ROUNDTABLE DISCUSSION ON THE DIGITALISATION OF JUSTICE

BRUSSELS, 14 December 2020

Questions from the public and Answers from the panellists

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1) Why do we worry about evil consequences of AI, if court system across the EU hardly reached the technical level of the 90s (remote access of court documents)?

→ João Paulo M.P. Vasconcelos Raposo / Head of Cabinet of the President of the Supreme Court of Portugal

The question raises a good point but it also contains an implicit opinion that deserves to be questioned itself.

The statement is that the discussion of artificial intelligence in justice is displaced because justice is still in a "prehistoric" phase of digitalization across Europe.

In fact, those are two very different problems and should not be mixed in the same discussion. It is true that there are countries where paper is still the king but there are also others, in the EU and worldwide, that reached very far in digitization of their justice systems. It`s also true that clear efforts are being made everywhere and this process, at different speeds, is unstoppable.

On the other hand, there are already projects with artificial intelligence in concrete implementation or under development. The Supreme Court of Portugal has an ongoing

project of this type, whose essential purpose is to summarize judicial decisions and casefile contents in legal and everyday language. It`s ultimate goals are to provide to legal professionals tools to simplify their job and, at the same time, provide transparency and accessibility to the whole of the justice system.

Other developments are in progress across Europe and can be consulted in Commission's RoadMap on the matter of digitalization.

That said, answering the question directly, yes, we should be discussing artificial intelligence in justice. And yes, we should be harmonizing the development of digitization across Europe. And yes, both can be done at the same time. And finally, a last yes to the question that artificial intelligence as the potential to provide huge gains to justice and brings precisely the same level of risks to the judicial systems.

At this point, I would leave the question of managing gains and risks with a single idea: that AI should be used as a tool at the service of the human decision maker and not as an instrument of autonomous decision making.

A few more considerations to this general idea are in the response I gave at the round table.

→ Bart Willocx / President of the court of first instance in Antwerp, Belgium

Because AI is now already relevant and not regulated (although our proper resources as court are indeed very limited)

→ Panos Alexandris /General Secretary of Justice and Human Rights' Office / Ministry of Justice / Greece

Digitisation of justice and the public sector is the main goal both at European and national level (As I mentioned in my intervention, Greece, among other member states, is making fast steps to that direction). Without digitalisation even simple applications (statistics) are not at use let alone AI applications. The latest could be of some use (translation is a good example) but are not a core issue for law or the functioning of the judiciary (at least for me the time being). In addition, we have always to keep in mind that the research and the investments globally regarding AI are not focused in law but in

areas like medicine (fighting cancer) etc.

2) A lot of talk, but many government offices still work with paper - e.g. ask citizens to print e-signed documents in 2020! How can this be fixed?

→ João Paulo M.P. Vasconcelos Raposo / Head of Cabinet of the President of the Supreme Court of Portugal

This question, in some way, follows on from the previous one. It is true that there are wide variations in the technological standpoint between EU countries.

This, of course, brings us to the question of the sovereignty and competences of the European Union, justice being a particularly sensitive area in this matter.

What we have in Europe are just a set of common principles on the rule of law and, even these, with known problems and very insufficient harmonization. Aside from this, what we have are simply cooperation tools that, in fact, were not designed with the digitalisation framework embedded in them.

This is an area that should involve much stronger joint efforts. E-Codex is a big step in that direction. Much more needs to be done, even in terms of economic stimuli, to establish minimum technological standards and interoperability between national justice systems. This is essential to effective cooperation, to the rule of law across Europe and even to the correct functioning of the internal economic market.

→ Bart Willocx / President of the court of first instance in Antwerp, Belgium

Exchange of technical solutions and financial support

→ Panos Alexandris /General Secretary of Justice and Human Rights' Office / Ministry of Justice / Greece

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3) To address the problems of cross-border e-Justice, would it be useful to prescribe certain European standards for digital tools, also for the use of AI tools?

→ James MacGuill / First-Vice President of the CCBE:

The Commission has a significant role to play with regard to EU cross-border judicial cooperation and digital tools. As an example, the Commission could:

- *Highlight best practices*
- *Prepare EU wide minimum standards*
- *Ensure that in criminal cases the rights of the defence are ensured. In addition, ensure that there is access to a lawyer and guarantee that the protection of confidentiality between a client and their lawyer is ensured.*

In view of the above and in order to provide EU-wide legal certainty, it would be very useful to have EU-wide minimum standards to ensure that national e-justice systems are able to guarantee rights to a fair trial, and to take the following organisational measures:

- *Structured monitoring of e-justice systems provided by Member States, with service level objectives and standards, including complaint handling procedures, reliable and public registration of any outages of e-justice systems provided by Member States, and proper contingency mechanisms in case of interruption of such systems, and*
- *Development of a sound method to test national e-justice systems before they are used as live systems.*

These actions must of course be undertaken whilst fully respecting the specificities of national systems including the roles and responsibilities of the various actors involved, in particular Bars and Law Societies.

Moreover, the fostering of interoperability should not undermine any existing well-functioning national system. A number of Members States have already in place well developed e-justice systems, and in some countries, Bars are partially or fully involved in the daily operation of such systems. The advantages of such well proven systems should be taken into consideration.

→ João Paulo M.P. Vasconcelos Raposo / Head of Cabinet of the President of the Supreme Court of Portugal

Yes. I think that is an essential approach to this issue, as I`ve said in the previous answer. We`re, no doubt, moving in that direction and I believe that sooner than many think, but probably later than many desire, we`ll have, both in the legal and in the technological frameworks, very effective harmonization tools in e-justice across Europe, including AI.

The next step after that will be common European digital tools (platforms and procedures).

→ Bart Willocx / President of the court of first instance in Antwerp, Belgium

Yes, sure, to avoid competition

→ Panos Alexandris /General Secretary of Justice and Human Rights' Office / Ministry of Justice / Greece

The basic conception for the moment is "interoperability" of the existing national systems and not common standards (in order not to undermine national investments done at previous years). This is also how e-CODEX is conceived. Nevertheless and inevitably some common standards will be put in place and this could be done not only through legislation but through synergies, exchange of good practices and know how (the Commission also contributes to that by creating Reference Implementations Systems which are extremely useful).

4) Are there any studies being carried out on the impact of remote hearings on effective use of defence rights, effective participation, and vulnerable defendants?

→ James MacGuill / First-Vice President of the CCBE:

The Council of Bars and Law Societies of Europe (CCBE) would like to refer to the CCBE Guidance on the use of remote working tools by lawyers and remote court proceedings ***and the analyses of video conferencing tools (which is an annex to the CCBE Guidance).***

The CCBE papers refers in detail to two inter-related aspects to the use of remote conferencing tools (1) Consultations and meetings by lawyers with their clients and others by remote means, and (2) Remote participation in Court hearings.

There is a degree of commonality in the issues concerning each aspect; but each also raises particular issues.

With regard to the use of remote working tools by lawyers, the following aspects are addressed in the paper:

(a) Fundamental Rights:

(b) Professional Secrecy / Legal Professional Privilege:

(c) GDPR compliance:

Regarding "Remote Court Proceedings" the CCBE paper covers a number of concerns, including the question of delivering an Art 6 ECHR compliant fair trial. Of particular note is the requirement for there to be parallel secure private channels accessible by the respective clients and their legal teams1.

The CCBE paper also refers to other matters which were discussed in a CCBE Paper on the Use of Videoconferencing in Criminal and Civil Cases which were based on the CCBE position on the proposals for amending the regulations on service of documents and the taking of evidence in civil and commercial matters (19/10/2018). ***The remarks made in that paper, are also relevant with regard to the question raised (i.e. question 4 "Are there any studies being carried out on the impact of remote hearings on effective use of defence rights, effective participation, and vulnerable defendants?") .***

[1] Sakhnovskiy v. Russia (Application no. 21272/03); and Marcello Viola v. Italy (Application no. 45106/04).

→ João Paulo M.P. Vasconcelos Raposo / Head of Cabinet of the President of the Supreme Court of Portugal

No, that I know of.

No, in the sense of "systematic and scientific studies" to this matter. Opinions, discussions, conferences that take the issue of remote hearing in consideration are very common, at least in my country, prior to the pandemic context (we should always remember ourselves that, in judicial systems, the remote hearing of witnesses is something absolutely common for years and that the pandemic has only increased the level of remote participation).

The opinions being given before pandemic on this topic were mainly focused on problems of trial itself rather than defence rights. The remote hearing possibility, when used upon parts request, is presented much more as an advantage in access to justice for any participant than a risk to the fairness of the system.

When it becomes the more common way of hearing, as it has with the pandemic, those risks should be considered and debated on a different perspective. But, as I said, they haven`t been yet, that I know of.

Giving my opinion to this debate, I`d say that, in the end, it`s the judge`s job to assure the fairness of the process. Even if this can seem a simplistic approach, it`s a direct opinion and I`m not sure that much more elaborated ones are required.

The judge must not allow any kind of remote hearing if defence rights are at stake. It`s just a direct consequence of due process and, in any jurisdiction, the judge will have the legal tools to accept or to deny the remote hearing at his/her disposal.

→ Bart Willocx / President of the court of first instance in Antwerp, Belgium

Not as far as I know.

→ General Secretary of Justice and Human Rights' Office / Ministry of Justice / Greece

We are not aware of studies like the mentioned but we agree that there should be.

5) Would it be useful to oblige Member States to respect a principle of "European interoperability by design and by default" for creation and use of e-Justice tools?

→ Ádám Tóth / Vice President of the CNUE

From the notarial perspective, the seamless and secure cross-border circulation of authentic instruments/authentic acts is of utmost importance. Transnational cases and transactions are more and more frequent in the notarial practice. Still, technical and legal obstacles can seriously hinder the effective exchange and use of the notarial acts in Member States different from the country of origin. One key element is the use of fully digital acts signed by interoperable e-signatures. Unfortunately, digital signatures' interoperability is a serious issue and one of the main obstacles to the circulation of notarial instruments within the EU. We firmly think that the easily verifiable but fully secure electronic signature could significantly accelerate this process. At the same time, in the digital space, trust and legal security have to enjoy the same level of protection as in the physical world.

Nowadays, the Apostille provides a high level of protection in cross-border context; however its paper-based form became quite obsolete in the 21st century; while the digital alternative, the eApostille is already existing, the broad use of it needs to be fostered by the EU Institutions.

In the above-presented context, the application of the principle of European interoperability by design and by default is necessary to effectively achieve the desired aims that can be beneficial to the citizens and businesses all over the European Union.

→ James MacGuill / First-Vice President of the CCBE:

The CCBE believes that the e-CODEX system is in this respect the appropriate mechanism ensuring interoperability of national e-justice systems and enabling cross-border electronic communications and transmission of information between judicial authorities. The CCBE therefore supports the adoption of a legal instrument establishing e-CODEX as the common mechanism for standardised secure exchange of cross-border information in judicial proceedings between EU Member States.

→ João Paulo M.P. Vasconcelos Raposo / Head of Cabinet of the President of the Supreme

Court of Portugal

No doubt about that. I refer to what I said before in answering question n.3. This interoperability will occur and it`ll be a fundamental milestone in the inevitable harmonization of judicial systems.

First, it`ll probably be a mandatory interoperability by default. Secondly, by design. And, in the future (that no one can predict when it`ll occur, but it believe it will), a unified European digital system.

In that moment, no interoperability will be required, being the national systems just parts of one (or several) European legal digital platform(s).

→ Bart Willocx / President of the court of first instance in Antwerp, Belgium

At least as an advice and information.

→ Panos Alexandris /General Secretary of Justice and Human Rights' Office / Ministry of Justice / Greece

As mentioned above interoperability is the basic principle and the use of e-CODEX is putting this principle in praxis.