



Proposal of the European Commission 2021/0394 (COD) 1 December 2021 - “e-Justice Regulation”

The Council of the Notariats of the European Union (CNUE) is the European umbrella organisation representing 22 national Notary Chambers and more than 45,000 notaries.

The CNUE is following with great interest the preparative work and the publication on 1 December 2021 **of the European Commission 2021/0394 (COD) proposal for an “e-Justice Regulation” on the digitalisation of cross-border judicial cooperation.**

The CNUE welcomes this initiative and is willing to take part as an active stakeholder in the negotiations and in the implementation of the regulation, ensuring that the expertise and the special features of the notarial function are duly taken into account. The CNUE and its Member Notariats already have considerable expertise in electronic communication, both on a national level where electronic communication is commonplace but also in a cross-border context through various CNUE IT projects. It is time to enable electronic communication also across borders in Europe.

The Covid-19 pandemic has shown that the digitalisation of judicial procedures might render judicial systems more resilient to some extent and that the removal of barriers to communication might have a positive impact on the day-to-day life of citizens and businesses. The decentralised IT system has the potential to make cross-border communication of notaries with other competent authorities as well as natural and legal person easier and faster.

Both citizens and public administration/justice authorities, however, will only trust IT systems developed at the highest technical level by a public entity and which have proven to be absolutely secure. Barriers outside the field of law are harder to find than barriers, which are based on law.

The digitalisation of cross-border procedures must not lead to a reduction in legal certainty. Therefore, all new measures should be designed to guarantee the highest possible level of legal certainty for all parties involved. For this reason, we welcome the choice made by the legislator in favour of a voluntary digital channel for natural and legal persons. We also appreciate that the purpose of the e-Justice framework is to set up a mere communication channel and that it shall not affect the national provisions in place as to the form and the security standards for documents. We also understand that the competencies conferred to national authorities by EU law and by national law are preserved in the context of the e-Justice Regulation. This is of utmost importance for legal certainty.

Finally, it is important to see technology as an additional service tool. The aim is to implement lasting legal solutions that take all interests into account as far as possible, and thus ultimately create legal certainty. Speeding up and simplification are key words in the context of digitalisation. Although improving processes is certainly a goal, speeding them up must not be the top priority. The focus should remain on individual advice, protection against overreaching and the drawing up of contracts that meet the individual needs of the client. Technology should not be an end in itself; the choice should be based on the respective project requirements and not on current trends. For



instance, when it comes to vulnerable people and people with few digital skills, there should always be a paper-based alternative.

After a first analysis of the proposal, we would like to submit the following remarks:

1. Clarification of the scope

For the reason of legal certainty, the scope of application of the proposed Regulation should be clarified. We understand that it shall **apply to all communications and procedures under the Union legal acts in Annex I and Annex II**. However, Art. 19 et seq. may be construed as meaning that the application of the e-Justice framework needs to be specifically provided for regarding a specific procedure either in the e-Justice Regulation itself or in the respective Union legal act. The Commission's mandate to establish technical requirements through implementing acts in Art. 12 of the e-Justice Regulation cannot and should not include establishing the functional use cases for electronic communication. The use cases should therefore be set unambiguously by the proposed Regulation.

2. The proposed Regulation must not affect competences of competent authorities or form requirements under Union or national law

The Notaries of Europe welcome the fact that the proposal respects the existing acquis and the main objective of the proposed Regulation, which is to establish electronic communication as the standard in cross-border judicial cooperation proceedings.

a) *The e-Justice Regulation does not affect any competences*

The e-Justice Regulation must not change the competences of any of the competent authorities, in particular the role of notaries as gatekeepers under national law. As this is in line with the purpose of the proposal to set up a mere electronic communication channel, inserting a corresponding clarification in this regard should be uncontroversial. We propose a clarification similar to Art. 13c(1) of the Digitalisation Directive that deals with essentially the same matter in the context of the digitalisation of transactions and procedures in company law:

“This Regulation shall be without prejudice to national laws that, in accordance with Member States’ legal systems and legal traditions, designate any authority or person or body mandated under national law to deal with any aspect of the verification and filing of applications, documents and information.”

b) *The e-Justice Regulation does not affect form requirements*

According to Art. 10 of the e-Justice Regulation, documents transmitted as part of electronic communication shall not be denied legal effect *“solely on the ground that they are in electronic*

form". It is important that this provision can be clearly understood to merely equate the simple electronic form with the written / paper form and nothing more. This means that if national law requires a higher form than the simple paper / written form, such requirement must not be affected by Art. 10 of the e-Justice Regulation. If, e.g., certain courts require the submission of documents in an electronic certified form and/or with an apostille, simply transmitting a scan cannot be sufficient. Also, if a Member State does not issue electronic Apostilles and thus refuses to accept an electronic document without an Apostille, this refusal of an electronic document would be caused by the lack of an Apostille and not by the electronic form of the document. This must be permissible.

The text of the proposed Regulation must therefore clearly state that the e-Justice framework does not affect Union law or national law requirements relating to form. Recital 20 seems not entirely clear in this regard as it too narrowly refers to "*documents, which may constitute evidence in accordance with national law*". This may be read to only pertain to the taking of evidence procedures in a strictly judicial context.

We propose a clarification similar to Art. 13c(3) of the Digitalisation Directive, which, again, deals essentially with this same issue in the context of company law:

"The requirements under applicable national law concerning the authenticity, accuracy, reliability, trustworthiness and the appropriate legal form of documents or information shall remain unaffected by this Regulation."

3. Possibility of representation of natural persons or legal entities

Articles 4 and 5 of the e-Justice Regulation establish the optional digital communication channel between natural and legal persons and competent authorities and the modalities of communication through the European electronic access point.

We propose to add the possibility of representation of natural persons or legal entities by a legal professional, e.g. a notary, in order to prevent that such representation is only possible via paper procedures. Effectiveness and speed of judicial procedures would thus be improved while ensuring that the natural or legal person who seeks professional legal advice is not disadvantaged in comparison to persons who do not seek legal advice. It should therefore be clarified that representatives of clients could communicate on behalf of the client by electronic means.

4. Videoconferencing only to be offered in judicial proceedings

According to Art. 7(1) of the e-Justice Regulation, competent authorities shall offer to the parties the use of videoconferencing or other distance communication technology in proceedings under the legal acts listed in Annex I or upon request of a party, inter alia, "*in any other civil and commercial matters where one of the parties is present in another Member State*".

The scope of this obligation is very broad and could include all civil law matters, including notarial procedures. However, outside of the scope of the Digitalisation Directive, it is up to the Member States where to offer notarial online authentication procedures and videoconferencing systems.



While we assume that the purpose of the e-Justice Regulation is to only include judicial procedures¹, without a clarification there is the risk that the e-Justice Regulation could circumvent the Member States' choices as to where to offer online notarization procedures. If there would be a need for further online notarization procedures, this decision should not be made implicitly, but deliberately and explicitly, analogous to the Digitalisation Directive.

5. The implementation process should take notarial needs into account

As far as the proposed e-Justice framework will affect notarial procedures, all relevant elements of the decentralized IT system need to fit notarial needs, in particular the following components of the decentralized IT system: (i) the European electronic access point hosted on the European e-Justice Portal; (ii) the reference implementation software; and (iii) the e-CODEX based access points.

Therefore, **notaries should be consulted in the implementation process** under Art. 12 of the e-Justice Regulation at a very early stage in the process.

The Notaries of Europe welcome the fact that within the e-Justice framework e-CODEX could ensure the coexistence and the interoperability with a notarial system. The CNUE will further explore this interoperability option – the coexistence of the existing systems that are/were developed at national and professional level with the new system envisaged at centralised level by the EU – especially with a view to its practical and technical implications. The CNUE and its Member Notariats will contribute their expertise as an active stakeholder to make the e-Justice framework a success.

6. Remarks on the e-CODEX system/portal

Finally, we would like to share the following general remarks concerning the system/portal to be applied and the communication:

- The accessibility of the IT system is important: with simple use of language and without thresholds, while maintaining alternatives for (digital) access.“ An alternative for digital is not always on paper, but could also be a different level of access.
- GDPR and information security requirements are essential. Secure exchange of information is of utmost interest. Requirements should be elaborated for the use of cloud, processing of personal data in the cloud, nonuse of non-European cloud, security levels for access, encryption mechanisms, just to name a few.
- The opportunity to elaborate requirements for the use of standards for the readability, reliability and authenticity of the documents and the exchange of structured data, as well as of requirements for the retention periods and error handling of transactions to ensure

¹ For instance, see Art. 7(1) (“hearing[s]”) and Art. 7 (1)(b) of the e-Justice Regulation, which requires that “the other party or parties to the proceedings” are given the possibility to submit an opinion on the use of videoconferencing technology. Such requirement should only be necessary in adversarial court proceedings, i.e. judicial procedures in a narrow sense.



security and data protection and for the easy accessible use of hardware and software should be considered.

- Interoperability should ensure that the national IT systems in the Member States remain operable and no complex new developments of these systems are needed.

7. Use of qualified electronic signatures and seals

Art. 9 of the e-Justice Regulation regulates the use of electronic signatures and electronic seals. According to Art. 9(3), advanced electronic seals, advanced electronic signatures, qualified electronic seals or qualified electronic signatures may be used instead of a seal or a handwritten signature for documents transmitted in the context of electronic communications pursuant to Art. 5 of the e-Justice Regulation. However, only the qualified electronic signature, in contrast to the electronic signature, is equivalent to the written form. Whenever a handwritten signature is required by law, this can only be replaced by a qualified electronic signature. The EU standard must not fall short of this principle by also allowing advanced electronic signatures for cross-border electronic legal transactions. The CNUE is strongly against departing from the existing security standards. As the signatures must comply with the standard set out in the eIDAS Regulation, it is also ensured that they can be read and verified in all Member States.

*Council of the Notariats of the European Union (CNUE)
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