

## **DIGITISATION IN CIVIL JUDICIAL COOPERATION IN THE EUROPEAN UNION: AN ANALYSIS OF ITS EVOLUTION<sup>245 246 247</sup>**

### **A DIGITALIZAÇÃO NA COOPERAÇÃO JUDICIÁRIA CIVIL NA UNIÃO EUROPEIA: UMA ANÁLISE DA SUA EVOLUÇÃO**

**Ana María Vicario Pérez**

PhD Student - Procedural Law University of Burgos Doutoramento em Direito pela Universidade de Burgos (Espanha). Pós-doutoranda na área do Direito Processual na Universidade de Burgos (Espanha). amvperez@ubu.es.

**ABSTRACT:** The aim of this document is to analyse European legislation on the cross-border electronic exchange of data relating to civil judicial proceedings. To this end, the evolution of the European Area of Freedom, Security and Justice will be analysed, from the signing of the Maastricht Treaty in 1992 to the legislative efforts of recent years to strengthen judicial cooperation between Member States through the use of new technologies. Particular emphasis will be placed on Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the electronic cross-border exchange of data in the field of judicial cooperation in civil and criminal matters. This makes e-CODEX the main European system for the electronic exchange of procedural data

between judicial authorities. We will therefore analyse the main features of this system, while addressing the issues related to its efficient management and the necessary respect to be shown in its use in relation to the processing of personal data. On the basis of Article 67(3) TFEU in general and Article 81(1) TFEU in civil matters, the TFEU provides that judicial cooperation must respect the principles of mutual recognition and approximation of laws. However, the creation of a genuine European procedural law is still a long way off, with the greatest efforts being directed not towards establishing single Community rules but, from a perspective that is perhaps less ambitious but certainly more respectful of the legal traditions of the member states, towards homogenising domestic procedural

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laws. The aim of legislative approximation in the field of civil procedure is to promote the mutual recognition of judgements handed down by the judicial authorities of one Member State which are to be enforced on the territory of another.

This is where the digitalisation of justice has a key role to play. In this regard, the European Union must promote the adaptation of national judicial systems to the new digital reality by fostering cross-border judicial cooperation through the automation of procedures for the exchange of procedural data, the use of telematic communication techniques and the interoperability of the digital systems used by the judicial authorities of the Member States. Indeed, a digitalised administration of justice and the use of information and communication technologies will undoubtedly promote much closer, faster and more effective judicial cooperation.

**KEYWORDS:** judicial cooperation; digitisation; European Union; e-codex; e-data; electronic data.

**RESUMO:** O objetivo do presente documento é estudar a legislação europeia relativa ao intercâmbio eletrônico transfronteiriço de dados relativos aos processos judiciais civis. Para o efeito, será analisada a evolução do Espaço Europeu de Liberdade, Segurança e Justiça, desde a assinatura do Tratado de Maastricht em 1992 até aos esforços legislativos dos últimos anos para reforçar a cooperação judiciária entre os Estados-Membros

através da utilização das novas tecnologias. Será dada especial ênfase ao Regulamento (UE) 2022/850 do Parlamento Europeu e do Conselho, de 30 de maio de 2022, relativo a um sistema informatizado de intercâmbio eletrônico transfronteiriço de dados no domínio da cooperação judiciária em matéria civil e penal. Isto faz do e-CODEX o principal sistema europeu de intercâmbio eletrônico de dados processuais entre autoridades judiciais. Analisaremos, por conseguinte, as principais características deste sistema, abordando simultaneamente as questões relacionadas com a sua gestão eficiente e o respeito necessário a demonstrar na sua utilização em relação ao tratamento de dados pessoais. Com base no artigo 67.º, n.º 3, do TFUE, em geral, e no artigo 81.º, n.º 1, do TFUE, em matéria civil, o TFUE prevê que a cooperação judiciária deve respeitar os princípios do reconhecimento mútuo e da aproximação das legislações. No entanto, a criação de um verdadeiro direito processual europeu está ainda muito longe, sendo os maiores esforços dirigidos não para o estabelecimento de regras comunitárias únicas mas, numa perspetiva talvez menos ambiciosa mas certamente mais respeitadora das tradições jurídicas dos Estados-Membros, para a homogeneização dos direitos processuais internos. O objetivo da aproximação legislativa em matéria de processo civil é promover o reconhecimento mútuo das decisões proferidas pelas autoridades judiciais de um Estado-Membro que devam ser executadas no território de outro.

É aqui que a digitalização da justiça tem um papel fundamental a desempenhar. A este respeito, a União Europeia deve promover a adaptação dos sistemas judiciais nacionais à nova realidade digital, fomentando a cooperação judiciária transfronteiriça através da automatização dos procedimentos de intercâmbio de dados processuais, da utilização de técnicas de comunicação telemática e da interoperabilidade dos sistemas digitais utilizados pelas autoridades judiciais dos Estados-Membros. De facto, uma administração da justiça digitalizada e a utilização das tecnologias da informação e da comunicação promoverão, sem dúvida, uma cooperação judiciária muito mais estreita, mais rápida e mais eficaz.

**PALAVRAS-CHAVE:** cooperação judiciária; digitalização; União Europeia; e-codex; e-data; dados electrónicos

## INTRODUCTION

The digitalisation of the Administration of Justice is a fact inherent to the technological change prevailing in all spheres of social life. The introduction of new forms of electronic data processing, the automatization of procedures, and the electronic practice of notifications or communication between individuals and legal operators, is intended to improve the provision of this public service, as well as to facilitate access to justice for natural and legal persons.

In the field of judicial cooperation between Member States, the European

Union legislator has also been taking into consideration for years the fundamental role of Information and Communication Technologies (ICT), aiming to facilitate the application of mutual recognition and legislative approximation instruments, making them more efficient.

In this respect, it is in the field of civil judicial cooperation where the greatest progress has been made in the digitisation of certain formalities and procedures. Perhaps conditioned by the need to guarantee due respect for the fundamental and procedural rights of the parties, which may be affected by certain practices carried out by telematic means, criminal judicial cooperation has lagged behind in this race towards digital transformation.

The aim of this paper is to analyse the steps taken on the road to the digitisation of civil judicial cooperation. To this end, we will dedicate a first section to the study of the Area of Freedom, Security and Justice (AFSJ) from the civil perspective, evaluating the journey from the creation of the European Economic Community to the provisions of the Treaty of Lisbon. This is to lay the foundations that will allow us, in the following sections, to unpack the measures adopted for the sake of digitisation. We will thus see that the e-CODEX system has experienced its greatest development in civil matters, where digital forms have been implemented for the complete processing of certain procedures, as in the case of the European payment order procedure or the European small claims procedure. We will also analyse the

provisions of the Regulation of the European Parliament and of the Council on digitisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, which modifies the European rules governing procedures in which e-CODEX already plays an important role.

## 1. JUDICIAL COOPERATION IN CIVIL MATTERS IN THE EUROPEAN UNION

The original antecedent to judicial cooperation in civil matters between Member States is to be found in the removal of obstacles to the free movement of goods, services, capital and merchandise. Indeed, the process of economic integration that is the European Union was not born with the aim of facilitating the transmission of judicial decisions between state

authorities, but with an eminently economic purpose. Thus, the establishment of a common market by means of the Treaty creating the European Economic Community of 27 March 1957<sup>248</sup> represents a first approach to a kind of principle of mutual recognition and equivalence. The proper functioning of the principle, in the absence of harmonised rules for the marketing of certain products, requires a commitment by the Member States to accept on their internal markets, on the basis of mutual trust<sup>249</sup>, goods and services produced according to the legislation of another Community country<sup>250</sup>.

The experience gained in the economic field paved the way for the extrapolation of the principle of mutual recognition to the European judicial area and the consequent creation of what is known as the "fifth Community

<sup>248</sup> Consolidated version in OJEC No C 325 of 24 December 2002.

<sup>249</sup> FAGGIANI, V., "El principio de reconocimiento mutuo en el espacio europeo de justicia penal. Elementos para una construcción dogmática", *Revista General de Derecho Europeo* 2016, n. 38, pp. 73 – 107, esp. pp. 74 – 75, available at <https://www.iustel.com/>, the author points out, in line with the above, that "in those matters that have not been the subject of harmonisation, the States must adopt all necessary and proportionate measures to achieve a fair balance between guaranteeing cross-border freedom and respecting the objectives and priorities of the European Union. Hence the strict relationship between the principle of mutual recognition and the institution of the internal market and its complementarity with the approximation of national criminal laws"; WISCHMEYER, T., "Generating Trust Through Law? Judicial Cooperation in the European Union and the

"Principle of Mutual Trust", *German Law Journal* 2016, Vol. 17, n. 3, pp. 339 – 382, esp. p. 351.

<sup>250</sup> CJEU of 20 February 1979, Case C-120/78, *Rewe-Zentral AG c. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, para 15. In its commentary on the judgment, the Commission notes that "Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter", Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in *Cassis de Dijon* (1980): <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1980:256:FULL&from=ES> (accessed: 12 Decembre 2023).



freedom", which is presented as the free movement of judgments between the countries of the Union<sup>251</sup>. In the civil field, this finds its manifestation in the Brussels Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>252</sup>.

The Maastricht Treaty of 7 February 1992<sup>253</sup> marked the beginning of a new stage. In its "Title VI - Provisions relating to cooperation in the fields of justice and home affairs" (known as JHA matters), Article K.3.2 empowers the Council to adopt common positions and actions in pursuit of the Union's objectives, including, in Article K.1, judicial cooperation in civil matters.

It was with the Treaty of Amsterdam of 2 October 1997<sup>254</sup> that it became clear that cooperation between the civil courts of the different Member States has undergone, from its early origins, a more rapid evolution than that attributable to the criminal field<sup>255</sup>. Indeed, this text brings about the "communitization" of civil judicial cooperation, which passes into the so-called First Pillar, while criminal judicial

cooperation remains in the new Third Pillar, characterised by intergovernmentalism<sup>256</sup>.

Specifically, Article 73 of the Treaty of Amsterdam already referred to judicial cooperation in civil matters with cross-border implications, with a view to achieving three fundamental objectives:

Improve and simplify the system of cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; and the recognition and enforcement of judgments in civil and commercial matters, including extrajudicial matters.

Promote the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

Remove obstacles to the good functioning of civil proceedings by promoting, where necessary, the compatibility of the rules of civil procedure applicable in the Member States.

Since its proclamation as the "cornerstone" of judicial cooperation in civil and criminal matters in the European Union<sup>257</sup>, the principle of

<sup>251</sup> MÖSTL, M., "Preconditions and limits of mutual recognition", *Common Market Law Review* 2010, n. 2, pp. 405 – 436; KLIP, A., *European Criminal Law. An Integrative Approach*, Intersentia, Antwerp-Oxford-Portland, 2012, p. 15; VAN BALLEGOOIK, W., *The nature of mutual recognition in European Law*, Intersentia, Cambridge, 2015, p. 45.

<sup>252</sup> OJEC No 27 of 26 January 1998.

<sup>253</sup> OJEC No C 191 of 29 July 1992.

<sup>254</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.

<sup>255</sup> JIMENO BULNES, M., "European Judicial Cooperation in Criminal Matters", *European Law Journal* 2003, n. 9, pp. 614 – 630, esp. pp. 617 – 620.

<sup>256</sup> JIMENO BULNES, M., "La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español", in M. Jimeno Bulnes (dir.) and C. Ruiz López (coord.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español*, Tirant lo Blanch, Valencia, 2022, pp. 27 – 81, esp. p. 30.

<sup>257</sup> Presidency Conclusions to the Tampere European Council of 15 and 16 October 1999.

mutual recognition has been constantly developing through the adoption of legislation on instruments implementing the principle and the development of new models. All this in the aim to facilitate the issuance and enforcement of orders and judgments between Member States<sup>258</sup>.

After the failure of the project for the adoption of a European Constitution<sup>259</sup>, it was not until the Treaty of Lisbon of 13 December 2007<sup>260</sup> that a legal expression of this principle was found, to which legislative approximation was added as an indissoluble complement. Together with this, Lisbon once again brings together the civil and criminal dimensions of judicial cooperation. With the abolition of the pillar structure and the disappearance of the normative instruments of the previous Third Pillar (such as the Framework Decisions), judicial cooperation is now redirected to the Area of Freedom, Security and Justice under Title V of the Treaty on the

Functioning of the European Union (TFEU). Article 81 TFEU is dedicated to civil matters, according to which "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States".

This provision already expressly sets out the two basic principles upon which judicial cooperation will be based: mutual recognition and approximation of legislation<sup>261</sup>. In accordance with the first, there is the successive adoption of legislative instruments for the enforcement in one Member State of judicial and extrajudicial decisions of the authorities of another<sup>262</sup>. Thus, and by way of example, among the most significant rules we highlight Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12

See [https://www.europarl.europa.eu/summits/tam\\_es.htm#b](https://www.europarl.europa.eu/summits/tam_es.htm#b) (accessed: 23 Decembre 2023). In particular, Conclusion 33: "Improved mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition, which it considers should be the cornerstone of judicial cooperation in civil and criminal matters in the Union. The principle should apply both to judgments and to other decisions of judicial authorities".

<sup>258</sup> BANTEKAS, I, "The principle of mutual recognition in EU Criminal Law" *European Law Review* 2007, n. 3, pp. 365 – 385, esp. p. 366.

<sup>259</sup> Treaty signed in Rome on 29 October 2004, OJEU No. C 310 of 16 December 2004; for its provisions on judicial cooperation in civil matters, see MIRELA, C., "Aspects Regarding the Judicial Cooperation in Civil and Commercial Matters", *EIRP Proceedings* 2009, n. 4, pp. 473 – 477, esp. p. 475.

<sup>260</sup> OJEU No. C 306 of 17 December 2007.

<sup>261</sup> KRAMER, X., "Judicial Cooperation in Civil Matters", in P.J. Kuijper, F. Amtenbrink, D. Curtin, B. De Witte, A. McDonnell and S. Van den Bogaert (eds.), *The Law of the European Union*, Kluwer Law International, Alphen aan den Rijn, 2018, pp. 721 – 740, esp. p. 726

<sup>262</sup> On mutual recognition in criminal decisions, generally, see KLIMEK, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, Cham, 2017.

December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>263</sup>. This Regulation, known as the Brussels I bis Regulation, is the result of a recasting of the successive amendments to the Brussels Convention of 27 September 1968, and is characterised by the complete elimination of exequatur as a procedure for the recognition of judgments of another Member State<sup>264</sup>.

Equally noteworthy are Regulation (EU) 655/2014 of the European Parliament and of the Council, of 15 May 2014, laying down the procedure for a European Account Preservation Order in order to simplify cross-border debt recovery in civil and commercial matters<sup>265</sup>; Council Regulation (EU) 2016/1104, of 24 June 2016, establishing enhanced cooperation in the fields of jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to the property consequences of registered partnerships<sup>266</sup>; or Council Regulation (EU) 2019/1111, of 25 June 2019, concerning jurisdiction and the recognition and enforcement of

judgments in matrimonial matters and the matters of parental responsibility and international child abduction<sup>267</sup>. The latter two, adopted under Article 81(3) TFEU, are rules established by the Council through a special legislative procedure.

From the procedural point of view, legislative approximation had already manifested itself in the approval of regulatory instruments which. Although these instruments do not permit us to speak of a European Civil Procedure in the strict sense<sup>268</sup>, they do allow us to glimpse an approach to specific procedures<sup>269</sup>. Such is the case, for example, of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure<sup>270</sup>, or Regulation (EC) 861/2007 of the European Parliament and of the Council, of 11 July 2007, establishing a European Small Claims Procedure<sup>271</sup>. It is precisely in the application of these rules that we can insert the increasing digitisation of judicial cooperation in civil matters.

<sup>263</sup> OJEU No L 351 of 20 December 2012.

<sup>264</sup> GASCÓN INCHAUSTI, F., *Reconocimiento y ejecución de resoluciones extranjeras en el nuevo Reglamento Bruselas I bis*, Tirant lo Blanch, Valencia, 2016, pp. 28 – 34.

<sup>265</sup> OJEU No L 189 of 27 June 2014.

<sup>266</sup> OJEU No L 183 of 8 July 2016.

<sup>267</sup> OJEU No L 178 of 2 July 2019.

<sup>268</sup> OSZTOVITS, A., “The Present and Possible Future of Judicial Cooperation in Civil Matters”, in A. Osztovits and J. Bóka (eds.) *The Policies of the European Union from a Central European Perspective*, Central European Academic

Publishing. Miskolc–Budapest, 2022, pp. 239 – 258, esp. p. 241.

<sup>269</sup> VIDAL FERNÁNDEZ, B., “La propuesta de Directiva sobre el establecimiento de normas mínimas comunes para un proceso civil europeo”, in M. Jimeno Bulnes (dir.) and C. Ruiz López (coord.), *La evolución del espacio judicial europeo en materia civil y penal: su influencia en el proceso español*, Tirant lo Blanch, Valencia, 2022, pp. 169 – 205, esp. p. 172.

<sup>270</sup> OJEU No L 399 of 30 December 2006.

<sup>271</sup> OJEU No L 199 of 31 July 2007.

## 2. TOWARDS DIGITALISATION OF EUROPEAN JUDICIAL COOPERATION

Transformation in the social, economic and technological fields would render the rules of mutual recognition instruments without substance if they are not adequately adjusted to the digital age. The incorporation of digitisation in all facets of justice is destined to play an essential role<sup>272</sup>.

However, it is undeniable that the use of digital means in the execution of judicial cooperation in criminal matters is not a subject to which the European legislator has paid attention only in the most recent years.

The Commission Communication "Towards a European e-Justice Strategy", issued on 30 May 2008, highlights the notion that the integration of information and communication technologies (ICT) in the administration of justice favours its optimal performance by simplifying procedures and reducing costs. It is thus stated that e-Justice can be defined as "the use of information and communication technologies to improve citizens' access to justice and the

efficiency of judicial action, understood as any activity consisting of resolving a dispute or punishing criminal conduct".

The aim is therefore to address a threefold need, which the Commission identifies as improving access to justice, strengthening judicial cooperation and the efficiency of the administration of justice itself. In this context, the European e-Justice Portal is conceived as an electronic platform designed to provide quick answers to legal questions<sup>273</sup>, such as how to apply for legal aid, how to guarantee the right to legal aid, how to determine the competent court or how to initiate proceedings through online forms.

Following the trend set by previous developments, following the entry into force of the Lisbon Treaty, digitisation has played a prominent role in the European Union's action to progressively shape the European Area of Justice<sup>274</sup>. In this way, judicial cooperation is promoted through systems for the automatic exchange of procedural data, the strengthening of telematic communication mechanisms and the interoperability of digital justice systems in the various Member States<sup>275</sup>.

<sup>272</sup> BARONA VILAR, S., "La digitalización y la algoritmización, claves del nuevo paradigma de justicia eficiente y sostenible", in I. Colomer Hernández (dir.), M.A. Catalina Benavente and S. Oubiña Barbolla (coords.), *Uso de la información y de los datos personales en los procesos: los cambios en la era digital*, Aranzadi, Cizur Menor, 2022, pp. 75 – 115, esp. pp. 80 – 84

<sup>273</sup> BUENO DE MATA, F., "Justicia online y ciudadanía: el Portal Europeo e-Justicia como medio de información y apoyo a los ciudadanos para solventar sus litigios transfronterizos",

*Revista Europea de Derechos Fundamentales* 2011, n. 18, pp. 191 – 219, esp. p. 192.

<sup>274</sup> HERNÁNDEZ LÓPEZ, A., "La digitalización de la cooperación judicial en materia penal en la Unión Europea: propuestas y perspectivas legislativas", in C. Arangüena Fanego, M. de Hoyos Sancho, E. Pillado González (dirs.) and P. Miguel Freitas (coord.), *El proceso penal ante una nueva realidad tecnológica europea*, Aranzadi, Cizur Menor, 2023, pp. 281 – 306, esp. pp. 282 – 283.

<sup>275</sup> BUENO DE MATA, F., "Interoperabilidad de sistemas de gestión procesal y debido proceso:



All this is done in the firm conviction that the promotion of Information and Communication Technologies (ICT) in their various forms will lead to closer, more efficient and streamlined cooperation.

This vision is embodied in the multi-annual "European e-Justice Action Plan 2009-2013"<sup>276</sup>. This plan envisages the establishment of a single European e-Justice portal with the aim of streamlining the exchange of information and data between judicial authorities. This objective is to be achieved through the compatibility and interconnection of the technical systems used by the justice administrations in the various Member States. The aim of "European e-Justice" is thus to "ensure the greatest possible compatibility between the various technical and organisational measures adopted for the applications of legal systems, while offering the greatest possible flexibility to the Member States", in order to achieve "an interoperable, efficient, secure and rapid exchange of information at the lowest possible cost"<sup>277</sup>.

The "Multi-annual European e-Justice Action Plan 2014 - 2018"<sup>278</sup> sets out the following objectives for e-Justice: i) access to information in the field of justice through the European e-Justice Portal; ii) facilitating access to courts and out-of-court procedures in cross-border disputes; iii) improving communication between judicial authorities in different Member States.

So, the actual implementation of the "e-Codex" system<sup>279</sup> is the result of the "European e-Justice Action Plan 2019 - 2023"<sup>280</sup>. This is the context for the adoption of Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the electronic cross-border exchange of data in the field of judicial cooperation in civil and criminal matters (e-Codex system) and amending Regulation (EU) 2018/1726<sup>281</sup>. This legislation has marked a significant milestone in the process of digital transformation of European justice, highlighting three fundamental aspects: i) the interoperability of Member States'

experiencias a nivel nacional y europeo para alcanzar una verdadera digitalización de la justicia", in M. Llorente Sánchez-Arjona and S. Calaza López (dirs.), *Digitalización de la justicia: prevención, investigación y enjuiciamiento*, Aranzadi, Cizur Menor, 2022, pp. 151 – 178, esp. pp. 167 – 172.

<sup>276</sup> OJEU No C 75 of 31 March 2009, pp. 1 - 12.

<sup>277</sup> *Ibidem*.

<sup>278</sup> OJEU No C 182 of 14 June 2014, pp. 2 – 13.

<sup>279</sup> "e-justice Communication via Online Data Exchange". This is defined as "an open source software system whose operation is based on a gateway program, which ensures communication between different national

access points, and on a connector program, which supports the exchange of information between these points and also verifies the identity of their users", VICARIO PÉREZ, A. M., "Cooperación judicial digital en la Unión Europea: e-CODEX como sistema de intercambio electrónico transfronterizo de datos procesales", in P. R. Suárez Xavier and A. M. Vicario Pérez (dirs.), *Cooperación judicial civil y penal en la Unión Europea: retos pendientes y nuevos desafíos ante la transformación digital del proceso*, Colex, A Coruña, 2023, pp. 233 – 266, esp. pp. 240 – 241.

<sup>280</sup> OJEU No C 96 of 13 March 2019, pp. 9 – 32.

<sup>281</sup> OJEU No. L 150 of 1 June 2022, p. 1 – 19.

digital procedural systems<sup>282</sup>; ii) access by legal operators and citizens to an electronic administration of justice<sup>283</sup>; iii) the streamlining of cross-border judicial processes through the use of telematic platforms for communication, data exchange <sup>284</sup> and submission of documents, applications and forms.

In relation to this last aspect, it is true that the use of the "e-Codex" system in the course of cross-border proceedings has, however, undergone greater development in civil judicial cooperation, as evidenced by the introduction of specific electronic forms for the development of the European order for payment procedure or the European Small Claims Procedure. In criminal matters, the use of electronic mechanisms for the exchange of information is covered by the rules governing the transmission of orders for

the enforcement of pecuniary penalties<sup>285</sup> and European Investigation Orders<sup>286</sup>, which refer to the use of any means that provide proof of their authenticity.

In the same vein, and certainly motivated by the COVID-19 pandemic<sup>287</sup>, the Council of the European Union published on 7 October 2020 the Conclusions "Access to justice: seizing the opportunities of digitisation" <sup>288</sup>, stressing that "measures such as the conduct of digital court proceedings, electronic communication between parties, courts and authorities, electronic transmission of documents and the holding of online hearings and conferences have already become important elements of the digital divide". It is also established that "measures such as digital court proceedings, electronic communication between

<sup>282</sup> Vid. Consideration 8 Regulation (EU) 2022/850: "The e-CODEX system provides an interoperable solution for the justice sector to connect to the IT systems of competent national authorities, such as the judiciary or other organisations. The e-CODEX system should therefore be considered as the preferred solution for the establishment of an interoperable, secure and decentralised network for communication between national IT systems in the field of judicial cooperation in civil and criminal matters".

<sup>283</sup> Vid. Consideration 3 Regulation (EU) 2022/850: "Such a system should contribute to improving access to justice and transparency by enabling citizens and businesses to exchange documents and evidence in digital format with judicial or other competent authorities, where provided for by national or Union law. Such a system should enhance citizens' trust in the Union and mutual trust between judicial and other competent authorities of the Member States".

<sup>284</sup> Vid. Consideration 9 Regulation (EU) 2022/850: "Electronic data exchange includes any content that can be transmitted in electronic form by means of the e-CODEX system, such as text, audio, visual or audiovisual recordings, in the form of structured or unstructured data, files or metadata".

<sup>285</sup> Art. 4.3 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJEU No. L 76 of 22 March 2005, pp. 16 - 30.

<sup>286</sup> Vid. art. 7.1 Directive 2014/41/UE, op. cit.

<sup>287</sup> MARCHAL ESCALONA, N., "El nuevo marco europeo sobre notificación y obtención de pruebas en el extranjero: hacia un espacio judicial europeo digitalizado", *Revista Española de Derecho Internacional* 2022, n. 47/1, pp. 155 - 179, esp. p. 155

<sup>288</sup> Council Conclusions 11599/20, JHA 794, Brussels, 8 October 2020.

parties, courts and authorities, electronic transmission of documents and online hearings and conferences have already become important elements of efficient judicial administration in many Member States". In line with this, further progress in the use of digital technologies in Justice was called for at both European and national level with a view to strengthening cooperative efforts.

### 3. THE GROWING DIGITALISATION OF CIVIL JUDICIAL COOPERATION

As mentioned above, the implementation of the e-CODEX system is currently most reflected in the sphere of civil judicial cooperation, and its use in the European order for payment procedure or the European Small Claims Procedure can be highlighted.

In both procedures, e-CODEX allows the electronic lodging of claims with the competent authorities of the defendant's Member State of residence, by means of the dynamic forms <sup>289</sup> accessible through the European e-Justice Portal <sup>290</sup>. Although the rules

governing the two procedures, which predate the creation of the e-CODEX system, do not logically provide for the use of such a system<sup>291</sup>, it is clear from their wording that the European legislator is permissive with regard to technological means of bringing actions. Indeed, Article 7(5) of Regulation (EC) 1896/2006 specifies that the application for a European order for payment shall be submitted on paper or "by any other means of communication, including electronic means, accepted by the Member State of origin and available to the court of origin". In the same vein, Article 4(1) of Regulation (EC) 861/2007 determines that the claim may be submitted to the competent court by "post or by any other means of communication (fax, e-mail, etc.) accepted by the Member State in which the proceedings are instituted".

The same applies to electronic service and taking of evidence. Thus, for procedures governed by Regulation (EU) 2020/1784 of the European Parliament and of the Council of, 25 November 2020, on the service in the Member States of judicial and extrajudicial

<sup>289</sup> Thus, forms such as the application for a European order for payment; the request to the claimant to complete or rectify the application; or the opposition to the order. See [https://e-justice.europa.eu/156/ES/european\\_payment\\_order\\_forms](https://e-justice.europa.eu/156/ES/european_payment_order_forms) (accessed: 15 September 2023).

<sup>290</sup> VIDAL FERNÁNDEZ, B., "Novedades en el proceso europeo de escasa cuantía", en M. Jimeno Bulnes (dir.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo una perspectiva multidisciplinar*, J.M. Bosch, Barcelona, 2016, pp. 33 – 82, esp. p. 77.

<sup>291</sup> It is referred, however, in the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure (COM (2015) 495 final, Brussels, 13 October 2015). In this regard, GARCIMARTÍN MONTERO, R., "The European order for payment procedure: a review ten years after its creation", *Actualities of Civil Procedural Law. National and Comparative Legal Theoretical and Practical Achievements* 2016, n. 2016, pp. 103 – 120, esp. p. 110.

documents in civil or commercial matters<sup>292</sup>, there are specific online forms<sup>293</sup>. Article 7(1) of Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>294</sup>, provides that requests for the taking of evidence shall be transmitted through the decentralised electronic system consisting of e-CODEX<sup>295</sup>.

<sup>292</sup> OJEU No L 405 of 2 December 2020.

<sup>293</sup> Form A. Request for service of a document; Form B. Request for establishment of the address of the person to be served with a document; Form C. Request for establishment of the address of the person to be served with a document; Form D. Acknowledgement of receipt; Form E. Request for additional information for the service of documents; Form F. Communication of return of the application and document; Form G. Communication of retransmission of the application and document to the territorially competent receiving agency; Form H. Acknowledgement of receipt by the territorially competent receiving agency to the transmitting agency; Form H. Communication of return of the application and document to the territorially competent receiving agency; Form H. Acknowledgement of receipt by the territorially competent receiving agency to the transmitting agency; Form I. Communication of return of the application and document to the territorially competent receiving agency; Form II. Communication of retransmission of the application and document to the territorially competent receiving agency; Form H. Acknowledgement of receipt from the territorially competent receiving agency to the transmitting agency; Form I. Request for information regarding compliance or non-compliance with formalities for service of documents; Form J. Reply to request for information regarding compliance or non-compliance with formalities for service of documents; Form K. Certificate of compliance or non-compliance with formalities

This previously limited regulation has been undoubtedly superseded by the entry into force of the Regulation (EU) 2023/2844, of 13 December 2023, of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation<sup>296</sup>. Its main objective being the establishment of a legal framework for

for service of documents; Form L. Informing the addressee of the right to refuse to accept a document. Vid. [https://online-forms.e-justice.europa.eu/online-forms/serving-documents-recast-forms\\_es](https://online-forms.e-justice.europa.eu/online-forms/serving-documents-recast-forms_es) (accessed: 12 December 2023).

<sup>294</sup> OJEU No L 405 of 2 December 2020.

<sup>295</sup> There are therefore specific forms: Form A - request for taking of evidence; Form B - acknowledgement of receipt of a request for taking of evidence; Form C - notice of transfer of a request for taking of evidence; Form D - request for supplementary information for the taking of evidence; Form E - acknowledgement of receipt of the provision of funds or advance; Form F - request for information on a delay; Form G - reply to request for information on a delay; Form H - notice concerning the request for special procedures or recourse to communications technology; Form I - notification of date, time and place of execution of the taking of evidence and conditions for participation; Form J - notification of delay; Form K - information on the execution of the request for taking of evidence; Form L - request for direct taking of evidence; Form M - information from the central body or competent authority concerning the direct taking of evidence; Form N - information on the technical aspects associated with the conduct of a videoconference or the use of other telecommunications technology. Vid [https://online-forms.e-justice.europa.eu/online-forms/taking-evidence-recast-forms\\_es](https://online-forms.e-justice.europa.eu/online-forms/taking-evidence-recast-forms_es) (accessed: 12 December 2023).

<sup>296</sup> OJEU of 27 December 2023, pp. 1 – 29.



electronic communication between the competent authorities in judicial cooperation procedures, as well as between them and natural and legal persons, the exchange of information and forms will be carried out respectively through a "secure, efficient and reliable decentralised computerised system" (Article 3(1)) and through an electronic access point available on the European e-Justice Portal (Article 4). Only in cases where electronic communication is not possible, the competent authorities may resort to alternative means of transmitting information, such as in the event of a breakdown of the decentralised computer system, when the material transmitted is of a physical nature or in cases of force majeure (Article 3(2)).

It should be noted that the use of digital means is foreseen in civil judicial cooperation for both judicial and extra-judicial proceedings. In accordance with Annex I of the Regulation, in the civil and commercial field, cross-border exchange of information will be allowed and encouraged in the areas of: legal aid in cross-border disputes; European enforcement order for uncontested claims; European order for payment procedure; European small claims procedure; enforcement of decisions in matters relating to maintenance obligations; enforcement of decisions in matters of succession upon death; enforcement of judgments in civil and commercial matters; proceedings concerning the European Account Preservation Order; insolvency proceedings; enforcement of judgments on matrimonial property regimes;

enforcement of judgments on the property consequences of registered partnerships; and enforcement of judgments on matrimonial matters and on parental responsibility and international child abduction.

Thus, following some of the examples given above regarding the already common use of e-CODEX in certain procedures, with the entry into force of the Regulation, Article 7.5 of Regulation (EC) 1896/2006 will be reworded as follows: "The application shall be submitted by the means of electronic communication set out in Article 4 of Regulation (EU) 2023/2844 of the European Parliament and of the Council, on paper or by any other means of communication, including electronic means, accepted by the Member State of origin and available at the court of origin". Article 4(1) of Regulation (EC) 861/2007 shall read as follows: "The claimant shall commence the European Small Claims Procedure by completing standard claim form A, as set out in Annex I to this Regulation, and lodging it directly with the competent court or tribunal or by sending it by post, by the means of electronic communication set out in Article 4 of Regulation (EU) 2023/2844 of the European Parliament and of the Council or by any other means of communication (fax, e-mail, etc.) accepted by the Member State in which the court or tribunal of origin is located. ) accepted by the Member State in which the proceedings are instituted. The claim form shall contain a description of the evidence on which the claim is based and shall be accompanied, where

appropriate, by any relevant supporting documents".

In order to streamline the management of such proceedings, Article 4(4) of the Regulation provides that the e-Justice Portal will contain information for natural and legal persons on their entitlement to legal aid, especially in cross-border proceedings. It will also allow their representatives to act on their behalf. According to this provision, the European electronic access point will enable natural and legal persons or their representatives to submit claims and applications, to send and receive relevant information from a procedural perspective, to communicate with the competent authorities or to receive service of documents, both in and out of court.

Finally, it is determined that, when a natural or legal person or their representative has expressly given their consent to use the European electronic access point as a means of communication, notification or transmission, the competent authorities shall communicate with that person or entity by means of this access point. In addition, they shall have the power to serve documents on him or her by the same means (Article 4(6)).

In addition to electronic communications through the E-Justice portal, the Regulation establishes a fourfold categorisation of electronic means: (i) videoconferencing or other

remote communication technologies; (ii) electronic signatures and seals; (iii) electronic documents; (iv) electronic payment of fees.

Of particular interest is the first point, where Article 5 of the Regulation refers to participation in a hearing by videoconference or by means of other remote communication technologies in civil and commercial matters. It is thus indicated that the competent authority shall decide on the use of this technology on the basis of three criteria, namely: the availability of such technologies; the views of the parties to the proceedings on the use of such technologies; and the appropriateness of the use of such technology in the specific circumstances of the case.

Finally, we would like to mention, at least briefly, the manifestations of digitalisation in the extrajudicial sphere, particularly in Alternative Dispute Resolution (ADR). The Electronic Platform for Online Consumer Dispute Resolution, regulated by Regulation (EU) 524/2013 of the European Parliament and of the Council, of 21 May 2013, on resolving consumer disputes online and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC <sup>297</sup>, is significant in terms of its development and usefulness. Its purpose is to provide "a European online dispute resolution platform to facilitate the out-of-court resolution of disputes between consumers and traders online in an

<sup>297</sup> OJEU L 165 of 18 June 2013, pp. 1 - 12. Article 4(1)(g) defines "electronic means" as "electronic equipment for the processing (including digital compression) and storage of data in which all

transmission, sending and receiving operations are performed by wire, by radio, by optical or by other electromagnetic means".

independent, impartial, transparent, effective and fair manner” (Article 1). Its basic functions are to facilitate communication between the parties through the electronic submission of complaints, as well as with the ADR entity. In other words, it is presented as a one-stop shop for consumers and traders who wish to settle their dispute out-of-court<sup>298</sup>, in such a way that the platform provides an electronic complaint form that will be forwarded after completion to the mediating entity, after informing the complained party.

## CONCLUSIONS

I. While judicial cooperation in criminal matters is still based exclusively on the principles of mutual recognition and legislative approximation as a manifestation of respect for the legal traditions of the Member States, these same principles have led to the introduction of certain European procedures in the area of judicial cooperation in civil matters. Although it is not possible to speak, at least to date, of a European civil procedure in the strict sense, the step has been taken to regulate the handling of procedures such as the order for payment or small claims procedure. This is, we insist, a notable difference with respect to judicial cooperation in criminal matters, where the reluctance of the Member States to cede the exercise of *ius puniendi* results

in the non-existence of common proceedings at European level.

II. The existence of this type of European civil proceedings is precisely what has led to the greatest progress in the civil field of judicial cooperation between Member States. In this respect, the e-Justice portal makes electronic forms available to natural and legal persons for the processing of proceedings. This is the case of the European order for payment; small claims; the European account preservation order; the mutual recognition of protective measures; the European Certificate of Succession; or the European Enforcement Order.

III. Alongside the digitisation of civil proceedings, the introduction of technological systems for the transfer and taking of evidence or the service of process is also taking place. This has undoubtedly been reinforced by the adoption of Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the electronic cross-border exchange of data in the field of judicial cooperation in civil and criminal matters (e-Codex system) and amending Regulation (EU) 2018/1726. It expressly regulates the use of the e-CODEX system as a decentralised electronic platform for the secure, efficient and reliable exchange of information.

IV. Equally transcendental has been the approval, on 11 December

<sup>298</sup> VALBUENA GONZÁLEZ, F., “La Plataforma europea de resolución de litigios en línea (ODR) en materia de consumo”, *Revista de Derecho*

*Comunitario Europeo* 2015, n. 52, pp. 987 – 1016, esp. p. 990.

2023, of the Regulation of the European Parliament and of the Council on digitisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and amending certain legislative acts in the field of judicial cooperation. The European rules governing the aforementioned European civil procedures (such as Regulation (EC) 1896/2006 on the European order for payment procedure and Regulation (EC) 861/2007 on small claims, among others) have been amended to expressly provide for the processing of such procedures by means of e-CODEX.

V. In short, the digitisation of civil judicial cooperation is a priority strategy on the European agenda. The approval of mutual recognition and legislative approximation instruments would be empty of content if it were not accompanied by the introduction of new systems that guarantee their effectiveness.

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