Digitalisation of cross-border judicial cooperation


This briefing provides an initial analysis of the strengths and weaknesses of the European Commission’s impact assessment (IA) accompanying the above-mentioned proposed regulation and the proposed directive on the digitalisation of cross-border judicial cooperation. Submitted on 1 December 2021, the two proposals were jointly referred to the European Parliament's Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The initiative is part of a new push for European democracy under the von der Leyen European Commission. It follows the proposed regulation of a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), published in December 2020 and currently under negotiation by the co-legislators.1 The e-CODEX system is a package of software components for EU judicial cooperation. However, the proposed regulation only aims to establish a legal basis for e-CODEX and to regulate its governance and maintenance. It would not prescribe practical cases of application, which is to be achieved through the present initiative (IA, pp. 7-8). While it is currently left to Member States to decide on use of digital tools in cross-border communication, this has led to fragmented use of the tools available (explanatory memoranda of the proposals).

Problem definition

A set of EU instruments is available to enhance judicial cooperation and access to justice in cross-border civil, commercial and criminal cases. While many of these instruments provide a legal basis for communication between authorities, individuals and legal entities, only a few provide for digital communication channels. The initiative aims at tackling the following two main problems:

(1) inefficient cross-border cooperation;

(2) barriers to justice in cross-border cases.

According to the IA, the two problems identified directly affect authorities’ ability to process cases. This concerns the number of cases received by national courts (an average of 2.3 new cases per 100 citizens in 2019, including cross-border ones), as well as the length of the court proceedings (IA, pp. 8-9). With regard to the first problem, the Commission observes that cross-border data exchanges are currently mostly paper-based and no information technology (IT) system fully supports this communication. Paper-based transmission is ‘inherently slow and relatively inefficient and unreliable’ and is ‘also particularly vulnerable to crises.’ The average time to post a first-class letter in the EU is 2 days, however the IA quotes anecdotal evidence that this may take much longer – between 3 and 15 days, depending on the destination. The IA emphasises that the current delays
mostly affect parties to the proceedings and their ability to protect and assert their rights effectively, as well as their effective access to justice (IA, pp. 11-12).

The second problem the Commission highlights is that the predominant use of paper files can curtail access to justice. This is of particular relevance in cross-border cases, where language differences, geographical distance and different legal systems can make proceedings expensive and cumbersome. Vulnerable people or people with a disability are especially affected in such cases. The Commission highlights that victims and defendants risk being deterred or unable to enforce their rights in cross-border cases. The lack of digital tools and communication channels in this field contrasts with the increased digitalisation in other areas of life according to the IA (pp. 13-14).

The IA lists several problem drivers, including different levels of digitalisation and voluntary use of existing digital channels (e.g., as of February 2020 only six Member States participate in the e-CODEX European order for payment pilot); the recognition of electronic signatures/seals and legal validity/acceptance of electronic documents; language barriers; and the lack of resilience in judicial systems facing force majeure situations (IA, pp. 15-17).

The Commission corroborates its problem definition using several sources and data (see below). However, in more general terms, despite recognising the different levels of digitalisation across the Member States, it does not provide further detail on their implications. As far as the first problem is concerned, digital (compared to paper-based) systems are also vulnerable to crises, e.g. cyberattacks (but this dimension is not discussed). The IA should have better explained the scale and the scope of the second problem, namely the barriers to access to justice. The IA refers here to the external study and the stakeholder consultation, which provide only limited information.

Subsidiarity / proportionality

The legal bases for this initiative are Articles 81(2)(e) and (f) and 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU). The Commission explains that the lack of digital communication channels in cross-border judicial proceedings could have negative consequences, including delays, security concerns and sub-optimal communication reliability. The competence to adopt measures in the area of freedom, security and justice is shared between the Union and the Member States. While Member States could act alone in this field, the IA points out that without EU action, progress can be expected to be very slow (IA, p. 20).

According to the Commission, the added value of EU action lies in improving the efficiency, the resilience, the security and the speed of cross-border judicial procedures. In addition, the digitalisation of EU judicial cooperation for all Member States is expected to bring added value (IA, p. 21). No reasoned opinions were submitted by national parliaments by the deadline of 14 March 2022. The IA states that the subsidiarity grid was deleted (as recommended by the Commission’s Regulatory Scrutiny Board), but the IA provides no explanations as to why.

Objectives of the initiative

The general objective of the initiative is to improve access to justice and the efficiency of cross-border judicial cooperation by ensuring the establishment and seamless use of digital tools. According to the Commission, the Covid-19 crisis has demonstrated that a more holistic approach is needed to modernise the European area of justice, making it resilient to challenges, strengthening trust in the Member States’ judicial systems and protecting fundamental rights. However, the link between the Covid-19 crisis and digital communication between courts is not clear and would have deserved some more explanation.

The IA sets the following five specific objectives:

- **Objective 1:** ensure the availability and use of electronic means of communication in cross-border cases between Member States' courts/competent authorities and relevant Justice and Home Affairs (JHA) agencies and EU bodies, where such communication is provided for in EU legal instruments on judicial cooperation;
• **Objective 2:** enable the use of electronic means of communication in cross-border cases between individuals and legal entities, on the one hand, and courts and competent authorities, on the other. The possibility of individuals and legal entities to communicate on paper will be maintained;

• **Objective 3:** facilitate the participation of parties in cross-border civil and criminal proceedings in oral hearings through videoconference or other remote communication technology, for purposes other than taking evidence in civil cases;

• **Objective 4:** ensure that documents are not refused nor denied legal effect solely because of their electronic form (without interfering with the courts' powers to decide on their validity, admissibility and probative value as evidence under national law);

• **Objective 5:** ensure the validity and acceptance of electronic signatures and seals for electronic cross-border judicial cooperation and access to justice.

The IA also defines the operational objectives of the proposed specific actions, as envisaged in the Commission’s Better Regulation Guidelines (IA, pp. 21-22). These operational objectives are rather general, and partly overlap with the specific objectives.

The objectives correspond largely to the problems identified, even though none of the objectives above seem to address: the specific issue of language barriers; cases where Member States do not have EU-wide recognised digital signatures (e.g. Poland); cases where Member States do not have digitalised internal civil/criminal procedures). Moreover, it is not clear how the objectives set by the Commission are time-bound and measureable in some cases.4

**Range of options considered**

The IA considered two policy options: a non-legislative and a legislative option, next to the baseline of no EU action. Not only is the range of options limited to two options, but at a closer look, it is also questionable whether there is a real alternative to the preferred legislative Option 2.

The IA discarded some options at an early stage because they were not seen as a 'real alternative' (e.g. a promotion campaign to use digital tools and the e-CODEX system), or were considered 'inappropriate' (e.g. the creation of a centralised IT system, which would be difficult to justify in terms of proportionality and subsidiarity) (IA, p. 29). However, it is not clear how the discarded promotion campaign is any different from non-legislative Option 1, which is also based on voluntary measures.

The preferred option and its sub-options are highlighted in grey below (see IA, p. 43).

**Baseline scenario** (IA, pp. 23-24)

Under this scenario, the EU would not take action to promote the digitalisation of judicial cooperation. Using digital tools in the cross-border context would remain voluntary for Member States.

**Option 1: non-legislative option** (IA, p. 24)

Under Option 1, the Commission encourages Member States to use the e-CODEX system for cross-border judicial cooperation and access to justice. A recommendation encourages Member States to:

- enable and allow individuals and legal entities to make electronic submissions in cross-border cases through national IT systems and accept such electronic submissions from other Member States;
- allow parties in cross-border cases and their representatives to participate in oral hearings by videoconference or other distance communication technology;
- incorporate standards on trust services, in line with the e-IDAS Regulation; and
- allow for the electronic payment of court fees.

The Commission continues to build and expand the use of the e-Evidence Digital Exchange System (eEDES), without providing a legal basis for its use. The eEDES is a decentralised system, meaning
that one secure portal will be installed and operated in each Member State, and the portals are subsequently interconnected through a secure information channel. The Commission also builds on the decentralised IT system for the recast Service of Documents and Taking of Evidence Regulations for instruments in civil, commercial and criminal matters.

**Option 2: legislative option** (IA, pp. 24-28)
Under Option 2, the Commission adopts a legal instrument on the use of digital tools in judicial cooperation and access to justice, including on the recognition and acceptance of electronic signatures and seals in cross-border civil, commercial and criminal cases. The instrument includes provisions establishing a secure electronic channel based on e-CODEX. This channel will be used for communication and exchanging information, data and documents between courts and competent authorities, with and between central authorities, and where relevant, the JHA agencies and EU bodies. Provisions are also introduced in support of communication between individuals and legal entities, on the one hand, and national courts and competent authorities, on the other. Additional issues are addressed through sub-options in three areas:

- **Sub-option 2.1: removing barriers to cross-border judicial cooperation and introducing digital means supporting such cooperation** (addressing specific objectives 1 and 4)
  - Sub-option 2.1.a: voluntary use of digital communication channel
  - Sub-option 2.1.b: obligatory use of digital communication channel, with possible well-defined and justified exceptions

- **Sub-option 2.2: introducing legal and technical measures supporting access to justice in cross-border cases** (addressing specific objectives 2, 3 and 4)
  Electronic communication would include, inter alia, videoconferencing or other distance communication technology, the acceptance and legal validity of electronic documents and evidence, as well as the possibility to pay court fees online.
  - Sub-option 2.2.a: voluntary acceptance of electronic communication
  - Sub-option 2.2.b: obligatory acceptance of electronic communication (the access point is a user-friendly online tool accessible at any time, in all Member States and in all EU languages)

- **Sub-option 2.3: recognition and acceptance of electronic signatures and seals** (addressing specific objective 5)
  - Sub-option 2.3.a: non-regulation of electronic trust services
  - Sub-option 2.3.b: regulation of electronic trust services

**Assessment of impacts**
The IA assesses qualitatively and quantitatively the economic, social, environmental and fundamental rights impacts of the two options, as well as of the baseline. The IA details both positive and negative impacts of the options (the initial Inception Impact Assessment only indicated positive impacts). The IA outlines the national measures taken in relation to Covid-19's impact on civil proceedings (see Annex 5 of the IA).

The Commission states that the voluntary approach to the digitalisation of the judiciary is not sufficient (as envisaged under Option 1), so one may wonder why this option was included in the IA in the first place as a 'realistic' option (IA, p. 31). In addition, it is striking that impacts relating to data protection and data security are hardly assessed (despite the RSB comments on this point).

Under the baseline scenario, the current economic impacts (see IA, Annex 7) for individuals, legal entities, legal professionals and courts/authorities are estimated in the EU at, annually:

- €32 472 900 for communication using physical formats;
• 15 390 000 days for communication by post or equivalent services;
• 192 375 days in administrative overheads linked to paper processing which translates to 874 person-years in processing effort in courts;
• 181 448 100 standard A4 80 g paper pages printed, at an overall average cost of €2 216 160 (IA, p. 30).

The barriers to access justice and the challenges to cross-border judicial cooperation are expected to remain. The Commission highlights that the social impacts of the use of communication technology ‘can be significant’, but provides little detail. The digital communication channel may improve public confidence in justice systems by speeding up access to justice and facilitating efficient functioning of the competent authorities (which depends on the uptake of the technology). The IA considers the main environmental impacts to be the use of non-renewable resources (paper-based communication, and its transport, as well as travel by the parties) (IA, pp. 30-31).

Under Option 1 (non-legislative), a Commission recommendation could lead to a harmonised approach regarding the use of electronic communications, including videoconferencing, electronic documents, seals and signatures. The economic impacts are estimated for Member States at:

- €32 174 616 for communication using physical formats;
- 15 387 525 days for communication by post or equivalent services.

The IA underscores that digital communication can only be effective and efficient if solutions are interoperable between Member States. It is not clear how this relates to fundamental rights impacts. The social impacts depend on whether a Member State would follow the Commission recommendation or not. If they do, a positive impact such as increased public confidence in justice systems and improved access to justice is to be expected.

A positive environmental impact can be expected under Option 1, if the digital tools and communication channels are widely adopted. According to the IA, the production and operation of IT equipment would not change the overall positive environmental impact as electronic communication has a smaller carbon footprint than standard mail (IA, p. 31-33).

Under preferred Option 2 (legislative), a digital channel for cross-border communication would be established. The obligation to set up such a channel would require new investment from the Member States to develop the necessary infrastructure to interact with e-CODEX. However, it is expected that in the long term, the digitalisation of justice would reduce the costs significantly. The Commission considers the following economic impacts:

- The total one-off cost for extending the e-Evidence Digital Exchange System (eEDES) and service of documents/taking of evidence systems would be €18.7 million over 5 years (covered by the digital Europe and the justice programmes);
- The installation costs for the Member States (new servers, etc.) will be limited: €8 100 000 per year (i.e. €300 000 per year on average per Member State); the average yearly saving at EU level would be €25 589 060 (postage and paper costs);
- Member States would save €21 002 260 (€19 274 300 per year in postage costs and €1 827 960 in paper costs);
- The average posting time would be reduced to 0, resulting in an overall yearly reduction of the duration of the procedures by 15 389 999 days (the use of ‘days’ is abstract here, the question arises as to what that means in practice);
- 874 person-years in processing effort at court/authority level would be gained;
- 181 448 100 A4 standard 80 g printing paper pages would be saved (IA, p. 34).

However, new electronic communication channels might have negative economic impacts on providers of postal service and transport services. The Commission considers that Option 2 could bring both positive and negative social impacts: introducing the digital communication channel would improve public confidence in justice systems, access to justice and the efficient functioning of the competent authorities and the justice system as a whole. However, it could also exacerbate
widening of the digital divide (IA, p. 35). It appears the Commission neither discussed possible cyber threats nor unintended data leaks and the associated costs of preventing such incidents.

The environmental and fundamental rights impacts are sub-option-specific.

**Sub-option 2.1** – voluntary v mandatory use of digital channel: Regarding the impact on fundamental rights, shortening proceedings through digital communication would bring tangible benefits for individuals, legal entities (including small and medium-sized enterprises (SMEs)) and legal practitioners. In the same vein, the use of digital channels can be expected to have a positive environmental impact (IA, pp. 36-37).

**Sub-option 2.2** – voluntary v mandatory acceptance of electronic communication: Obliging Member States to accept electronic communication from individuals and legal entities would have a positive impact on fundamental rights, according to the IA (i.e. enhanced access to justice, by providing additional, faster, more secure means of communicating with courts and thus shorter judicial proceedings). If the acceptance of electronic communication remains voluntary, the positive impact and legal certainty would be reduced. The IA does not discuss the possible negative impact of videoconferencing on the rights of the defence, if a judge can no longer see a witness face-to-face.

Individuals and legal entities would be free to opt for paper-based communication. This would also mitigate the risks of the digital divide and exclusion. Reduced travel, substituted by videoconferencing, is expected to have positive environmental impacts (IA, pp. 37-38).

**Sub-option 2.3** – (non-)regulation of trust services: if the acceptance and recognition of electronic signatures and seals are not regulated (but remain within the remit of the Member States), this would result in a negative impact on fundamental rights. On the other hand, regulating the acceptance of electronic communication would result in greater legal certainty and a more secure business environment. No environmental impacts were identified for this sub-option (IA, p. 39).

**SMEs / Competitiveness**

The Commission emphasises that SMEs involved in cross-border transactions are expected to benefit directly from the improved access to justice resulting from the proposals, as well as from lower costs and shorter proceedings when enforcing rights across borders. According to the IA, the lower costs of proceedings will have an indirect effect by improving SME competitiveness (see Annex 3, p. 72).

**Simplification and other regulatory implications**

The proposals aim at introducing digital technology to improve access to justice and judicial cooperation in cross-border civil, commercial and criminal cases. According to the Commission, the use of a digital communication channel should alleviate administrative burden and lead to more efficient processing of cases (see the proposals' explanatory memoranda). The initiative links to other existing instruments, including the e-CODEX system, the e-Evidence Digital Exchange System (eEDES) and the decentralised IT system for the recast Service of Documents and Taking of Evidence Regulations for instruments in civil, commercial and criminal matters.

**Monitoring and evaluation**

The Commission presents a monitoring and evaluation framework. The IA identifies several indicators (IA, pp. 45-46), however, it fails to consistently link them to the operational objectives. In particular, it seems there are no indicators to measure the achievement of the third operational objective (‘guarantee the legal validity of documents and commonly agreed types of electronic signatures/seals’). Moreover, while some data on the baseline (e.g. costs and delays) are indicated, it would have been useful to set specific targets defining a ‘successful’ implementation. This raises the question as to how progress will be measured. The IA envisages an evaluation every five years.
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Stakeholder consultation

The IA identifies the stakeholders affected by the preferred option and explains how they would be affected. They include citizens, businesses (including SMEs), legal professionals, national courts and other competent authorities (see Annex 3). Stakeholder views are reflected in the IA, and it is pointed out that the stakeholders are 'overwhelmingly' in favour of a legislative act (IA. p. 31)

The Commission published the Inception Impact Assessment on 8 January 2021. It received 19 replies as feedback, which are summarised in Annex 2. The Commission also conducted a 12-week open public online consultation from 16 February to 11 May 2021. The open public consultation received 89 replies. Most of these replies came from EU citizens (43) followed by public authorities (20). The replies originated from almost all EU Member States, with Germany providing most feedback (10 replies).

Different stakeholders have been contacted, and consultations have been carried out within the e-Justice, Civil and Criminal Council Working Parties – EJN-civil, EJN-criminal (Annex 1, p. 49). In addition, a questionnaire was sent to Member States. However, there is no further information about the outcome of these consultations or the questionnaire. More precise information is also missing on the consultation activities conducted by the contractor who prepared the supporting study.

Supporting data and analytical methods used

The IA is underpinned by several studies, sources and data, including the EU Justice Scoreboard, the Rule of Law report and data from the European Commission for the Efficiency of Justice (CEPEJ), which is a Council of Europe initiative (see Annex 1, pp. 48-49). While overall, the evidence appears sound, the Commission however admits that the data used is fragmented. It seems that the Commission only made the supporting study prepared by the consultancy Valdani Vicari & Associati (VVA) available in the interinstitutional database of EU studies at the end of January 2022. This database is not accessible to the wider public, which is contrary to transparency requirements.

The Commission indicates the assumptions upon which the IA was based are:

- It was estimated that the number of cross-border cases in civil, commercial and criminal matters would grow with the increase in the number of people living and working in a Member State different to that of their origin and with the increase in the number of people traveling for tourism purposes (however, one may wonder how this assumption is in fact compatible with the Commission's promotion of out-of-court settlement, mediation and arbitration);
- It was estimated that the number of persons visiting and using the European e-justice portal would result in increased numbers of cross-border cases.

The Commission also highlights the limitations of the IA, which included fragmented data on:

- the number of cross-border cases in civil, commercial and criminal matters;
- the length and costs of the cross-border proceedings in civil, commercial and criminal matters (Annex 1, pp. 49-50).

Follow-up to the opinion of the Commission Regulatory Scrutiny Board

The RSB issued a positive opinion on 27 September 2021. The RSB pointed out that the following two improvements to the report should be made: (1) the problem definition, including the underlying evidence, should be sufficiently clear and the coherence with linked initiatives sufficiently analysed; (2) secondary effects linked to a more efficient transmission of data, including the capacity of judicial systems and potential increased data protection risks, should be examined.

In Annex 1 to the IA, the Commission services explain how they addressed the RSB’s comments in the final IA. While most comments appear to have been dealt with, the description of the impacts on the fundamental right to data protection are very limited.
Coherence between the Commission's legislative proposal and IA

It appears that the Commission's legislative proposal corresponds to the preferred option of the IA, even though not all monitoring indicators were carried over.

While the Commission makes the case for advancing the digitalisation of judicial cooperation, and while the IA supporting this initiative received a positive opinion from the RSB, it does nevertheless appear weak on several points. The Commission corroborates its problem definition using several recent sources and data. The Commission conducted several stakeholder consultation activities, for some of which, more specific information would have been useful. Stakeholder views are reflected in the IA report. It appears, however, that the main source, an external study, is available only in the interinstitutional database of EU studies and not available to the wider public at the time of writing. Moreover, it appears that the range of options is very limited, with seemingly no real alternative to the preferred legislative, Option 2 (the voluntary approach under the Option 1 is not considered as effective). It is notable that the description of impacts relating to data protection and data security is very limited for all options, despite their likely relevance.

ENDNOTES

2 See the Platform for EU Interparliamentary Exchange (IPEX).
3 The subsidiarity grid aims to provide a shared and consistent approach to assess conformity of a given proposal or initiative with the Treaty-based principles of subsidiarity and proportionality (see the Commission Task Force).
4 According to the S.M.A.R.T criteria of the Better Regulation Guidelines, objectives should be specific, measurable, achievable, relevant and time bound.
5 In the first two years, the cost of installation would be €100 000 per year per MS. This amount includes hardware and the manpower to configure it. The remaining €200 000 are necessary for support to the increasing number of users. As of the third year, there are no hardware and installation costs, but only costs for user support and maintenance of the system. This is estimated at €300 000 (see IA, p. 34).

This briefing, prepared for the Legal Affairs (JURI) and Civil Liberties, Justice and Home Affairs (LIBE) committees, analyses whether the principal criteria laid down in the Commission’s own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.