

# 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

29/07/2022

## EXECUTIVE SUMMARY

*The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers.*

The proposal should recognise and integrate, national IT systems, including those operated by Bars and Law Societies, for communication between lawyers and Courts or other competent authorities.

The use of the European electronic access point should not undermine the use of these professional IT systems for communication between lawyers and Courts.

The European electronic access point should ensure that national procedural requirements, such as forms, language and legal representation are respected. The right to legal assistance and the conditions concerning the use of the European access point by lawyers should be clarified in the proposal.

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.

The CCBE considers as inappropriate the provisions of Recital 21 concerning the possibility to apply *mutatis mutandis* the rules of taking evidence to hearings through videoconferencing, in the absence of national rules governing the use of videoconferencing.

While understanding the will to stay technologically neutral, the CCBE believes that the possibility to use other means of communication than videoconferencing for hearings, without clarifying what are those digital means of communication causes legal uncertainty.

The CCBE considers that the consent of the parties on the use of videoconferencing should be a general principle applicable in all proceedings. Article 7.3 should provide that the decision of the competent authority to organise a hearing through videoconferencing should be based on such consent and other circumstances related to the parties and the case.

Article 7 should provide explicitly for the protection of the confidentiality of communication between clients and their lawyers during the hearing through videoconferencing in civil and commercial proceedings.

On 1 December 2021, the European Commission published a proposal for a Regulation 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.

The CCBE welcomes that the Commission considered various aspects which the CCBE suggested in its [response](#) to the public consultation on the digitalisation of cross-border judicial cooperation. Regarding the Digitalisation of Justice, the CCBE adopted [comments](#) on the communication on Digitalisation of justice in the EU as well as a [position paper](#) on the proposal establishing the e-CODEX system, on 26 March 2021.

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.

## 1. General Comments

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The CCBE welcomes the 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. The CCBE considers that the digitalisation of cross-border procedures could have several advantages, such as increasing the accessibility of information and easing access to judicial procedure; lowering costs of handling cases for administrations, citizens and businesses, as well as speeding up cross-border procedures and make them more efficient. For these reasons, the proposal is to be welcome. The CCBE points out that the benefit of digitalisation depends on its proper implementation, which may vary from a Member State to another.

On the other hand, the CCBE considers that the digitalisation of judicial procedures, in order to uphold fair trial rights, must always be coupled with sufficient safeguards and due process procedures including the protection of professional secrecy and legal professional privilege. The CCBE stresses that e-justice systems need to be secure and support an "electronic equality of arms" and "access to justice". 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. Regarding the access to a file, the digital file must contain all the elements that would be found in a "paper" file.

The "digital gap" can be significant within and between Member States. Insofar as digital technology should be used to simplify access to justice, it should not have the opposite effect. **Therefore, digitalisation should not be full or completely mandatory. The possibility of communication and exchanges by paper should be maintained to respond to certain situations, in order to prevent infringements of the rights of the defence and access to justice, and more generally to the law.**

In this regard, the CCBE would like to highlight the recent judgement of the European Court of Human Rights, in the case [Xavier Lucas v. France](#), from 9 June 2022, in which it held that “*by giving precedence to the rule that proceedings in the Court of Appeal were to be issued electronically, while disregarding the practical hurdles faced by the applicant in doing so, the Court of Cassation had taken a formalistic approach that was not needed to ensure legal certainty or the proper administration of justice and which therefore had to be regarded as excessive*”<sup>1</sup>.

The Court concludes that “*a disproportionate burden had been placed on the applicant, upsetting the proper balance between, on the one hand, the legitimate concern of ensuring adherence to the formalities for the issuance of court proceedings and, on the other, the right of access to a court*”; therefore there has been a violation of Article 6§1 of the Convention<sup>2</sup>.

In this respect, the CCBE welcomes the equivalence maintained between written physical communications and electronic communications between natural or legal persons and concerned authorities.

The CCBE considers that digitalisation must be undertaken whilst fully respecting the specificities of national justice 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 Member 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 safeguarded.

**The proposed regulation should therefore recognise and integrate, national IT systems including those operated by Bars and Law Societies, for communication between lawyers and Courts or other competent authorities. The use of the European electronic access point, provided for in Article 4, should not undermine the use of these IT systems for communication between lawyers and Courts.**

## 2. The European electronic access point

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The Article 4 of the proposal establishes the European electronic access point, located on the European e-Justice Portal. This European electronics access point is part of the decentralised IT system and may be used by natural and legal persons for electronic communication with the courts and competent authorities in civil and commercial matters with cross-border implications.

**The CCBE stresses that the proposal does not address the issue of legal assistance towards the targeted persons using the e-Justice Portal, as a future European access point, to communicate with courts by electronic means, in order to file claims, launch requests, send or received relevant information for example. The right to legal assistance and the conditions concerning the use of the European access point by lawyers should be clarified in the proposal.**

**In any case, the European electronic access point should ensure that national procedural requirements, such as forms, language and legal representation are respected.**

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<sup>1</sup> ECHR, 9 June 2022, Xavier Lucas v. France, application 15567/20, §57

<sup>2</sup> *Ibid.* §§58-59

## 3. Hearing through videoconference and other means of communication

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### 3.1. Comments of the use of videoconferencing

Regarding the use videoconferencing in general, the CCBE would like to recall the EU has **no competence** with regard to national judicial proceedings and hence cannot require any changes to procedural law to impose the use of videoconferencing.

Furthermore, the CCBE considers there are potential risks and drawbacks that must be considered before using it 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.

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 tend to ask fewer questions and be less likely to interrupt an argument, which might not be a beneficial outcome for the parties. Concerning the rights of the defence, particularly in the context of criminal trials, the use of videoconferencing could affect the inner conviction of the judge, the reality of the defendant's situation, the impressions of the hearing, and the publicity of the debates.

In this regard, the CCBE regrets that the proposal does not mention, at least in the Recitals, the potential risks and drawbacks raising from the use of videoconferencing in judicial proceedings. **Reference should be made to the necessary specific safeguards which should be in place for the use of videoconferencing.**

Finally, the CCBE notes that Recital 21 provides that conducting a hearing through videoconferencing should not be refuse due to the absence of national rules governing the use of such technology and, in such cases, the most appropriate rules available under the national law, such as rules for taking of evidence, should apply *mutatis mutandis*. **The CCBE considers that the application *mutatis mutandis* of the rules for taking evidence to hearings through videoconferencing is inappropriate and could lead to arbitrary results; as mentioned above the use of videoconferencing should be accompanied by specific safeguards and rules of proceedings to protect the rights of the parties.**

### 3.2. Other distance means of communication

The CCBE notes that Chapter IV refers to hearings through videoconferencing or other distance communication technology. While the CCBE appreciate the intention of staying technologically neutral, it underlines that the possibility to use other means of communication than videoconferencing for hearings in civil, commercial and criminal matters will create legal uncertainty.

### 3.3. The use of videoconferencing in civil and commercial matters (Article 7)

#### 3.3.1. Consent of the parties

The CCBE considers that the **consent** of the parties on the use of videoconferencing should be a **general principle applicable in all proceedings**. Therefore, it should be made clear in Article 7.3 that the **decision of the competent authority to organise a hearing through videoconferencing should be based on such consent and other circumstances related to the parties and the case**. Again, the CCBE warns against the mandatory use of digital technology in judicial proceedings which could be a disproportionate burden for the parties in some circumstances, violating their right of access to a court, as ruled by the European Court of Human Rights in the above mentioned case *Xavier Lucas v. France*.

#### 3.3.2. The protection of confidentiality

The CCBE regrets that Article 7 does not provide explicitly for the protection of the confidentiality of communication between clients and their lawyers during the hearing through videoconferencing. The CCBE notes that such protection is only ensured in criminal matters in Article 8.4.

In this regard, the CCBE considers that, as indicated in the **CEPEJ Guidelines on videoconferencing in judicial proceedings**, “*all guarantees to a fair trial under ECHR apply to remote hearings in all judicial proceedings*”, “*The court should safeguard the right of a party to be effectively assisted by a lawyer in all judicial proceedings, including confidentiality of their communication*”. The confidentiality of clients-lawyers communications shall be ensured in all judicial proceedings held through videoconferencing as a fundamental principle for civil and commercial proceedings as well as criminal proceedings. Therefore, the CCBE considers that **Article 7 should be amended by a new paragraph** providing that:

***“The confidentiality of communication between parties and their lawyer for the purpose of the hearing through videoconferencing or other distance communication technology shall be ensured at all times and in any circumstances”.***

The same wording should be used for Article 8.4 concerning hearings through videoconferencing in criminal matters in order to ensure that the protection of confidentiality is ensured at all stages of the procedure, in particular the hearing.