

CCBE Response to the Public Consultation on modernisation of judicial cooperation in civil and commercial matters in the EU (Revision of Regulation (EC) 1393/2007 on service of documents and Regulation (EC) 1206/2001 on taking of evidence) 26/02/2018

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 responding to the Public [Consultation](#) on service of documents and taking of evidence in civil and commercial matters. This is an important consultation and the CCBE wishes to respond to it. However, the questionnaire is structured in such a way as not to elicit responses relating to the area which is a particular concern of the CCBE. Accordingly, in the present document the CCBE sets out its responses to the questionnaire and makes some further general observations on a possible EU initiative on modernisation of judicial cooperation in civil and commercial matters.

Digitalisation of judicial procedures (e-justice) – important requirements

Standardisation requirements

The CCBE supports the move towards electronic transmission of documents to be served or evidence, as it will allow rapid management of judicial cooperation.

In order to avoid different models being developed, the CCBE stresses that it would like to see the e-CODEX infrastructure being used only in cross-border e-justice initiatives based on interconnection of judicial systems as well as communications by stakeholders in justice, such as servicing of documents or exchanging evidence.

Nevertheless, it is equally important that **any mechanism enabling the electronic service of documents or exchange of evidence in the course of cross-border judicial assistance, takes into account the progress in standardisation in related fields**, e.g. the Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) and the Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

While the e-CODEX system currently follows the legal and interoperability frameworks of the EU e-Signature legislation and the EU e-Signature Standards Framework, its e-delivery concept is currently not based on any standards, since, for the time being, there is no standard in place for electronic registered delivery service. As long as there is no such standard, users, including lawyers, will have to adapt to the specific technical e-delivery solution of e-CODEX, which involves additional technical measures and resources.

Moreover, there is currently no EU standard format for end-users (including lawyers) regarding (a) what documents and files they are expected to be able to read, and (b) to what formats they should convert evidence at their disposal so that the courts and other participants in litigation can work with such files. Unless there are such standard formats and easily available software libraries to use, it is very difficult to determine and satisfy the requirements of all end-users.

Therefore, the systems, formats, and software lawyers will be expected or forced to use when documents to be served or evidence obtained are transmitted or exchanged through electronic channels, should be easily capable of integrating with the technical tools lawyers currently work with. In this respect, it is important to take into account that lawyers are not consumers, but business users and their IT systems are very diverse.

Currently, there are already manifold national IT systems used by lawyers, and even within the same country lawyers must use different IT systems based on applications. For example, one system for electronic document exchange with courts, a completely different with police, with prosecutors, with every major branch of administration and larger governmental body. A different one with the central bank, with the national e-communications authority, the competition office. Even in one small country, there may be thousands of such different authorities with dozens of different IT systems used for e-government. Every authority has its own requirements as to document formats, sizes, forms to be used, for acknowledgement of receipt of documents etc., and the requirements are constantly changing.

As a result, before moving towards an electronic system of service of documents or exchange of evidence, lots of standardising efforts are required to ensure that the various users are easily capable of receiving files submitted through the electronic delivery service used by the e-CODEX system.

Even if the envisaged electronic system of service of documents or exchange of evidence would only facilitate communications between state authorities (e.g. court/judge/central authority of Member State “A” to court/judge/central authority of Member State “B”), this still affects other users (such as lawyers) since a solution needs to be found to a) deliver the file to the recipient (such as a lawyer) in Member State “B”, and b) to convert the file into a format that that recipient can easily read.

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.**

In any case, any electronic system of service of documents or exchange of evidence must ensure protection of professional secrecy and legal professional privilege. This requirement should be supervised by the relevant Bars and Law Societies.

Possibility for EU lawyers to have access to the e-justice systems in other Member States

Depending on the final architecture of the envisaged electronic system of service of documents or exchange of evidence, **it might be necessary for lawyers – in order to be able to exercise their right to provide services in other EU Member States in accordance with Directive 77/249/EEC – to have access to the national e-justice system of other Member States.**

In this respect, the CCBE wishes to draw attention to the judgement of the Court of Justice of the EU (CJEU) in the **Lahorgue case C-99/16**. In this case, the CJEU ruled that “[t]he refusal, on the part of the competent authorities of a Member State, to issue a router for access to the private virtual network

for lawyers [necessary for online filing of court proceedings] to a lawyer duly registered at a Bar of another Member State, for the sole reason that that lawyer is not registered at a Bar of the first Member State, in which he wishes to practise his profession as a free provider of services, in situations where the obligation to work in conjunction with another lawyer is not imposed by law, constitutes a restriction on the freedom to provide services under Article 4 of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, read in the light of Article 56 TFEU and the third paragraph of Article 57 TFEU. It is for the national court to determine whether such a refusal, in the light of the context in which it is put forward, genuinely serves the objectives of consumer protection and the proper administration of justice which might justify it and whether the resulting restrictions do not appear to be disproportionate in regard to those objectives.”

Access to the e-justice systems of other Member States must be carried out in full compliance with the principle of professional secrecy/legal professional privilege.

Other requirements

All e-justice initiatives related to the interconnection of justice systems as well as communications between justice stakeholders, including the service of documents and exchange of evidence, must ensure protection of professional secrecy and legal professional privilege.

A crucial requirement that needs to be taken into account when designing systems for the electronic service of documents is the ability to prove delivery personally, particularly in relation to initiating process, priority of process under Brussels II Revised/recast, applications during the proceedings, and/or orders made (especially those which are time-sensitive, such as financial freezing orders and other injunctions, and those which may also need to be served on relevant third parties, such as banks or other financial institutions).

In family cases it may be important to give notice that an action has been commenced. The operation of the *lis pendens* rule may require service, but even where seizure is dependent on the document commencing the proceedings being lodged, an opponent should be given notice that the court in another jurisdiction has been seized.

Interim orders may have been granted on lodging of the document commencing proceedings and it may be important that the opponent knows this (for example, when divorce proceedings are commenced against a person resident in another Member State, an order may need to be served preventing that person from taking money from his/her pension fund, which is something that person needs to know about as soon as possible).

Regarding service between state authorities, particularly in the context of the information-provision requirements of the European Maintenance Regulation, **it is important that the timeline of the request for and provision of such information, and its extent, is fully visible/traceable and provable.**

There will also be a requirement to ensure that any such documents are transmitted securely, in an encrypted and protected format, as they will contain personal data and often sensitive personal data.

Hearings through videoconferencing

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 considered in order not to undermine fundamental principles of a fair trial. The CCBE therefore wishes to make the following recommendations:

- a) 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. Moreover, 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.

Therefore, **it is important that the EU develops 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 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.

- b) 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.
- c) Contingency plans need to be in place in order to effectively deal with issues such as dropping or bad connections during the VC session.
- d) The software necessary for the VC should be free of charge, easily accessible, user friendly, and require only basic hardware.**
- e) In some countries the use of VC might be subject to the participants' approval. **It therefore needs to be verified whether it is necessary to seek explicit consent of them to participate in a VC, and, if so, under what conditions participants can refuse a VC, and whether a legal counsel needs to be present/consulted if participants explicitly consent or refuse.**
- f) 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.
- g) 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);
- h) 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.
- i) 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.
- j) 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.
- k) 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.

- l) 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.

CCBE responses to the questionnaire:

In the list below, only those questions have been copied which are considered to be of relevance to the CCBE.

B) Digitalisation

2. To which extent do you agree with the following statements (in light of your experience)?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	Do not know/ No opinion
The rules regulating cross-border service of documents and taking of evidence in the Member States in civil and commercial matters should take into account and exploit recent legal and technological developments in the IT sector, as well as the use of IT systems.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The use of electronic means should become the default standard in communication between the authorities /agencies involved in cross-border judicial cooperation in civil matters.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
As a basis, documents to be served should be transmitted through electronic channels in course of cross-border judicial assistance.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
As a basis, and whenever it is feasible, the evidence obtained should be exchanged through electronic channels in course of cross-border judicial assistance.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

As a rule, a person with residence in another Member State should be heard through videoconferencing instead of being summoned in person to a foreign court.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Legal obstacles resulting from the differences of national laws which are in the way of performing electronic service across borders should be eliminated. (E.g. that different legal requirements exist in terms of validity of an electronic service of a document).	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

C) Direct methods of judicial assistance

3. To which extent do you agree with the following statements?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	Do not know/ No opinion
The Regulation contains clear rules on service by post of a judicial or extrajudicial document in another Member State, it provides a satisfactory level of legal certainty in this regard.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
It would be good if postal operators, when carrying out a service of a document under Article 14 of Regulation (EC) 1393/2007, would be expressly informed about the judicial or extra-judicial nature of the document to be served.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It would be a good idea if competent persons (e.g. bailiffs, process servers) could be directly requested from abroad in all Member States to perform service of documents in their territory.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

It should be generally permitted to a court from a Member State to take evidence in the territory of another Member State directly and without prior consent of that Member State, provided that no compulsion is applied.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
It would be beneficial if the current procedure for direct taking of evidence in Article 17 of Regulation (EC) 1206/2001 would be further simplified. .	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
It should be ensured that the court performing a direct taking of evidence in another Member State gets assistance from the authorities of that State to perform compulsory measures there, should the necessity arise.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

D) Protection of the rights of the defence

4. To which extent do you agree with the following statements?

	Strongly agree	Tend agree to	Tend to disagree	Strongly disagree	Do not know/ No opinion
The Regulation on service of documents should ensure a uniform level of protection for defendants from another Member State who did not appear before the court. E.g. the time limit for the availability of an extraordinary remedy against any default judgment, which can be invoked on the basis of the improper service of the claim, shall not depend on the declaration of individual Member States.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<p>Service of a judicial or extrajudicial document should always be attempted first through the channels provided for by the Regulation on service of documents if the place of residence of the addressee in another Member State is known to the person initiating the service.</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<p>The mechanism in the Regulation on service of documents relating to the right of the addressee to refuse the acceptance of a document on the basis of its language (Article 8) should be designed in a way which helps the court to determine the languages with which the addressee is familiar with. At the same time, the mechanism should be deterrent to any abuse.</p>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<p>The Regulation on taking of evidence could contain minimum standards relating to the heads of privileges on which a person (party or a witness) can rely to refuse answering questions or providing information in course of the cross-border taking of evidence.</p>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

E) Scope of application of the instruments on service of documents and taking of evidence

5. To which extent do you agree with the following statements?

	Strongly agree	Tend to agree	Tend to disagree	Strongly disagree	Do not know/ No opinion
The Regulation on service of documents should ensure that there is greater transparency in terms of finding the whereabouts of addressees who are residing in the territory of other Member States. E.g. the e-Justice Portal could be used as a tool for accessing such type of information in other Member States (provided that such information is publicly available there).	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The Regulation on service of documents should include a mechanism by which judicial assistance is provided in another Member State for the purpose of determining the whereabouts of a person there, provided that this is requested by a court in the Member State of origin in accordance with the law of that State.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The Regulation on taking of evidence should comprehensively and exhaustively govern the taking of evidence from another Member State in civil and commercial matters, unless there is a specific EU instrument which regulates cooperation separately taking into account the specificities of its particular field.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
More clarification is needed in the Regulation on taking of evidence on the scope of the judicial acts that may be requested as a "taking of evidence" in another Member State.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

F) Minimum standards of procedural law in areas other than service of documents and taking of evidence

6. Are you in favour of introducing additional procedural standards in areas beyond service of documents and taking of evidence?

Yes

No

I do not know

Please explain

2500 character(s) maximum

Please insert your comment here: