DIGITALISATION OF JUSTICE IN THE EUROPEAN UNION AND IN SPAIN

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PART 1: THE EUROPEAN LEVEL

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PART 1

THE NEW REGULATION ON THE DIGITALISATION OF JUDICIAL COOPERATION IN THE EUROPEAN UNION

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

The European Union, like the Member States, is facing the regulatory challenges brought about by the digitalisation of social and economic life at an accelerated pace. Digital is, of course, one of the cornerstones of the transformation of justice in contemporary societies and, for this reason, the European institutions have been looking for some time now for ways to achieve a clear objective, that of digitising national justice systems.

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

> Originating in a 2008 Communication,[2] there are to date the 2009-2013 Action Plan;[3] the European e-Justice Strategy 2014-2018[4] and its Action Plan;[5] and the 2019-2023 Strategy[6] and its Action Plan.[7] Their contents are also revealing of the progressive developments on the interrelation between justice and technology.

The European Union, as is well known, cannot impose the digitisation of civil proceedings at national level, because it would be exceeding its competences. Despite this, it has been developing its own e-Justice policy for a long time now, in which it is not

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[1] https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en

[2] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Towards a European e Justice Strategy SEC(2008)1947 SEC(2008)1944 /* COM/2008/0329 final (30.5.2008).

[3] Multi-annual European e-Justice action plan 2009-2013, OJ C 75, 31.3.2009, p. 1–12.

[4] Draft strategy on European e-Justice 2014-2018, OJ C 376, 21.12.2013, p. 7–11.

[5] Multiannual European e-Justice Action Plan 2014-2018, OJ C 182, 14.6.2014, p. 2–13.

[6] 2019-2023 Strategy on e-Justice, OJ C 96, 13.3.2019, p. 3–8.

[7] Multi-annual European e-Justice action plan, OJ C 96, 13.3.2019, p. 9–32.

easy to distinguish between what is a development of the treaties and what, on the other hand, seems more voluntarist. In the successive Strategies and Action Plans, the approaches have evolved and gone beyond the merely cross-border dimension.

> Thus, in the 2009-2013 action plan, the link with Art. 81 TFEU is explicit: it is expressly stated that 'E-Justice therefore has horizontal relevance in the context of European cross-border proceedings' (para. 15) and dematerialisation is limited to cross-border judicial and extrajudicial proceedings. The 2014-2018 strategy, on the other hand, takes a slight step forward, as cross-border is no longer assumed to be an insurmountable limit: 'European e-Justice aims at the use and development of information and communication technologies at the service of the Member States' judicial systems, in particular in cross-border situations, with a view to enabling greater access to justice and judicial information to citizens, businesses and legal practitioners and facilitating cooperation between judicial authorities of the Member States. It strives to enhance the effectiveness of the justice system itself whilst respecting the independence and the diversity of the judicial systems of the Member States as well as fundamental rights' (para. 2). However, the Strategy itself points out the voluntary nature of participation when there are no issues under EU competence at stake: 'Voluntary participation in European e-Justice projects is at the discretion of each individual Member State, except where a European Union legislative instrument has been adopted which includes a requirement to implement a specific project in the context of the European e-Justice system' (para. 19). Such an ambiguity is also present in the 2014-2018 action plan, which ultimately focuses on actions at the European level, never on a strictly national level. In the 2019-2023 Strategy, the European Union does take the step of alluding to the day-to-day functioning of the courts of the Member States, beyond the purely intra-European cross-border sphere.

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

> There is also an interesting evolution in terms of the meaning of digitisation itself. In the first stage, digitisation seems to remain at the level of what is external, of the forms of proceedings: it is primarily identified with electronic communication, be it in terms of notifications or participation in hearings by videoconferencing. In the most recent projects and proposals, however, there is already a move towards digitisation of proceedings as a whole, not just of some of its acts. This is where one of the distinctive features of European procedural law, the use of forms,

comes into play. Initially, the forms were intended to facilitate cooperation by homogenising the framework and forcing the authorities to individualise the relevant data, thereby alleviating the difficulties associated with the cross-border context: the use of the form was a European standard for cross-border litigation. However, the digitisation of the forms themselves has given them enormous added value, as it allows them to become 'smart' forms, capable of capturing data, which can then be managed for better governance: this makes it possible not only to manage each case, but also to gather general information that can be used to make diagnoses and guide future developments.

From an institutional perspective, the flagship is the European e-Justice Portal,[8] which also represents the point of confluence of many other initiatives and functionalities and aims to become a 'one-stop-shop in the field of justice'. The predominant focus of the portal is on citizens' access to justice – 'making your life easier', as stated on the portal's front page. This explains the vast amount of information provided on legal systems, how justice works and how to assert rights, in understandable language and available in all official languages. This is also the purpose of many of the tools that the Portal leads to, such as those for finding legal professionals of all kinds (lawyers, notaries, mediators, translators-interpreters or experts) or the online forms for cross-border civil proceedings that do not require the assistance of a lawyer, such as the European Small Claims Procedure or the European Payment Order Procedure. The Portal is also extremely useful for legal professionals: it is the anchor point for the European Judicial Atlas, the European Judicial Network in civil and commercial matters and the European Judicial Network in criminal matters.

The digital focus has also been evident in the civil procedural rules emanating from the European Union, both in the area of international judicial cooperation and in European proceedings designed to deal more effectively with cross-border litigation. These legal instruments have enshrined genuine European standards of digitised justice.

The first visible commitment came more than ten years ago, with the 2013 Regulation on ODR in consumer matters,[9] which gave rise to the online dispute resolution platform,[10] managed by the European Commission and intended to serve as a focal point for European consumers to find solutions to disputes arising from their online purchases. Its failure in practice has recently led to the decision to abolish it.

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[8] https://e-justice.europa.eu

[9] 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, OJ L 165, 18.6.2013, p. 1-12.

[10] https://ec.europa.eu/consumers/odr/main

In 2015, the European Small Claims Procedure[11] was amended with the aim of taking advantage of ICTs to make it more flexible. In this sense, the amended text shows a strong preference for the holding of the hearings by videoconference (Arts. 8 and 9 ESCPR); the same preference is shown in favour of electronic service of documents (Art. 13 ESCPR); Member States are also obliged to allow the remote payment of court fees, by providing the appropriate digital means (Art. 15a ESCPR).

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

The new Regulation on the taking of evidence[12] imposes the electronic transmission of requests for cooperation between the judicial authorities and the central authorities involved (Art. 7 ER). More precisely, such transmission is required to take place 'through a secure and reliable decentralised IT system', which is 'based on an interoperable solution such as e-CODEX'. Only exceptionally (e.g. in the event of a system outage) may 'the swiftest, most appropriate alternative means' be used. In addition, ICTs are also used for the enforcement itself of requests for the taking of evidence. If it chooses to follow the general channels, the requesting judicial body may request the use of video- or teleconferencing - e.g. in the case of taking statements - and this request will bind the requested judicial body, unless it is incompatible with its national law or when 'major practical difficulties' prevent it [Art. 12(4) ER]. But, in addition, the court involved in the taking of evidence or the questioning of a person who is present in another Member State may request the direct taking of evidence by videoconference, where appropriate with the practical assistance of the central or judicial authority concerned (Arts. 19 and 20 ER). If the requesting or requested court does not have access to the technology necessary to enable videoconferencing or teleconferencing, the other court involved may provide it by mutual agreement.

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[11] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 341, 24.12.2015, p. 1-13.

[12] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, pp. 1-39 (ER, hereafter).

The patterns are similar in the new Regulation on service.[13] Here too, electronic means is the default channel for communication between the bodies and agencies involved in the operation of the system (Art. 5 SR). It also requires the use of a decentralised, secure and reliable IT system based on an interoperable solution, such as e-CODEX. This means that requests for service are to be sent, except in exceptional cases - such as a system outage - electronically via e-CODEX. Direct electronic service is also allowed, if the requirements set out in Art. 19 SR are fulfilled - in this case e-CODEX will not be used, but, as will be seen below, it is envisaged to allow the use of a new 'European' tool, the European electronic access point.

In addition, the EU is committed to regulating aspects that are not strictly legal but essential for the functioning of the system and which are dealt with in exactly the same terms in both regulations. The Commission - at the expense of the general budget of the EU - assumes the creation, maintenance and future development of reference implementation software which Member States may choose to use as a back-end system instead of a national IT system (Arts. 27.1 ER and SR). Member States, for their part, bear the costs that go beyond the above: on the one hand, the costs arising from the installation, operation and maintenance of access points interconnecting the national IT systems in the context of the decentralised IT system[14] (Arts. 28.1 ER and SR); and, on the other hand, the costs of establishing - or adjusting - national IT systems interoperable with the access points, as well as the costs of administering, operating and maintaining these systems (Art. 28.2 ER and SR).

The missing piece to make the provisions of both texts operational was the secure and reliable decentralised IT system based on an interoperable solution, i.e. e-CODEX. Its planning and design had already been underway for some time (since 2010) at a technical level,[15] but its regulation was equally necessary, which crystallised just two years ago in the form of the 'e-CODEX Regulation'.[16] It is not a regulation similar to those dealing with other aspects of international judicial cooperation: its content is primarily technical

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[13] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on n the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) OJ L 405, 2.12.2020, p. 40-78 (SR, hereafter).

[14] Decentralisation of the system means that the exchange of information involves only the sender and the recipient, with no third party being able to intervene in or know the content of what is transmitted.

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

[16] Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance) OJ L 150, 1.6.2022, p. 1-19.

and organisational, which makes it difficult to understand for readers accustomed to the categories and terminology of EU procedural law regulatory instruments. The Regulation itself defines the e-CODEX system as the 'computerised system for the cross-border electronic exchange of data' - short formulation - and as the 'decentralised and interoperable system for cross-border communication for the purpose of facilitating the electronic exchange of data, which includes any content transmissible in electronic form, in a swift, secure and reliable manner in the area of judicial cooperation in civil and criminal matters' - extended formulation - (Art. 3.1 of the e-CODEX Regulation). Somewhat more didactically, the Commission[17] clarifies that e-CODEX is a software package that enables connection between national systems, allowing users, such as judicial authorities, legal practitioners and members of the public, to send and receive documents, legal forms, evidence and other information in a swift and safe manner. From an operational point of view, the Regulation hands over the management of the e-CODEX system to the eu-LISA agency.[18] It should be further stressed that e-CODEX does not replace the IT applications used at national level: it only harmonises the central points of entry, to enable cross-border communication exchanges.[19]

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

This explains the EU's interest in generalising digitisation schemes and extending them beyond the evidence and the service regulations, and the consequent inclusion of an additional piece in the Union's 'legislative production chain', the new Regulation on digitalisation of judicial cooperation and access to justice in cross-border civil,

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

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

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

commercial and criminal matters[20] (hereafter: DJCR), adopted on 13 December 2023 and applicable as of 1 May 2025.

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

The elaboration of a specific Regulation enshrining a generalised and structural digitisation of judicial cooperation in the EU has its earliest origin in December 2020, with the Communication from the Commission entitled 'Digitalisation of justice in the European Union - A toolbox of opportunities'.[21] Among many other issues, it included a section 3.2, with a very expressive heading: 'Making the digital channel the default option in EU cross-border judicial cooperation'. In this section, the Commission noted that the use of digital tools in judicial cooperation within the EU was not the rule at the legislative level - with the exception of the regulations on evidence and service, which had just been amended in that direction at that time - and it also noted that it was not the rule in practice, despite its obvious necessity. To force change, the Commission considered that binding regulatory action was necessary and undertook to present a legislative proposal on the digitalisation of cross-border judicial cooperation by the fourth quarter of 2021. To fulfil this promise, the Commission formally presented on 1 December 2021 its Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters,[22] together with an additional directive to implement the amendments to the directive on legal aid in cross-border cases and, above all, the framework decisions and directives on criminal cooperation that would be affected by the change of approach sought by the Regulation. Both the Regulation and the Directive[23] were adopted simultaneously and published jointly in the OJ on 27 December 2023.

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[20] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, OJ L 2844, 27.12.2023, p. 1-29.

[21] Supra note 17.

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

[23] Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, OJ L, 2023/2843, 27.12.2023.

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

The reasons for this approach are obvious and are summarised very clearly in Recital 4: the aim is to 'improve the efficiency and effectiveness of judicial procedures and to facilitate access to justice by digitalising the existing communication channels, which should lead to cost and time savings, a reduction of the administrative burden, and improved resilience in force majeure circumstances for all authorities involved in cross-border judicial cooperation'. The approach is therefore purely efficiency-oriented.

The adoption of the Regulation has its legal basis in Arts. 81 and 82 TFEU, i.e. in the EU competences in the area of judicial cooperation between Member States: this explains why its scope of application is limited to cross-border litigation and why it cannot have a direct impact on the procedural legislation of the Member States outside this area. An indirect impact, however, will be inevitable and, in fact, the interest of the European institutions in promoting the digitisation of judicial proceedings in the Member States is clear: this is indeed one of the issues addressed by the EU Justice Scoreboard,[24] the latest edition of which, published in 2023, stresses the need for the Member States to speed up modernisation reforms in digital matters, as there is still considerable room for improvement in some of them.

It should be noted, still on a general level, that neither Ireland nor Denmark have decided to exercise their opt-in option for the new instrument, so that it will not apply to them (recitals 59 and 60). Finally, several transitional periods are foreseen for its full application, during which both the Commission and the Member States must make the necessary regulatory and, above all, technical adjustments (Art. 26 in conjunction with Art. 10 DJCR).

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

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

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

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

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

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

This main purpose - to digitise the channels through which communications take place in any context of international judicial cooperation - also explains why the Regulation excludes from its scope the taking of evidence and the service of documents (recital 17): this goal has already been achieved with the 2020 regulations, so that no further regulatory action is needed in these areas. However, as will be seen below, the SR has been amended to accommodate the use of the European Electronic Access Point as a valid method of cross-border service (through the addition of a new Art. 19a in the SR).

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

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

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

This is something that may also end up happening with the Regulation on digitalisation: if any Member State might still have doubts about it, the Union makes its preference for digital clear and applies it to everything that depends on its regulatory action. It can therefore be said that the Regulation implicitly invites the Member States to do, internally and across the board, what it envisages: to use digital channels of communication, to

standardise the use of videoconferencing and electronic trust services, to recognise the full legal effectiveness of electronic documents and to allow the electronic payment of court fees. Regarding these issues, then, clear European standards are set or confirmed: such standards may be criticised, of course; and, above all, it may be 'regretted' that the European legislator's solutions have not gone as far as would have been desirable. And this, in turn, may create an impression of 'much ado about nothing', especially in those Member States where legislative development has already led to levels of digitalisation that meet the European minimum.

3. Communication channels and the European electronic access point

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

3.1. Communication between authorities

Where the actors at both ends of the communication are public authorities, the new Regulation builds on the acquis generated by the 2020 Regulations on evidence and service, which have thus served, to a certain extent, as a test bed. This means making the e-CODEX system the basic tool for cross-border digital communications within the EU.[25] The text of Art. 3(1) DJCR does not expressly mention e-CODEX,[26] but refers generically to the use of 'a secure, efficient and reliable decentralised IT system'; however, it is clear that, for the time being, that system is e-CODEX and, in fact it is expressly mentioned in Art. 13, when the costs of the system are addressed - this is also done in several recitals (9, 20, 21 and 53).

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

> Annex I lists the legislative instruments in the field of judicial cooperation in civil and commercial matters to which the provisions of the new Regulation will apply: the Legal Aid Directive (2003/8/EC); the Regulations creating the European Enforcement Order (805/2004), the European Order for Payment Procedure

[25] Recital 20 states clearly that 'The access points of the decentralised IT system should be based on e-CODEX', thus assuming it is the only valid moment, at least for the moment.

[26] As is done, by contrast, in Arts. 7(1) ER and 5(1) SR.

(1896/2006), the European Small Claims Procedure (861/2007) and the European Account Preservation Order (655/2014); the Brussels Ia Regulation (1215/2012) and the regulations on jurisdiction, recognition and enforcement of judgments in matrimonial matters, parental responsibility and international child abduction (2019/1111); maintenance (4/2009); succession (650/2012); protection measures in civil matters (606/2013); matrimonial property regimes (2016/1103); property consequences of registered partnerships (2016/1104); and the insolvency regulation (2015/848).

Annex II identifies the legal instruments in the field of criminal cooperation: the framework decisions on the European arrest warrant (2002/584), the freezing of assets and evidence (2003/577), the prevention and settlement of conflicts of jurisdiction (2009/948) and the mutual recognition of various types of judicial decisions, such as financial penalties (2005/214), confiscation orders (2006/783), judgments imposing custodial sentences or measures (2008/909), probation judgments and orders (2008/947) and orders on supervision measures (2009/829); the directives establishing the European protection order (2011/99) and the European Investigation Order in criminal matters (2014/41); and the regulation on mutual recognition of freezing and confiscation orders (2018/1805).

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

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

inferred, but the European legislator has sensibly preferred not to impose specific predetermined conditions.[27]

3.2. The European electronic access point

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

The European electronic access point is primarily a focus for natural and legal persons to access information about their entitlement to legal aid, especially in cross-border proceedings. But its primary objective is to operate as a two-way communication channel between litigants and authorities,[28] albeit in a partially asymmetrical way.

> (i) It functions, of course, as a channel of communication for litigants with the authorities they must contact, depending on the procedure, formality or action they intend to carry out through the access point: Art. 4(4) DJCR expressly refers to the filing of claims, the launching of requests and the sending of procedurally relevant information - very generic terms, which aim to cover the plurality of situations envisaged by the provision.
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> In these cases, the channel is directly operational, so that the authority to which the communication is addressed must accept it [Art. 4(5) DJCR]. The entry into force of the Regulation at this point, therefore, obliges Member States to be diligent in implementing the e-CODEX access points and the other infrastructure and software necessary to make the right of European litigants to use this communication channel fully operational. In fact, in the medium term, this provision has the potential to lead to a generalisation of this type of access points. If it works for cross-border litigation, all the more reason why it should operate in all types of proceedings - or, if one prefers, it will be difficult to explain why the

[27] Recital 24 admits, as a last resource, postal service.

[28] This is the reason why Art. 4(7) DJCR establishes that the European electronic access point shall be such as to ensure that users are identified (something obvious, anyway).

State should not provide for all proceedings a tool from which only the participants in cross-border proceedings benefit. The European legislator is thus offering a model or, if one prefers, an 'image of the future' for notification in domestic matters: the creation of a single access portal in which each citizen has his or her own folder or his or her own space.[29]

(ii) It must also be possible to use it to enable individuals to receive service of judicial or extrajudicial documents, in any of the areas where the system is applicable [Art. 4(4) DJCR]. In fact, an amendment of the SR has introduced a new Art. 19a, which will allow for the direct service of judicial documents through the European electronic access point. However, in any event, service via the European electronic access point will be subject to the prior consent of the addressee [Art. 4(6) DJCR]. The European legislator thus once again confirms the standard for electronic service on litigants: the consent of the addressee is required. As a standard, of course, it can easily be described as 'minimal', since in practice it entails a waste of digital channels of communication. It may be reasonable not to subject individuals to the burden of having the means to connect to the access point and to periodically check its content: such a burden may be seen as excessive, especially for those who could be described as 'digitally vulnerable' (not only those who lack the material means - computer and internet connection - but also those who do not have the digital skills to deal safely with this type of actions). However, it has long been a general requirement for legal persons - at least for many legal persons - to have a website and an electronic address, i.e. to be fully operational in digital mode; it would not be disproportionate, therefore, to impose on them the burden of validly receiving judicial notifications through these channels.[30]

Art. 4(6) CJEU further clarifies that 'each instance of consent shall be specific to the procedure in which it is given and shall be given separately for the purposes of communication and service of documents'. It can be understood that the European legislator wants to avoid the use of contractual clauses that incorporate

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[29] The CCBE sees this partly as a risk for the existing systems of communication between lawyers and courts, which are in many cases developed and/or operated by the bar associations; it therefore stresses that any future use of the European electronic access point should not be at the expense of the use of these other systems of communication between lawyers and courts (*CCBE* [1] p. 3).

[30] Recital 29 seems to limit these precautions only to natural persons, […] 'to ensure that access to justice through digital means does not contribute to a further widening of the digital divide, the choice of the means of communication between electronic communication, as provided for by this Regulation, and other means of communication should be left to the discretion of the persons concerned'.

a sort of generic prior consent for any judicial proceedings or equivalent situation (it should be recalled that the SR also applies to the service of extrajudicial documents).

In whichever direction it is intended to be used, Art. 4(4) DJCR provides that communication through the European electronic access point shall comply with 'the requirements of Union law and national law of the relevant Member State, in particular with regard to form, language and representation'. This default application of national and/or European procedural rules serves to clarify that the channel cannot be used in any manner, which is obvious, but also to recall that the access point is only a channel of communication and that the Regulation is therefore not fully regulating a method of service or communication. European or national law will therefore continue to determine the content of what has to be communicated - including certain more or less stereotyped formulas, such as means to challenge the decision - ; and, of course, the procedural rules on the validity, invalidity and cure of communications made through the access point will also apply - including the consequences for the right of defence in the event of defective implementation.

The use of the European electronic access point is only envisaged, at least initially, in civil and commercial matters and, more specifically, in the context of the enforcement of certain European legal instruments and for certain purposes [Art. 4(2) DJCR] :[31]

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

> For example, it can be used to submit the initial application for a European order for payment, the application for a European Small Claims Procedure or the application for a European Account Preservation Order with the competent court.

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

[31] Many of the final provisions of the Regulation (Arts. 20 to 24) are designed to amend these legal texts and adapt them to the new rules, including the possible use of the European electronic access point as a channel of communication.

It can be used, for instance, to apply for enforcement of a judgment given in State A before the courts of State B or for the exequatur of a judgment that is not directly enforceable.

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

The clearest example is the application for the certificate referred to in Art. 53 of the Brussels Ia Regulation, which must accompany the application for enforcement of a judgment given in another Member State.

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

(e) To communicate with central authorities, where necessary in cases of maintenance, matrimonial matters, parental responsibility, international child abduction and obtaining legal aid.

Thus, for example, a creditor seeking the recovery of maintenance may use the access point to contact the central authority of another Member State requesting the enforcement of a judgment in his or her favour [Art. 56(1)(b) of the Maintenance Regulation]. It can also be used by a person seeking legal aid in another Member State in cross-border proceedings (Art. 13 of the Legal Aid Directive).

It should also be noted that the incorporation of the European electronic access point into the list of the mechanisms of service envisaged by the SR may give it a much wider potential, given that its scope of application covers civil and commercial matters in the general terms of Art. 1(1) of the SR.[32]

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

[32] Unlike other European regulations on judicial cooperation, Art. 1(1) SR expressly excludes from the notion of "civil or commercial matters" only tax, customs or administrative matters and the liability of a Member State for acts or omissions in the exercise of its authority (acta iure imperii).

The digitalisation of communication channels forms the core of the Regulation, as it is the aspect of international judicial cooperation on which the European legislator has wished to have the strongest impact. Alongside this, the commitment to digitisation is visible regarding four other aspects, where the impact of the Regulation may be less significant.

4.1. Hearings through videoconferencing in civil and commercial matters

The use of videoconferencing - and other remote communication technologies - has undoubtedly become more widespread as a result of the COVID-19 pandemic, although it is a possibility that was already provided for in EU law beforehand.[33] Its maintenance, once the public health reasons have disappeared, is justified by reasons of efficiency, clearly understandable in the field of cross-border litigation and international judicial cooperation. It was therefore inevitable that the European legislator should include it in the Regulation through which the digitisation of judicial cooperation is to be consolidated.

For civil and commercial matters, Art. 5 DJCR lays the foundations. The primary objective is to generalise the possibility for the parties and their legal representatives to participate in a hearing by videoconference to be held in another Member State, beyond the cases in which it is already provided for by a European legal instrument:[34] in particular, it must be clear that the ER - and not the new Regulation - will apply when the purpose of the videoconference is the taking of cross-border evidence.[35] In any case, this is an aim in line with the search for efficiency, cost savings and overcoming the obstacles inherent in cross-border litigation. The way to promote it is simple: the judicial authority hearing a civil and commercial proceeding may allow the parties and their representatives to intervene by videoconference in an oral proceeding if that party is present in another Member State at the time of the proceeding.

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

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

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

[34] This is the case with the regulations on the taking of evidence, on the European Account Preservation Order and on the European Small Claims Procedure, which have more specific and detailed provisions.

[35] Recital 40 insists on this. In a similar vein, see also *Kramer* [3] p. 6.

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

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

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

If these conditions are met, the actual conduct of the videoconference must comply with the rules of the Member State in which the hearing is held [Art. 5(4) DJCR], including the provisions on the recording of hearings, with the express requirement that the recordings must be made and stored securely and not publicly disseminated [Art. 5(3) DJCR].[36] Given the cross-border nature of the cases, it would be reasonable to have ad hoc rules, including the use of interpreters, to help overcome possible language barriers.[37]

The scope of the rule is much wider than is apparent from the terms in which it is expressed, which convey the idea of a possibility. If an authority, under the Regulation, can permit this form of participation of a party in a hearing, it is because it has that power. It is true that the Regulation does not go so far as to create an unconditional right of litigants and their legal representatives to intervene by videoconference in cross-border contexts. But what the Regulation does create is a power in the court to opt in to this mode of participation, which the court might not have had under its domestic law. The additional power to impose on the party and/or its legal representative the videoconference format for participation in the hearing, on the other hand, will only exist where national procedural law also grants it to its judges in domestic situations.

Be that as it may, this is a pure procedural rule, which will have a direct impact on national legal systems, which will be altered to the extent that they have not granted their courts the power to decide, with a certain margin of discretion - at least at the request of a party - to establish participation in a hearing by means of videoconferencing. If, by any chance, the legislation of a Member State were to lack rules on the use of videoconferencing, the entry into force of the Regulation would oblige that State to adopt the appropriate regulation - even if only for the cross-border situations covered by the Regulation - due to the basic requirements of the principle of effectiveness of Union law.[38] And this is a

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[36] Given that the recording of a hearing involves the processing of personal data, it seems reasonable to assume that the general application of the GDPR in all Member States ensures that this safeguard is duly respected.

[37] See, for instance, Art. 20(2) ER.

[38] The Council of the European Bar insists on the lack of competence of the EU to impose the use of videoconferencing at national procedural level (*CCBE* [1] p. 4). The Regulation, in recital 33,

legitimate interference by the European legislator in procedural matters, since it is covered by the regulatory competence of Art. 81 TFEU, as it only applies in cross-border situations (a party or his representative is located in a Member State other than the one in which the proceedings are to take place).

Moreover, the European legislator's choice implies that the decision of the court before which the videoconference is to be held should be sufficient for the videoconference to take place, i.e. for the subject located in another Member State and receiving the invitation and the link to connect to be able to do so validly: it is not subject, therefore, to the requirements of international judicial cooperation,[39] which are operative, however, when it comes to obtaining evidence (i.e. when it comes to taking the testimony of parties, experts and/or witnesses).

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

The wording of the provision raises an additional doubt as to its scope of application: it makes it conditional on 'one of the parties or their representative [being] present in another Member State', but does not clarify whether the power conferred on the court is to be limited to the participation by videoconference of that party - and/or their legal representative - or to that of all parties, including those who are present in the Member State and could attend the hearing in person without particular difficulty. The spirit of the

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underlines that a possible national gap on this point should be filled by applying mutatis mutandis the 'most appropriate' rules of national law and specifically mentions those relating to the taking of evidence - a suggestion that is strongly criticised by the European Bar.

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

rule suggests a certain flexibility in relation to this question, which has to be in line with domestic procedural rules.[40]

What is unambiguous, however, is the scope of the term 'participate': the use of videoconferencing must be possible not only when the party is to take an active part in an action - e.g. to take a position on a request made by the opposing party - but also for any other procedural activity in which the active intervention of the party is possible - e.g. a preparatory hearing or a main hearing with evidence involving the testimony of other parties.[41]

4.2. Hearings through videoconferencing in criminal matters

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

Firstly, the use of videoconferencing is only foreseen for the hearing of a suspect, accused or convicted person or a person 'affected' by a freezing or confiscation order[42] who is present in another Member State.

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

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

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

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

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[40] Recital 38 considers the possibility that the court has allowed the participation 'of at least one of the parties or other persons'.

[41] Provided that it is not necessary to have recourse to the mechanisms of the ER, which would exclude the application of the DJCR.

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

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

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

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

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

In this context, the requesting authority's request generates a duty on the authority of the executing Member State to allow the participation by videoconference of the suspect, accused or convicted person or the person affected by a freezing or confiscation order who is located in its territory in an oral hearing as part of the criminal proceedings concerning that person and which is taking place in the Member State of the requesting authority. However, this is a rather mitigated duty – and a rather limited power - as it depends on two requirements [Art. 6(2) DJCR]: (i) the circumstances of the case justify its use;[44] and (ii) the suspect, accused, convicted person or the person affected has given consent to participate in the hearing through videoconference.

This second requirement of consent is a real safeguard of criminal proceedings,[45] given the negative impact that the use of videoconferencing can have in terms of immediacy and the right of defence. For this reason, the provision of consent has been subject to additional requirements:

(i) Before deciding whether or not to consent, the suspect or accused person may request legal assistance in accordance with Directive 2013/48/EU.

(ii) Before deciding whether or not to consent, the competent authorities shall provide the person to be heard with information on the procedure for holding a hearing by

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[43] Recital 43 forcefully emphasises this point.

[44] Art. 6(3) DJCR obliges the requested authority to ensure that persons who have to act by videoconference have access to the infrastructure necessary (especially those with disabilities).

[45] In this vein also *Kramer* [3] p. 8 and *CCBE* [1] p. 5.

videoconference, as well as about their procedural rights, including the right to interpretation and the right of access to a lawyer.

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

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

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

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

(i) First of all, it is required to inform without delay the holders of parental authority or another appropriate adult. This information must be given before the hearing, although the silence of the DJCR prevents a clear consequence being attached to their possible refusal of the virtual format: it will therefore be up to domestic law to determine whether

the holders of parental authority - or those exercising equivalent functions - have a power of veto or only the right to express their opinion. (ii) Furthermore, the competent authority will take into account the interests of the child when deciding whether to take the child's statement by videoconference; in relation to the latter, it should be understood that the requesting authority must expressly state the reasons for the way in which it has weighed up the interests of the child and, of course, it may do so taking into account any domestic legislation on this matter, which often advises videoconferencing to mitigate secondary victimisation.

The impact of a hearing by videoconference on the legal position of a suspect, defendant, convicted person or affected person can be tremendous, as can be seen from the procedural contexts in which the DJCR allows its use. This is why Art. 6(8) recognises 'the possibility of seeking an effective remedy, in accordance with national law and in full respect of the Charter' if the requirements or guarantees established in Art. 6 itself have not been complied with. This is a very open provision, which does not predetermine a specific consequence, and is therefore irremediably covered by the reference to the national procedural rules of the State in which the criminal proceedings in which the video conference has been held are taking place. The only thing that the DJCR imposes, on this point, is the right of the subject concerned to bring to light the infringement of Art. 6 DJCR, but it does not oblige, e.g., that this should be done by means of appeals - this would be normal -, nor does it allow the infringement to be reported immediately - it could, therefore, impose the burden of reporting the infringement when challenging the decision taken as a result of the videoconference, as the case may be.

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

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

a) Firstly, a block reference is made to the eIDAS Regulation[46] for the purpose of establishing how documents transmitted through digital communication channels in cross-border proceedings and when applying the international cooperation mechanisms referred to in Annexes I and II - including cases in which the European electronic access point is used - are to be sealed or signed (Art. 7 DJCR).

b) Secondly, there is an obligation to recognise the legal effects of electronic documents that have been transmitted in the context of cross-border proceedings and when implementing the international cooperation procedures referred to in Annexes I and II:

[46] 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, OJ L 257, 28.8.2014, p. 73–114.

they may not be denied legal effect solely on the grounds that they are in electronic form (Art. 8 DJCR). On this point, the European legislator adopts an approach that should already be considered to have been peacefully accepted by all the Member States, even in purely internal cases. The literal wording of the provision, indeed, copies with the necessary exceptions what is already provided for in Art. 6 ER and Art. 8 SR.

c) Finally, the Regulation echoes a long-standing demand of legal practitioners involved in cross-border litigation and which is envisaged for the European Small Claims Procedure: to enable the necessary mechanisms for the electronic payment of fees 'including from Member States other than that where the competent authority is situated' [Art. 9(1) DJCR]. These last words suggest that the mandate does not only cover cross-border cases and international judicial cooperation, but that it would have a more general scope - albeit of doubtful compatibility with the procedural autonomy of the Member States, given its insufficient anchorage with Art. 81 TFEU.

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

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

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

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

What is *old*, of course, is the reference to videoconferencing, which at this stage of regulatory evolution can no longer be considered as a novelty. On this point, therefore, the DJCR tends to enshrine minimum standards that are most probably already provided for at the domestic level, but whose extension to the cross-border sphere should be ensured.

There are several elements present in the batch of the *borrowed*. The choice of digital by default and the e-CODEX system for digitised communication between judicial and other

authorities, which is taken from the regulations on the taking of evidence and service of documents, and the reference to the eIDAS Regulation in relation to document sealing and signature systems, are certainly not surprising. The European legislator could not do anything other than what it has done on this point.

Finally, the *blue* colour evokes the flag of the European Union and identifies the substantial technological and economic contribution that the European budget is going to make to the practical implementation of the system, both in the setting up of the technological tools that the Regulation provides for and, in particular, in the establishment of the European electronic access point (cf. Arts. 12 and 13 DJCR).[47]

References

1. Council of European Bars (CCBE): CCBE position paper on the proposal for a regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters (2022). Available at https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Position_papers/EN_ITL_20222907_CCBE-position-paper-on-the-proposal-for-a-regulation-on-the-digitalisation-of-judicial-cooperation-and-access-to-justice-in-cross-border-civil-commercial-and-criminal-matters.pdf

2. Hess, B.: Cooperación judicial digital en el espacio de libertad, seguridad y justicia. La cooperación judicial en materia civil. In Gascón Inchausti, F., Peiteado Mariscal, P. (eds.) Estándares europeos y proceso civil. Hacia un proceso civil convergente con Europa, Atelier, Barcelona (2022).

3. Kramer, X.: Digitising access to justice: the next steps in the digitalisation of judicial cooperation in Europe. Revista General de Derecho Europeo, 56 (2022).

4. Themeli, E.: The frontiers of digital justice in Europe. In Kramer, X., Hoevenaars, J., Kas, B., Themeli, E. (eds.) Frontiers in Civil Justice. Privatisation, Monetisation and Digitisation, Edward Elgar, Cheltenham (2022).

5. Velicogna, M., Lupo, G.: From Drafting Common Rules to Implementing Electronic European Civil Procedures: The Rise of e-CODEX. In Hess, B., Kramer, X. (eds.) From common rules to best practices in European Civil Procedure, Nomos, Baden-Baden (2017).

[47] The 2020 Communication states, at the end of para. 3.2, the following: 'The process of digitalising EU judicial cooperation would certainly entail non-negligible costs. In this regard, Member States should be able to benefit from EU financial support. Generic IT solutions developed at EU level, for use by all Member States, could be a major cost-reduction measure.'

PART 2

SPAIN

DIGITAL REVOLUTION AND PROCEDURAL LAW IN SPAIN

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0. Introduction

In Spain, as has happened in the rest of the world, the pandemic associated with Covid-19 has served to focus political and academic attention on the digitization of justice. Perhaps it would be fairer, however, to point out that the pandemic has served to exacerbate interest in a subject that had long been in the spotlight. Indeed, Spain has been dealing with the digitization of justice for two decades now, from angles and with approaches that have not always been homogeneous.

All the governments that have succeeded each other since the end of the 20th century have presented their plans for the digitization of justice, associated with the idea of "modernization" - the lack of "modernity" is possibly one of the greatest fears of the Spanish legislators in many areas, including justice. These plans, however, have never been global or stable. They have not been global, because they have focused on specific issues (e.g., promotion of videoconferences or telematic communication), depending on

the moment. And they have not been stable, because priorities have changed based on the political colour of the government.

A first provisional assessment of the situation could, perhaps, be expressed as follows: extraordinary progress and trends in some aspects, but striking shortcomings and defects in others.

This asymmetry in the progress towards digitization is largely explained by an inefficient justice governance mechanism. In the Spanish legal system, powers in matters of justice are distributed between the state government, some regional governments and the autonomous government of the judiciary. The Ministry of Justice and some regional governments manage the material means of justice, as well as human resources, except for judges. The General Council of the Judiciary, for its part, guarantees judicial independence and, therefore, is competent in relation to the professional status of Spanish judges (which includes their training). The digitization of justice requires a combination of impulses on different factors that, unfortunately, are not well coordinated: the economic means are shared between the national government and the regional governments; the management of human resources involves also the General Council of the Judiciary. In a way that is difficult to explain, the different autonomous governments have their own plans for the digitalization of justice and have even developed their own computer tools for procedural management, which are not always compatible with each other or with the one generally designed by the Ministry Justice for regions that do not have jurisdiction in matters of justice. These lines of action, in addition, do not always respond to the demands of the judges themselves, channelled through the General Council of the Judiciary.

Another general feature, which should also be highlighted from the beginning, are the differences between the legal texts and the reality of the courts. Several laws have been passed to sustain progress in the digitization of justice, but they have not always managed by themselves to unleash the transformation that was sought: the absence of human or economic means and, especially, the lack of a clear impulse have caused the existence of a great difference between law in the books and law in practice. Governance deficits, as already noted, are once again a handicap. One piece of information can be revealing: in 2011 a specific act[48] (LUTICAJ) was approved, which sought to unify regulation and serve as a basis for further developments. This law, surprisingly, went practically

[48] Law 18/2011, of July 5, regulating the use of information and communication technologies in the Administration of Justice (Ley 18/2011, de 5 de julio, reguladora del uso de las tecnologías de la información y la comunicación en la Administración de Justicia), also known as LUTICAJ for its acronym.

unnoticed, possibly because the period in which it should have been developed coincided with the toughest period of public cuts after the economic crisis that began in 2008. When circumstances in 2015 allowed to relaunch the digitization projects, however, lawmakers did not turn their eyes to the 2011 act, but rather its provisions were distributed in a fragmented manner in the various procedural codes (e.g., the code of civil procedure, the code of criminal procedure, the code of administrative procedure and so on): a holistic and horizontal approach was abandoned, considering the regulatory dispersion more effective.

Despite all these obstacles at the level of governance, significant achievements have been made and new lines of development have been opened, which will be the focus of this report. In my opinion, it is advisable to distinguish different approaches in the development of digitization. Although some of them may seem typical of more initial stages, they are all evolving in a rather parallel way.

1. Procedural law takes account of digital revolution in society

There are, firstly, a series of measures and actions whose objective is to recognize the need for judicial processes to take into account the digital revolution that is taking place in the economic and social reality. Through judicial processes, the law is applied to specific cases, as a way to resolve legal disputes: if these disputes are in any way influenced by the digital revolution, procedural law must articulate how to adapt to this new reality.

a) *Electronic evidence*

The first step was taken in 2000, when a new civil procedure code was approved, totally open to electronic evidence. Given that in the reality of civil and commercial relations, technological means are used to communicate and to document acts and contracts, the law generally allowed their use in the process as evidence. It is also a specific means of proof, different from documents in the strict sense. And regulation is also technologically neutral, so that it can adapt to evolution. Thus, at the beginning of the 2000s, it was used basically to incorporate emails or audio / video files into the process; nowadays new objects have been incorporated, such as whatsapp messages and similar instant communication devices.

> Article 299.2 of the civil procedure code admits as evidence the means of reproduction of the word, sound and image, as well as the instruments that allow to store and know or reproduce words, data, figures and mathematical operations carried out for accounting or other purposes, which are relevant to the process.

In addition, and according to Article 299.3, "When certainty about relevant facts could be obtained by any other means not expressly provided for in the previous sections of this article, the court, at the request of a party, will admit it as evidence, adopting the measures that in each case are necessary."

The taking of digital/electronic evidence is partially developed in Article 384 of the code of civil procedure: the court will examine these elements using the means that the proposing party suggests or that the court decides to use; in any case, contradiction of evidence by the other parties must be ensured.

In a similar vein, criminal proceedings are also open to using new technologies as means to carry out criminal investigation. Along with the interventions of electronic communications, the criminal procedure code also regulates remote access to computer equipment or the installation of people and vehicle tracking systems, among others.

A legal reform in 2015 took care of adapting the criminal investigation to technological advances and regulated in great detail the various tools available to criminal prosecution authorities (Articles 588 bis a to 588 octies were then enacted, along with the amendment of many other pre-existing provisions)

b) *Legal information and resources available to courts and legal professionals*

The procedural system is also aware of the existence of legal databases, compiling the case of the Supreme Court, but also of the lower courts. In Spain there is no public monopoly on this sort of legal information. The General Council of the Judiciary publishes all resolutions through a free public access database. On this basis, various companies (mostly legal publishers) reuse the data and provide added value to market them (through more powerful and accurate search engines, completing them with doctrinal analysis, for example).

Although it is not purely an e-Justice tool, the procedural system is aware of its existence and counts on it when regulating certain institutions. A good example is offered by the appeal for cassation (second appeal). It is an extraordinary means of recourse, so that only certain judgments can be appealed, when the need to activate the Supreme Court's role to create case law becomes evident. Among the cases in which this happens are those where the judgment is contrary to the Supreme Court's established case law or addresses an issue regarding which there are discrepant criteria among the lower courts. It seems clear to me that the legislator has dared to impose this requirement because it is aware that lawyers have powerful tools that allow good searches of case law in databases.

c) *Digital assets*

A third sector in which the need for procedural laws to take into account a digitized social reality can be highlighted is digital assets. Precautionary measures, evidence assurance measures or even enforcement measures may be necessary for this type of property. News of cases in which the need to seize cryptocurrencies, such as bitcoins, is becoming more common. At this point, the Spanish legal system has not provided new tools, so that the courts have to work by applying categories designed for tangible assets by analogy. This is an area in which reforms and adaptations may be necessary.

> An example of this need for updating was revealed in 2019 with a judgment of the Criminal Chamber of the Spanish Supreme Court[49]. It was a fraud crime, in which the scammer tricked the victim into giving him a certain amount of bitcoins. As a civil action *ex delicto* –which in Spain is adjudicated together with the criminal action, in the framework of the criminal proceedings–, the victim requested the restitution of this currency, something to which the Supreme Court refused: for the Court, bitcoin is not to be returned to the victim because it is not a material object, nor does it have the legal consideration of money. The victim, therefore, has the right to financial compensation, but not to the return of the bitcoin.

2. Procedural law uses ICT tools as instruments for a better performance of "human" justice: justice is digitized

The greatest impact of the digital revolution on justice can obviously be seen when verifying how the procedural systems use the new ICT tools that are being developed. These tools are used to improve the functioning of a justice system that remains essentially human, although some of them involve the use of artificial intelligence elements. In general, they are intended to be applied to the daily, ordinary operation of the administration of justice. Some of them, however, have been introduced to face extraordinary situations and it is convenient to analyze what is the true place that they should occupy in a newly "normalized" future.

2.1. *ICT tools to improve "normal" functioning of justice*

Already in 1985 the Spanish legislator opened the door to the use of "any technical means of documentation and reproduction", with the sole requirement that they "offer the due guarantees of authenticity" (initial version of art. 230 of the LOPJ). In 1994, the rule was modified, allowing the courts to use "any technical, electronic, computerized and telematic means, for the development of their activity and exercise of their functions"; the door was also opened for processes to be processed "with computer support"; and the

[49] STS 326/2019, of June 20, 2019.

right of defendants to interact with the Administration of Justice through technical means was recognized when they are compatible with those used by the courts. In 2015 an additional and significant change took place: the use of digital media stopped being a possibility to be an obligation.

The starting point in this field, therefore, is the mandatory use of electronic means and instruments, also established in article 8 of the LUTICAJ, which affects all members of the Administration of Justice. Large investment has been made to set IT instruments enabling the implementation of e-Justice. From here on, several aspects of the functioning of the justice system have been most clearly benefited by the various digitization initiatives that have taken place in Spain.

a) *Dematerialising justice – The electronic judicial file*

One of the "mantras" that have been used by all governments to promote justice digitization plans has been the "paper 0 target". It is common to criticize the image of Spanish courts as spaces full of paper boxes, stored in any corner, apparently waiting for the attention of a judge or judicial official. For this reason, since 2015 the processing of judicial processes is done practically in its entirety electronically, without paper. The litigants' briefs must be submitted electronically; also the documents attached to those; likewise, judicial decisions are made and served in digital format. Exceptionally, however, the document by which the plaintiff begins a process must also be presented on paper, in order to be able to notify the defendant on that medium.

The basis for a good performance of dematerialized justice is a good management of the electronic judicial file (*expediente judicial electrónico*). The electronic judicial file is defined (Art. 26.1 LUTICAJ) as “the set of data, documents, formalities and electronic activity, as well as audio-visual recordings corresponding to a judicial procedure”. The problem, in practice, is that the electronic judicial file has so far not received adequate development and has not been formally implemented in a generalized way. This means that, in its day-to-day life, each court organizes the "electronic elements or items" of each file in potentially different ways.

> The government, however, is taking care of developing the IT tools to achieve comprehensive electronic management of procedures. The so-called *Minerva-NOJ* system has been designed to implement procedural management of electronic files. And *Visor Horus* is the system that allows consulting information in judicial electronic files.

b) *Electronic service of documents – Lexnet platform*

Associated with the "paper 0 target" is also the generalization of electronic service or, if preferred, of communication between the courts and the parties to legal proceedings. At this point, the Spanish judicial system is in a very advanced stage of development, especially since the 2015 reform. The keys to understanding the system are the following:

i) The Government has designed a specific platform, called LexNet, similar to a webmail system that allows, after identification with a certificate and electronic signature with a cryptographic card, to send notifications to professionals from the courts with full legal effects.[50] In addition, various regional governments with transferred powers in justice have designed their own electronic notification systems on a similar basis, which are (or should be) compatible with each other.

ii) In matters of an amount greater than 2000 euros, it is necessary that the parties, in addition to having the assistance of a lawyer, be represented by a *procurador*. This figure of the Spanish *procurador* is unique: it is a legal professional in charge of managing the communication of the litigant with the court and with the opposing party.

iii) *Procuradores*, like attorneys, are required as of January 1, 2016 to use LexNet –or the equivalent regional tool– for all procedural communications. So are all the public entities that intervene in judicial proceedings (e.g., the Prosecutor's Office in criminal proceedings). This means that (almost) all procedural communications in practice are performed electronically.

[The details on the functioning of the system, including rules on how to proceed in case of technical problems, are not addressed in this first report].

iv) There are two exceptions to this general situation:

— Cases were litigants are not represented by a *procurador* (ie, cases below 2000 euros).

— In all cases, first service of the claim on the defendant: at this initial stage the defendant has not yet identified their *procurador* and the legislation does not allow to perform this first service electronically (it might be tried, but if there is no acknowledgement of receipt by the defendant, then “traditional” service –using court officers and paper– will

[50] Real Decreto 1065/2015, de 27 de noviembre, sobre comunicaciones electrónicas en la Administración de Justicia en el ámbito territorial del Ministerio de Justicia y por el que se regula el sistema LexNET (https://www.boe.es/eli/es/rd/2015/11/27/1065/con)

need to take place). It shall be recalled that, according to the Spanish procedural system, statements of claim are directly submitted to the competent court and, if admitted, they are then served on the defendant (by court officers or, if so requested by the claimant, by the claimant's *procurador*).

This last issue (electronic first service of the claim) is, in my view, the main challenge in this field: could all citizens be required to have a valid and active electronic address for official purposes, so that courts could directly use it.

c) *Videoconferencing*

The Spanish procedural system is very attached to orality. In general terms, the statements of the parties, witnesses and experts must be made in a public hearing, orally, so as to guarantee the contradiction, publicity and immediacy. This rule, however, can imply rigidity for the system: without the physical presence of the parties, witnesses or experts, it is not possible to take evidence or hold a hearing. As a way of granting flexibility to the system, but also to bypass avoidable costs or complications, the use of videoconferencing has been allowed since October 2003. Specifically, art. 230.3 LOPJ indicates that these statements -as isolated pieces of a hearing - or the hearings as a whole "may be made through videoconference or another similar system that allows bidirectional and simultaneous communication of image and sound and visual, auditory and verbal interaction between two geographically distant people or groups of people, ensuring in any case the possibility of contradiction of the parties and the safeguarding of the right of defence, when so agreed by the judge or court."

The use of video conferencing has become widespread in practice. It is especially visible in criminal proceedings: it is used, for instance, when an incarcerated person has to testify in another case or, very frequently, to have certain "official" experts give testimony at trial.

> In criminal cases for drug trafficking, experts from the Institute of Toxicology, who analysed the drug when it was seized, are often called to testify by the defence, who intends to question the reliability of their analysis. To avoid a waste of time incompatible with their work, these experts connect by videoconference at the time of the trial, to explain to the court how they developed their analysis.

In civil matters its use is more unusual: normally the litigants prefer to bear the traveling expenses of witnesses and experts, so that the use of videoconferencing is limited to situations of exceptional need.

From the point of view of its functionality, two main problems can arise:

— In the first place, there can be technical problems of connection, image, sound, and coordination.

— Second, the identification of the person who testifies via videoconference without being present in court can raise some concerns. In relation to this, the law offers a fairly flexible answer: the court clerk will accredit the identity of the people who intervene through the videoconference by means of a prior sending of the identity documents, through the direct display or exhibition of documentation, by personal knowledge or by any other suitable procedural means.

d) *A specific platform: the "Punto Neutro Judicial"*

Another of the most interesting achievements of the Spanish e-justice system is the so-called *Punto Neutro Judicial* (PNJ, Judicial Neutral Point). [51] The PNJ is a complex platform, created by the General Council of the Judiciary, which serves to make available to the courts a very diverse network of services, which have in common access to applications and databases with useful information for the development of judicial activity. Very diverse administrations are integrated into the PNJ: the Tax Agency, the representative bodies of the legal professions (lawyers, *procuradores*, notaries, registrars), the police, the traffic administration, the Prosecutor's Office, the Ministry of Justice, the prison administration, the social security administration, among others. At present, according to the information provided by the CGPJ, the PNJ provides a total of 35 services, which include property inquiries, information exchanges, prison inquiries and access to judicial statistics. In the last year, 12 million accesses were made.

The PNJ has proven to be very useful in enforcement proceedings, more specifically when it comes to performing the necessary tasks to carry out the discovery of assets. The information in public registers should be made available through electronic means, as well as that in the possession of public bodies and financial entities. This would allow sparing time, something which is of the essence if we want to avoid assets to "vanish" as soon as the debtor has the suspicion that the creditor might be starting enforcement proceedings against him. As already mentioned, the PNJ platform connects the court

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[51] See J.M. González García, "El Punto Neutro Judicial: una herramienta al servicio de la mayor eficacia de la Administración de Justicia española", in A. De la Oliva Santos, F. Gascón Inchausti and M. Aguilera Morales (eds.), in A. De la Oliva Santos, F. Gascón Inchausti and M. Aguilera Morales (eds.), *La e-Justicia en la Unión Europea. Desarrollos en el ámbito europeo y en los ordenamientos nacionales*, Pamplona, 2012, 197-215.

system to the most relevant stakeholders in the field of assets discovery: public registers, banks, tax and social security administration, and police authorities.

When court clerks are required by the creditor to perform an investigation on the debtor's assets, they just need to enter the platform and introduce the debtor's official identification number and launch a search with all relevant entities. The request will be automatically transferred to the electronic files of those entities, which will in turn deliver the information they are holding: immovable property, cars, bank accounts, and so on. The system is not perfect, especially regarding bank accounts, because it does not allow any sort of on-line access to the debtor's bank account, but only monthly or quarterly reports. As compensation, the system allows the court clerk to launch an immediate seizure of the money standing to the debtor's account –provided that there are sufficient funds–.

> It is the so-called *embargo masivo de cuentas a la vista* (ECCV), launched already in 2011, on the basis of an agreement between the CGPJ and the Spanish banking associations.

The system is still far from perfect, but from now it is just a question of progressively improving its quality and potentialities.

e) *Electronic judicial auctions*

Another of the sectors in which there has been a very good interaction between the judicial system and new technologies is that of enforcement proceedings.

In addition to the usefulness of the *Punto Neutro Judicial* platform to locate debtor's assets –mentioned above- electronic auctions must be taken into account for the sale of seized assets. In the Spanish procedural system, enforcement proceedings are judicial: the court system as such is competent to enforce judgments and other enforceable titles (like notarial deeds); no bailiffs, *huissiers* or equivalent officers exist as of today in Spain.

One of the traditional problems of enforcement was the limited publicity of the auctions, the consequent reduced number of bidders –if any– and the low economic performance of the assets, to the detriment of both the creditor and the debtor. Following a pilot plan associated with the initiative of a court clerk, the 2015 reform generalized the duty that judicial auctions be carried out electronically.

The approach is simple and largely similar to that of e-Bay and similar platforms. The website of Spain's Official Journal houses the Electronic Auctions Portal (https://subastas.boe.es/). The portal identifies the assets pending auction by provinces and categories (movable, real estate, cars). It offers available information on them,

stemming mostly from public registers (there are, alas, no photographs of the assets, which may have a deterrent effect on potential purchasers). Any interested bidder may log in and, providing surety of 5% the asset's value, they may take part in the auction, which remains open for 20 days.

> In addition to the "official" Electronic Auctions Portal, the *Consejo General de Procuradores* –ie, the body governing these legal professionals– has also launched its own portal. If the parties agree to it or, at least, if the creditor so requests, *procuradores* will be in charge of managing the auction –Article 641.1 LEC–. It is expected that they will show greater involvement in obtaining a good sale price, but in practice the volume of assets sold by the *procuradores* is still modest if compared with judicial auctions.

f) *Other electronic judicial activity*

In addition to what has already been mentioned, procedural laws have also been adapted so that certain procedural acts can be carried out electronically. In a similar way to what is happening with other public administrations, Electronic Judicial Offices (*Sede Judicial Electrónica*) are being designed and enhanced. An electronic office is, in reality, a digital platform that brings together information for citizens and, especially, all the services, forms and procedures that they can access digitally. The number of these procedures and services is gradually expanding.

An example of the above is the granting of a power of attorney to the *procurador*. The role of the *procurador* is to represent the litigant in the process, before the court and before the other parties (the *procurador*, as also indicated above, presents the documents and receives the notifications). For his performance to be valid, he needs a power of attorney, which is granted by the litigant. It is customary to do this before a notary. However, according to art. 24 LEC, this power of attorney can also be made *apud acta*, that is, in the court premises, in the presence of a court clerk, without having to go to the notary's office. Since 2015, in fact, it is not necessary to do it in person at the courthouse, but it can be done electronically.

An additional example is the project to use artificial intelligence systems for the automated transcription of hearings. In the Spanish procedural model, minutes of oral hearings are no longer elaborated: the hearing is video-recorded and the recording works as minutes. The parties cannot demand from the court a later transcription of these recordings, as it would be an impossible job with the available human resources. At the same time, practice has shown that working with recordings can be inefficient, since relevant information is not readily available: juniors in law firms spend hours viewing

recordings until they find passages in which the relevant statements or decisions are made. Having a written text would allow this type of task to be carried out more quickly. The Ministry of Justice has announced, in this regard, that it is working on the implementation of systems that will allow the content of these hearings to be transcribed in an automated way.

g) *Further challenges*

Much has been done, but much remains to be done. Progress is not taking place in a homogeneous way, but there are important differences depending on the territory. Without forgetting the economic costs, there are three main elements that the system must continue to take care of:

i) It is necessary to organize the judicial offices in a different way from what had been done in the traditional way. The digitization of judicial processes allows - and at the same time also requires - a different way of working in the courts, which should affect above all the employees of the judicial offices. In this sense, Spain has been promoting a restructuring of judicial work for more than ten years, through the so-called New Judicial Office (*Nueva Oficina Judicial*): it is intended to create numerous “common services”, shared by various courts, which are in charge of managing the development of proceedings, practicing notifications, promoting enforcement, thus overcoming the pre-existing structure of working groups directly linked to a judge or court. The move to the NOJ is closely linked to the digitization of judicial processes: it would not be possible without it, and at the same time digitization would not be really efficient without this new structure.

ii) Advancing in ICT training for all the stakeholders of the judicial system is also essential. Also on this point, important developments are taking place, with training plans for judges and judicial officials. Bar associations are, on their side, taking care of lawyers’ training. The digital divide, however, will continue to be an obstacle to direct access by citizens to the system, where "intermediaries" (such as lawyers) are not necessary. It is common to point out that the digitization of justice can make it more accessible to all. This statement, however, will only be true if there is indeed sufficient training for all potential beneficiaries.

iii) An additional challenge, at least from the Spanish perspective, is the interoperability of digital systems. Different tools are being developed, due in part to the fact that powers in the administration of justice are shared between the State and the regions. When we speak of e-Justice from a legal perspective, however, we cannot ignore the demands and

difficulties that often arise at a technical level. Proposals and reforms in the field of e-Justice should not be made without rigorous and effective technical support.

2.2. *ICT tools in extraordinary situations: a new starting point to replace physical courts by on-line courts?*

The spring 2020 confinement forced by the pandemic associated with Covid-19 determined, in Spain as in the rest of the world, a need to convert judicial activity from face-to-face to virtual. After an initial period of shock, the need to continue with the times of justice determined that the face-to-face proceedings became, for the most part, virtual.

In this sense, Royal Decree-Law 16/2020, of April 28, on procedural and organizational measures to deal with COVID-19 in the field of the Administration of Justice must be taken into account. Its article 19, which has as rubric "Celebration of procedural acts through telematic presence", established three basic principles:

– During the state of alarm and up to three months after its termination, trials, appearances, statements and hearings and, in general, all procedural acts, will preferably be carried out through telematic presence, provided that the courts and prosecutor's offices have the necessary technical means at their disposal.

– However, the physical presence of the accused will be necessary in trials for a serious crime: these cases, therefore, will demand face-to-face activity (although with all necessary cautions).

– The deliberations of the courts will take place in a telematic presence regime when the necessary technical means are available.

The rule, in practice, received uneven application, as it did not contain a clear mandate. It is said in it, if it is observed, that the telematic celebration will be "preferable", but not mandatory. During the state of alarm and, above all, during the following months, the courts had to readjust their schedules, to make up for the time lost as a result of the initial shock, which had forced the suspension and postponement of many proceedings. The courts, in many cases, offered lawyers two alternatives: a telematics/virtual holding of the hearing (preliminary hearings and trials, mainly) fairly close in time; and, if they opted for a “traditional”/face-to-face hearing, a rather long wait, of several months in many cases. It was clearly an indirect way of forcing the virtual celebration, because many lawyers and defendants continued and continue to prefer the face-to-face environment.

The government is currently working on a major procedural reform that, among other factors, includes the possibility that the court may order that certain acts and certain hearings must necessarily be held via videoconference (and not just preferably).

This opens the door to a totally electronic processing of proceedings, so that the courtroom becomes something merely virtual. The culmination of this evolution would be online proceedings, albeit with human judges. However, there are many challenges that such an evolution may entail. Regardless of technical problems, it will be necessary to determine whether basic procedural safeguards, such as publicity and immediacy, are affected. In relation to the latter, it cannot be ignored that a judicial process is, to a large extent, a context of communication between subjects: and it must also be specified to what extent the virtual context ensures an intrinsic -not only extrinsic- quality of communication, adequate to ensure that the judge is in the best position to make the best decision.

3. Procedural law uses ICT tools to replace "human" activity in "justice"?

All the developments and projects analysed so far are based on a clear premise: digital tools, more or less sophisticated, are at the service of a justice system led by humans, in which decisions are made by persons and in which lawyers who defend the positions of the parties are also persons.

It is possible, however, to imagine a further evolution: the use of technology to replace human activity in justice. At this point, the Spanish system currently has little to offer in the comparative landscape.

The use of artificial intelligence is making its way, albeit slowly and with clearly instrumental aims.

> i) Law publishers, for example, are launching their "jurimetrics" tools, to help attorneys gauge chances of success based on the type of case and court. They also offer tools designed to automate the writing of legal briefs.
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> ii) The use of complex algorithms is also at the core of the "VioGen" system, a tool that helps the police and the courts to determine the level of danger of repetition faced by victims of gender-based violence (and which can become an additional factor to decide the type of precautionary measures to be adopted during a criminal proceeding).
>
> iii) On the other hand, unlike what happens in other countries, the step of automating the processing of some proceedings, such as payment orders, has not yet been taken: at this point, the Spanish system is Latin, not Germanic, so that it is based on documents, which need to be analysed by the court at the outset.

But, of course, the hypothesis that certain judicial decisions are automated does not seem to be considered yet.

4. ICT and AI in the field of ADR

In the world of ADR, there is greater regulatory flexibility, compared to what happens in the judicial sphere. This is why important advances are taking place, especially in the area of online mediation.

For the moment, the use of ICTs and Artificial Intelligence also maintains an instrumental value in this area. There is a lot of discussion, in the academic sphere, about the possibility that certain simple and repetitive litigation, especially in consumer matters, can be resolved directly through artificial intelligence systems. But its social acceptance and practical use still seem a long way off.