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CCBE comments regarding the Roadmap on the digitalisation of justice in the EU

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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 is providing feedback on the Roadmap regarding the digitalisation of justice in the European Union (EU).

The digitalisation of judicial proceedings is a very important matter for lawyers as, if properly managed, it can significantly improve their clients' access to justice - including better and faster justice, and allow legal professionals to organise their work more efficiently, especially in the context of cross-border judicial proceedings.

The CCBE therefore welcomes EU initiatives to support the digitalisation of judicial procedures, to foster interoperability of different national systems, and to support the uptake of new technologies in the day-to-day functioning of justice systems. However, in order to uphold fair trial rights, such endeavours must always be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege.

Any development in this field is of prime significance for the legal profession, and the CCBE stands ready to constructively engage with the EU institutions and all stakeholders regarding the further development of the European e-justice environment.

The sudden acceleration of the digitalisation of national judicial proceedings in response to the COVID-19 crisis calls for a **proper assessment as to whether all technologies used are capable of delivering a fair trial**. Digitalisation efforts should consider the different stages of a judicial process and carefully assess whether, and if so, how these can be supported by technology. Any perceived need to increase efficiency through the use of technology should not sacrifice the consistent delivery of justice at least as well as that delivered by traditional means. It is important that all users are also aware of the risks related to the use of online tools and remote hearings, and that special attention is paid to the respect of human rights and other ethical principles.[1]

As for lawyers, not only is the digitalisation of justice systems (hereinafter referred to as "e-justice") an important tool for them, they are also relevant actors for the *development* of e-justice. Lawyers are one of the main user groups of e-justice applications. As such, they have concerns and relevant input to provide at the development stage: e-justice systems need to be secure and ensure an equal playing field and accessibility for all parties. It also needs to grant lawyers and their clients the same procedural rights as paper-based systems. Furthermore, e-justice needs to consider lawyers' requirements and obligations in terms of deontology, data protection, professional liability, rules of evidence, etc. **For**

[1] See in this regard: CCBE concerns and propositions regarding the current phase of reactivation of the justice system in the light of the COVID-19 crisis (24/06/2020), p. 3.

these reasons, it is very important that lawyers, through their Bars and Law Societies, are fully involved in the development of e-justice systems.

In this respect, it is also important to consider that lawyers are not consumers, but business users and their IT systems are very diverse. Currently, there are already many national IT systems used by lawyers, and even within the same country, lawyers must use different IT systems based on applications. This can mean, for example, a system for electronic document exchange with courts, a completely different system with police, with prosecutors, with every major branch of administration and larger governmental bodies. A different one with the central bank, with the national e-communications authority, the competition office. Even in a small country, there may be dozens of such different authorities with many different IT systems used for e-government. Different authorities often have their own requirements in regard to document formats, sizes, forms to be used, for acknowledgement of receipt of documents etc.; and the requirements are constantly changing. Such changes can concern technical evolutions which require a permanent upgrading of systems, as well as constantly changing laws and procedures. Therefore, e-justice systems should be sufficiently coherent with other e-government tools and remain flexible to address frequently changing requirements as well as the variety of IT systems among different countries.

A particular problem which the CCBE wishes to bring to the Commission's attention is the **limited technical capabilities of authorities in verifying electronic signature/stamps from other EU countries**. Even if the eIDAS Regulation clearly provides that qualified signatures should have the same legal effect as a handwritten signature, many authorities (mainly those dealing with a large number of submissions) refuse to verify electronic signatures. As a result, a submission made by a lawyer from another member state may be refused because the signature on the document may not be automatically verifiable by the judge or a different authority. There are extensive technical differences even in the format of electronic signatures used or the containers of electronically signed documents (ASICS-E, P12, DER etc.), and also in the fields of the certificates that should be used for identifying a person, e.g. a "common name" of a person included in one field of the certificate will usually not uniquely identify someone. Different identifiers need to be used, such as tax numbers, e-government identifier, personal identification numbers, etc. Automated verifications have to rely on these extra fields, and this may pose a significant problem for cross border use of e-signatures in judicial proceedings. These problems not only affect authorities, but also businesses trying to rely on the authenticity of e-signed documents from another EU country (e.g. banks).

In view of the above and in order to provide EU-wide legal certainty, it would be very useful to have EU-wide minimum standards to ensure that national e-justice systems are able to guarantee rights to a fair trial, and to take the following organisational measures:

- **Structured monitoring of e-justice systems provided by Member States, with service level objectives and standards, including complaint handling procedures, reliable and public registration of any outages of e-justice systems provided by Member States, and proper contingency mechanisms in case of interruption of such systems, and**

- **Development of a sound method to test national e-justice systems before they are used as live systems.**

These actions must of course be undertaken whilst fully respecting the specificities of national systems including the roles and responsibilities of the various actors involved, in particular Bars and Law Societies.

Moreover, the fostering of interoperability should not undermine any existing well-functioning national system. A number of Members States have already in place well developed e-justice systems,

and in some countries, Bars are partially or fully involved in the daily operation of such systems. The advantages of such well proven systems should be taken into consideration.

Furthermore, in order to avoid the use and development of different e-delivery systems, 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.

When promoting the digitalisation of judicial procedures, it needs to be ensured that – in compliance with the divergent training systems under national law – appropriate training is offered for both lawyers and other legal professionals on the use of e-justice tools as well as on the opportunities and challenges brought by such tools. Adequate funding, including through EU programmes, should therefore be foreseen and accessible for lawyers to facilitate the successful implementation of the digitalisation of justice.

In light of the advent of innovative technologies such as **Artificial Intelligence (AI)** in the legal services and justice environment, legal tech start-ups have emerged throughout Europe and have brought, or are planning to bring, a range of tools on the market promising to facilitate legal practitioners with legal analysis, reduction of repetitive and time-consuming tasks, speeding up judicial processes, or even assisting judges in decision-making.[2] Likewise, AI tools for policing purposes have emerged and started to play an important role in criminal justice systems.

The use of AI raises many questions, especially with regard to fundamental rights and the rule of law, and thus constitutes a real challenge for both judicial institutions and lawyers. When considering the different **possible uses of AI in the judicial process**, we immediately see that its introduction within court systems could undermine many of the foundations on which justice is based. See in particular pages 6-8 of the CCBE Response to the consultation on the European Commission's White Paper on Artificial Intelligence (05/05/2020) which contains a more detailed explanation on this.

Much debate is still needed critically to assess what role, if any, AI tools should play in our justice systems. Change should be embraced where it improves or at least does not worsen the quality of our justice systems. However, fundamental rights and adherence to ethical standards that underpin institutions based on the rule of law, cannot be subordinated to mere efficiency gains or cost saving benefits, whether for court users or judicial authorities.

Any deployment of such tools should therefore be **strictly regulated and be preceded by in-depth evaluation and impact assessments** with the involvement of all relevant actors and stakeholders.

Therefore, it is important that, if deployed, **AI tools are properly adapted to the justice environment**, taking into account the principles and procedural architecture underpinning judicial proceedings. Before AI tools (or any kind of automated decision-making tools) are implemented in judicial systems,

[2] Reference is made to the EU-funded project "AI4Lawyers" which is currently undertaken by the CCBE together with the European Lawyers Foundation (ELF) and which aims to provide: (a) an overview of "average state of the art" IT capabilities of lawyers and law firms in the European Union and a gap analysis using comparisons with other non-EU countries, (b) an assessment of the opportunities and barriers in the use of natural language processing tools in small and medium sized law practices, and (c) guidance for EU lawyers and law firms on the use of AI in legal practice. A more detailed project description can be found here: https://www.ccbe.eu/actions/projects/.

a set of rules and principles governing the use of AI must be defined and adopted. In particular, the following **minimum** safeguards should be upheld:

- **The possibility to identify the use of AI**: all parties involved in a judicial process should always be able to identify, prior to and within a judicial decision, the elements resulting from the implementation of an AI tool.

- **Non-delegation of the judge's decision-making power**: under no circumstances should the judge delegate all or part of his/her decision-making power to an AI tool. In any case, a **right to a human judge** should be guaranteed at any stage of the proceedings.

- **The possibility for the parties to verify the data input and reasoning of the AI tool**.

- **The possibility for the parties to discuss and contest AI outcomes** in an adversarial manner outside the deliberation phase and with a reasonable timeframe.

- **The neutrality and objectivity of AI tools** used by the judicial system should be guaranteed and verifiable.

Further details can, of course, be developed within and outside the examples noted above. The CCBE remains at the Commission's disposal for any additional contributions it needs.