Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2024, n. 2

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies" www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Indice-Sommario
2024, n. 2

Editoriale

FOCUS
La proposta di regolamento europeo in materia di filiazione (COM (2022) 695 final, del 7 dicembre 2022)

Il Focus contiene saggi e contributi elaborati a seguito della riflessione realizzata nel Convegno organizzato presso l'Università di Macerata (22 novembre 2023)

Articoli, Commenti e Note

TOWARDS THE DIGITALIZATION OF EU JUDICIAL COOPERATION: ACCESS TO JUSTICE TO BE IMPROVED

Paola Giacalone*

1. Introduction

At the end of 2023, an important, though not yet entirely decisive, step was taken towards the effective simplification of cross-border judicial procedures. Following the negotiation in the co-decision procedure between the Council and the European Parliament, the Regulation of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation was adopted.

The measure aims to improve the efficiency and effectiveness of judicial procedures and facilitate access to justice by digitalising the existing communication channels. This should lead to cost and time savings, a reduction of the administrative burden, and improved resilience in force majeure circumstances for all authorities involved in cross-border judicial cooperation.

The use of digital communication channels between competent authorities should reduce case processing delays, both in the short term and in the long term. This should benefit individuals, legal entities, and Member States' competent authorities and strengthen confidence in justice systems.

Double-blind peer reviewed article.

* PhD Student of International and Economic Law at Private and Economic Law Department (PREC) of Vrije Universiteit Brussel (VUB), Orcid number: 0000-0003-3682-6712. E-mail: paola.giacalone@vub.be.

Disclaimer: This work is the result of conducting research as part of *SCAN II* project [co-funded by the Civil Justice Programme of the European Union (JUST-2021-JCOO)]. The content of this paper represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Effective access to justice is a core EU objective in the European area of freedom, security, and justice. Digital transformation is a key step towards improving access to justice and the efficiency, quality, and transparency of justice systems. So, this measure is fully in harmony with the developments at the EU level of appropriate channels and tools to ensure that justice systems can cooperate digitally efficiently.

Therefore, it is essential to establish an EU uniform information technology instrument that allows swift, direct, interoperable, reliable, accessible, secure, and efficient cross-border electronic exchange of case-related data between competent authorities.

This will allow the competent authorities of the individual Member States and all citizens and businesses to approach justice in a way that is in step with the times and the means available in the information technology society.

The rise of international e-commerce has increased commercial interactions within Europe, leading to an uptick in cross-border disputes. The COVID-19 pandemic has also accelerated the use of digital services, enabled remote work and education, and boosted online shopping.

Developing an effective European area of justice in civil matters and providing an efficient framework for cross-border judicial cooperation has become essential for the effective growth of society. In the European Union, there are approximately 3.4 million civil and commercial court proceedings with cross-border implications each year[1], not including out-of-court proceedings and those situations that are not censored. To this end, the EU implemented legal instruments to front the challenges of an increasingly integrated cross-border community, such as specific provisions to smooth the service of judicial and extrajudicial documents in civil and commercial matters while safeguarding a high level of security in the transmission of legal documents and the rights of the addressee.

Considering society's increasingly penetrating digitalisation, it is essential to properly function the internal market and build trust in cross-border situations[2]. This is particularly important as it affects people's perceptions of the judiciary and the rule of law in EU member states[3].

[1] European Commission, *Commission Proposes to Modernise and Digitalise EU Civil Judicial Cooperation*, 2018, available online: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3991 (accessed on 23 May 2024).

[2] See also: the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of the document) Brussels, 31 May 2018, COM(2018) 379 final, 2018/0204(COD); Commission Staff working documents evaluation, accompanying the document proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) n. 1373/2007, 2018, p. 12.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 05.07.2023 Rule of Law Report, COM (2023) 800 final.

In this framework, E-Justice means using electronic systems to carry out activities that have been performed in some other way or in a way that is much less reliant on the said systems than envisaged for the future[4].

E-justice is ordinary justice, but it uses the tools that ICT provides to organise and perform the tasks of judicial bodies. Therefore, the changes that e-justice entails should only be external and should only affect the form of the procedural acts. The use of electronic systems should under no circumstances jeopardise any of the safeguards applicable to judicial activities.

The focal point of the EU's e-justice in civil matters is enhancing access to justice in cross-border cases. Civil procedure differs in the Member States regardless of the specific level of harmonisation.

Due to that, the litigants in Member States can face legal and practical obstacles when endeavouring to enforce their cross-border claims. Those obstacles can derive from the necessity to establish international jurisdiction properly, the need for cross-border service of documents, the taking of evidence, enforcement, diverging domestic procedures, and having to incur additional costs for local legal representation, the translation of documents, and travel expenses[5].

All aforementioned elements indicate that the EU's legal framework for international judicial cooperation in civil matters needs to address the usage of technological means to improve access to justice, uphold procedural guarantees in the use of such means, secure data protection, and provide the necessary resilience of communication flows in judicial cooperation, both during usual times and in the case of lasting disruptive events[6]. As part of these efforts, the EU legislator adopted new provisions for the cross-border service of judicial and extrajudicial documents in civil and commercial matters.

Several legal instruments have been adopted at the European level to address these challenges, including innovative mechanisms to improve cooperation and access to justice[7].

---

[4] See, M. VELICOGNA, *In Search of Smartness: The EU e-Justice Challenge*, in *Informatics*, 2017, no. 1, pp. 1-17.

[5] X. E. KRAMER, *Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU*, in K. BENYEKHLEF, J. BAILEY, J. BURKELL, F. GÉLINAS (eds.), *eAccess to Justice*, Ottawa, 2016, p. 354.

[6] E. A. ONTANU, *Normalising the use of electronic evidence: Bringing technology use into a familiar normative path in civil procedure*, in *Oñati Socio-Legal Series*, 2022, no. 3, p. 585.

[7] The European action in judicial cooperation in civil matters is vast and varied, covering crucial issues, such as family law or rules for non-contractual obligations. Overall, specific legal instruments have been adopted to ease the determination of jurisdiction and the recognition of decisions in extra-judicial cases (Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Council Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial cases and the issues of parental responsibility, repealing Regulation (EC) No 1347/2000; Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Regulation (EC) No 805/2004, creating a European Enforcement Order for uncontested claims; Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession), to harmonize conflict of law rules (Regulation (EC) No 593/2008

Indeed, establishing digital channels for cross-border communication would contribute directly to improving access to justice by enabling natural and legal persons to seek the protection of their rights and assert their claims, initiate proceedings, and exchange case-related data in digital form with judicial or other competent authorities, in procedures falling under the scope of Union law in the area of civil and commercial matters[8].

In this framework, it is essential to overview digitalisation's developments in civil judicial cooperation and identify the key elements of said text.

2. The developments of digitalisation

The justice system's digitisation level is undoubtedly anachronistic, considering technological advancement and the role of various digital communications in daily life.

A clarification of terminology is also appropriate regarding the different terms: digitisation and digitalisation. The two letters make all the difference ("al"). It's a matter of scope and potential value. Understanding the distinctions between these two approaches is critical as digital transformation gains momentum and businesses move toward digital technologies to enhance visibility and eliminate inefficiencies in their operations. Digitisation is the process of converting analogue content into a digital format. This conversion is done by scanning, photographing, or transcribing the original content. On the other hand, digitalisation is the process of converting a product, service, or any other entity into digital form[9]. This means that the digitalisation we are dealing with presupposes appropriate digitisation processes.

Around the globe, the COVID-19 pandemic had the only positive aspect of accelerating efforts to digitise internal workflows within the judiciary further, increase digital communication with parties, and introduce and expand video conferencing for hearings[10]. Courts were temporarily closed, and judges, lawyers, bailiffs, and clerks were

(Rome I) and the Regulation (EC) No 864/2007 (Rome II) seek to improve the legal certainty and predictability of the outcome of litigations concerning non-contractual obligations. Together with this, Regulation (EU) No 1259/2012 establishes a comprehensive legal framework for divorce and legal separation, and the Council Directive 2002/8/EC of 27 January 2003 improves access to justice in cross-border disputes by establishing minimum standard rules relating to legal aid for such disputes; the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1896/2006 of 21 May 2008 on certain aspects of mediation in civil and commercial matters) and smooth cross border cooperation between civil courts (e.g., Regulation 1206/2001 adopted to simplify and expedite judicial cooperation in taking of evidence in civil matters).

[8] Recital 11 of the Regulation (EU) 2023/2844.

[9] See A. FRENZEL, J.C. MUENCH, M. T. BRUCKNER, D. VEIT, *Digitization or digitalization? Towards an understanding of definitions, use and application*, in *IS research*, 2021.

[10] M. VELICOGNA, G. LUPO, E. A. ONTANU, *Simplifying access to justice in cross-border litigation, the national practices and the limits of the EU procedures. The example of the service of documents in the order for payment claims*. Paper presented at EGPA Annual Conference, 2015, PSG XVIII: Justice and Court Administration, Toulouse, France, August 24-29; Available online: https://ssrn.com/abstract=3224271 (accessed on 31 October 2022).

obliged to work from home. Some Member States introduced an "emergency legislation"[11] to facilitate distance means of communication and remote hearings. However, some measures were only put in place temporarily, so many technical solutions were developed *ad hoc* to limit disruption of justice services and judicial cooperation. However, such solutions may not always satisfy the highest level of security and guarantee fundamental rights.

The EU co-legislators (European Parliament and Council of the EU) have recently adopted several legislative acts to digitalise judicial cooperation in civil and criminal matters. These include the e-CODEX Regulation[12] and some rules of two recast regulations adopted in 2020 on the service of documents and taking of evidence[13]. Furthermore, the 2014 e-IDAS Regulation[14], which lays down rules on, among other things, trust services, electronic seals, and electronic signatures, should be mentioned.

These acts were adopted to address the lack of interconnection of national electronic systems (where available for judiciaries). However, the measures establish a legal basis for communications between authorities, individuals, and legal entities. So, the initiative aims to tackle two main problems: inefficient cross-border cooperation and barriers to justice in cross-border cases.

The e-CODEX system is a set of software products that allow for secure digital communication between judicial authorities in the EU. Its purpose is to digitalise judicial communication, including the exchange of judicial documents between courts and citizens. Currently used by 21 EU Member States, e-CODEX still needs a clear legal basis at the EU level. To address this, the European Commission proposed a regulation in December 2020 to formally establish e-CODEX at the EU level and entrust its operational management to eu-LISA, an EU agency. The proposed regulation would ensure uniform application of e-CODEX rules across all 27 Member States and prevent legal fragmentation.

Since July 2023[15], Eu-LISA has been fully managing e-CODEX. The establishment of e-CODEX is intended to facilitate its use by all Member States for current and future procedures.

---

[11] See for an extensive exploration of developments in selected countries B. KRANS, A. NYLUND (eds.), *Civil Courts Coping with Covid-19*, Chicago, 2021.

[12] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerized system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726, Official Journal of 1 June 2022.

[13] Regulation E-IDAS (electronic IDentification Authentication and Signature) – Reg. EU 910/2014 on digital identity.

[14] Regulation Service of Documents (recast) in the Member States of judicial and extrajudicial documents in civil or commercial matters – Reg. EU 2020/1784.

[15] On 7 June 2021, the Council of the EU approved the Regulation on the cross-border judicial instrument e-CODEX, which provides for the transfer of its operational management to EU-LISA to provide a sustainable, long-term legal framework for the system. E-CODEX - which aims to improve the efficiency of cross-border communication between European judicial authorities and facilitate access to justice for citizens and businesses - was developed by a consortium of Member States, which will oversee its management until 2024. The draft regulation introduces provisions to protect the independence of the judiciary and specifies the governance and management structure to be implemented within EU-LISA.

All these acts were adopted to address the need for interconnecting national electronic systems available to the judiciary, where they exist. To do this, these measures establish a legal basis for communications between authorities, individuals, and legal entities.

Therefore, the initiative aims to address two main problems: the inefficiency of cross-border cooperation and obstacles to access to justice in cross-border cases. These critical issues limit the ability of the competent bodies to manage the flow of judicial proceedings efficiently and promptly to be examined.

Together with the Regulation on Judicial Cooperation[16], the European Commission has identified the need to implement more functional IT systems as a significant factor in overcoming the current situation of slow and unreliable exchanges of paper data.

The second negative aspect is the predominant use of paper files, which makes cross-border proceedings difficult and expensive, particularly for vulnerable people and those with disabilities. Thus, several obstacles exist, including different levels of digitalization, a lack of digital channels, language barriers, and a need for more resilience in judicial systems during crises.

The drive to digitise both the single procedures and the judicial cooperation at the EU level stems from the digitalisation of society to improve the efficiency of civil and criminal proceedings. However, in many countries, judicial remedies are still too expensive and operate slowly. Some Member States still rely heavily on paper-based proceedings, and technology such as videoconferencing for remote communication needs to be improved or more present. This is due to various reasons, including the difficulties in aligning technology with legal requirements and protecting rights, the cost of implementing and maintaining an IT system, and concerns over preserving fundamental rights.

Additionally, resistance from within the judiciary to adopt new work methods is also a negative element, as well as the need for adequate training in innovation technology by legal professionals. The level of digitisation in the justice system needs to be updated compared to technological advancements and the widespread use of digital communication in everyday life[17].

Recently, the Digital Justice Regulation laid down provisions for the digital exchange of information that are intended to apply to cross-border proceedings in civil and criminal matters. This material scope is quite remarkable since, until now, the regulatory framework of EU judicial cooperation has developed in a differentiated and even hermetic manner between its civil component (Art. 81 TFEU) and its criminal one (Art. 82 TFEU).

Digitalisation marks, *inter alia*, a turning point in the unification of the European judicial area, which began with the e-Codex Regulation. It is meant to be one of the structural digital dimensions of that area. So, it is welcome that the EU legislator adopts a unified regulatory framework in this matter, considering the EU's judicial area.

[16] Regulation 2023/2844 of 13th December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, EUOJ L. 27.12.2023.
[17] See the Initial Appraisal of a European Commission Impact Assessment, K. EISELE, April 2022.

3. The challenges of the Regulation

3.1. Digitalisation in EU judicial cooperation

The approach of EU institutions to solving the problems examined in the previous paragraphs is acceptable. It is well expressed in the introductory paragraph of the explanatory *memorandum* of the EU Commission's Proposal[18] for the Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial, and criminal matters, now enclosed in the so-called Digital Justice Regulation[19]: "Efficient cross-border judicial cooperation requires secure, reliable, and time-efficient communication between courts and competent authorities. Moreover, this cooperation should be carried out in a way that does not create a disproportionate administrative burden and is resilient to force majeure circumstances. These considerations are equally important for individuals and legal entities. Getting effective access to justice reasonably is a crucial aspect of the right to a fair trial, as enshrined in Article 47 of the EU Charter of Fundamental Rights of the European Union (the Charter)"[20].

These aims well reflect the EU Commission's willingness to improve digitalization.

The primary strategy to approach digitalisation in civil judicial cooperation is to view it as a mission for EU and national bodies and as a mindset for users.

The differences in the level of digitalisation of justice among Member States are considerable[21]. While several Member States have advanced in digitising justice, others need to catch up. At the EU level, going digital has complicated judicial cooperation among Member States due to these different degrees of digitalisation. The above risks mustn't impede progress.

From the outset, a combined approach has been taken between the EU Commission and Member State's responsibilities, and to a large degree, EU digitalisation will be based on the "digital by default" principle, but it will be fully implemented only at the end of an extended transition period. This is due to the resilience of Member States in accepting the mandatory use of digital channels for the exchange of communications.

The absence of sufficient digital communication channels in cross-border judicial proceedings could lead to adverse outcomes such as delays, security issues, and unreliable communication. EU and Member States share the power to implement measures for

[18] Proposal for a Regulation of the European Parliament and of the Council on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM (2021)759 final.
[19] Regulation 2023/2844 of 13th December 2023 in EUOJ L. 27.12.2023, cited in footnote 17.
[20] C. E. TUO, *Digitalizzazione e Unione europea a 27: gli effetti sulla cooperazione giudiziaria civile*, 2022. See also, A. DI STASI, A. IERMANO, A. LANG, A. ORIOLO, R. PALLADINO, *Spazio europeo di giustizia e applicazione giurisprudenziale del Titolo VI della Carta dei diritti fondamentali dell'Unione europea*, Napoli, 2024.
[21] For more information about the different levels of digitalization in EU Member States, please see the results of the questionnaire on the digitalization of civil judicial cooperation of *EFFORTS* project [co-funded by the Civil Justice Programme of the European Union (JUST-JCOO-AG-2019-881802)].

freedom, security, and justice. As Member States could act individually, it is evident that further progress would be slow without EU intervention. EU action would improve cross-border judicial procedures' efficiency, resilience, security, and speed and bring added value by digitalising judicial cooperation for all Member States.

Indeed, the use of different systems in Member States raises questions about interoperability[22].

This is a multifaceted concept, and it is generally viewed as a crucial and challenging technical issue. In each IT, it signifies that two or more different systems or devices can communicate with each other and work together. The concept of interoperability is a cornerstone of the ICT industry.

In today's networked ICT environments, devices do not function purely independently; most interact with other programs and devices. A device that cannot interoperate with the other products consumers expect it to interoperate is essentially worthless.

Domestic IT solutions are often designed for something other than cross-border data exchanges.

The concept of interoperability may be applied beyond the purely technical domain and contribute to the development of international law[23].

While interoperability is usually defined at different levels, the Digital Criminal Justice Study's definition for the Digital Justice Regulation is "the ability of computer systems or software to exchange and make use of information". In other words, interoperability refers to two or more systems that agree on how they will communicate and interpret the received messages. Technical interoperability requires the adoption of technical protocols and specifications[24].

While some progress on interoperability has been made at the national level, in some cases, national IT solutions for judicial authorities have been developed uncoordinatedly, leading to different and fragmented IT systems across the Member States and inside each MS[25].

The lack of interoperability between existing national systems can have significant negative consequences, also in terms of security, such as:

1) low or no trust about problems of authentication and signature;

2) lack of semantic interoperability between forms and data elaborated in one system by another system;

3) no guarantee for the authenticity and integrity of the documents;

---

[22] M. MELLONE, *Legal Interoperability in Europe: An Assessment of the European Payment Order and the European Small Claims Procedure*, in F. CONTINI, G. LANZARA (eds.), *The Circulation of Agency in E-Justice*, Dordrecht, 2016.

[23] P.C. JESSUP, *Transnational Law*, Yale University Press, 1956; C. SCOTT, *Transnational Law as Proto–Concept: Three Conceptions*, in *German Law Journal*, 2009, p. 877.

[24] See A. SANTOSUOSSO, A. MALERBA, *Legal Interoperability as a Comprehensive Concept in Transnational Law*, in *Law, Innovation and Technology*, 2014, n. 6, pp. 2-5.

[25] See the final results of the *EFFORTS* project [co-funded by the Civil Justice Programme of the European Union (JUST-JCOO-AG-2019-881802)].

4) mutual misunderstanding of enforceability of procedures because of diverging legal systems in the matter;

5) Incoming requests need to be manually entered into the national case management system.

This process takes time and involves a high risk of human error, which could have severe consequences for the request's treatment.

Hence, action is needed to develop interoperability at the European and national levels. There are numerous uncoordinated initiatives toward a clear legal strategy both at the EU and national levels. The need to present a common approach backed by all the relevant agents involved is a challenge that requires in-depth coordination. The digital world is in its infancy; consequently, the further the legislation advances at the national level, the more significant European-level divergences will be in the future. It generates obstacles to future harmonisation because each Member State could adopt divergent ways to tackle the same problems.

To prevent this situation, the European Commission intends to advance integration before the proliferation of national hurdles might significantly slow down the process, leaving Europe behind at a global level in a critical sector for economy and society. It estimates that digital integration could contribute 415 billion euros annually to European economic growth and boost employment, competition, investment, and innovation[26].

In addition, it could establish Europe's international influence and protect Europeans from technology corporations under the influence of totalitarian governments or guided by the maximisation of profits with neither social constraints nor essential contributions to the development of the societies in which they operate. The new digital Europe requires a legal framework to settle and effectively and respectfully expand the principles that guide European society[27].

The European Union worked to this end, also including digital issues in preparing the first annual report on the state of the rule of law in the European Union (Communication COM (2020) 580 final[28]). The general concept of the European framework emphasises the development of economic and labour market resilience with social, environmental, and institutional sustainability as the guiding principle of community policies.

Given the rapid evolution of digitalisation, the EU foresees additional requirements to review the developments in each Member State.

According to all these considerations, rather than staring on the said limits, they should be acknowledged, and appropriate safeguards put in place. By doing so, the benefits of digitalization in this matter can be realized.

[26] U. Von Der Leyen, *My agenda for Europe. Political guidelines for the next European Commission 2019-2024*, p.13.

[27] A. E. Onțanu, *Normalising the use of electronic evidence: Bringing technology use into a familiar normative path in civil procedure*, in *Oñati Socio-Legal Series*, 2022, n. 3, pp. 582-613.

[28] See for more details: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX:52020DC0580.

3.2. The close correlation between digitalization and the fundamental right of access to justice

As evident from its title and the development of its recitals and articles, the Regulation under review demonstrates the strong correlation between digitalisation mechanisms and the effective implementation of the fundamental principle of access to justice[29].

These two phenomena influence each other mutually. Access to justice drives the development of increasingly reliable and secure digital communication systems. Conversely, digital channels have direct effects on the practical exercise of the right to access justice[30].

In this paragraph, we will explore the connections and interactions between these two concepts, drawing on the conclusions of the European Council[31]. The Council aims to highlight access to justice as a prerequisite for developing processes through technology. We will also evaluate the objectives and application areas of the Digitalisation Regulation that directly impact this fundamental right[32].

We will demonstrate how new technological communication channels can affect citizens' and businesses' practical exercise of judicial protection[33]. Without digitalised procedures, individuals might be discouraged from pursuing litigation or face significant costs and long waits for cross-border dispute resolutions[34].

As to its nature, the notion of access to justice is not new. As long as justice has existed, there have been those who have struggled for access to it. This is expressed in clause 40 of the *Magna Carta*, an 800-year-old document, which states: 'To no one shall we sell, to no one shall we refuse or delay, law or justice'.

On what basis can it be said that access to justice should never have a price? Modern Constitutions are based on the principle of the rule of law. For the law to govern, however, it must be able to provide a remedy on every occasion when a right is violated because the lack of a right and the lack of a remedy are reciprocal and interconnected. If the remedy is derived from rights, it should also not come at a high cost to the individual. If a plaintiff is unable to obtain the proper remedy, his right will never be exercised. When the law gives an individual the right to a remedy, the cost of the remedy mustn't turn that right into a privilege.

---

[29] See M. CAPPELLETTI, G. BRYANT, *Access to Justice: A World Survey*, Milano, 1978; B. DICKSON, *Access to Justice*, in *Windsor Review of Legal and Social Issues*, 1989.
[30] G. SHARP, *The Right of Access to Justice Under the Rule of Law: Guaranteeing an Effective Remedy*, in *Saskatchewan Law Review*, 2016.
[31] See Council Conclusions "Access to Justice – Seizing the Opportunities of Digitalisation", 10999/1/20 REV.
[32] K. ROACH, L. SOSSIN, *Access to Justice and Beyond*, in *University of Toronto Law Journal*, 2010.
[33] G. CUNIBERTI, *The recognition of foreign judgments lacking reasons in Europe: Access to justice, foreign court avoidance, and efficiency*, in *International and Comparative Law Quarterly*, 2008.
[34] A. H. RAYMOND, S. J. SHACKELFORD, *Technology, ethics, and access to justice: Should an algorithm be deciding your case?*, in *Michigan Journal of International Law*, 2014.

Access to justice is considered a fundamental right, an affirmation of the rule of law. Justice certainly consists of the resale of rights originating in law, so if it is not accessible, it cannot be said to be the rule of law. Therefore, it is always necessary to monitor the concrete and effective level of the right of access to justice and what is demanded of the law.

Effective access to justice also represents a fundamental principle of society in case-law, reflecting the State's commitment to a civil and orderly society, in which all are bound by the rules, principles and values of the Constitution as the supreme source of law and authority[35].

Access to justice should not necessarily mean access to judicial proceedings. Therefore, the European Union also emphasizes alternative dispute resolution (ADR) methods. However, the fundamental goal remains to ensure that citizens can access justice, understood as the recognition of their rights. To achieve this, judicial procedures must be simplified, or alternative procedures must be refined and promoted[36].

The real issue for citizens and businesses is securing the protection of their rights, whether judicially, alternatively, or preventively. Regarding the costs and duration of judicial protection, solutions include simplifying existing judicial procedures and moving towards alternative remedies.

This confirms that access to justice is a fundamental right and a core element of the rule of law, one of the essential values on which the European Union is founded (Art. 2 of the TEU) and common to the Member States. Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, entrusting shared responsibility for judicial review within the EU legal order to national courts/tribunals (Art. 19 TEU)[37].

Every person has the right to an effective remedy before an independent and impartial court/tribunal to have any violation of their rights and freedoms considered in a fair and public hearing, with the right to have someone to advise, defend, and represent them (Art. 47 of the Charter of Fundamental Rights of the European Union).

Digital technologies can be used in judicial systems to advance adherence to rule of law standards and respect for fundamental rights.

---

[35] If people cannot raise legal questions in court, the creation and maintenance of positive law will be hindered because the laws will not apply[35]. Therefore, any impediment to an individual's ability to bring legal matters before a judge will impede the operation of social norms, and in that case, the law will be unfit to provide rules. If the establishment of the rule of law depends on access to justice, it means that the constitutional principle of the protection of rights has the potential to be further developed. See S. STAIANO, *Costituzione e forma di governo*, in F. MUSELLA (a cura di), *Il Governo in Italia*, Bologna, 2018.

[36] The EU action plans have focused on this issue, recognizing the need to simplify procedural mechanisms and alternative dispute resolutions due to the high costs of justice and the duration of processes. See M. E. MÉNDEZ PINEDO, *Access to justice as hope in the dark in search for a new concept in European law, the lack of common concept, the imprecise definition of "Access to Justice*", in *EU/EEA Law*, 2011, pp. 9-19.

[37] The EU's mandate from Articles 81 and 82 of the Treaty on the Functioning of the European Union emphasizes developing judicial cooperation in civil and criminal matters with cross-border implications, reaffirming the objective of ensuring effective access to justice in the EU and its Member States.

The regulation aims to improve the efficiency and effectiveness of judicial procedures and facilitate access to justice by digitalising existing communication channels. This will lead to cost and time savings and reduced administrative burdens.

Digitalisation of procedures must ensure access to justice for everyone, including people with disabilities. Within this framework of clear objectives, all citizens should benefit from additional digital possibilities and enjoy equal opportunities regarding digital access to justice and fair proceedings. Digital participation must be unconditionally guaranteed to all societal groups without discrimination, considering the needs of vulnerable persons, including children, the elderly, persons with disabilities, and crime victims. In any case, the use of digital technologies in justice systems should not diminish procedural safeguards for those who do not have access to such technologies.

Using digital communication channels between competent authorities will reduce delays in handling cases in the short and long term, benefiting individuals and legal entities as well as the competent authorities of the Member States, and strengthening trust in judicial systems.

Effective access to justice is a fundamental objective of the area of freedom, security, and justice. Digital transformation is crucial to improving access to justice, efficiency, quality, and transparency of judicial systems. Therefore, it is essential to establish and advance suitable channels and tools to ensure judicial systems can effectively cooperate digitally. Establishing a uniform IT tool at the EU level is crucial to enable competent authorities to exchange case-related data quickly, directly, and fully interoperable. Data and communication exchanges must also be reliable, accessible, secure, and efficient.

Establishing digital channels for cross-border communication can effectively improve access to justice, allowing individuals and legal entities to seek protection of their rights and assert their claims, initiate legal proceedings, and exchange case-related data digitally with judicial or other competent authorities within the scope of EU civil and commercial law.

Digitalisation, despite the slow pace of implementation regulation, becomes an indispensable means to bring citizens closer to exercising their rights more effectively, efficiently, and economically.

Cross-border cases, which would never be pursued through ordinary means due to translation and international legal assistance costs and the burdensome traditional evidence collection channels, can benefit from the simplifications arising from digital communication channels.

For instance, in cross-border notifications, a secure digital communication system only requires mutual authentication of the communicating parties. The issue of the so-called "double date" problem diminishes as digital notifications are instantaneous, eliminating the need to distinguish between the notifier's effects (when the act is timely and formally delivered to the competent transmission authority) and the notified's effects (which occur upon receipt or legal knowledge of the act)[38].

[38] H. GENN, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, in *Yale Journal of Law & the Humanities*, 2013, pp. 397-417.

Moreover, linguistic barriers can be easily overcome through new platforms or the improvement of existing ones. The objective is to use one's language to select elements of the act to communicate and utilize the platform's system for translation into the destination language with equivalent legal terms and vocabulary.

The same advantages come from the increased use of video and teleconferencing. Particularly in small claims matters, no one imagined during the negotiation of the original EU instruments that teleconferences or video conferences would become widespread for taking evidence in low-value consumer cases. However, the pandemic and digitalisation have enabled unprecedented developments in exchanges and communications based on new IT technologies.

Therefore, it is appropriate to briefly review the practical needs that digitalisation[39] can easily address in cross-border cases governed by EU judicial cooperation instruments.

Concerning Regulation (EC) No 1896/2006 on the European Order for Payment Procedure, concerns have been raised about the multilingual standard forms used throughout the procedure being user-unfriendly and difficult for individuals to understand. The PDF form's identical font for the heading and information filled in by the applicant makes it difficult to read and may cause confusion. An advanced multilingual platform could easily bypass such difficulties in completing/procession forms.

Moreover, the EOP procedure forms require a signature and/or stamp. In practice, this sometimes results in filled-in forms being only stamped without a signature. As a stamp is not identical to a signature or a qualified electronic signature, the forms should be both stamped and signed. Online form filling and sending, through identification and secure authentication instruments, should avoid these problems. Specifically, regarding the statement of opposition, the current paper-based form may be contrary to the EOP Regulation, as according to Article 16(5), the statement shall be signed by the defendant or, where applicable, by their representative.

Regarding Regulation (EC) No 861/2007 on the European Small Claims Procedure, it is necessary to clarify how courts apply provisions on communication with parties, particularly concerning electronic communication and parties domiciled abroad (Art. 13.2 of the ESCP Regulation).

Unlike cross-border service of documents, other communications between the court and the party are not subject to any linguistic regime, comparable to the right to refuse service of documents drawn up in a language other than the country where the service is affected or the language the addressee understands. If correctly instructed and employed, an interconnected EU platform may ensure instantaneous translation of specific legal texts for direct transfer to the addressee.

Implementing the ESCP in each case involves applying two legislative instruments: the ESCP Regulation and the national procedural law of the forum Member State for

[39] F. GASCÓN, F. INCHAUSTI, *The new regulation on the digitalisation of judicial cooperation in the European Union: something old, something new, something borrowed and something blue*, in *ERA Forum*, 2024, pp. 535-552.

aspects not directly governed by the Regulation. While users or potential users of the ESCP can obtain comprehensive information on the EU instrument (through the EJN guides published on the e-Justice Portal), access to information on relevant national procedural law, as provided in the EJN factsheet on small claims combined with Member States notifications on the European Judicial Atlas, is more limited[40].

Further elaborated country-specific information documents will be easier, presenting the actual course of the ESCP in each Member State in a synthetic manner. AI and online platforms should ensure frequent and precise updating of relevant national information, standardizing the level and precision scope of the information collected.

One of the most frequent complaints by ESCP users is communication with the courts when deadlines provided in the ESCP Regulation are exceeded. Citizens and companies use the ESCP expecting an accelerated procedure and hope deadlines will be met. When this is not the case, claimants often struggle to get information on the progress of their case, especially if they do not speak the court's language. Described online platforms and simultaneous translation in the EU's official languages could be more appropriate measures to address this issue.

Following the adoption of Regulation (EU) 2023/2844 on the digitalization of judicial cooperation and access to justice, the Commission is working on implementing acts. ESCP and EOP have been designated as the first civil law instruments to be digitalized.

To facilitate the access of natural and legal persons to competent authorities in civil and commercial matters, the Regulation establishes the "European electronic access point" at the Union level, as part of the decentralized IT system. It contains information for natural and legal persons on their right to legal aid, enabling them to file claims, launch requests, send, request, and receive procedurally relevant information, including digitalized case files, and communicate with competent authorities, or have their representative do so on their behalf, in instances covered by this Regulation, and be served with judicial or extra-judicial documents.

Relevant case law from the Court of Justice of the European Union (CJEU) reinforces the importance of access to justice within the EU legal framework[41].

As the EU continues to invest in and develop digital judicial tools, it is imperative that these technologies are implemented in a manner that respects and reinforces the independence and impartiality of the judiciary, the right to a fair trial (European Convention on Human Rights, Article 6), and the provision of effective legal protection (Treaty on the Functioning of the European Union, Article 67). This alignment with the core values of the EU legal framework ensures that digitalization not only improves the

[40] G. GREENLEAF, G. PERUNGINELLI, *A comprehensive free access legal information system for Europe*, in *UNSW Law Research Paper*, 2012.

[41] In the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (C-279/09), the CJEU ruled that access to legal aid is a component of the right to a fair trial under Article 47 of the Charter, underscoring the necessity of removing financial barriers to accessing justice. Similarly, in Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, the Court highlighted the principle of judicial independence as integral to access to justice, affirming that digital tools must uphold the independence and impartiality of the judiciary.

efficiency and accessibility of judicial processes but also upholds the fundamental rights and principles that are the cornerstone of the EU's legal order.

Finally, looking at the past and hoping for a better future, it is useful to review how EU institutions addressed simplifying access to justice in Europe.

In the Tampere Conclusions[42], 25 years ago, it was stated: "To facilitate access to justice, the European Council invites the Commission, in cooperation with other relevant fora, such as the Council of Europe, to launch an information campaign and publish appropriate "user guides" on judicial cooperation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and updated by a network of competent national authorities (point 29). It also invited the Council to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union, as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States (point 30). Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union (point 31)".

In recent years, the e-CODEX system has been adopted, improving interoperability between legal authorities within the European Union. In an increasingly digital society, cross-border judicial cooperation relies on e-Justice solutions to facilitate interaction between different national and European actors in legal procedures. E-CODEX offers a European digital infrastructure for secure cross-border communication and information exchange in criminal and civil law.

Modern information and communication technology will make the justice system more efficient, help people assert their rights more quickly and easily, and reduce costs.

Services provided by e-CODEX and the Regulation examined here allow secure communication and information exchange between Member States in the field of justice. The broader vision of these instruments is that any citizen or legal professional in the European Union could communicate electronically with any legal authority, including communication between legal authorities themselves. The described systems are currently being implemented in civil matters for payment orders, small claims procedures, and mutual recognition of financial penalties. Additionally, the system will be adopted as the transmission channel for the secure exchange of electronic evidence between judicial authorities in criminal matters.

By harmonizing different approaches within EU countries, e-CODEX and the Digitalization Regulation will improve the efficiency of cross-border information exchange. The main benefits include increased security and reliability and time savings in completing cross-border processes.

[42] Tampere Conclusions, European Council 15 and 16 October 1999, Presidency Conclusions.

The future outcome will be an interoperable environment built upon national systems and infrastructures supporting e-Justice activities, especially the European e-Justice Portal and the activities of the e-Justice Action Plans.

According to this overview, the close interrelation between the concepts of digitalization and access to justice is confirmed. There is a genuine reciprocal relationship between them.

Judicial protection should inspire the use of increasingly efficient and secure technologies, while these technologies facilitate and make access to justice concrete and effective.

In summary, we aim to move from a paper-based exchange of forms to an electronic transfer of online and translated documents, actively helping parties to truly exercise their fundamental right to access to justice.

4. Digitalisation in the various EU Regulations on civil matters

It is time to examine the relationship between the use of IT technologies and the actual system of EU judicial cooperation. In general, despite the single EU measures on civil cooperation, including specific rules on the simplified exchange of documents and communications, the level of regulation of the matter is not sufficiently satisfying. In fact, as it will be clarified further, each regulation contemplates different hypotheses and modalities. This fragmentation has also negatively affected the application of the regulations in each member state. It has not allowed for adequate dissemination of the tools under consideration.

Therefore, the Digital Regulation does not directly aim to change the state of the art regarding the structure and application regime of EU Regulations on civil and commercial cross-border judicial decisions. Rather, it aims to envisage a general framework to implement all the rules on simplified communications in each regulation.

The Regulations on the European Order for Payment Procedure (hereinafter EOP)[43] and the European Small Claims Procedure (hereinafter ESCP)[44] merely enable the use of distance communication to apply for or respond to a claim (see, e.g., Article 4 ESCP Regulation), now specifically amended by Art. 20 of the Digital Justice Regulation.

[43] The European Order for Payment (EOP) is a simplified procedure for recovering uncontested debts in the European Union. The procedure is available in all EU Member States, except Denmark, and is governed by Regulation (EC) No 1896/2006. The EOP allows for a claim to be made in the debtor's Member State and for a decision to be obtained quickly and inexpensively. Once an EOP has been issued, it can be enforced in other Member States without the need for a declaration of enforceability.

[44] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Small claims procedures are simplified court proceedings for resolving disputes involving relatively small amounts of money. The procedures vary by jurisdiction but often involve simplified rules of evidence and procedure and limited discovery. Small claims procedures aim to provide a quick, informal, and affordable way for individuals and small businesses to resolve disputes.

Whether this can be done electronically depends on the Member State where the application is submitted, or the claim must be lodged.

The Regulation on the European Small Claims Procedure, as amended effective in 2017 (Regulation 2015/2421), incorporates the use of technology for distance hearings (videoconferencing, teleconferencing) as a default (Article 8 ESCP). However, it is still up to the Member States whether they use this.

Up to the complete implementation of the Digital Regulation, the situation in the various judicial operation measures in civil matters has been as follows: the European Order for Payment Procedure can be handled fully electronically (Article 8 EOP Regulation), but only a few Member States have incorporated this (e.g., Germany).

Other fields in which digitisation will become increasingly decisive are notifications and evidence, which are already covered by EU regulations.

The recast of the Service and Evidence Regulations, adopted in 2020 and applied on 1 July 2022, is an essential step in regulating digital communication among Member States.

Regarding service of documents, the 2020 Regulation did not change the core of the provision on the transmission of documents between the agencies, it only changed the medium through which transmission must be performed.

The central rule obliges the agencies and bodies designated by the Member states to conduct all communications and exchange documents through a secure and reliable decentralised IT system.

Article 24 of the Digital Justice Regulation introduced a new article 19a to the Service Regulation 2020/1784, explicitly and punctually ruling on service or communications by electronic channel through the European Electronic Access Point, as ruled by Art. 4.2 of the said Digital Justice Regulation.

Both Service and Evidence Regulations recasts take digital communication a step further by obliging the competent authorities of Member States to communicate with each other using a decentralised IT system, for example, regarding the exchange of standard forms.

These IT systems should be connected through an interoperable system, such as e-Codex. The latter has been firmly established for over a decade and is prominent in the measures currently being considered.

Digitalisation of justice requires investments in infrastructure, design, implementation, maintenance, and training[45]; it is a strategic investment. To achieve any of these improvements, it is necessary to have "financial support for the Member States to start a real digital transformation of their justice systems and support for implementing EU-wide initiatives"[46]. Each approach should be used to support the transition to digital

[45] See K. GOGIĆ, *The Impact of Covid-19 on the Digitalization of Justice in the European Union*, in *CIFILE Journal of International Law*, Vol. 3, No. 6, fall 2022, pp. 1-11 available on line: http://www.cifilejournal.com.

[46] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2020 Rule of Law Report - The rule of law situation in the European Union*, COM (2020) 580 final, 30.9.2020.

justice, including the new cohesion policy instruments. European Union gives financial support to Member States because, without it, most of them couldn't make these changes.

These reforms were necessary because of the damage that has been done and still is causing a pandemic in all parts of citizens' lives worldwide, including EU citizens, which means in the justice system too.

So, the EU regulations on cross-border judicial decisions have enabled the use of technology for communication. Still, it's up to individual Member States to decide whether and how to use these methods. The EU has provided financial support for the IT implementation of judiciary systems, which is necessary, as digital justice requires investment in infrastructure, design, maintenance, and training.

5. Key elements of the new Regulation

To achieve the objectives described above, reviewing the core elements of this legal act is now appropriate. The EU Commission has placed digitalisation at the top of its strategic goals[47]. Therefore, it is necessary to see how the limitations and obstacles that are present in each national system in implementing simpler, secure, and less expensive communications can be overcome[48].

An extensive impact assessment for further digitalisation of both civil and criminal justice preceded the proposal of the new measure. A public consultation was launched along with a consultation of a series of stakeholders. A study to support the impact assessment was prepared by a contracted party and involved experts; this entailed an extensive mapping of the existing instruments and the options for further regulation.

Overall, a toolbox approach is adopted, including a set of measures to advance the digitalisation of justice at both the EU and national levels. While previous legislative activities focused on specific instruments or areas, EU institutions broadly modernise the legislative framework for EU cross-border procedures in civil and commercial law.

Regarding civil justice, the measure's scope is limited to cross-border cases. However, as discussed above, EU policy in this area at the same time aims to upgrade digitalisation at the national level. For reasons of subsidiarity and proportionality, the choice for Article 81(2) for civil justice is most apparent. It will also benefit the instruments based on this provision, including, for instance, the European harmonised procedures. However, as the Service and Evidence Regulations have just been amended

[47] See *supra*, footnote 9 on e-Codex.

[48] About the genesis of the new instrument, along with the basis of the e-Codex system, the Commission put forward its Communication on the digitalisation of justice in the EU in December 2020 (JOIN/2020/18 final). This was also included in the Commission work plan for 2021 as a "digital judicial cooperation" package (COM/2020/690 final). See the text of the Regulation of the European Parliament and of the Council on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM/2021/759 final (with annex).

and provide for their own specific rules, these instruments are, as such, mainly outside the current Regulation[49].

It first rules communication between authorities, specifying that it should be done through a secure and reliable decentralized IT system, specifically the e-CODEX system. However, the existing variations in national IT systems among Member States suggest that achieving uniformity will be challenging. The goal is to link these varied systems together to promote equal justice and opportunity in cross-border procedures.

The Regulation also allows for alternative communication methods in certain circumstances, such as system disruptions or specific case nuances, which could lead to varied interpretations and practices among Member States.

A European electronic access point on the European e-Justice Portal is previewed regarding communication between individuals and authorities, leveraging existing digital justice systems. The Commission will manage this, and it will serve as a voluntary communication channel for those who consent to its use.

A key element of the envisaged system should have been the "digital by default" principle, which is meant to improve the efficiency and resilience of communication and reduce costs and administrative burden by making the digital channel of communication the preferred one to be used. This should also greatly simplify access to justice for citizens and business operators. However, verifying whether and how the "digital by default" objective has been adequately pursued through the recent Regulation is necessary[50].

At the EU level, the need to secure effective access to justice, which should be swift, cost-efficient, and transparent, is clearly highlighted. The existing set of instruments in civil justice does not sufficiently provide for secure and reliable digital communication channels or recognition of electronic documents, signatures, and seals.

References are also made to the Covid-19 pandemic[51] as a force majeure event that may severely affect the functioning of justice systems in the EU. While solutions were developed in an *ad hoc* manner in many Member States, these did not always comply with security standards.

Commission's view is that a common EU approach is necessary as leaving Member States to develop their own national IT solutions leads to fragmentation and the risk of incompatibility. It is interesting to underline that the Commission seems to limp somewhat between the need for judicial cooperation in cross-border cases, and the necessity to improve digitalization of justice at the national level.

[49] With the exception, as far as the Service of Documents Regulation, Reg. 2020/1784, of the amendments to it introduced in Art. 24, to align specific operational mechanisms with the Regulation on the Digitisation of Judicial Cooperation, Reg. 2023/2284.

[50] As explained above, the Commission states that "efficient cross-border Judicial cooperation requires secure, reliable and time-efficient communication between courts and competent authorities". At the same time, this cooperation should not impose disproportionate administrative burdens and should be resilient. See paragraph 3.

[51] See also A. POORHASHEMI, *Reforming the United Nations for the Post Covid-19 World*, Apolitical, 2020/9/25, https://apolitical.co/solution-articles/en/reforming-unitednations-post-covid-19, (accessed 25 May 2024).

The impact of the new regulatory instrument can be deduced precisely from the comparison between the general objectives of judicial cooperation and the level of progress of the individual national ITT systems.

How can digitalisation make an effective contribution to improving judicial cooperation? Both systems aim to simplify procedures and require harmonization or compatibility between national systems. In general, the objective of judicial cooperation has always been to facilitate the movement of procedures and decisions: the movement of individuals throughout the territory of the Union also means being able to move freely with the baggage of their rights, but also without shirking the performance of their duties.

However, for the free movement of processes and decisions to be effective and not excessively costly, breaking down or at least reducing language and legal barriers must be possible.

Therefore, to effectively use digitalisation, the cross-border justice system must find reasons for simplification and coherence within it.

Otherwise, it will not be able to benefit from digitalisation adequately. This, in fact, presents intrinsic difficulties, first of all the so-called “digital divide” principle between national systems and the lack of interoperability in court procedures in each Member State.

So, the principal goals for effectively managing the digitalisation of judicial cooperation are twofold: firstly, to achieve simplicity, and secondly, to ensure harmonisation.

Addressing simplicity first, it’s quite a challenge to simplify regulations surrounding digitalization due to its inherent complexity. The novelty of digitalization in the legal field requires regulations to be approached with fresh perspective. It is paramount to have clear-cut regulations and limit the number of digital tools in judicial cooperation to prevent further complicating the intricate nature of these matters. The European Union (EU) aims to simplify these solutions, but this objective has yet to be fully realized in their execution.

The second goal, harmonization, is fundamental to EU regulation to avoid additional fragmentation. While European laws are intended to unify the regulations of different Member States, the reality often needs to be revised, resulting in a disordered array of regulations that, instead of creating cohesion, lead to more complexity and barriers in civil judicial cooperation. With digitalization, there’s a risk that this fragmentation could be exacerbated, which calls for cautious consideration before enacting new rules.

As far as its content, the regulation would only apply if the cross-border proceedings fall within the scope of one of the instruments listed in either annex I or annex II. If the proceedings are not listed, they would be excluded from the regulation’s scope. This method of defining the scope based on the subject matter is more efficient than providing cross-cutting definitions within the regulation.

However, there is a lack of uniformity in the definition of a cross-border element within the sectoral acts, with some using a narrow definition and others using a broader

one[52]. This could lead to complications in determining the scope of the regulation in practice, as a two-step verification would be necessary.

First, the court or the other competent authority must verify that the conditions for applying one of the legal acts listed in the annexes are met, through a specific verification according to the concept or the notion of "cross-border case", ruled in each act. Second, they must determine if the specific conditions outlined in the horizontal regulation are fulfilled.

The e-CODEX regulation defines its scope differently, referring simply to "judicial cooperation in civil and criminal matters" rather than listing the applicable legislation. This leaves the definition of "judicial cooperation" open-ended and requires interpretation based on the specific legal basis in Articles 81 and 82 TFEU.

The text outlines the definitions of six important notions used in it[53]. These definitions are crucial in determining the scope of the legal act and the focus of EU legislators during the legislative process.

"Competent authorities" are courts, public prosecutors, EU agencies, bodies and other entities involved in judicial cooperation procedures in accordance with each legal act listed in the Annexes.

Other "Competent Authorities" with reference to Articles 5 and 6 constitute an open-ended notion that includes non-judicial authorities, who are legally competent according to judicial regulations.

"Electronic communication" refers to the digital exchange of information through the Internet or another electronic network, while "electronic document" refers to a document that is transmitted as part of electronic communication, including scanned paper documents.

A "decentralised IT national system" is a network of IT systems and interoperable access points operating under each Member State's sole responsibility and management.

The "European electronic access point" is a single access point in the decentralised IT system that individuals and businesses throughout the Union can use.

"Fees" are payments made by competent authorities for proceedings under the acts listed in Annex I but exclude court fees for criminal procedures and legal fees. This

[52] About the concept of cross-border litigation in civil judicial cooperation, see the fundamental judgement of EU Court of justice in *Owusu* case (C-281/01). The English courts initially took the view that they only had to apply the rigid European regime when determining jurisdiction as between the courts of European States. Thus, the English courts considered that, even if they had jurisdiction under the European regime, they nevertheless retained a common law discretion to stay proceedings or decline jurisdiction in favour of the courts of a non-European State if it was the more appropriate forum. However, in *Owusu*, in which the defendant was sued in the courts of its European State of domicile, the ECJ ruled that in those circumstances they had no such discretion and were obliged to hear the dispute. The *Owusu* case ruling sought to confirm the existence of predictable and unified jurisdictional rules throughout the European Union.
The same concept of "cross border – case" was echoed in other CJEU cases, such as Court of Justice, judgment C -116/02, points 143, 144, 250; Court of Justice, judgment C -159/02, points 5, 6, 144, 260; Court of Justice, judgment C -168/02, points 127, 160 and Court of Justice, judgment C -70/03, point 204. For a deeper prospective of this study, see M. A. LUPOI, *L'ultima spiaggia del forum non conveniens in Europa?*, in *Il Corriere giuridico*, 2006, pp.15-21.
[53] See Art. 2 of the Proposal.

definition only applies to proceedings under the acts listed in Annex I, not purely domestic cases.

"Videoconferencing" refers to audiovisual transmission technology that allows two-way and simultaneous communication of image and sound, thereby enabling visual, audio, and oral interaction.

The EU measure on digitalization contains five aims[54]:

(1) Ensuring the availability and use of electronic means of communication in cross-border cases between Member States' judicial and other competent authorities;

(2) Enabling the use of electronic means of communication in cross-border cases between individuals and legal entities, and courts and competent authorities, except in cases covered by the service of documents regulations[55];

(3) Facilitating the participation of parties to cross-border civil and criminal proceedings in oral hearings through videoconference or other distance communication technology for purposes other than the taking of evidence in civil and commercial cases (ruled in the specific regulation);

(4) Ensuring that documents are not refused or denied legal effect solely on the grounds of their electronic form (without interfering with the courts' powers to decide on their validity, admissibility, and probative value as evidence under national law);

(5) Ensuring the validity and acceptance of electronic signatures and seals in the context of electronic communication in cross-border judicial cooperation and access to justice.

These are strategic goals that help form the cadre for using digital technologies in civil cooperation. They reduce the complications arising from the paper-based procedure and the time, cost, and security problems of communications between agencies and stakeholders.

The text under consideration provides a comprehensive framework for using electronic communication and digital technologies in judicial cooperation procedures in the European Union. It covers various aspects, such as electronic communications, videoconferencing, electronic signatures, and electronic document acceptance in civil, commercial, and criminal matters.

Using a Regulation instead of a Directive ensures that common rules apply to all EU judicial cooperation instruments in a single, imperative act that directly binds the Member States. So, one of the most significant inequalities that currently exist among Member States can be eliminated: the different levels of digitisation. Therefore, it is essential that the common framework arising from the regulation be directly binding in all EU countries linked by the measure. As it will be discussed, this framework will have to be accompanied by financial support from the European Union to facilitate the expansion of

[54] See the Explanatory Memorandum of the Proposal for the Regulation on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, 2021/0394, COD.
[55] See *supra* footnote 10 and 11. See also P. BOHUNOVA, *Regulation on Service of Documents: Translation of Documents Instituting Proceedings Served Abroad*, in *Dny práva—2008—Days of Law*, 2008, available online: http://www.muni.cz/research/publications/818211 (accessed on 31 May 2024).

the available technological apparatus and the training of the necessary specialised personnel.

6. The way to exchange communications and forms

The text establishes a uniform legal framework for electronic communication between competent authorities and between natural or legal persons and competent authorities in judicial procedures[56]. The regulation applies to electronic communications, electronic fee payment, and videoconferencing in the context of the instruments listed in Annexes I[57] and II[58].

This legal act will apply to electronic communication in judicial cooperation procedures in civil, commercial and criminal matters, as provided for in Articles 3 and 4 of the regulation, and to videoconferencing and other distance communication technology in civil, commercial and criminal matters as provided for in Articles 7 and 8 of the regulation (Article 1(2)).

One key provision requires that written communication and form exchange between courts and competent authorities be carried out through a secure and reliable decentralized IT system.

The Regulation (Article 3(1)) provides for mandatory use of electronic means for written communication between competent authorities in both civil and criminal cross-

[56] The same legislative approach – through an explicit and closed renvoi to a list of instruments – was followed in the Commission proposal for the e-CODEX regulation; however, the final text of that regulation, adopted on 30 May 2022, takes an open-ended approach, defining the scope of application by referring simply to "judicial cooperation in civil and criminal matters" (Article 2).

[57] Annex I lists 12 instruments in civil justice, such as the Order for Payment, Small Claims, Account Preservation Order, Brussels I-bis, Insolvency, Maintenance, Succession, and Matrimonial Property.

[58] The instruments covered in the area of civil procedure comprise one directive (2003 Legal Aid Directive); four instruments establishing autonomous EU types of civil procedure (2004 European Enforcement Order Regulation; 2006 European Order for Payment Regulation; 2007 European Small Claims Regulation; 2014 European Account Preservation Order Regulation); and instruments in the area of private international law and international civil procedure, regulating conflicts of laws and conflicts of jurisdiction, and providing for recognition and enforcement of Judgements across the EU. These include: 2012 Brussels I-bis Regulation; 2019 Brussels Il-Ter Regulation; and sector-specific regulations: 2008 Maintenance Regulation; 2012 Succession Regulation; 2015 Insolvency Proceedings Regulation, including two regulations that implement enhanced cooperation between Member States that chose to participate: 2016 Matrimonial Property Regulation and 2016 Registered Partnerships Regulation.
The instruments covered in the area of criminal procedure include several framework decisions (CFDs), one directive and one regulation: CFD 2002/465/JHA on joint investigation teams; CFD 2002/584/JHA on the European arrest warrant; CFD 2003/577/JHA on orders freezing property or evidence; CFD 2005/214/JHA on financial penalties; CFD 2006/783/JHA on confiscation orders (no longer in force, replaced by a regulation); CFD 2008/909/JHA on custodial sentences and measures involving deprivation of liberty; CD 2008/947/HA on probation decisions; CFD 2009/829/JHA on supervision measures; CFD 2009/948/JHA on conflicts of criminal jurisdiction; 2014 European Investigation Order Directive; 2018 Freezing and Confiscation Orders Regulation. Interestingly, about the concept of "judicial cooperation", the text of the e-CODEX Regulation neither uses nor defines the notion of a "cross-border" element, which is nonetheless a legal prerequisite for triggering EU competence in Articles 81 and 82 TFEU. The notion of "judicial cooperation" is not defined, either, presumably requiring that the regulation be interpreted in line with its specific legal basis in Articles 81 and 82 TFEU.

border cases. However, Article 3(2) included exceptions from the use of electronic means owing to i) disruption of the decentralised IT system, ii) the nature of the transmitted material or iii) 'exceptional circumstances'. In those exceptional cases, documents might be transmitted by non-electronic means, which should, nevertheless, be "the swiftest" and "most appropriate" available alternative. It is not specified what kind of non-digital transmission is meant; however, since it should be "the swiftest", traditional postal delivery is excluded, whereas delivery by courier could be envisaged.

Furthermore, Article 3(3) provides for an additional exception from using the decentralised IT system, namely if the use "is not appropriate in view of the specific circumstances of the communication in question". In such cases, 'any other means of communication may be used', i.e. not only the swiftest and most appropriate alternative (as required by Article 3(2)), but also any other alternative, including traditional paper mail.

However, the "specific circumstances" exception does not apply to the exchange of forms. This means that forms may be transmitted non-electronically only in situations listed in Article 3(2).

While the original proposal applied the use of electronic communication between competent authorities (Chapter II) to "written communication between competent authorities in cases falling under the scope of the legal acts listed in Annex I [civil procedure] and Annex II [criminal procedure]", the compromise text has clarified that electronic communication is obligatory not only "between competent authorities of different Member States" in civil procedure (Annex I), and within criminal procedure (Annex II) but also "between competent authorities of different Member States and between a national competent authority and a Union body or agency"(Article 3(1))[59].

Additionally, the co-legislators have adjusted the exceptions from the obligatory use of electronic communication (Article 3). While the original three exceptions (disruption of decentralised IT system; nature of the transmitted material; exceptional circumstances) were kept, other two were formulated in a more specific way, by adding that it is the "physical or technical" nature of the transmitted material and changing the vague expression "exceptional circumstances" to the legal technical term "force majeure".

Notwithstanding these clarifications, the possibility to invoke exceptions is too broad, so the adoption of the Regulations remains only one first step on the road to the "digital by default" element.

Lastly, the compromise text allows for optional use of electronic communication, not envisaged in the original text, between national authorities of the same Member State (Article 3(6)) and between EU bodies or agencies (Article 3(7)).

It is also envisaged that a European electronic access point on the European e-Justice Portal will allow citizens to fill in forms and submit them electronically, simplifying

[59] The co-legislators inserted an additional rule (Article 3(4)) that stipulates that if the authorities are present in the same location (e.g., a judge from Member State A and a judge from Member State B), they may exchange documents directly or through other appropriate means if this is necessary given the urgency of the matter.

access to justice. However, this is subject to the availability of national IT portals and the specific rules of each Member State.

According to the principle "digital by default", the Regulation introduces as a matter of principle the use of electronic means for written communication between competent authorities unless there is a disruption of the IT system, the nature of the material transmitted, or exceptional circumstances. In the latter cases, alternative means of communication must be the swiftest and most appropriate available, without the possibility to include traditional postal delivery.

In civil cases, communication between individuals and authorities is less strict, with individuals being able to choose between paper or electronic forms when communicating with leads.

While communication between competent (judicial or administrative) authorities of two Member States must mandatory be in digital form, the regulation is less rigid and more comprehensive when it comes to individuals (natural or legal persons) communications. Furthermore, the text is completely silent about communication between individuals (individual-to-individual), even though, in several countries' civil procedure rules, some types of documents – such as a final reminder to pay, or even the statement of claim (document instituting civil proceedings) – are sent directly by the claimant to the defendant (without a court's intermediation)[60].

Leaving the communication between individuals outside its scope, the horizontal digitalisation regulation focuses, as regards private parties, only on their communication with competent authorities, both in the authority-to-individual and the individual-to-authority formats.

In the communication from individual to authority, the individual may always opt for electronic form, but may also refrain from it and stick to paper form. There is no once-and-for-all switch from paper to digital, and the individual may choose to send some documents in paper form and others in electronic form, even in the same lawsuit. Electronic documents have full effect – they are to be treated as equivalent to paper ones, and the recipient authority must not refuse them simply because of their electronic form (as a consequence of Article 4.5).

Communication in the opposite direction, i.e., in the authority-to-individual format, is subject to different rules (Article 4(6)). The key element is consent by the individual to receive communication in electronic format, which triggers the authority's duty to use only electronic means. Unlike the individual, who may switch back and forth between paper and electronic formats, the authority not only does not have the right to switch on its own; rather, it must follow the individual's will and either use the paper format (if the

[60] Such documents could, however, be transmitted under the Service of Documents Regulation in the form of "extrajudicial documents", which the latter defines broadly as comprising not only "documents that have been drawn up or certified by a public authority or official", but also "other documents of which the formal transmission to an addressee residing in another Member State is necessary for the purposes of exercising, proving or safeguarding a right or a claim in civil or commercial law (Recital 11).

individual did not consent to electronic form) or the electronic format (if the individual expressed their will to receive communication in electronic form)[61].

About these electronic communication between private parties and competent authorities in civil proceedings (Chapter III), the final negotiations "compromise" text specifies, in Article 4(2), the types of procedures in which this will be possible, by reference to the procedures and legal acts under which this communication is allowed.

The regulation also requires the individual's consent to communicate electronically with authorities. The compromise text has also modified the rules on consent of private parties to the use of electronic communication (Article 4(6)), making them more specific. It stipulates that each instance of consent is specific to the procedure in which it is given and must be given separately for the purposes of communication, on one hand, and service of documents, on the other.

The compromise text contributed to define some of these key concepts, leaving every other to competent authorities to interpret them, with possible challenges from interested parties through judicial remedies.

The very exposition of the content of the rules shows that the implementation of the principle of "digital by default" is still far from being fully achieved. In fact, it will only be able to operate with respect to communications between the competent authorities and even in relation to these, the cases that can be framed as exceptions are likely to be numerous. Communication between natural or legal persons and the competent authorities may only take place with the recipient's consent (in the case of a natural or legal person).

In addition, the aforementioned "digital divide", which still exists in national systems, may represent another serious obstacle to the system's efficiency. This has led the European Union bodies and the Member States to opt for a long transitional period, as will be shown in the examination of Art. 10 of the Regulation.

7. Other provisions and the steps for the complete implementation of the measure

The text also deals with electronic signatures, securing the legal effects of electronic documents, and enabling the electronic payment of fees.

The Regulation rules electronic signatures and seals, in accordance with the eIDAS Regulation. The latter aims to integrate existing EU rules rather than create new ones that could contribute to fragmentation. Documents transmitted electronically must be recognized for their legal effects, and electronic fee payment must be made possible in every Member State.

[61] The regulation is silent on the question of revocation of consent by the individual. The individual's right to revoke such consent should be presumed from the general scheme of the regulation, which places an emphasis on civil litigants' autonomy of will. However, lacking a precise formulation in the rules, the question could become open to interpretation in single cases.

Videoconferencing or other distance communication technology are also ruled in civil and commercial matters (Art. 5) and criminal matters (Art. 6).

In civil cases, a party may request videoconferencing for a cross-border hearing. The other party must be allowed to express their opinion but does not have the right to block the use of videoconferencing.

The decision to use videoconferencing is up to the court and is granted if the technology is available and if one of the parties is in another EU Member State. The request for videoconferencing can be submitted through the European electronic access point or national IT portals. The court may refuse the use of videoconferencing if the circumstances of the case are incompatible.

The court may also order the use of videoconferencing without a request from any party. The rules on videoconferencing are subject to the national law of the Member State conducting the videoconference, not the law of the Member State where the individual is located or resides. These rules are fallback rules and do not override specific provisions in existing civil procedure instruments listed in Annex I.

According to the final "compromise text", the decision to use videoconferencing in civil proceedings is to be made by the competent authority, based on the availability of the IT technology, the opinion (but not necessarily consent) of the parties, and the appropriateness of its use (Article 5(1)). The competent authority must reassure itself that the parties have access to the technology, including people with disabilities (Article 5(2)). In principle, the procedure for holding a hearing through videoconferencing is subject to the law of the Member State conducting the hearing (Article 5(3)). Anyway, in some cases, the law of the Member State of the country in which the proceedings take place is applicable, as well, for instance concerning the recording of hearings (Article 5(4)).

The Commission is responsible for the implementation of software and the Member States must bear the costs of installing, operating, and maintaining the decentralized IT system.

The regulation also updates certain existing legislative acts to align with new provisions regarding digital tools in civil and commercial judicial matters.

A specific rule of the Digital Justice Regulation sets out when the implementing acts must be adopted by the Commission. For ease of reference, we will put in relation each delay with the relevant instruments in civil matters:

a) 17th January 2026, as a time-limit for the implementation of the European Payment Order (Reg. EC 1896/2006) and the European Small Claims Procedure (Reg. EC 861/2007);

b) 17th January 2027, as a time-limit for the implementation of the following legal acts: Legal Aid Directive (Council Directive 2003/8 EC), Cross-border protection measures (Reg. EU 606/2013); European Account Preservation Order (Reg. EU 655/2014); Insolvency Recast Reg. (Reg. EU 2015/848);

c) 17th January 2028, as a time-limit for the implementation of the following legal acts: Succession Regulation (Reg. EU 650/2012); Matrimonial Property Regime

Regulation (Reg. EU 2016/1103); Property consequences of registered partnerships (Reg. EU 2016/1104);

d) 17th January 2029, as a time-limit for the implementation of the following legal acts: European Enforcement Order (Reg. EC 805/2004); Maintenance Regulation (Reg. EC 4/2009); Brussels Ibis Regulation (Reg. EU 1215/2012; Brussels IIter (Reg. EU 2019/1111).

But it didn't end here. The Digital Justice Regulation shall indeed enter into force on the 20 days following its publication on the EU Official Journal, but it shall apply from 1st May 2025.

Moreover, Article 26 (3) specifies the applicability of Articles 3 and 4. They shall apply from the 1st day of the month following the period of two years from the date of entry into force of the corresponding implementing acts, referred to in the above-described Article 10 (3), establishing the decentralised system for each of the abovementioned legal acts.

This means that the Regulation aims to establish a common, uniform, decentralized uniform for IT Communications in the justice field. However, the completion of the process is not just around the corner, since it will end around February 2031.

Among other things, the final completion will take place so far in time for the most important regulation of civil judicial cooperation: the Brussels I bis Regulation (Reg. 1215/2012).

Such a long deadline for the implementation of European rules is familiar. When several partners do not adequately share the objectives of regulatory harmonisation, the solution to facilitate the completion of the negotiation may be to grant a long transitional period. In the case of digitalisation, this may also be due to the different levels of technological development in the individual Member countries. This, however, does not justify setting such a long deadline, such as greatly diminishing the measure's effectiveness and its impact precisely because we are talking about rapidly progressing, evolving, and improving technologies.

Not to mention that ICT is advocated by the EU institutions precisely to simplify and reduce the time and costs of justice in cross-border cases. But if the result is the one above described, then we can only wonder how in a famous Italian song of the Sixties: "Tell me quando, quando, quando".

That is why it has been announced that the effective and complete implementation of the "digital by default" principle is still far off.

The final provisions concern information protection, monitoring and evaluation, amendments to specific instruments, and the transition and entry into force.

The success of this digitalisation measure will depend on the active involvement and proper training of justice professionals, including judges, court clerks, and judicial officers, in using digital tools, but also in the application of relevant EU Regulations and corresponding national implementation methods, if available. So, the matter was

explicitly ruled in Article 11 of the said Regulation[62], providing for the training of justice professionals, to be implemented by the Member States and supported financially by the Commission through the relevant financial programmes, as well as grants.

8. The adaptation of existing measures

The regulation implies amending specific measures on judicial cooperation in civil matters to coordinate their rules on communications and document exchanges with the new opportunities of digitalization.

According to Recital 51, it is necessary, for the purposes of ensuring the full attainment of the objectives of Digital justice Regulation and for the alignment of the existing Union legal acts in civil, commercial and criminal matters with the said Regulation, that amendments be introduced in some Regulation to ensure that communication takes place in accordance with the rules and principles set out in the new Digital Justice Regulation.

So, it is useful to have a short review of these EU civil judicial cooperation measures and their specific rules on documents' service or communication aligned with Service or Digital Justice Regulations.

About service of documents, the starting point was Regulation 1348/2000, later replaced by Regulation 1393/2007. Articles 4 and 7 refer to the possibility of using e-mail in the context of the transmission of documents between transmitting and receiving agencies. Direct service of documents by email is considered up to now as rather daunting, if the key issue still needs to be resolved, namely clear proof of a reliable certification that the addressee has received notice. The 2007 Service of Documents Regulation provided that the transmission of documents between the transmitting and receiving agencies could be carried out by any appropriate means provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible. This technology-neutral formulation permitted electronic exchanges, but they were not used in practice. Regulation did not set any time limit for the agency to transmit the documents to the foreign agency following the request of the interested party.

The new rules of the 2020 Service of Documents Regulation do not change the core of the provision on the transmission of documents between the agencies, it only changes the medium through which transmission must be performed. The central rule establishes an obligation for all communication and exchanges of documents between the agencies and bodies designated by the Member States to be carried out by a secure and reliable decentralised IT system. The Regulations mentions the e-Codex as an example of a decentralised IT system[63].

[62] Article 11 of Digital Regulation.

[63] That's because it was not the intention of the legislator to tie the Regulation to e-Codex firmly, but to leave space for more advanced technical solutions in the future.

Thing should have come better from July 2022, i.e., when the new Regulation 2020/1784 is entered into force, replacing the above. Anyway, no later than 1 May 2025, when the provision enters into force[64], all the technical measures must be taken to make this ICT system operational, and the transmitting agencies should be able to use their usual national application interface or software provided by the European Commission to send the documents to be notified to the receiving agencies via the e-CODEX system[65].

As far as the Regulation 805/2004, on the creation of a European Enforcement Order, according to Articles 13 § 1 and 14 § 1, service by electronic means is possible. Pursuant to Article 13 § 1 which determines legal regulation for a service with proof of receipt by the debtor, "the document instituting the proceedings, or an equivalent document may have been served on the debtor by one of the following methods: … (d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor". As for a service without proof of receipt by the debtor established by the Article 14 "service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been performed by one of the following methods: (f) electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance".

To reach the digitalization objectives, Article 18 of the Digital Justice Regulation has modified Article 19.1 of the EEO Regulation, including "electronic means" among the ones to employ for service or communication under articles 19 and 19 a of Service Reg. UE 2020//1784.

Then, Regulation (EC) No 1896/2006 of 12 December 2006, creating a European order for payment procedure, contains fragmentary provisions on digitalization, i.e., Article 13 and 14. According to the Article 13 that establishes regulation for a service with proof of receipt by the defendant: "the European order for payment may be served on the defendant in accordance with the national law of the State in which the service is to be effected, by one of the following methods: (d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt, including the date of receipt, which is signed and returned by the defendant". In the case of a service without proof of receipt by the defendant determined by the Article 14 which states: "1. The European order for payment may also be served on the defendant in accordance with the national law of the State in which service is to be effected, by one of the following methods: (f)

[64] Article 37, 2020 Service of Documents Regulation. The provision of means of communication between transmitting and receiving agencies and central bodies will come into force on 1 May 2025, three years after the entry into force of the Implementing Act establishing the decentralised IT system, which was adopted on 14 March 2022; Commission Implementing Regulation (EU) 2022/423 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council, C/2022/1417 [2022] OJ L 87, p. 9–13.

[65] The specific standard form of the request will be completed in electronic format in one of the official languages of the requested State or in a language accepted by that State. The receiving agency, for its part, will send an automatic acknowledgement of receipt to the transmitting agency via the same system, using the electronic version of the forms.

electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance". To reach the digitalisation goals, Article 19 of Digital justice Regulation has modified Articles 7.5, 7.6, 13, 16.4 and 16.5 of EOP Regulation including "electronic means" among the ones to employ for service or communication under articles 19 and 19 a of Service Reg. UE 2020//1784 and Article 4 of DJ Regulation and electronic signature in accordance with Article 7.3 of the latter Regulation.

Regulation 861/2007, on the European Small Claims Procedure, contains two provisions on digitalization, i.e., Articles 4 and 13. Article 4 stipulates commencement of the procedure which determines that: "1. The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced. The claim form shall include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents"[66].

For the alignment of these provisions, Article 20 of the Digital Justice Regulation has modified Articles 4.1, 13.1, 113.2 and 15a of the ESCP Regulation, including "electronic means" among the ones to employ for service or communication under articles 19 and 19 a of Service Reg. UE 2020//1784 and Article 4 of the DJ Regulation.

Rules on service of documents are included also in Regulation (EU) No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters[67]. A protected person wishing to receive protection in another EU country must provide the competent authority of that EU country with 1) a valid copy of the protection measure, 2) the certificate issued in the EU country of origin, 3) a translation of the certificate where necessary, provided by the EU country of origin using the multilingual standard form. To reach the digitalization objectives, Article 21 of Digital justice Regulation has modified Articles 8.1 and 11.4 of Regulation n. 606/2013 including "electronic means" among the ones to employ for service under articles 19 and 19 a of Service Reg. UE 2020//1784.

[66] According also to the Article 13 which establishes regulation for a service of documents, "1. Documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt. 2. If service in accordance with paragraph 1is not possible, service may be performed by any of the methods provided for in Articles 13 or 14 of Regulation (EC) No 805/2004".

[67] This Regulation works in tandem with Directive 2011/99/EU which sets up a mechanism allowing persons who benefit from a protection order in one EU country to request a European Protection Order giving them EU-wide protection.

According to Article 5 which establishes regulation for means of communication to be used by transmitting agencies, receiving agencies and central bodies, "Documents to be served, requests, confirmations, receipts, certificates and communications carried out on the basis of the forms in Annex I between transmitting agencies and receiving agencies, between those agencies and the central bodies, or between the central bodies of different Member States, shall be transmitted through a secure and reliable decentralised IT system.

Regulation (EU) No 655/2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, also contains two provisions on digitalization, namely, Articles 5 and 8[68].

That decentralised IT system shall be based on an interoperable solution such as e-CODEX. The general legal framework for the use of qualified trust services set out in Regulation (EU) No 910/2014 shall apply to the documents to be served, requests, confirmations, receipts, certificates and communications transmitted through the decentralised IT[69].

To align these provisions, Article 22 of the Digital Justice Regulation has modified Articles 8.4, 17.5, 29, 36.1, and 36.3 of EAPO Regulation, including "electronic means" among the ones to employ for service or communication under Articles 3 and 4 of DJ Regulation.

Finally, there is to consider Regulation (EU) 2015/848, recast of rules on insolvency proceedings, which aims to ensure the efficient administration of insolvency proceedings involving an individual or business that has business activities or financial interests in another EU country than the one in which they are usually based. The regulation sets out EU-wide rules to establish a. which court has jurisdiction to open an insolvency case; b. the applicable national law; c. recognition of the court's decision when a company, a trader or an individual becomes insolvent[70]. To reach the digitalization goals, Article 23 of Digital justice Regulation has modified Articles 42.3 and 53 of Regulation n. 2015/848 Insolvency proceedings Recast including "electronic means" among the ones to employ for service under articles 3 and 4 a of DJ Reg. UE 2023/2844.

Because of all the above observations, technology alone cannot overcome all obstacles arising from the need to coordinate EU rules and national procedures, the proliferation of local practices, or concerns about protecting certain procedural rights when moving from paper-based to digital exchange[71].

---

[68] Article 8 regulates the application for a preservation order. It stipulates that "The application and supporting documents may be submitted by any means of communication, including electronic, which are accepted under the procedural rules of the Member State in which the application is lodged".

[69] Where the documents to be served, requests, confirmations, receipts, certificates and other communications referred to in paragraph 1 of this Article require or feature a seal or handwritten signature, qualified electronic seals or qualified electronic signatures as defined in Regulation (EU) No 910/2014 may be used instead. If transmission in accordance with paragraph 1 is not possible due to the disruption of the decentralised IT system or due to exceptional circumstances, the transmission shall be carried out by the swiftest, most appropriate alternative means, considering the need to ensure reliability and security.

[70] The regulation covers 'preventive' insolvency proceedings available under national law which may be launched at an early stage in order to enhance the chances of rescuing the business. These proceedings are listed in Annex A of the regulation. It also covers a larger range of personal insolvency proceedings.

[71] Cft. E. STEIGENGA, S. TAAL, A. MEDICI, M. VELICOGNA, *Pro-CODEX Report Exploring the potential for a Service of Documents e-CODEX use case in The Netherlands*, finalised 12 June 2018. This report focused on the Dutch system and shows how the possible digitalisation of the procedure could affect certain procedural rights of the addressee, notably the personal verification of the acknowledgement of receipt. In paper-based procedure, this step is carried out by bailiffs, who deliver the documents in person to litigants. However, digital personal acknowledgement is currently not possible. This results in a lack of assurance that the addressee has received and is aware that the document has been served on him/her. The Report also stresses that, at present, certified e-mail service or infrastructure are not available in the Country. Please note that this Report has been realised within the framework of "Pro-CODEX: Connecting legal

In effect, for a digitalized cross-border procedure to be effective, at least two fundamental aspects must be considered: standardization and interoperability, which refer to having consistent processes and systems that can work across different organizations and jurisdictions; and security and trust, which entail ensuring the security and privacy of data and building trust among stakeholders by providing transparency and accountability in the process.

However, a realistic analysis of the Regulation suggests that the establishment of a secure system for the electronic exchange of documents risks being hampered by the existence of multilevel legal sources (European, national, and local) that the new instrument does not fully address.

Therefore, in this scenario, the progress and advantages of the Regulation in question are summary because they are partial and very limited in time as regards their effective implementation.

9. Concluding Remarks

The digitalisation of legal systems, both at the national and EU levels, is one of the most important tasks of the EU and its Member States. Although this has been true for many years, real progress with technological advancements in the legal sphere can only now be seen.

Even if in a very fragmented scenario, all Member States share the same goal as the EU legislator in this field. This is especially significant since legal digitalisation within the EU can only be successful if all the Member States join their efforts and collaborate to achieve this goal.

The new Regulation is only one part of the bigger framework when discussing the digitalisation of law and the legal sphere. However, access to justice and judicial cooperation between the Member States are of the utmost importance, and they will also have to be further developed and improved.

One main conclusion that can be brought is that it is a step in the right direction for the EU, as the regulation of the use of digital tools in access to justice and judicial cooperation is necessary so as to harmonise the diverging rules that are very visible when looking at the different national legal systems of EU's Member States.

With clear and precise rules throughout the whole of the EU, progress and achievement of the goal that is common to all can be harmonised. The most significant advancements of the Regulation are that it creates a specific legal framework for electronic communication and that it obliges the Member States to provide the possibility

practitioners' national applications with e-CODEX infrastructure", project co-funded by the European Commission Directorate-General Justice within the Justice Programme (2014–2020), Action Grant to support judicial cooperation in civil matters Application: JUST/2014/JCOO/AG/CIVI 4000007757.

for the use of videoconferencing and other distance communication tools, as well as electronic payment of fees.

Additionally, it clearly equates legal effects of electronic documents with the non-electronic ones. In that regard, the measure creates a basis for using these electronic means during the procedure. This is particularly important since, until now, the one characteristic of the involvement of the Member States in the development of e-justice in the EU was that such participation was only voluntary, which limited the overall possible impact.

The Regulation aimed to achieve one of the goals set out in last year's Communication on the Digitalization of Justice: "making digital communication channels the default channel in cross-border judicial cases". Unfortunately, this scope cannot be considered entirely dealt with.

Digitalisation will cover completely only the exchange of documents among competent authorities.

Concerning communications between competent authorities on one side and natural or legal persons on the other, their accomplishment is still conditioned to the prior consent of the addressee party.

Both types of document exchange will still struggle with the different levels of digitalisation in each Member State.

Nevertheless, the scope is to address two main problems of cross-border judicial cooperation: inefficiencies affecting this cooperation and barriers to access to justice in cross-border civil, commercial and criminal cases.

Nowadays, there are highly developed and sophisticated means of electronic communication. Due to their convenience and effectiveness, their application in civil justice procedures is inevitable and very appropriate.

The new instrument provides a comprehensive framework for the use of digital technologies in judicial cooperation procedures in the EU and seeks to simplify access to justice for citizens. However, the success of this initiative will depend on the availability of technology, proper training of professionals, and the allocation of resources for implementation. The digitalization of the procedure offers, after all, good opportunities to improve the system in terms of efficiency. The secure exchange of electronic documents between sending and receiving agencies could alleviate some complications arising from the paper procedure, first and foremost reducing notification time and security problems.

It would also provide national agencies with a direct and secure channel of communication, including for consultation purposes.

The 2023 Digitalization Regulation aims to replace, *inter alia*, the paper-based transmission mechanism with the decentralised ICT system of national applications interconnected by a secure and reliable communication infrastructure – e-Codex. This framework offers promising opportunities to improve the system in terms of efficiency. It reduces notification time and security problems and offers direct and secure

communication channels. The overall time left for implementing those provisions in national systems is too far back in time.

Still, there is a certain doubt about resorting to the traditional transmission channels due to the provided exceptions.

Also, in the parallel Service of Documents Regulation (Reg. 2020/1784), some rules may suffer a slow and hard implementation.

For instance, the new provision on electronic service grants to the court of proceedings the choice to decide whether it will use the electronic service, if the electronic mean of service is available under its national law. By providing strict conditions to use this service method and allowing Member States to add additional requirements, the Service of Documents Regulation leaves a small place for the procedural safeguards to be breached. Still, those strict conditions, together with the sufficient data on national laws provided on the e-Justice Portal, indicate that the full benefits of electronic service at the EU level are hardly reachable.

Both the Service of Documents Regulation and the Digitalization Regulation had two ambitious objectives: to introduce digital communication and to address the existing shortcomings in the previous rules concerning its clarity and operation in practice.

Unfortunately, everything indicates that the new provisions on digitalisation risk introducing new shortcomings in the sense of their clarity and implementation. The new rules are not in line with the advancement of modern technology and thus not contribute to the expected enhancement of the individual's right to access to justice.

However, when looking beyond the basis of the digitalisation framework, some points can still be further improved upon.

While the act surely provides solutions to some of the problems that can be encountered, it must also be stated that it also opens doors to different ones. This is mainly related to the fact that the differences between the Member States' digitalisation developments remain significant.

Furthermore, it offers many alternatives in practice and does not really provide a clear and simple vision of means of communication for all of the Member States. While this act aims to simplify the rules on communication, it is questionable whether it will actually achieve this aim in practice.

Some clarification of the rules in regard to the use of distance communication technology could also be advisable so they could not be open to much interpretation and so the Member States would all apply them according to their initial aim.

With all of that in mind, there is certainly a long road that awaits the EU before all of its ideas of a digital nature come into fruition. One crucial fact is that there certainly exists a precise final aim that seeks to improve access to justice and simplify court proceedings for all. What needs to be maintained through the long process before us is a clear vision of this aim and work on its realisation in the long run, instead of turning to quick solutions which, in time, always uncover more additional problems.

The solution for the future of digitalisation in civil judicial cooperation might be to consider it as a mindset. Although there are risks, those risks shouldn't stand in the way of progress.

So, instead of focusing on the fact that there are risks, just acknowledge them and provide safeguards for those risks and as a result, read the benefits of digitalization.

However, given the certainly not short time frame foreseen for the definitive implementation of the matter, there is a risk that citizens and legal practitioners, who are looking for a more effective answer to the demands for the protection of their rights, will wonder when the answer will be able to approach and simplify.

ABSTRACT: The paper discusses the recent European Digital Judicial Cooperation Regulation and its challenges. The Regulation aims for a "digital by default" approach but has not yet fully implemented it. It calls for a common EU approach to improve efficiency, reduce costs, and ensure the concrete exercise of the fundamental right of access to justice. The EU must overcome these challenges and establish a digital framework for cross-border judicial cooperation. The close correlation between digitalization and access to justice should also be examined in order to enable citizens and businesses to effectively exercise their rights in the European judicial area. It is also essential to analyse the relevant provisions of the new Regulation on the digitalisation of judicial cooperation to highlight its development and analyse the issues that arise. The main finding is that while the Regulation is a step in the right direction, it leaves room for further differentiation of access to justice between Member States. Therefore, additional improvements are desirable for a prompter implementation. In conclusion, the paper outlines the delicate balance between the need for simple, harmonised digital tools in judicial cooperation and the challenges arising from the complexity and diversity of existing systems within Member States. The Regulation aims to advance digital justice while addressing potential disparities in technology adoption and legal practices across the EU.

KEYWORDS: digitalisation – access to justice – e-justice – interoperability – electronic documents – cross-border procedures.