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Digitalisation of Judicial Cooperation in the EU: A Long Road Ahead[1]

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Abstract

This paper aims to highlight the development and pinpoint the issues that arise in the ongoing process of digitalisation of justice in the EU, particularly by analysing the relevant provisions of the new Proposal for a Regulation on the digitalisation of judicial cooperation. Different digital landscapes of the national courts in different Member States will also be showcased so as to detect possible issues in practices with the application of the new Proposal. The paper's main conclusion is that the Proposal, while a step in the right direction, leaves room for further differentiation of access to justice between Member States. Additional improvements before its adoption are therefore desirable.

Keywords

Digitalisation; e-Justice; European Civil Procedure; Judicial Cooperation in the EU.

1 Introduction

The process of digitalisation has, without a doubt, had one of the most significant impacts on the whole world in the recent history. Starting slow, it has since been gaining significant traction, which led to the global need of incorporating digital tools in almost all aspects of society. The legal sphere was certainly not the first area where this happened, which is unsurprising considering that the legal field can historically be described as resistant

1 This paper was co-financed by the Croatian Science Foundation through the Young Researchers' Career Development Project (DOK-2020-01).

to change.[2] However, after a while, it inevitably also started to adapt to the new challenges brought by digitalisation and new technological tools which became available. Perhaps the biggest acceleration factor was the COVID-19 pandemic which truly showcased all of the possibilities that digital tools offer, as well as the limitations of legal rules, particularly the procedural ones, when we take into account the changing dynamics of the society itself. Because of this, majority of the countries started to develop their own digital tools both for legal practitioners and/or the parties in the national procedures. Even before the pandemic, some Member States had already started to implement information and communication technology ("ICT") in judicial proceedings, including digitalisation of court administration, start of the usage of videoconferencing or, for some, even handling the procedures completely online.[3] This is unsurprising considering the major advantages that digitalisation can bring to the justice system, such as optimisation of the use of resources, higher degree of efficiency, acceleration of court proceedings, facilitation of access to justice and information, as well as strengthening the confidence in the justice system.[4]

This also holds true when we look at the bigger picture of the EU as a whole, taking into account that the cross-border element in litigation without a doubt provides for many additional complexities in comparison to strictly national litigation.[5] Despite this fact, initiatives for increased usage of ICT

2 MANNINEN, H. Between Disruption and Regulation – How Do Lawyers Face Digitalisation? In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 87.

3 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 351.

4 VELICOGNA, M. Justice Systems and ICT: What can be learned from Europe? *Utrecht Law Review*. 2007, Vol. 3, no. 1, p. 129; BANICA, R. Digitization of justice in the context of COVID-19 pandemic and the implications of digitalization on constitutional rights. *Revista de Drept Constitutional*. 2020, no. 2, p. 12; CASHMAN, P. K., GINNIVAN, E. Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions. *Macquarie Law Journal*. 2019, Vol. 19, p. 40; BODUL, D., NAKIĆ, J. Digitalizacija parničnog postupka (reforma načela ekonomičnosti?). *IUS-INFO* [online]. 7. 5. 2020 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/strucni-clanci/CLN20V01D2020B1373

5 VELICOGNA, M. et al. Connecting EU jurisdictions: Exploring How to Open Justice Across Member States Through ICT. *Social Science Computer Review*. 2018, Vol. 38, no. 3, pp. 278–279.

tools can be found not only on local and national, but also international level, with many interdependencies created among all of the aforementioned levels.[6] Particularly in regards to the EU, one of its main goals for a couple of decades already has been progress in the area of digitalisation in general, as well as particularly digitalisation of judicial cooperation in its Area of freedom, security and justice.[7] This is one of the points of EU's interest that has been gaining significant importance in the academic circles, as well as in practical ones, since cross-border judicial proceedings are becoming more of a regularity in the current times. This goal of digitalisation is visible in the plethora of action plans and reports presented in the last years by the EU, which all have modernisation of digital tools as one of the top priorities for future development.[8] On its path to promoting digitalisation in the judicial cooperation, the EU has accomplished many of its goals, some of which include the development of the European e-Justice Portal[9] and e-CODEX[10], which aim to help with the sharing of information on the national systems of the Member States and to provide a communication tool for cross-border cooperation between judges, lawyers and legal practitioners in general.

Despite promoting and developing multiple digital tools through different regulations and/or directives in all areas of law, the EU has so far not regulated the questions of digitalisation of judicial cooperation in one place. This will soon change, as the European Commission recently adopted two proposals, one for a Regulation which will lay down the rules of the digitalisation in judicial cooperation in civil, commercial and criminal matters ("the Proposal")[11], and one for a Directive which aims to align the existing

6 VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 1.

7 Art. 67 Treaty on the Functioning of the European Union.

8 See, e.g., Multi-annual European e-Justice Action Plan 2009–2013, C 75/01 (2009); Multiannual European e-Justice Action Plan 2014–2018, C 182/02 (2014); 2019-2023 Strategy on e-Justice, C 96/03 (2019); 2019–2023 Action Plan European e-Justice, C 96/9 (2019).

9 European e-Justice Portal [online]. *European e-Justice* [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/home?action=home&plang=en

10 E-Codex [online]. *e-Codex* [cit. 30. 5. 2022]. Available at: https://www.e-codex.eu/

11 Proposal for a Regulation of the European Parliament and of the Council 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.

rules on communication with the rules established in the aforementioned Regulation.[12] This is undoubtedly an important step for judicial cooperation in the EU, long awaited by many. However, when establishing general rules such as these, it is highly important to take into account the significant differences of national digitalisation developments in different Member States. Since such differences are certainly not of a small scale, it is necessary to question whether one legislative document will solve all the existing problems, or, on the other hand, even exacerbate them.

This paper therefore aims to present and analyse the proposed rules of the new Regulation for digitalisation of judicial cooperation in the EU, focusing specifically on the cooperation in civil matters. By taking into account the national developments of some of the Member States in terms of digitalisation in the area of justice, it will showcase how the proposed rules will affect those Member States and the EU as a whole. By comparing the national developments with the EU's aims for the future, conclusions on the necessary steps that need to be taken will be brought, particularly in regards to the Proposal in question, as it can still undergo many changes before its adoption and implementation.

Chapter 2 will first depict the road to digitalisation by the EU so far, highlighting the most important achievements, as well as its drawbacks. Chapter 3 will offer a comparative view on some of the Member States national practices and developments of specific IT tools. This will provide the reader with a fuller picture of the current digital landscapes of the selected Member States. It is in these landscapes that the new Regulation will have to be implemented, therefore, it is important to detect possible issues that may occur in that process. Chapter 4 will then focus specifically on the new Proposal and the rules it provides. By analysing the rules and predicting the impact they will have on different Member States in question, strengths and weaknesses of the Proposal will be pinpointed and ideas for

12 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/8/EC, Council Framework Decisions 2002/465/JHA, 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, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation.

possible improvements offered. Finally, Chapter 5 will conclude with the final remarks on the future for the digitalisation of judicial cooperation and the long road that is ahead of the EU in that regard.

2 The Road to Digitalisation of Judicial Cooperation in the EU

2.1 Long Road With a Clear Goal in Mind?

Before diving into all of the accomplishments and future goals, it is important to start from the EU's initial ideas with regards to digitalisation progress in general. It has long been known that digital technologies hold a great importance and offer a plethora of possibilities for ways in which they could improve the lives of regular citizens. Despite some resistance against the unknown, aspects of digitalisation have started to seep into the area of justice within the EU in 2008.[13] On the one hand, this seems like not so long ago. In only 14 years that have passed, many accomplishments, which will be highlighted later on in the chapter, have been made. At the same time, it may seem like real steps towards digitalisation have only started to be made after the emergence of COVID-19 pandemic left the citizens and the authorities with no other choice.

First action plan by the EU was presented in 2009 and established the aims for the following five years.[14] It was created by the Justice and Home Affair Council with a vision of simplified judicial proceedings and easier access to justice. Its main and primary goal was the creation of a European portal.[15] This plan, therefore, presents the start of what is now one of the biggest achievements in the area of digitalisation of cross-border judicial proceedings in the EU, the creation of e-Justice. At the time of the publication of the Action Plan, many of the actions necessary for the accomplishment of that goal, such as the development of pilot projects and conducting complementary studies, have already been in progress, as stated

13 See, e.g., Digitalisation of justice. General information. *European Commission* [online]. [cit. 30. 5. 2022]. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/general-information_en

14 Multi-annual European e-Justice Action Plan 2009–2013, C 75/01 (2009).

15 Ibid., para. 1.

in it.[16] One of the important facts also established is that the European e-Justice project must be distinguished from any national e-Justice projects that the Member States are free to conduct among themselves.[17] A beginning of a differentiation between the developments of the Member States can be seen here.

The second action plan followed in 2014,[18] while it has been superseded by the current 2019–2023 Action Plan[19] and 2019–2023 Strategy on e-Justice[20]. All of the aforementioned action plans show a clear vision for a digitised future of the EU. Since the first plan, e-Justice was established, along with other successful projects, and the ongoing plans aim not only to improve the already established mechanisms but to further enhance the use of digital technologies in all aspects of EU law. These kinds of overarching plans seem to be a good thing for the EU's future, as they take into account all of the ideas and projects that are currently in place or being prepared for the future. Only with the full picture in mind can the goal of digital and simplified justice be achieved. Another positive novelty is the "EU Justice Scoreboard"[21] which is an annually published document, starting from 2013, that analyses the national systems of the Member States depending on three factors: efficiency, quality, and independence.[22] Relevant for the purpose of this paper is the fact that it includes the digitalisation aspects of the Member States' legal systems as one of the particularly important points of research and analysis. In this way, the EU can "keep an eye" on the

16 Ibid., para. 30.
17 Ibid., para. 17.
18 Multi-annual European e-Justice Action Plan 2014–2018, C 182/02 (2014).
19 2019–2023 Action Plan European e-Justice, C 96/05 (2019).
20 2019–2023 Strategy on e-Justice, C 96/04 (2019).
21 See, e.g., The 2022 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of Regions, COM (2022) 234; The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 389; European Commission, The 2020 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2020) 306.
22 The 2022 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of Regions, COM (2022) 234, p. 1.

progress of the national systems in regards of the digitalisation aspects, which can in turn help to establish EU rules which are in line with the Member States' possibilities.

However, the plans also show that the road to that goal is not a fast and easy one. Significant drawbacks and other bumps along the way are therefore to be expected. What is important is to keep the goal in mind and the EU seems to be on the right track in that regard.

2.2 Establishment of e-Justice and e-CODEX

On its path to digitalisation, the EU has already achieved some of the goals established from its beginnings. The most important one is certainly the creation of the European e-Justice portal.[23] Created as a "one-stop shop"[24] in the area of justice within EU, it serves as a main source of information on the general questions of EU law and cross-border judicial cooperation, on the national systems of the Member States, as well as a provider of online forms for the selected procedures that will be further elaborated upon in the next chapter. It also offers visitors the necessary details on taking legal actions in the EU, reclaiming one's legal rights and provides tools for finding legal professionals. Additionally, it is a good way for connecting between legal professionals, especially by providing judicial trainings and professional networks for communication and sharing best practices.

With everything previously mentioned in mind, it is obvious that e-Justice intends to combine different things in one place and offers a lot of different information. With so much information and possibilities in one place, it is important to keep in order all of the different aspects of the website. In terms of cross-border judicial cooperation and especially in terms of providing relevant information to the citizens looking to start proceedings in another Member State, the Member State's themselves have a duty to help by providing sufficient information on their national legal rules and update

23 *European e-Justice Portal* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/home?action=home&plang=en

24 Ibid.; see also LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws*. 2014, Vol. 3, no. 2, p. 364; VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 7.

it regularly. This is the part that in some cases seems to be forgotten. Although e-Justice portal truly provides necessary information to anyone who wishes to do some research on their own, one cannot be sure whether that information is up to date.

Wrong information on the e-Justice can be seen on the example of Croatia and the information it provides in terms of court with jurisdiction for the applications to issue and review European Order for Payment. The e-Justice states that the competence lies exclusively with the Commercial Court in Zagreb *(Trgovački sud u Zagrebu)*.[25] However, this is not true as of 2019, after amendments to the Croatian Civil Procedure Act *(Zakon o parničnom postupku)* have been introduced, including the one on the courts with jurisdiction in terms of European Order for Payment Procedure.[26] The competence now lies with all the municipal or commercial courts that have jurisdiction. Similar issues have been noticed in the case of Italy,[27] concerning the payment of court fees in both European Order for Payment and European Small Claims Procedure, but has since been corrected and updated.[28] When searching for information, it should therefore be advisable to check the date of last changes which can be found at the bottom of each page. However, there is also a possibility that, for some of the Member States, the relevant information is not provided at all, which obviously poses additional problem.

Besides the impairments on the website itself, the usage of the e-Justice in practice must also come into question. Although without a doubt a useful tool, both for practitioners and citizens, it is not widely known, especially among citizens. Further steps could therefore be taken to popularise the website primarily among all EU citizens, which is not an easy task at all. However, further action is expected and definitely needed.

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25 See European payment order. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/353/EN/european_payment_order?clang=en

26 Croatia. Art. 507i zakon o parničnom postupku (Civil Procedure Act).

27 CONTINI, F., LANZARA, G. F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, p. 11.

28 See Court fees concerning European Payment Order procedure. Italy. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/305/EN/court_fees_concerning_european_payment_order_procedure?ITALY&member=1#05

Another one of the most important achievements in the area of digitalisation in the EU was the e-CODEX project (the e-Justice Communication via Online Data Exchange).[29] The project focuses on the creation of a transnational information infrastructure which would support and enhance cross-border communication in the EU legal sphere.[30] It is EU's first large scale project, which started more than a decade ago, in 2010.[31] Worth of significant 24 million €, the project is now managed by a consortium of Member States which is financed by an EU grant.[32] Without going into the technical intricacies of the e-CODEX system, it is a platform whose main purpose is to connect the already existing national e-justice systems with the European e-Justice Portal, which was discussed previously.

The e-CODEX facilitates secure communication and is to be used both in civil and criminal procedures.[33] It aims to provide for cross-border exchange of electronic documents and messages in a secure setting, which not only upgrades the interoperability between the legal authorities, but also enhances access to justice.[34] In regards to the documents, it also provides digital standardised forms that allow exchange of communication between all of the national IT systems in place. The e-CODEX consists of software products which are used to set up access point for secure communication.[35] Through it, other access points all over the EU can interconnect to provide opportunity for safe communication between them, which is particularly relevant for the judicial cooperation in cross-border cases.

29 *E-Codex* [online]. [cit. 30. 5. 2022]. Available at: https://www.e-codex.eu/

30 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726.

31 Ibid., p. 1.

32 Ibid.

33 LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws.* 2014, Vol. 3, no. 2, p. 364.

34 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 351; CARBONI, N., VELICOGNA, M. Electronic Data Exchange Within European Justice: e-CODEX Challenges, Threats and Opportunities. *International Journal for Court Administration*. 2012, Vol. 4, no. 3, p. 109.

35 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, p. 1.

The new Proposal relies heavily on the e-CODEX system as a tool for achieving interoperability between the national IT systems. In that way, the Proposal builds on the already existing project so as to establish synergy between the two. This is obviously a positive aspect of the Proposal, since it is important to keep in line with the goal of simplicity and to avoid fragmentation in application. It is also positive in terms of technological aspect, as working and building upon an already existing installed base has many design advantages, according to many.[36] In terms of judicial cooperation in the EU, it is also necessary in order to avoid dismissal of all of the different national IT systems that have already been implemented.[37] The e-CODEX is therefore the main technical solution on which all of the interoperable IT systems rely on.

The e-Justice platform and the e-CODEX are certainly not the EU's only achievements in the area of judicial cooperation. Many of the digital systems were formed for different purposes, e.g., e-Curia[38] specifically for the Court of Justice of the EU or EUR-Lex[39] as the official website of EU legal acts, case-law and documents for both legal professionals and citizens. Some additional novelties in the digital world also include the creation of the Online Dispute Resolution (ODR) Platform provided by the European Commission with an idea to help resolve the cross-border disputes in an alternative way to regular litigation in court.[40] Apart from all of what has already been mentioned, there are many more instances of digital platforms and systems created at the EU level with the intention to push forward the digitalisation

36 LUPO, G., BAILEY, J. Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws*. 2014, Vol. 3, no. 2, p. 356.

37 Ibid.

38 E-Curia. *Cour de justice de l'Union européenne* [online]. [cit. 30. 5. 2022]. Available at: https://curia.europa.eu/jcms/jcms/P_78957/fr/

39 Access to European Union law. *EUR-Lex* [online]. [cit. 30. 5. 2022]. Available at: https://eur-lex.europa.eu/

40 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR); see also Online Dispute Resolution. *European Commission* [online]. [cit. 30. 5. 2022]. Available at: https://ec.europa.eu/consumers/odr/main/?event=main.home2.show; see also KOULU, R., PAKASLAHTI, H. Why We Need Legal Technology. In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 29.

in judicial cooperation, and in that way to simplify and speed up disputes in the EU, making life easier for its citizens. What is important to notice is the variety of different platforms and systems created, many of which the regular citizens are probably unaware of. It is therefore important to observe the introduction of the new Proposal and its provisions with all of these newly developed systems and platforms in mind.

2.3 Creation of Autonomous European Procedures

Another significant step in view of digitalisation of judicial cooperation was the creation of the first autonomous European procedures. European Order for Payment Procedure ("EOP")[41] has been established in 2006, while only a year later, in 2007, came the European Small Claims Procedure ("ESCP")[42]. Despite limited success, these procedures seem to have prompted further creation of additional procedures, since the new European Account Preservation Order ("EAPO") was also presented some years after, in 2014.[43] The significance of these autonomous procedures for the EU civil procedure is obvious, but what is particularly relevant for the purposes of this paper is that their creation was also highly assisted by relying on digital tools.

Both EOP and ESCP were created with the aim of simplifying, speeding up and reducing the costs of litigation in the cross-border cases.[44] While the EOP regulates uncontested pecuniary claims,[45] the ESCP deals with monetary claims of smaller value, concretely below 5,000 €.[46] Their main novelty point is that both are supposed to be conducted through the use of forms which can be filled out online and are available on the e-Justice website. The influence of the EU's aims to digitalise justice system can therefore directly be linked to the creation of the aforementioned

41 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

42 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

43 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

44 Art. 1 para. 1 EOP; Art. 1 ESCP.

45 Art. 1 para. 1 letter a) EOP.

46 Art. 2 ESCP.

procedures. In terms of simplifying the litigation, both EOP and ESCP offer the possibility to conduct them without the assistance of a lawyer, using only the forms and the information available on e-Justice. This is a huge step in the simplification of legal proceedings, directly excluding the role of legal professionals. It would certainly not be possible without the use of digital technologies in law, particularly since these are strictly cross-border proceedings.

As for the EAPO, it presents a different type of procedure than the previously mentioned EOP and ESCP, enabling creditors to obtain an order which would secure the subsequent enforcement of his/her claim. This is done through a withdrawal or transfer of funds held by the debtor or on his behalf in a bank account in any of the Member States.[47] As this procedure is still fairly new, its success (or failure) is yet to be seen.

Despite the visionary ideas behind these procedures, it is important to look at the results before prematurely concluding that digitalisation can solve all of the procedural issues. Although EOP and ESCP seem like attractive choices for possible applicants, the reality is that they are seldom used in practice, as is the EAPO which is much newer so the low usage in practice is more understandable here. The procedures in general are still relatively unknown to the regular citizens, but even to those that are aware of such possibility, some issues with the procedures itself still remain. Despite the fact that EOP and ESCP should be manageable without legal assistance, in many cases this does not hold true in practice, as many points of the forms are not understandable to a layperson.[48] Many problems with the translation also remain,[49] as is often the case with cross-border procedures of any kind. Specifically with EOP and ESCP, although it is possible to fill out a form in one language on the e-Justice platform and have it directly translated to another, this only holds true with regards to some parts. The forms in general are done by the closed system of "ticking boxes". However, there are still some open fields, e.g., field for description of a claim. Those

47 Art. 1 para. 1 EAPO.

48 ONTANU, E. A., PANNEBAKKER, E. Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach. *Erasmus Law Review.* 2012, Vol. 5, no. 3, p. 174.

49 Ibid., p. 181.

parts of the form that are open field cannot be translated, which can present an issue (and additional need for a translator).

Although the EOP and ESCP could definitely be improved and the forms made more appropriate for laypersons, the main issue is the fact that they are still unknown to many. Perhaps a certain level of repulsion by some towards further digitalisation in the legal sphere still exists, therefore, procedures such as these ones cannot fully thrive. However, it is reasonable to expect that more and more people are going to be open to full scope of the possibilities that digitalisation offers. With regards to EOP and ESCP, their time is yet to come, but their existence is already a good proof that a different and novel way of access to justice is possible and that these new options that digital technology offers should be further explored.

2.4 A Vision for the Future

As for the next steps for the digitalisation aspects in the EU, it seems that the time of the biggest changes lies ahead in the imminent future. After establishing e-Justice and e-CODEX, as well as creating autonomous EU procedures and many of the other digital tools such as EUR-Lex, e-CURIA, ODR, etc., the next prospect seems to be the establishment of clear and succinct rules of digitised justice and extending their use to all aspects of legal procedure.

Particularly important is the further expansion and improvement of e-Justice, which is visible from the Action Plan and Strategy on e-Justice for the years 2019–2023,[50] after which a new action plan can be expected. As already mentioned in previous chapters,[51] e-Justice certainly can and needs to be improved for it to provide proper assistance in cross-border judicial cooperation and help for citizens.

The e-CODEX is also set to be further regulated and expanded, as was presented in the proposal for a new regulation in 2020.[52] The proposal is currently in the process of awaiting Council's 1st reading position. The e-CODEX proposal is therefore of high importance also for the Proposal,

50 2019–2023 Strategy on e-Justice, C 96/9 (2019).

51 See above Chapter 2.2.

52 Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726.

which is to be further discussed in this paper, since it directly correlates to the inner working of the e-CODEX on which all of the rules of communication between the citizens and authorities rely on.

Besides the aforementioned, new proposal for establishing a framework for a European Digital Identity is also currently awaiting Committee decision.[53] This proposal is set to amend the previous Regulation (EU) No 910/2014[54], which provides rules on the regulation of digital identity solutions and digital data.

All of the new proposals follow after the previously recast regulations on service of documents[55] and taking of evidence[56], which both establish comprehensive legal framework for electronic communication in cross-border judicial cooperation. These regulations also rely on the e-CODEX decentralized IT system. In a way, all of these new regulations and proposals establish an interconnected structure of digital procedure in the EU.

Finally, at the same time with the new Proposal that will be discussed in detail in Chapter 4, a new Directive aligning the existing rules on communication with the rules of the Proposal was presented.[57] The goal is to ensure the uniform application of the rules on communication, which can be regulated differently in different EU acts. This is to be amended by the proposed Directive which will align all of the rules with the Proposal.

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53 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity.

54 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23. 6. 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

55 Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25. 11. 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).

56 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).

57 Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/8/EC, Council Framework Decisions 2002/465/JHA, 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, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation.

3 A Comparative View at the Selected Member States' Digitalisation Developments

Before analysing the new Proposal, it is important to have an overview of the digitalisation development at the national level. Implementing rules on the digitalisation of EU procedure depends heavily on the state of the current national procedures and the possibilities of using ICT tools while conducting the procedure.

This chapter will provide an overview of all the possibilities that the selected Member States offer to citizens, as well as authorities, for the use of digital tools in national proceedings. It will provide a comparison of the more advanced Member States with the less advanced ones. Additionally, it will present some of the innovative digital tools that were created in selected Member States, particularly in Croatia, Slovenia, and the Netherlands. By highlighting the developments particular to each of the Member States, similarities and differences of their journey to digitalisation will be found. In that way, further conclusions on the appropriateness of the newly proposed rules can be drawn for each of the Member States in question. Such analysis will also help to predict the impact that the Proposal will achieve in practice.

3.1 An Overview of Application of Digital Tools in the National Proceedings

The biggest push for the inclusion of the digital tools in the national judicial proceedings in the last years was certainly brought by the surge of COVID-19 throughout the world. When faced with the fact that human interaction must be heavily controlled and reduced, while the legal systems cannot simply stop operating, all of the Member States of the EU tried to mitigate the impact of the pandemic by relying on the use of digital technologies in the course of the proceedings. For some, this was a hard choice, since beforehand such tools were unimaginable in the justice system. For others, such change was long expected and praised. Because of such initial differences, the current state of digital developments and ICT usage still varies greatly depending on the Member States. Despite this, the biggest

positive after two years of life in a pandemic is that digital revolution is moving forward in the justice systems throughout the EU, no matter how small the steps taken by certain Member States may be.

In this chapter, practices of some of the Member States with regard to the introduction of digital tools in the national civil proceedings will be showcased. A broader overview will be given so as to paint a fuller picture of the usage of digital tools in different practices throughout the EU. As it may be expected, these practices differ greatly depending on the Member State in question. Since the new Proposal aims to push for further digitalisation in all of the national justice systems, it is important to view the changes that are before us in that regard from the viewpoint of different Member States, since expectations and opinions will certainly vary depending on whether it is one of the more advanced ones in the use of digital tools, or one of the less developed ones.

The first step to court is the initiation of the proceedings. With the restricted access of citizens, some of the Member States allowed for online initiation of such proceedings. For example, in Estonia, which is one of the more advanced Member States in terms of digitalisation,[58] the court proceedings can be initiated online via e-File system.[59] The system is available not only for civil cases, but also for administrative, criminal and misconduct proceedings. Any interested party is free to initiate the proceedings at any time. In the Netherlands, the electronic initiation of the court proceedings is not a novelty from the time of pandemic. Even before, from 2017, civil claims with compulsory legal representation, which covers the claims amounting over to 25,000 €, had to be conducted electronically.[60] However, this change

58 BODUL, D., NAKIĆ, J. Digitalizacija parničnog postupka (reforma načela ekonomičnosti?). *IUS-INFO* [online]. 7. 5. 2020 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/strucni-clanci/CLN20V01D2020B1373

59 E-File. *RIK Centre of Registers and Information Systems* [online]. [cit. 30. 5. 2022]. Available at: https://www.rik.ee/en/e-file; see also Estonia. Art. 60 Tsiviilkohtumenetluse seadustik (Code of Civil Procedure) 2005.

60 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220; see also Online processing of cases and e-communication with courts. Netherlands. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts?NETHERLANDS&member=1

was not long-lasting nor over-encompassing, as it stopped being applicable after 2019 and it was only ever relevant for claims brought before the district courts of Central Netherlands and Gelderland.[61] Despite the drawback, the Dutch judiciary is still working on new ways of providing digital access to citizens.[62] On the other edge of the spectrum, some Member States still do not recognise initiation of court proceedings online. Such conduct is still not possible in Luxembourg, Bulgaria nor Cyprus.[63]

Similarly to the initiation of court proceedings online, the question of whether documents in general can be submitted electronically in a proceeding emerges. The practices of the Member States highly vary in this regard. On this point, the Croatian system provides for the possibility for the parties to submit documents electronically via an IT system.[64] Additionally, it obliges certain subjects such as lawyers, notaries and legal entities to always submit their documents electronically.[65] On the other hand, Germany does not always provide for such an option. Even though the law in principle does allow it, the usage in practice depends on the federal state in question, as well as on the type of proceedings.[66] In fact, the German federal system is one of the drawbacks for digitalisation attempts overall, as difficulties in coordination and fragmentation in decision making result in a fairly modest progress in the implementation of ICT tools for a Member State such as Germany.[67] For additional example, Slovenia also allows for submission of documents online, with Article 16a of the Slovenian *Zakon o pravdnem postopku* providing that an electronic form is equal to a written

61 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220.

62 Ibid.

63 The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2021) 389, p. 35.

64 Croatia. Art. 106a zakon o parničnom postupku (Civil Procedure Act).

65 Croatia. Art. 106a para. 5 zakon o parničnom postupku (Civil Procedure Act).

66 See Online processing of cases and e-communication with courts. Germany. *European e-Justice* [online]. [cit. 30. 5. 2022]. Available at: https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts?GERMANY&member=1

67 KENNETT, W. *Civil Enforcement in a Comparative Perspective: A Public Management Challenge*. Cambridge: Intersentia, 2021, pp. 526–527.

form on the condition that the data in electronic form is capable of being processed at court.[68]

National practices also vary depending on whether there is a possibility for online payment of court fees. While, according to the 2021 EU Justice Scoreboard, many of the Member States do offer such possibility, it can be surprising to find out that some of the Member States, such as France or the Netherlands, do not provide for such practice.[69] Additionally, if we look at the possibilities of usage of digital technology in courts, instances of Member States not providing any possibility for conducting procedure by distance communication technology can be found, e.g., Bulgaria and Greece.[70]

This short overview of some of the basic practices relevant for court procedures in each of the Member States just shows how divergent the available options in different Member States are. While on the one end of the spectrum, some Member States clearly show strong ambition for inclusion of digital tools in the conduct of their proceedings, on the opposite end, others show a complete lack of it. The majority of the Member States, however, remain in the middle zone. For those Member States, the digitalisation practices shine only in some aspects, while in the other aspects, further progress is yet to come. Viewed in this light, it is important to question what effect will the new Proposal have in terms of pushing the Member States to improve and develop their national proceedings while also establishing sufficient base necessary for the cooperation on the cross-border level to function properly. With all of the differences in mind, it is safe to say that change cannot happen overnight and there are many obstacles that still need to be crossed before the final aim of the Proposal can be achieved.

3.2 Digital Innovations of the National Legal Systems

In addition to allowing for communication practices to be done online, many of the Member States also introduced some of its original IT systems

68 Slovenia. Art. 16a Zakon o pravdnem postopku (Civil Procedure Act).

69 The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2021) 389, p. 35.

70 Ibid., p. 32.

for different areas of procedure. These systems' objectives range from establishing online case files containing all the relevant documents of the case in question to establishing certain tools for specific areas such as enforcement. In a similar fashion, as the differences in the development discussed previously, the novel systems particular to Member States vary. In the following chapter, some of the national IT systems will be presented so as to highlight possible particularities of the selected Member States in handling of the different areas of justice in a digital manner.

One of the most prominent areas in which national IT systems were built is the creation of online case files as a replacement for paper files. Instances of such systems can be found in Croatia and the Netherlands. Croatian *e-Predmet* is in place since 2014 and the platform provides all the parties of the court procedure with free and public access to the basic information about their case.[71] The system is based on the similarly named *eSpis* system which presents an integrated case management information system used by the Croatian courts in all instances.[72] The *eSpis* system dates back to 2009 when it was only used by a smaller number of courts, but its use has since become mandatory.[73] Many of the other tools besides *e-Predmet* were also built upon the *eSpis* system, such as *e-Oglasna ploča* (e-Notice Board of the courts).[74] It is interesting to see that even the EU's newest Member State which can be considered as being behind many of the older Member States in different developmental aspects, still works hard on staying in line with the digital improvement in the justice system, even before the push caused by COVID-19.

Similar to the Croatian practice, the Netherlands provides for *MijnZaak* (My Case) system of digital case files which can be created by the parties and through which they can submit a claim.[75] Different categories of persons can log by different means, with private persons using their national

71 VIDAS, I. Novine koje donosi prijedlog Pravilnika o izmjenama i dopunama Pravilnika o radu u sustavu eSpis. *IUS-INFO* [online]. 21. 12. 2021 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/aktualno/u-sredistu/48766

72 Ibid.

73 Croatia. Sudski poslovnik.

74 E-Oglasna ploča sudova. *e-Oglasna ploča sudova* [online]. [cit. 30. 5. 2022]. Available at: https://e-oglasna.pravosudje.hr/

75 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 219.

identification number, lawyers by using their lawyers pass, and organisations through specific *eHerkenning* system.[76] These means of identification equal as an electronic signature in the Dutch legal system.[77] While highly similar, the thing that differentiates the Dutch *MijnZaak* from the Croatian *e-Predmet* is the fact that the Croatian parties cannot initiate court proceedings by creating a file on their own. In Croatia, it is simply an online digital file system, while the Dutch version provides an extra possibility for the parties to create new case and submit their claim online. It is visible by this example that even with the national IT systems that are basically trying to achieve the same goal, significant differences remain. Additionally, in a similar fashion as the Croatian *eSpis*, the Netherlands also provides for *MijnWerkomgeving* (My Workspace) which is to be used only within the courts, by the judges and other court staff.[78] Again, the objectives slightly differ, as the scope of the subjects that can (and are obliged to) use the Croatian *eSpis* is broader than for the Dutch *MijnWerkomgeving*.[79]

One of the other important objects of the newly created digital tools are the enforcement proceedings. Croatia presented its *eOvrha* (e-Enforcement) which is an information system for managing court cases.[80] The Rules of Procedure in the *eSpis* system apply accordingly also to the matters of *eOvrha*.[81] An external user of the system can submit a motion for enforcement electronically, on the condition that it is signed by a qualified electronic signature that must be in a machine-readable form.[82] A proposal

76 KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 219.

77 Ibid.

78 Ibid.

79 Croatia. Pravilnik o radu u sustavu eSpis (Rules of procedure in the eSpis system); VIDAS, I. Novine koje donosi prijedlog Pravilnika o izmjenama i dopunama Pravilnika o radu u sustavu eSpis. *IUS-INFO* [online]. 21. 12. 2021 [cit. 30. 5. 2022]. Available at: https://www.iusinfo.hr/aktualno/u-sredistu/48766; KRAMER, X., GELDER, E. van, THEMELI, E. e-Justice in the Netherlands: The Rocky Road to Digitised Justice. In: WELLER, M., WENDLAND, M. (eds.). *Digital Single Market: Bausteine eines Rechts in der Digitalen Welt*. Tübingen: Mohr Siebeck, 2018, p. 220.

80 E-Ovrhe. *e-Građani* [online]. [cit. 30. 5. 2022]. Available at: https://e-ovrhe.pravosudje.hr/#/home

81 Croatia. Art. 4 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

82 Ibid., Art. 6 para. 1.

for enforcement can then be formed in the electronic enforcement system. However, this option of submitting a motion for enforcement electronically is only available for a specific type of enforcement, particularly the Croatian enforcement on the basis of trustworthy document.[83] Other types of enforcement cannot be initiated electronically.

A similar IT tool can be found in Slovenia. Prior to 2008, e-filing in the enforcement procedures was not possible and the Slovenian courts were required to perform a number of different activities which are usually left to the creditors in different legal systems.[84] Such conduct often led to mistakes and delays in the processing time which, combined with the organisational fragmentation of the enforcement proceedings, resulted in high workload of courts.[85] Fortunately, this bad state in which the courts were in led to the necessary change and creation of a new IT system for enforcement on the basis of authentic documents. *Central Department for Enforcement on the Basis of Authentic Documents* ("COVL"), has been in function since 2008.[86] It forms a special organisational unit of the Local Court in Ljubljana which now has competence for enforcement of authentic documents that was previously held by 44 different local courts.[87] The project's aim was to achieve a combination of simplicity and user-friendly approach which would in turn relieve the backlog of the Slovenian courts and solve the problem of inefficiency.[88] Claims for enforcement on the basis of authentic documents can be submitted by the interested parties through the online system where they will be processed and validated. Considering that the work, previously done at 44 different courts, is now specialised in the Local Court in Ljubljana, combined with the statistics that point to the lowering of the number of pending cases and faster decision-making time,[89] show that the COVL is a well-functioning system that achieved its initial goals.

83 Croatia. Art. 3 para. 10 and Art. 4 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

84 CONTINI, F., LANZARA, G. F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, p. 111.

85 Ibid., p. 112.

86 Ibid., p. 110.

87 Ibid., p. 118.

88 Ibid., p. 110.

89 Ibid., pp. 128–129.

When comparing the Slovenian COVL and the Croatian *eOvrha* systems, many important differences can be pointed out. The Croatian *eOvrha* does neither relieve the enforcement courts nor does it specialise just one court in a way that Slovenian COVL does. Technological differences can also always be found between these types of systems. Question of necessity of electronic signature also arises, as this is strictly necessary when filing a claim through *eOvrha*,[90] but not applicable when starting enforcement proceedings through the COVL in Slovenia.[91] All of these differences point to the fact that, while the new national systems that have been developed in recent years so as to diminish some of the difficulties by creating digital tools may seem similar, their aims often differ in reality. Looking at it from the EU's perspective, it is certainly a hard mission to try to connect all of the IT systems specific to each of the Member States so as to create a unique solution built upon all of what has already been made. In light of all the aforementioned differences between the progress of the Member States, the analysis of the rules of the new Proposal will be featured in the following Chapter.

4 Proposal for a Regulation on the Digitalisation of Judicial Cooperation and Access to Justice in Cross-Border Civil, Commercial and Criminal Matters: A Path to Digitalised EU?

4.1 Main Aspects of the Proposal

The Proposal was presented by the European Commission on 1 December 2021 and is currently awaiting the committee decision. It states that its main goal is to appropriately regulate communication between courts and competent authorities, particularly by using digital tools as a way of enhancing

90 Croatia. Art. 6 Pravilnik o obrascima u ovršnom postupku, načinu elektroničke komunikacije između sudionika i načinu dodjele predmeta u rad javnom bilježniku.

91 CONTINI, F., LANZARA, G.F. *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*. Berlin: Springer, 2014, pp. 122, 124.

its reliability, security, and time-efficiency.[92] An interesting point is made in the Explanatory Memorandum accompanying the Proposal, where it states that the use of digital technologies has a great potential in providing extra efficiency to all of the judicial systems within the EU, while also pointing to the fact that leaving these matters solely to the national IT solutions of a particular Member State may lead to fragmentation in approach.[93] While this may be true, considering the diversity of approaches that the Member States can take in developing their own IT solutions, it does not change the fact that fragmentation can certainly be an obstacle even when trying to regulate on the EU level. This will be shown in the following chapters analysing the proposed rules.

Starting with the main subject matters and scope, the new Regulation establishes a legal framework for electronic communication between competent authorities and between natural or legal persons and competent authorities. The main rules regard the use of videoconferencing or other distance communication technology, the application of electronic trust services, the legal effects of electronic documents, and the electronic payment of fees. It anticipates a creation of a decentralised IT system for communication between competent authorities,[94] while the establishment of European electronic access point on the e-Justice Portal is envisaged for communication between natural or legal persons and competent authorities.[95] The use of videoconferencing and other distance communication tools is to be allowed upon parties' request, if such technology is available.[96] The other party to the procedure must also be provided with a possibility to submit opinion on such use.[97] As for electronic signatures and electronic seals, the Proposal points to the application of the rules set in the Regulation (EU) No 910/2014, on the electronic identification and trust services for

92 Para. 10 Proposal for a Regulation of the European Parliament and of the Council 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.
93 Ibid., p. 2.
94 Ibid., Art. 3 para. 1.
95 Ibid., Art. 4 para. 1.
96 Ibid., Art. 7 para. 1.
97 Ibid.

electronic transactions in the internal market.[98] Any documents that are transmitted by electronic communication cannot be denied their legal effect solely based on the fact that they are in electronic form.[99] Member States would also have to provide for the possibility of electronic payment of fees for all of the other Member States.[100]

The presented provisions also call for additional amendments to certain other EU acts in the area of civil and commercial matters. In that regard, the Proposal also amends the Regulation on the creation of European Order for Payment Procedure, Regulation establishing a European Small Claims Procedure, Regulation establishing a European Account Preservation Order Procedure, and Regulation on insolvency proceedings,[101] all in a way as to point to the rules of the newly proposed Regulation in terms of the digitalisation aspects it establishes.

4.2 A Space for Further Improvements

When talking about the need for digitalisation of judicial cooperation in the EU and particularly its regulation, some aims remain constant and can be detected from all of the annual plans, strategies, previous acts on different matters of digitalisation and, finally, the Proposal itself. The two most prominent aims, i.e., two necessities for proper regulation of digitalisation of judicial cooperation, can be distinguished, those being the need for simplicity and the need for harmonisation.

Starting with the first aim, the one of simplicity, it is certainly not an easy task when regulating matters of digitalisation, which are complex by its own nature. However, it is important to keep in mind the relative newness of the digitalisation aspects in law and proceed accordingly with the attempts for regulation. Clear rules and a smaller number of digital tools that should

98 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

99 Art. 10 Proposal for a Regulation of the European Parliament and of the Council 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.

100 Ibid., Art. 11 para. 1.

101 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

be used in judicial cooperation and communication between parties should therefore be a priority so as to not oversaturate the already complicated field on its own. Despite this being the EU's goal, the final product still lacks the simplicity of solutions.

The second important aim, that is the need for harmonisation and preventing possible further fragmentation in any aspect, is a point which any EU regulation seeks to achieve. It is one of the most important purposes of any of the European laws. However, in practice, this can be almost impossible to achieve even if it was the original aim. This can be seen in all of the regulations on the judicial cooperation in civil matters, particularly the vast number of regulations which were presented in this ever-growing field of law. Despite the initial goal being to harmonise the rules of different Member States, it was done in a fragmented and "disorderly" manner,[102] which allowed for further obstacles and complexities in this area of law.[103] The same can certainly be done in aspect of digitalisation, which would even enhance the already existing issue of fragmentation. A careful consideration of the proposed rules should therefore be done before any adoption.

In view of these two aims, an analysis of the presented rules will follow.

Looking first at the rules on communication between competent authorities, the Proposal provides that such communication shall be carried out through a "secure and reliable decentralised IT system".[104] This IT system would be based on the already mentioned e-CODEX system and the Proposal itself forms a legal basis for its usage.[105] It would also serve as an interoperable point through which other national IT systems would interconnect. This means that the Member States remain free to develop or further improve their already used national systems which would then all be interconnected. Starting with this first point, it is already visible that differentiation between

102 See, e.g., KRUGER, T. The Disorderly Infiltration of EU Law in Civil Procedure. *Netherlands International Law Review*. 2016, Vol. 63, no. 1, pp. 1–22.

103 VELICOGNA, M. In Search of Smartness: The EU e-Justice Challenge. *Informatics*. 2017, Vol. 4, no. 4, p. 7.

104 Art. 3 para. 1 Proposal for a Regulation of the European Parliament and of the Council 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.

105 Ibid., p. 3.

the Member States is expected here since each of the national IT systems will remain in place. At this point in time, many of the Member States already have their own systems in place and it is impossible to have no fragmentation in approach when taking it into account. However, it is necessary to connect all of the different national systems and diminish their differences so as to ensure equal access to justice and equal opportunities to all parties of the cross-border procedure. The creation of a decentralised IT system which would be a connecting factor for all is a good novelty in this sense.

The Proposal goes on by establishing the possibility of using alternative means for communication between competent authorities, under conditions that electronic communication is not possible due to the disruption of the said IT system, the nature of the material that is subject to communication or other exceptional circumstances.[106] It does not provide any additional explanation regarding what kind of alternative means it is referring to. Furthermore, the Proposal provides for the possibility of using "any other means of communication" in instances where the use of decentralised IT system cannot be used considering the specific circumstances of the relevant communication on a case-by-case basis.[107] Although necessary, considering the many obstacles that are inevitably going to be faced with when dealing with digital tools, this kind of approach leaves much space for diverging interpretation and differentiation of practices between the Member States. What kind of alternative means will be used and in which particular circumstances will the Member States use this option remains to be seen. It is to be expected that various approaches to the interpretation of this provision are going to be created depending on different Member States.

This type of communication concerns only the communication between competent authorities, not the communication between natural or legal persons and competent authorities. The latter is regulated in a separate article of the Proposal, which anticipates the establishment of a European electronic access point on the European e-Justice Portal.[108] It can be seen that the new rules are building upon the systems already created in the area of digital justice,

106 Ibid., Art. 3 para. 2.
107 Ibid., Art. 3 para. 3.
108 Ibid., Art. 4 para. 1.

with the rules of communication in the new regulation depending on the existing e-CODEX system and e-Justice platform. This can certainly only be a good thing, considering that these systems have been tested and improved since their creation. The European electronic access point shall be managed by the Commission, and it will provide a place where all natural and legal persons can file claims, launch requests, and communicate with the competent authorities.[109] However, the Proposal does not oblige parties to communicate through this access point. Instead, it only offers it as a possibility in cases where natural or legal persons gave their prior consent to use it.[110] Otherwise, national IT portals can also be used, if they are available. This again provides an opportunity for differentiation of practices between Member States. With varying level of usage of digital tools, it is to be expected that some Member States will wholeheartedly accept this opportunity for communication, while others will not use it to its full potential.

One important aspect of the Proposal is the obligation for authorities to accept electronic communication transmitted through the previously established means.[111] Although many of the Member States have already set on similar paths, one common rule for the whole of the EU can certainly help with the goal of further harmonisation.

The next important aspect of the Proposal are the rules on videoconferencing and the use of other distance communication tools for hearings. Similarly to the previous provisions on the communication between parties and authorities, the rules on videoconferencing and other distance communication technology leave room for differentiation of practices between Member States, as well as offer some of the less-concrete choices for regulation.

The Proposal grants the possibility of hearing in civil and commercial matters through videoconferencing or other distance communication technologies on the request of a party to the proceedings or their representatives, as well as on the own motion of the competent authorities.[112] In both cases, the

109 Art. 4 para. 2, 3 Proposal for a Regulation of the European Parliament and of the Council 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.
110 Ibid., Art. 5 para. 2.
111 Ibid., Art. 6.
112 Ibid., Art. 7 para. 1, 3.

usage of such technologies will be possible provided that two conditions are met.[113] Firstly, such technology must be available. This, as is the case with all of the previously mentioned provisions, can lead the Member States that already have highly developed digital tools in place to advance even more in digitalisation aspects, while others stay stagnant in such practices. Second condition is that the other party (or both parties in case of authorities' own motion) has to be given the possibility to submit their opinion on the use of such technologies in the procedure.

The use of videoconferencing and other distance communication tools therefore depends on each individual case, on the availability of the necessary tools in the concrete court and the opinions of the parties on such use. Problems could arise in terms of the latter, when the parties could possibly refuse the use of such technology for the other party to the procedure, which could lead to further delays and issues. However, the Proposal only prescribes the obligation of giving an opportunity for all the parties to express their opinions on the use of videoconferencing and the use of distance communication tools, not the obligation also to follow along with the parties wishes that may sometimes be unreasoned.

Parties' request for using videoconferencing or other distance communication technology in the proceedings can be refused by the competent authorities in cases where *"the particular circumstances of the case are not compatible with the use of such technology"*[114]. This leaves space for the relevant authority to consider the particularities of each case and the appropriateness of using distance communication in the specific case at hand. When providing such discretion, it may always be overused or underused, depending on the features of the court and the national systems in question. Variance of views in the interpretation of this provision is therefore to be expected.

With regards to the electronic signatures and electronic seals, the Proposal points out to the rules of Regulation on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation).[115] In this

113 Ibid., Art. 7 para. 1.
114 Ibid., Art. 7 para. 2.
115 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

way, it connects already existing EU rules without making additional ones and contributing to the fragmentation of rules and approaches to digitalisation aspects.

The Proposal also provides that all of the documents being transmitted through instruments of electronic communication cannot be denied their legal effects nor be considered inadmissible just for the fact that they are in electronic form.[116] This is also in line with the overall EU's goals and will certainly push some of the Member States which still do not offer the possibilities in their national procedures to reconsider such a stance. The same holds true in terms of electronic payment of fees, which the Proposal makes an obligatory option which must be available in each Member State.[117]

Besides the aforementioned, the Proposal also amends some of the existing legislative acts on civil and commercial matters, particularly the Regulation on the creation of European Order for Payment Procedure, Regulation establishing a European Small Claims Procedure, Regulation establishing a European Account Preservation Order Procedure, and Regulation on insolvency proceedings. It amends the existing rules so as to point to the new Regulation in terms of all of the topics that it offers new rules on.

4.3 The Issue of Costs

Despite the previously mentioned drawbacks of the new Proposal, perhaps one of the most prominent issues is not that of the rules itself, but the one of costs. When regulating digitalisation aspects which are to be implemented only by establishing and interconnecting certain IT systems, it is important to keep in mind that none of the imposed rules matter if there are no such systems in place. For the new Regulation to produce effect, it is necessary to create secure and reliable systems beforehand. Furthermore, it is necessary to adjust them and make them interoperable in view of creating a connected system for the whole of the EU. None of this is possible without significant financial investments. This is where the costs aspect of the Proposal comes into discussion.

116 Art. 10 Proposal for a Regulation of the European Parliament and of the Council 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.

117 Ibid., Art. 11 para. 1.

The Proposal envisages that each Member State must bear the costs of the installation, operation and maintenance of the decentralised IT system's access point which is situated in the territory of the said Member State.[118] It is on the Member State to also adjust its national IT systems, or establish one if there is none yet, in such a way that they are interoperable with the access points. All of the expenses connected to the creation, operation, and maintenance fall on the burden of the Member State in question. On the other hand, the Commission bears the costs of the European electronic access point.[119]

It is understandable that in order to push for further achievements in terms of digitalisation in the EU, it is necessary for all the Member States to participate in the efforts to do so. That participation is primarily reflected in the financial aspects. However, it is doubtful that this option will achieve the goal of harmonisation and speedier turn to digital solutions in judicial cooperation. Considering the already varying aspects of digitalisation and the use of digital tools employed in different Member States, it is obvious that there is no one and the same starting point for all on which this Proposal would build on. As highlighted in Chapter 3, usually the Member States which cannot invest bigger amounts of money into digitalisation are also the ones which lack in those aspects, which is obvious on its own. There is no doubt that the provision obliging them to suddenly develop and maintain their own IT systems and access points interoperable with other ones, is not going to produce much effect when they are solely responsible for taking the financial burden that this creates. On the other hand, Member States that have much more opportunities for such investments have already developed their systems and this will therefore be easier task for them. As was already established with many of the proposed rules, this will again create significant disbalance between different Member States.

In order to push for equal opportunities for digitising access to justice for all, a different distribution of costs should be more advisable for achieving the said goal. Particularly, specific funds could be created just for the aims of this new Proposal that would allocate resources according to the means

118 Ibid., Art. 14 para. 1.
119 Ibid., Art. 14 para. 6.

already available in each of the Member States. In such a way, uniformity between the possibilities offered, as well as between the final products in each of the Member State would be achieved. Throughout the previous analysis in this chapter, as well as in Chapter 3, it has been established many times that the differences between Member States in terms of digitalisation aspect are significant. Because of this, it is important to provide the Member States which are still in the earlier phases of their path to digitalisation of justice with sufficient funds so as to give them a possibility of "catching up" with the rest. Otherwise, the differences will just keep on growing and the final aim of harmonising the digitalisation aspects throughout the EU will not be achieved.

This is obviously also a matter of politics. It is to be expected that this costs aspect will give rise to additional negotiations before the adoption of the Proposal.[120] However, keeping politics aside, it would be advisable to reconsider the current rules on costs. How likely this suggestion is in reality still remains to be seen.

5 Conclusion: A Long Road Ahead

Digitalisation of legal systems, both at the national and EU level, is without a doubt one of the most important agendas of the EU and its Member States. Even though this has been true for many years already, a real progress with the true technological advancements in the legal sphere can only now be really seen. Whether those are specialised national IT systems or a mere possibility for the parties to initiate proceedings online or to send court documents via the Internet, it shows that all of the Member States share the same goal as the EU legislator. 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.[121] With the unwanted push that the COVID-19 pandemic has provided, the digitalisation developments will only have to be made faster and in a more advanced way.

120 KRAMER, X. Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe. *Revista General de Derecho Europeo.* 2022, Vol. 56, p. 6.

121 See also KOULU, R., PAKASLAHTI, H. Why We Need Legal Technology. In: KOULU, R., HAKKARAINEN, J. (eds.). *Law and Digitalisation: Rethinking Legal Services*. Helsinki: University of Helsinki Legal Tech Lab Publications, 2018, p. 39.

The new Proposal is only one part of the bigger picture when discussing digitalisation of law and legal sphere. However, it is of utmost importance to access to justice and judicial cooperation between the Member States which is an area that will also have to be further developed and improved. While it may still undergo changes before its adoption and implementation, the Proposal currently presents the EU legislators' vision of what is to come in the near future. 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. Without clear and precise rules throughout the whole of the EU, there cannot be harmonised progress and achievement of the goal that is common to all. The biggest advancements of the new Proposal are that it does create a certain legal framework for electronic communication and that it obliges the Member States to provide possibility 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 Proposal does create a basis for the use of these electronic means in the course of the procedure. This is particularly important since, until now, the one characteristic of the involvement of the Member States in the development of the e-Justice in the EU was that such involvement was only voluntary, which limited the overall possible impact.[122]

However, when looking beyond the basis of the framework of digitalisation, some points can still be further improved upon. While the new Proposal surely provides solutions to some of the problems that can be encountered, it must be stated that it also opens doors to different ones. This is particularly related to the fact that the differences between the digitalisation developments of the Member States still remain significant. The Proposal should therefore aim to harmonise them to the highest possible extent. In that regard, some adjustments of the provisions could be considered before its adoption

122 KRAMER, X. Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU. In: BENYEKHLEF, K. et al. (eds.). *eAccess to Justice*. Ottawa: University of Ottawa Press, 2016, p. 363.

so as to eliminate the need for additional amendments soon after its adoption, which is one of the undesirable characteristics of EU legislature.

Some of the adjustments could include simplification of the rules on the means of communication, as the Proposal currently envisages different means of communication depending on whether it is between competent authorities or between natural or legal persons and competent authorities. 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 Proposal 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.

One additional change that should be considered is a different distribution of costs. While this point is not of a legal matter *per se*, it unfortunately remains of the highest importance if the EU wishes to implement its proposed rules and achieve significant progress with the digitalisation developments throughout its territory. Since not all of the Member States can be provided with the same starting point considering their divergent national progress in terms of digitalisation of legal systems and court procedures, the least that the EU can do is to provide an opportunity to the lesser developed ones to "catch up" with the rest, instead of furthering the divide. The fastest way to do so is the different distribution of costs, particularly not putting the same high burden on the Member States when not all of them can sustain it equally.

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 important fact is that there certainly exists a clear 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.

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