



Deutscher **Anwalt**Verein

Position Paper

of the German Bar Association by the Committees
on the Law of Civil Procedure and Criminal Law

**on the Proposal for a Regulation 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 COM (2021) 759 final**

Position Paper No.: 51/2022

Berlin, August 2022

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- Committee on Legal Affairs (JURI)
- Committee on Civil Liberties, Justice and Home Affairs (LIBE)

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Press

Neue Zeitschrift für Strafrecht, NStZ
Strafverteidiger
Juris
KriPoZ Kriminalpolitische Zeitschrift
Redaktion Anwaltsblatt / AnwBl
Redaktion Berliner Verlag
Redaktion Juris – Das Rechtsportal
Redaktion JUVE
Redaktion Legal Tribune Online / LTO
Redaktion Neue Juristische Wochenschrift / NJW
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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 61.000 German lawyers and lawyer-notaries in 253 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on a German, European and international level. The DAV is listed in the lobby register for the representation of interests vis-à-vis the German Bundestag and the Federal Government under register number R000952.

The German Bar Association appreciates the opportunity to comment on the European Commission's proposal for a Regulation 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 (hereinafter: Draft Regulation).

Summary:

The German Bar Association welcomes the objective of the proposed regulation to eliminate inefficiencies to impede cross-border judicial cooperation and to simplify access to justice in cross-border civil, commercial and criminal cases.

While the aim of the regulation - to ensure secure, reliable and time-efficient communication between the courts and competent authorities - is to be welcomed in principle, the DAV would like to use this position paper to address some points where there is still room for improvement. On the one hand, this concerns the repeated use of undefined and very vague terms. This vagueness could be deliberately exploited to circumvent or abuse possible hearings by videoconferencing or electronic communication of the authorities with the parties and between the authorities as provided for in the regulation. On the other hand, the DAV criticizes that the use of the envisaged technology to modernize judicial cooperation is repeatedly subject to its availability (cf. Articles 7 and 8 of the Draft Regulation). This enables the courts and the authorities of the Member States to circumvent the requirements of the Regulation too easily.

1. GENERAL PROVISIONS

a) Extend the scope of application to lawyers

Electronic communication with lawyers acting in cross-border cases before the courts, as well as – since 1 August 2022 – electronic communication with professional practice companies according to § 59b of the Federal Lawyer's Act (Bundesrechtsanwaltsordnung – BRAO), should be explicitly included in the scope of the Regulation as regulated by Article 1 of the Draft Regulation. The same applies to hearings via videoconferencing under the scope of Articles 7 and 8 of the Draft Regulation. Here lawyers must be explicitly named as possible participants in hearings via video conferencing technology as well. The existing systems of electronic communication between lawyers and authorities, such as the special electronic lawyer's mailbox (‚besonderes elektronisches Anwaltspostfach‘ - beA) in Germany, should then be connected to the respective national access point.

b) Relation to service of documents and taking of evidence

The Draft Regulation should be more precise regarding the relation to the taking of evidence in cross-border proceedings. According to Article 1, Paragraph 1 (a) the Draft Regulation lays down rules on the use of videoconferencing or other distance communication technology for purposes other than taking of evidence under Regulation (EU) 2020/1783. The latter one applies to the taking of evidence in civil or commercial matters in cross-border cases by the requesting court or by the competent court of the other Member State. Regulation 2020/1784 on the service of documents is also excluded from the scope of the present proposal (see Explanatory Memorandum or Recital 9 of the Draft Regulation).

However, a separation between the taking of evidence and an informal hearing is not strictly possible under German Law of Civil Procedure, because fact-finding does not follow rigid rules of evidence. To arrive at their conviction judges must not only consider the result of a formally ordered taking of evidence, but according to § 286, Paragraph 1 sentence 1 of the Code of Civil Procedure (‘Zivilprozessordnung’ – ZPO), “the court is to decide, at its discretion and conviction, and taking account of the entire content of the

hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue.”

This applies, for example, to the consultation of experts. The latter is not explicitly provided in Form A (Annex I) of Regulation 2020/1783. Such a hearing can be understood as part of the taking of evidence under German law pursuant to § 411 ZPO. To this extent, Regulation 2020/1783 is likely to be applicable by using clause 11.3 of the form to the regulation. Whether this also applies to a "separate hearing [...] at which the expert is familiarised with his tasks" according to § 404a, Paragraph 5 ZPO is not as clear.

Thus, it is not clear whether a videoconference is to be conducted on the basis of the present proposal for a regulation or, for example, on the basis of Regulation 2020/1783 and – more precisely - its article 20. In this matter, not even recital 9 of the Draft Regulation clarifies the relation to the service of documents or the taking of evidence.

c) Language

As far as can be seen, the proposed regulation does not specify the language to be used for (electronic) communication. The comprehensibility of the transmitted message is of considerable importance in cross-border legal relations and should therefore be regulated (as it has been done in the regulations on the service of documents and taking of evidence). What happens if an authority does not understand the text received from a foreign authority or person? What languages may be used? Who, if anyone, is responsible for the translation? All of these questions will arise in cross-border communications. Therefore, it must be ensured that for both, transmitter and receiver it is clear which language requirements apply.

2. Communication between competent authorities in civil, commercial and criminal cases (Article 3)

a) Scope of application

According to Article 3, Paragraph 1 of the draft Regulation, written communication between competent authorities in proceedings falling within the scope of the acts listed in Annexes I and II shall take place via a secure and reliable decentralized IT system.

We agree with the scope of application listed in Annex I regarding Civil and Commercial Law proceedings. But in our view the list in Annex II is incomplete; in particular, the directives on strengthening the procedural rights of suspects and defendants in criminal proceedings, which should be implemented throughout the EU in order to grant minimum standards of defense rights, and to which the European Public Prosecutor also considers itself bound, should be included. Only in this way the proposal's claim to grant effective access to justice for the realization of the principle of a fair trial (Article 47 Charter of Fundamental Rights – CFR) can be achieved.

This concerns the following directives in detail:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the **right to interpretation and translation** in criminal proceedings.
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the **right to information** in criminal proceedings.
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the **right of access to a lawyer** in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
 - *this directive is also explicitly referred to in Article 8 of the Draft Regulation* –
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.
- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the **presumption of innocence** and of the right to be present at the trial in criminal proceedings.

- Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on **procedural safeguards for children** who are suspects or accused persons in criminal proceedings.

b) End-to-end encryption

The DAV points out that the security and reliability of the system must be guaranteed from the beginning and in full compliance with the principle of confidentiality. For this reason, end-to-end encryption of communication must be guaranteed.

Therefore, at the end of Article 3, Paragraph 1 of the Draft Regulation, the following second sentence should be inserted:

"End-to-end encryption of communication shall be ensured."

c) Requirement for specification

The DAV deems several clarifications necessary with regard to Article 3 Paragraph 2 of the Draft Regulation. On the one hand, it must be defined in more detail, at least by means of presumptive examples, when there is an impossibility of electronic communication due to "exceptional circumstances". Firstly, we understand it to mean the disruption of the system and secondly the cases in which the nature of the evidence prevents electronic transmission – such as in the case of physical/material evidence mentioned in recital 14 of the Draft Regulation. This should be made clear accordingly. Otherwise, exceptional circumstances could be assumed hastily by the competent authorities. On the other hand, there is a need for clarification regarding the "appropriate alternative means" by which communication is to be carried out if electronic communication according to Article 3, Paragraph 1 of the Draft Regulation is not possible for the reasons described. Therefore, recital 14 of the Draft Regulation mentions "other secure electronic means or [...] postal service". It is our understanding that an e-mail or fax might be admissible, although the security of these means is not guaranteed in all cases.

It also seems important to specify the "specific circumstances of the communication in question" mentioned in Article 3, Paragraph 3 of the Draft Regulation – on the basis of which the use of the decentralized IT system does not appear to be appropriate – as it is left completely open when and for what reasons the use could be "not appropriate". It is to be welcomed that, pursuant to Article 3, Paragraph 4 of the Draft Regulation, the exchange of forms – as provided for in the list of proceedings in Annexes I and II – is not subject to the provision of Article 3, Paragraph 3 of the Draft Regulation.

3. Communication between natural or legal persons and competent authorities in civil and commercial matters (Articles 4-6)

The DAV is in favor of the creation of a European, electronic access point for electronic communication between natural or legal persons and the competent authorities.

In particular, it is to be welcomed that according to Article 4, Paragraph 2 of the Draft Regulation the Commission is responsible for the management, development and maintenance of the electronic access point.

When it comes to the communication between natural or legal persons and competent authorities (as provided for in Article 5 of the Draft Regulation), also applies what has already been said about Article 3 of the Draft Regulation concerning the security and confidentiality of communication. End-to-end encryption must be ensured.

Moreover, it must be ensured that the systems already established in the Member States for the communication of lawyers with the courts (such as in Germany the above-mentioned 'beA', which is also used by German lawyers established abroad) can still be used for this kind of communication - as it is said in recital 6 of the Draft Regulation. Insofar as a second, parallel system would have to be introduced for cross-border communication, the DAV is strictly opposed, because a parallel system would mean an additional burden for the activities of lawyers working across borders.

According to Article 5, Paragraph 1 of the Draft Regulation, written communication between natural or legal persons and competent authorities in proceedings falling within the scope of the legal acts listed in Annex I, should take place either via the electronic European access point or via national IT portals. Therefore, as specified by recital 5 of

the Draft Regulation, it should be ensured that the judicial systems also cooperate digitally in an efficient and secure manner using a national IT portal.

Moreover, it is not clear from Article 5, Paragraph 2 of the Draft Regulation how the consent of the parties to use the electronic communication channel is to be obtained. This should be specified to avoid doubts with regard to this consent. More precisely, consent should be revocable at any time (within a lead time). If necessary, the requirements contained in the Service of Documents Regulation (EU) 2020/1784 (Article 19 in particular) should be adopted.

4. Hearing by videoconference in civil and commercial matters (Article 7)

a) Scope of application

According to the wording of Article 7, Paragraph 1 of the Draft Regulation, in conjunction with Article 1, Paragraph 2 (c) of the Draft Regulation, not only proceedings in the legal acts listed in Annex I are covered, but also "other civil and commercial matters where one of the parties is present in another Member State". Thus, even national proceedings could be covered. This is to be welcomed, since the problems addressed in the draft regulation also arise in national proceedings involving foreign parties.

b) Proviso of technical availability

According to Article 7, Paragraph 1 (a) of the Draft Regulation the participation of a party by means of a video conference is again subject to the availability of the technology. The explanatory memorandum to the Draft Regulation also lists the secured availability and use of electronic means of communication as one of the objectives. In order to prevent the competent authorities from being able to rely (permanently) on non-existent technology, an appeal to the Member States should – for example – be included in the recitals, ensuring the widespread actual availability of corresponding technology (in particular sufficient video conferencing equipment, including microphones and cameras).

c) No order against the will of a party

From our point of view, it should be made clear that participation in a hearing by video conference cannot be ordered against the will of one of the parties. This clarification is deemed necessary because according to Article 7, Paragraph 1 (b) of the Draft Regulation, the allowing of a hearing by video conference requires that "the other party or parties to the proceedings were given the possibility to submit an opinion on the use of videoconferencing or other distance communication technology." The latter could also be understood as meaning that a videoconference can take place against the will of a party – if necessary. Clarification is needed in this regard, since a party's objection cannot undoubtedly be subsumed under Article 7, Paragraph 2 of the Draft Regulation either, according to which the holding of a hearing by means of videoconferencing may be refused "where the particular circumstances of the case are not compatible with the use of such technology".

Therefore, Article 7, Paragraph 1 (b) of the Draft Regulation should be worded as follows: "the other party or parties were given the possibility to object to the use of a video conference or other remote communication technology."

- d) "Particular circumstances of the case", Article 7, Paragraph 2 of the Draft Regulation

Clarification would be desirable on these particular circumstances of the case.

- e) Procedural comments

According to Article 7, Paragraph 4 of the Draft Regulation, the procedure for requesting and conducting a videoconference is subject to the national law of the Member State conducting the video conference.

This represents an impediment in linguistic and legal terms for the party in the "foreign" Member State. In this regard, it would require legal assistance for the submission of the application, possibly combined with the involvement of a translator. Article 7 of the Draft Regulation does not contain a provision on the involvement of an interpreter, as was done - at least to some extent - in Article 20 of Regulation 2020/1783 on the taking of evidence in civil or commercial matters.

Therefore, the provision in Article 7, Paragraph 4 of the Draft Regulation raises the expectation of inconsistent rules on the use or conducting of videoconferences, which is likely to be opposed to the promotion of (digitized) judicial cooperation.

5. Hearing by video conference in criminal matters (Article 8)

a) Hearing only with the consent of the person concerned

First of all, it is to be welcomed that the hearing of the "suspect, accused or convicted person" by video transmission is only possible with his or her consent (Article 8, Paragraph 1 (c) of the Draft Regulation).

In addition to the competent authority, the person concerned and his legal counsel should also have the right to request a hearing by video conference – for example in extradition proceedings.

b) Access to legal assistance

The DAV welcomes the fact that, pursuant to Article 8, Paragraph 1 (c) of the Draft Regulation, the accused person must have access to legal assistance in accordance with Directive (EU) 2013/48 before consenting to a hearing by video conference. To ensure confidentiality, this consultation must take place in person and not using state-controlled video technology.

Yet the wording falls short - legal advice and representation must be guaranteed not only in advance of the hearing, but especially during the hearing itself. Once again, in order to guarantee confidential communication, this is only possible if the legal counsel is personally present at the place of the suspect, accused or convicted person during the hearing. The personal presence of an interpreter may also be required (cf. Directive 2010/64/EU).

c) Advising about rights before the hearing

In addition, the person concerned should also be adequately **informed** of his or her procedural rights - even and especially without legal counsel if he or she does not request it (cf. also Article 3 of the Directive 2012/13/EU). Particularly in the case of the

sentenced person, the extremely relevant question regarding the duty to testify will arise in practice as to whether the hearing is for the purpose of questioning a witness or for the purpose of a planned takeover of execution (e.g. in the context of the Framework Decision on custodial sentences) or even for the purpose of questioning a defendant in other criminal proceedings.

d) Legal aid

In order to make legal counseling factually available to all affected persons regardless of their financial means, the right to legal aid pursuant to Directive (EU) 2016/1919 shall be guaranteed and the affected person shall in particular be informed about his or her rights in this regard.

e) Reservation of technical availability

According to Article 8, Paragraph 1 (a) of the Draft Regulation, the contribution of a party by means of videoconferencing is subject to the availability of the technology. In order to prevent the competent authorities from being able to rely (permanently) on a non-existent technology, an appeal to the Member States should – for example – be included in the recitals, ensuring the widespread actual availability of corresponding technology (in particular sufficient video conferencing equipment, including microphones and cameras).

f) Use of the technology only in exceptional cases not justified

Article 8, Paragraph 1 (b) of the Draft Regulation requires a more precise definition of the "particular circumstances of the case" under which the use of the technology is justified.

g) Applicable law and translation service

According to Article 8, Paragraph 4 of the Draft Regulation, the implementation of the videoconference is subject to the law of the Member State conducting the videoconference. This represents an impediment in linguistic and legal terms for the party in the "foreign" Member State. In this regard, it would require legal assistance for the submission of the application, possibly combined with the involvement of a translator.

h) Hearing of children

The provision regarding the hearing of children in Article 8, Paragraph 5 of the Draft Regulation does not appear to be sufficient. It is true that – especially with regard to minors – cases are conceivable in which a hearing by video conference appears to be a less invasive measure in the interest of the child. However, in light of the different forms of juvenile criminal law in Europe, there is no clear age classification: are persons under the age of 14 or only under the age of 18 considered to be children? Moreover, the question arises whether children themselves must give their consent according to Article 8, Paragraph 1 (c) of the Draft Regulation, or whether their legal guardians give consent in these cases. Finally, the special rights of minors pursuant to Directive (EU) 2016/800 must also be taken into consideration.

i) Recording of hearings

According to Article 8, Paragraph 6 of the Draft Regulation, the recording of hearings is possible if provided by the national law of one of the Member States involved. This is to be welcomed without reservation. The DAV has been advocating the use of video and sound in criminal proceedings for years.

j) Right to effective legal remedy

Also to be welcomed without reservation is the explicit right to an effective remedy in the event of a breach of this Article.

6. Legal effects of electronic documents (Article 10)

The wording of Article 10 raises the question on which rules to apply in proceedings regarding acts not listed by Annexes I and II, but in which – pursuant to Article 1, Paragraph 2 (c) and Article 7, Paragraph 1 Alternative 2 of the Draft Regulation – video conferences take place (= "in other civil and commercial matters where one of the parties is present in another Member State"). Could a document in the latter proceedings be transmitted by electronic communication and denied legal effect solely because it is in electronic form? A clarification is needed here.

7. Adoption of implementing acts by the Commission (Article 12)

According to Article 12, Paragraph 1 (a-d) of the Draft Regulation, the EU Commission shall adopt implementing acts for the establishment of the decentralized IT system.

The implementing acts shall – among other things – regulate the technical specifications defining the methods of communication by electronic means for the purposes of the decentralized IT system as well as information security objectives and minimum information security standards.

Although it is obvious that, from a legislative perspective, detailed technical issues in particular cannot be defined in the actual regulatory section in the interest of legal clarity and applicability, it should nevertheless be ensured that decisions on certain fundamental technical issues are already taken in the ordinary legislative procedure and are not left to the implementing acts. This includes, for example, ensuring end-to-end encryption of the communication.

8. Reference implementation software (Article 13)

It is appreciated that the EU Commission is broadly responsible for the European electronic access point (technical management, development, maintenance, security and support) as well as for providing, maintaining and supporting the reference implementation software free-of-charge.

9. Protection of information transmitted – Ensuring the level of protection of the state of origin (Article 15)

First of all, it is to be welcomed that with Article 15 of the Draft Regulation a provision on data protection is included. However, a clarification would be desirable that the European data protection regulations apply to the processing of personal data not only within the decentralized IT system, but throughout the entire scope of the Regulation.

The provision in Article 15, Paragraph 3 of the Draft Regulation, according to which the competent authorities shall ensure that information which is considered confidential in the Member State from which it is transmitted also remains confidential in the Member State to which it is transmitted while staying "in accordance with the national law of the Member State" must be critically evaluated. This could be interpreted to mean that – regarding confidentiality – the level of protection applicable in each case is that of the

Member State to which the information is transmitted. However, the level of protection applicable in a Member State, for example in terms of the lawyer's professional secrecy, may not be undermined as a result of a cross-border procedure or deviating regulations in the "receiving" Member State. The DAV points out that client confidentiality must be comprehensively guaranteed. Although it is also recognized under EU law as a consequence of the rule of law and moreover as an indispensable component of the right of defense (Article 47, Paragraph 2 sentence 2 CFR and Article 6, Paragraph 3 (c) ECHR), the national regulations in this regard are structured differently.

It is therefore absolutely necessary to clarify that the state of origin's level of protection also applies in the receiving state.