

# The Digitalisation of European Union Procedures: A New Impetus Following a Time of Prolonged Crisis

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## Abstract

The COVID-19 pandemic temporarily brought national and cross-border procedures to a standstill. Prior to the pandemic, the use of information and communication technology in court procedures was mostly voluntary and seldom used; although various developments were contemplated, they were slow to be financed and implemented. The pandemic and associated limitations gave digitalisation of procedures, including at the European Union (EU) level, a new impetus and increased authorities' and professionals' openness towards technology, including in cross-border judicial cooperation. The measures adopted at the time of writing focus on aspects such as communication between competent national authorities in taking of evidence and service of documents. These are expected to soon be extended to all other EU private international law instruments. In cross-border claims, e-CODEX will be the decentralised information technology system used in this process of facilitating access to justice with digital support. The aim is for identification and certifications of e-signatures and e-identities in this digital environment to be based on the eIDAS Regulation. While all these are welcome developments for facilitating and speeding up access to justice, this paper points out that the process still requires some years for its full implementation and may be exposed to various risks, complexities and challenges. Consequently, the process will not put an end to the EU fragmentation but will work around national and EU realities.

**Keywords:** e-Justice; electronic communication; electronic service; remote digital hearings; eIDAS; e-CODEX.

## 1. Introduction

For years, the European Union (EU) has sought to respond to the challenges of cross-border access to justice by adopting a number of legal instruments regarding matters of jurisdiction,<sup>1</sup> applicable law,<sup>2</sup> service of documents,<sup>3</sup> taking of evidence,<sup>4</sup> uniform alternative EU procedures for debt recovery,<sup>5</sup> legal aid,<sup>6</sup> mediation<sup>7</sup> and alternative dispute resolution.<sup>8</sup> These

<sup>1</sup> Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, December 20, 2012, 1–32.

<sup>2</sup> Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, July 4, 2008, 6–16; Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, July 31, 2007, 40–49.

<sup>3</sup> Present Regulation (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ L 405, December 2, 2020, 40–78.

<sup>4</sup> Present Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, December 2, 2020, 1–39.

<sup>5</sup> Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims OJ L 143, April 30, 2004, 15–39; Regulation (EC) 1896/2006 creating a European order for payment procedure, OJ L 399, December 30, 2006, 1–32; Regulation (EC) 861/2007 establishing a European Small Claims Procedure, OJ L 199, July 31, 2007, 1–32.

<sup>6</sup> Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 026, January 31, 2003, 41.

<sup>7</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, May 24, 2008, 3–8.

<sup>8</sup> Directive 2013/11/EU on alternative dispute resolution for consumer disputes, OJ L 165, June 18, 2013, 63–79; Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, OJ L 165, June 18, 2013, 1–12.



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instruments have been linked mainly to paper-based procedures and, sometimes, the physical presence of the parties in a particular country before a court or mediating body. Reliance on technology to support the application of these instruments has been limited and uptake has been slow,<sup>9</sup> despite electronic means enabling speedier and more efficient provision of access to justice services, communication between relevant national authorities, and carrying out of certain procedural steps (e.g., paying court fees, lodging a claim with a court).

The process of digitalising cross-border procedures in the EU began prior to the COVID-19 pandemic and has been going on for some time but faces challenges at the legislative level (e.g., the diversity of national procedural rules, the interaction between national and EU procedural rules), regarding technology solutions (e.g., different e-justice domestic architectures [where available], different levels of information technology [IT] development, the lack of interoperability of existing technology infrastructure used by national justice systems) and relating to organisational arrangements (e.g., EU and national competencies, different authorities structures, governance). Compared to a purely domestic framework, these are additional elements of complexity and fragmentation that the digitalisation of EU procedures has to contend with.

The limited use of technology solutions in handling proceedings across EU Member States and the slow development or even reversal of digitalisation of national proceedings<sup>10</sup> made access to justice particularly vulnerable to crisis situations. The prolonged COVID-19 pandemic underlined the vulnerabilities of systems that do not benefit from full e-justice solutions for carrying out proceedings when physical access to court premises is prohibited or significantly restricted. Such limitations of access to justice increase in a cross-border setting when travelling to courts is severely restricted or even made impossible by the closing of national borders, strict national lockdown measures, and partial or total suspension of courts' and judicial authorities' work at public premises.<sup>11</sup>

The limitation of access to justice experienced during the pandemic made the modernisation of justice processes, their digitalisation and dematerialisation for reorganising the services, and securing the delivery of justice in any type of environment—physical or digital—even more important.<sup>12</sup> The crisis showed that traditional court procedures and practices need to change and evolve beyond the physical presence of stakeholders within certain premises or reliance on paper document deliveries. Quick pragmatic fixes needed to be put in place by national justice systems during the pandemic.<sup>13</sup> This led to an unprecedented openness of public authorities towards information and communication technology (ICT) tools.<sup>14</sup> Together with technology solutions, ad hoc legislative steps were taken to legalise their integration.<sup>15</sup> Courts and justice authorities began experimenting with various options of remote justice (e.g., only written submissions and exchanges between the parties and the court,<sup>16</sup> online video hearings<sup>17</sup> and e-filing). Previously, some of these solutions had been resisted or looked at with distrust.<sup>18</sup>

Within the EU, the slow but necessary process of including ICT in cross-border procedures was invigorated. New specific rules were adopted and legislative proposals supporting technology use were (and are being) discussed. By the end of 2020, the first series of new rules establishing and extending the use of ICT was included in the Service and Taking of Evidence Recast Regulations. This was followed by the enactment of a Regulation that institutionalises the management of the EU decentralised IT system to be used in cross-border procedures—the e-CODEX Regulation<sup>19</sup>—and proposals for a Regulation on the Digitalisation of Cross-Border Judicial Cooperation and review of the Electronic Identification and Services (eIDAS)

<sup>9</sup> Krans, "Civil Courts Coping with COVID-19"; Gascón Inchausti, "Classic Cross-Border Case," 51, 55; Onțanu, Cross-Border Debt Recovery in the EU.

<sup>10</sup> In the Netherlands, for example, see van Gelder, *The Deadlock in the Digitalisation*.

<sup>11</sup> The first wave of the pandemic brought many national proceedings, including the cross-border ones, to a halt for a number of months. See for example, CJEU, *Uniqo Versicherungen AG v VU*, Case C-18/21, ECLI:EU:C:2022:682; Velicon, "National COVID-19 Legislation and EU Uniform Procedures."

<sup>12</sup> Dias, "Judicial Responses to COVID-19 Attack," 12.

<sup>13</sup> Krans, "Civil Courts Coping with COVID-19."

<sup>14</sup> Fabri, "Will COVID-19 Accelerate Implementation of ICT in Courts?" 2–3; OECD, *Access to Justice and COVID-19 Pandemic*; European Commission for the Efficiency of Justice, "Lessons Learnt and Challenges Faced," 3; European Commission, "Comparative Table on COVID-19 Impact on Civil Proceeding."

<sup>15</sup> For example, in France, Circular of the Minister of Justice CIV/02/20 of 26 March 2020 and Ordinance No 2020-304 of 25 March 2020; in the Netherlands, *Tijdelijke wet COVID-19 Justitie en Veiligheid*; in Slovenia, *Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (COVID-19)*, Official Gazette, No. 36/20.

<sup>16</sup> These measures were followed, for example, in Belgium, France (on a case-by-case basis) and Lithuania (where possible).

<sup>17</sup> For example, videoconferences in Estonia, Latvia, Bulgaria, Italy, the Netherlands, Portugal and Romania.

<sup>18</sup> Contini, *ICT and Innovation*; Lanzara, *Shifting Practices*.

<sup>19</sup> e-CODEX (e-Justice Communication via On-line Data Exchange) is designed to facilitate the cross-border electronic exchange of data for judicial cooperation in civil and criminal matters. Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), OJ L 150, June 1, 2022, 1–19.

Regulation.<sup>20</sup> The process of revising the eIDAS Regulation is relevant for the digitalisation of EU procedures because it is going to be relied on for stakeholders' identification and the integrity (i.e., certification and validity) of electronic documents and communications in cross-border judicial cooperation. At the time of writing, the latest development is seeking to prepare the way for the development, integration and use of artificial intelligence systems as components of large-scale IT systems in the EU Area of Freedom, Security and Justice, for the administration of justice or for ancillary justice activities.<sup>21</sup> Given the limited information available on immediate civil and commercial law applications, this paper will not focus on the proposed Artificial Intelligence Act.

This paper provides a much-needed comprehensive legal analysis of recent developments and remaining challenges in the process of digitalisation of EU cross-border judicial proceedings. There is a growing maze of legal instruments and provisions, but the picture is fragmented and the process does not follow a unified path. The analysis will bring some clarity to what has been achieved at the legislative level and the coming legislative steps to support the creation and deployment of a technological infrastructure for the cross-border interoperability of national judicial systems. A clear mapping of the content of the legal component can be useful in the development of the technical and institutional components.

## 2. Methodology

The analysis mainly follows a legal descriptive approach towards the process of digitalisation of cross-border litigation in the EU and will marginally touch on the organisational or technology components when necessary for the legal analysis. The focus is on the newly adopted EU regulations and expected legislative developments based on existing proposals. Together with the legislative analysis, where relevant, the paper integrates perspectives offered by the author's personal observations of the EU legislative process, gathered as an expert and during national judiciary trainings.

Overall, the paper follows an integrated approach in analysing the various EU instruments that are part of the digitalisation process. This adds to the existing body of literature on the digitalisation of national procedures by considering the latest solutions and advancements brought about by the needs of access to justice in a domestic framework during the COVID-19 pandemic. Prior studies focusing on the EU framework often date back to a period predating the pandemic or analyse single components of the EU legislation. By undertaking an updated analysis of legislative developments, this paper provides a clearer perspective of the normative complexity of a multilayered legal framework such as that in the EU.

## 3. The National ICT Basis for EU Developments

Several EU Member States (e.g., the Netherlands and Spain)<sup>22</sup> are revising their national legal frameworks in the post-emergency phase and gearing towards supporting long-term technology developments to ensure fundamental procedural guarantees are upheld by the new technology-led solutions and the security of transmission and preservation of documents.<sup>23</sup> Legislative and technological changes underway at the national level will support judicial cooperation and create the basis for building interoperability between e-justice systems in cross-border litigation. In the EU, cross-border ICT solutions are dependent on national achievements and the willingness of Member States to implement and use ICT.<sup>24</sup> Although the EU actively encouraged the use of ICT in cross-border situations—namely, taking of evidence, hearings in the European Small Claims Procedure (ESCP), transmission of documents and requests between competent national authorities, and interconnection of national registries (e.g., insolvency, incorporation, property) and databases (e.g., national case law access)—in practice, it was rarely used extensively. Most legislation supporting judicial cooperation in civil and commercial matters did not contain

<sup>20</sup> Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, August 28, 2014, 73–114; Proposal for a regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity (eIDAS Review Proposal), COM(2021)281.

<sup>21</sup> Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021)206.

<sup>22</sup> See, for example, in the Netherlands, the rules published in October 2020 on electronic litigation for civil and administrative law cases contained in the Electronic Proceeding Decree (*Besluit van 15 oktober 2020, houdende regels voor het langs elektronische weg procederen in het civiele recht en in het bestuursrecht (Besluit elektronisch procederen*, <https://zoek.officielebekendmakingen.nl/stb-2020-410.html>), and, in Spain, the Justice 2030 plan to digitalise justice and access to public authorities (<https://www.justicia2030.es/plan-de-trabajo>) and the three legislative projects on Organisational Efficiency (*Ley de Eficiencia Organizativa del Servicio Público de Justicia*), Digital Efficiency (*Ley de Eficiencia Digital del Servicio Público de Justicia*) and Procedural Efficiency (*Ley de Medidas de Eficiencia Digital del Servicio Público de Justicia*).

<sup>23</sup> Krans, "Civil Courts Coping with COVID-19"; Sorabji, "Developing Courts the New Normal for English Civil Procedure Post Covid-19," 64 referring to Lord Burnett CJ evidence to House of Lords Select Committee on the Constitution.

<sup>24</sup> Onțanu, Cross-Border Debt Recovery in the EU, 436; Velicogna, "e-Justice in Europe," 42; Kramer, "Access to Justice and Technology," 353.

ICT-dedicated rules, and Member States were left to indicate if they were accepting such practices, whether such channels were available, and whether they could be used in cross-border litigation. The EU has limited competence in the area, and national developments are key for legalising technology solutions for court procedures. For example, cross-border systems like e-CODEX rely on national access points and cross-border recognition of the legal effects of procedural steps carried out in different countries in a digital format or transmitted digitally to authorities in other countries.<sup>25</sup>

As new procedural routines and rules related to technology ‘have acquired a representation, have been learned, and applied’<sup>26</sup> during the pandemic, this may make it easier to adapt to national-level practices—receiving electronic documents, consulting files, interacting with parties and holding hearings—in a cross-border setting. Thus, national developments can be stepping stones towards further actions in establishing an EU e-justice system. The alternative to reliance on national e-justice systems is a standard EU Reference Implementation Framework that can be deployed at the national level.<sup>27</sup> The Service of Documents and Taking of Evidence Recast Regulations<sup>28</sup> give EU Member States the choice to develop and rely on their own national e-justice systems as access points to an interconnected, decentralised EU IT system—e-CODEX—or to use an EU Reference Implementation Framework for the same purpose in cross-border procedures. A general reliance on an EU Reference Implementation Software would reduce national e-justice specificities and simply the solutions that have to be developed from a legal, technological and organisational perspective to secure valid cross-border electronic exchanges. In practice, however, this is not possible, given the EU’s competencies in the area and Member States’ choices to rely on their own e-justice systems as access points to e-CODEX, if they choose that option.

#### 4. Opening the EU Legislative Framework to e-Justice Solutions

Previously, the European Commission’s legislative proposals were seldom able to bring incremental change and make technology use mandatory in cross-border judicial cooperation. The reasons for this were the different levels of development of e-justice systems across Member States, the state of national infrastructures, the costs of developing e-justice systems and professionals’ preferences for in-person interactions.<sup>29</sup> Nevertheless, ICT solutions for cross-border litigation were being worked on, considered and tested for a number of years (e.g., the e-CODEX project, provisions in some regulations such as the ESCP and Taking of Evidence). The process was slow in creating the necessary legal framework, making institutional arrangements and building the missing technology components.<sup>30</sup> For years, several Member States participated in the e-CODEX project,<sup>31</sup> but when the COVID-19 pandemic reached the EU, the legislative and technical infrastructures were insufficiently developed to cope with the needs of a remote justice process and not resilient to prolonged force majeure events.<sup>32</sup> Ad hoc national solutions<sup>33</sup> and commercial software use (such as Zoom in Germany, Austria, Spain and Lithuania; Skype for Business in Germany, Finland and Italy; and Microsoft Teams in Croatia, Italy and Poland; in combination with systems

<sup>25</sup> Pangalos, “Using IT to Provide Easier Access to Cross-Border Legal Procedures,” 45–46; Velicogna, “Coming to Terms with Complexity,” 310; Velicogna, “Connecting EU Jurisdictions,” 282.

<sup>26</sup> Onțanu, “Normalising the Use of Electronic Evidence,” 600.

<sup>27</sup> In criminal matters, an EU Reference Implementation Software has been already used for the European Investigation Order (EIO) in the e-EDS Infrastructure, which is based on e-CODEX (e-codex.eu/EXECII). For further information on the eEvidence Digital Exchange System Reference Implementation, see Ben Miloud, “e-Evidence Digital Exchange System (eEDS).” In the civil domain, similar solutions are being developed for the Service of Documents and Taking of Evidence Recast Regulations—the Reference Implementation Software for Service of Documents (SoD) and Reference Implementation Software for Taking of Evidence (ToE). Article 1 of Commission Implementing Regulation (EU) 2022/423 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council, OJ L 87, March 15, 2022, 9; Article 1 of Commission Implementing Regulation (EU) 2022/422 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council, OJ L 87, March 15, 2022, 5. See further Onțanu, “Article 27 Reference Implementation Software”; Nicolau, “The e-CODEX and the European Platform for the Transmission of Documents,” 124.

<sup>28</sup> Service of Documents Recast Regulation, Article 27; Taking of Evidence Recast Regulation, Article 27.

<sup>29</sup> Onțanu, “Normalising the Use of Electronic Evidence,” 595; Onțanu, Cross-Border Debt Recovery in the EU, 437.

<sup>30</sup> Amato, “Cross-Border Document Service Procedures in the EU”; Steigenga, Pro-CODEX Report.

<sup>31</sup> Velicogna, “From Drafting Common Rules.”

<sup>32</sup> Explanatory Memorandum, Proposal for a Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, amending certain acts in the field of judicial cooperation, COM(2021)759; Explanatory Memorandum, Proposal for a Directive amending Council Directive 2003/8/EC, Council Framework Decision 2002/465/JHA, 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation, COM(2021)760.

<sup>33</sup> Velicogna, “Cross-Border Civil Litigation in the EU,” 16.

provided by states) had to be scrambled to continue cooperation in urgent cross-border matters (e.g., child return procedures and maintenance requests).<sup>34</sup>

The sudden openness towards ICT solutions at the national level (prompted by the pandemic) gave the EU process a new impetus to focus on adopting the necessary legislation, achieve the institutional capabilities for the management of a digital system at the EU level (i.e., give the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice [eu-LISA] the necessary resources)<sup>35</sup> and provide financial support for building any missing national-level ICT components.<sup>36</sup>

The exposed urgent needs of cross-border litigation and ongoing legislative proposals to amend the Service of Documents and Taking of Evidence Regulations were taken by the EU legislator as an opportunity to adopt additional rules on digitalisation for various instruments and advance the digitalisation process.

The first legislative developments—the Taking of Evidence and Service of Documents Recast Regulations<sup>37</sup>—have ‘the use of technology and the dematerialisation of documents’ as focal points. The new technology-related rules concern the use of a decentralised IT system (e-CODEX) for communication of requests and documents between national authorities, the legal effects of electronic documents, digital taking of evidence, electronic service of documents, the creation of a Reference Implementation Software for Member States to choose as an alternative to their national ICT systems, the responsibility for costs related to the establishing and maintenance of a decentralised IT system, and the financing of national developments. In 2022, the implementation regulations to the recast regulations established the technical specifications for the decentralised IT system and national access points to interconnect to the e-CODEX decentralised system without Member States needing to build or make technical changes to their own national IT systems (Taking of Evidence Recast Regulation, Article 27; Service of Documents Recast Regulation, Article 27).<sup>38</sup> In the same year, the Regulation establishing the legal framework for the e-CODEX system was adopted to institutionalise the management of the cross-border electronic data exchange system for judicial cooperation with an EU agency, eu-LISA.

The existing legislative framework is fragmented and has numerous gaps. One of the European Commission’s proposals—the Digitalisation of Judicial Cooperation and Access to Justice Regulation—will include similar technology-related provisions to the Taking of Evidence and Service of Documents Recast Regulations for most EU instruments concerning judicial cooperation and access to justice in cross-border litigation. This will address some of the present gaps, but fragmentation is likely to remain due to the complexity of the EU framework and choices made by the EU and national legislators in the digitalisation of cross-border procedures. The proposed Digitalisation of Judicial Cooperation Regulation will act as an umbrella framework, adding provisions on the digitalisation of various steps of the proceedings in existing civil, commercial and criminal law instruments supporting judicial cooperation.<sup>39</sup> The proposal will:

- lay down the rules for a general secured electronic communication between courts and competent authorities, and access points as part of the EU decentralised IT system (e-CODEX) and via the e-Justice Portal
- secure the acceptance of electronic communication between Member States for all EU regulations in the area of cross-border judicial cooperation

<sup>34</sup> Zahrastnik, “Videoconferencing in Times of the Pandemic and Beyond,” 49; Sanders, “Video-Hearings in Europe Before, During and After the COVID-19 Pandemic,” 12–14. The situation was confirmed to the author by national judges participating in European Judicial Training Network (EJTN) trainings.

<sup>35</sup> Explanatory Memorandum, Proposal for a Regulation on computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), COM(2020)712, 5.

<sup>36</sup> See for example, Taking of Evidence Recast Regulation, Article 28(3); Service of Documents Recast Regulation, Article 28(3).

<sup>37</sup> Amato, “Cross-Border Document Service Procedures in the EU,” 20.

<sup>38</sup> Commission Implementation Regulation (EU) 2022/422 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council, OJ L 87, March 15, 2022, 5–8; Commission Implementing Regulation (EU) 2022/423 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council, OJ L 87, March 15, 2022, 1–19.

<sup>39</sup> Proposal for a Regulation on 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 (Digitalisation of Judicial Cooperation Proposal), COM(2021)759. This will not be applicable to the Service of Documents and Taking of Evidence Recast Regulations. The regulations covered by this proposal are currently not subject to an evaluation and review process. The Digitalisation of Judicial Cooperation and Access to Justice Regulation, once adopted, would equip these other regulations in the area of cross-border litigation with the necessary legal provisions for using ICT solutions and securing the legal validity of the procedural steps carried out via ICT or with technology support.

- make electronic submissions and use of videoconferencing and other distance communication means possible beyond the Taking of Evidence and Service of Documents Recast Regulations<sup>40</sup>
- address the legal effects of electronic documents
- require the availability of electronic payment methods for fees
- require protection of personal data exchanged
- mandate the European Commission to create and maintain a Reference Implementation Software for Member States.

Additionally, a Proposal for a Directive seeks to amend certain Directives and Council Decisions to align the references with digital means of communication to support the digitalisation of judicial cooperation.<sup>41</sup>

Besides the abovementioned regulations and proposals, a few other regulations have gained a procedural dimension and are relevant for the EU digitalisation process as they directly or indirectly address aspects related to the process of digitisation of EU procedures (e.g., storage and processing of data, technical aspects related to electronic documents, electronic identification, trust services). These are the General Data Protection Regulation (GDPR),<sup>42</sup> processing of data by EU institutions Regulation<sup>43</sup> and eIDAS Regulation.<sup>44</sup> Revision of the eIDAS Regulation became urgent with the outbreak of COVID-19<sup>45</sup> to address its limitations and establish an EU-wide secured public electronic identification of natural and legal persons (eID) and trust services (e.g., interoperable digital signatures) that public authorities can use.<sup>46</sup> When adopted, the amended text of the eIDAS Regulation should improve the identification possibilities available to the e-CODEX system under its Circle of Trust Agreement (e.g., recognising the identities of users and signatures).<sup>47</sup> The proposal to amend the eIDAS Regulation seeks to develop ‘an EU-wide framework for secure public electronic identification (eID)’ and for ‘interoperable digital signatures’ to provide people with an ‘interoperable digital identity’, control over their data and ‘access to public, private and cross-border digital services’.<sup>48</sup> This can contribute to simplifying some of the complexity of securing cross-border identification for e-CODEX users, their data and signatures.

## 5. EU e-Justice: Building Digital Solutions for a Cross-Border Litigation

The process of digitalising EU procedures follows an incremental approach and now focuses on achieving mandatory electronic communication between authorities from different Member States, electronic service and transmission of documents, the recognition of legal effects for electronic documents or for documents transmitted via ICT systems between EU Member States, the use of digital hearings and collection of electronic evidence, and the creation of an extended circle of trust for electronic identifications. The following sections analyse these legal developments.

### 5.1 Electronic Communication Between Authorities

ICT can speed up communication between authorities involved in judicial cooperation and reinforce access to the EU justice system. However, such communication means for cross-border judicial cooperation were, in practice, seldom used voluntarily

<sup>40</sup> Annexes to the 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, COM(2021)759.

<sup>41</sup> Proposal for a Directive amending Council Directive 2003/8/EC, Council Framework Decision 2002/465/JHA, 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation, COM(2021)760.

<sup>42</sup> Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), OJ L 119, May 4, 2016, 1–88.

<sup>43</sup> Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, officers and agencies and on the free movement of such data, and repealing Regulation (EC) 45/2001 and Decision 1247/2002/EC, OJ L 295, November 21, 2018, 39–98.

<sup>44</sup> Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, August 28, 2014, 73–114.

<sup>45</sup> Report from the European Commission to the European Parliament and the Council on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Report), COM(2021)290, 8.

<sup>46</sup> Tenhunen, Revision of the eIDAS Regulation, 1–2.

<sup>47</sup> When the e-CODEX system was developed, the legal framework on electronic communication and signature was not sufficient to support legally valid exchanges of legal documents or performing legal steps in cross-border procedures. Thus, a Circle of Trust Agreement was created, which allowed mutual recognition of electronic data, documents and signatures between Member States; if information was trusted in the Member State where it originated, it was also trusted in the receiving Member States. Velicogna, “Can Complexity Theory Help,” 16.

<sup>48</sup> Report from the European Commission to the European Parliament and the Council on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Report), COM(2021)290, 4.

prior to the COVID-19 pandemic.<sup>49</sup> This is expected to change. The relevant EU regulations are starting to have dedicated provisions establishing electronic communication means as the mandatory form of communication for documents, forms, requests, confirmations, receipts, certificates, and communications transmitted between courts and competent authorities through a secured and reliable decentralised IT system (i.e., e-CODEX).<sup>50</sup> For e-CODEX to function as the system facilitating cross-border electronic communication, national IT systems will have to become technically interconnectable with the EU decentralised system, or, alternatively, Member States can choose to rely on the Reference Implementation Software solutions.<sup>51</sup> The system will have to be created and managed by the European Commission for Member States to use, if they choose this solution. The software is not yet available but is expected to become available before electronic communication becomes mandatory in 2025.

The use of electronic communication between authorities should ensure a speedy transmission of documents and requests,<sup>52</sup> improve the effectiveness of judicial procedures, directly facilitate access to justice, lead to costs and time savings, and ‘improve resilience in force majeure circumstances for all authorities involved in cross-border judicial cooperation’<sup>53</sup> while maintaining the essential features of each of the EU instruments concerning cross-border cooperation in civil and commercial matters. At the time of writing, not all the technical and organisational components are in place at the national level in all Member States and between the EU and national levels to support legal communication through a dedicated EU system. However, arrangements are being made to achieve this. Thus, if global emergencies such as the COVID-19 crisis were to strike again in the near future (i.e., before mid-2025), this would be before the full e-justice infrastructure is implemented and operational, so ad hoc solutions previously tested (e.g., commercial software and national public systems) would likely need to be used again. The process of formalising the establishment and general use of the e-CODEX infrastructure for the transmission of requests and other communications between national authorities should become operational by 1 May 2025.<sup>54</sup> The necessary technical specifications of the communication methods and protocols, security objectives and technical standards, requirements for the implementation of the decentralised IT system, minimum availability of services objectives<sup>55</sup> and steering committee will have to ensure the operation and maintenance of the e-CODEX system. The same process of specifications will likely also be followed for the communications processes contained in the twelve other civil and commercial instruments listed in Annex 1 of the Digitalisation of Judicial Cooperation Proposal. These concern aspects such as jurisdiction, recognition and enforcement, EU uniform procedures, maintenance, insolvency, succession, property, parental responsibility and international child abduction.

The legal certainty of apposite identity, signatures, seals and time stamps—the trust services—for electronic communication according to the recast regulations and legislative proposals will be based on the provisions of the eIDAS Regulation. These requirements will apply to procedural requests, communications, confirmations, receipts and certificates transmitted through the e-CODEX system. Reliance on this circle of trust will mean securing a user-friendly interface for the courts. Several verification and validation steps to confirm the integrity of transmitted data, origin of the data, validation of signatures, authentication and authorisation of registered users, their identity and proof of data being received will not need to be performed separately by the receiving judges and/or court staff if qualified identification credentials, as established by the eIDAS Regulation, are used by stakeholders. The technicalities of the check will be ‘closed from a technological perspective (black-boxed) and certified’<sup>56</sup> for legal compliance, and thus simplified, for judges and court staff, who would be able to rely on

<sup>49</sup> An evaluation report based on data collected from 15 EU Member States found that 38% of respondents indicated it is possible (technically and legally) to receive electronic documents from other Member States for service. See the Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), SWD(2018)287, May 31, 2018, 15; Richard, “La refonte du règlement sur la notification des actes judiciaires et extrajudiciaires,” 532.

<sup>50</sup> See Taking of Evidence Recast Regulation, Article 7(1); Service of Documents Recast Regulation, Articles 5(1) and 3(1). The Digitalisation of Judicial Cooperation Proposal establishes that, in future, communication between competent authorities will have to be carried out through a secure and reliable decentralised IT system.

<sup>51</sup> On the e-CODEX infrastructure, see Velicogna, “From Drafting Common Rules,” 181–212; Velicogna, e-CODEX and the Italian Piloting Experience; Velicogna, “Coming to Terms with Complexity,” 309–330.

<sup>52</sup> Taking of Evidence Recast Regulation, Recital 7; Service of Documents Recast Regulation, Recital 10.

<sup>53</sup> Digitalisation of Judicial Cooperation Proposal, Recital 4.

<sup>54</sup> Taking of Evidence Recast Regulation, Article 35 in conjunction with Article 25; Service of Documents Recast Regulation, Article 37 in conjunction with Article 25.

<sup>55</sup> According to paragraph 6.1 Annex, Commission Implementation Regulation (EU) 2022/422 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 and Commission Implementing Regulation (EU) 2022/423 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784.

<sup>56</sup> Contini, “Artificial Intelligence,” 9.

automated checks and guaranteed technical standards used by the system.<sup>57</sup> These verification standards for stakeholders' identity, signatures, seals and time stamps set by the eIDAS Regulation will have to be relied on both by the national e-justice systems interconnected to the e-CODEX infrastructure and the Reference Implementation Software. This will create common ground and expertise for national courts in using the same standards of security and technical guarantees.

## 5.2 Electronic Service of Documents

Electronic service of documents has not been extensively used across all EU Member States or in cross-border EU procedures.<sup>58</sup> Prior to the COVID-19 pandemic and the Service of Documents Recast Regulation, reliance on electronic services as a valid method of direct service in cross-border litigation was only available in the European Enforcement Order (EEO), European Order for Payment (EOP) and ESCP. Service by electronic means such as fax, email attested by an acknowledgement of receipt (EEO, Article 13(1)(d); EOP, Article 13(d)), or electronic means attested by an automatic confirmation of delivery when the defendant has priorly accepted this method (EEO Article, 14(1)(f); EOP, Article 14(1)(f)) were recognised as national methods fulfilling the 'minimum requirements that a valid service had to comply with'.<sup>59</sup> For the ESCP, service by electronic means is possible if such methods are available in the national procedural rules and the addressee has expressly accepted in advance that documents can be served in this way or is under a legal obligation to accept such a method of service.<sup>60</sup> According to national reports, the pandemic did not significantly change the limited use of electronic service methods, as national systems are not yet interconnected.<sup>61</sup>

Article 19 of the Service of Documents Recast Regulation marks a significant step forward in supporting direct electronic service of documents in all cross-border court proceedings, and not only for the special EU uniform procedures. A 'qualified electronic registered' delivery service or an email address can be used, provided that the procedural rules of the forum Member State consider such service valid and the addressee gave prior consent and provides acknowledgement of receipt when necessary.<sup>62</sup> Thus, electronic service of documents is extended to any cross-border procedure but, at the same time, limited by the availability of such methods in the relevant Member States and national procedural rules recognising the legal value of such communication methods.

The use of electronic service methods as set out in the Service of Documents Recast Regulation supposes that the parties have concluded an agreement prior to the dispute or after the dispute arose, or stipulated in their contract that electronic service can be used for a specific procedure or in case of dispute.<sup>63</sup> Such an agreement may be difficult to achieve after a dispute arose or if one of the parties is trying to use tactics to avoid or delay court proceedings or enforcement, and the *lex fori* must establish the way in which such an agreement should be concluded following a dispute.<sup>64</sup> Thus, the outcome of the rules for electronic service may prove, at least in the short term, limited to systems where parties have a duty to accept such service methods.

Reliance on a qualified electronic registered delivery service is not a novel solution per se. The characteristics of a qualified electronic registered delivery service are established by Articles 3(37) and 44 of the eIDAS Regulation and suppose that the transmissions of data by electronic means, such as forms of certified emails or accounts, are able to provide evidence related to the transmission of the data (including proof of sending and receiving data), secured by an advanced electronic signature identifying the party from which it emanates, include a qualified electronic time stamp certifying the date and time of transmission and receipt, and protect the data by advanced electronic seal against the risk of loss, damage, theft or unauthorised modifications. The Circle of Trust used by the e-CODEX system has some differences compared to the eIDAS solutions (e.g., validation at origin of the signature and identity) because it was established before the adoption of the eIDAS Regulation. The revision of the eIDAS Regulation could lead to an alignment of the requirements and solution used.

Article 19(1)(b) does not make a distinction in terms of effects of service when using an email address but places a duty on the addressee to confirm its receipt. This alternative comes with a few checks and balances to secure a high threshold of probability that the documents reached the intended party: the email address has to be indicated by the addressee; upon receiving the documents, the addressee has to 'confirm receipt by signing and returning an acknowledgement of receipt or by returning an

<sup>57</sup> For example, in the validation of signature process in e-CODEX, the signature is checked by the sending Member State, which issues a PDF document with the result of the check. This PDF document will be attached to the transmitted message and enables the receiving judge and court staff to read the result of the verification, so they need not perform further checks themselves.

<sup>58</sup> For example, Estonia is at the forefront; see Council of the European Union, Comments from Member States, ST 6067 2019, March 5, 2019, 39, 45, The Netherlands uses it only in special cases; see Sujecki, "Neufassung der Europäischen Zustellungsverordnung," 290.

<sup>59</sup> Onțanu, Cross-Border Debt Recovery in the EU, 38.

<sup>60</sup> ESCP Regulation, Article 13(1)(b).

<sup>61</sup> Krans, "Civil Courts Coping with COVID-19."

<sup>62</sup> See Service of Documents Recast Regulation, Recital 31.

<sup>63</sup> Service of Documents Recast Regulation, Recital 32.

<sup>64</sup> Sujecki, "Neufassung der Europäischen Zustellungsverordnung," 290.



email from the email address furnished’; and Member States are expected to specify additional conditions for acceptance of electronic service by email (e.g., identification of sender and recipient, integrity of documents) (Recital 33).<sup>65</sup> The acknowledgement of receipt can be signed electronically, but the text of the Service of Documents Recast Regulation does not specify whether this can be a simple electronic signature or a qualified electronic signature in the sense of the eIDAS Regulation. Given the limited familiarity with and use of the eIDAS Regulation’s qualified identification mechanisms in cross-border litigation, this development may require some time to realise its full potential in facilitating and speeding up the service of documents. The possibility for EU Member States to specify additional conditions (understandable, given the diversity of national rules) is an element of complexity for cross-border procedures and EU e-justice infrastructure.

### 5.3 Legal Effects of Electronic Documents

Electronic documents are defined in the eIDAS Regulation as ‘any content stored in electronic form, in particular text or sound, visual or audiovisual recording’ (Article 3(35)). The Proposal for Digitalisation of Judicial Cooperation uses a narrower definition; it focuses on documents exchanged as part of an electronic communication, thus likely only in written format and/or scanned copies of paper documents (Article 2(3)). These two definitions can be a valuable proxy for defining electronic evidence.<sup>66</sup> The proposal refers to ‘electronic documents’ rather than ‘evidence’, most likely because the exchanges of documents with authorities will take place via a decentralised IT system and will involve more than just evidentiary materials. The definition has to be seen in conjunction with the provision requiring authorities not to deny legal effect to electronic documents or consider them inadmissible in court proceedings on the ground of their electronic format (Article 10). Similar provisions on the legal effects of electronic documents in the Taking of Evidence Recast Regulation (Article 8) and Service of Documents Recast Regulation (Article 6) are used to prevent rejection of such documents due to their format.<sup>67</sup> All three provisions are modelled around the wording of Article 46(2) of the eIDAS Regulation, which establishes that electronic documents should ‘not be denied legal effect and admissibility as evidence [...] solely on the grounds that it is in electronic form’.

The EU regulations do not contain general guidance on the elements to be considered in the assessment of electronic evidence or collection of such evidence during remote hearing sessions, formats of electronic evidence to be considered, devices containing evidence, metadata or technical standards, or requirements for electronic evidence. This can be indirectly deduced to some extent from references to the type of technology used and the value of documents in electronic format. In evaluating the authenticity and integrity of evidence, the Taking of Evidence Recast Regulation refers to the eIDAS Regulation on several occasions: preservation of electronic material, diversity of sources carrying out potential electronic evidence, and elements related to the authenticity and integrity of materials. The evaluation of electronic evidence itself is left to domestic legislation in view of the principles of procedural autonomy, subsidiarity and proportionality. Thus, the EU rules remain on a general level as to the probative effect of electronic documents, and the actual evaluation is carried out by national judges based on domestic procedural rules. It would have been desirable to have a unified EU approach, but this could not be achieved during the negotiation of the eIDAS Regulation. There was strong opposition to considering an electronic document equivalent to a paper document and declaring it admissible at the EU level as evidence in national court-led legal proceedings.<sup>68</sup> An interaction between the two legislative levels is necessary and needs to be calibrated to support courts and practitioners in the process. This is key because the legal effect of electronic documents and evidence is not always guaranteed recognition across jurisdictions. The intention is to secure the legal effect of electronic documents and documents transmitted electronically through the decentralised IT system, regardless of their format,<sup>69</sup> but also ‘without prejudice to the assessment of the legal effects or the admissibility of such documents as evidence in accordance with national law’ or the ‘conversion of documents’ (Taking of Evidence Recast Regulation, Recital 13). The medium in which evidence information is presented can shape the *corpus* of knowledge, based on which a judge can make further inferences and/or take further actions.<sup>70</sup>

### 5.4 Electronic Signatures and Other Identification Data

According to the eIDAS Regulation, qualified electronic signatures (Article 25(2)) are recognised as being of equivalent value to handwritten signatures, while qualified electronic seals (eIDAS Regulation, Article 35(2)), qualified time stamps (eIDAS Regulation, Article 41(2)) and electronic registered delivery service (eIDAS Regulation, Article 43(2)) enjoy the presumption of integrity of the data sent. The effect of other electronic formats of certifications concerning written text, sound, visual or

<sup>65</sup> See Chardon, “Le Nouveau Règlement (UE) 2020/1784 Présenté aux Praticiens,” 95.

<sup>66</sup> Onțanu, “Normalising the Use of Electronic Evidence,” 587.

<sup>67</sup> Jansen, “Explaining the Methods,” 753; European Parliament legislative resolution of 13 February 2019 (COM(2018)0378 – C8-0242/2018 – 2018/0203(COD)), C 449/537, December 23, 2020.

<sup>68</sup> Fin, “Article 46 Legal Effects of Electronic Documents,” 339.

<sup>69</sup> See also eIDAS Regulation, Recital 63; Taking of Evidence Recast Regulation, Recital 13; Service of Documents Recast Regulation, Recital 16.

<sup>70</sup> Lanzara, *Shifting Practices*, 188–190.

audiovisual documents have to be established in accordance with the domestic procedural law of the forum Member State;<sup>71</sup> that is, the national law of the forum court will determine their probative effect or relevance.<sup>72</sup> Thus, various outcomes are possible for the same electronic identification data. The difference between qualified formats and other formats originates in the lack of agreement in the Council of the EU on the proposed eIDAS Regulation Article 34 on Legal Effects and Acceptance of the Electronic Documents.<sup>73</sup> The situation creates uncertainty on the legal effects of electronic signatures or other identification data, depending on the country in which these have to be used. Such situations should be avoided following the revision of the eIDAS Regulation.

### 5.5 Remote Digital Hearings and Collection of Electronic Evidence

Digital hearings are a current EU priority.<sup>74</sup> Prior to the COVID-19 crisis, videoconferencing techniques for oral hearings were possible in the ESCP (ESCP, Article 8(1)) and when the Taking of Evidence Regulation was relied on (Articles 10(4) and 17(4)).<sup>75</sup> Both regulations encouraged the use of videoconference and other ICT for oral hearings, but these were seldom used.<sup>76</sup> The use of such means for remote hearings is dependent on available technology and whether it is integrated into the national e-justice systems. The reliance on ICT for digital hearings in several EU instruments needs to be made in close coordination with developments in the EU Member States. This is ‘in order to ensure mutual trust, interoperability and security’,<sup>77</sup> as well as securing the financing of the enterprise.

The use of ICT should never undermine or trade away the fundamental values of justice; these secure parties’ and society’s trust in the fair handling of a case. Therefore, it is crucial that use of technology does not infringe parties’ right to a fair trial (e.g., right to attend a trial, professional secrecy between lawyer and client and the confidentiality of their exchanges, the possibility to challenge proposed or presented evidence, or to raise questions for witnesses and experts)<sup>78</sup> and to facilitate access to such technology when parties need it.

With the aim of addressing potential shortcomings in the use of ICT while encouraging its use, the European Commission sought to include in the Taking of Evidence Recast Regulation provisions concerning the place from where electronic evidence should be taken, guaranteeing reliance on qualified interpretation services, observance of professional secrecy and legal professional privacy via the system used, the procedure for presenting documents or other materials during a videoconference or other distance communication technology hearing, minimum standards and requirements for the use of videoconferencing (including high-quality communication and real-time interaction) in the transmission of the information, and a high level of security, protection of privacy and protection of personal data.<sup>79</sup> However, some of these proposed rules could not be agreed upon in negotiation of the text, so they were included in the recitals or the Annex Forms of the Regulation. For example, although the express provision on the place from which evidence taking should be carried out via ICT was suppressed, Article 20 could be interpreted as referring to court premises or other formal public environments as relevant authorities or courts may be assigned to provide practical assistance in direct taking of evidence.

An important point that the current legal provisions do not address is the minimum standards and requirements for the use of videoconference. Each Member State performing evidence-taking tasks via distance communication technology will have to decide. This means the cross-border framework will remain fragmented. The lack of a harmonised approach may create difficulties, given the differences in standards and ICT solutions used by courts in different Member States. When using videoconferencing or other distance communication technology, Form N in the Taking of Evidence Recast Regulation sets a duty for the requesting authority to provide information and coordinate with the requested authority on practical aspects like the type of connection preferred, connection testing before the hearing, the language in which the communication will take place, whether interpretation services are necessary or assistance is required for this purpose, and if a recording of the session will be made. If necessary, the requesting court can receive assistance in finding an interpreter or certified interpreter if the person to be heard does not speak the language of the proceedings (Recital 22). This is in keeping with the requirement of ‘fair conduct of proceedings’ (Recital 21). For sensitive cross-border cases (e.g., international child abduction), certain conditions may need be established or requirements fulfilled by the national central body or competent authority for proceeding to direct

<sup>71</sup> Fin, “Article 46 Legal Effects of Electronic Documents,” 339.

<sup>72</sup> Fin, “Article 46 Legal Effects of Electronic Documents,” 339.

<sup>73</sup> D’Hervé, “L’identification électronique,” 117.

<sup>74</sup> 2019-2023 Action Plan European e-Justice, 2019/C 96/05, OJ C 96, March 13, 2019, 21.

<sup>75</sup> Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, June 27, 2001, 1–24.

<sup>76</sup> Taking of Evidence Recast Regulation, Recital 21; Onțanu, Cross-Border Debt Recovery in the EU.

<sup>77</sup> Fabri, “Will COVID-19 Accelerate Implementation of ICT in Courts?” 5.

<sup>78</sup> Communication from the European Commission, Digitalisation of Justice in the European Union, COM(2020)710, 14.

<sup>79</sup> Article 17a of the proposal.

evidence taking, else requests may be refused altogether as contrary to the fundamental principles of the requested Member State.

Another practical aspect for guaranteeing the fair conduct of proceedings is the instructions the parties and their representatives should receive before a digital hearing. The court seized of the proceedings will have to instruct the parties and their representatives on the procedure for making available, presenting and/or relying on documents and other materials in the examination procedure (Recital 23). The Taking of Evidence Recast Regulation seeks to clarify and harmonise the type of information that will have to be provided, but the way in which the courts will provide the information is left to national procedural rules and, thus, inevitably, will result in various approaches and fragmentation.<sup>80</sup>

In the process of cross-border evidence taking, the requesting court can ask the requested court to use ‘specific communications technology [...] in particular by using videoconferencing or teleconferencing’ (Taking of Evidence Recast Regulation, Article 12(4)). Such specific requests are expected to be granted by the requested authority unless this ‘would be incompatible with its national law or the requested court is unable to do so because of major practical difficulties’. Although the text provides flexibility to allow national authorities to request the use of a different type of technology for evidence taking, when it comes to the reasons for refusing such requests, the Regulation does not give further clarifications as to what could be qualified as ‘major practical difficulties’. This can be expected to regard limited situations in which the technology is ‘not available to the requested court or would be too burdensome to acquire for the purpose of carrying out the request’,<sup>81</sup> but the threshold of the interpretation could differ between Member States. Only time will tell if this construction will hinder requests for specific technology use in evidence taking. Article 20 of the Taking of Evidence Recast Regulation, on evidence taking by videoconferencing or other distance communication technology, sets that the use of such technology is voluntary, provided it is available to the court and considered appropriate for the case.<sup>82</sup> Given the different extent of developments in technology for justice across Member States, the EU legislator chose a flexible formulation. This can accommodate differences between Member States but also allows for future developments.

Direct evidence taking by technological means has to be requested based on a standard form—Form N in the Taking of Evidence Recast Regulation. The central body or the competent authority of the requested Member State or the court assigned to provide practical assistance in the taking of direct evidence will have to agree on the practical arrangements in preparing for and carrying out the hearing. If certain technology is not available in a Member State, the national authorities can agree with each other in providing access to available communication technology. This offers some additional flexibility to the authorities involved and encourages the use of technology in direct evidence taking. Having such possibility supports access to justice and reinforces cooperation and assistance between authorities in using technology when needed for justice services in prolonged emergency situations. These arrangements can also be used when technology is not yet institutionalised in a Member State while another Member State is able to offer its system for carrying out a digital hearing. The Regulation creates the legal framework for hybrid arrangements when not all parties can be easily physically present in court at the same time. Such solutions are useful and sometimes the only way to guarantee access to justice within a reasonable timeframe or in urgent circumstances.

The Digitalisation of Judicial Cooperation Proposal also contains a dedicated provision on digital hearings in civil and commercial matters. If adopted in its present form, Article 7 will extend the possibility to request the organisation of digital hearings in any EU cross-border case in which a party to the proceedings is present in a Member State other than the forum Member State. Similar to the Taking of Evidence Recast Regulation, such a request would be granted if the videoconferencing technology or other requested technology is available. A difference from the Taking of Evidence Recast Regulation is that the proposal sets an additional requirement for the use of technology: the other party/parties to the proceedings must agree on the use of such technology. This requirement, if maintained, will add complexity, create opportunity for abusive tactics from counterparties and result in two EU regimes that will unreasonably differentiate between the Taking of Evidence Recast Regulation and other EU regulations on cross-border procedures. The Regulation text does not specify what the outcome of the request will be if the other party/parties oppose it. Can this mean that the competent authority is free to decide, provided all parties had the opportunity to express their opinion (Article 7(3)) and the request does not justify a refusal? A refusal by the competent authority should be limited to situations where ICT is not compatible with the circumstances of the case (Article 7(2)). All elements concerning the request and organisation of the hearing will probably be regulated by the national laws of the Member States conducting the videoconference (Article 7(4)). The present Regulation text is not clear on which state this will be—the forum state handling the claim, the state/states in which the person/persons to be heard are situated, or a mix of the two. Further, the holding of a hearing by videoconferencing or other ICT means should not be refused solely for the reason

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<sup>80</sup> Onțanu, “Normalising the Use of Electronic Evidence,” 597–598.

<sup>81</sup> Onțanu, “Normalising the Use of Electronic Evidence,” 598.

<sup>82</sup> Taking of Evidence Recast Regulation, Article 19.

that there are no dedicated express national rules on the use of ICT for a court hearing. Should no such dedicated national rules be in place, then the national court should be able to apply the most appropriate rules available for evidence taking (Recital 21). Certainly, courts and practitioners will have to go through a learning process in dealing with technology, just as during the COVID-19 pandemic. Overall, they will have to get used to more extensive use of ICT for hearings and ‘learn to work with multiple representations’<sup>83</sup> of reality based on the media in which the evidence is displayed or contained (e.g., paper, digitalised paper document, coded electronic document, electronic generated evidence, video recording, sound recording, metadata, personal observation and discussion). Collection of evidence or electronic evidence via a remote hearing is closely connected with its subsequent evaluation and acceptance.

Other aspects of legalising the use of technology in evidence taking are not directly addressed by the Taking of Evidence Recast Regulation, but references are made to other cross-sectorial instruments such the GDPR and eIDAS Regulation. With regard to privacy requirements in electronic data collected and for the persons involved, the Taking of Evidence Recast Regulation, Article 7(1), together with Recitals 7 and 12, set that the communication and transmission of requests and evidence are to be carried out through ‘a secured and reliable decentralised IT system with due respect for fundamental rights and freedoms’. The e-CODEX system will have to observe a high level of security in the transmission and protection of privacy and personal data based on the GDPR and Directive 2002/58/EC requirements. The same will apply to national e-justice systems. Further, the court requested to take evidence will have a duty to secure the confidentiality of information transmitted in accordance with their national law, as well as during videoconferencing and use of other ICT tools for evidence taking.<sup>84</sup>

Although the Taking of Evidence Recast Regulation addresses relevant points in the process of digitalisation and some new provisions will be added when the Digitalisation of Judicial Cooperation Proposal is adopted, normative gaps remain and the traditional diversity of national provisions will be maintained. The complex picture of shared competencies between the EU and Member States, the diversity of legal systems, the dynamic of the interaction between national and EU rules in cross-border litigation, and the ICT systems already in place or being developed at the national and EU level will maintain a diverse ICT reality for the EU. This will influence the way electronic forms of evidence are used in court proceedings in the near future.

### **5.6 Creating a Circle of Trust for Electronic Identifications**

Electronic identifications are key in the process of legalising electronic exchanges in court procedures. Creating a circle of trust between Member States’ authorities and courts is a prerequisite for technology-based proceedings to have recognised legal effect in cross-border matters, given the lack of direct interoperability between national ICT systems.

In 2016, the eIDAS Regulation set the basis for mutual recognition of electronic identifications, electronic signatures, legal seals, time stamps and registered deliveries. Its provisions facilitate the process of recognition of electronic identification means, create a circle of trust and establish a dedicated legal framework (Article 1). The Regulation’s functionalities are able to replace several functions of the traditional, physical, document-format and handwritten signature, including ‘the procedural evidence-function’.<sup>85</sup> Electronic identities, signatures, seals and stamps exist in some form in every EU Member State,<sup>86</sup> but recognising them and using them in a cross-border case is complex due to a lack of direct interoperability between systems. The eIDAS Regulation’s qualified identification and authentication mechanisms allow the treatment of certain electronic documents in a similar way to physical written and signed documents, not only in a national framework but also in a cross-border setting.

The e-CODEX system did not initially benefit from the electronic identification and trust services provided by the eIDAS Regulation as the infrastructure predates this Regulation. This meant that an e-Identification and e-Signature had to be developed for e-CODEX as they were both a technical and legal problem.<sup>87</sup> Further, these had to be compatible with the legal systems of EU Member States, and their interface had to be ‘user friendly’ to encourage their use.<sup>88</sup> The eIDAS Regulation provisions are now taking centre stage in providing much of the necessary circle of trust in the EU legislation, but e-Identification is still used by e-CODEX, given the existing limitations of the eIDAS Regulation framework. Hopefully, this will change with the revision of the Regulation.

<sup>83</sup> Lanzara, “Shifting Practices”, 190.

<sup>84</sup> Taking of Evidence Recast Regulation, Article 30.

<sup>85</sup> Smidt-Kessel, “Documentary Formalism for the Digital Age,” 23. See also Section 5.3 above.

<sup>86</sup> For example, different eID schemes (at times, more than one) are available within countries (e.g., Italy and the Netherlands). See Tenhunen, Revision of the eIDAS Regulation, 3.

<sup>87</sup> Velicogna, “From Drafting Common Rules,” 195.

<sup>88</sup> Borsari, High Level Architecture Definition, 8.

In practice, the eIDAS Regulation has registered modest results in terms of generating an interoperability of electronic identifications schemes between Member States and service providers.<sup>89</sup> Following the COVID-19 pandemic, its provisions had an important role in the process of digitising justice services and reinforcing e-justice cooperation among EU Member States. For example, the Taking of Evidence and Service of Documents Recast Regulations rely on the eIDAS Regulation to support electronic identification and create a circle of trust for electronic documents. EU cross-border litigation needs a supranational approach, as purely national ICT solutions are inadequate and ineffective because they lack direct technical and legal interoperability.

Electronic identifications are essential in correctly identifying the parties involved, professionals and their qualifications, and the identity of parties generating and signing judicial acts in proceedings. Given that the technical solutions within the framework of the eIDAS Regulation remain complex, in practice, many identity solutions were developed by private parties or national authorities. Additionally, the eIDAS Regulation electronic identification schemes are not broadly known or accepted.<sup>90</sup> This means that limitations in electronic identification affect access to online public services, including justice, in a cross-border setting. The current situation is rather inadequate and insufficient for the digitalisation needs revealed by the COVID-19 pandemic.

Due to the expected developments in the area of e-justice within the EU, the eIDAS Regulation provisions are part of a revision process. This process aims to improve digital identity solutions<sup>91</sup> and generalise the use of a European Digital Identity Wallet (eID). eID will allow citizens to prove their identity and share electronic documents in a cross-border setting.<sup>92</sup> This would enable their digital national identity to be recognised throughout the EU and would be of significant value in cross-border proceedings.<sup>93</sup> In future, three new areas are expected to be added to the eIDAS Regulation's qualified trust services: electronic archiving and electronic attestation of attributes, management of remote electronic signature and seal creation devices, and electronic ledgers.<sup>94</sup> These developments will affect the digitalisation of EU procedures and likely justice developments based on the future Artificial Intelligence Act.

## 6. Concluding Remarks

The legislative steps and technology developments followed by the EU legislator concentrate on five main lines: (1) making digital communication means compulsory between courts and competent authorities in cross-border litigation; (2) requesting courts and competent authorities to accept electronic communication from natural and legal persons when these have chosen to make use of such means; (3) widening the legal basis for the use of videoconferencing and other distance communication technology for oral hearings and taking of evidence; (4) broadening the use of identity recognition and trust services; and (5) creating the legal framework and institutionalising the management of the e-CODEX cross-border communication system.

Developments are unfolding on a step-by-step basis and look to create and support resilience in accessing justice, but fragmentation will remain part of the EU reality. In coming years, further complexities may be encountered in the deployment of the mandatory decentralised IT system for all EU regulations supporting judicial cooperation between Member States. Member States do not yet rely on harmonised technical standards for guaranteeing the quality and security of transmissions (e.g., firewalls, password use, biometrics for identification of the parties and legal professionals, personal data protection). This could be improved by an Implementation Regulation dealing with technical standards. Many access points to the e-CODEX system will have to be established at national levels, and their financing and technical development may be subject to delays. As with previous technology-supported processes adopted by national judiciaries,<sup>95</sup> the initial period can register difficulties of application as the components are calibrated to the practices of the courts and authorities involved, and courts and practitioners get accustomed to the functionalities of the IT solutions.

<sup>89</sup> According to the eIDAS Evaluation Report, only 40% of Europeans benefit from electronic identification. On the digital identity and trust services shortcomings of the present eIDAS Regulation text, see Tenhunen, Revision of the eIDAS Regulation, 7.

<sup>90</sup> Report from the Commission on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the Internal Market (eIDAS), SWD(2021)130.

<sup>91</sup> Report from the Commission to the European Parliament and the Council on the evaluation of Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the Internal Market (eIDAS Report), COM(2021)290.

<sup>92</sup> eIDAS Proposal, Article 6a.

<sup>93</sup> The European Commission aims for 80% of European citizens to be able to use an electronic identification solution by 2030. European Commission Communication, 2030 Digital Compass: The European Way for a Digital Decade. COM(2021) 118, 12.

<sup>94</sup> Proposal for a regulation amending Regulation (EU) 910/2014 as regards establishing a framework for a European Digital Identity (eIDAS Review Proposal), COM(2021)281.

<sup>95</sup> Lanzara, Shifting Practices.

Potential issues in the process of deployment may be raised by the:

technical characteristics of the system, the interconnection between various national access points and the European gateways of the e-CODEX as well as the knowledge and dynamics of court staff and judges acquiring the technical skills required for a smooth use of the new system, adjusting their procedural practices, and their ease in handling of various forms.<sup>96</sup>

At the same time, national courts and practitioners will have more tools to deal with electronic documents, communications and evidence. The framework being built is partial and will remain fragmented between national and EU procedural rules; hopefully, further legislative actions and guidelines will address practice and parties' needs.

Balance will need to be found between harmonisation of the above elements, flexibility, and evolvability of the law and technical systems, as many of the discussed elements remain the domain of national systems developed in a piecemeal approach. Adapting rigid e-justice systems to new legal or technology developments requires substantial resources for periodic redesigning, implementation and interconnection.<sup>97</sup> This is not an option for the EU or its Member States due to the consequent limitation of access to e-justice systems, delays in justice services and costs responsibility. Digital services must be sustainable, appealing, understood by the parties relying on them, and trustworthy.<sup>98</sup>

The ongoing legislative developments in the EU will have a long-lasting impact on human interactions in future court proceedings. Changes may not be expected to happen as fast as during the COVID-19 pandemic, but the digitalisation of justice systems and their interconnection has been set in motion and encouraged by that crisis. It is not unthinkable that justice services will become increasingly mediated by technology, software programs and platforms built to guarantee flexibility, adaptability and continuity of justice systems in any circumstances, both nationally and at the EU level. Once in place and applicable, the e-CODEX system will certainly accelerate exchanges between national authorities.

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<sup>96</sup> Onțanu, "Normalising the Use of Electronic Evidence," 601.

<sup>97</sup> Wallace, "Courts in Victoria," 5; Onțanu, "Adapting Justice."

<sup>98</sup> See also Fabri, "Will COVID-19 Accelerate Implementation of ICT in Courts?" 3.

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