TECHNOLOGY AND NEW MEANS OF COMMUNICATION IN EUROPEAN CIVIL PROCEDURE – REGULATIONS (EC) 1393/2007 AND (EC) 1206/2001

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"It fills us with joy to be able to contribute a little so that Europe may become a unique state, thus getting farther and farther from our children's horizon the miserable spectre of war" – José Fernando de Salazar Casanova[1]

I. The evolution of judiciary cooperation regarding civil and commercial matters in the European union

From as early as the XVIII century, the necessity of international cooperation regarding matters of justice has been felt within European confines. Letters of request are probably the oldest recorded means of communication across borders, allowing national courts to ratify rulings outside of their area of jurisdiction, including in foreign countries[2].

It wasn't until the XIX century, with the rapidly expanding industrial and technological revolution, that the first international instruments were celebrated in pursuit of a faster, more efficient interstate cooperation – an evolution that continues throughout the XX century, and to this day, with the rise of globalization and the potential elimination of borders and the expansion of Humanity across the globe, in an ever-crescent miscegenation of cultures, peoples and values. And, in the background, the need for economic security and the lingering presence of international commerce.

Thus the need for security, either from the perspective of the market and from the perspective of the citizen, regarding the facilitation of judiciary actions and procedures across international borders – inspiring the elaboration of several bilateral agreements including the (still in practice) Hague Convention of 1970.

The objective of simplifying the formalities regarding recognition and execution of judicial decisions across the Member-States of the Union was already a concern in article 220 of the Treaty

[1] Portuguese Judge in the Supreme Court of Justice. The quote was written in Portuguese in an article published by *Revista da Ordem dos Advogados,* Ano 62 – Vol. III – December 2002 and freely translated by the subscribers.

[2] LAURENT LÉVY, "L'Entraide Judiciaire Internationale en Matière Civile", *in Colloque L'Entraide Judiciaire Internationale en Matière Pénale, Civile, Administrative et Fiscale*, Genève, 6-7 February 1985, p. 55.

of Rome, which instituted the European Economic Community in 1957, leading to the celebration of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in 1968. Undisputedly of capital importance, this instrument predicted, in its article 26, the mutual recognition of judgments among contracting stages, without the need of any special procedure, and instituted the prohibition of reviewing the substance of the matter decided in the foreign ruling[3]. The Lugano Convention of 1988 then reinforced these rules among members of the European Economic Community and also members of the European Free Trade Agreement.

With the Treaty of Maastrich, in 1992, judicial cooperation in civil matters was determined as an area of common interest to the EU Member-States (third pillar), but the most important step forward followed, with the signing of the Treaty of Amsterdam, and the conceiving of the area of freedom, security and justice.

This treaty established specific provisions on judicial cooperation in civil matters, which were, thereby, transferred to the first pillar and fell within the scope of immediate legislative competence of European Union. Improving and simplifying the systems for cross-border service of judicial and extra-judicial documents, cooperation, taking of evidence and the recognition and enforcements of decisions on civil matters was, therefore, considered essential for the proper functioning of the internal market.

The Treaty of the Functioning of the European Union (as instituted by the Treaty of Lisbon in 2007) brought further expansion of the judicial cooperation in civil matters and, nowadays, clearly states as a primary objective of the Union *"the judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases"*[4], electing as main areas of action (while aiming for the mutual recognition and enforcement between Member-States of judgments and of decisions in extrajudicial cases), the cross-border service of judicial and extrajudicial documents, the compatibility of the rules applicable in the Member-States concerning conflict of laws and of jurisdiction, cooperation in the taking of evidence, effective access to justice, the elimination of obstacles to the proper functioning of civil proceedings (if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member

[3] JOÃO AVEIRO PEREIRA, "Cooperação Judiciária em Matéria Civil e Comercial", *in Direito e Justiça,* vol. XV, Tomo 2, 2002, p. 117.
[4] Article 81, par. 1 of the TFEU.

States), the development of alternative methods of dispute settlement, and support for the training of the judiciary and judicial staff.[5]

As pursuant to these objectives, the Regulation was the legal instrument considered adequate to the purpose of harmonization of Member-States legislations, given the cross-borders characteristics of the premise and the clear goal of facilitating the free circulation of goods, people and ideas which is the *ex libris* of the EU – due to its binding force and direct applicability in all Member-States[6] - and in the wake of these clear goals, the number of regulations keeps growing. From Regulation 1346/2000 on Insolvency Proceedings, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Regulation 44/2001 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and, last but not least and the main object of this present paper, Regulations **1393/2007 o**n the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and **1206/2001** on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Judicial cooperation in civil matters is, hereupon, the given name for a quickly expanding and developing European civil procedure. Even tough there is not a uniform European Civil Procedure Act, the notion of European civil procedure covers areas regarding typical cross-border issues and topics which are often considered as a procedural part of international private law.

Consequently, as citizens of the world and, for what matters, citizens of Europe, no one can be in denial as to the increasingly faster development and growth of new technological tools – and European legislation and jurisprudence cannot, by any means, get behind the age of the Internet.

Communication from one point of the globe to the other in instant speed is now a given data. From the humble origins of the e-mail, to the possibility of connecting in a video-call from the United States to Australia through a device about the size of a human hand, the transmission and travel speed of information is now at all-time high.

And from the new horizons opened by these new means of technology arises the concept of "**electronic justice**", or simply "E-justice", which can be defined as the use of technology, information and communication to improve access of citizens to justice and effective judicial action[7].

[5] Article 81, par. 2 of the TFEU.
[6] Article 288, § 2 of the TFUE.
[7] In his Political Guidelines, President Juncker has defined the need for a better judicial cooperation among one of the

The development of E-justice has been widely recognized by the European authorities as a key element in the modernization of judicial systems. Proof of this is the creation of online data bases such as *curia.europa.eu* and the implementation of a judicial atlas in criminal and civil cases enabling practitioners to determine the appropriate judicial authorities in different parts of the EU; and, of course, the building of a judicial network portal in civil and commercial matters, in 2003, by the Commission – *e-justice.europa.eu.*

E-justice brings undeniable advantages to the values of efficiency, transparency, celerity, and even to timely delivery of justice. Thus, these values favour and benefit the administration of justice, which, in turn, fulfils the aim brought about by the article 47 of the Charter of the Fundamental Rights of the European Union and the article 6 of the European Convention on Human Rights – *the rights to due process, fair trial and effective remedy*[8].

As such, in this paper, we will be analysing two of the most relevant legal instruments in the field of European civil judicial cooperation already mentioned above: Regulations 1393/2007 on the service in the Member-States of judicial and extrajudicial documents in civil or commercial matters and 1206/2001 on cooperation between the courts of the Member-States in the taking of evidence in civil or commercial matters, in order to appreciate not only their specific previsions regarding the use of electronic tools but also its effective use in the judiciary practice. Furthermore, we will also address the most problematic aspects of the Regulations, on this matter, mainly, their use by the judicial operators on a daily basis.

II. Service in the Member-States of judicial or extrajudicial documents – Regulation 1393-2007 of the European Parliament and of the Council

1. Overview

Cross-border service of judicial documents has long been one of the main fields of mutual judicial assistance in civil and commercial matters.

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10 priorities of the Commission: "*as citizens increasingly study, work, do business, get married and have children across the Union, judicial cooperation among EU Member States must be improved step by step... so that citizens and companies can more easily exercise their rights across the Union*".

[8] The European Parliament has adopted an own-initiative report on common minimum standards of civil procedure in the EU. In its resolution of 4 July 2017, the European Parliament includes recommendations to the European Commission and expresses the need of minimum procedural standards and a wider use of modern communication technology both relating to service of documents and taking of evidence.

Different methods were agreed upon, beyond the traditional method of using diplomatic or consular channels, namely those resulting from bilateral and multilateral treaties, such as the Hague Convention of 1954 on Civil Procedure, followed by the Hague Convention of 1965 in the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In the frame of the European Union, this matter has been one of the keystones of judicial cooperation in civil and commercial matters, defined in the Treaty of Amsterdam.

Indeed, through the settlement of the judicial cooperation in civil matters among the direct legislative competences of the Union, necessary for the functioning of a an internal market, the European legislator adopted Regulation 1348/2000, later replaced with Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007. Aware of the importance of such matters, the legislator targeted, in creating the precepts within these Regulations, the improving of the transmission of proceedings between the courts of the Member-States, to make them fluid, quick and simple.

The adoption of this Regulation operated a clear paradigm shift on what is now the main concern about cross-border service of documents. If, until then, such concern was somewhat keen on the protection of national sovereignties, the main focus today is the protection of individual procedural guarantees for the parties in the procedure.

Indeed, the service of process gradually shifted from being looked upon as an exercise of powers of a sovereign state on another one's territory, to being considered as an act of providing assistance and cooperation, reaching for the objective of guaranteeing adversarial procedure and effective exercise of the right of defence.

Taking the example of the parts on a judicial demand, from the defendant's point of view, the main concern will obviously be the guarantees of a due process, such as regarding the language and translation requirements on documents and the right to be heard and to contradiction. On the other hand, from the claimant's point of view, his concern will regard speed, reliability and low cost transmission in order to effectively access justice.

In fact, Regulation 1393/2007 provides for different ways of transmitting and serving documents, without any rule of precedence or priority between them[9], even tough we can state the positive effects on efficiency and celerity of the direct way of service.

Indeed, the first way is through designated transmitting and receiving agencies. This is a direct mean connection, that is to say, without intermediary, by means of a channel that has, on the one hand, the one that asks for the practice of the act and the need for intervention and, on the other hand, another who implements it, as results, with the necessary clarity, of articles 4 to 11 and 16 of the Regulation.

On the other hand, the Regulation also provides for a direct way of service, through competent judicial officials of the member state addressed, as long as it is permitted under the law of the requested Member-State, such as stated on the article 15 of the Regulation. At last, the Regulation also provides for the possibility of transmission by consular and diplomatic channels (v. article 12 and 13), and through mail, per registered letter worth acknowledgment of receipt or equivalent (v. article 14)

Regarding to methods of service, the Regulation provides for important requirements concerning language. Namely, it is required for the document to be served to be translated in a language that the addressee understands or the official language of the Member State addressed – otherwise the addressee may justifiably refuse to accept the document, an entitlement which must be advertised by the serving agency.

Hence, at the level of principles, the rules stated by the Regulation correspond to an effective exercise of the right to be heard in a proceeding, and, therefore, granting procedural guarantees, such as those relating to cost barriers and effective access to court, besides those relating to the duration of proceedings.

2. New possibilities: an integrated European system of service

After this brief explanation of the European system of service as maintained by Regulation 1393/2007, it is now imperative to regard the practice within the Union, as well as between Member-States, and the scenario provided by the Regulation itself.

[9] As stated by the European Court of Justice in, for example, judgements of 2 March 2017, *Andrew Marcus Henderson*, C-354/15, paragraph 71; 9 February 2006, *Plumex*, C-473/04 paragraphs 20 – 22; 19 December 2012, *Alder*, C-325/11 paragraphs 31 and 32.

First of all, it is mandatory to observe and conclude that the Regulation does not contain specific provisions regarding the electronic service of documents.

On a second note, we can ascertain as per the information obtained from the E-Justice portal, that it is starting to be accepted that the court can serve documents to the parties through electronic means across some of the Member-States,[10] although, in many cases, this is only possible if the party has agreed or specifically asks for such a method and indicates to the court an electronic address in which they can receive the document via e-mail.[11] Other Member-States, however, have gone a step further and created online systems through which parties can be served, at least when the proceedings have already started.

We can refer to a few examples: first of all, we have the *Citius* system in **Portugal**, which allows for legal representatives to be served documents, to notify the other legal representatives, to consult all proceedings in which they represent a party, as well as to submit documents to the court. Electronic submission via the *Citius* portal is nowadays the rule in civil proceedings, recently being also extended to criminal proceedings, while submission of documents to court and service to the parties by postal service or in person is becoming the exception. **Austria**, which began to digitally file procedural documents as early as the 1990's, created the *Elektronischer Rechtsverkehr* system, which is mandatory to a number of entities, including lawyers and notaries – also, since 2014, it now allows citizens to receive correspondence from the authorities through a secure e-mail account.[12]

With this in mind, it is important to share information on the Estonian e-Residency system, which in our investigation we concluded that could be an example towards the building of a legal and infrastructural framework for an integrated hub of judicial communication, service and consultation across Member-States.

The e-Residency system allows anyone who has a connection to the Estonian state to manage their business from anywhere in the world, from receiving and authenticating documents, to start a company and manage it. The feature which we would mostly like to bring to attention is the

[10] Exceptions include **Malta**, **Ireland**, **Northern Ireland**, **Gibraltar**, **Luxembourg**, **The Netherlands** and **Cyprus**, States in which electronic service is not allowed, either by strict legal prohibition or absence of regulation. Greek legislation allows for the electronic service of documents, although the specific aspects are yet to be regulated by a presidential decree; **Belgium** is also still building the body of regulation and the technical process to create a system of electronic service.

[11] It is the case with **Slovakia**, **Finland** (regarding only documents that must be served by the Public Prosecutor), **Romania**, **Gibraltar** (only if both parties have a legal representative), **France** (within the conditions allowed by article 748 of the Code de Procédure Civile), the **Czech Republic** and **Bulgaria**.

[12] https://www.digital.austria.gv.at/legal-framework-in-austria and https://www.bmdw.gv.at/Digitalisierung/ElektronischeZustellung/Seiten/default.aspx).

possibility of obtaining a Personal Identification Code (PIC), which consists of a unique 11-digit code that remains the same for the entire lifetime of the resident, which can be attributed to anyone working or living in Estonia.[13]

This is not entirely a novelty, as one could argue that almost every country in the world attributes an identification number to its citizens or residents. However, in light of the present paper, we would like to point out that any citizen with a PIC has an e-mail address attributed to them, which is in turn used by all the national authorities to serve documents and transmit information upon their citizens; and this is relevant, because, given the existence of an Estonian PIC, the Estonian Code of Civil Procedure allows the court to electronically serve the document upon the PIC's titular, even if they do not have a legal representative.[14] The court sends an e-mail to the code's titular associated address, with a link that allows the citizen to access the courts' information system and view all the documents relevant to the procedures, as well as to confirm reception of the document.[15]

Now, bearing in mind this small exemplification of the Member-State's solutions, we will continue by stating that it is necessary to distinguish two situations within the Regulation, since this instrument *"applies to documents to be served which can be very different in nature, depending on whether they are judicial or extrajudicial documents and, if the former, on whether it is a document instituting the proceedings, a judicial decision, an enforcement measure or any other document."*[16] This means that the Regulation is relevant when the document is served in a running procedure, as well as to initiate one. And the difficulties begin here, as there is a substantial difference between these phases of a civil proceedings.

In fact, despite this rather laudable effort from some of the Member-States, it is worrying to verify that there's been a certain resistance to apply the same principles to the service of documents across borders. An initiative by the Directorate-General for Justice and Consumers[17] produced a report which identifies several shortcomings regarding the proper application of Regulation 1393/2007, stating that *"there is evidence that despite their ambition to promote the use of modern technologies, Member States' designated authorities do not accept electronic means of communications for interactions between themselves and that electronic service methods are not used and neither electronic evidence is transmitted or accepted under the Regulation."*

[13] *https://www.workinestonia.com/coming-to-estonia/personal-id-code/*
[14] Article 311.1, line 5 of the Estonian Code of Civil Procedure.
[15] See the article of the Estonian CCP mentioned in the note above, and the information obtained in the E-Justice Portal.
[16] Judgement of the European Court of Justice from 8 May 2008*, Ingenieurbüro Michael Weiss und Partner GbR*, C-14/07, paragraph 41.
[17] Available in the E-Justice portal in *https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5988152_en.*

As stated before, the Regulation does not specifically address electronic service. It is also true that the Regulation operates under two conflicting interests: while the ever-present economic interests of the Union require fast methods of service, the fundamental rights of the citizen to a proper defence and due process of law require safe and certain means to serve a document, particularly when the proceedings have not been initiated yet and the party may not even have a legal representative. This represents a permanent tension between *speed* and *security; "speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a standard form, to be completed in the official language or one of the official languages of the place where service is to be effected, or in another language accepted by the Member State in question."*[18]

This need to assure security in the transmission or service of documents has resulted in the system which we described above, with the primary means of service being the transmission through transmitting and receiving agencies and the proper use of the Regulation's forms.

It must be pointed out that, regarding the proper service of documents, the requesting State, through its transmitting agency, can ask for the service to be processed in a specific manner, in an alternative (rather than an exception) to the principle *lex fori regit proccessum*, which states that the service should be made according to the law of the receiving State.[19] In this light, the receiving State can refuse to comply, if that method is incompatible with its internal law: however, one could argue that, like the similar system proposed by article 10.3 of Regulation 1206/2001, such refusal should be founded on manifest incompatibility of the internal law with the requested means, and not merely on the absence of regulation regarding a given communication method; and also, technical difficulties to comply with a given request should also be insurmountable, in a way that it is completely impossible for the requested State to comply with the request.[20]

If this interpretation might be possible in Regulation 1206/2001, the problem with the service of documents regards mainly the proof of reception, the compression of the sovereignty of the requested Member State and the disharmony between all the internal legal and technological systems. It is hard to conceive a full harmonization between all the Member States civil procedures

[18] Consideration 7 of Regulation 1393/2007.
[19] See article 7.1 of Regulation 1393/2007.
[20] ALFONSO YBARA BORES, *El Sistema de Notificaciones en la Unión Europea en el Marco del Reglamento 1393/2007 y su Applicación Jurisprudencial*, in Cuadernos de Derecho Transnacional (Octubre 2013), Vol. 5, Nº 2, p. 493 (including note 46).

in a way that would allow the service of documents electronically throughout the European Union territory.

Even if the main way of service, build upon this triangular (or rather, quadrangular) system does not completely remove the Regulation's demand for speed, considering that article 4.1 stipulates that this contact between the agencies and the recipient should be done *"directly and as soon as possible"*, it is understandable and natural that electronic means of communication are not being used between agencies, considering either that security in transmission could be impressively harmed by such methods, but also, in light of the different approaches made by the Member States in their internal law regarding the use of electronic tools of service.[21]

The problem is obviously a lot more pressing regarding the service of documents which initiate the instance; but even regarding the documents being served *during* the proceedings, one cannot ignore the fact that the Regulation is still silent regarding electronic service; an argument could be advanced in the sense that, based on the method of *analogia legis,* article 14, regarding direct service by postal service, could be interpreted in the sense of allowing for e-mail communication, at least when a proceeding is already running its course.[22] We do consider that this last option might mean a huge effort of interpretation, which the Regulation might not have allowed.

In conclusion, even in the aforementioned Portuguese, Estonian and Austrian cases, one most point that their systems only function either between operators or in a voluntary basis, and it is not easy or, for that matter, even legally admissible to impose on citizens the adhesion to this kind of system.

In order for such system to be implemented it would be advisable to start with larger corporations, which have the means, time and resources to control the reception of service. A problem, which, we believe, would, however, still linger, concerns the proof of receipt, as well as the technical inadequacies and civil procedure diversity among Member States.

[21] Articles 6.1 and 6.2 can also be used as thorough examples when they mention *"the swiftest possible means of transmission".*

[22] Given also that, unlike its predecessor (Regulation 44/2001), Regulation 1393/2007 does not allow Member-States to impose any conditions on the means of service via postal service. The report we mentioned above by the Directorate-General for Justice and Consumers gives notice of a cost between €5 to €20 to serve documents via postal service from one State to the other; electronic communication does not usually carry any costs, which would, in *ultima ratio*, benefit both the communitary institutions and its citizens.

3. eIDAS and the future of electronic service

As such, despite technological advances and the work put in by some Member States in order to dematerialize judicial proceedings and make way for electronic service, the conclusion to withdraw is that it doesn't appear possible, merely under the legal framework of the Regulation, for receiving States to comply with a request which demands the use of a given means of transmission, including electronic service, even taking into consideration also that Regulation 1393/2007 specifically states that the refusal options should be kept to a minimum, to ensure its efficiency (see Consideration 10). To such oppose either the incompatibility of internal law and technical difficulties, as explained.

However, it is defendable, at least *de iure constituto,* to propose and think about new possibilities, given at least by a few instruments already developed by the European institution: in particular, the e-Delivery project, which in turn has its roots on the eIDAS system.

E-Delivery is a node for electronic communications, which allows for electronic transmission of documents across the Union space; with this objective, any given Member-State can merge any current IT system with the e-Delivery nodes, to enable secure and reliable transmission of documents and data.[23] As an integrant part of the aforementioned eIDAS system, it shares the common goals of Regulation 910/2014 of the European Parliament and Council, which regulates electronic identification and trust services for electronic transactions in the internal market.

Born from an invitation from the European Council to the Commission, in the Council's conclusions of 27 May 2011, eIDAS and the aforementioned Regulation operate under the central idea of forbidding the refusal of legal effects of electronic documents solely on the base of that electronic character. Articles 43 and 46 of the Regulation do pay tribute to this objective, by expressly stating that electronic documents cannot be refused legal effect as admissible evidence, and that there is a presumption of the integrity of the data, the sending of that data by the identified sender, its receipt by the identified addressee and the accuracy of the date and time of sending and receipt indicated by the qualified electronic registered delivery service.[24]

While integrated in a larger scheme, as part of the Commission's Connecting Europe Facility (CEF), which means to facilitate European citizens access to electronic services in all of the Union space, the specific reference made in Regulation 910/2014 regarding judicial procedures

[23] *https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/What+is+eDelivery+-+Overview.*

[24] *https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/What+is+eDelivery+-+EU+legislation*. Also to note is that this Regulation has been in full appliance since the 1st of July 2016, according to its article 52.

demonstrates the European institutions desire in bringing electronic communication and electronic justice to a relevant stage in citizen's lives. Not only electronic communication and service might contribute to speed in the service of documents, it also can contribute to the diminishing of administrative costs of time and money associated with the intervention of central transmitting and receiving agencies.

The possibility of joining the tools provided by the eIDAS and e-Delivery systems, with a legal framework built upon Regulations 1393/2007 and 910/2014, might be a first step towards a more efficient electronic justice system.[25]

It would be important, to review and develop the legal instruments already at hand, since, as the subscribers of this paper can tell, the eIDAS Regulation and system is not being currently implemented or even used; and there is still a long way to go towards a perfect interconnected system. But we hope that, with this small exposure of the possibilities and the work of several of the Member-States, we may have advanced a possible solution to the problem. If serving documents via electronic means is already a given in some Member-States, the Union cannot fall behind its members, and as we've shown has been steadily working towards the structuring of a strong, efficient European justice, based on the new information and technological advances.

III. The taking of evidence in civil matters in the European Union – Council Regulation 1206/2001

1. Overview

The EU Regulation 1206/2001, of 28 May 2001, is the tool used to enable a court from a Member-State, accountable for its appreciation, to take evidence in a simple, effective and swift manner in another Member-State, through direct contact with judicial authorities of the latter, and is applicable to any taking of evidence procedure instituted in the civil law or anticipated evidence.

The Regulation aim is to avoid countries confines within the European Union to represent an obstacle in solving cases that demand cross-border evidence collecting, therefore creating a homogenous procedural system, which allows a court from a Member-State to have access to the

[25] Since the eIDAS system and Regulation were mostly created to certify electronic signatures, it would be extremely useful considering also its use for notarial effects, mainly within Regulation 650/2012 regarding enforcement of authentic instruments in matters of succession; the certification of the document's origin would accelerate and rectify proceedings in a field where tardiness is often the rule.

evidence, without regarding to where it has to be taken, ensuring the effectiveness of four principles: *simplicity, clarity, judicial security* and *quickness*.

The Regulation was preceded by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and gave expression and effectiveness to articles 61 c) and 65 of the Amsterdam Treaty, which determined and assumed the need to simplify and improve judicial cooperation in cross-border collecting of evidence.

The main innovation introduced by Regulation 1206/2001 is to allow a court from a Member-State, by itself directly, having for such been authorized, to take evidence in another Member State territory, regarding any taking of evidence procedure admitted in the civil law.

The Regulation states, therefore, two different ways of operating the taking of evidence in another Member State's territory. A Court may either ask another Member State court or authorities to collect the evidence, or it can take it directly in that other Member State's territory, in terms as follow.

2. Direct and indirect taking of evidence

The taking of evidence by the requested court, under the provisions set out by Articles 10 to 16 of the Regulation, relies on a direct communication and transmission between both requesting and requested courts, using standard forms attached to the Regulation, and gives expression to the principle of *active cooperation*, which supresses the intervention of third party entity.

This means that the requested court will take the evidence by itself, as it would normally proceed if it were the jurisdictional responsible authority on a non cross-border case.

Indeed, using the designated forms, the requesting Member-State court requests the performance by the authorities of the requested Member-State. The form on which the request is made must clearly indicate information such as regarding the requesting court's denomination, the names and addresses of the parties to the proceedings and their representatives, if any, the nature and subject matter of the case and a brief statement of the facts, apart from a description of the taking of evidence to be performed and the purpose the request serves, besides the documents or other objects to be inspected.

Once the request has been received, the competent court shall acknowledge the receipt in 7 days, and the Regulation states that the request shall be fulfilled in 90 days from the date of receipt, according to the legislation of the requested Court.

However, the requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties[26].

Once the procedure is completed, the requested court shall send the requesting court the documents establishing its execution[27].

The taking of evidence by the requesting court relies, on the other hand, on a request by the national court to the **central body** of a given Member State, under Article 17 of the Regulation, on somewhat we can name and perceive as the principle of *passive cooperation*.

Once the green light is given and the collecting of evidence is granted, the Member-State's requesting court is allowed to perform any actions in order to take the evidence directly, on its own, without the interference of a court, according to its own legislation.

A significant aspect we must point out regards article 17.2, which specifically states that the direct taking of evidence may only take place and can only be performed on a voluntary basis, this meaning that the target person must voluntarily collaborate in the procedures, since the Regulation, on what concerns to this way of collecting evidence, forbids the use of coercive measures. Furthermore, in the cases of direct taking of evidence aiming for the inquiring of a designated person, the requesting court shall inform such person that the performance shall take place on a voluntary basis. The requesting court itself is responsible for organising the hearing and for notifying the witness of date, the time and place of the hearing as well as of the fact that the giving of evidence is voluntary.

Summarizing, the most relevant differences between both ways of taking evidence are, therefore (besides, obviously, the court responsible for the taking of evidence), the possibility of the

[26] According to Article 10.4, paragraph 4, if there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.
[27] Article 16.

use of coercive measures (only on active cooperation), the applicable law (requested state's law on active cooperation) and the participation or not of an entity of contact, since article 17, differently from article 10, foresees the need to address to a central body/competent authority.

3. Videoconference: direct or indirect taking of evidence?

Both in active cooperation, under the article 10.4, or in passive cooperation, in accordance with article 17.4, paragraph 4, the use of communication technologies is widely encouraged, especially videoconference and teleconference. This has been considered to meet the standards of Article 6 of the European Convention of Human Rights. Reducing delay, improving economy, efficiency and effectiveness and the more general objective of promoting confidence in the justice system through the use of new technologies are laudable aims and are unlikely to generate much dissention.[28]

Most Member-States, in fact, already allow for the taking of evidence through videoconferencing, as we can confirm by a simple consultation of the *E-Justice* portal.[29]

Courts have, however, been often characterised by a very low level of technological competence. Adding up to this fact, it is also worth noting that the technology needed for the use of videoconferencing is not available in every court of most Member States, and where videoconferencing is available, the different systems might not be compatible with the ones used in the other Member States' courts.

We should remind that the Regulation does not limit the use of information technologies to videoconferencing, since it states that the use of communication technology allowed and encouraged, with both articles 10.4 e 17.4, paragraph 4, pointing out teleconference and videoconference only as examples.

At this point one should question if it wouldn't be advisable to use tools like *Videolink* and consumer applications such as Skype, to perform the taking of evidence, since these solutions guarantee stability and compatibility to a larger degree than the classic videoconference systems, which rely on different hardware and software.

[28] B. Loveday, in M. Fabri *et al.* (eds.), *The Challenge of Change for Judicial Systems*, 2000 p. 23
[29] https://e-justice.europa.eu/content_taking_evidence_by_videoconferencing-405-en.do?clang=en

Despite the fact that the use of communication technologies is incentivized and encouraged by the Regulation, it omits whether the taking of evidence through them should take place directly under Article 17 or should otherwise, be the requested Member States' authorities to carry it out.

Both articles 10.4 and 17.4 of the Regulation indicate the use of communication technologies. The arrangement of a cross-border hearing using communication technologies requires for certain formal measures to be taken. We can imagine the Regulation providing for two possibilities regarding the use of communication technologies in cross-border taking of evidence, based on the systems we mentioned above.

Under articles 10 to 12, the requesting court may request the requested court in another Member-State to enable it or the parties to be present or participate by means of video or audio communication technologies in the taking of evidence by the requested court. Such a request may only be refused if it is incompatible with the law of the Member-State of the requested court or by reason of major practical difficulties.[30] Article 13 then provides for coercive measures for the execution of the request. However, under Article 14 the witness may claim the right to refuse to give evidence in accordance with the law of the Member-State of the requesting or the requested court. We should note that in this procedure the intervention of the requesting court is somewhat limited. Even if article 12 allows for the intervention of the requesting court, *it does not clearly specify the level of participation attributed to it*.

Under Article 17, the requesting court itself takes evidence directly in another Member-State with the consent of the central body or competent authority of this Member-State. Under Article 17.4, the central body or competent authority is obliged to encourage communication technologies for this purpose. Article 17.2 specifies that direct taking of evidence may only take place if it can be performed on a voluntary basis.

However, using the info stated by the already quoted "*Modernisation of judicial cooperation in civil and commercial matters: Service of documents",* the European Commission states that, regarding to the Regulation on taking of evidence, *"available data suggest that the method of direct taking of evidence is used rarely" and that this is partly explained by "objective obstacles, such as the inaccessibility of videoconferencing equipment, but partly also by the structure of the procedure established by the Regulation, which is considered to be formalistic and cumbersome".*

[30] On this matter, see page 9 above.

The provisions of the Regulation regarding the direct taking of evidence give express voice to sovereignty concerns: hence the need for the intervention of a central body in the framework of the direct taking of evidence.

But one could question the current need and, more than that, the current coherence of this solution, based on the intervention of a central body authority, rather than on a simply court-to-court liaison.

The central body's figure is increasingly less present in EU legislation, so we can argue about either the symbolic meaning of the remaining role of a central authority on what regards the collecting of evidence, but also about the need of its lasting presence and prerogatives. On the perhaps unnecessary role of the central authority in this matter, Carlos Marinho also considers that the use of video and audio communication technologies should not be looked upon with sovereignty concerns, once it does not imply for a physical and effective incursion on another Member-State territory[31].

Likewise, we believe that the prohibition of coercive measures will most likely obstruct to better results in the direct taking of evidence procedures regarding the use of video and audio communication technologies.

We must not forget the concerns with favouring and fomenting the area of freedom, security and justice and also to the developing of an effective and simplified system, thus developing cooperation on a *common judiciary space,* where judicial decisions circulate and legal situations acquired under one legal system are acknowledged within the EU across borders without unnecessary obstacles.[32]

In fact, the primary objective that presides and underlies the Regulation is the ideal of the creation of an area of freedom, security and justice, such as implied in article 65 of the Treaty of European Community – today article 81 of the Treaty of Lisbon. The swift and agile ways of taking evidence in the context of cross-border evidence cooperation must be the legislator resolution.

The solutions regarding video and audio communication technologies, with, in our appraisement, the appointed contradictions, disturb the full success of international judicial cooperation, most needed for the proper functioning of the internal market. This will only be

[31] CARLOS MELO MARINHO, *Textos de Cooperação Judiciária Europeia em Matéria Civil e Comercial,* Coimbra Editora, 2008, pp. 29-31.
[32] As stated by YBARRA BORES, Alfonso, op. cit., pp. 248-265

achieved on a basis of total mutual trust between the Member-States' courts and authorities, mutual trust that is somewhat mitigated because of the passive cooperation or direct taking of evidence still being dependant on a central body's figure intervention and also because of the denial about the use of coercive measures.

At this point, we should also note that we don't see reasons to affirm that there is a true and pure way of direct taking of evidence in what concerns the use of communication technologies within article 17 of the Regulation. The central body's intervention and the lack of coercive measures to impose the participation of witnesses compromise the effectiveness of this procedure. With Alfonso Ybarra Bores[33], we also believe that "(…) *La figura del órgano central, esencial en los instrumentos internacionales clásicos en materia de asistencia judicial internacional bajo la denominación de autoridades centrales —y en particular en los que se han ocupado de la obtención de pruebas en el extranjero—, no desaparece en el Reglamento 1206/2001, si bien en éste su papel ha quedado relegado a un segundo plano, aunque no carente de importância."*

We believe that video and audio communication technologies should preferably be used – whether it's under the indirect or direct taking of evidence – in the framework of direct contact between the courts of the Member States involved. [34]

We should also remind that, according to the E-Justice portal,[35] "*videoconferencing is an efficient tool that has the potential to facilitate and speed up cross-border proceedings and to reduce the costs involved*, and in our opinion the intervention of a central body lacks coherence with the aims of judicial cooperation. We believe that the role of the central body could be revised by the legislator in the future or even be eliminated.

As a final note, to ensure of the importance of videoconferencing, the E-Justice platform lists a series of future plans, which could include[36]:

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[33] Op. cit., p. 255.

[34] Also, one can never forget the jurisprudence laid down by the ECJ judgment of 21 February 2013, *Pro-Rail,* case C-332/11, in the sense that an act of investigation by an expert from a Member-State can take place in another Member-State's territory, outside of the Regulation's provisions; meaning that the Regulation stipulates a set of organized rules that are not necessarily imperative, and does not prevent Member-States to obtain evidence under different understandings. As such, it is our conclusion that this line of thinking can be applied to any means of extracting and taking evidence, and not exclusively regarding expert analysis. So, videoconferencing and other video/audio communication methods, could be used in cross-border cases outside of the Regulation rules – even though communication with the central body might prove, at least, a security measure.

[35] *Videoconferencing as a part of european e-justice the essentials of videoconferencing in cross-border court proceedings*, European Communities, 2009.

[36] https://e-justice.europa.eu/content_general_policy_description-70-en.do

- links to EU legislation and legislation of the Member States regulating the use of videoconferencing;
- consolidated information on all courts with videoconferencing facilities in the Member States;
- tools for the practical arrangement of videoconferences (electronic forms, possibly a booking system in the long-term);
- links to national instructions or manuals, where available;
- a section on examples of videoconferencing in cross-border proceedings and a collection of best practices;
- information on training and online training modules;
- a link to the interconnected interpreters' databases.

IV. Final thoughts

With this paper we meant to draw attention to the fact that it is not only the protection of national sovereignty that is the major concern in regards to cross border legal assistance. On the contrary, the EU legislator's concern is, besides the goal on establishing a genuine single market and judicial area, to protect the individual interests of people who participate in cross-border litigation and this has to be taken into consideration and reflected on the provisions set by the Regulation, or in its interpretation.

We believe that both Regulation 1393/2007 and 1206/2001 hardly live up to their full potential in terms of reaching the EU legislator's goals, such as making judicial proceedings simpler, more efficient and with an impulse and impact on the protection of fundamental rights of the parties involved, in particular access to justice and the rights of the defense. There is still much to be done. But with the proper investment from the judiciary, it is only a matter of time until we see the use of information technologies to their maximum capabilities to the benefit of cross-border litigation and the freedom, security and justice space.

The world is changed, and the European institutions are revealing the will and desire to implement technological advance in the functioning of the Union; the judiciary procedure is one of

the fields which would benefit the most from these changes, with all the advantages mentioned above which might be brought upon the due process and the lives of citizens and companies, and lastly, the European economy, function and objectives of gathering and union.

The possibilities are endless, and ours is just a small contribution; within the confines of this paper, we do hope we have given the reader a small rendering of the current panorama, and the possible advances we might build, as a united Europe.