

Opinion of the European Economic and Social Committee on ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Digitalisation of justice in the European Union. A toolbox of opportunities

(COM(2020) 710 *final*)

(2021/C 286/16)

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1. Conclusions and recommendations

1.1. The EESC welcomes the Communication as an essential and effective step to enable the digitalisation of justice. It is crucial to support Member States at national level in making this change by providing them not only with the necessary funding, but also with tools. With this support, the digitalisation of justice can be expanded at European level to create mechanisms facilitating closer cross-border cooperation between judicial authorities.

1.2. The EESC notes that the picture across Member States is highly varied, with a diverse range of national IT tools in place, which means that certain mechanisms, such as e-CODEX ⁽¹⁾, are not used in a consistent manner.

1.3. For the EESC it is therefore increasingly important to lay down rules for a more homogeneous approach among the Member States.

1.4. The EESC believes that the digitalisation of justice is a crucial tool for ensuring genuine cooperation between Member State authorities in combating criminal practices that severely damage the European area.

1.5. The EESC notes that some specific aspects of the Communication do not reflect the multifaceted reality of the judicial systems in the different Member States.

1.6. The EESC proposes that the Commission adopt a directive on judicial proceedings held at distance, providing for and accepting any means of contact by video call using any medium that guarantees the right to privacy and does not jeopardise the protection of the personal data of the individuals concerned or of the case in question.

1.7. The EESC does not believe that the use of other means of distance communication, which already exist, could jeopardise data protection itself, given that anyone can attend most court proceedings.

1.8. The EESC believes that when investigating a potential terrorist group in a Member State, the police must have instant access to the evidence gathered, not only in the databases of Europol, Eurojust and the European Public Prosecutor's Office (EPPO), but also in the databases of each Member State law enforcement authority.

⁽¹⁾ COM(2020) 712 *final*.

1.9. The EESC stresses the need to also make the most of the advantages of digitalisation for the possibility of enforcing judgments in other Member States, for alternative dispute mechanisms and for administrative cooperation between the Member States and EU agencies.

2. The Commission communication

2.1. This communication proposes a toolbox for the digitalisation of justice, in order to move the justice sector forward in the digital area. The proposed approach takes into account the Member States' differing national circumstances and national competences, and fully respects the principles of subsidiarity and proportionality. At the same time, it is important that all Member States work towards reducing the existing digitalisation gaps and the fragmentation between national justice systems and leverage the opportunities available under the relevant EU funding mechanisms.

3. General comments

3.1. The COVID-19 crisis has caused considerable difficulties for the workings of the judicial system and for effective judicial protection. These include delays in the holding of in-person proceedings and in the cross-border serving of judicial documents, the temporary impossibility of obtaining personal legal assistance and the expiry of time limits due to delays. At the same time, the increase in the number of insolvency and dismissal cases linked to the pandemic is making the work of the courts even more difficult.

3.2. There is therefore a need for new measures to enable justice to be moved more effectively and more swiftly towards digitalisation. It is essential to support Member States at national level by providing them not only with the necessary funding, but also with the tools to ensure that all judicial authorities and those working in the field of justice are prepared for this new era of change. It is crucial to make justice more accessible and to bring it closer to the citizens.

3.3. It is only with this support, at the domestic level, that the digitalisation of justice can be expanded at the European level, in order to create mechanisms facilitating closer cross-border cooperation between judicial authorities.

3.4. It should be noted that overall at the moment, the picture across Member States is highly varied, with a diverse range of national IT tools in place, which means that certain mechanisms, such as e-CODEX, are not used in a consistent manner.

3.5. It is therefore increasingly important to lay down rules for a more homogeneous approach among the EU's Member States.

3.6. The communication primarily aims at further digitalising public justice services, promoting the use of secure and high-quality distance communication technology (videoconferencing), facilitating the interconnection of national databases and registers, and promoting the use of secure electronic transmission channels between competent authorities.

3.7. The digitalisation of justice is a crucial tool for ensuring genuine cooperation between Member State authorities in combating criminal practices that severely damage the European area, such as terrorism-related crimes, money laundering and corruption, human trafficking, hate crimes and incitement to engage in hate speech and violence.

3.8. These crimes are increasingly cross-border in nature, and the transition to digital therefore represents a huge — and essential — step forwards in the investigative and law-enforcement approach to these harmful activities.

3.9. Despite the enormous effort that the Commission has been making in this area, and even though the communication should be viewed very positively, the digitalisation of justice is a long and difficult process.

3.10. Some specific aspects of the Communication can be criticised, due to their shortcomings or to the failure to understand that the ideas put forward do not reflect the multifaceted reality of the judicial systems in the different Member States.

3.11. The Commission appears to have overlooked the arrangements for conducting trials and other judicial proceedings, in civil, commercial and labour law, as well as in criminal law (such as the questioning of defendants and the interviewing of witnesses during a criminal investigation), allowing those involved to take part remotely, either by means of applications available on the market or by video calls using communication apps.

3.12. The EESC understands the need to respect the conventions of justice, but the COVID-19 crisis has helped us see that videoconferencing does not necessarily have to be carried out through existing mechanisms for interaction with the courts (whether at national or international level), with those involved in proceedings present in the courts in the area where they live or in venues previously designated and authorised (such as police facilities, the premises of forensic agencies and others). This is because contact with witnesses may take place via computer or mobile phone, irrespective of their location.

3.13. Nowadays, there are already certain means of distance communication that make it possible not only to guarantee the right to privacy, but also data protection — a key issue that must, of course, be safeguarded.

3.14. It should be noted that the principle of public access applies to most judicial proceedings. Thus, at court proceedings open to the public, there might be not only the relatives and friends of the various parties involved (plaintiffs and defendants in civil, commercial and labour law proceedings, or witnesses and defendants in criminal proceedings), but also other individuals who have no interest in the proceedings, and even in many cases journalists and other media workers.

3.15. The EESC does not therefore believe that the use of other means of distance communication, such as computer platforms or other duly certified digital applications, which already exist, could jeopardise data protection itself, when in fact anyone can attend most court proceedings.

3.16. Moreover, and especially in criminal procedural law, defendants too should have the option of being heard by means of distance communication rather than having to appear in person in court, if there are no specific exceptions justifying the appearance of the defendant in person in court.

3.17. With regard to witnesses, steps must be taken to ensure that a person with a physical disability, living in a small village, where the nearest court is located many kilometres away, does not have to leave the comfort of their home to spend hours in a court-house waiting to be called to give their witness statement, because there are reliable and certified electronic platforms that guarantee security and confidentiality in the exchange of information and the deposition of witness statements at a distance.

3.18. In this communication, the Commission proposes ‘promoting the use of secure and high-quality distance communication technology (videoconferencing)’.

3.19. Consequently, and in line with the above, the EESC proposes that the Commission adopt a directive on judicial proceedings held at distance, providing for and accepting any means of contact by video call using any medium (e.g. a desktop computer, laptop or even mobile phone) that guarantees the right to privacy and does not jeopardise the protection of the personal data of the individual concerned or of the case in question.

3.20. This is consistent with the Commission’s 2020 Strategic Foresight Report, which concludes that the digital transition in justice should put citizens first and should create new opportunities for the different stakeholders, helping to reduce delays, increase legal certainty and make access to justice cheaper and simpler.

3.21. This situation should, however, be closely monitored where minors and vulnerable persons are concerned, and in cases dealing with crimes of hate or of a sexual nature — where the need to ensure legal privacy and security is greater and, in fact, essential.

3.22. In the communication, the Commission expresses its concern about the development of a standard template for access to the case-law of national courts in machine-readable format — a European Case-Law Identifier.

3.23. This proposal deserves full support but, in order to be completely effective, may require a legislative complement in the sense of the formal standardisation (not of substance) of court sentences.

3.24. As we know, each Member State has not only its own legislation but also its own system of conventions. The structure and content of a judgment in Portugal will by no means be the same as in Italy or France and such differences should therefore be duly considered by the Commission.

3.25. The Commission also proposes setting up an IT platform for collaboration through joint investigation teams (bringing together Member States' investigators and prosecutors, if necessary with the support of Europol, Eurojust and the EPPO). Access to available data and databases in Member States should be limited to the competent authorities, complying with data protection requirements.

3.26. This is an excellent proposal that could, however, be hampered by the lack of standardisation of rules in the various Criminal Procedure Codes of the Member States, which govern all matters relating to the taking of evidence.

3.27. Until such standardisation has taken place, there is a possibility that certain investigative procedures may lead to cases being declared invalid according to the legislation of some Member States, thus undermining the effectiveness of joint investigations.

3.28. The fight against terrorism is one of the Commission's concerns in this communication. As well as stating the need for a legislative proposal on the exchange of cross-border digital terrorism proceedings, however, it is essential to create and implement tools based on digital interconnection for the exchange not only of proceedings but also of information on suspects and on the activities of groups under surveillance ⁽²⁾.

3.29. Given the need to curb terrorism, the EESC believes that when investigating a potential terrorist group in a Member State, the police must have instant access to the evidence gathered, not only in the databases of Europol, Eurojust and the EPPO, but also in the databases of each and every Member State law enforcement authority. However, care must be taken to ensure that the information is not transmitted to unauthorised or untrusted persons.

3.30. The provision of online services, such as the renewal of ID cards, electronic judicial certificates, permanent civil status certificates or even criminal records, or online consultations of court cases, should also be ensured because, as well as reducing travel to the physical locations of the services, it also means that those services can be provided even when the physical locations are closed.

3.31. However, with regard to the interconnection of data (specifically data relating to companies, insolvencies, building and business registers and criminal records) efforts must be made to ensure that access to this data cannot, in some cases (concerning data from criminal records, for example), jeopardise the right to privacy or the protection of personal data.

3.32. It is therefore essential that the IT model in this field be studied particularly thoroughly to ensure that the desired digitalisation does not work against citizens and does not undermine their fundamental rights.

3.33. In the communication, the Commission details the creation of an instrument called My e-Justice space, which is intended to give individuals electronic access to judicial documents (in national cases or in cases pending in other Member States) which they or their legal representatives are allowed to consult and/or obtain.

⁽²⁾ See EESC opinion (OJ C 110, 22.3.2019, p. 67).

3.34. The possibility of digital access to information relating to cases in which an individual is involved is a very important aspect of creating genuine judicial transparency, which is an essential tool for people to feel that justice is not opaque or inaccessible, and for promoting access to justice more quickly and effectively, with fewer associated costs.

3.35. The fact that judicial authorities and lawyers themselves can have electronic access to cases tried in another Member State is a huge and very important step in the proposed digitalisation of justice.

3.36. However, in view of the differences between the various Member States as regards the scope of judicial confidentiality in criminal proceedings, without harmonisation of national laws in this area, this excellent Commission proposal will certainly be compromised when it comes to cross-border registers.

3.37. The desired digitalisation of justice must offer the EU citizen new and substantial opportunities to settle disputes in a cross-border context. This is the only way to achieve the objective of expanding people's right of access to justice.

3.38. In this respect, the Commission notes, for example, the creation of (digital) means to trigger cross-border claims and the possibility of cross-border enforcement of the delivery of support payments for minors under parental responsibility.

3.39. However, in its Communication the Commission has overlooked a truly fundamental issue, namely the possibility of enforcing judgments in other Member States. Digitalisation offers the means to put this objective into practice, which is a long-standing demand of many legal professionals. It should be noted that in several areas (commercial law and family law) the situation in question is already provided for, so it needs to be extended to the areas not yet covered.

3.40. It has long been established that rulings are inevitably issued by the courts of each Member State and, in this area, the sovereignty of the Member States of the European Union must be regarded as inviolable.

3.41. However, the fact is that the final recipients of many rulings are goods, businesses or citizens located outside the country where the ruling was issued.

3.42. In such cases, the borders between the Member States are obstacles to the speedy implementation of justice, and intra-Community judicial cooperation should therefore take advantage of the opportunities offered by digitalisation so that judgments are enforced directly in the country where the property they concern is located.

3.43. The same applies to the mechanisms for alternative dispute resolution, which should also be allowed to take place online, including the activities of arbitration centres, magistrates and public mediation schemes.

3.44. As regards cooperation between national authorities and EU agencies and bodies in fighting cross-border crime, the Commission rightly identifies the need to strengthen capacities for digital cooperation.

3.45. However, despite the expectation that the Commission communication would set out the model to be adopted and the investments it would be willing to make to achieve this important objective, the result is nothing more than the vain hope that Eurojust, the EPPO, OLAF (European Anti-Fraud Office) and Europol 'agree on a common approach that ensures smooth and secure cooperation with Member States (...)'.
(...)

3.46. In such an important area, however, the Commission must set a time limit for establishing a model of cooperation and, rather than simply hoping that the institutions will arrange matters among themselves, it must commit to creating an instrument (possibly a directive) in order to impose here, too, a mechanism based on the potential of digitalisation.

3.47. The Commission's declaration of intent in this communication is welcome as regards financial support for Member States to develop appropriate IT systems and to draw up a strategy for the digitalisation of justice in the EU under the new Justice Programme and the Digital Europe programme.

3.48. It should be noted that the main obstacle to digitalisation is not the judicial authorities or citizens, but the lack of Member State resources to put in place the requisite measures to create and implement digital platforms and electronic systems in the area of justice.

3.49. Thus, and especially in the face of the current crisis — which has dealt a sudden shock to Member States' economies, affecting not only the short term but also the long term — funding solutions for these countries are urgently needed so that the digitalisation of justice can be achieved with the necessary harmony and uniformity. Only then can cross-border cooperation be achieved at European level.

3.50. It is also worth noting the concern expressed by the Commission that this important objective of using the digitalisation process to achieve an area of freedom, security and justice within the EU should harness the resources that will be made available under the Recovery and Resilience Facility.

3.51. It is also reassuring to note the Commission's view that the Technical Support Instrument, arising from a proposal for a Regulation of the European Parliament and of the Council, will support all Member States in implementing reforms in the justice sector, which will of course involve the investment referred to above in the digital transition.

3.52. As the Commission considers that the current, paper-based form of cross-border cooperation has many shortcomings that have a negative impact on the efficiency and costs of legal proceedings, it is essential that electronic transmission become the default medium for communication and exchanges of documents.

3.53. It would be feasible to set up a decentralised IT system to link national systems so that documents can be shared electronically more quickly and securely. To this end, data protection and privacy should be taken into account when transmitting documents and gathering evidence.

3.54. Making the use of electronic court proceedings universal, promoting paperless communication between courts and other bodies and services, and having procedural documents delivered by legal representatives in a variety of multimedia formats are essential measures for digitalising justice.

3.55. The Commission's attention should also be drawn to the importance of providing legal practitioners with the tools they need to implement the intended measures, through training in the digital sphere and specialist courses in the use of certain electronic applications and platforms, which will inevitably also entail costs.

3.56. However, an exception must be made for Member States subject to proceedings for infringing fundamental rights or for breaches of the rule of law:

a) they should not benefit from EU funding; and

b) not all information should be shared with them because their courts, their judicial system and their police authorities cannot be trusted anymore.

3.57. Current transformation efforts provide a solid basis for making greater use of technological capabilities through emerging technologies to build a digitally empowered and people-centred justice ecosystem.

3.58. The EESC has high hopes that the legislation will be amended to enable the much-anticipated transition of justice into the digital era, to include acceptance of electronic identification for the digital transmission of judicial documents and the admissibility of electronic or electronically transmitted documents as evidence in court proceedings.

Brussels, 27 April 2021.

The President
of the European Economic and Social Committee
Christa SCHWENG
