OVERVIEW

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

In the European Parliament, the Committee on Legal Affairs (JURI) and the Committee on Civil Liberty, Justice and Home Affairs (LIBE) are dealing jointly (Rule 58) with the proposal. On 14 October 2022, the co-rapporteurs presented their draft report. In the Council, the proposal has been examined by the e-Justice working party.

On 30 June 2022, the Council Presidency summarised the working party’s preliminary findings in a document circulated to Member States’ delegations, with view to continuing work at the political level.

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Introduction

In its explanatory memorandum to the proposal, the European Commission pointed out that secure, reliable and time-efficient communication between courts and competent authorities is a prerequisite for effective cross-border judicial cooperation in the EU. At present, the body of EU legislation regulating judicial cooperation and access to justice in cross-border cases (both civil and criminal) contains many references to communication between judicial and non-judicial authorities. Many of these legislative acts do not prescribe digital communication, and even if they do, the practical and safe use of digital communication is not sufficiently guaranteed by these regulations. In the Commission’s view, this has negative impact on both judicial cooperation and access to justice, making communication less efficient, secure and reliable.

Existing situation

The EU co-legislators (European Parliament and Council of the EU) have recently adopted several legislative acts in the area of digitalisation of judicial cooperation in both civil and criminal matters. These include the e-CODEX Regulation adopted earlier this year and two recast regulations adopted in 2020 – on service of documents and taking of evidence. Furthermore, the 2014 e-IDAS Regulation lays down rules on, inter alia, trust services, electronic seals and electronic signatures.

Parliament’s starting position

While Parliament has not adopted an own-initiative resolution specifically on digitalisation of civil and criminal procedures, it has been overwhelmingly supportive of previous Commission legislative initiatives in the area, most recently the e-Codex Regulation. At the same time, Parliament has emphasised the need to safeguard the rule of law and fundamental rights: its amendments to the Commission proposal on e-Codex, which have been retained in the adopted text, focused largely on ensuring that, in judicial cooperation, the rule of law and fundamental rights are upheld.

Council starting position

On 9 June 2020, the Council adopted conclusions on ‘Shaping Europe’s digital future’, which recognised that ‘the digitalisation of the justice systems of the Member States has the potential to facilitate and improve access to justice throughout the EU’. The conclusions called on the Commission ‘to facilitate the digital cross-border exchanges between the Member States both in criminal and civil matters and to ensure the sustainability and ongoing development of the technical solutions which have been developed for cross border exchanges’. Furthermore, in October 2020, the Council adopted conclusions on ‘Access to justice – Seizing the opportunities of digitalisation’, which reiterated its call on the Commission to take concrete action to digitalise justice, including by introducing the ‘digital by default’ principle in civil proceedings.

Preparation of the proposal

On 2 December 2020, the Commission adopted a communication on the digitalisation of justice, explaining the rationale for digitalising cross-border cooperation between EU judiciaries, and describing various initiatives, including non-legislative ones. A fact-finding exercise on the situation in the Member States, carried out between June and September 2020, preceded preparation of the proposal, to take stock of the EU justice sector’s level of digitalisation, based on data available in studies on this topic. The outcome of the fact-finding exercise was published in a Commission staff working document accompanying the communication. The Commission proposal is accompanied by an impact assessment (IA), published in parallel as a staff working document on 1 December 2021. Analysing three options (no action, non-legislative action, and adoption of a legislative act), the Commission clearly preferred a legislative intervention to digitalise judicial cooperation across the EU. The IA was analysed in an EPRS initial appraisal, published in April 2022.
The changes the proposal would bring

Subject matter, scope, definitions

Horizontal legal framework for digital judicial cooperation

The proposal’s subject matter is the establishment of a legal framework for electronic communication between competent authorities in both civil and criminal matters, and for communication in judicial procedures between private parties, on the one hand, and competent authorities, on the other. The proposed regulation is therefore transversal and indistinctive, in the sense that its rules cover both civil and criminal matters. This is a new approach: previously, EU legal acts were adopted separately for civil and criminal procedures (on the basis of Articles 81 and 82 of the Treaty on the Functioning of the EU (TFEU), respectively), even if the nature of the subject matter, such as transmission of documents or taking of evidence, could be said to be common for both types of procedure. This is in line with the Commission’s 2020 communication on digitalisation of justice, which also covered both criminal and civil procedures indistinctively, even if the rationale for digitalising civil justice (primarily economic effectiveness) and criminal justice (primarily fundamental rights) are not identical.

Apart from establishing a horizontal legal framework for electronic transmission of documents in civil and criminal procedures, the proposed regulation lays down horizontal rules on the use of videoconferencing (or other distance-communication technology) for hearing i) parties in civil proceedings (but not witnesses or experts, as this is already regulated in the 2020 Taking of Evidence Regulation), and ii) suspects, accused and convicts in criminal proceedings. The proposal also provides for rules on using, in the scope of judicial cooperation, electronic trust services, acceptance of electronic documents (signed with e-seals and e-signatures), and the electronic payment of court fees in civil proceedings.

Scope of application ratione materiae: Reference to a list of legislative acts

Article 1(2) of the proposed regulation lays down the scope of application by referring to two distinct lists of EU legal instruments annexed to the regulation: annex I includes a list of instruments in the area of civil procedure, and annex II a list of instruments in the area of criminal procedure. In other words, the regulation would apply only if the cross-border proceedings in question would fall in the scope of application of one (or more) instruments listed in one of the two annexes. Other proceedings, even with a genuine cross-border element, would seemingly be excluded from the regulation’s scope (argumentum a contrario). This way of defining the scope of application ratione materiae (i.e. by subject matter) has the advantage of ‘delegating’ the definition of the cross-border element of civil or criminal proceedings to the specific legal acts, rather than providing a cross-cutting definition within the proposed horizontal regulation. However, within the sectoral acts, the notion of a cross-border element is not defined uniformly. Some legal acts adopt a more narrow definition, others a broader one. For instance, Recital 5 of the Service of Documents Regulation defines ‘cross-border service’ broadly as ‘service from one Member State to another Member State’, while Article 3(1) of the European Small Claims Regulation defines a ‘cross-border case’ narrowly as ‘one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seized’. The Taking of Evidence Regulation also takes a broad approach, including all situations when a court of Member State A, in accordance with the law of that Member State, requests the court of Member State B to take evidence, or even engages directly in the taking of evidence in Member State B (Article 1(1)).

Given the different approaches to defining the cross-border element in various EU legal acts, and the ensuing differences in the scope of application ratione materiae of those acts, triggering the proposed horizontal regulation on digitalisation could, in practice, become significantly more complex than it seems at first sight. For the provisions of the horizontal regulation to apply, a two-step verification of its scope of application would have to be applied. In a first step, the
court or other competent authority would have to verify that the premises of applying one of the legal acts listed in annexes I or II are fulfilled, which, given the differences in their scope, would require an act-specific verification (because each of these acts has its own definition of what is considered ‘cross-border’). In a **second step**, once at least one of the legal acts listed in annexes I or II would cover the proceedings, the court or other authority would have to move on to verify whether the specific premises envisaged in the horizontal regulation are fulfilled in their own right (because each of the rules of the proposed horizontal regulation specifies the circumstances when its application is triggered – see details in the following sections).

The instruments covered in the area of **civil procedure** comprise one directive (2003 **Legal Aid Directive**); four instruments establishing **autonomous EU types of civil procedure** (2004 **European Enforcement Order Regulation**; 2006 **European Order for Payment Regulation**; 2007 **European Small Claims Regulation**; 2014 **European Account Preservation Order Regulation**); and instruments in the area of **private international law and international civil procedure**, regulating conflicts of laws and conflicts of jurisdiction, and providing for recognition and enforcement of judgments across the EU. These include: 2012 **Brussels I-bis Regulation**; 2019 **Brussels II-ter Regulation**; and sector-specific regulations: 2008 **Maintenance Regulation**; 2012 **Succession Regulation**; 2015 **Insolvency Proceedings Regulation**, including two regulations that implement enhanced cooperation between Member States that chose to participate: 2016 **Matrimonial Property Regulation** and 2016 **Registered Partnerships Regulation**.

The instruments covered in the area of **criminal procedure** include several framework decisions (CFDs), one directive and one regulation: CFD 2002/465/JHA on joint investigation teams; CFD 2002/584/JHA on the European arrest warrant; CFD 2003/577/JHA on orders freezing property or evidence; CFD 2005/214/JHA on financial penalties; CFD 2006/783/JHA on confiscation orders (no longer in force, replaced by a regulation); CFD 2008/909/JHA on custodial sentences and measures involving deprivation of liberty; CFD 2008/947/JHA on probation decisions; CFD 2009/829/JHA on supervision measures; CFD 2009/948/JHA on conflicts of criminal jurisdiction; 2014 **European Investigation Order Directive**; 2018 **Freezing and Confiscation Orders Regulation**.

The same legislative approach – a **renvoi** to a list of instruments – was followed in the Commission proposal for the e-CODEX regulation; however, the final text of that regulation, adopted on 30 May 2022, takes an **open-ended approach**, defining the scope of application by referring simply to 'judicial cooperation in civil and criminal matters' (Article 2), rather than listing the legislation currently applicable in both areas. Interestingly, by speaking of 'judicial cooperation', the text of the e-CODEX Regulation neither uses nor defines the notion of a ‘cross-border’ element, which is nonetheless a legal prerequisite for triggering EU competence in Articles 81 and 82 TFEU. The notion of ‘judicial cooperation’ is not defined, either, presumably requiring that the regulation be interpreted in line with its specific legal basis in Articles 81 and 82 TFEU.

**Key concepts and their definitions**

Article 2 of the proposal provides for definitions of **key concepts** used throughout the proposal. The list of definitions is crucial to determining the proposal's effective scope *ratione materiae* and *ratione personae* (i.e. as regards persons or other entities subject to a regulation) and in the course of legislative proceedings, co-legislators usually pay particular attention to key definitions. Article 2 provides for horizontal definitions of six concepts used throughout the proposed regulation:

- ‘**competent authorities**', meaning ‘courts, public prosecutors, Union agencies and bodies and other authorities taking part in judicial cooperation procedures in accordance with the provisions of the legal acts listed in Annex I and Annex II’. The notion of ‘other authorities' used in the definition is open ended and could also include non-judicial authorities, if they are legally competent to participate in judicial cooperation procedures;
‘electronic communication’, which means ‘digital exchange of information over the internet or another electronic communication network’; proposal is technology-neutral, as it does not specify the concrete transmission mode;

‘electronic document’, that is, ‘a document transmitted as part of electronic communication, including scanned paper documents’. The definition is, once again, fully technology-neutral, particularly in that it does not specify the file format to be used for scanned documents, in particular, which can be transmitted in different file formats;

‘decentralised IT system’, defined as ‘a network of IT systems and interoperable access points, operating under the individual responsibility and management of each Member State, Union agency or body that enables the secure and reliable cross-border exchange of information’; while not mentioned explicitly in the definition, e-CODEX is clearly referred to in the recitals;

‘European electronic access point’, taken to mean ‘an interoperable access point in the context of the decentralised IT system, which is accessible to natural and legal persons throughout the Union’;

‘fees’, defined as ‘payments levied by competent authorities in the context of the proceedings under the legal acts listed in Annex I’ – meaning essentially court fees charged in the context of civil procedure, as opposed to lawyers’ fees (legal fees), which fall outside the scope of this concept (in line with the maxim of legal reasoning known as *argumentum a contrario*, to the effect that ‘what is not included in a legal rule is excluded from it’). Any fees in criminal procedure are also outside the definition (given that EU acts on cross-border criminal matters are listed in annex II). Importantly, the definition would not cover all fees, but only those in proceedings that fall in the scope of one of the acts listed in annex I – so, in purely domestic cases, the rules on fees would not apply.

Communication between competent authorities

Article 3(1) of the proposal provides for **mandatory use of electronic means for written communication** between competent authorities in both civil and criminal cross-border cases. However, article 3(2) provides for **exceptions** from the use of electronic means owing to i) disruption of the decentralised IT system, ii) the nature of the transmitted material or iii) ‘exceptional circumstances’. In those exceptional cases, documents may be transmitted by **non-electronic means**, which should, nevertheless, be ‘the swiftest’ and ‘most appropriate’ available alternative. It is not specified what kind of non-digital transmission is meant; however, since it should be ‘the swiftest’, traditional postal delivery seems to be excluded, whereas delivery by courier could be envisaged. Furthermore, article 3(3) provides for an additional **exception** from using the decentralised IT system, namely if the use ‘is not appropriate in view of the specific circumstances of the communication in question’. In such cases, ‘any other means of communication may be used’, i.e. not only the swiftest and most appropriate alternative (as required by article 3(2)), but also any other alternative, including traditional paper mail. However, as provided for in article 3(4), the ‘specific circumstances’ exception do not apply to the **exchange of forms**. This means that forms may be transmitted non-electronically only in situations listed in article 3(2). The proposal **does not define key concepts triggering the exceptions** (‘nature of the transmitted material’, ‘exceptional circumstances’, ‘specific circumstances’), leaving it ultimately to the competent authorities to interpret them (with the possibility of having those findings challenged by the interested parties using the judicial remedies available to them under domestic procedural law).

Communication between individuals and authorities in civil cases

While communication between competent (judicial or administrative) authorities of two Member States must be in digital form (as explained in the previous section), the **proposed regulation is**
less strict and comprehensive when it comes to individuals (natural or legal persons). For instance, the regulation is completely silent about communication between individuals (individual-to-individual), despite the fact that, in several countries’ civil procedure rules, some types of documents – such as a final reminder to pay, or even the statement of claim (document instituting civil proceedings) – are sent directly by the claimant to the defendant (without a court’s intermediation). Such documents could, however, be transmitted under the Service of Documents Regulation in the form of ‘extrajudicial documents’, which the latter defines broadly as comprising not only ‘documents that have been drawn up or certified by a public authority or official’, but also ‘other documents of which the formal transmission to an addressee residing in another Member State is necessary for the purposes of exercising, proving or safeguarding a right or a claim in civil or commercial law’ (Recital 8).

Leaving the communication between individuals outside its scope ratione materiae, the proposed horizontal digitalisation regulation focuses, as regards private parties, only on their communication with competent authorities, both in the authority-to-individual and the individual-to-authority formats. However, the rules for both formats differ. In the communication from individual to authority, the individual may always opt for electronic form, but may also refrain from it and stick to paper form (article 5(1)). There is no once-and-for-all switch from paper to digital, and the individual may choose to send some documents in paper form and others in electronic form, even in the same lawsuit. Electronic documents have full effect – they are to be treated as equivalent to paper ones (article 5(3)), and the recipient authority must not refuse them simply because of their electronic form (article 6).

Communication in the opposite direction, i.e. in the authority-to-individual format, is subject to different rules (article 5(2)). The key element is consent by the individual to receive communication in electronic format, which triggers the authority’s duty to use only electronic means. Unlike the individual, who may switch back and forth between paper and electronic formats, the authority not only does not have the right to switch on its own; rather, it must follow the individual’s will and either use the paper format (if the individual did not consent to electronic form) or the electronic format (if the individual expressed their will to receive communication in electronic form). The regulation is silent, however, on the question of revocation of consent by the individual. It seems that the individual’s right to revoke such consent should be presumed from the general scheme of the regulation, which places an emphasis on civil litigants’ autonomy of will. However, lacking a precise formulation in the rules, the question could become open to interpretation in specific cases.

Electronic communication from a natural or legal person to a competent authority may take place in two ways: either through the European electronic access point or through a national IT portal, where available. The European electronic access point is regulated in article 4. It is to be established on the European e-Justice portal for electronic communication between individuals and competent authorities in civil matters. The Commission is to be responsible for its technical management, development, maintenance, security and support. It will allow individuals to file claims, launch requests, send and receive procedurally relevant information, and communicate with the competent authorities.

Use of videoconferencing

The use of videoconferencing (or other distance communication technology) for hearings is regulated separately for civil cases (Article 7) and criminal cases (Article 8).

Civil cases

In civil cases, the decision to use videoconferencing for a cross-border hearing is made on request of a party to the proceedings (one of the litigants). The other party or parties to the proceedings must be given the possibility to submit an opinion on the use of videoconferencing or other distance communication technology. However, the right to submit an opinion does not entail the
right to block the use of videoconferencing. The other party may try to persuade the court that it would not be appropriate to organise a videoconferenced hearing, but it is up to the court to grant or refuse the request. The competent authority is under a legal duty to grant the request, after hearing the other party, if the technology is available and if one of the parties is indeed ‘present in another Member State’ (requirement of cross-border element). Of note, ‘present in another Member State’ is broader than ‘resident’ or ‘habitually resident’ (as required, for instance, in the European Small Claims Regulation). Under the proposed regulation, the parties may all be normally residing in the same Member State, and it will be sufficient for one of them to be temporarily present in another Member State (for instance, as a tourist) to trigger the rule on videoconferencing. However, if they are present outside the EU (in a third country), the article 7 rule will not apply, as its scope of application is limited to cross-border situations within the EU. The request for the use of videoconferencing can be submitted through the European electronic access point and national IT portals, where available (article 7(5)). The competent authority may refuse the use of videoconferencing if ‘the particular circumstances of the case are not compatible with the use of such technology’ (article 7(3)). However, the proposal does not define the concepts of ‘particular circumstances’ or ‘incompatibility’, leaving the decision to the authority itself. Finally, the use of videoconferencing technology may be ordered by the court ex officio, i.e. without a request of any of the parties (article 7(3)), after hearing all parties’ opinion.

Article 7(4) provides that both the requests for videoconferencing and the actual conducting of a videoconference must be subject to the national law of the Member State conducting the videoconference (lex fori). This means that it will be the lex fori, i.e. the law of the court that is conducting the proceedings (and doing a hearing through video link as part of the proceedings), and not the law of the Member State where the individual is actually located or of which they are a national or where they are resident. The only connecting factor of relevance is the forum (the competent court).

The rules on videoconference provided for in article 7 are fall-back rules, i.e. they apply ‘without prejudice to specific provisions’ on this issue contained in the existing instruments on civil procedure, listed in annex I.

Criminal cases

Article 8 regulates the use of videoconferencing or other distance-communication technology in criminal proceedings. The rule’s scope ratione personae is limited to suspects, accused and convicts. A contrario, this rule does not apply to witnesses, victims or other parties to criminal proceedings (e.g. civil parties, who – in some Member States – may join criminal proceedings if they have a claim for damages to the person accused). The initiative to demand the use of videoconferencing is vested in the competent authority of a Member State (requesting authority), while the duty to comply with this request rests with the competent authority of another Member State, i.e. the one where the suspect, accused or convict is located. The rule’s modality is that of an obligation (‘the [requested] competent authority shall allow [the suspect’s, accused’s or convict’s] participation to the hearing by videoconferencing’). In other words, the requested authority has a duty to comply with this request; however, the requested authority has a duty to comply with the requests, provided that the three prerequisites listed in article 8(1) are present: i) availability of videoconferencing technology; ii) justification for the use of videoconferencing technology by ‘the particular circumstances of the case’ – a concept not defined in the proposal; and iii) consent of the suspect, accused or convict. Thus, if the three premises are jointly met, the requested authority cannot refuse to grant the possibility of using videoconferencing. However, the regulation neither explains what is meant by the expression that ‘particular circumstances of the case justify the use of such technology’, nor indicates who is to decide whether such justification is present or not. In the absence of more detailed rules to this effect, it can be assumed that it is up to the requesting authority to indicate those circumstances, and persuade the requested authority that justification is present; however, ultimately it is for the requested authority to decide. Given that there is no appeal
procedure in place, the decision to grant or refuse videoconferencing is not subject to any review or appeal under the regulation; however, it may be subject to appeal under the applicable rules on criminal procedure. The rule of article 8(1), analysed above, is a **fall-back rule**, meaning it is applicable if nothing else follows from the specific provisions of the legislation listed in annex II.

Article 8(3) specifies that the law applicable to videoconferencing will be the national law of the Member State conducting the videoconference. This means that it is the **law of the requested authority**. The applicable domestic procedural law will, therefore, be able to flesh out more accurately when videoconferencing is ‘justified’ in accordance with article 8(1)(b), and provide for a possibility of reviewing or appealing the decision to grant or refuse videoconferencing in a specific case. For instance, the decision could be appealed by other parties to the proceedings, such as the victim or the public prosecutor. In any event, given that the regulation provides only for a very general legal framework, it will be up to national legislators to **fill in the gaps in the regulation** with national rules of criminal procedure, in particular as regards the **right to an effective remedy** granted to the suspect, accused or convict in article 8(7), which the national legislators are obliged to provide for (see below).

Article 8(4) mandates that the confidentiality of **communication between suspects, accused or convicted individuals and their lawyer** before and during the hearing through videoconferencing or other distance communication technology be ensured. This is in line with the principle of protecting ‘legal privilege’, which is inherent in the rights of the defence in criminal procedure. Article 8(5) provides that, before **hearing a child through videoconferencing**, holders of parental responsibility or another appropriate adult as referred must be promptly informed. When deciding whether to hear a child in this way, the competent authority must take into account the child’s best interests. Given the systematic placement of article 8(5) within the proposal, it seems to be a **lex specialis** vis-à-vis article 8(1), which would apply only to the hearing of suspected, accused or convicted children, and not to children who are witnesses or victims (the latter being altogether outside the scope of the regulation). Article 8(6) introduces the **principle of equivalence** between domestic and cross-border cases as regards the recording of hearings: if such recording is provided by the national law for domestic cases, the same rules must apply to cross-border ones. According to article 8(7), a suspect, an accused and the convicted person must have the right to an **effective legal remedy** under national law in the event of a breach of any of the rules of article 8.

**Electronic form of documents and payment of fees**

Article 9(1) provides that the rules of the e-IDAS Regulation on trust services are to apply in the scope of the proposed regulation. Whenever national law requires that a seal or handwritten signature be placed on a document to be transmitted **between competent authorities** in a cross-border civil case, a qualified electronic seal or qualified electronic signature, as defined by the e-IDAS Regulation, is legally sufficient (article 9(2)). Conversely, in communication **between an individual and the competent authority** in cross-border civil proceedings, the required seal or handwritten signature may be replaced by qualified electronic seals or qualified electronic signatures under the e-IDAS Regulation (article 9(3)). According to article 10, documents transmitted as part of electronic communication may not be denied legal effect or be considered inadmissible in the context of cross-border civil or criminal proceedings solely on the ground that they are in electronic form. Article 11 obliges the Member States to provide for the possibility of **electronic payment of fees**, including from Member States other than where the competent authority is situated. This must be enabled through the European electronic access point.

**Provisions on software and financing of the IT systems**

Article 13 provides that the Commission will be responsible for the creation, maintenance and development of **reference implementation software**, which Member States may choose to apply as their back-end system instead of a national IT system. The software will be financed from the EU general budget. According to article 14, Member States will bear the costs of the installation,
operation and maintenance as regards the e-CODEX access points located on their territory. They will also have to pay for establishing and adjusting their national IT systems to make them interoperable with e-CODEX. The EU will cover the costs of the e-CODEX components under their responsibility.

Other rules

Article 15 provides that the competent authority will be the data controller with regard to personal data sent or received via the e-CODEX system, while the Commission will be regarded as controller with respect to personal data processing by the European electronic access point. Competent authorities will have a duty to protect the confidentiality of data deemed confidential in the Member State from which they are being transmitted. Article 16 provides for the comitology procedure to be applicable, as defined in the 2011 Comitology Regulation. The committee that will assist the Commission is required to follow the examination procedure laid down in Article 6 Comitology Regulation. Article 12 of the proposal grants to the Commission powers to adopt implementing acts (in the comitology procedure), which will establish the decentralised IT system. Article 17 provides that the Commission will evaluate the regulation every five years, and present a report supported by information supplied by the Member States and collected by the Commission. To this end, the Member States will have to inform the Commission annually about certain aspects relating to the regulation’s application. Articles 19 and 20 provide for amendments to existing legislation in the area of judicial cooperation in both civil and criminal matters. The aim of these amendments is to make digital communication, as laid down in the proposed regulation, legally effective in all sectoral legislative acts. The typical formula, repeated in all amendments, makes ‘electronic means of communication provided for’ in the proposed horizontal regulation as legally effective under the given sectoral regulation or framework decision. The amendments in question are thus purely technical. (It is worth recalling that the horizontal regulation’s scope of application is defined primarily by that of the sectoral regulations listed in annexes I and II, and that the horizontal regulation itself can only be triggered once one of them applies, provided the premises for applying one of its rules are met in the specific circumstances.) The regulation is due to enter into force the day after its publication (article 25), but will apply only two years later; Member States will have two years to start using the decentralised IT system mandated by the regulation (article 24).

Advisory committees

On 19 May 2022, the European Economic and Social Committee (EESC) adopted an opinion on the proposal. In its opinion, the EESC pointed to the need of eliminating several shortcomings in the proposal, in particular as regards security and confidentiality, given the sensitive nature of the issues covered in the various hearings; the openness of the justice system (in terms of participation, observation and accessibility); and the digital divide – to prevent a situation in which citizens with poor digital skills, limited access to technology, and low levels of literacy and legal knowledge would face increased barriers in access to justice.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 14 March 2022. No subsidiarity concerns were raised.

Stakeholder and academic views

On 29 July 2022, the Council of Bars and Law Societies of Europe (CCBE) published its position paper on the proposal. While welcoming the proposal in principle, the CCBE drew attention to several shortcomings. It regrets that article 7 does not provide explicitly for the protection of the confidentiality of communication between clients and their lawyers during the hearing through videoconferencing, providing such protection only in criminal cases (article 8(4)). The CCBE would also strengthen the principle of consent, to the effect of introducing an explicit requirement that
the decision of the competent authority to organise a hearing through videoconferencing must be based explicitly on such consent of the parties. It also considers that the use of videoconferencing for judicial hearings carries certain risks, in particular for the rights of the defence, and that the proposal does not address them sufficiently. There is a need, the CCBE argues, to include additional safeguards to protect the parties' rights. Furthermore, it draws attention to the missing element of necessary assistance to the parties in filling out the electronic forms, which, at least for some, could be challenging. On the relation between the EU IT system and national IT systems, the CCBE regrets that the regulation does neither recognises nor seeks to integrate the existing national systems for communication between lawyers and courts, which are already in place. More generally, the CCBE questions the Commission’s approach aiming to make digitalisation of justice full and mandatory – it should, in the lawyers' view, remain optional, with the possibility of paper communication maintained in order to safeguard the rights of the defence and access to justice. In April 2022, the European Law Institute (ELI) organised a high-level expert group meeting on the proposal. The experts’ contributions will be consolidated and then considered by the ELI executive committee and council. In an article on the proposal, Xandra Kramer expresses the hope that it will help achieve a more integrated, sustainable and secure e-justice system in the EU, but notes that an important aspect needs addressing, namely the training of justice professionals in the use of digital tools. In an article on electronic evidence, Dr Elena Alina Oţanu claims that the new proposal will fill in some legislative gaps. However, she considers that EU legislation in the area is only partially adequate to provide a comprehensive framework, and does not offer much guidance when considering metadata or assessing electronic evidence.

Legislative process

European Parliament

On 14 October 2022, the European Parliament’s co-rapporteurs from the JURI and LIBE committees presented a joint draft report comprising 59 amendments to the Commission proposal: 17 on the preamble and 42 on the substantive part of the legislative text. Among the changes envisaged, the following seem to affect the legal substance most significantly:

- amendment 19, which specifies that the regulation is without prejudice to any national rules on entities entrusted with verifying and filing of applications, documents and information, and that it does not affect national requirements on authenticity, accuracy, reliability, trustworthiness and appropriate legal form of documents and information;
- amendment 26, which mandates the European electronic access point to contain information for natural and legal persons on their right to legal assistance, and which requires that the access point comply with national requirements on form, language and representation;
- amendments 30 and 37, which delete the requirement of availability of information and communications technology (ICT) for conducting videoconferenced hearings in civil (amendment 30) and criminal (amendment 37) proceedings, i.e. Member States would not be able to refuse on grounds of unavailability but would have to make the technology available;
- amendment 31, which obliges the national authority refusing a request for a videoconferenced hearing in civil proceedings to give reasons for its refusal to the requesting party;
- amendments 33 and 42, which oblige national authorities using videoconferencing in civil and criminal proceedings to make sure that confidentiality of communications is respected in line with the requirements of applicable national law;
- amendment 34, which states that videoconferencing in civil procedure will be subject to the law of the Member State where proceedings are taking place, not the law
of the Member State conducting the videoconference (if other than that where proceedings are taking place);

- amendment 36, which changes the scope of application of videoconferencing in criminal proceedings: rather than referring only to suspects, accused and convicts, the amendment speaks more generally of ‘persons either directly involved in or relevant to’ criminal proceedings, which would include also witnesses, expert witnesses and victims;

- amendment 38, which requires the competent authority to provide suspects, accused persons and convicts with information on the procedure, before they are required to consent to the use of videoconferencing;

- amendment 39, which requires that suspects, accused persons and convicts grant a voluntary and unequivocal consent to the use of videoconferencing.

Council

Within Council, the proposal was examined during the French Presidency (first half of 2022) by the e-justice working party. The outcome was presented in a document prepared by the French Presidency with the incoming Czech Presidency and published on 30 June 2022. The working party highlighted the need to make several legal definitions more precise, including the crucial one of ‘competent authority’. It also focused on the regulation’s scope, which it felt should not be determined for the instrument as a whole but rather for each individual article. Many of the working party’s remarks concerned consistency between the proposed regulation and existing instruments in the area of judicial cooperation in civil and criminal matters. One of the options suggested to delegations was to broaden the scope of application with regard to civil procedure to all cross-border proceedings, not only those covered by existing sectoral instruments. On criminal procedure, the working party invited delegations to consider whether the Charter of Fundamental Rights indeed stipulates that the hearing of a suspect, accused person or convict requires their consent, it proposed deleting the rule on the right to an effective remedy for suspects, accused persons or convicts as regards the use of videoconferencing.

Czech Presidency compromise text (September 2022)

In early September 2022, the Czech Presidency published a document containing the Presidency compromise text (12086/22), then replaced by an amended version (13468/22) in early October following discussions within the working party. The amendments in that text included a new rule allowing Member States to use the decentralised IT system for communication between their domestic authorities (i.e. even without a cross-border element), a new rule allowing EU agencies or bodies to use the decentralised IT system for their internal communication, and a technical simplification of the rules on communication between private parties and authorities. The requested Member States would no longer be obliged to use videoconferencing in cross-border civil proceedings upon request. On videoconferencing in cross-border criminal proceedings, the compromise text excludes the need for explicit consent of a suspect, accused person or convict where ‘participation in a hearing in person may pose a threat to public security or health’.

Council general approach

On 25 November 2022 the Presidency put forward a proposed general approach, which was approved as the Council’s negotiating mandate on 9 December 2022. A Member State would have the possibility to decide to use the decentralised IT system for communication between its own national authorities in cases falling under the scope of the legal acts listed in Annex I or II, and Union agencies or bodies will also have the possibility to decide to use the decentralised IT system for communication within the agency or body in cases falling under the scope of the legal acts listed in Annex II (judicial cooperation in criminal matters). Regarding the use of the European electronic access point for cross-border civil cases, article 2(2) would enumerate the situations and
types of communication for which private parties could use this means of communication to contact competent authorities. Use by competent authorities to communicate with natural and legal persons or their representatives would be admissible only in situations specifically listed in article 2(2) and specific consent would be necessary, given by the private party separately for each procedure, and given separately for the purposes of communication and for the service of documents. Communication would have to comply with requirements both of EU and applicable national law. For cross-border hearings in civil cases, videoconferencing would be optional for the authorities, rather than mandatory on request of the parties. The procedure for holding such hearings would be regulated by the national law of the Member State conducting the hearing. Hearings of suspects, accused or convicted persons would be obligatory if demanded by authorities of one Member State, provided it was possible and the suspect, or accused or convicted person agreed. The law of the requesting Member State, rather than the law of the State conducting the videoconference, would apply. The Commission would be required to issue an implementing act laying down the implementation timetable for the dates of availability of the reference implementation software, its installation by the competent authorities, and, where relevant, completion of adjustments to national IT systems to comply with the regulation’s requirements.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Eisele K., Digitalisation of cross-border judicial cooperation, EPRS, European Parliament, April 2022.

OTHER SOURCES

Legislative Observatory (OEIL), Digitalisation of cross-border judicial cooperation, European Parliament.

ENDNOTES

1 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under ‘European Parliament supporting analysis’.

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