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THE EPPO and EU law: a step forward in integration



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EPPO AND EU LAW: A STEP FORWARD IN INTEGRATION

TOPIC 4: THE EPPO
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HIGHLIGHTS

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THE EPPO AND THE DIGITALIZATION OF CRIMINAL JUSTICE

THE OPERATIONALIZATION OF THE EPPO WILL EQUALLY BUILD ON BROADER EU-LEVEL EFFORTS TOWARDS THE DIGITALIZATION OF JUSTICE, AND CRIMINAL JUSTICE IN PARTICULAR. IN DECEMBER 2020, THE EUROPEAN COMMISSION ADOPTED A PACKAGE OF INITIATIVES TO MODERNIZE THE EU JUSTICE SYSTEMS, INCLUDING THE COMMUNICATION ON THE DIGITALIZATION OF JUSTICE IN THE EU. THE COVID-19 PANDEMIC HAS GIVEN AN EXTRA IMPETUS TO DIGITALIZATION EFFORTS



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INTRODUCTION

- In December 2020, the European Commission adopted a package of initiatives to modernize the EU justice systems, including the Communication on the Digitalization of Justice in the EU.
- Ensuring the effective access of citizens and businesses to justice and facilitating judicial cooperation in civil, including commercial, and criminal matters between the Member States are among the main objectives of the Union's area of freedom, security and justice enshrined in Part three, Title V of the Treaty on the Functioning of the European Union (TFEU).
- Access to justice needs to be maintained and to keep pace with change, including the digital transformation affecting all aspects of our lives.
- It is sometimes difficult to access justice systems for a number of reasons such as formalistic and expensive legal procedures, long procedural delays and high costs of using court systems.

INTRODUCTION

- The COVID-19 crisis has thus underlined the need to strengthen the resilience of the justice system across the EU. It has also stressed the importance to further cooperate with its international partners and promote best practices also in this policy area. This represents an important component of a society based on European values, and of a more resilient economy.
- In 2020, the Commission undertook several initiatives to step up digitalisation of justice to swiftly respond to emerging challenges.
- It is thus important that appropriate channels are developed to ensure that justice systems can efficiently cooperate in a digital way. Therefore, it is essential to establish, at Union level, an information technology system that allows for the swift, direct, interoperable, sustainable, reliable and secure cross-border electronic exchange of case-related data, while always respecting the right to protection of personal data.
- Such a system should contribute to improving access to justice and transparency by enabling citizens and businesses to exchange documents and evidence in digital form with judicial or other competent authorities, when provided by national or Union law. That system should increase citizens' trust in the Union and mutual trust between Member States' judicial and other competent authorities.

INTRODUCTION

- This Communication is setting out a new approach to the digitalisation of justice based on a **‘toolbox’** – a comprehensive set of:
 - **Legal,**
 - **Financial,**
 - **IT instruments,** to be used by the various actors in our justice systems according to their needs.
- This approach would thus de facto ensure that everyone in our Union can make full use of new or additional digital tools in the justice area.

CHALLENGES FOR JUSTICE SYSTEMS IN THE DIGITAL AGE

- As a first step, the Commission carried-out a fact-finding (mapping) exercise, which took stock of the state of play of digitalisation of justice at both national and EU level. The mapping exercise is based on a comprehensive review of existing sources on the level of digitalisation of justice in Europe, as well as on additional surveys, which were conducted specifically for the purposes of this exercise.
- It reveals a different level of progress amongst the Member States.
- For example, in 2020:
 - individuals can access an electronic file of their ongoing cases in 10 Member States in all types of civil law procedure;
 - in the context of criminal law, victims can access an electronic file in seven Member States and defendants in nine;
 - evidence can be submitted to a court exclusively in digital format in the context of all types of criminal proceedings in 13 Member States;
 - in civil and commercial law, digital evidence is admissible in all types of proceedings in 10 Member States.

CHALLENGES FOR JUSTICE SYSTEMS IN THE DIGITAL AGE

- Overall, the results portray a very varied landscape across the Member States. The EU justice scoreboard and the mapping show that many areas of justice could benefit from further digitalisation.
- With certain exceptions, one area where a slow pace of digitalisation has been encountered relates to registers and databases. Individuals, businesses and legal practitioners all have difficulties in accessing the information to which they are entitled. In many cases, such access is not available online, resulting de facto in a number of inefficiencies.
- In addition, current EU legislation does not stipulate the medium or detailed arrangements for such transfers. As a result, most communication remains paper-based, thus generating inefficiencies in cross-border exchanges (mainly with regard to speed, reliability, traceability and cost), complicating individuals' and businesses' access to information, and slowing down exchanges between Member State authorities.

CHALLENGES FOR JUSTICE SYSTEMS IN THE DIGITAL AGE

- In order to effectively support the relevant Member States' authorities in the fight against cross-border crime, EU justice and home affairs (JHA) agencies and bodies have identified the need to enhance their digital cooperation capabilities.
- They have had to face a number of challenges, such as a lack of state-of-the-art digital infrastructure, a trusted communication channel and the necessary applications for the exchange of evidence between national authorities and between those authorities and the EU agencies and bodies. It is therefore essential that agencies and bodies such as the EU Agency for Criminal Justice Cooperation (Eurojust), the European Public Prosecutor's Office (EPPO), the European Anti-Fraud Office (OLAF) and the European Union Agency for Law Enforcement Cooperation (Europol) agree on a common approach that ensures smooth and secure cooperation with Member States, while complying with the applicable legal framework, in particular as regards personal data protection.

A TOOLBOX FOR THE DIGITALISATION OF JUSTICE

- The tools of the proposed toolbox are broadly categorised as follows:
- **Financial support** to Member States, to harness the potential for creating long-term impact;
- **Legislative initiatives**, to set the requirements for digitalisation in order to promote better access to justice and improved cross-border cooperation, including in the field of Artificial Intelligence;
- **IT tools**, which can be built upon in the short to medium term and used in all Member States. It is important that existing and new IT tools are interoperable by default, accessible for persons with disabilities, user-centred, fast, secure, reliable, resilient and data-driven, and ensure privacy, data protection and transparency;
- **Promotion** of national **coordination and monitoring** instruments which would allow regular monitoring, coordination, evaluation and exchange of experiences and best practices.

A TOOLBOX FOR THE DIGITALISATION OF JUSTICE

- Any action relating to the digitalisation of justice must be implemented in full compliance with fundamental rights, such as the rights to the protection of personal data, to a fair trial and to an effective remedy, and the principles of proportionality and subsidiarity.
- At the same time, institutional, organisational and technical measures must ensure full access to justice by disadvantaged groups and people in situation of vulnerability, such as children or older people, who may lack the requisite means or digital skills. Victims of crime should also be able to benefit from digital tools in accordance with every victim's specific needs.
- The right to a fair trial and effective legal remedy must be guaranteed. In particular, in criminal proceedings in a digital environment, care should be taken to avoid any interference with the rights of defence, including the right of access to a lawyer and the right of access to material evidence.

FINANCIAL SUPPORT TO MEMBER STATES

- In order to the fist tool provided by the Communication, we have to say that developing adequate IT systems for use in the field of justice requires time and, more importantly, resources. A comprehensive strategy to tackle the digitalisation of justice in the EU therefore needs to address access to funding.
- The digitalisation of justice systems, the uptake of existing digital solutions and the introduction of new ones require significant investments in infrastructure, design, implementation, maintenance and training. To achieve a sufficient pace of change, a twofold approach is needed:
 - financial support for Member States to start the true digital transformation of their justice systems;
 - and support for implementing EU-wide initiatives.

FINANCIAL SUPPORT TO MEMBER STATES

- Every means available should be used to support the transition to digital justice, including the new cohesion policy instruments, the new 'justice 'and 'digital Europe 'programmes, as well as the Recovery and Resilience Facility.
- The Recovery and Resilience Facility aims in fact at supporting the national investments and reforms that are essential for a sustainable recovery. This is why, when setting out guidance to help Member States to prepare and present their recovery and resilience plans for the implementation of the Recovery and Resilience Facility, the Commission stressed that the digital transformation of the justice sector is one of the domains in which Member States are strongly encouraged to focus reforms and investments.
- National initiatives in this regard can be counted towards the 20% digital expenditure target under the Recovery and Resilience Facility, in order to realise a 'Europe fit for the digital age'.

FINANCIAL SUPPORT TO MEMBER STATES

- A prerequisite for digitalisation of the systems is the reengineering of those processes and the design of the systems supporting them, always with the citizens and businesses in mind. Digital transformation structural reform without high-level process reengineering in mind, would be of limited impact.
- As regards digitalisation initiatives with an EU dimension, support should be available under the new Justice programme and the Digital Europe programme. Both instruments foster the digitalisation of justice, for example by supporting the establishment of interoperable solutions for more efficient cross-border cooperation and interconnecting registers and databases. The Digital Europe programme will also provide opportunities for piloting multi-sectoral innovative technology initiatives, in particular those based on AI and distributed ledger (blockchain) technologies.

MAKING THE DIGITAL CHANNEL THE DEFAULT OPTION IN EU CROSS-BORDER JUDICIAL COOPERATION

- In order to the second tool, the digitalisation of cross-border judicial cooperation procedures has been based mostly on voluntary initiatives between the Member States.
- However, this approach has reached its apparent limits. For example, in the area of civil and commercial law, seven Member States use digital communication tools for all relevant EU legal instruments when communicating with other competent authorities, six use them in a limited context, and seven currently do not use them at all.
- On the basis of this experience, the Commission will take a step further and propose legislation on the further digitalisation of judicial cooperation procedures in civil, commercial and criminal matters. Such a proposal could:

MAKING THE DIGITAL CHANNEL THE DEFAULT OPTION IN EU CROSS-BORDER JUDICIAL COOPERATION

- Require Member States by default to use **digital channels** for cross border communication and data exchanges between competent national authorities;
- Require Member States to accept **electronic communication** for cross-border procedures involving citizens and businesses, without ruling out the use of paper;
- Guarantee that the solutions and principles set out in the **eIDAS Regulation** are referenced and used, in particular:
 1. the principle that electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form;
 2. electronic identification and signatures/seals should become acceptable for the digital transmission of judicial documents and their appropriate assurance levels agreed.
 3. Provide a basis for the processing of personal data, within the meaning of the General Data Protection Regulation and applicable Union rules on data protection and determine the responsibilities of different controllers and processors;
 4. Ensure that any electronic access points established for use by the general public cater for persons with disabilities;
 5. In order to ensure that national IT systems are interoperable and able to communicate with each other, lay down the broad architecture of the underlying IT system for digital communication.

E- CODEX AND E-EVIDENCE DIGITAL EXCHANGE SYSTEM (EEDES)

- e-CODEX (e-Justice Communication via Online Data Exchange) is a key technological enabler for modernising, through digitalisation, the communication in the context of cross-border judicial proceedings.
- e-CODEX is the main tool for establishing an interoperable, secure and decentralised communication network between national IT systems in cross-border civil and criminal proceedings.
- It 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 in a swift and safe manner.

E- CODEX AND E-EVIDENCE DIGITAL EXCHANGE SYSTEM (EEDES)

- On the 30th may 2022 the EU co-legislator European Parliament and Council, adopted the REGULATION (EU) 2022/850 having as main object the e-CODEX system.
- This system provides functions such as verification of electronic signatures via a security library and proof of delivery. In addition, the entity managing the e-CODEX system has developed data schemas for digital forms to be used in the specific civil and criminal procedures for which it has piloted the e-CODEX system.
- As part of the reform, by the end of 2023 the management of e-Codex will be entrusted to the EU Agency for Large Scale Information Systems (eu-Lisa), based in Tallinn (Estonia). After formal approval by the Council, the act will be published in the Official Journal and will enter into force 20 days after publication.

E- CODEX AND E-EVIDENCE DIGITAL EXCHANGE SYSTEM (EEDES)

- With regard to the e-evidence digital exchange system (eEDES) is an IT tool whereby Member State authorities can securely exchange European investigation orders, mutual legal assistance requests and associated evidence in digital format. At present, authorities send requests and receive evidence by (slow) postal or electronic means that do not always ensure the necessary levels of security.
- Against this background and a growing need to secure e-evidence quickly in cross-border criminal investigations, Member States called for the creation of a secure platform. eEDES is designed to directly improve the efficiency and speed of existing cooperation procedures, while ensuring the security of exchanges and enabling verification of the authenticity and integrity of transmitted documents. It is also designed to be interoperable with national case management systems. All Member States should swiftly connect to eEDES in order to generate true EU added value.

MY E-JUSTICE SPACE

- In a number of Member States, individuals already have electronic access to various services offered by the judiciary and public administrations, e.g. provision of certified copies (of a clean criminal record check for use when applying for a job, statement of marital status, birth certificate or a will).
- Such services save time, can be accessed from anywhere and are available even in challenging situations, such as the COVID-19 pandemic.
- However, individuals and businesses are often not fully aware of their existence. Furthermore, despite the obligations of public sector bodies to make their websites and content accessible for persons with disabilities, the reality is that many of them still face barriers to their use.

MY E-JUSTICE SPACE

- The Commission therefore considers that a “My e-Justice space” should be established as an entry point with links to available national services. This space should be part of the e-Justice portal and managed in close cooperation with all Member States.
- The tool would apply only to judicial documents that a person, or their legal representative, is allowed to consult and/or obtain. It should not provide access to all judicial documents concerning a person, in particular those in criminal proceedings where a balance must be struck between the confidentiality of investigation, the suspect/defendant’s right to information and the victim’s right to information and protection, and where there are specific provisions under EU law.

DIGITAL CRIMINAL JUSTICE

- The modernisation of digital tools for judicial cooperation and information exchange in criminal investigations and proceedings across the EU is crucial in the light of evolving security threats and the pace of technological change.
- There is broad consensus on the need to modernise Eurojust's case management system (CMS). This will need to be financially sustained. The Commission will seek to support Eurojust in this work including through the 'Digital Europe' programme;
- 'hit/no-hit' connections between Eurojust's, Europol's and the EPPO's CMSs will ensure that they are aware at all times of any links between investigations or prosecutions they are working on, in line with their respective mandates. These interconnections, which will allow these organisations to see whether there is a "hit" between the information they hold and information from other EU agencies and bodies, are already foreseen in most of the respective legal acts establishing these organisations – the key is to ensure now that these interconnections work as intended by the legislation. In addition, there are currently no provisions on hit/no-hit links between the EPPO and Europol. Europol's legal framework should therefore be amended accordingly. The Commission will address this as part of its proposal to strengthen the mandate of Europol, which will be presented in December 2020.

DIGITAL CRIMINAL JUSTICE

- The Council Decision on the exchange of information and cooperation concerning terrorist offences and Eurojust's counter-terrorism register need improvement. The Council Decision is one of the few instruments requiring Member States to share information on their counter-terrorism cases with Europol and Eurojust, and as such is a cornerstone of those agencies' work in helping Member States to combat terrorism.
- The Commission will present a legislative proposal on exchanges on digital cross-border terrorism cases, and identify possible further improvements to Eurojust's data-processing framework.
- Forming a joint investigation team (JIT) has been widely recognised as one of the most efficient steps in carrying out a cross-border investigation

PROPOSAL FOR A REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CASES

- On 1 December 2021, the European Commission tabled a proposal for a horizontal regulation on digitalisation of judicial cooperation and access to justice, intended to apply to both civil and criminal proceedings of a cross-border nature within the EU.
- It would supplement horizontally, rather than replace, existing rules on the digital delivery of documents, digital hearings and other uses of information technology (IT) for cross-border judicial cooperation. In principle, **Member States' competent judicial or other authorities would be under a duty to use digital channels of communication, whereas for individuals, the use of such channels would be optional.**

PROPOSAL FOR A REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CASES

- The proposal's subject matter is the establishment of a legal framework for electronic communication between competent authorities in both civil and criminal matters, and for communication in judicial procedures between private parties, on the one hand, and competent authorities, on the other. The proposed regulation is therefore transversal and indistinctive, in the sense that its rules cover both civil and criminal matters.
- The proposed regulation lays down horizontal rules on the use of **videoconferencing** (or other distance-communication technology) for hearing i) **parties in civil proceedings** (but not witnesses or experts, as this is already regulated in the 2020 Taking of Evidence Regulation), and ii) **suspects, accused and convicts in criminal proceedings**. The proposal also provides for rules on using, in the scope of judicial cooperation, **electronic trust services, acceptance of electronic documents** (signed with e-seals and e-signatures), and **the electronic payment** of court fees in civil proceedings.

PROPOSAL FOR A REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CASES

- Article 2 provides for horizontal definitions of six concepts used throughout the proposed regulation:
 - **competent authorities**', meaning 'courts, public prosecutors, Union agencies and bodies and other authorities taking part in judicial cooperation procedures;
 - **'electronic communication'**, which means 'digital exchange of information over the internet or another electronic communication network'; proposal is technology- neutral, as it does not specify the concrete transmission mode;
 - **'electronic document'**, that is, 'a document transmitted as part of electronic communication, including scanned paper documents'. The definition is, once again, fully technology-neutral, particularly in that it does not specify the file format to be used for scanned documents, in particular, which can be transmitted in different file formats;
 - **'decentralised IT system'**, defined as 'a network of IT systems and interoperable access points, operating under the individual responsibility and management of each Member State, Union agency or body that enables the secure and reliable cross- border exchange of information'; while not mentioned explicitly in the definition, e-CODEX is clearly referred to in the recitals;
 - **'European electronic access point'**, taken to mean 'an interoperable access point in the context of the decentralised IT system, which is accessible to natural and legal persons throughout the Union';
 - **'fees'**, defined as 'payments levied by competent authorities in the context of the proceedings under the legal acts listed in the context of civil procedure, as opposed to lawyers' fees (legal fees), which fall outside the scope of this concept (in line with the maxim of legal reasoning known as argumentum a contrario, to the effect that 'what is not included in a legal rule is excluded from it').

PROPOSAL FOR A REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CASES

- Article 3(1) of the proposal provides for mandatory use of electronic means for written communication between competent authorities in both civil and criminal cross-border cases. However, article 3(2) provides for 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'.
- Article 8 regulates the use of videoconferencing or other distance-communication technology in criminal proceedings. The rule's scope *ratione personae* is limited to suspects, accused and convicts. *A contrario*, this rule does not apply to witnesses, victims or other parties to criminal proceedings (e.g. civil parties, who – in some Member States – may join criminal proceedings if they have a claim for damages to the person accused).
- Three prerequisites listed in article 8(1) are present: i) availability of videoconferencing technology; ii) justification for the use of videoconferencing technology by 'the particular circumstances of the case' – a concept not defined in the proposal; and iii) consent of the suspect, accused or convict.

PROPOSAL FOR A REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION AND ACCESS TO JUSTICE IN CROSS-BORDER CASES

- Article 8(4) mandates that the confidentiality of communication between suspects, accused or convicted individuals and their lawyer before and during the hearing through videoconferencing or other distance communication technology be ensured. This is in line with the principle of protecting 'legal privilege', which is inherent in the rights of the defence in criminal procedure.
- Article 8(5) provides that, before hearing a child through videoconferencing, holders of parental responsibility or another appropriate adult as referred must be promptly informed. When deciding whether to hear a child in this way, the competent authority must take into account the child's best interests.
- Article 8(6) introduces the principle of equivalence between domestic and cross-border cases as regards the recording of hearings: if such recording is provided by the national law for domestic cases, the same rules must apply to cross-border ones. According to article 8(7), a suspect, an accused and the convicted person must have the right to an effective legal remedy under national law in the event of a breach of any of the rules of article 8.