

Digitalisation of cross-border judicial cooperation: Public Consultation

30/04/2021

Please find below the CCBE answer to questions of the [public consultation](#) on the digitalisation of cross-border judicial cooperation which are of interest for lawyers (**Questions 1-10 and 15**). The answers were drafted with the feedback of the delegations and our previous position papers. Please note that CCBE answers are limited due to the number of characters required by the European Commission.

Please note that the questions are optional and respondents may choose not to reply to all of them.

I. General questions

1) In principle, do you think that there is a need to transition to electronic means of communication in the context of the EU cross-border judicial cooperation procedures?

at most 1 choice(s)

- Yes
 No
 Undecided

2) What would be, in your view, the benefits of the digitalisation of EU cross-border judicial procedures (e.g. the use of the digital channel instead of paper with and between competent authorities)?

Multiple choice – one or several replies are possible:

between 1 and 7 choices

- Better accessibility of information and easier access to judicial procedures
 Lower costs of handling cases for both administrations and citizens / businesses
 Less time consumed for both administrations and citizens/businesses
 Speedier and more effective/efficient cross-border procedures
 Increased resilience of judicial systems
 Other (please elaborate in the box below)
 I don't see any benefits

If Other, please specify:

1000 character(s) maximum

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. Beyond the benefits mentioned above, the CCBE considers that the digitalisation of cross-border procedures could have the advantage of sharing good practices concerning the use of digital tools by lawyers and litigants. The benefit of digitalisation depends on its proper implementation. In some Member States, experiences regarding

digitalisation do not show any speedier and more effective/efficient system in general, but these benefits may arise in the future, thanks to increased training and organization. Furthermore, a increased resilience of judicial systems might be possible, this will depend very much on the implementation of new digital tools, especially regarding IT security.

3) What do you consider as key barriers to the digitalisation of cross-border judicial cooperation?

Multiple choice – one or several replies are possible

between 1 and 10 choices

- Different level of digitalisation of the Member States
- Lack of financial and human resources for developing and maintaining IT systems
- Lack of digital skills of users and/or competent authority staff
- Equipment/Connectivity constraints (i.e. no access to a computer or to the internet)
- Lack of trust in IT solutions (e.g. due to cybersecurity or data protection concerns)
- Lack of regulation providing for the use of electronic communication under national law.
- Lack of regulation recognising legal effects of considering electronic evidence admissible under national law (e.g. if there is a requirement under national law for an original paper document, when a scanned electronic version is more easily available)
- Lack of recognition of electronic identities and electronic signatures/seals between Member States
- Lack of interoperable national IT systems which can communicate with each other
- Other (please elaborate in the box below)

If Other, please specify:

1000 character(s) maximum

The CCBE would like to stress the limited technical capabilities of authorities in verifying electronic signature from other EU Member States. Even if the eIDAS Regulation provides that qualified signatures should have the same legal effect as a handwritten signature, many authorities refuse to verify electronic signatures from another Member State. The CCBE notes that other barriers to the digitalization of cross-border judicial cooperation may be considered such as: the lack of interoperability between different digital tools and systems; the re-use of data and respect of professional secrecy by private bodies; the lack in the use of common nomenclatures in order to classify decisions in the same way in the different Member States. Furthermore, considering the existing digital gap concerning the low rate of equipment, the unreliable network coverage and the digital illiteracy that affect a part of the population within the European Union, the digitisation of justice cannot be complete.

4) What would be, in your view, the disadvantages of the digitalisation of EU cross-border judicial procedures?

Multiple choice – one or several replies are possible

between 1 and 8 choices

- Risk of exclusion due to: Lack of digital skills
- Risk of exclusion due to: Lack of access to the internet / unreliable internet connection
- Risk of exclusion due to: Lack of adequate equipment (e.g. no access to a computer, or a mobile device)
- Disproportionate need of investments
- Cybersecurity concerns
- Data protection concerns
- Other (please elaborate in the box below)
- I don't see any disadvantages

If Other, please specify:

1000 character(s) maximum

The CCBE stresses the risk of computer bugs with access to justice not guaranteed on a continuous basis. Before implementing digital procedures, a transitional regime might be needed coupling paper and digital procedures in order to face the possibility of loss/duplication of information. Also, digitalisation presents a greater risk of security breaches due to the number of devices used and the large number of possible gains from the misappropriation/modification of information. Digital tools, despite their reliability, can break down. In order to prevent such cases, the possibility of a return to paper when electronic communication is mandatory seems necessary to preserve access and communication in all matters and for the benefit of all types of users of European solutions. Disadvantages can raise regarding the dehumanization of procedures and the respect of equality of arms. It is therefore necessary to involve lawyers in the implementation of such a system in order to preserve access to justice for litigants. In addition, the digitization must guarantee the right of effective access to a human judge.

5) Do you consider that the digitalisation of cross-border judicial cooperation could adversely affect the right to a fair trial and defence rights (such as the right of access to a lawyer and the right of access to the case file)?

Please select one of the choices below:

at most 1 choice(s)

- Yes (please elaborate)
- No (please elaborate)
- Undecided

If Other, please specify:

3000 character(s) maximum

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 CCBE notes that the Commission has also included videoconferencing in its Communication on the digitalization of justice. As already stated in the CCBE's comments on the communication, 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.

Regarding the use videoconferencing in general, the CCBE considers there are potential risks and drawbacks that must be considered before generalising its adoption in any 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 judge's intimate belief, the reality of the defendant's situation, the impressions of the hearing, and the publicity of the debates.

Further, 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, digitization 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.

6) Which are the EU cross-border judicial cooperation legal instruments or areas that you consider should provide for an electronic channel of communication as a priority (if any)?

Please, list them and explain why below.

3000 character(s) maximum

Some areas could benefit from the digitalisation of cross border judicial proceedings. For instance, mass litigations could be treated more quickly such as those leading to fines (personal injury, etc.) or the ones requiring a quick reaction of the public authorities (such as in family matter). It has to be noted that divorces, parental authority, child abduction, children placement, maintenance, property regimes, succession, more generally family cases represent an important part of cross-border cases where digitalisation could have a beneficial impact. Relevant examples include accessing decisions and information about the status of proceedings; obtaining regulations' certificates, transmitting all relevant information related to a child abduction or submitting placement orders online.

7) In the context of a possible transition to an electronic channel of communication for EU cross-border judicial cooperation procedures:

a) do you consider that there are risks of exclusion of individuals and businesses (including SMEs) if the electronic channel becomes the default one (e.g. owing to lack of internet access, low digital skills, vulnerability or due to other reasons)?

Please select one of the choices below:

at most 1 choice(s)

Yes - How should these risks be addressed? (please elaborate)

No

Undecided

If Other, please specify:

1000 character(s) maximum

The CCBE considers that if the use of digital tools is generalised, it is important that it does not leave behind some category of people who have specific needs or have low/do not possess IT capabilities. E-justice systems need to secure and ensure an equal playing field and accessibility for all parties. Therefore, it is important to have tools financially accessible and easy to use. The use of several interchangeable tools can be an option (smartphones, laptops, tablets). Such tools should be made available to litigants by the courts. Given the digital gap due to the low rate of equipment, unreliable

network coverage and digital illiteracy affecting part of the population within the European Union, the digitalisation of justice cannot be complete. In order to limit the impact on certain parts of the population, the provision of tools by justice authorities as well as the implementation of support by justice staffs in the event of difficulties encountered could represent a valuable aid. Investments would therefore be necessary to equip justice authorities but also to train the staff in order to ensure this support.

b) What potential additional challenges should be considered in the transition to digitalisation of cross-border judicial cooperation procedures within the European Union? Please explain in the box below:

3000 character(s) maximum

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 into consideration. Furthermore, the CCBE calls to maintain the independence of the judiciary and the right to a fair trial in the development of the European e-justice infrastructure. This applies in particular if the management of the digitisation of justice is entrusted to a European agency (for instance: the handover of e-CODEX to eu-LISA). Any doubts about the extent to which the independence of the judiciary is guaranteed may have a negative impact on the willingness of European citizens, businesses and legal professionals to use the system, thus undermining cross-border access to justice.

Digitalisation must also ensure equality in the access to the necessary means in order to use digital tools. It is therefore important to set up standards in order for Member States to ensure an equivalent level of access to the digital infrastructure.

Efforts should be centred around how digitalisation can benefit society in the long term by focusing on improving the quality of justice from a user perspective. One must remain vigilant that digitalisation remains focused on improving the quality of our justice systems and are not only introduced for achieving efficiency gains or cost savings. This requires a structural dialogue and collaboration among all justice stakeholders, such as EU institutions and agencies, national Ministries of Justice, judges, councils of the judiciary, court staff, and especially legal practitioners such as lawyers.

8) What would be your preferred scenario for the potential digitalisation of EU cross border judicial cooperation:

a) electronic communication between courts and other competent authorities of the Member States.

Please select one of the choices below:

at most 1 choice(s)

- Mandatory - i.e. use of the digital channel by default, subject to justified exceptions
- Optional – i.e. left at the discretion of Member States
- Undecided

b) electronic communication of individuals/businesses with the courts and other competent authorities of the Member States.

Please select one of the choices below:

at most 1 choice(s)

- Mandatory - i.e. obliging Member States to provide for such a possibility, without excluding alternative channels
- Optional - i.e. left at the discretion of Member States
- Undecided

9) In case it is decided to propose a new EU legal instrument, what aspects of digitalisation should it regulate:

Multiple choice – one or several replies are possible

between 1 and 6 choices

- The mandatory or optional nature of electronic communication with and between competent national authorities
- The legal validity of electronic documents and evidence
- The conditions for the use of electronic signatures/seals
- The responsibilities for data protection obligations
- The architecture of the IT system to be used
- Other (Please elaborate in the box below)

If Other, please specify:

1000 character(s) maximum

EU-wide minimum standards are necessary to ensure that national e-justice systems are able to guarantee rights to a fair trial, and to take organisational measures such as the structured monitoring of national e-justice systems, with service-level objectives and standards (mandatory complaint mechanism, statistics on complaints received, reliable and public registration of outages, contingency mechanisms in case of interruption) and the development of a sound generic process to test national e-justice systems by all categories of users before they are used as live systems.

If electronic communications become mandatory, the use of paper should be introduced as an exception in case of technical or material impossibility. Further, the legal value of electronic documents and evidence should be regulated. The conditions for the use of electronic signatures/seals should refer to the eIDAS regulation. Regarding the regulation of the architecture of the IT system to be used, the CCBE calls to respect the specificities of national justice systems, to not undermine any existing well-functioning national system. The legal qualification of the concerned actors should also be specified. Questions relating to the geographical location must be dealt with (lawyers, clients, staff).

As already stated in the CCBE's comments on the communication, 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.

On the national level, regarding videoconferencing, guarantees should be provided to the parties to the proceedings and to the lawyers, in particular for the purposes of respecting the rights of the defence.

10) Are there any other points that you would like to make?

Please elaborate in the box below

1000 character(s) maximum

III. The below question is targeted to private individuals or representatives of a business, or their legal representatives:

15) In case you are involved in a cross-border case¹ as an individual or representative of a business, or their legal representative – what would be your preferred way of communication?

Please select one of the choices below:

at most 1 choice(s)

- I would prefer to use traditional paper-based means of communication
- I would prefer to use electronic communication with all the participants in the procedure
- I would prefer to have the possibility to use both means of communication
- Undecided

¹ A cross-border case in this consultation means a case which is dealt with under EU cross-border judicial cooperation procedures in civil, commercial and criminal matters, for instance a request for a European Payment Order under Regulation 1896/2006 (OJ L 399, 30.12.2006, p. 1–32) or a small claim under Regulation 861/2007 (OJ L 199, 31.7.2007, p. 1–22).