



Council of the European Union
General Secretariat

Interinstitutional files:
2018/0203(COD)
2018/0204(COD)

Brussels, 05 October 2018

WK 11710/2018 INIT

LIMITE

JAI
JUSTCIV
EJUSTICE
COMER
CODEC

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Civil Law Matters (Service of documents/Taking of evidence)
Subject:	Follow-up to the meeting of the Working Party on Civil Law Matters on 4 October 2018: Commission presentations

As a follow-up to the above mentioned meeting, delegations will find attached the presentations made by the Commission of the proposal for a Regulation amending Regulation (EC) No 1393/2007 on the Service of Documents, the proposal for a Regulation amending Council Regulation (EC) No 1206/2001 on the Taking of Evidence and their accompanying impact assessments.



Council Working Party (Civil Law)
4 October 2018

**Digitalisation of exchanges
between authorities and
courts in the service of
documents and taking of
evidence proposals**

COM(2018)378 final of 31 May 2018

Mandatory electronic communication

- Mandatory communication between authorities and courts through electronic channels is a key element of both proposals.
- Only well-defined narrow exceptions: Where the system is interrupted or not suitable (e.g. transmission of an DNA sample as evidence), other channels can still be used.
- Electronic transmission should be conducted via a decentralised IT system composed of national IT systems interconnected by a communication infrastructure enabling the secure and reliable cross-border exchange of information between the national IT systems (e.g. an e-Delivery solution – e-CODEX.)

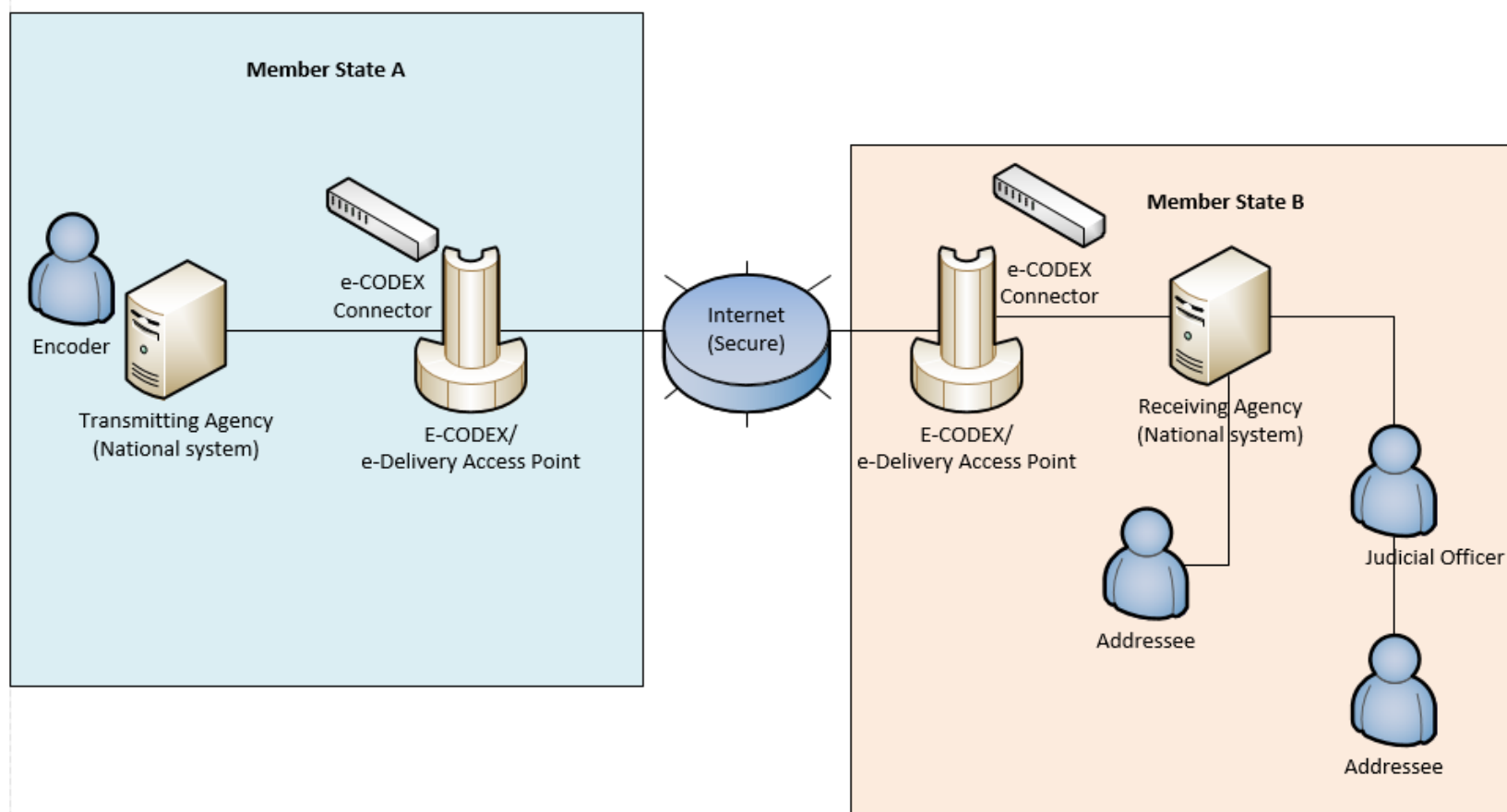
System of transmission of documents (1)

- In line with the approach of previous legislation (see the BRIS Directive), the COM proposal on SoD/ToE is technology and product agnostic and only defines a broad decentralized electronic communication model.
- e-CODEX would be an example of a suitable software solution for SoD/ToE. e-CODEX uses several of the horizontal Digital Building Blocks developed in the context of the Digital Single Market, and has already piloted a number of legal instruments in the justice field. It would be useful to clarify its use in the course of the legislative process.

System of transmission of documents (2)

- Output of a former large scale project led by a consortium composed of 21 Member States and COM, which resulted in a software product and technical documentation.
- Provides reliable, secure and standardized electronic communication across borders.
- Uses the e-Delivery building block maintained within CEF (Connecting Europe Facility) which is generally promoted by the COM in various pan-European IT systems – e.g. BRIS, pilot projects on European Payment Order, Small Claims (389 deployments as of Q2 2018 in different policy areas).
- Complies with the standards of the eIDAS Regulation relating to the ERDS trust service (electronic registered delivery service).

Service of documents – sample concept



Sample implementation roadmap

- Certain technical work will need to take place at central level - defining interoperable schemas (XML schemas), the workflows relevant to both Regulations and defining security/data protection rules. This could be in the remit of Commission expert group.
- Each Member State would need to:
 - Deploy a national e-Delivery Access Point (or re-use an existing deployment)
 - Deploy a national e-CODEX connector (or re-use an existing deployment)
 - Establish/modify a user interface for use by the transmitting/receiving authorities
 - Interlink the national system with the local e-CODEX deployment
 - Carry out testing, configuration and related activities



Sustainability

- The reference **e-Delivery Access Point** component is one of the Digital Building Blocks and is already maintained by DG CONNECT / DG DIGIT.
- The **e-CODEX Connector** component is maintained by a group of Member States with EU financing. As of 2022 e-CODEX may be transferred to euLISA.

Financing

- EU co-financing with respect to the deployment of national e-Delivery/e-CODEX infrastructure and modifications to national systems used by the transmitting/receiving authorities will likely be available under the next MFF.
- At the moment a similar funding opportunity is available under the Connecting Europe Facility (CEF) programme.



Council Working Party (Civil Law)

4 October 2018

Impact Assessments accompanying the proposals on service of documents and taking of evidence

SWD/2018/285 final

SWD/2018/287 final

Main shortcomings of the existing Regulation

- The traditional channel via **transmitting and receiving agencies** is **underperforming**.
- **Modern channels** of communications between authorities and courts are in practice **not used**, partly due to old habits, partly due to legal obstacles, partly due to lack of interoperability of the national IT systems.
- **Service by post** is a popular, quick and relatively cheap way of delivering the document to the addressee, but it is **not very reliable and has a high failure rate**
- **Direct service** provides a reliable solution but **access to it is limited** (not available in all Member States)
- **Direct taking of evidence and videoconferencing** is **used only to a limited extent**.

Horizontal Issues

- **Several issues** for discussion for the **2 initiatives** are actually **identical** or at least very similar
- the functioning of both Regulations is satisfactory but there is **significant room for improvement** in ways which are very similar;
- the two initiatives are **closely intertwined to the overall Commission priority of digitalization** and e-Justice and follows the suit of parallel work in the field of criminal justice (e-Evidence) in order to create a **level playing field** in the areas of criminal and civil justice alike.

Options analysed in the IA

- **Limited/non-binding** intervention only
- **Targeted** intervention
- **Ambitious comprehensive** intervention (e.g. making the application of the ToE Regulation mandatory, excluding any additional methods existing under national laws)

Preferred option:

Targeted intervention concerning the most important issues.

The **precise nature** of the intervention was **fine-tuned** for each subject matter to be regulated (e.g. **mandatory** electronic communications between authorities, electronic service on parties as an **option** under strict conditions).

What we propose to do?

1. improve the **efficiency of the classical channels** between transmitting and receiving agencies through electronic communication;
2. **make alternative modern methods** of direct taking of evidence **more attractive** (videoconferencing)
3. make **postal service more reliable**

At the same time we are trying to solve some other problems such as rights of defence.

System of transmission of documents: Benefits

- **Potential savings in the context of service of documents and taking of evidence:** Approx. 30 to 78 million EUR per year across the EU due to reduction of expenses related to paper, envelopes, printer cartridges, toner or ink, shelves, archiving materials and space.

System of transmission of documents: Costs (1)

- The one-off installation costs of e-CODEX are estimated to be around 80-100 person-days. They are related to the **deployment of the national connector and gateway at a central level** which are the components of the e-CODEX enabling the interactions between the relevant national IT systems of the various Member States. Member States must ensure that all their national transmitting and receiving agencies at local level are in turn connected to the national gateway.
- One-off costs related to **modifying systems used by the transmitting/receiving authorities** – this relates to the development/modifications necessary to link the systems used by transmitting and receiving agencies to the national e-CODEX installation. The average costs in the case of a central, web-based solution are estimated to be in the 20.000 – 50.000 EUR range.

System of transmission of documents: Costs (2)

- **Additional hardware acquisition costs are not included** in the calculation. It is assumed that all agencies and bodies designated under the Regulations (courts, bailiffs, governmental authorities) are **equipped with a PC with internet connection** which is all that is required for access to the decentralised IT system.
- Costs would be **lower** for Member States which **already have the necessary e-Delivery/e-CODEX infrastructure in place** and plan to re-use it.

Videoconferencing: Benefits

- More videoconferencing will lead to savings. The cost of a cross-border hearing of a party or of a witness carried out via videoconferencing is typically EUR 100, against between EUR 400 and EUR 800 for a physical hearing.

Videoconferencing: Costs

- For the acquisition, implementation, and operation of professional, high-end VC equipment, costs are estimated to be in the range of EUR 36.000 annually. It should, however, be noted that a certain number of the 6000 courts in the EU has already VC equipment, and that it is not required that all courts have one.
- EU co-funding opportunities are available under the Justice Programme and the Connecting Europe Facility (CEF).

SoD: Benefits

The changes will:

- reduce costs and delays (e.g. through introducing an electronic communication system and encouraging the use of e-service of documents),
- reduce negative environmental impacts and
- modernise public (including judicial) administrations, achieve cross-border interoperability and facilitate easier interaction with citizens in line with Digital Single Market Strategy and e-Government Strategy.

Currently there are many problems with receiving documents cross-border as return slips vary and often are not correctly filled out. It is estimated that with a uniform return slip more than EUR 2.2 million could be saved every year.

Stakeholder views

1. Digitalisation

Support for digitalisation was **very strong**: There was practically a consensus that electronic communication should become the default between authorities/agencies involved in cross-border judicial cooperation in civil matters, with 61 % of respondents agreeing and 39 % tending to agree.

65 % of respondents to the public consultation either strongly supported or tended to **support using modern means** of taking evidence such as videoconferencing (instead of being summoned in person to a foreign court).

Stakeholder views

2. Taking of Evidence

65 % of respondents to the public consultation either strongly supported or tended to **support using modern means of taking evidence** such as videoconferencing (instead of being summoned in person to a foreign court).

Furthermore, there was also **strong support for direct taking of evidence**: 31 % strongly agreed and 33 % tended to agree.

Stakeholder views (3):

3. Service of Documents

61% of the respondents agreed that electronic means should become the **default standard communication** between the authorities/agencies involved in cross-border judicial cooperation in civil matters and 39% of them tend to agree.

As regards **direct service**, **35 %** of the respondents taking a position **strongly agreed** with the idea that competent persons as bailiffs or process servers could be directly requested from abroad in all Member States to perform service of documents in their territory, **while 46 % tended to agree.**

43 % of the respondents strongly agreed with the idea of ensuring a **uniform level of protection for defendants** from another Member State who did not appear before court and 47 % tended to agree.



Council Working Party (Civil Law)

4 October 2018

**Proposal for a Regulation 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)**

COM(2018)379 final of 31 May 2018

Why a proposal to legislate?

- The proposal aims to improve the smooth functioning of the area of freedom, security and justice, and of the internal market, by increasing the efficiency and speed of the cross-border service of documents;
- it will achieve this by adapting Regulation (EC) No 1393/2007 to technical developments, exploiting the advantages of electronic service digitalisation and increasing the efficiency of existing methods of service.
- the initiative increases legal certainty and thereby helps to avoid delays and undue costs for citizens, businesses and public administrations and addresses shortcomings in the protection of parties' procedural rights.

Current situation

- Regulation (EC) No 1393/2007 has improved the efficiency of legal proceedings — both as compared with the Hague Convention and over time between 2007 and 2018.
- The Commission's Report on the practical operation of the Regulation concluded that the Regulation has been applied satisfactorily by Member State authorities in general.
- However, full advantage is not being taken of the potential of recent technological developments. Although the language of the Regulation was drafted in a 'technology-neutral' way, modern channels of communication are in practice not used.

Commission proposal: Preparation

- 2013: Commission Report on the practical operation of the Regulation on service of documents (COM(2013) 858 final)
- 2017: Commission undertook a regulatory fitness (REFIT) evaluation
- December 2017 - March 2018: public consultation
- 2017 – 2018: Dedicated meetings of the European Judicial Network; meetings with Member States' experts; workshop for selected stakeholders
- 31 May 2018: Adoption of the proposal

Article 1 - Scope

- New Article 1 clarifies that the Regulation applies in all situations where the domicile of the addressee is in another Member State (rather than where the document has to be transmitted to another Member State)
- This new wording excludes practices of qualifying service as 'domestic' and of using alternative or fictitious methods of service under national law although the addressee's address is abroad

Article 3c – Assistance

- This new provision provides 3 options of MS' assistance in locating the whereabouts of a recipient in another Member State to tackle a problem that is particularly acute in cross-border situations:
 1. Judicial assistance through authorities designated by the Member States
 2. Providing access to public domicile registers through the e-justice Portal
 3. or providing detailed information via the e-justice Portal on available tools for locating persons on their territory

Article 7a Representative

- Article 7a allows Member States to require the appointment of a representative to serve documents on them in the Member State of the proceedings
- This option would only be available after that party has been duly served with the document instituting the proceedings.
- The Regulation provides an **alternative** to avoid the costs related to such a representative if the party concerned consents to **electronic service of documents**.

Article 8 - Refusal

- Improves addressee's **right to refuse** to accept the document.
- Addressee only needs to return the standard form, not the accompanying documents;
- Clarifies that it is for the court seised to consider whether the refusal was well founded.

Article 14 – Service by post

- This Article obliges the postal service providers to use a **specific return slip** (acknowledgement of receipt) set out in an Annex when serving documents by post under the Regulation in order to lower the failure rate by ensuring that the slip provides complete and reliable information
- It also introduces a minimum standard concerning the eligibility of other persons as recipients if the postal service provider cannot serve the document on the addressee in person

Article 15 – Direct service

This provision extends the scope of the existing Article in two aspects:

- it is no longer limited to persons with an interest in the proceedings, thereby making it available to transmitting agencies and courts of their own initiative;
- **direct service** needs to become available in all Member States.

Article 15a – Electronic service

Introduces the electronic service of documents directly to the user account of the recipient as an additional alternative method of service provided certain conditions are met:

- Either use of qualified electronic registered delivery services under the eIDAS Regulation (electronic equivalent of registered post)
- Or express consent of the addressee

Article 19 – Default judgment

This Article aims to reduce the existing fragmentation in national systems when it comes to default judgments without certificate of service.

- *Firstly, the court seised will be **required** to send an alert message about the initiation of the proceedings or about the default judgment to the available user account of the defendant in absentia.*

*The notion of **reasonable efforts** has been expanded by modern communication technology, e.g. **social media**.*

- *Secondly, the time period for the availability of the **extraordinary review** is uniformly set to **two years** as of the issuance of the default judgment.*



Council Working Party (Civil Law)
4 October 2018

**Remaining provisions of the
proposal for a Regulation
amending Council Regulation
(EC) No 1206/2001 on
cooperation between the
courts of the Member States
in the taking of evidence**

COM(2018)378 final of 31 May 2018

Why a proposal to legislate?

- The proposal aims to improve the smooth functioning of the area of freedom, security and justice, and of the internal market, by increasing the efficiency and speed of the cross-border taking of evidence.
- It will achieve this by adapting Regulation (EC) No 1206/2001 to technical developments, exploiting the advantages of digitalisation and ensuring that more use is made of videoconferencing.
- The initiative increases legal certainty and thereby helps to avoid delays and undue costs for citizens, businesses and public administrations and addresses shortcomings in the protection of parties' procedural rights.



Current situation

- Regulation (EC) No 1206/2001 has improved the efficiency of legal proceedings — both as compared with the Hague Convention and over time between 2001 and 2017.
- The introduction of standard forms and direct court-to-court contacts have facilitated communication. The introduction of common methods for taking evidence has been welcomed by practitioners.
- The Regulation has increased mutual trust between courts and helps to reduce the burden for citizens and businesses engaged in cross-border proceedings.
- But: Certain obstacles remain.

Obstacles

- They relate overwhelmingly to delays and costs for businesses and citizens caused by failure to exploit the potential of modern technologies for speedier communication and the direct taking of evidence.
- The Regulation does not currently require the uptake of modern technologies in the judiciary; this depends entirely on Member States' individual efforts.
- This has led to a failure to use electronic communication in exchanges between Member States' courts and authorities, which are still predominantly paper-based, and the marginal use of electronic communication, in particular videoconferencing, for the direct taking of evidence.

Commission proposal: Preparation

- 2007: First COM report on the application of the Regulation (COM/2007/0769 final)
- 2016: external study
- December 2017 - March 2018: public consultation
- 2017 – 2018: Dedicated meetings of the European Judicial Network; meetings with Member States' experts; workshop for selected stakeholders
- 31 May 2018: Adoption of the proposal

Article 1(4): Definition of court

- Currently, the term 'court' is not defined and this has led to diverging interpretations among Member States.
- Some take it as referring only to traditional tribunals, while others also execute requests from other judicial authorities (e.g. notaries public) if they are empowered under their national laws to perform tasks of taking of evidence.
- These uncertainties should be eliminated by a definition of the concept of "court" as "any judicial authority in a Member State which is competent for the performance of taking of evidence".

Articles 17 and 17a: Videoconference

- The purpose of the proposed amendments is to ensure a **more appropriate, more frequent and faster use** of direct taking of evidence via videoconference.
- The provision is worded as an obligation, but the obligation is **conditional** upon
 - the **availability** of videoconferencing to the courts in question; and
 - the assessment of the court that videoconferencing is **appropriate** in the light of the specific circumstances of the case.
- Therefore **courts remain free to decide on the method of taking evidence**, in particular to request the competent court of another Member State to take evidence.

Article 17b

- The purpose of this Article is to **facilitate** the taking of evidence by diplomatic officers or consular agents.
- This method of taking evidence is **admissible under the relevant Hague Convention** and **used by several MS**. It should therefore be **incorporated** into the scope of the Regulation.
- Such officers may therefore, in the territory of another Member State and in the area where they exercise their functions, take evidence without the need for a prior request, by hearing nationals of the Member State which they represent without compulsion in the context of proceedings pending in the courts of that Member State.

Article 18a: Digital evidence

- This Article 18a should - as **rule of mutual recognition** - ensure that digital evidence taken in accordance with the law of the Member State where it was taken is not rejected as evidence in other Member States solely due to its digital nature.
- Digital evidence is data or information which is **produced and/or stored in digital form and which can serve as evidence** in the context of civil proceedings. Many legal systems set certain standards that digital evidence must meet in order to be admitted in civil proceedings. One of the most affected fields is **the enforcement of intellectual property rights**, where a substantial part of infringements takes place through the internet.