



Judicial videocooperation in cross-border criminal proceedings

Proposals for establishment of
European standards and platform for
videoconferencing

Team of NIJ Bulgaria:

Teodora Karabasheva – judge trainee

Slavena Koycheva – judge trainee

Gospodin Tonev - judge trainee

Tutor: Judge Angelina Lazarova



April, 2021

I. Introduction to the background of the research.

Judicial cooperation in criminal matters is not only a part of the primary law of the European Union (EU)¹, based on the principle of mutual recognition of judgements and additionally established through the instruments of the secondary legislation. It is also a fruitful and inexhaustible concept researched, criticized and encouraged by academics². Most importantly, it is a vivid and actively applicable set of tools³ for the practitioners of criminal law in the EU involved in the process of combating, prosecuting and punishing cross-border crime.

If we consider this in the context of the challenges and opportunities presented by the 21st century, we speculate on a new concept – “Judicial Videocooperation in cross-border criminal proceedings”. From our perspective as trainees to be judges in the EU, it will be a true achievement to complete a criminal case or procedure of mutual recognition, in hybrid (physical and virtual) dimensioned court room in synchronisation with the colleagues from an executing country or countries. Where there is a will, there is a way. Therefore, we start exploring the grounds for the idea.

1. Chronological overview and relevant legal framework in EU. The first common EU provision allowing hearing by videoconference (VC) of the witnesses, experts and accused person under explicit consent was Art. 10 of Convention established by the Council in accordance with Art. 34 of the Treaty on EU, on Mutual Assistance in Criminal Matters between the Member States (MSs) of the EU⁴ (Convention 2000). Soon afterwards, at the level of Council of Europe (CoE) was announced Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters⁵, with a similar procedure in Art. 9. Regarding reports of the European Judicial Network (EJN) for cooperation in criminal matters, between 2008-2014, court’s authorities of MSs were interested in provided opportunity to take oral evidence by videoconference but expressed concerns about national law and technical equipment. Its potential to facilitate and speed up cross-border proceedings was recognised, and VC was included in the context of the European e-justice⁶.

¹Articles 82-86, Chapter IV, Treaty on the Functioning of the European Union (TFEU)

²HÜTTEMANN, Suzan *Principles and perspectives of European criminal procedure*, <https://cadmus.eui.eu/>, WILLEMS, Auke *The Principle of Mutual Trust in EU Criminal Law* <https://eclan.eu/>, RAMOS, Vania et al, *Improving Defence Rights*, In *Eucrim* 2020/3, from <https://eucrim.eu/>

³ See https://e-justice.europa.eu/content_cooperation_in_criminal_matters-89-en.do

⁴ Official Journal 197 , 12/07/2000 P. 0003 – 0023.

⁵ ETC No.182, Strasbourg, 08/11/2001.

⁶*Videoconferencing as a part of European E-justice - The essentials of videoconferencing in cross-border court proceedings* – Council of Europe’s booklet from 2009

The evolution of judicial assistance and strengthening of the mutual trust give reason for the main post-Lisbon Treaty instrument in criminal matters -Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters. Its Art. 24 “Hearing by videoconference or other audiovisual transmission” undoubtedly replaces⁷corresponding provisions of previous Conventions and broaden the notion allowing to be used any kind of VC equipment. In preamble⁸, EU legislators make an interesting conjunction between EIO and European Arrest Warrant (EAW) with a view to the proportionate use of an EAW and permit the issuing authority to consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. Moreover, an EIO could be issued for the hearing of a suspected or accused person by videoconference as an effective alternative of the EAW. The other comparison to the disused European Evidence Warrant (EEW) and to basic mutual legal assistance, clarifies that the EIO provides a “rationalization” of the grounds for refusal, and the right of the issuing authority to request that one or several of its officials assist in the execution of the measure in the executing State⁹. The specific spirit and characteristics of EIO are discussed in Judgement of CEU on 8 December 2020 on Case C-584/19, PPU, from the LandesgerichtfürStrafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria), in the criminal proceedings against A and Others. The Court made it clear that “the concepts of ‘judicial authority’ and ‘issuing authority’, within the meaning of those provisions, include the public prosecutor of a Member State...”¹⁰.

The legal issues raised by VC in cross-border and national criminal cases, describe empirical results that indicate the benefits of its use. The effectiveness of the participation of either party in a trial depends on their ability to clearly express themselves and to represent their interest which is integral to the right to a fair trial guaranteed by Art. 6 of the ECHR. Participation in person gives the full scope of a presence both for the judge and for the party in reliance with the principles of EU law. Reduced, but still possible physical impression and expression is ensured by VC presence. In opposite, hearing by teleconferencing almost excludes procedural presence taking the same mutual efforts for organisation as for the VC.

One of the main objectives of the EU’s Area of Freedom, Security, and Justice¹¹is to establish and ensure effective justice systems in all MSs, which includes the right of every party to have equal access to justice in the criminal proceedings. Therefore, the pace of

⁷ In relationships within EU MSs, except Denmark and Ireland.

⁸ Rec. 25 and 26 of Directive 2014/41 EIO

⁹ Summary of EJN meeting discussion from 07.05.2020

¹⁰ ECLI:EU:C: 2020:1002

¹¹ Article 67 of the Treaty on the Functioning of the European Union

change in terms of digitalisation and higher protection of fundamental rights requires the application of legal instruments like the Council Directive 2004/80/EC of 24 April 2009 relating to compensation to crime victims (Art. 9) and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Art. 7 par. 2 and Art. 17 par. 1 “b”). In addition, on 24 June 2020 the Commission adopted its first-ever EU strategy on victims' rights (2020-2025)¹², declaring that its main objective is to ensure that all victims of crimes, no matter where or how the crime took place, can fully rely on their rights.

2. Reactions on COVID-19 crisis and aftermath. The pandemic, as a health crisis with serious human and social consequences, created challenges for courts and judicial authorities. An immediate response, and the best one as it turned out, was the implementation of VC which offers the opportunity for the public service of justice to continue functioning during the crisis and to ensure the right of access to justice. Experts highlighted that the reactions must be strictly based on the principles of the rule of law and must respect and protect human rights. Transforming the judiciary for the future should be approached in a positive manner and always with respect for fundamental rights guaranteed by the ECHR¹³. MSs have made considerable efforts to adjust to new circumstances and to make the best use of existing resources to ensure the functioning of their courts¹⁴, without reducing standards or breaching legal guarantees.

In the professional vocabulary as synonyms were used – hearing by videoconference; remote hearings; audiovisual court session; hearing through distant communication technology; virtual hearings; etc. Irrespective of the title, the frames and means of the procedure are well understood and therefore actively motivate the judiciaries “pro”-s and “con”-s.

The enhancement of digitalisation of justice unanimously was outlined as a crucial step forward. Between June and September 2020, the European Commission carried out a fact-finding report in order to check the level of digitalisation in the MSs justice systems, the judicial cooperation and related sources¹⁵. The MSs were invited to respond to several questions concerning the capacity of judges and court staff to telework and carry out their functions remotely, the availability of necessary technologies, and the opportunities for

¹² EU Strategy on victims' rights (2020-2025), COM/2020/258 final, <https://eur-lex.europa.eu>

¹³ CEPEJ Declaration for the efficiency of justice, 10 June 2020

¹⁴ OSCE *The functioning of courts in the Covid-19 pandemic: Primer* <https://www.osce.org/>

¹⁵ European Commission Staff Working Document - Brussels, 2.12.2020, SWD(2020) 540 final

hearing defendants, victims, witnesses, and experts remotely with regard to criminal proceedings. Of 26 invited MSs¹⁶, 11 MSs reported that the use of distance communication technologies is possible for all explored aspects, 14 MSs reported partial possibility for such use, while in 1 MS the use of distance communication technologies is not possible at all. Of the 16 responding MSs, in 5 MSs legal practitioners use such technologies in all aspects of their work, in 2 MSs – in most aspects of their work, while in 9 MSs the use is more limited¹⁷. In line with its Better Regulation guidelines, the Commission published a Roadmap of “Digitalisation of justice in the EU” and considered it as means to increase efficiency and access to justice systems in time of crisis.

3. Achievements, good practices, dilemmas. The discussions and national decisions about existing and future effective solutions¹⁸ to ensure the continuity of courts’ work and access to justice are still numerous. Looking for recommendations based on International standards, experts from Serbia, Russia, France, and England shared their countries’ experiences in the application of VC in court hearings, especially during the COVID-19 crisis¹⁹. France and England have been using VCs extensively prior to the lockdown, while Russia and Serbia broadened its application²⁰. In England, practical difficulties were observed in relation to jury trials which were postponed for safety reasons during the lockdown, but an experiment held there showed that VC is suitable for short, simple cases. Italy and Austria have created a centralized booking system available for the national courts which allows direct bookings for the courtrooms with VC equipment. Finland has started installing different kinds of VC equipment - for the court sessions, there is a complete set, with high-definition HD quality of picture in cameras and screens; for the preliminary hearings, there is a separate set for meeting rooms; for hearing witnesses there is a basic set with a terminal, camera, and microphone. In Germany, a simultaneous interpreting facility has occasionally been inserted into the VC equipment, for proceedings in which defendants speak a foreign language and interpreters have also been involved via a link in order to reduce costs.

The accumulated experience in the application of VC in criminal cases was a prerequisite for an optimal transformation of the courts’ hearings. MSs use all the existing instruments – Conventions and EIO Directive, to organise a cross-border VC²¹. Observing

¹⁶ Source: Questionnaire sent to the group of “Contact persons for national justice systems”

¹⁷ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-European-Union->

¹⁸ Digital tools in Member states - E-Justice measures

¹⁹ International Commission of Jurists – Videoconferencing, Courts and Covid-19 – Recommendations based on International Standards, November 2020

²⁰ Regional online round table Report of the Council of Europe from July 2020

²¹ Regarding data from EJNI, in 2019-2020 were consulted 359 VC witnesses’ hearings, 20 of them based on EC 1959, 194 – on Convention 2000, the rest – on EIO Directive.

appropriate legal instrument, it is mandatory to assess that Ireland and Denmark will not execute EIO²², Greece and Croatia will not act on the grounds of Convention 2000²³, because they are not parties to these multilateral agreements²⁴. Invaluable professional support in answering complex questions is afforded to practitioners permanently on the pages of EJM in criminal matters²⁵. VC can be requested and organised easily by its resources - “Fiches Belges” with a concise and practical legal information on the measure and particularly MS’s application; “Atlas” which helps potential users of VC to check the competent authorities; “Compendium” step by step practical guide and tool for fulfilment of the request or order. Conceived as a future electronic “one-stop-shop in the area of justice”, the European e-Justice Portal also is useful in administering VC, e.g. about availability of court’s equipment²⁶. The current Eurojust Annual report for 2020²⁷, discloses different practical applications of VC – for hearing of persons or witnesses; coordination of meetings and remote organisation of action-days; for using secure VC systems to allow prosecutors to still meet under the auspices of Eurojust and discuss cooperation strategies on common cases during the pandemic; to make video statements; meetings with simultaneous interpretation in 31 languages, etc.

The EJM’s and Eurojust statistics based on criminal cases involving VC since 2017 show that this digital tool has proved to be a practical option for collecting evidence and hearing the participants in criminal proceedings. Information is submitted from the EJM contact points (CPs) who provided and reported their national practice in complex criminal cases. Moreover, as active players on the stage of cooperation in criminal matters, EJM CPs have a real vision on application and the scope of instruments based on the principle of mutual recognition. Therefore, during the 53-rd EJM Plenary meeting they addressed more questions related to in absentia procedures, proportionality for issuing EAW for questioning of defendants and the possibility to issue an EIO for hearing a defendant via VC in the court session²⁸. The suggestion is grounded in view of a proportionate use of the EAW in recital 26 of the EIO Directive. Most of the EJM CPs, however, concluded that, as an issuing State, such an alternative measure would not be admissible in accordance with their national procedural law. Some of them noted that it could be possible to execute an incoming EIO for hearing by VC. Regarding *in absentia* judgments and the question on whether it would be possible for

²² https://www.ejm-crimjust.europa.eu/ejm/EJM_Library_StatusOfImpByCat.aspx?CategoryId=120

²³ https://www.ejm-crimjust.europa.eu/ejm/EJM_Library_RatificationsByCou/EN

²⁴ Digital tools in Ireland are respective to infrastructure to facilitate remote court hearings and this complies with the principle that justice should be administered in public. In Croatia the communication with all participants in court proceedings is done electronically -“eCommunication”, which users are able to view the content of all documents in the case management system, digital tools are available to judges and courts.

²⁵ https://www.ejm-crimjust.europa.eu/ejm/Ejm_Home/EN

²⁶ VC facilities in the courtroom or in special hearing rooms for witnesses and experts: <https://e-justice.europa.eu>

²⁷ <https://www.eurojust.europa.eu/>

²⁸ EJM/2019/103, <https://www.ejm-crimjust.europa.eu/>

the MSs to organise a retrial or appeal trial by hearing the sentenced person via VC (EIO) and allowing the person to be heard in the country of nationality or residency, some of the CPs concluded that this would not be possible under their national law, whereas others expressed that it would be possible, but only in minor cases. Practical reasons against the use of VC were brought forward, such as how to ensure an effective “presence” of the defendant throughout the trial, the presence of a lawyer, interpreting and costs.

The dilemmas, viewed by the EJM CPs even before COVID 19, now are growing and seeking for the MSs answers in two main directions – technical opportunities and guarantees for the protection of the human and procedural rights relevant to cross-border criminal proceedings. These directions determine our further study and proposals for European standards and a platform for VC.

II. Elaboration of the EU digital judicial cooperation in cross-border criminal proceedings.

The process of digitalisation of justice has started several decades ago and we can expect that it will continue perpetually. If we try to examine in detail what has been done until now in the EU in terms of promoting the use of distance communication technologies in criminal proceedings involving foreign elements, our conclusions will need hundreds of pages. With respect to all EU efforts and documents, we need to outline the basis.

1. EU strategies and concepts. In June 2007, the JHA Council came to a conclusion that the implementation of information and communication technologies (ICT) in the field of justice could be supported at EU level, particularly by “creating a European portal to facilitate access to justice in cross-border situations”²⁹. In response to the Council, in June 2008 the Commission presented its Communication³⁰ aimed at promoting the development of e-Justice tools in close coordination with the MSs. The idea was to create synergies between efforts at EU and national levels in the area of e-Justice and to offer economies of scale. With the Resolution on e-Justice from 18 December 2008³¹ the Parliament invited the Commission to “complement the European Area of Justice, Freedom and Security with an area of e-Justice by (...) enhancing and providing, without delay, tools such as VC for improving the taking of evidence in other MSs”.

²⁹ Draft strategy on European e-Justice 2014-2018, <https://eur-lex.europa.eu/>

³⁰ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Towards a European e Justice Strategy SEC(2008)1947 SEC(2008)1944
/* COM/2008/0329 final */ <https://eur-lex.europa.eu/>

³¹ E-Justice European Parliament resolution of 18 December 2008 with recommendations to the Commission on e-Justice (2008/2125(INI)), <https://op.europa.eu>

The Multiannual European e-Justice Action Plan (MEEJAP) for the period 2009-2013³² was the first e-Justice Plan, adopted by the JHA Council in November 2008, prepared in cooperation with the Commission and the Parliament. The Plan underlined that “the use of ICT would help to rationalise and simplify judicial procedures”. It was stated that “simplifying and encouraging communication between the judicial authorities and the MSs, more specifically in the framework of instruments adopted in the EU judicial area, is of particular importance (e.g. VC or secure electronic networks)”. There were various projects orchestrated by this action plan, one of which was focused on the better use of the VC technology - a booklet³³ and a guide on VC in cross-border proceedings³⁴ were published online. The e-Justice portal, which is hosted and operated by the Commission in line with the guidelines of the Council, was launched on 16 July 2010.

MEEJAP for the term of 2014-2018³⁵, underlined that the use of VC where appropriate, “should be extended in order to remove the need for one to travel to the court to take part in the judicial proceedings, in particular in cross-border cases”. The Council encouraged the development of electronic communication between the judicial authorities of the MSs. It stated that the “e-Justice Portal should continue to be developed as an efficient tool for legal practitioners and judicial authorities providing them with a platform and individual functionalities for effective and secure exchange of information, including via the e-CODEX network”. The informal working group (IWG) on cross-border VC, set up to “examine possible ways for MSs’ authorities to promote and share experiences about the use of VC facilities in cross-border situations”³⁶, presented its final report³⁷. It included significant findings and valuable proposals (connected with the development of guideline-document, standard procedure, know-how transfer, improved form for requesting/confirming a VC, etc.). An interesting idea presented in the report was that “the use of VC facilities at the EU Level (e.g. multi-point control units at Eurojust or at the Commission) by creating secure “virtual VC meeting rooms where the participating MS could deal-in should be considered”. According to the report, “this type of solution is (...) feasible for the e-Justice Portal”. The IWG affirmed that if the Commission implement this idea, “MS would get access to a common VC network where security, reliability and performance would increase”. After the

³² Multi-annual European e-Justice action plan 2009-2013, <https://eur-lex.europa.eu>

³³ <https://e-justice.europa.eu/fileDownload.do?id=f26030b3-ae25-4d08-825f-05152d7bb772>

³⁴ Guide on videoconferencing in cross-border proceedings, <https://op.europa.eu>

³⁵ MULTIANNAL EUROPEAN E-JUSTICE ACTION PLAN 2014-2018, <https://eur-lex.europa.eu>

³⁶ Council Recommendations ‘Promoting the use of and sharing of best practices on cross-border videoconferencing in the area of justice in the Member States and at EU level’ <https://eur-lex.europa.eu>

³⁷ <https://e-justice.europa.eu/fileDownload.do?id=dd1801f0-6a44-43a9-b84b-7859bbe094b2>

announcement of the IWG's report, the Council promulgated its Recommendations on cross-border VC³⁸.

The current MEEJAP for the period 2019-2023³⁹ emphasizes that “in order to more immediately involve citizens in electronic judicial proceedings, tools for direct communication between citizens, practitioners and judicial authorities need to be developed”. The plan drafts a project which aims to identify problems related to cross-border VC, to enable it via exchange of information, good practices and technology. Under this project short-term actions and initiatives should be suggested, in order for cross-border VC to be improved. In accordance with the plan, MSs are expected to provide courts with VC equipment. The document which provides a vision on what to be included into MEEJAP is the European e-Justice Strategy⁴⁰: “e-Justice should facilitate electronic interaction and communication between judicial authorities as well as with citizens and practitioners in judicial proceedings (e.g. through VC or secure electronic data exchange) in compliance with the existing legal framework”.

Crucial recent EU documents are the Communication from the Commission on the digitalisation of justice in the EU⁴¹ and the working document accompanying the Communication⁴², which were published in December 2020. The Communication underlines that “it is essential that the EU brings the digitalisation of justice up to full speed” and that “digital transformation is one aspect of the structural reforms of the justice systems which should positively impact the systems”. Its objective is two-fold – at national and at EU level (one of the key emphases is on the promoting of the use of secure and high-quality VC). The tools which are proposed in support of the digitalisation of justice will be carefully examined in the following paragraphs.

2. The assistance and support of Eurojust and the EJN. Both have participated in the drafting of the Final Report on Cross-border VC⁴³, which “focuses on the limitations and conditions of a legal nature for the use of VC in cross-border criminal proceedings and proposes best practices and recommendations to overcome them”. According to this Report, both bodies “may develop a relevant role in the identification of the legal instrument applicable for the organization of particular VC”. They support MSs in the issuing,

³⁸ Council Recommendations ‘Promoting the use of and sharing of best practices on cross-border videoconferencing in the area of justice in the Member States and at EU level’ <https://eur-lex.europa.eu>

³⁹ 2019-2023 Action Plan European e-Justice, <https://eur-lex.europa.eu>

⁴⁰ 2019-2023 Strategy on e-Justice, <https://eur-lex.europa.eu>

⁴¹ Digitalisation of justice in the European Union A toolbox of opportunities COM/2020/710 final, <https://eur-lex.europa.eu>

⁴² COMMISSION STAFF WORKING DOCUMENT Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Digitalisation of justice in the European Union A toolbox of opportunities SWD/2020/540 final, <https://eur-lex.europa.eu>

⁴³ <https://e-justice.europa.eu/fileDownload.do?id=dd1801f0-6a44-43a9-b84b-7859bbe094b2>

transmission and execution of letters of request for a hearing by VC presented in reports for their activities^{44,45}. Eurojust bridges the exchange of information between the judiciaries, expedites and guarantees coordination between MSs in ongoing investigations and prosecutions. In case of a request for the taking of testimonies of suspected and accused persons, Eurojust thoroughly analyses the legal systems of both MSs concerned, in order to ensure the compatibility between the procedural rights and guarantees at stake. The EJM is used both for “providing guidance in specific cases (e.g. (...) assistance with VC) and for answering general questions”⁴⁶. There is a notable fourfold increase in the number of hearings by VC, in 2018 in comparison to 2017⁴⁷, conducted as a result of EIOs. We acquired data from a legal assistant at EJM on the use of VC between 2017 and 2021⁴⁸. In 2017-2019 an increase of approximately 40 % has been registered and a slight decrease was recorded in 2020. For 2019-2020 the contact points assisted the execution of 3,596 EIO, incl. for hearing by VC.

3. The digitalisation of justice in the EU - a toolbox of opportunities.In the end of 2020 the Commission, taking into consideration the MS’s divergent situations, national competences and the fundamental rights⁴⁹ and fully respecting the principles of subsidiarity and proportionality, proposed a “toolbox for the digitalisation of the justice”⁵⁰. The tools fall into four categories: 1. Financial support to MSs; 2. Legislative initiatives; 3. IT tools; 4. Promotion of national coordination and monitoring instruments. The Commission understands that “developing adequate IT systems (...) requires time and (...) resources”, so the Communication considers the access to funding. The document proposes twofold approach: 1. Financial support for MSs “to start the true digital transformation of their justice systems”, and 2. Support for implementing “EU-wide initiatives”. MSs are encouraged to focus on the digital transformation of the justice sector when they prepare and present their plans for the implementation of the Recovery and Resilience Facility, which is one of the options for funding the development of e-Justice. On the other hand, the financing of the digitalisation of the national justice systems is possible via the European Regional Development Fund and the European Social Fund Plus. The Technical Support Instrument⁵¹ is also expected to bolster the digital transformation of MSs’ justice systems. As regards initiatives at EU level, the

⁴⁴ Eurojust annual report 2020, <https://www.eurojust.europa.eu>

⁴⁵ The Report on activities and management of the EJM, <https://www.ejm-crimjust.europa.eu/>

⁴⁶ Assessment of allocation of cases to Eurojust and to the EJM, 2019, <https://www.ejm-crimjust.europa.eu/>

⁴⁷ Report on activities and management 2017-2018, EJM, <https://www.ejm-crimjust.europa.eu>

⁴⁸ We were warned that the information is based on the cases reported by the contact points themselves, so discrepancy in the numbers is possible.

⁴⁹ Such as the rights to the protection of personal data, to a fair trial and to an effective remedy

⁵⁰ Digitalisation of justice in the European Union A toolbox of opportunities COM/2020/710 final, <https://eur-lex.europa.eu/>

⁵¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a Technical Support Instrument COM/2020/409 final, <https://eur-lex.europa.eu>

digitalisation of justice (e.g. the establishment of interoperable solutions for more efficient cross-border cooperation) can be supported under the new Justice Programme and the Digital Europe Programme.

The Commission discerns that “the use of digital communication tools on its own does not address the needs of fully digitalised procedures, which requires appropriate legal arrangements” and thus proposes “new approach to digitalisation” and establishing of “a legal framework for communication between national authorities in the context of cross-border cooperation”, under which digital channel for communication will be the “default option”. The Commission concludes that “generic IT solutions developed at EU level, for use by all MSs, could be a major cost-reduction measure”. The Commission acknowledges that the final decision-making in criminal process “must remain a human-driven activity and decision”. Having that in mind, the Commission understands that the use of artificial intelligence (AI) applications in the justice sector “could be very beneficial” so the judges should “fully understand” them. The Commission focuses on EU AI applications without risk for the fundamental rights such as those providing anonymisation of court decisions, speech-to-text conversion and transcription, machine translation, chatbots supporting access to justice and robot process automation. Support for the development of common IT tools for the “digitalisation of cross-border cooperation in (..) criminal matters (based on work on eEDES)” is declared. e-CODEX should become “the gold standard for secure digital communication in cross-border judicial proceedings”. This tool “enables connection between national systems, allowing users (...) to send and receive documents, legal forms, evidence and other information in a swift and safe manner”. The Proposal for a Regulation of the EP and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726 was announced on 2 December 2020⁵². In order to ensure e-CODEX’s long-term sustainability, the Commission adopted last year a proposal⁵³ to “entrust its further development and maintenance to the eu-LISA”⁵⁴. The scope of eEDES should be broadened to provide a “secure platform” which to enable “secure communication between competent authorities”. According to the Commission “the future scope of eEDES will be laid down in the legislative proposal on the digitalisation of judicial cooperation procedures”. Some of the proposals of the Commission are related to digital criminal justice. It is notable that the Communication proposes the development of a joint investigation teams (JITs) collaboration platform - a

⁵² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 COM/2020/712 final <https://eur-lex.europa.eu>

⁵³https://ec.europa.eu/info/sites/info/files/law/contribute_to_law-making/documents/e-codex-main-act-en.pdf

⁵⁴<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>

specific IT environment tailored to the needs for communication and document and evidence storage and exchange of the JITs. Moreover, according to the Commission, “cross-border digital exchanges should also be adapted to ensure the exchange of large files”.

III. Difficulties identified.

Considering the flourishing state of EU digital justice, it is notable that promotion of the use of VC in cross-border criminal proceedings is always accompanied by strict instructions for the protection of the right to a fair trial and the rights to defence, such as the rights to attend one’s trial, to communicate confidentially with the lawyer, to put questions to witnesses and to challenge evidence. Regarding the lack of explicit legal provisions and synchronised jurisprudence in MSs, in order to guarantee a ‘virtual fair trial’, it is necessary to consider the following difficulties:

1. **Tension with the European Convention of Human Rights.** ECHR was opened for signature in 1950 and entered into force in 1953. At that concrete moment there was no reasoned expectations for the MSs to foresee such accelerative technical development and to enact legal basis that regulate the use of video and audio technology in the public hearings. Since then, IT technologies and VC have been implemented by various countries with the anticipation to increase efficiency and access to justice. In the jurisprudence of the European Court of Human Rights (ECtHR) there were some appropriate occasions to discuss the compatibility between the standards of the Convention and VC regarding the obligation of the national authorities to ensure overall fairness of the proceedings. Let us point the main requirements that guarantee the principles embodied in Art. 6:

Effective participation in the proceedings. Art. 6 guarantees the right of the defendant to be present at the hearing, including the opportunity to participate actively, to hear and follow the proceedings. In the aspect of the use of a video link in the proceedings, the Court has held that this form of participation is not, as such, incompatible with the notion of a fair and public hearing. However, recourse to this measure in any given case must serve a legitimate aim and the arrangements for taking of evidence must be compatible with the requirements under Art. 6. The legitimate aim should be justified by the specific circumstances in each case regarding the appropriateness of the chosen technical solutions, the proportionality with the other procedural mechanisms and the pursued balance between individual rights and public interest⁵⁵. According to the recent professional observations of Mr. Evgeni Boev – a lawyer in the Registry of ECtHR, a well-reasoned suggestion can be made that the application of sanitary measures in protection of the party’s health and the judge’s safety, combined with the necessity to prevent unreasonable duration of the criminal

⁵⁵Marchello Viola v. Italy, no. 45106/04, 5 October 2006, §67 - 71

proceeding, will be determined as a legitimate aim for the purposes of VC use. The judge's discretion in that situation is decisive and therefore it should analyse the related previous judicial experience, practical arrangements and possible complications that might stem from these technological solutions.

Right to examine the evidence and witness testimony. The right to adversarial hearing is defined as the guaranteed opportunity of each party to have knowledge of and comment on all evidence presented by the opposite party with the view to influence the court's final decision⁵⁶. In particular, it must be ensured that the defendant is able to follow the proceedings and examine the presented evidence without any technical impediments. The defendant should be able to achieve „physical appearance and presence“in the courtroom as much as the implemented audiovisual technology enables him. On the other hand, the witnesses and expert witnesses should be able to react in real time when they are questioned so as to give well-timed answers, support the dynamic process of evidence gathering and participate actively in cross-examination⁵⁷. Criminal proceeding where VC technology is used would be compatible with the standards of adversarial hearing when the actors in the proceeding could communicate effectively, timely and subsequently.

During a hearing where VC is used substantial complications might appear – lack of appropriate audiovisual equipment, unstable internet connection, slow transfer and exchange of evidence. In this case the court should provide such procedural safeguards to the parties that would ensure the effective conduct of the proceedings observing the essential principles of fair trial⁵⁸. In this case the party should inform the judge at the particular phase of the hearing for the specific technical impediment which resulted into violation of his/her procedural rights so the judge could consider its weight and possible impact on the validity of the proceedings⁵⁹. If such technical impediments are found, the judge should take a leading role for the purpose of ensuring procedural immediacy and “equality of arms”, slow down the procedural actions and repeat part of the hearing or provide additional explanation to the concerned party.

Confidential communication with a lawyer. In making our assessment of the relevant procedural guarantees in cross-border proceedings where VC is implemented, the right of everyone charged with a criminal offence to be effectively defended by a lawyer is an

⁵⁶Brandstetter v. Austria, § 67

⁵⁷Blokhin v. Russia, no. 47152/06, 23 March 2016, §201 and §215, Accardi v. Italy no. 30598/02, January 2005, Schatshaschwily v. Germany, no. 9154/10, 15 December 2015

⁵⁸Sakhnovskiy v. Russia, no. 21272/03, 2 November 2010, § 98 and §104, Golubev v. Russia, 26260/02, 9 November 2006, Yevdokimov and Others v. Russia, § 43

⁵⁹Grigoryevskikh v. Russia, no. 22/03, 9 April 2009

essential aspect of the safeguards under Art. 6 of ECHR⁶⁰. When the defendant participates remotely in the proceedings, consultations with his/her lawyer should be conducted in private, without any imposed restriction to the confidential contact. Any limitation to the contact between clients and lawyers, whether direct or indirect, should not thwart the effective legal assistance to which a defendant is entitled⁶¹. Examples of such limitations might be recording the content of the conversations between an accused/defendant and his/her lawyer, restriction of the privacy⁶², lack of separate communication channel, supervision of communication between the accused/defendant and the lawyer in the courtroom, intervention or interruption of private discussion⁶³. Ability of the lawyer to provide effective legal assistance to the accused/defendant, including conferring with him/her and receiving confidential instructions without surveillance, requires establishment of secured communication channel under the control of the accused/defendant and the lawyer, protected from any unexpected or unauthorized intervention.

Public hearing and access of the general public and mass media. The arising problem with the public nature of the hearing where VC is applied starts the debate about the opportunity to open the courtroom through broadcasting the hearing online or to record and upload video content afterwards via specialized platforms. The proceedings held via Skype or Zoom were not accessible to the general public and the question of their compatibility to standards of Art. 6 of the ECHR could be considered in terms of their safety and technical limitations⁶⁴. The ECtHR's jurisprudence held that the criminal proceeding conducted as whole with the participation of the defendant from the detention centre through videoconference was not generally incompatible with Art. 6 if there was public information provided to the media in advance with announced details for the time and place of the hearing and possibility for their effective access⁶⁵.

The discussion on the procedural standards, which should be applied to VC in cross-border criminal proceeding, always will take into consideration the specific facts and practical obstructions occurring in the proceedings, concerning technical equipment, software's quality and adequate procedural safeguards provided by the national authorities. In conclusion, the jurisprudence of ECtHR has evolutive nature which allows it to be adaptive to the social and

⁶⁰Doyle v. Ireland, no. 51979/17, 23 May 2019, §73 - §75

⁶¹Sakhnovskiy v. Russia, no. 21272/03, 2 November 2010, § 102

⁶²Sakhnovskiy v. Russia, § 104; Gorbunov and Gorbachev v. Russia, § 37

⁶³ Guide on Article 6 of the ECHR (criminal limb), Updated on 31 December 2020

⁶⁴Regional online round table Report of the Council of Europe from July 2020

⁶⁵Riepan v. Austria, no. 35115/97, 14 November 2000, § 28-31; Starokadomskiy v. Russia (no. 2), §55-58

technological changes, in particular the progressive judicial cooperation in cross-border cases and extensive digitisation in the judicial systems⁶⁶.

2. Inconsistent approach of the Member States. According to recital 24 of EIO Directive additional rules are necessary for certain types of investigative measures which should be indicated in the EIO, such as hearing by videoconference, but, where necessary, practical arrangements should be agreed between the issuing and the executing State in order to accommodate the differences existing in the national laws of those States.

Hearing of a participant or third party in the territory of the executing State is one of the investigative measures which always should be available under the law of the executing authority and recourse to different type of measures is not allowed according to Art. 10 of EIO Directive. Regarding the specific national procedural provisions, which regulate the particular subjective scope of application of VC in criminal proceedings, there might be a collision between the approaches of the issuing and the executing States to the efficiency and proportionality of the investigative measure, based on a VC technology. At the same time, the legal sources establish the regime for obtaining evidence in cross-border criminal proceedings in the EU, but do not provide a possibility for ensuring the remote participation of the victims, the suspected or the accused person in the whole proceedings. The significant number of incoming to Bulgarian courts EIOs demand ensuring the defendant located in Bulgaria to be in front of a Bulgarian judge with a purpose to participate in a trial against him/her in the issuing state⁶⁷. The EIO is seen also as a tool for VC court sessions for the application of other mutual recognition instruments, e.g. Art. 19 par. 1 of the Council Framework Decision 2002/584 on EAW. In conclusion, the discussed problematic differences in the national approaches to the implementation of VC in the cross-border criminal proceedings could be permanently solved by consistent and purposeful actions for establishing a European standard for VC which will allow the MSs to strengthen their cooperation and mutual trust.

2. Practical challenges. To name but a few:

Technical implementation. The identified technical issues concern the incompatible technical standards between the MSs which result into impossibility to establish a stable VC session and incapacity of the used equipment to transmit video as well as audio signals with high quality. Comparable or similar complex or technical parameters applicable for all MSs is evaluated as a useful instrument for synchronizing the approaches of the States to the implementation and effective use of VC in cross-border proceedings. Another problem is the absence of secure network that potentially ensures a protected environment modified to

⁶⁶Tyrer v. United Kingdom, Series A no. 26, § 31

⁶⁷Discussed during the VC meeting on 29.03.2021 between the team and Bulgarian judges, specialized in cooperation in criminal matters.

support real-time traffic and exchange of information. In principle, the parties and the judge should be able to access secure VC points of entry in virtual private network after confirmation of their identity⁶⁸. In the process of organization and preparation of VC MSs should receive information in advance, if the technical parameters provide secure connection, data protection, risk assessment and elaborated protocol for simultaneous technical support. In the aspect of data integrity validation, the authorities using VC might establish a control system for verification of the identity of the person, public media and third parties, who are entering, attending, presenting evidence, participating actively or passively in the proceedings.

Training. The ability of the judicial system to operate remotely in cross-border cases requires that the judge should have the expertise to manage a remote/virtual hearing, including his own participation and that of others⁶⁹. The judge is obliged to supervise the proper quality of the audio-visual communication during the trial, react to possible technical impediments, caused by the equipment or software and operate competently with the services provided by the IT tools.

New judicial perception. VC poses challenges to judge's capability to detect hesitation or deception, appreciate cultural differences or understand non-verbal signs that some of the parties might express when they appear before the court. The judgement is a result of a weighted average of variable sources of information and each piece of information is valued due to its credibility, relevance and consistency with the other evidence. On the one hand, the communication established by the VC could modify the judicial comprehension on the behavioural specifics and rhetorical influence of the participants. On the other hand, it will enrich the judge's perspectives for the technological opportunities of the digital justice and its full compliance with the needs of the judicial cooperation across the EU.

IV. Proposed solutions.

1. EU standards for VC in cross-border criminal proceedings. According above conclusions proposed standards aim to affirm judicial cooperation regarding the basic safeguards in the ECHR and ensure the establishment of independent and impartial court via EU platform for judicial cooperation in cross-border criminal proceedings.

1.1. Human-centred solution. Every participant should be informed of the standards for videoconferencing in cross-border criminal proceedings, know the particular prerequisites for its application and have the right to express reasoned objection to its use. Criminal

⁶⁸Final report from the Informal Working Group (IWG) on Cross-border Videoconferencing (VC), 02 March 2014

⁶⁹Covid-19 and the Impact on Human Rights, An overview of relevant jurisprudence of the European Court of Human Rights, 2020 AIRE Centre

proceedings should provide such technical conditions that allow “real-to-life” atmosphere for interaction to be reproduced in the courtroom. In order to ensure the right to follow the proceedings, each participant should have a full view of all the other participants. The judge should consider whether some of the participants have difficulties or disabilities which would impact rendering the attention via technology. If the participation of vulnerable witnesses is conducted through VC, the judge has the discretion to decide whether they have to be questioned in a private space in the presence of their lawyer and whether their credibility is in issue due to their location and surroundings. The right of the defendant to participate personally in the remote hearing, through VC, should be guaranteed by the special procedural requirements – direct communication with the judge, right to inform the court in every phase of the proceedings about existing impediments, which result in infringement of the right to personal participation. If such impediments lead to violation or limitation of the defendant’s rights, the court should repeat the actions, slow down the pace of the proceedings, assist the defendant and provide technical support. Thus, the use of VC in cross-border criminal proceedings indeed has the potential to improve defence rights⁷⁰.

1.2. Effectiveness and immediacy. Access to the case file should be granted to the suspect/accused/defendant and any disclosed evidence to be examined during the interview or the hearing should be made available on the platform. During witness interrogation, the defendant should be empowered with the right to ask questions in good time, supervise sufficiently the behaviour of the witnesses, scrutinise the given testimonies and participate actively in cross-examination. Constant and informed engagement of the remote participants should be maintained within the process of evidence gathering and disclosure due to the requirement for immediacy. Every participant should be heard in the presence of a judicial authority or another public authority in the executing state, in order to verify their identity, prevent interference with their statements and have their rights guaranteed. The standard for effectiveness and immediacy also includes provision of high-quality images and sound via audio-visual technology which will support and facilitate courtroom interaction and participants’ comprehension.

1.3. Confidentiality and integrity. The standard for confidentiality and integrity ensures that every participant who protects his/her own rights should have the opportunity to consult or provide instructions in private during the proceedings without any interference. The right of the suspect/accused/defendant to consult with a lawyer should be guaranteed at all times throughout the proceedings – in the pre-trial as well as the trial stage. If the suspected/accused person is interviewed by executing authority in a state other than that of

⁷⁰Regarding also opinion of Ramos Vania et al, Improving Defence Rights, In Eucrim 2020/3, <https://eucrim.eu/>

his/her residence, an opportunity should be provided to use legal aid from the executing authority, if necessary, with the assistance of an interpreter. The executing authority is obliged to provide communication tools/ channel that enable confidential, meaningful and immediate consultation. Access to the case file should be granted to the defence council and any disclosed evidence to be examined during the interview or the hearing should be made available. The executing authority should prevent any additional technical impediments, provoked intentionally or spontaneously, that might hinder the effective communication between the party and the lawyer.

1.4. Publicity and transparency. Cross-border criminal proceedings conducted on the digital platform should enable members of the public media to attend the trial, observe the hearings, announce information to the public and prevent defamation and public suspicion. The future platform should provide options to the journalists and the public for watching remote hearings in real time online. When the hearings take place remotely the issuing and executing authorities should publish information for the actual date and time of the hearing and instructions on how to log in and watch the hearing online through a video link. If there is no practical opportunity for streaming the hearing in real time, the executing authorities should record the hearing. After the hearing has been recorded and sensitive data or confidential information have been excluded where necessary, the recordings could be made available to the media and the public on the official websites of the issuing and the executing authorities for a certain period of time.

1.5. Preparation and involvement of the judge. Cross-border criminal proceedings require preliminary preparation and additional practical arrangements between the issuing and executing authorities, on the one side, and participants in the proceedings, on the other. The preparation of the authorities includes organising a test hearing in order to avoid possible technical complications, delays in the communication and incompatible equipment. The issuing authority should send beforehand guidelines to every remote participant with individualized instructions for their procedural rights and obligations concerning the remote hearing via VC⁷¹.

2. The EU platform for VC in cross-border criminal proceedings. Regarding the specification of the platform, we take into consideration the positions of legal practitioners and experts, i.a. the European Criminal Bar Association⁷², the Council of Bars and Law

⁷¹A _____ such _____ is _____ published _____ by _____ ECtHR:
https://www.echr.coe.int/Documents/Guidelines_videoconference_hearings_ENG.pdf

⁷² ECBA Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World,
<https://www.ecba.org/>

Societies of Europe (CCBE)⁷³, Fair Trials⁷⁴, Deloitte⁷⁵, The AIRE Centre and Civil Right Defenders⁷⁶. The creation of a single, secure and specialized platform for MSs would affirm the mutual trust, facilitate cross-border criminal proceedings and provide “the quality of the technology ... a key factor in ensuring the right to a fair trial”⁷⁷. The use of commercial platforms should be avoided. The platform used for criminal proceedings must be governed at the EU level by a public institution. It should meet the highest standards for data security and privacy and must have both public and restricted access. Technical arrangements must ensure that the platform is protected from improper access (hacking). High-quality video and audio as well as uninterrupted connection must be guaranteed. Audio-visual recording of the hearings of sufficient quality should also be possible. The proposed platform would enable the exchange of large amounts of information electronically (incl. confidential information). The development would allow the uniform implementation of AI tools, such as speech-to-text conversion and transcription, translation, identification of persons and signatures. Comprehensive guidelines on technical procedure and standards in all EU official languages would facilitate the use of the platform from all its users. AEU centralized platform used in all MSs would most likely accumulate economies of scale.

It is crucial that the platform should be completely in line with the specific principles of criminal proceedings and proposed EU specific standards. Therefore, the publicity, confidentiality, psychological wellbeing of the participants in criminal proceedings, the exchange of written files and photographs would not be limited, and the rights enshrined in ECHR and EU procedural Directives would not be violated. This would enable the evolution of the notion of the right to be physically present at the trial to the notion of the right to be present at the trial by videoconferencing, subject to specific consent by the accused or sentenced.

In the event that our proposals are implemented in practice, the platform: <https://www.videoconference.CJ.eu> shall be used for 1). Court hearings in cross-border criminal proceedings using EU instruments based on the principle of mutual recognition (EIOs, EAWs, orders on custodial sentences, probation measures, financial penalties, freezings and confiscations and related legal remedies), as well as for confidential communication between defendant and lawyer before and during hearings.; 2). Consultations on arrangements of competent authorities, preparations and executions of requests,

⁷³ CCBE comments Draft 2nd Additional Protocol to the Convention on Cybercrime, <https://rm.coe.int/ccbe-written-comments-draft-2nd-additional-protocol-to-the-convention-/168098bc6e>

⁷⁴ Beyond the emergency of the COVID-19 pandemic. Lessons for defence rights in Europe <https://www.fairtrials.org>

⁷⁵ Cross-border digital criminal justice. Final report, <https://op.europa.eu/>

⁷⁶ Covid-19 and the Impact on Human Rights, <https://www.rolplatform.org>

⁷⁷ Covid-19 and the Impact on Human Rights, <https://www.rolplatform.org>

proportionality tests, postponements, provisional measures, transmission of evidence.; 3). Meetings (incl. confidential) of the EJM, EUROJUST, professional and regional networks, working groups, with third countries; 4). Trainings, organised by the EJM and national training institutions, channels with recorded courses may be provided for online, hybrid and self-education; 5). Forum for the exchange of ideas, proposals and good practices.

Considering all this, we expect that the adoption of our proposals may provide the possibility for hearing of all kinds of cross-border criminal cases, incl. based on the principle of mutual recognition.

3. Objectives and prospects. The advantages of our proposals for the EU standards (software) and platform for VC (hardware), relate to upgrading the specific EU legal framework for using VC across MSs and aligning it with the opportunities of e-Justice. We are convinced that the EU legislators are trying to find the proper way to broaden the use of VC in cross-border proceedings in criminal matters. Undoubtedly, such a development will strengthen the trust and the cooperation between MSs' legal authorities.

In conclusion, the Art of Justice is required from legislators and practitioners at all times, conditions, in the face of all concerns and should be applied accurately, in a uniform and fair manner. Our contribution to this swiftly developing process is our proposal for European standards and platform for VC. Through them we can reach a new level of judicial videocooperation in criminal proceedings, obtain faster results in thousands of cases, and ensure the mutual trust between the MSs.