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The new regulation on the digitalisation of judicial cooperation in the European Union: something old, something new, something borrowed and something blue

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Abstract
This paper analyses the new EU Regulation on the digitalisation of judicial cooperation and access to justice in civil, commercial, and criminal matters, adopted in December 2023. The main objective is to promote the use of digital channels for communication between the authorities involved in the different instruments of judicial cooperation within the EU, extending the use of e-Codex. But the Regulation also determines the creation of the European electronic access point as a tool for communication with litigants and provides a minimum framework for participation by videoconference in certain judicial proceedings by those located in other Member States. Finally, the use of electronic seals, signatures and documents is generalised, as well as the electronic payment of court fees.

Keywords e-Justice · Digitalisation · Judicial cooperation · Videoconferencing · European electronic access point

1 The digitalisation of justice as a policy of the European Union

The European Union is facing the regulatory challenges brought about by the digitalisation of social and economic life at an accelerated pace. Digital is, of course, one

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of the cornerstones of the transformation of justice in contemporary societies and, for this reason, the European institutions have been looking for some time now for ways to achieve a clear objective, that of digitising national justice systems.

Digitisation can indeed be said to be the most obvious gravitational axis of the Union's legislative policy on justice. The EU Justice Scoreboard includes it under the label of quality, but it is sufficiently important to constitute a topic in its own right. The impetus for this action is part of a more general policy of promoting digital governance at all levels and in different ways: of course, by promoting Regulations and directives where possible; in addition, European funds promote the digitisation of justice at national level, under the umbrella of the successive European e-Justice action plans and strategies.[1]

The European Union cannot impose the digitisation of civil proceedings at national level, because it would be exceeding its competences. Despite this, it has been developing its own e-Justice policy for a long time now, with approaches that have evolved and gone beyond the merely European cross-border dimension.

Indeed, the implementation of e-Justice at the cross-border level is only possible if the daily functioning of justice has already been digitised: the cross-border level cannot be disconnected from the internal level, because it is directly based on it. Therefore, even if the EU were to limit itself to promoting digitisation only in relation to cross-border litigation, it would also be promoting it, albeit indirectly, at the purely internal level.

From an institutional perspective, the flagship is the European e-Justice Portal, which also represents the point of confluence of many other initiatives and functionalities and aims to become a 'one-stop-shop in the field of justice'. The digital focus has also been evident in the civil procedural rules emanating from the European Union, both in the area of international judicial cooperation and in European proceedings designed to deal more effectively with cross-border litigation. These legal instruments have enshrined genuine European standards of digitised justice.

The first visible commitment came more than ten years ago, with the 2013 Regulation on ODR in consumer matters,[2] which gave rise to the online dispute resolution platform, managed by the European Commission and intended to serve as a focal point for European consumers to find solutions to disputes arising from their online purchases. Its failure in practice has recently led to the decision to abolish it.

In 2015, the European Small Claims Procedure[3] was amended with the aim of taking advantage of ICTs: hearings by videoconference (Arts. 8 and 9 ESCPR), electronic service of documents (Art. 13 ESCPR)and remote payment of court fees (Art. 15a ESCPR).

[1] Originating in a 2008 Communication (COM/2008/0329 final), there are to date the 2009-2013 Action Plan (OJ C 75, 31.3.2009); the European e-Justice Strategy 2014-2018 (OJ C 376, 21.12.2013) and its Action Plan (OJ C 182, 14.6.2014); and the 2019-2023 Strategy (OJ C 96, 13.3.2019) and its Action Plan (OJ C 96, 13.3.2019).

[2] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.5.2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1-12.

[3] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16.12.2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015, p. 1-13.

The commitment to digital in the field of civil judicial cooperation within the EU becomes much more radical in 2020, with the adoption of the new Regulations on service and taking of evidence and, even more clearly, with the Commission's assumption of the generalisation of the e-CODEX system. There is a clear change in approach: digital is no longer seen as an add-on, an option that, where possible, will 'make things better', but as something structural, which 'should be the rule', i.e. as the archetype to be taken into account when designing the rules.

The new Regulation on the taking of evidence[4] imposes the electronic transmission of requests for cooperation between the judicial authorities and the central authorities involved (Art. 7 ER), which is required to take place 'through a secure and reliable decentralised IT system', 'based on an interoperable solution such as e-CODEX'. Only exceptionally (e.g. in the event of a system outage) may 'the swiftest, most appropriate alternative means' be used. In addition, ICTs are also used for the enforcement itself of requests for the taking of evidence [see Arts. 12(4), 19 and 20 ER].

The patterns are similar in the new Regulation on service.[5] Here too, electronic means is the default channel for communication between the bodies and agencies involved in the operation of the system (Art. 5 SR). It also requires the use of a decentralised, secure and reliable IT system based on an interoperable solution, such as e-CODEX. Requests for service are to be sent, except in exceptional cases, electronically via e-CODEX. Direct electronic service is also allowed, if the requirements set out in Art. 19 SR are fulfilled – e-CODEX will not be used then, but a new 'European' tool, the European electronic access point, is envisaged for this purpose.

The missing piece to make the provisions of both texts operational was the secure and reliable decentralised IT system based on an interoperable solution, i.e. e-CODEX. Its planning and design had already been underway for some time (since 2010) at a technical level,[6] but its regulation was equally necessary, and crystallised just two years ago with the 'e-CODEX Regulation'.[7] Its content is primarily technical and organisational, which makes it difficult to understand for readers accustomed to the categories and terminology of EU procedural law regulatory instruments. E-CODEX is a software package that enables connection between national systems, allowing users, such as judicial authorities, legal practitioners and members of the public, to send and receive documents, legal forms, evidence and other information

[4] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25.11.2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, pp. 1-39 (ER, hereafter).

[5] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25.11.2020 on n the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) OJ L 405, 2.12.2020, p. 40-78 (SR, hereafter).

[6] *Velicogna/Lupo* [5] p. 181-212; *Hess* [2] p. 766-768; *Themeli* [4] p. 112-114.

[7] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30.5.2022 on a computerised 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 (Text with EEA relevance) OJ L 150, 1.6.2022, p. 1-19.

in a swift and safe manner;[8] but it does not replace the IT applications used at national level: it only harmonises the central points of entry, to enable cross-border communication exchanges.[9] The management of the e-CODEX system is entrusted to the eu-LISA agency.[10]

Service of documents and taking of evidence in civil matters does not exhaust the spectrum of judicial cooperation within the EU. On the one hand, the whole area of cooperation in criminal matters can undoubtedly benefit from digitisation; the advantages in this field – particularly speed – are even more obvious. But, in addition, and returning to the field of civil and commercial matters, there are many contexts of 'interrelation' between judicial authorities and/or with litigants that take place in cross-border contexts under the rules that make up the European civil procedural *acquis*, without this interrelation involving the service of documents or the gathering of evidence.

This explains the EU's interest in generalising digitisation schemes and extending them beyond the evidence and the service Regulations, and the consequent inclusion of an additional piece in the Union's 'legislative production chain', the new Regulation on digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters[11] (hereafter: DJCR), adopted on 13 December 2023 and applicable as of 1 May 2025.

2 The new regulation on digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters: general features

The elaboration of a specific Regulation enshrining a generalised and structural digitisation of judicial cooperation in the EU has its earliest origin in December 2020, with the Communication from the Commission entitled 'Digitalisation of justice in the European Union – A toolbox of opportunities'.[12] Among many other issues, it included a Sect. 3.2, with a very expressive heading: 'Making the digital channel the default option in EU cross-border judicial cooperation'. In this section, the Commission noted that the use of digital tools in judicial cooperation within the EU was not the rule at the legislative level – with the exception of the Regulations on evidence and service, which had just been amended in that direction at that time – and it also noted that it was not the rule in practice, despite its obvious necessity. To force change,

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Digitalisation of justice in the European Union. A toolbox of opportunities COM(2020) 710 final, 2.12.2020 (para. 3.5).

[9] *Hess* [2] p. 768-769.

[10] European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice.

[11] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13.12.2023 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, OJ L 2844, 27.12.2023, p. 1-29.

[12] Supra note 8.

the Commission considered that binding regulatory action was necessary and undertook to present a legislative proposal on the digitalisation of cross-border judicial cooperation by the fourth quarter of 2021. The Commission formally presented on 1 December 2021 its Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters,[13] together with an additional directive to implement the amendments to the directive on legal aid in cross-border cases and, above all, the framework decisions and directives on criminal cooperation that would be affected by the change of approach sought by the Regulation. Both the Regulation and the Directive[14] were adopted simultaneously and published jointly in the OJ on 27 December 2023.

The general objective of the Regulation – and of the amendments of the framework decisions and directives underpinning judicial cooperation in criminal matters within the EU – is to enshrine the digital by default principle to articulate the core of the procedural activity generated by the instruments of judicial cooperation in civil, commercial and criminal matters. Moreover, this rule is also extended to the so-called 'European civil procedures', i.e. those established to ease cross-border litigation: the European Order for Payment Procedure, the European Small Claims Procedure and the procedure for obtaining a European Account Preservation Order. The latter explains why the title of the new Regulation includes a reference to 'access to justice', which in these cases does not necessarily entail recourse to mechanisms of international judicial cooperation in the strict sense – although, conversely, it is clear that mechanisms of international judicial cooperation are ultimately at the service of access to justice.

The reasons for this approach are obvious and are summarised very clearly in Recital 4: the aim is to 'improve the efficiency and effectiveness of judicial procedures and to facilitate access to justice by digitalising the existing communication channels, which 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 approach is therefore purely efficiency-oriented.

The adoption of the Regulation has its legal basis in Arts. 81 and 82 TFEU, i.e. in the EU competences in the area of judicial cooperation between Member States: this explains why its scope of application is limited to cross-border litigation and why it cannot have a direct impact on the procedural legislation of the Member States outside this area. An indirect impact, however, will be inevitable and, in fact, the interest of the European institutions in promoting the digitisation of judicial proceedings in the Member States is clear: this is indeed one of the issues addressed by the EU Justice Scoreboard,[15] the latest edition of which, published in 2023, stresses the need for

[13] COM(2021) 759 final. See *Kramer* [3] and *CCBE* [1].

[14] Directive (EU) 2023/2843 of the European Parliament and of the Council of 13.12.2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, OJ L, 2023/2843, 27.12.2023.

[15] In this vein, also *Themeli* [4] p. 114-115.

the Member States to speed up modernisation reforms in digital matters, as there is still considerable room for improvement in some of them.

It should be noted, still on a general level, that Ireland has decided to exercise its opt-in option for the new instrument (recital 59, OJ 8.3.2024); Denmark, on the contrary, has not done it, so that it will not apply to it (recital 60). Finally, several transitional periods are foreseen for its full application, during which both the Commission and the Member States must make the necessary regulatory and, above all, technical adjustments (Art. 26 in conjunction with Art. 10 DJCR).

An analysis of its content leads to a first conclusion: the digitalisation that the Regulation seeks to promote is relatively limited in scope, since it is primarily concerned with what it refers to as 'channels of communication'.

(i) It is not, of course, a question of digitising as such all the procedural activity of national judicial proceedings, as this would go far beyond the Union's legislative competence and the principles of subsidiarity and procedural autonomy of the Member States.

(ii) Nor is it the intention to digitise judicial cooperation procedures in civil, commercial or criminal matters as a whole – e.g. to digitise in full the Euro-warrant procedure or the exequatur procedure of a decision in family law matters. It is possible that the Union's regulatory power to introduce a change of this nature could be accommodated in the TEU and the TFEU, if it were considered that this digitisation is necessary for the proper functioning of judicial cooperation mechanisms; but, of course, the new Regulation does not want to reach that point.

(iii) For the time being, therefore, the only aim of the European legislator is to extend the digital-by-default-principle to the activity of communication in the strict sense between judicial bodies and the rest of authorities and bodies potentially involved in the various regulatory instruments through which judicial cooperation in the European Union is developed.

The same applies to the so-called 'European procedures': the aim is not to make them completely dematerialised – a development that may come about in the future – but only to digitalise the channels of communication that may have to be used when they involve the need for cooperation between authorities in different States – e.g. for the transmission of a European Account Preservation Order to the competent authority in the other Member State where it is to be enforced or for the service of a European order for payment.

This main purpose – to digitise the channels through which communications take place in any context of international judicial cooperation – also explains why the Regulation excludes from its scope the taking of evidence and the service of documents (recital 17): this goal has already been achieved with the 2020 Regulations. However, the SR has been amended to accommodate the use of the European Electronic Access Point as a valid method of cross-border service (new Art. 19a SR).

It should also be noted that the Regulation goes beyond the scope of communication channels, insofar as it deals with other aspects, more or less directly linked to judicial cooperation, in relation to which it also supports the digital option in cross-border contexts: a) the use of videoconferencing or other remote communication technologies; b) the use of electronic trust services (electronic signatures and electronic seals); c) the legal effects of electronic documents; and d) the electronic payment of fees.

It should therefore be noted that the title of the Regulation is somewhat misleading: judicial cooperation in civil, commercial and criminal matters is not fully digitalised; nor is access to justice in cross-border cases. We are dealing with a regulatory action of limited scope, as it affects a reduced sector of procedural activity -that relating to international judicial cooperation and cross-border litigation- and which, furthermore, is not designed to generate an absolute transformation of this activity, as it only affects the channels of communication and specific procedural activities. My intention is not to belittle the value of the initiative, but to make clear the expected impact of the Regulation introduced. Indeed, the aspects of judicial cooperation and cross-border litigation that are affected are those for which the digital format is most beneficial, i.e. those that are most likely to benefit from the change in practices that the regulatory change should bring about. If secure and interoperable, digital communication channels ensure time savings that are crucial for the effectiveness of the protection of rights, for an effective enforcement of rights, an effective criminal prosecution and an effective legal defence. From this perspective, judicial cooperation and access to justice are no longer different issues: in the vast majority of cross-border cases – and in others which, strictly speaking, may not be cross-border at the outset – it becomes necessary to resort to international judicial cooperation mechanisms, whose effectiveness determines a better or worse access to justice; promoting this effectiveness through digitisation is, therefore, a way of demonstrating a genuine commitment to the right to judicial protection.

This improvement is promoted in one 'corner' of civil litigation and criminal prosecution, the one in which they deserve to be qualified as cross-border. However, it is becoming increasingly clear that, in the field of European procedural law, what is initially established for an apparently small and marginal sector of the justice system – cross-border cases and proceedings in legal areas harmonised at European level – ends up having a strong potential for expansion in the medium term. The 'European solution', even if it is not contained in an instrument with immediate binding force, tends to be perceived as an example to be followed for the improvement of the national legal system. It therefore functions as a standard of good Regulation, which many legislators end up following, sometimes by inertia, sometimes by conviction, sometimes by pressure – after all, it is not easy to explain to litigants and legal operators that the protection of rights is more effective in those areas that have benefited from the direct regulatory action of the European institutions, when the European solution would be equally transferable to the purely internal context.

This is something that may also end up happening with the Regulation on digitalisation: if any Member State might still have doubts about it, the Union makes its preference for digital clear and applies it to everything that depends on its regulatory action. It can therefore be said that the Regulation implicitly invites the Member States to do, internally and across the board, what it envisages: to use digital channels of communication, to standardise the use of videoconferencing and electronic trust services, to recognise the full legal effectiveness of electronic documents and to allow the electronic payment of court fees. Regarding these issues, then, clear European standards are set or confirmed: such standards may be criticised, of course; and, above all, it may be 'regretted' that the European legislator's solutions have not gone as far as would have been desirable. And this, in turn, may create an impression of

'much ado about nothing', especially in those Member States where legislative development has already led to levels of digitalisation that meet the European minimum.

3 Communication channels and the European electronic access point

The fundamental aspiration of the Regulation and its accompanying Directive is to generalise the use of digital means of channelling all communications that take place in application of judicial cooperation instruments within the EU. The way in which this is done varies depending on whether only public authorities or, in addition, also litigants are involved.

3.1 Communication between authorities

Where the actors at both ends of the communication are public authorities, the new Regulation builds on the acquis generated by the 2020 Regulations on evidence and service, which have thus served, to a certain extent, as a test bed. This means making the e-CODEX system the basic tool for cross-border digital communications within the EU (recital 20). Art. 3(1) DJCR does not expressly mention e-CODEX, but refers generically to the use of 'a secure, efficient and reliable decentralised IT system'; however, for the time being, that system is e-CODEX and, in fact it is expressly mentioned in Art. 13, when the costs of the system are addressed – and in recitals 9, 20, 21 and 53.

The general rule will therefore be the use of digital channels of communication between all judicial authorities and public bodies involved in judicial cooperation procedures and in the implementation of the European procedures mentioned in the annexes to the Regulation.

Annex I lists the legislative instruments in the field of judicial cooperation in civil and commercial matters to which the provisions of the new Regulation will apply: the Legal Aid Directive (2003/8/EC); the Regulations creating the European Enforcement Order (805/2004), the European Order for Payment Procedure (1896/2006), the European Small Claims Procedure (861/2007) and the European Account Preservation Order (655/2014); the Brussels Ia Regulation (1215/2012) and the Regulations on jurisdiction, recognition and enforcement of judgments in matrimonial matters, parental responsibility and international child abduction (2019/1111); maintenance (4/2009); succession (650/2012); protection measures in civil matters (606/2013); matrimonial property regimes (2016/1103); property consequences of registered partnerships (2016/1104); and the insolvency Regulation (2015/848).

Annex II identifies the legal instruments in the field of criminal cooperation: the framework decisions on the European arrest warrant (2002/584), the freezing of assets and evidence (2003/577), the prevention and settlement of conflicts of jurisdiction (2009/948) and the mutual recognition of various types of judicial decisions, such as financial penalties (2005/214), confiscation orders (2006/783), judgments imposing custodial sentences or measures (2008/909), probation judgments and orders (2008/947) and orders on supervision measures (2009/829); the directives establishing the European protection order (2011/99) and the European Investigation Order in

criminal matters (2014/41); and the Regulation on mutual recognition of freezing and confiscation orders (2018/1805).

The e-CODEX system thus becomes the Union's major technical contribution in this field and one of the best examples of the success of an initiative that has emerged as a multidisciplinary project. E-CODEX will be the channel for communication between the national authorities of the Member States, and also between them and the European Union authorities involved in international judicial cooperation (in particular Eurojust and the European Public Prosecutor's Office). In fact, as a sign of the potential for expansion of European legislation in areas of strictly national jurisdiction, Art. 3(6) DJCR suggests that the Member States use the decentralised IT system for communication between their own authorities, provided that this internal communication must take place within the scope of application of one of the legislative instruments referred to in the annexes (e.g., if the national authority that has received a decision for recognition and enforcement is not the competent authority and has to forward it to the competent one).

The 'digital by default' approach, however, is not synonymous with 'digital only': the Regulation also contains provisions for cases where it is impossible to use e-CODEX (due to system disruption, the physical or technical nature of the transmitted material or force majeure): the swiftest and most appropriate alternative means of communication must then be used, taking into account the need to ensure a secure and reliable exchange of information [Art. 3(2) DJCR]. A preference for digital alternative channels can be inferred, but the European legislator has sensibly preferred not to impose specific predetermined conditions (see recital 24).

3.2 The European electronic access point

The truly novel contribution of the Regulation as regards the digitalisation of communications is the creation of the European electronic access point. It is defined as 'a portal which is accessible to natural and legal persons or their representatives, throughout the Union, and is connected to an interoperable access point in the context of the decentralised IT system' [Art. 2(4) DJCR]. In other words, it is a form of access for any citizen to the e-CODEX system or any equivalent electronic communication system through which a specific procedural action or activity is to be channelled. And, because of this access approach, it will be located on the European e-Justice Portal: 'access to the access point' will be through the Portal [Art. 4(1) DJCR]. In fact, the Commission also assumes its technical management, development, accessibility, maintenance, security and technical assistance to its users – this assistance, moreover, must be free of charge (art. 4.3 DJCR).

The European electronic access point is primarily a focus for natural and legal persons to access information about their entitlement to legal aid, especially in cross-border proceedings. But its main objective is to operate as a two-way communication channel between litigants and authorities, albeit in a partially asymmetrical way.

(i) It functions as a channel of communication for litigants with the authorities they must contact, depending on the procedure, formality or action they intend to carry out through the access point: Art. 4(4) DJCR expressly refers to the filing of claims, the launching of requests and the sending of procedurally relevant information.

In these cases, the channel is directly operational, so that the authority to which the communication is addressed must accept it [Art. 4(5) DJCR]. Member States will need to be diligent in implementing the e-CODEX access points and the other infrastructure and software necessary to make the right of European litigants to use this communication channel fully operational. In the medium term, this provision has the potential to lead to a generalisation of this type of access points. If it works for cross-border litigation, all the more reason why it should operate in all types of proceedings – it will be difficult to explain why the State should not provide for all proceedings a tool from which only the participants in cross-border proceedings benefit. The European legislator is thus offering a model, an 'image of the future' for notification in domestic matters: the creation of a single access portal in which each citizen has his or her own folder or his or her own space.[16]

(ii) It must also be possible to use it to enable individuals to receive service of judicial or extrajudicial documents, in any of the areas where the system is applicable [Art. 4(4) DJCR]. In fact, an amendment of the SR has introduced a new Art. 19a, which will allow for the direct service of judicial documents through the European electronic access point. However, in any event, service via the European electronic access point will be subject to the prior consent of the addressee [Art. 4(6) DJCR]. The European legislator thus once again confirms the standard for electronic service on litigants: the consent of the addressee is required. As a standard, of course, it can easily be described as 'minimal', since in practice it entails a waste of digital channels of communication. It may be reasonable not to subject individuals to the burden of having the means to connect to the access point and to periodically check its content: such a burden may be seen as excessive, especially for those who could be described as 'digitally vulnerable' (not only those who lack the material means – computer and internet connection – but also those who do not have the digital skills to deal safely with this type of actions). However, it has long been a general requirement for legal persons – at least for many legal persons – to have a website and an electronic address, i.e. to be fully operational in digital mode; it would not be disproportionate, therefore, to impose on them the burden of validly receiving judicial notifications through these channels (see recital 29).

Art. 4(6) CJEU further clarifies that 'each instance of consent shall be specific to the procedure in which it is given and shall be given separately for the purposes of communication and service of documents'. It can be understood that the European legislator wants to avoid the use of contractual clauses that incorporate a sort of generic prior consent for any judicial proceedings or equivalent situation (it should be recalled that the SR also applies to the service of extrajudicial documents).

In whichever direction it is intended to be used, Art. 4(4) DJCR provides that communication through the European electronic access point shall comply with 'the requirements of Union law and national law of the relevant Member State, in particular with regard to form, language and representation'. This default application of national and/or European procedural rules serves to clarify that the channel cannot be used in any manner, which is obvious, but also to recall that the access point is only

[16]The CCBE sees this partly as a risk for the existing systems of communication between lawyers and courts, which are in many cases developed and/or operated by the bar associations (*CCBE* [1] p. 3).

a channel of communication and that the Regulation is therefore not fully regulating a method of service or communication. European or national law will therefore continue to determine the content of what has to be communicated – including certain more or less stereotyped formulas, such as means to challenge the decision -; and, of course, the procedural rules on the validity, invalidity and cure of communications made through the access point will also apply – including the consequences for the right of defence in the event of defective implementation.

The use of the European electronic access point is only envisaged, at least initially, in civil and commercial matters and, more specifically, in the context of the enforcement of certain European legal instruments and for certain purposes [Art. 4(2) DJCR]:[17]

(a) In all procedural steps where communication with natural or legal persons (or their representatives) is necessary in the context of European order for payment procedures, European Small Claims procedures and European Account Preservation Orders (e.g., to submit the initial application with the competent court).

(b) In general terms, in procedural steps associated with the issuance and enforcement of European Enforcement Orders, as well as those foreseen for recognition, declaration of enforceability or refusal of recognition under the Brussels Ia Regulation and the other sectoral Regulations – matrimonial matters, parental responsibility, international child abduction, maintenance, succession, protection order, matrimonial property regimes and the financial effects of registered partnerships – (e.g., to apply for enforcement or for exequatur).

(c) In procedural steps for the issuance, rectification or withdrawal of certain documents or certificates provided for in several of the European Regulations on judicial cooperation in civil matters: the extracts provided for in the Maintenance Regulation; the European Certificate of Succession and the other certificates provided for in the Regulation on succession; the certificates referred to in the Brussels Ia Regulation (e.g., the certificate referred to in Art. 53) and the equivalent certificates in the case of European protection orders, matrimonial property regimes, the property consequences of registered partnerships and parental responsibility and international child abduction.

(d) For a foreign creditor to lodge a claim in insolvency proceedings (under Art. 53 of the Insolvency Regulation).

(e) To communicate with central authorities, where necessary in cases of maintenance, matrimonial matters, parental responsibility, international child abduction and obtaining legal aid (e.g. for a creditor seeking the recovery of maintenance to contact the central authority of another Member State requesting the enforcement of a judgment).

It should also be noted that the incorporation of the European electronic access point into the list of the mechanisms of service envisaged by the SR may give it a much wider potential, given that its scope of application covers civil and commercial matters in the general terms of Art. 1(1) of the SR.

[17] Many provisions (Arts. 20 to 24) amend these legal texts and adapt them to the new rules, including the possible use of the European electronic access point.

4 Beyond communication channels: videoconferencing, electronic trust services, electronic documents and payment of fees

The commitment to digitisation is visible regarding four other aspects, where the impact of the Regulation may be less significant.

4.1 Hearings through videoconferencing in civil and commercial matters

The use of videoconferencing – and other remote communication technologies – has undoubtedly become more widespread as a result of the COVID-19 pandemic, although it is a possibility that was already provided for in EU law beforehand.[18] Its maintenance, once the public health reasons have disappeared, is justified by reasons of efficiency, clearly understandable in the field of cross-border litigation and international judicial cooperation. It was therefore inevitable that the European legislator should include it in the Regulation through which the digitisation of judicial cooperation is to be consolidated.

For civil and commercial matters, Art. 5 DJCR lays the foundations. The primary objective is to generalise the possibility for the parties and their legal representatives to participate in a hearing by videoconference to be held in another Member State, beyond the cases in which it is already provided for by a European legal instrument:[19] This is an aim in line with the search for efficiency, cost savings and overcoming the obstacles inherent in cross-border litigation. The way to promote it is simple: the judicial authority hearing a civil and commercial proceeding may allow the parties and their representatives to intervene by videoconference in an oral proceeding if that party is present in another Member State at the time of the proceeding. However, the ER – and not the new Regulation – will apply when the purpose of the videoconference is the taking of evidence.[20]

More specifically, Art. 5(1) DJCR empowers a court to order a party and its representatives to participate in a hearing by videoconference, on the following terms:

(i) The party must be present in a Member State other than the one in which the hearing is to take place.

(ii) It must be requested by one of the parties, but it may also be agreed ex officio if the national procedural system allows it. The DJCR, however, obliges the court to listen to the opinion of the parties in this respect, although it does not have to follow it.

(iii) The use of videoconferencing must be appropriate in the light of the specific circumstances of the case.

(iv) The tools to do so must be available, including, according to Art. 5(2) DJCR, accessibility for persons with disabilities.

[18] See the Council Recommendations 'Promoting the use of and sharing of best practices on cross-border videoconferencing in the area of justice in the Member States and at EU level', OJ C 250, 31.7.2015, pp. 1-5), and the European e-Justice Portal.

[19] This is the case with the Regulations on the taking of evidence, on the European Account Preservation Order and on the European Small Claims Procedure.

[20] See also recital 40 and *Kramer* [3] p. 6.

If these conditions are met, the actual conduct of the videoconference must comply with the rules of the Member State in which the hearing is held [Art. 5(4) DJCR], including the provisions on the recording of hearings, with the express requirement that the recordings must be made and stored securely and not publicly disseminated [Art. 5(3) DJCR].[21] Given the cross-border nature of the cases, it would be reasonable to have ad hoc rules, including the use of interpreters, to help overcome possible language barriers.

The Regulation creates a power in the court to opt in to this mode of participation, which the court might not have had under its domestic law. If, by any chance, the legislation of a Member State were to lack rules on the use of videoconferencing, the entry into force of the Regulation would oblige that State to adopt the appropriate Regulation – even if only for the cross-border situations covered by the Regulation – due to the basic requirements of the principle of effectiveness of Union law.[22] The additional power to impose on the party and/or its legal representative the videoconference format for participation in the hearing, on the other hand, will only exist where national procedural law also grants it to its judges in domestic situations.

Moreover, the European legislator's choice implies that the decision of the court before which the videoconference is to be held should be sufficient for the videoconference to take place, i.e. for the subject located in another Member State and receiving the invitation and the link to connect to be able to do so validly: it is not subject, therefore, to the requirements of international judicial cooperation,[23] which are operative, however, when it comes to obtaining evidence (i.e. when it comes to taking the testimony of parties, experts and/or witnesses).

In a different vein, it should be stressed that the new Regulation is limited to participation in a hearing by videoconference, not to the holding of remote hearings. This is an important difference, as the implications in one case and the other on the right to due process are different. If the hearing is to be held remotely anyway, videoconferencing will be the only way to participate in it: however, in such a case, the European rule may not be the relevant one, as it will be something to be provided for by national procedural law. And it may also happen that the attendance by videoconference of the only participant in a procedural activity – e.g., because it is the testimony of a witness – determines that the court opts for the virtual format for the entire activity: but this, again, will be a matter for national procedural law, not required by the European legislator.

[21] Recording of a hearing involves the processing of personal data, so the general application of the GDPR ensures that this safeguard is respected.

[22] The CCBE insists on the lack of competence of the EU to impose the use of videoconferencing at national procedural level (*CCBE* [1] p. 4). The Regulation, in recital 33, underlines that a possible national gap on this point should be filled by applying mutatis mutandis the 'most appropriate' rules of national law and specifically mentions those relating to the taking of evidence – a suggestion that is strongly criticised by the European Bar.

[23] In this connection, Hess stresses that the Regulation settles the discussion in German scholarship as to whether the sending of a link to participate in a videoconference to a person in another State 'encroaches on' the sovereignty of that second State, as it is tantamount to sending a bailiff. (*Hess* [2] p. 773).

4.2 Hearings through videoconferencing in criminal matters

The approach is partly different when the activity moves to the criminal field. The purpose is the same – to generalise the use of videoconferencing in cross-border situations – but the European legislator has imposed many more limitations in Art. 6 DJCR.

Firstly, the use of videoconferencing is only foreseen for the hearing of a suspect, accused or convicted person or a person 'affected' by a freezing or confiscation order[24] who is present in another Member State.

Secondly, the provision may only be used in some specific procedural contexts [Art. 6(1) DJCR]:

(i) the hearing of a person for whom a European Arrest Warrant has been issued, as long as the decision has not been taken by the executing authority [under Art. 18(1)(a) of Framework Decision 2002/584];

(ii) the hearing of the sentenced person's position regarding his or her transfer to another State for the enforcement of a custodial sentence [under Art. 6(3) of Framework Decision 2008/909];

(iii) the hearing of the sentenced person before the decision on the imposition of a sentence is taken, in the context of the enforcement of a judgment or probation decision [under Art. 17(4) of Framework Decision 2008/947];

(iv) the hearing of the affected person prior to the adoption of decisions subsequent to the execution of a supervision measure as an alternative to provisional detention [pursuant to Art. 19(4) of Framework Decision 2009/829];

(v) the hearing of the person causing danger before issuing a European protection order [under Art. 6(4) of Directive 2011/99];

(vi) the invocation by the affected person of a legal remedy against freezing and confiscation orders [under Art. 33(1) of Regulation 2018/1805].

Outside these areas, it is also possible to carry out proceedings by videoconference in cross-border situations, but they will have to comply with the specific Regulation of the instrument of cooperation that provides for them – like the European Investigation Order and the European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union – [Art. 6(4) DJCR]. It should be noted, in addition, that the provisions of the new Regulation do not apply to judicial proceedings of an evidentiary nature or to the holding of trials that may lead to a decision on the guilt or innocence of the accused person (recital 43).

In this context, the requesting authority's request generates a duty on the authority of the executing Member State to allow the participation by videoconference of the suspect, accused or convicted person or the person affected by a freezing or confiscation order who is located in its territory in an oral hearing as part of the criminal proceedings concerning that person and which is taking place in the Member State of the requesting authority. However, this is a rather mitigated duty – and a rather limited power – as it depends on two requirements [Art. 6(2) DJCR]: (i) the circumstances of

[24] Pursuant to Art. 2(10) of Regulation 2018/1805, 'affected person' means the natural or legal person against whom a freezing order or confiscation order is issued, or the natural or legal person that owns the property that is covered by that order, as well as any third parties whose rights in relation to that property are directly prejudiced by that order under the law of the executing State.

the case justify its use; and (ii) the suspect, accused, convicted person or the person affected has given consent to participate in the hearing through videoconference.

This second requirement of consent is a real procedural safeguard,[25] given the negative impact that the use of videoconferencing can have in terms of immediacy and the right of defence. For this reason, the provision of consent has been subject to additional requirements:

(i) Before deciding whether or not to consent, the suspect or accused person may request legal assistance.

(ii) Before deciding whether or not to consent, the competent authorities shall provide the person to be heard with information on the procedure for holding a hearing by videoconference, as well as about their procedural rights, including the right to interpretation and the right of access to a lawyer.

(iii) Consent shall be voluntary and unequivocal and shall be subject to verification by the requesting competent authority before the hearing starts; it should also be expressly reflected in the records of the hearing.

(iv) Exceptionally, the competent authority may decide not to seek the consent of persons who are to be heard where their participation in person in the hearing would poses a serious threat to public security or public health which is shown to be genuine and present or foreseeable.

According to the provisions of Art. 6(9), the law of the requesting authority will govern the conduct of the videoconference, although the special rules of the DJCR will have to be respected. Thus, e.g., the mechanisms for informing and requesting the consent of the person concerned will have to be articulated, even if they are not established at the domestic level; and the provisions on the hearing of children or on confidentiality will also be imposed. In any case, the 'practical arrangements' will have to be agreed between the requesting and requested authority (e.g. the day and time, the software or platform, the location of the camera, the presence of an interpreter). In this, therefore, a certain margin of flexibility is recognised, provided that the respect of any essential procedural guarantees is not compromised. In an equivalent way to what is established for hearings by videoconference in civil matters, Art. 6.7 DJCR places videoconferences carried out by virtue of it on the same level as those that have taken place in purely internal proceedings with regard to their recording; it also imposes the duty to store them securely and to prevent their public dissemination. And, in equally general terms, it establishes the duty of the Member States to guarantee the confidentiality of communication between suspects, accused persons, convicted persons or affected persons and their lawyers, both before and during the hearing [Art. 6(5) DJCR]. If they are present in the same physical space when the videoconference is to take place, they should be allowed to meet in a confidential space, and they should also be entitled to take breaks during the hearing in order to speak in a confidential manner. It is also possible that lawyer and client are in different physical spaces; if so, the system used for the videoconference should have a confidential virtual room where they can meet prior to the hearing and to which they can go 'virtually', in recess, when necessary.

The European legislator also provides for a number of additional safeguards when it comes to taking a child's statement by videoconference [Art. 6(6) DJCR].

[25] Also *Kramer* [3] p. 8 and *CCBE* [1] p. 5.

(i) First of all, the holders of parental authority or another appropriate adult shall be informed without delay before the hearing; it will be up to domestic law to determine whether these persons have a power of veto or only the right to express their opinion. (ii) Furthermore, the competent authority will take into account the interests of the child when deciding whether to hear them by videoconference; the requesting authority must expressly state the reasons for the way in which it has weighed up the interests of the child (e.g., taking into account domestic legislation, which often advises videoconferencing to mitigate secondary victimisation).

The impact of a hearing by videoconference on the legal position of a suspect, defendant, convicted person or affected person can be tremendous. This is why Art. 6(8) recognises 'the possibility of seeking an effective remedy, in accordance with national law and in full respect of the Charter' if the requirements or guarantees established in Art. 6 itself have not been complied with. This is a very open provision, whose consequences will be determined by national procedural rules of the State in which the criminal proceedings in which the video conference has been held are taking place. The DJCR imposes, on this point, the right to bring to light the infringement of Art. 6 DJCR, but it does not demand, e.g., that this should be done by means of appeals, nor does it allow the infringement to be reported immediately – it could, therefore, impose the burden of reporting the infringement when challenging the decision taken as a result of the videoconference.

4.3 Electronic trust services, legal effects of electronic documents and electronic payment of fees

The digitalisation of judicial cooperation and access to justice in cross-border cases is concluded with three blocks of provisions.

a) Firstly, a reference is made to the eIDAS Regulation[26] for the purpose of establishing how documents transmitted through digital communication channels in cross-border proceedings and when applying the international cooperation mechanisms referred to in Annexes I and II – including cases in which the European electronic access point is used – are to be sealed or signed (Art. 7 DJCR).

b) Secondly, there is an obligation to recognise the legal effects of electronic documents that have been transmitted in the context of cross-border proceedings and when implementing the international cooperation procedures referred to in Annexes I and II: they may not be denied legal effect solely on the grounds that they are in electronic form (Art. 8 DJCR). On this point, the European legislator adopts an approach that should already be considered to have been peacefully accepted by all the Member States, even in purely internal cases. The literal wording of the provision, indeed, copies with the necessary exceptions what is already provided for in Arts. 6 ER and 8 SR.

c) Finally, the Regulation echoes a long-standing demand of legal practitioners involved in cross-border litigation and which is envisaged for the European Small Claims Procedure: to enable the necessary mechanisms for the electronic payment of

[26] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23.7.2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73–114.

fees 'including from Member States other than that where the competent authority is situated' [Art. 9(1) DJCR]. The mandate does not only cover cross-border cases and international judicial cooperation – albeit of doubtful compatibility with the procedural autonomy of the Member States, given its insufficient anchorage with Art. 81 TFEU.

These technical means of electronic payment shall comply with applicable rules on accessibility. Moreover, if technically possible, they must be accessible through the European electronic access point [Art. 9(2) DJCR].

5 Something new, something old, something borrowed and something blue

The new Regulation does not aim to overturn the handling of judicial cooperation at EU level, but it does aim to make clear the primacy of the 'digital by default' approach, filling the existing gaps in areas not affected by other previous instruments (notably the ER and the SR in the civil field). By way of a graphic conclusion, it can be said that the digitalisation of judicial cooperation and access to justice, as set out in the Regulation, meet the requirements that, according to American film culture, every bride should respect when getting married: to bring 'something new, something old, something borrowed and something blue'.

Its main contribution – the *new* thing – is the European electronic access point, which may end up becoming a very useful tool and a powerful lever from which to bring about a new approach to the practice of procedural communications, including at internal level.

Old is the reference to videoconferencing, at this stage of regulatory evolution. On this point, therefore, the DJCR tends to enshrine minimum standards that are most probably already provided for at the domestic level, but whose extension to the cross-border sphere should be ensured.

There are several elements present in the batch of the *borrowed*. The choice of digital by default and the e-CODEX system, which is taken from the ER and the SR, and the reference to the eIDAS Regulation, are certainly not surprising. The European legislator could not do anything different.

Finally, the *blue* colour evokes the flag of the EU and identifies the substantial technological and economic contribution that the European budget is going to make to the practical implementation of the system, both in the setting up of the technological tools that the Regulation provides for and, in particular, in the establishment of the European electronic access point (Arts. 12 and 13 DJCR).

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