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NOTE

From: Presidency

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Subject: Digitalisation of judicial cooperation

Proposal for a Regulation of the European Parliament and of the Council 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)

Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters

- Policy debate

I. INTRODUCTION

1. The Commission adopted the abovementioned revision proposals¹ on 31 May 2018, and submitted them to the Council and Parliament. Their legal basis is Article 81 (Judicial cooperation in civil matters) of the Treaty on the Functioning of the European Union, and they are subject to the ordinary legislative procedure. Both proposals are accompanied by an Impact Assessment² (IA).
2. Regulation (EC) No 1393/2007 on the Service of Documents has put in place a fast, secure and standardised transmission procedure for documents in civil or commercial matters between courts and other parties located in different Member States. One major objective of the revision proposal on the Service of Documents Regulation is to adapt the cooperation mechanisms and transmission workflows in the existing Regulation to the technical developments provided by digitalisation. In that way, the efficiency of service of documents should be improved by promoting secure and faster electronic transmission and service of documents.

¹ 9620/18; 9622/18.

² 9620/18 ADD1 + ADD2; 9622/18 ADD1 + ADD2.

3. Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the Taking of Evidence in civil or commercial matters is another important instrument for European judicial cooperation. The purpose of this instrument is to provide a framework for cross-border judicial assistance between Member States in civil and commercial matters by facilitating the collection of evidence across borders. The revision proposal on the Taking of Evidence Regulation aims to establish an EU-wide system for the direct, secure and rapid transmission of requests for the taking and execution of evidence by exploiting the advantages of digitalisation.
4. Therefore, the key common objective of both revision proposals, in addition to a number of other improvements³, is to address the need for modernisation, in particular through digitalisation and the use of IT technology, of cross-border exchanges between courts, authorities and agencies in relation to the taking of evidence and service of documents, while strengthening procedural safeguards. The Commission proposals call for the establishment of a mandatory electronic decentralised IT system for that purpose. In this regard, they reflect the general principles set out in the Strategy on European e-Justice 2014-2018, adopted by the Council in December 2013⁴.

³ Including the promotion of the use of direct taking of evidence via videoconference which is also related to digitalisation.

⁴ Published in the Official Journal on 21 December 2013 (2013/C 376/06).

5. On 13 February 2019, the European Parliament adopted its first-reading position on the Service of Documents proposal, with 64 amendments to the Commission proposal, by 563 votes to 27, with 9 abstentions, and, its first-reading position on the Taking of Evidence proposal, with 37 amendments to the Commission proposal by 554 votes to 26, with 9 abstentions. In its positions, the EP expresses the view that the digitalisation of judicial cooperation in the context of both proposals should be carried out through a decentralised IT system comprising national IT systems interconnected by a communication infrastructure enabling the secure and reliable cross-border exchange of information in real time between national IT systems. Such a decentralised IT system should be based on the e-CODEX⁵ system and be managed by eu-LISA⁶.
6. The European Economic and Social Committee adopted its opinion⁷ on these proposals on 17 October 2018. The EESC found both proposals to be in line with the digital market strategy in relation to e-government, especially as regards the need to take steps to modernise public administration and achieve cross-border interoperability.
7. Pursuant to Article 3 of Protocol (No 21) to the Treaties on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Ireland has decided to opt in to both proposals and the United Kingdom has decided to opt in to the proposal on the Service of Documents. The UK has not made use of the possibility set out in Article 3 of Protocol (No 21) to take part in the adoption and application of the proposal on the Taking of Evidence. In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark does not take part in the adoption of the proposed measures.

⁵ e-Justice Communication via Online Data Exchange.

⁶ European Union Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

⁷ 14013/18.

II. DIGITALISATION OF JUDICIAL COOPERATION

a) **The proposals of the Commission**

8. The Commission proposes mandatory availability and (except in exceptional circumstances) use of a decentralised IT system in the context of the two revision proposals. The justification for this is twofold. On the one hand, a mandatory use would bring added value through the speedier transmission of requests and cross-border proceedings that are less expensive (although this would incur initial costs as regards the setting up of national systems). On the other hand, a decentralised approach would respect existing national IT systems, would limit the impact on national IT solutions and would provide opportunities for closer technical integration. The Commission proposals do not explicitly mention by name a specific software solution and leave that technical specification to the implementing acts. However, in the Commission Impact Assessments accompanying both proposals, e-CODEX is considered the most suitable and only readily available IT system. The development of another decentralised system would mean that the same challenges already addressed in the context of the development of the e-CODEX would be addressed once again.

b) **State of play in the Council**

9. The Working Party on Civil Law Matters (Service of Documents/Taking of Evidence) has regularly examined the two revision proposals since it received them from the Commission in 2018. During the negotiations at technical level, the digitalisation was one of the most debated aspects.

10. While there seems to be very wide agreement on the need to modernise judicial cooperation at EU level in line with the general principles set out in the Strategy on European e-Justice 2014-2018, adopted by the Council in December 2013⁸, discussions within the Council Working Party have shown some diverging views with regard to the following aspects:
- i) mandatory versus non-mandatory use of an IT system;
 - ii) a centralised as opposed to a decentralised IT system;
 - iii) using an existing IT solution as opposed to establishing a new one;
 - iv) costs associated with the establishment and use of an IT system.
11. With regard to mandatory or non-mandatory availability and use of an IT system, the positions of the delegations seem split. A non-mandatory approach was advocated in order to provide the necessary flexibility for the Member States, allowing them to adapt and develop at their own pace the digitalisation of the judiciary. However, the use of an IT system for the purpose of exchanges with other Member States in the context of the service of documents and taking of evidence would not presuppose an overall digitalisation of the judiciary at national level. In addition, voluntary use might not provide sufficient leverage and incentives for the speedier modernisation of cross-border judicial cooperation. While electronic communication is already possible in other contexts (e.g. the European Order for Payment procedure), experience has shown that this medium is rarely used on a voluntary basis. A mandatory approach would overcome the reluctance to use digital solutions in cross-border proceedings. Certain delegations have advanced the idea that a different approach could be taken with regard to the two revision proposals, taking into account, for example, that the use of a mandatory IT system could be justified for the Service of Documents, and not necessarily for the Taking of Evidence. However, such a differentiated approach has not yet been analysed with regard to its justification and implications for the other aspects of the two revision proposals.

⁸ Published in the Official Journal on 21 December 2013 (2013/C 376/06).

12. With regard to the use of a centralised or a decentralised IT system, it seems that the preference of the majority of the delegations is the decentralised approach. As stated previously, this decentralised approach would respect existing national IT systems and would limit the impact on national IT solutions as it would allow smooth interconnection with such systems. However, this would imply somewhat higher costs for the Member States. In fact, those delegations advocating a centralised approach mainly emphasised as an advantage that the costs would be incurred for the EU budget, and not for the national budgets.
13. With regard to using an existing IT solution or establishing a new one, the positions of the delegations also appear to be split. One of the existing solutions is e-CODEX, a system developed with EU financial support by a consortium of Member States over a period of almost ten years. E-CODEX is currently used for the following: Business Registers Interconnection System (BRIS)⁹; the interconnection of national insolvency registers¹⁰; the e-Evidence Digital Exchange System¹¹. However, insofar as use cases based on voluntary cooperation are concerned, e-CODEX is not yet implemented and used by all the Member States. In this context, during the discussions in the Working Party, for the Member States where there are currently no IT systems that support electronic procedures, the Commission could consider the development of a reference implementation solution for a back-end system at national level, provided that there is sufficiently strong and broad delegations' support for mandatory electronic communication. All systems would have to be technically interoperable and compliant with the same set of technical specifications (protocols, standards, XML schemas and workflows).

⁹ Set up by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

¹⁰ Set up by Regulation (EU) 2015/848 on insolvency proceedings.

¹¹ Set up by the 2018 Council Conclusions on promoting mutual recognition by enhancing mutual trust.

14. With regard to the costs associated with the establishment and use of an IT system, the Commission Impact Assessments mention, as indicative cost-estimate averages, 15.000 EUR for the deployment of e-CODEX at national level and between 20.000 – 50.000 EUR for the development of a central national back-end system. It should be noted that in the framework of the current Multiannual Financial Framework, the Commission has provided funding aimed at digitalising access to justice and judicial cooperation under both the Justice Programme and the Connecting Europe Facility (CEF) programme. However, some Member States have carried out their own estimations on costs and have reached the preliminary conclusion that these costs would be higher than the Commission's estimates. It seems that further analysis on costs would be needed in order to allow certain delegations to better understand the implications of the two revisions proposals on their national systems.

III. POLICY DEBATE

15. In the light of the discussions held at Working Party level, possible compromises on the common digitalisation aspects of both proposals will depend on their further development. Maintaining the mandatory use of an IT system could be considered if this were set in the context of a longer transition period so as to make use compulsory and if exemptions (to be identified) were allowed providing scope for traditional paper-based service of documents and taking of evidence. This should be done in conjunction with further work aimed at identifying the costs incurred for the Member States. A non-mandatory use of an IT system could also be considered. However, this should be assessed from the point of view of the added value of the revision of both Regulations and its practical implications, taking into account the issues set out in paragraphs 11 and 13.

16. In order to make further progress on these two files, the Presidency considers that a discussion at ministerial level is needed on the digitalisation aspects, as these play an important role in the two proposals. It is important to take into account the fact that the number of cross-border cases has increased and will continue to do so given the growing number of cross-border transactions and the increased number of legislative instruments in the area of judicial cooperation in civil and commercial matters. In this context, the use of modern technologies could contribute to ensuring that cross-border proceedings become swifter and less expensive.
17. The results of this discussion, based on the principle that *nothing is agreed until everything is agreed* should guide further work on the proposals.
18. Against this background and with the understanding that further analysis is necessary on the estimation of costs, the Presidency invites the Council to hold a policy debate on the following questions:
 - a) Should the digitalisation of judicial cooperation in the context of the Service of Documents/Taking of Evidence be based on a secure decentralised IT system comprising interconnected national IT systems?
 - b) Should the introduction and the use of such IT system be mandatory for the Member States, coupled with a longer transition period and subject to the availability of a reference implementation back-end system to be provided by the Commission? If the use should be mandatory, to what extent and under which circumstances should other means of communication be allowed?
 - c) Should e-CODEX be the software solution to be used for the decentralised IT system?