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

CCBE comments on the Communication on Digitalisation of justice in the European Union

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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.

On 2 December 2020, the European Commission published a communication "*Digitalisation of Justice in the European Union – A toolbox of opportunities*" and on the Inception Impact assessment on the Digitalisation of cross-border judicial cooperation. Moreover, the Commission published the same day a proposal for a Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726 (hereafter the "e-CODEX proposal").

The CCBE welcomes that the Commission considered various aspects which the CCBE suggested during the preceding consultation process. Regarding the Digitalisation of Justice, the CCBE previously issues comments regarding the Roadmap on the digitalisation of Justice in the EU. The CCBE published more specific papers on Artificial Intelligence, such as the CCBE Response to the consultation on the European Commission's White Paper on Artificial Intelligence and the CCBE Considerations on the Legal Aspects of Artificial Intelligence.

With this paper, the CCBE wishes to further develop its position in relation to several aspects of the communication and the inception impact assessment. A separated paper will develop the position of the CCBE on the e-CODEX proposal.

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The communication of the Commission proposes a **toolbox** for the digitalisation of justice, in order to tackle challenges such as the slow pace of digitalisation of registers and databases, the persisting use of paper files, or the lack of forward planning and coordination within and between the Member States to move the justice sector forward in the digital area. The proposed tools concern the financial support to Member States, legislative initiatives, IT tools and the promotion of national coordination and monitoring instruments.

The CCBE welcomes the proposed 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.

The CCBE estimates that endeavours on e-justice must respect and ensure fundamental rights and principles, as they are recognised by the EU Charter of Fundamental Rights and the European Convention on Human rights. The CCBE stresses that e-justice systems need to be secure and support an "electronic equality of arms" and ''access to justice''. In other words, digital procedures should facilitate all parties in a trial and not only one party to the possible disadvantage of the other party. Also, they should ensure that all parties enjoy at least the full procedural rights that they previously had under paper-based systems. Moreover, e-justice systems need to consider lawyers' deontological and statutory duties which serve the interests of their clients and the rule of law in general. For example, lawyers must be able to use digital services, especially cloud services, in a way

that assures all legal aspects of provision of legal services and in particular the client confidentiality principle, which often lacks relevant procedural protection by cloud services providers.

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 CCBE wishes to comment the following parts of the communication:

"3.2. Making the digital channel the default option in EU cross-border judicial cooperation"

The Commission plans to present a legislative proposal on the digitalisation of cross-border judicial cooperation during the last quarter of 2021. Several policy options are presented in the inception impact assessment. Such a proposal could, in particular:

- Make digital channels the default option for EU cross-border judicial cooperation;
- Require Member States to accept **electronic communication** for cross-border procedures involving citizens and businesses, without ruling out the use of paper;
- **Guarantee that the solutions and principles set out in the eIDAS Regulation are referenced and used,** in particular*:*
    - the principle that **electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings** solely on the grounds that it is in electronic form;
    - **electronic identification and signatures/seals** should become acceptable for the digital transmission of judicial documents and their appropriate assurance levels agreed.
- Provide a basis for the **processing of personal data**, within the meaning of the GDPR and other relevant EU instruments;
- Ensure that any electronic access points established for use by the general public **cater for persons with disabilities**;
- In order to ensure that national IT systems are interoperable and able to communicate with each other, lay down the broad **architecture of the underlying IT system** for digital communication.

The CCBE stresses that the digitalisation of justice systems (hereinafter referred to as "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.

In this regard, the CCBE brought a particular problem to the Commission's attention which is the limited technical capabilities of authorities in verifying electronic signature from other EU Member States.

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 from another Member State.

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 in the containers of electronically signed documents (ASICS-E, P7M, XAdES-based XML-type, PAdES-based PDF, 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 identifiers, personal identification numbers, etc.

Automated verification carried out by authorities often has 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). As a consequence, authorities and businesses try to shift the burden of incompatibility on the users and refuse to accept cross-border documents.

These very practical problems are not yet addressed by the EU body of law. Authorities of Member States frequently refuse documents from another Member State on the basis that (i) the document submitted is not readable by them, not in the right format, or (ii) they are not able to carry out certain automated verification on that document (such as on their validity or the identity of the issuer, certificate revocation information, etc.). Therefore, they will not accept and process it.

Some of these issues should have already been addressed by eIDAS, e.g. by the accessibility and use of qualified verification, preservation services or registered electronic delivery services. However, nearly 7 years after the adoption of eIDAS, important qualified trust services are still missing in most of the Member States. Cross-border interoperation of these services are not yet solved even at a technical (standardisation) level. As of now, of the 27 EU Member States, only 8 have registered electronic delivery services, 9 qualified preservation services and 11 qualified validation services, and these solutions are independent from each other. **The CCBE welcomes the proposed action presented by the Commission to require Member States to accept communication in cross-border procedures and to guarantee the effective application of the eIDAS regulation.**

Moreover, in order to provide EU-wide legal certainty, the CCBE points out the necessity 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, so that the effective operation of these e-justice system become transparent for users EU-wide, including (i) mandatory complaint handling procedures to be followed, sharing the number and category of complaints received, (ii) 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 generic process to test national e-justice systems by all categories of users 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.

"3.3. Artificial intelligence (AI)"

The Commission explains that "*the use of AI applications can bring a lot of benefit, such as making use of information in new and highly efficient ways, and improve access to justice, including by reducing the duration of judicial proceedings. At the same time, the potential for opacity or biases embedded in*

certain AI applications can also lead to risks and challenges for the respect and effective enforcement of fundamental rights, including in particular the right to an effective remedy and fair trial". **The Commission considers that the use of AI can support but must not interfere with the decision-making power of judges or judicial independence.**

Moreover, the Commission stresses the considerable risks associated with the use of AI-based applications for automated decision-making and predictive justice. The EC is working on a **general framework to address the risks of AI technologies**, including notably of high-risk AI applications. Regarding the use of machine learning, the Commission recalls that appropriate safeguards are needed to guarantee the protection of fundamental rights, such as equal treatment and data protection and to ensure the responsible, human centric development and use of AI tools where their use is in principle appropriate.

Finally, the Commission notes that the final decision-making must remain a human-driven activity and decision. The use of AI applications must not prevent any public body from giving explanations for its decisions. It is therefore important that judges and prosecutors are trained on the use of AI applications.

The use of Artificial Intelligence 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, its introduction within court systems could undermine many of the foundations on which justice is based, as the CCBE stressed in its response on the European Commission's Whiter Paper on Artificial Intelligence.

Much debate is still needed to critically 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. Also, AI systems should be introduced only when there are sufficient safeguards against any form of bias or discrimination. 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, the CCBE considers that a set of rules and principles governing the use of AI must be defined and adopted.

The European Commission underlines that the final decision-making must remain a human-driven activity and decision. While the CCBE welcomes this statement in general, the approach needs to be strengthened. **Any tendency that AI-made judgements are purely signed off by a judge has to be avoided**. Such a risk is real at a time when budgetary constraints increasingly weigh on the judicial system. **The CCBE calls on the Commission to further underline the right to a human judge in their actions and accordingly foresee explicit safeguards.**

In addition, the following minimum safeguards and principles should be upheld to counter the potential risks and impact of AI tools within court systems:

- **The possibility to identify the use of AI (Principle of identification): 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 (Principle of non-delegation): 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 (Principle of transparency).**
- **The possibility for the parties to discuss and contest AI outcomes (Principle of discussion) in an adversarial manner outside the deliberation phase and with a reasonable timeframe.**
- **The neutrality and objectivity of AI tools (Principle of neutrality) used by the judicial system should be guaranteed and verifiable.**

"3.4. Better IT tools for access to information through the interconnection of registers"

The Commission considers that Member states should pursue the establishment of electronic registers and databases as a priority, noting that electronic databases are easy to consult, minimise time and cost for users, and are resilient to crises such as COVID-19. The Commission stresses that digitalising databases and registers is a precondition for their interconnection at EU level for the benefit of cross-border users and to support the single market.

Moreover, the Commission considers that "***whenever possible, Member States should recur to the use of videoconferencing***. *The use of videoconferencing in judicial proceedings, where permissible by law, substantially reduces the need for burdensome and cost-intensive travel and may facilitate proceedings*". The Commission points out that "***the use of videoconferencing should not infringe the right to a fair trial and the rights of defence, such as the rights to attend one's trial, to communicate confidentially with the lawyer, to put questions to witnesses and to challenge evidence***".

Regarding the use of videoconferencing, the CCBE published a Guidance on the use of remote working tools by lawyers and remote court proceedings. In this document, the CCBE analyses the main risks and challenges posed by the use of remote working tools by lawyers, especially in relation to fundamental rights, professional secrecy and legal professional privilege, and GDPR compliance. The CCBE furthermore provides recommendations to be implemented in the context of remote court proceedings in order to ensure that the right to a fair trial is respected.

The CCBE recalls that all technologies used should be equally capable of delivering a fair trial. Any perceived need to reduce backlogs or costs should not sacrifice the consistent delivery of justice at least as well as that delivered by traditional means.

The wording used by the European Commission calling for the use of videoconferencing "*whenever possible*" is not appropriate. The CCBE understands that the use of videoconferencing systems provides several advantages. However, there are potential risks and drawbacks that must be considered before generalising the adoption of videoconferencing in judicial proceedings. Its use should not undermine fundamental principles of a fair trial especially with respect to defence rights or with respect to witness testimonies (examination of witnesses) in civil law cases.

Judicial authorities must look beyond convenience alone to determine whether in the circumstances of the individual case, the use of videoconferencing is, on balance, beneficial to the overall fair and efficient administration of justice. In cross-border cases, particularly where the parties might not be native speakers and will be subject to different cultural influences, the investigative judge, prosecutor or opposing counsel might not be able to examine so easily the nuances of the parties' or witnesses' appearances and responses through a video-link. Moreover, judicial authorities 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.

Also, the CCBE would like to recall that the Commission has no competence with regard to national judicial proceedings and hence cannot demand any changes to procedural laws and impose the use of videoconferencing.

Furthermore, it is important to develop mandatory minimum standards 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 examined person. Technical arrangements must also ensure that the videoconferencing is protected from improper access (hacking).

Such mandatory minimum standards should also ensure protection of professional secrecy and legal professional privilege during the videoconferencing session. Specific safeguards should be in place to ensure the possibility for lawyers to participate in a hearing conducted through videoconference in order to defend their clients' interests.

"3.7. My e-Justice space"

The Commission considers that a "My e-Justice space" should be established as an entry point with links to available national services and should be part of the e-Justice portal and managed in close cooperation with all Member States. The tool would apply only to judicial documents that a person, or their legal representative, is allowed to consult and/or obtain. The Commission stresses that "*it should not provide access to all judicial documents concerning a person, in particular those in criminal proceedings where a balance must be struck between the confidentiality of investigation, the suspect/defendant's right to information and the victim's right to information and protection, and where there are specific provisions under EU law*".

The Commission identifies a first step where a comprehensive collection of links could be posted on the e-Justice portal to facilitate access to available national electronic services provided by the judiciary and the relevant public administrations. It considers coupling the tool more closely with national systems, so that individuals and businesses can make requests and receive documents directly from the e-Justice portal. Furthermore, the Commission notes that "my e-Justice space" should also facilitate access to justice in EU cross border procedure, provide individuals, businesses and their legal representatives with a EU-level access point from which they could file claims electronically and communicate seamlessly with the national competent authorities.

The CCBE welcomes the proposed action of the European Commission regarding "My e-Justice space". The CCBE stresses that such initiative should be coupled with sufficient safeguards. The system should provide sufficient information for its users regarding its functioning, legal consequences and risks. It should recall that the presence or assistance of a lawyer, even when it is not compulsory, is recommended for any action which could have legal consequences on any individual or legal person (e.g. launch of a procedure).

The CCBE suggests to the Commission to take a cautious approach in order to solve one by one the problems related to the creation of "My e-Justice Space". Considering the national differences, providing an EU-level electronic access for individuals, businesses and their legal representatives at the same time is a very complex task.

The CCBE also suggests that before making the first version of "My e-Justice space" available for the public, the Commission should either make it possible for individuals or businesses to empower their representatives, including lawyers, to have access to specific parts of this space, or provide other ways to enable such persons to grant access to third parties to the documents available on "My e-Justice space".