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Council of Bars and Law Societies of Europe
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Rue Joseph II, 40/8 - B-1000 Brussels
T.: +32 (0)2 234 65 10 - ccbe@ccbe.eu - www.ccbe.eu

CCBE Position on the proposals for amending the regulations on service of documents and the taking of evidence in civil and commercial matters

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In this paper the CCBE wishes to provide its views in relation to the Commission proposals for amendment of the regulations on service of documents and the taking of evidence in civil and commercial matters. This initiative is a follow-up to the public consultation on modernisation of judicial cooperation in civil and commercial matters in the EU that was launched in December 2017, and to which the CCBE also responded.

Revised regulation on service of documents

1. Clarification of the scope (Art. 1)

The CCBE welcomes the clarification of the scope that the regulation shall apply to the service of judicial documents on persons domiciled in a Member State other than the one where the judicial proceedings take place as set out in Article 1 (1)(a).

2. Mandatory electronic communication – e-CODEX as the default platform (Art. 3a)

Article 3a of the proposal stipulates that communication and exchange of documents between sending and receiving authorities is carried out electronically, through a decentralised IT system made up of national IT systems interconnected by a secure and reliable communication infrastructure. In order to allow a rapid management of judicial cooperation, the CCBE supports that the use of electronic means becomes the default standard in communication between the competent authorities involved in cross-border judicial cooperation in civil matters. However, such a move towards electronic communication must be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege. Furthermore, in order to avoid the use and development of different e-delivery systems in this respect, it is necessary to establish the e-CODEX infrastructure as the standard mechanism ensuring interoperability of national e-justice systems and enabling cross-border electronic communications and transmission of information between judicial authorities.

The CCBE therefore calls upon the EU institutions to adopt as soon as possible a legal instrument establishing e-CODEX as the common mechanism for standardised secure exchange of cross-border information in judicial proceedings between EU Member States.

3. Alternative means of transmission (Article 3a (4))

The fact that Member States have to make considerable efforts to make their national IT systems interoperable with the cross-border communication infrastructure carries a risk that the respective IT systems in the Member States are not ready or capable to ensure a smooth transmission of documents.

The CCBE therefore wishes to emphasise the importance of the provision set out in Article 3a (4), which allows relevant authorities to use an alternative form of transmission in the case of unforeseen and exceptional disruption of the decentralised IT system.

It is also welcomed that according to Art. 3b (3) Member States have the possibility to apply for grants to support their activities in this field. Additionally, the Commission should set up technical support in the form of a hotline or something similar in order to allow transmitting and receiving agencies to contact a technical support agency.

4. Assistance in address enquiries (Article 3c)

The assistance for address enquiries as proposed in Art. 3c is particularly welcomed by the CCBE. Especially the practical guidance on the mechanisms available for the determination of addresses as provided in Art. 3c para. 1 lit. c will be beneficial in practice.

5. Obligation to appoint a representative for the purpose of service in the forum Member State (Article 7a)

The provided right of the Member States to impose an obligation upon a defendant who is domiciled in another Member State to appoint a representative after the delivery of the document instituting the proceedings, is expedient. This obligation obviously cannot apply if the defendant has appointed a lawyer admitted to the bar as a representative in the forum Member State as this representative is – regardless of the law practice's location – competent for the service of all further procedural documents.

6. Refusal to accept a document (Article 8)

The provision in Article 8, which extends the refusal to accept a document to two weeks instead of one week, is welcomed. The period of one week has shown itself to be too short in practice for instances in the case of bringing about a decision to the question within a company.

7. Service by postal services (Article 14)

In Article 14, the CCBE particularly welcomes that the wording was clarified and that in the cases of cross-border service by postal services specific and consistent acknowledgement of receipt was set out in Annex IV. It remains to be seen if and how this receipt will be accepted in practice by the postal services.

8. Facilitation of electronic direct service – the need for explicit consent and common minimum requirements (Articles 15 and 15a)

Through the newly proposed **Articles 15 and 15a**, transmitting agencies and courts seised with the proceedings will be allowed to service judicial documents electronically and directly to persons domiciled in another Member State. Under this scenario, the document to be served is submitted by a Member State authority through electronic channels to the electronic account (mailbox) of an addressee residing in another Member State, provided that the documents are sent and received using the qualified electronic registered delivery service (ERDS) within the meaning of the eIDAS Regulation or in case express consent was given in the course of a legal proceeding to use that particular account. In practice this means that relevant authorities will only service documents to a user account where there is some support information that it is owned by the addressee (either by their consent or by the use of some so-far unknown functions of electronic registered delivery service). This means for example that theoretically citizens or lawyers disposing of a government-provided electronic mailbox could be served cross-border judicial documents directly to their government-provided electronic mailbox and are therefore required to be vigilant to keep track of such messages received in that account. The CCBE understands that theoretically electronic registered delivery services could be treated as equivalent to service by registered post, but they are being used only in very few countries, with large differences in function and in legal effect of delivery. Also, government-provided mail boxes are usually only used for communications with public administrative authorities for specific purposes, for example, in the context of tax obligations, social security management, or communal services etc. The CCBE is therefore concerned about the lack of clarity on how such

service of documents would be carried out in practice, the considerable differences in national implementations and the lack of public awareness that such delivery services could also be received from judicial authorities of other Member States in the context of civil or commercial cases.

The CCBE therefore believes that qualified electronic registered delivery services should only be used to serve documents if in the course of legal proceedings, the addressee has given express consent to the court or authority seised to use his/her user account which fulfils the requirement of ERDS within the meaning of the eIDAS Regulation. The condition of explicit consent should be strictly complied with and verified in order to especially prevent a violation of the defendant's rights.

In addition, the CCBE also wishes to stress the importance of establishing minimum level of service and service guarantees for Member States in relation to electronic service of documents undertaken under Article 15a. The current regulation of electronic registered delivery services are not based on these being public services, but only on aspects of electronic authentication. As soon as these mechanisms are used for the delivery of critical, possibly life changing documents, there needs to be a very different set of minimum requirements to rely on the delivery. Currently, it is up to each Member States to decide on whether it wishes to use a particular national electronic delivery service for such important purpose or not. With this regulation, the relevant authorities of other Member States will be able to decide whether it will use the electronic delivery service of another Member State for the purpose of servicing judicial and extrajudicial documents in civil or commercial matters. At this moment, there is no common set of minimum requirements in this regard, other than what is specified in the eIDAS Regulation, which only comprises very narrow standards mostly for non-repudiation purposes only.

The CCBE therefore believes that the Commission should be required and empowered to adopt delegated acts to set a number of minimum requirements for the following aspects:

a) common standards for publicly available reports on the availability (including outages) of electronic registered delivery services that may be used for such purposes, and common methodology for defining key performance indicators, performance and for measuring such availability;

b) common standards for scope and time of mandatory testing of such services before their use in production environments, including mandatory prior notice with sufficient minimum notice period before any changes are introduced;

c) obligation to provide an application programming interface level access to such delivery services for use by regulated professions and enterprises having multiple employees (i.e. prohibition to provide only a single interface for citizens), and obligations to provide access to the API and the documentation of such API for free;

d) mandatory contingency measures and disaster recovery plans to be provided by the operator;

e) definition of security requirements above the level of standards for eIDAS qualified ERDS, because of the high risk of fraud and abuse in the delivery of such documents (failure to access documents delivered to such electronic addresses can result in imprisonment, loss of very high value assets etc., and mitigation of such fraud risks are not aimed by ETSI standards in development on ERDS).

In this regard, reference is made to the requirements of API as defined in PSD2 RTS Article 32-33 (Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication).

The CCBE therefore proposes to amend Article 15a as follows:

Proposal from the Commission	Proposed CCBE amendment
"*Article 15a* **Electronic service** Service of judicial documents may be effected directly on persons domiciled in another Member State through electronic means to user accounts accessible to the addressee, provided that ***one of*** the following conditions ***is*** fulfilled: (a) the documents are sent and received using qualified electronic registered delivery services within the meaning of Regulation (EU) No 910/2014 of the European Parliament and of the Council (b) after the commencement of legal proceedings, the addressee gave express consent to the court or authority seised with the proceedings to use that particular user account for purposes of serving documents in course of the legal proceedings.";	"*Article 15a* **Electronic service** Service of judicial documents may be effected directly on persons domiciled in another Member State through electronic means to user accounts accessible to the addressee, provided that ***one of*** the following conditions ***is are*** fulfilled: (a) the documents are sent and received using qualified electronic registered delivery services within the meaning of Regulation (EU) No 910/2014 of the European Parliament and of the Council***, and*** (b) after the commencement of legal proceedings, the addressee gave express consent to the court or authority seised with the proceedings to use that particular user account for purposes of serving documents in course of the legal proceedings."; ***(c) (new) The Commission shall be empowered to adopt delegated acts for the purpose of establishing minimum level of service and service guarantees of national electronic registered delivery services used for the service of documents.***

9. Defendant not entering an appearance (Article 19)

The CCBE welcomes the new rules in Article 19 concerning a defendant not entering an appearance. This is for example the case with the harmonisation of the period of two years in Article 19 (5) during which the defendant can apply for a relief from the effects of the expiry of the time for appeal from the judgment by default.

The inclusion of the obligation in para. 3, to make reasonable efforts to inform the defendant in the case that no certificate of service or delivery has been received after the expiry of a period of six months through other available channels of communication (especially the "modern communication technology") is generally positive. This rule creates another possibility to inform the defendant of the introduction of legal proceedings against him and thus the delivery of a default judgment can be avoided. Consequently, the defendants' rights are strengthened. At this point, the CCBE considers necessary a definition of the term "modern communication technology". This could include known accounts in social networks, a web presence or further "modern" communication channels. In the spirit of a consistent handling it should be determined which accounts comply with the term and must therefore be taken into account by the court as well as whether preferential accounts or web appearances exist in this regard. Furthermore, precise specifications on how the message will be sent to an "available user account" are missing. In this regard the question arises if this possibly includes the creation of an own account for enabling the contacting, dispatching of friendship requests or the creation of public posts. Currently the CCBE still has doubts about how the service shall be implemented in practice and whether the obligation, which courts will have to face, is adequately clarified.

10. Sufficient time for the implementation of the technical innovations

Finally, the CCBE welcomes that the proposal provides in Article 2 a sufficient time frame for the implementation of the proposed technical innovations. During the further legislative procedure this rule should be maintained. The experience has shown that the implementation of legal regulations in IT systems requires a time frame of at

least 24 months, required by the programming and especially testing. The conversion of a software within a few days is not only impossible, but also presents a violation of fundamental rights. IT system manufacturer and possibly lawyers would be affected in their occupational freedom and property guarantee.

Revised Regulation on Taking of Evidence

1. **Mandatory electronic communication – e-CODEX as the default platform (Art. 6)**

Article 6 of the proposal introduces the mandatory electronic transmission, as a rule, of requests and communications between competent authorities pursuant to the Regulation. In exceptional cases, i.e. where the system is interrupted or not suitable for the transmission in question (e.g. transmission of a DNA sample as evidence), other channels can still be used (paragraph 4).

In order to allow a rapid management of judicial cooperation, the CCBE supports that the use of electronic means becomes the default standard in communication between the competent authorities involved in cross-border judicial cooperation in civil matters. However, such a move towards electronic communication must be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege. Furthermore, in order to avoid the use and development of different e-delivery systems in this respect, it is necessary to establish the e-CODEX infrastructure as the standard mechanism ensuring interoperability of national e-justice systems and enabling cross-border electronic communications and transmission of information between judicial authorities.

The CCBE therefore calls upon the EU institutions to adopt as soon as possible a legal instrument establishing e-CODEX as the common mechanism for standardised secure exchange of cross-border information in judicial proceedings between EU Member States.

2. **Facilitation of direct taking of evidence – the need for explicit consent and common minimum requirements (Article 17a)**

Article 17a of the proposal seeks to ensure a more appropriate, more frequent and faster use of direct taking of evidence in accordance with Article 17 via videoconference, where available to the courts in question and appropriate in the light of the specific circumstances of the case.

The CCBE understands that the use of videoconferencing ("VC") systems provides a number of advantages. However, there are potential risks and drawbacks that must be addressed in order not to undermine fundamental principles of a fair trial. In this respect, it is insufficient that according to Article 17a (2) the "requesting court and the central body or the competent authority referred to in Article 3(3) or the court on whose premises the hearing is to be held shall agree on the practical arrangements for the videoconference".

First and foremost, in some Member States the use of VC might be subject to the participants' approval. **It therefore needs to be verified on a case by case basis in accordance with the national law of the concerned Member State whether it is necessary to seek explicit consent of the person to be heard to participate in a VC, and, if so, under what conditions a person can refuse a VC, and whether a legal counsel needs to be present/consulted if a person explicitly consents or refuses.**

Also, necessary arrangements must be made to ensure that the following due process requirements are properly addressed:

a) During a VC session, the lawyer(s) (in all jurisdictions participating in the VC) should be able to sit together with his/her/their client(s). If this is not possible, arrangements must be made in order to enable the lawyer(s) to participate in the VC from another location.

b) The requesting and requested court/judicial authority must ensure that the lawyer is able to confer confidentially with her/his client (both in case lawyer and client are sitting together or remotely from each other);

c) The court/judicial authority needs to notify the parties, including their lawyers, of the date, time (taking into account different time zones), place and the conditions for participation in the VC. Sufficient advance notice should be given.

d) The requesting and requested court ensure that lawyers are able – if necessary – to identify themselves in accordance with national rules towards the (cross-border) judicial authorities.

e) Instructions need to be provided to the lawyer by the relevant court/judicial authority as to the procedure they need to follow to present documents or other material during the VC. Arrangements need to be made to ensure that all participants in the VC can see the material that is presented during the VC.

f) In cases where documents must be shown to a witness, that should be done via an independent person present with them (court clerk or similar) who can ensure (e.g. from the point of view of the plaintiff) that they are looking at the right page and (from the defendant's point of view) also ensure they are not looking at other documents, especially not to documents that have not been disclosed to the defendant or other parties.

g) The procedure should allow that the participant testifies in presence of judicial authorities who will ensure that he/she is not instructed by other participants. It should be guaranteed that the participant to be heard does not confer with any person during her/his testimony as this may have an adverse impact on the proceedings.

Furthermore, in cross-border cases, particularly where the parties might not be native speakers and will be subject to different cultural influences, the judge might not be able to examine so easily the nuances of the parties' appearances and responses through a video-link. Judges might have a tendency to ask fewer questions and be less likely to interrupt an argument, which might not be a beneficial outcome for the parties.

It is therefore important that mandatory minimum standards are set as to the technical arrangements that should be in place for the use of videoconferencing to ensure as much as possible a true-to-life hearing experience including full communication/interaction of all the parties to the procedure with the person to be heard. Technical arrangements must also ensure that the VC is protected from improper access (hacking). Consumer-level videoconferencing services, such as Skype or FaceTime, are inadequate in this respect. Such mandatory minimum standards should also ensure protection of professional secrecy and legal professional privilege during the VC session.

Consequently, the CCBE believes that the Commission should be required and empowered to adopt delegated acts to set a number of minimum technical requirements that will adequately take into consideration the technical requirements set out above and will also consider the following technical aspects:

a) Before establishing a VC program, courts/judicial authorities should implement their VC system via a pilot program that they can evaluate and modify. Courts should set up a system where, following a VC, they receive feedback from all stakeholders (including lawyers) on the VC's organization in order to further improve their VC system. Additionally, courts should provide structured training for judges and anyone who will operate the VC equipment during the hearing, as well as available IT staff. They should also share VC best practices with each other in order to reduce costs and increase efficiency.

b) Contingency plans need to be in place in order to effectively deal with issues such as dropping or bad connections during the VC session.

c) The software necessary for the VC should be free of charge, easily accessible, user friendly, and require only basic hardware.

In this context, the relevant recommendations of the „Guide to Good Practice on the Use of Video-Link under the Evidence Convention" of the Hague Conference on Private International Law (especially Part B and C), which are currently being finalised, should be taken into account. Of relevance are also the „Guideline on videoconferencing in cross-border legal proceedings" of the General Secretariat of the Council[1] as well as the correspondent information on the website of the European Justice Portal[2].

Furthermore, the wording of Article 17a (3)(a) should be modified so that the central body or competent authority "shall" assign a court – instead of "may"– which takes part in the performance of the taking of evidence in order to ensure the compliance with the fundamental principles of the law of the requested Member State.

[1] http://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/ [last reviewed on 20/09/2018].
[2] https://e-justice.europa.eu/content_videoconferencing-69-en.do?init=true [last reviewed: 20.09.2018].

In view of the above, the CCBE proposes to amend Article 17a as follows:

Proposal from the Commission	Proposed CCBE amendment
"*Article 17a* **Direct taking of evidence by videoconference** 1. Where evidence is to be taken by hearing a person domiciled in another Member State as witness, party or expert and the court does not request the competent court of another Member State to take evidence in accordance with Article 1(1)(a), the court shall take evidence directly in accordance with Article 17 via videoconference, if available to the respective courts, where it deems the use of such technology appropriate on account of the specific circumstances of the case. […] 3.Where evidence is taken by videoconference: (a)the central body or the competent authority referred to in Article 3(3) in the requested Member State ***may*** assign a court to take part in the performance of the taking of evidence in order to ensure respect for the fundamental principles of the law of the requested Member State; […]	"*Article 17a* **Direct taking of evidence by videoconference** 1. Where evidence is to be taken by hearing a person domiciled in another Member State as witness, party or expert and the court does not request the competent court of another Member State to take evidence in accordance with Article 1(1)(a), the court shall take evidence directly in accordance with Article 17 via videoconference, if available to the respective courts, where it deems the use of such technology appropriate on account of the specific circumstances of the case***, and, if provided for in the national law of the concerned Member State, subject to the consent of the person to be heard in accordance with these national provisions***. […] 3.Where evidence is taken by videoconference: (a)the central body or the competent authority referred to in Article 3(3) in the requested Member State ***shall*** assign a court to take part in the performance of the taking of evidence in order to ensure respect for the fundamental principles of the law of the requested Member State; […] ***4. (new) The Commission shall be empowered to adopt delegated acts for the purpose of establishing minimum standards as to the technical arrangements that must be in place for the use of videoconferencing to ensure as much as possible a true-to-life hearing experience including full communication and interaction of all the parties to the procedure with the person to be heard.***

3. Taking of evidence by diplomatic officers or consular agents (Article 17b)

Article 17b does not include any requirement that the diplomatic officers or consular agents who are in charge of the taking of evidence ensure that procedural safeguards are adhered to in the same way when the evidence is taken by a judge. The provision does not exclude bias of the staff involved nor the possibility to influence the taking of evidence. Any taking of evidence should take place under the authority of a court.

4. Missing regulations concerning expert evidence

Finally, the CCBE regrets that the proposal does not contain provisions concerning expert evidence, even though experts constitute an essential and common form of cross-border evidence taking. Furthermore, significant questions to this specific topic are likely to arise. It would have been helpful to include for example the clarification as established by the ECJ decision "ProRail" that for the order of taking expert evidence in the forum of another Member State the procedure provided for by Article 17 of the Regulation does not necessarily need to be applied.[3]

[3] ECJ, Judgment of 21 February 2013, C-332/11 "ProRail".