

OPINION OF THE SUPREME COURT OF CASSATION OF REPUBLIC OF BULGARIA ON THE NEED FOR LEGISLATIVE AMENDMENTS TO THE E-JUSTICE PROVISIONS OF THE JUDICIARY SYSTEM ACT AND THE PROCEDURAL CODES

The introduction and implementation of e-Justice represents a significant challenge which requires adequate legislative solutions, technical security and sustained efforts in the coming years, in the context of the ongoing judicial reform with due regard to the fundamental principles of civil and criminal justice and respect for the fundamental rights of the parties in civil and criminal proceedings.

1. Violation of fundamental principles of civil and criminal procedures

Violation of the principle of audi alteram partem laid down in Article 8(3) of the Code of Civil Procedure and Article 12(1) of the Code of Criminal Procedure, namely the duty of the court to ensure possibilities for the parties to acquaint themselves with the opposing party's claims and arguments, the subject matter of the case and its progress, and to comment on them.

Violation of the principle of equality of parties in the proceedings laid down in Article 9 of the Code of Civil Procedure and Article 12(2) of the Code of Criminal Procedure concerning the equal opportunity of the parties to exercise the rights conferred on them, the principle of the equality of citizens before the law in criminal proceedings, as provided for in Article 11 of the Code of Criminal Procedure.

Violation of the principles of the Charter of Fundamental Rights of the European Union (EU) as conferred by Article 41(1)(b), Article 42 and Article 47 of the Charter, namely the right to good administration, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy (Article 41(1)(b)), the right of every EU citizen and any natural or legal person residing or having its registered office in a Member State to have access to documents of the EU institutions, bodies, offices and agencies, regardless of their medium (Article 42), the right of everyone whose rights and freedoms guaranteed by the EU law are violated to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47 (Article 47). The provisions of Article 360h(4) and (6) of the Judiciary System Act and Article 102c(4) of the Code of Civil Procedure are insufficient, and the provision in the third sentence of Article 102h(3) of the Code of Civil Procedure creates an unjustified financial burden on the relevant party.

2. Violation of the rights of the parties in the proceedings

The lack of technical electronic means or access to the Internet, or insufficient knowledge of and experience in working in an electronic environment which is relevant for some of the parties, mainly natural persons, may act as a deterrent to seeking protection of their infringed rights, or result in a direct violation of the fundamental principles of audi alteram partem and equality of the parties. The aforementioned consequences cannot be avoided by the courts' duty laid down in Article 360h(4) of the Judiciary System Act to provide persons entitled to access case files with remote, continuous and free electronic access to electronic case files, as well as technologies and means of access to electronic case files at the premises where their administrations are located.

If the aim of the legislator and the requirements of Articles 360a, 360h of the Judiciary System Act, Articles 102a and 102f of the Code of Civil Procedure, Articles

33(7) and (8), 310(1) and 311(2) of the Code of Criminal Procedure for the creation of electronic case files and for the performance of certifying acts and procedural steps and issuance of documents in electronic form is to exclude the existence of paper case files, including the existence of court instruments in paper form, this would infringe some parties' right of access to the case files, given the lack of technical equipment, knowledge, experience and information of some parties, most often natural persons. Thus, limiting the access to case files only to electronic files, if paper case files are not created, currently does not constitute a legitimate legislative objective.

3. Making the work of courts more difficult

The Judiciary System Act provides for the issuance of acts by judicial authorities in electronic form (Article 360a) and the initiation of electronic case files (Article 360g). The interpretation of the Judiciary System Act provisions among some judges gives the impression of the legislative will for the courts to bring only electronic cases in the future while removing the hard copies altogether. If the legislative intention is to initiate only electronic cases and to stop maintaining a paper case file, this legislative solution is currently inappropriate.

Courts' work is hampered by the following non-exhaustive facts and circumstances:

- insufficient technical equipment in the courts given the lack of the necessary computer and scanning devices of new generation;
- non-functioning Single e-Justice Portal (SJP), which cannot ensure that procedural steps and certifying acts are carried out in electronic form;
- uncomfortable Unified Information System for Courts (UISC) which is not adapted to the specific requirements for handling certain types of cases and lawsuits;
- impossibility to enter the pre-trial proceedings in criminal cases in electronic files in order to make them accessible to the parties;
- lack of connection between the SJP and the UISC;
- lack of electronic data exchange between courts at instance level between the separate instances – there is no complete electronic connection allowing a case file to be accepted electronically by another court without further action (including duplicate scanning of some of the documents in each instance).

4. We believe that currently paper-based case files are needed and that it is impossible for procedural steps to be carried out only electronically and in electronic form

The legislative framework provides for, and cannot exclude, the submission of documents by the parties to the court in paper form. The rules for the creation of electronic images in a form and in a manner allowing submissions and acts submitted to the judicial authorities to be reproduced in paper form, as well as all documents and information in paper form, are laid down in Article 360g of the Judiciary System Act.

5. Guidelines for amending and supplementing the legislative framework relevant to e-Justice and civil justice

The above non-exhaustive list of considerations and arguments lead to the conclusion that legislative amendments and additions to the legal framework relevant to e-Justice, civil and criminal justice should be undertaken and that the necessary technical and information provision should be carried out in compliance with the fundamental

principles of civil and criminal procedure and respect for the rights of the parties to the proceedings.

1) Postponement of the effects of the provisions of Chapter 18a ‘Certifying acts and procedural steps’ of the Judiciary System Act and the amendments and supplements to the Code of Civil Procedure and the Code of Criminal Procedure adopted by the Act Amending and Supplementing the Code of Civil Procedure, State Gazette No 110/29.12.2020.

2) Suspension of the operation of the UISC until full implementation of the SJP, connecting the SJP with the UISC or other information system having the features of a comprehensive case management system for the needs of the courts and ensuring full information connectivity and electronic exchange of data between courts.

As regards criminal cases, a connection with the pre-trial authorities – police, investigative authorities and the prosecutor’s office – and entrance by such authorities of the full pre-trial case files, should also be ensured.

3) Alternatives for creating and maintaining court case files in paper form also with complete and accurate electronic images in the information and case management systems used by courts.

4) Precise defining of the types of cases for which only electronic case files can be maintained at this stage. In that regard, it is necessary to resolve the issue of the gradual creation of case files only in electronic form, the appropriateness of converting a case file in paper form into an electronic case file, or an electronic case file only should be maintained if the case has been initiated in that form by the first instance court. An assessment must be made as to which categories of cases, which types of proceedings, and whether for all instance proceedings maintenance of electronic case files only is appropriate. It is necessary to bear in mind that the creation of an electronic case file does not exclude the maintenance of a case file on paper, both of which would provide the parties with easier access to justice, information and performance of procedural steps.

5) Irrespective of the maintenance of case files in paper form, ensuring and enabling electronic communication between the court and the parties to the court proceedings.

6) Amendments and supplements to the provisions concerning the service of notices and summons, lifting the mandatory obligation to summon and serve communications on certain parties only electronically.

7) Refining the provisions of the Judiciary System Act and the procedural laws concerning the form of judicial instruments, and adoption of additional provisions by removing the existing contradiction as to the form of a judicial instrument in the separate procedural laws and providing for an alternative for the creation of both written rulings in paper form with handwritten signatures with the possibility of retaining an electronic image of the paper original, and in electronic form. It should be borne in mind that the system must be linked to the individual institutions (including police, investigating authorities and public prosecutors), enforcement officers, registration judges, state and municipal administrations, etc. The provisions relevant to the form of issuing a writ of execution and a protective order should be clarified and clearly defined. A comparison of the provisions of Article 102a and Article 235(4) of the Code of Civil Procedure allows for a different interpretation of the validity of court instruments issued in different forms.

As a matter of urgency, the provisions of Article 33(7) and (8), Article 310(1) and Article 311(2) of the Code of Criminal Procedure must be amended by removing the requirement to draw up court instruments and transcripts of court hearings in the Unified Information System for Courts, but providing that, once they have been drawn up in paper form and signed with handwritten signatures in ink by the relevant persons provided for by

law, they will be entered into the Unified Information System for Courts in accordance with the procedure laid down in Article 360g of the Judiciary System Act.

Producing them directly in the UISC poses a number of risks of prior knowledge of their content before being made public to the parties or in the court's time book, and the system does not currently guarantee their stability. Moreover, the statutory obligation under Article 33(7), Article 310(1) and Article 311(2) of the Code of Criminal Procedure does not in any way help to ease the work of the judicial panel, but, on the contrary, makes the work of judges and staff more difficult by increasing the time spent working with the UISC.

The written form of court instruments of major importance for criminal proceedings (convictions, decisions and orders) should be maintained in the future, and such instruments must be entered in the UISC after their issuance in accordance with the procedure laid down by law: with digital signature of the judge rapporteur or other member of the judicial panel for clerical purposes only; the unnecessary signing of the first-instance verdict/conviction by the jury with digital signatures should be removed.

Article 33(8) of the Code of Criminal Procedure should be repealed because the modern criminal procedural law does not provide for a court instrument to be signed by the parties to the proceeding. The court transcript recording the final agreement between the public prosecutor and the defendant's defence counsel can be entered into the UISC as an electronic document after scanning the transcript in a PDF-file.

8) The provisions of the Judiciary System Act and of the procedural laws, in particular the part concerning the possibility of collecting evidence and participating in the proceedings via videoconferencing, should be clarified and detailed.

9) The terminology in Articles 360a to 360u of the Judiciary System Act should be clarified with a view to removing contradictions and avoiding confusion among users of information systems. To this end, it is desirable to involve relevant experts with knowledge in this field.

When drafting the provisions amending and supplementing the Judiciary System Act, the Code of Civil Procedure and the Code of Criminal Procedure, it should be borne in mind that the introduction of e-Justice in terms of improving digitalisation in the judiciary system must not be to the detriment of the fundamental principles of civil and criminal justice and of the rights of the parties to the proceedings, nor practically lead to their infringement.

There is a need to develop a comprehensive e-Justice concept with a clear vision of the final outcome and a series of steps reconsidered and arranged in logical order, while considering the creation of a multitude of necessary electronic registers in which information from actions carried out by the court and issued court instruments is automatically transmitted – a register of succession, including waivers of succession, a register of European certificates of succession, a register of the civil status of persons; a register of permits issued for the disposal of property of minors, incapacitated persons, etc. The creation of e-Justice is not an end in itself, but part of the concept of the overall e-government system aimed at improving the efficiency of the judiciary system and facilitating access to justice.

With regard to the need to clarify and supplement the provisions of the Judiciary System Act, the Code of Civil Procedure and the Code of Criminal Procedure, a working group of the Supreme Court of Cassation has prepared detailed proposals for legislative amendments, which have been brought to the attention of the working group set up in the Ministry of Justice (with the participation of representatives of the Supreme Judicial Council and other judicial authorities).