT proceedings. The platform would be composed of a centralised IT system, which would allow for the central temporary storage of data, and communication software, a mobile application, which would facilitate communication and storage of data from local communications.

Although the platform would operate over the internet to provide flexible means of access, the

emphasis would be on ensuring confidentiality from the moment of design, it would use encryption algorithms to encrypt data in transit or at rest.

3.2. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases¹³

Since 2005, the importance of exchanging information between Member States as well as with Europol and Eurojust has become imperative. Directive (EU) 2017/541¹⁴ on combating terrorism amended Council Decision 2005/671/JHA¹⁵, to ensure that information is shared between Member States in an effective and timely manner, taking into account the serious threat posed by terrorist offences. One of the key aspects of Eurojust's work in this area is the European Counter-Terrorism Judicial Register (CTR) launched in September 2019, based on Council Decision 2005/671/JHA. For the CTR, Member States provide information on judicial proceedings relating to terrorist offences under their jurisdiction, with the data being stored and cross-checked in the Eurojust Case Management System (CMS) in the same way as operational data on ongoing judicial cooperation cases supported by Eurojust. Based on the findings of the Digital Criminal Justice Study¹⁶, improving the functioning of the CTR has been indicated as a priority for European criminal law. The proposal aims to facilitate Eurojust's more efficient identification of links between parallel cross-border investigations and prosecutions of terrorist offences and to provide proactive feedback on these links to the Member States concerned by making the exchange of data between Member States, Eurojust and third countries more efficient and secure. The legislative instrument will ensure legal certainty on the scope of the obligation to exchange information in terrorism cases and the relationship with Council Decision 2005/671/JHA.

¹⁰ https://ec.europa.eu/info/sites/default/files/3_1_178497_regul_jit_en.pdf.pdf.

¹¹ OJ C 197, 12.7.2000, p. 3.

¹² OJ L 162, 20.6.2002, p. 1.

¹³ https://ec.europa.eu/info/sites/default/files/2_2_178485_regul_counter_terr_en.pdf.pdf.

¹⁴ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.03.2017, p. 6).

¹⁵ Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences (OJ L 253, 29.09.2005, p. 22).

¹⁶ European Commission, Directorate-General for Justice and Consumers, *Cross-border digital criminal justice: final report*, Publications Office, 2020, <https://data.europa.eu/doi/10.2838/118529>.

4. Horizontal legislative initiative launched by the European Commission in the area of digitalisation of judicial cooperation and access to justice

Building on the objectives set out in the Communication on the digitalisation of judicial cooperation, the European Commission has included in the legislative package launched on 1 December 2022 also a horizontal instrument aimed at improving access to justice and increasing the efficiency and resilience of communication flows inherent in cooperation between judicial and other competent authorities in cross-border cases in the EU, namely the *Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border procedures in civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation*¹⁷.

The proposal establishes a dedicated and secure decentralised IT system, composed of the IT systems of the Member States and of Justice and Home Affairs agencies and bodies, which will be interconnected through interoperable access points (based on the e-CODEX system). Where Member States do not have existing national IT systems, they could use, free of charge, a Commission-developed reference implementation solution. The Commission will develop a European access point, free of charge, hosted on the e-Justice Portal and each person will be able to create an account and file all types of submissions both to national judicial authorities and to those of other Member States. Where national IT portals, platforms or other electronic channels for electronic communication in EU civil law matters exist, they can continue to be used

One of the most important provisions of the proposal (art. 2) establishes the obligation of electronic communication between courts and competent authorities, through a secure and reliable decentralised computer system consisting of interoperable IT systems and access points operating under the individual responsibility and management of each Member State, each JHA agency and each EU body. In addition, art. 5 requires the courts and competent authorities of the Member States to accept electronic communication from natural and legal persons in judicial proceedings, but the choice of electronic means of communication is left to the discretion of natural and legal persons. We note in this context, translating the reasoning in the interest of this study, the opinion of the Constitutional Court¹⁸ called to rule on the constitutionality of the Law to supplement GO no. 2/2001 on the legal regime of

contraventions. The Court notes that the assessment which the court must make when granting the requested measure (*i.e.* the holding of court hearings by audiovisual telecommunications) essentially concerns two categories of issues: technical and legal. The technical assessment does not require any special rules, since it involves examining clearly defined objective conditions - the existence or otherwise of the infrastructure necessary for the conduct of court hearings by audiovisual telecommunications means. However, given the scope of the law, the legal assessment is highly complex and requires a precise regulatory framework. However, the law at issue does not lay down any criteria for the court to decide whether or not to grant the offender's request to hold court hearings exclusively by audiovisual telecommunications systems. Accordingly, in accordance with the criticisms made, the Court holds that the admissibility of requests for the hearing of cases in matters relating to administrative offences by means of audiovisual telecommunications must be determined by clear and precise rules, in the light of the requirements laid down by art. 20 of the Constitution, with reference to art. 6 - Right to a fair trial - of the Convention on Human Rights.

Art. 6 of the proposed regulation also requires the competent authorities to accept electronic communication from natural and legal persons by making electronic transmissions equivalent to paper transmissions. With regard to the value of applications submitted to the civil court by electronic means, the case law of the HCCJ¹⁹, faced with a hypothetical situation in which it was necessary to clarify the legal value of the electronic signature, held that an electronic signature is data in electronic form which is attached to or logically associated with other data in electronic form and which serves as a method of identification. Accordingly, where a party intends to submit applications to the court in electronic form, the existence of a scanned signature of the signatory is not sufficient, in view of the special provisions laid down by Law no. 455/2001, which lays down the legal regime governing electronic signatures and electronic documents and the conditions for the provision of electronic signature certification services. In such cases, where applications are submitted to the courts in electronic form, the digital signature links the electronic identity of the signatory to the digital document and cannot be copied from one digital document to another, which gives the document authenticity (it attests that the document belongs to the signatory and the author of the document cannot claim

¹⁷ https://ec.europa.eu/info/sites/default/files/law/cross-border_cases/documents/1_1_178479_regul_dig_coop_en.pdf.pdf.

¹⁸ CCR Decision no. 19/2022 [A] on the objection of unconstitutionality of the Law supplementing GO no. 2/2001 on the legal regime of contraventions (Official Gazette of Romania no. 183/2022).

¹⁹ HCCJ Decision no. 520/2019 of March 2019.

responsibility for the content of the document with a valid electronic signature). In practice, the valid electronic (digital) signature provides the court with a guarantee that the message or digital document is created by the person who signed it and that the content of the message or digital document has not been altered since its issuance.

In conclusion, the use of the digital channel will be voluntary for natural and legal persons. The Regulation also lays down rules on the use and recognition of electronic trust services, on the legal effects of electronic documents, on the use of videoconferencing or other means of distance communication for the hearing of persons in civil, commercial and criminal matters (art. 7 and 8).

As regards electronic payment of fees, art. 11 of the proposal provides that Member States shall provide for the possibility of electronic payment of fees, including from Member States other than where the competent authority is situated. Member States shall provide for technical means allowing the payment of the fees also through the European electronic access point.

5. e-CODEX (e-Justice Communication via Online Data Exchange)

e-CODEX (e-Justice Communication via On-line Data Exchange) was launched under the multiannual e-Justice action plan 2009-2013, to promote the digitalisation of cross-border judicial proceedings facilitating the communication between Member States' judicial authorities. The long-term sustainability, the increased use and operational management of e-CODEX were a priority for the Union. The e-CODEX system was managed by a consortium of Member States and other organisations, financed by an EU grant but using further action grants to manage the system was not a sustainable solution that could allow e-CODEX to become the default system for cross-border civil and criminal proceedings in the future. The Commission launched a proposal for

a Regulation as the proposed legal instrument to establish the e-CODEX system at EU level, and is entrusting the eu-LISA Agency with the system's operational management. To this effect, the proposal amended Regulation (EU) 2018/1726 establishing eu-LISA²⁰.

The Council presidency and the European Parliament reached a provisional agreement on the proposal for a regulation on the e-CODEX system on the 8th of December 2021.

6. Conclusions

The possibility for natural and legal persons to lodge applications and communicate digitally with the courts and competent authorities and the possibility to participate in hearings by videoconferencing or other means of remote communication technology will ensure improved access to justice in cross-border proceedings. Furthermore, the package of legislative initiatives prepared on the basis of the consultation with Eurojust would, if adopted, have an enormous impact on how Eurojust can support cross-border judicial cooperation. On the other hand, the role of general principles of EU law in regulating the operation of new technologies may also require the emergence of new ones that correspond to new market conditions. Thus, today, the principles structuring the EU's digital single market have the potential not only to bring about further integration of the internal market, but also to remove barriers to the movement of factors of production within the digital spaces of Member States, societies and economies.²¹ At the same time, it is necessary to balance the need to implement innovative technologies in the area of justice with the protection of fundamental rights, given that, as noted in the literature, in the face of the expansion of the use of IT in most areas of social life, a number of fundamental rights (the right to privacy, family and private life, freedom of expression, secrecy of correspondence) have been exposed to risks, some inherent (related to cyber security, for example), others determined by the intrusive action of the state.²²

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²⁰ Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) no. 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) no. 1077/2011 (OJ L 295, 21.11.2018, p. 99).

²¹ P.E. Gill, A. Zemskova, X. Groussot, *Spre principii generale 2.0: aplicarea principiilor generale ale dreptului Uniunii Europene în societatea digitală**, in Revista Română de Drept European (Comunitar) no. 4/2019.

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