

INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

TITLE OF THE INITIATIVE	<i>Digitalisation of cross-border judicial cooperation</i>
LEAD DG (RESPONSIBLE UNIT)	<i>DG JUST.B3</i>
LIKELY TYPE OF INITIATIVE	<i>Regulation</i>
INDICATIVE PLANNING	<i>Q4 2021</i>
ADDITIONAL INFORMATION	<p><i>Press release</i></p> <p>https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2246</p> <p><i>Communication on digitalisation of justice in the EU – A toolbox of opportunities:</i></p> <p>https://ec.europa.eu/info/sites/info/files/communication_digitalisation_en.pdf</p>

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

A. Context, Problem definition and Subsidiarity Check

Context
<p><i>As announced in its 2021 Work Programme, the Commission will propose legislation on the further digitalisation of judicial cooperation procedures in civil, commercial and criminal matters¹. As a first step, on 2 December 2020 the Commission adopted a Communication on this issue² which proposes a set of cross-border and national measures. It also suggests reflection on how to modernise the existing legislative framework for cross-border procedures while ensuring all safeguards are in place.</i></p> <p><i>This document provides initial ideas on how such modernisation could be achieved, and assesses the risks.</i></p>
Problem the initiative aims to tackle
<p><i>Many data exchanges in cross-border judicial cooperation still take place on paper. This is slower and less efficient than using electronic means. It is also particularly vulnerable to crises, such as the COVID-19 pandemic. Many procedures, including cross-border ones, had to be suspended, depriving citizens and businesses of effective access to justice. Digitalisation still lags in this sector, compared to others. Current models of digital cooperation between national justice systems have the following major limitations:</i></p> <ul style="list-style-type: none"> <i>• voluntary participation – every country is free to decide whether to participate in a digital exchange project.</i> <i>• admissibility/legal effects of electronic documents – outside of issues covered in the e-IDAS Regulation³, the legal validity of electronically sent documents may be called into question.</i> <i>• electronic signatures – in the absence of agreed assurance level(s) in cross-border judicial cooperation, the signatures used by the issuing country may not be recognised by the receiving country.</i> <i>• data protection – the allocation of responsibility for this is not always clear in the current pilots.</i> <i>• interoperability – domestic IT solutions are often developed in isolation, so may not be suitable for cross-border data exchange.</i>
Basis for EU intervention (legal basis and subsidiarity check)

¹ https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en

² COM(2020) 710 final.

³ Regulation (EU) 910/2014. For details: <https://ec.europa.eu/digital-single-market/en/policies/trust-services-and-identification>

Legal basis

Articles 81 and 82 of the TFEU.

Subsidiarity

This initiative has cross-border scope, facilitating cooperation between EU countries in judicial proceedings. This could not be achieved by countries acting alone. It will drive improvements by all countries, compared to the present situation where only some of them have taken action, resulting in a limited and fragmented response to the problem. To overcome these limitations, and ensure interoperability requirements are addressed, EU level action is necessary.

Digitalising cross-border judicial procedures may entail costs for IT infrastructure and tools, both at EU and national level. Some funding for this can be obtained, e.g. from the Justice or Digital Europe Programmes.

B. Objectives and Policy options

Objectives

Generally, to increase the efficiency and resilience of cross-border judicial cooperation in civil, commercial and criminal matters, and improve access to justice for citizens, businesses and legal practitioners, while fully respecting procedural rights, especially the right to a fair trial.

Specifically:

- Make digital communication the **default, mandatory channel** for all EU cross-border judicial cooperation communication and data exchanges between competent national authorities (unless justified).

Where this is mandated by EU judicial cooperation legal instruments, the possibilities for introducing a digital channel with the relevant EU Justice and Home Affairs (JHA) agencies/bodies should also be exploited.

- Ensure EU countries accept electronic communication for cross-border procedures involving **individuals and businesses**, without excluding the possibility for them to communicate on paper, and develop an access point for launching these procedures via the European e-Justice Portal.
- Ensure documents are **not refused or denied legal effect** because they are electronic;
- Ensure **electronic identities/signatures/seals** can be used for digital transmission of judicial documents in line with the eIDAS Regulation, by securing agreement on the assurance levels required for each procedure (simple, advanced or qualified electronic signatures/seals);
- Define the **responsibilities of different controllers and processors** and describe high-level requirements for ensuring appropriate technical and organisational measures to ensure secure processing;
- Ensure different countries' IT systems are **interoperable** and can communicate with each other, also where envisaged by EU judicial cooperation legal instruments with the relevant JHA agencies/bodies (as identified by the Digital Criminal Justice study)⁴. Broadly define the architecture of the underlying IT system for the digital channel (The reference software portal developed for the e-Evidence Digital Exchange System (e-EDES) for exchanges of electronic evidence in criminal proceedings should also be re-used and built on).

Policy options

Option 0: Baseline – no further action to promote digitalised cross-border judicial procedures

- Providing a cross-border digital channel would remain voluntary for EU countries; the possibility to transmit electronic judicial documents would remain uncertain and the use of electronic signature/seals and data protection responsibilities would continue to be regulated differently by EU countries.

Option 1: Promoting increased use of the digital channel

- National authorities and legal practitioners could be encouraged to use the digital channel for more cross-border legal procedures, e.g. through funding instruments. An e-CODEX⁵ access point could also be placed on the e-Justice Portal⁶. Participation by EU countries in digitalisation projects would however remain patchy.

Option 2: Amending existing instruments

- This would involve several legal instruments, amending the various civil, commercial and criminal cooperation instruments. It would ensure acceptance of digital documents and evidence, regulate the use of electronic signatures, outline the architecture for IT system and data protection requirements, and make digital the mandated communication channel.

⁴ <https://op.europa.eu/nl/publication-detail/-/publication/e38795b5-f633-11ea-991b-01aa75ed71a1/language-en>.

⁵ e-CODEX (e-Justice Communication via Online Data EXchange) is an IT tool which ensures secure communication between judicial authorities in legal proceedings and secure cross-border electronic messages exchange in the judicial area

⁶ <https://e-justice.europa.eu/home.do>

Option 3: A new horizontal legal instrument

- This would make it mandatory to provide and use the digital channel by default for cross-border cooperation, ensure acceptance of digital documents and evidence, regulate the use of electronic signatures, and outline the architecture of the IT system and data protection requirements.

C. Preliminary Assessment of Expected Impacts

Likely economic impacts

Positive.

The initiative could require new investment from EU countries to develop the necessary infrastructure that can interact with e-CODEX. Investment would depend on the current national level of digitalisation, level of involvement in the e-CODEX project, the interoperability of solutions implemented by EU countries and the possibility under national law to allow for electronic transmissions. However, in the long run, digitalisation of justice would significantly decrease the costs incurred by national justice systems in cross-border procedures.

To address cost concerns, the initiative could also propose that the Commission develops and provides EU countries with a reference implementation software solution (back-end portal) for their national use.

As mentioned in the Communication on the digitalisation of justice, the upcoming Multiannual Financial Framework and financial instruments for Next Generation EU could also provide funding.

The EU countries could reduce costs by re-using the infrastructure being developed for the European Investigation Order in criminal proceedings (eEDES) and for Service of Documents and Taking of Evidence also for other judicial cooperation instruments.

With its potential to substantially cut the cost of participating in cross-border cases, the initiative would also directly benefit citizens and businesses (including small/medium firms) concerned by the various EU civil law instruments. Use of these instruments (e.g. the European Small Claims procedure and European Order for Payment) by citizens, businesses and legal practitioners would also increase, through the new electronic access point.

Likely social impacts

Positive.

The initiative would improve the application of EU law on civil, commercial and criminal law and increase the accessibility and efficiency of justice.

It would bring very tangible benefits to citizens, businesses (including small/medium firms) and legal practitioners. This is likely to increase trust in the judiciary and EU cooperation, and incentivise the enforcement of rights granted to these parties through existing law.

Easier enforcement of their rights abroad is likely to encourage people and businesses to make more frequent use of their opportunities to buy and sell across the EU, especially when they realise that they can seek redress more easily in the event of disputes.

Likely environmental impacts

Very positive:

- significantly less paper needed and costs for transporting it.
- lower travel costs for citizens, representatives of businesses and legal practitioners to participate in different judicial procedures regulated by EU law (depending on the uptake of solutions and the possibility to use them in different proceedings).
- energy-efficient IT infrastructure (this would be a requirement).

Likely impacts on fundamental rights

The initiative would have a **positive** impact on the right to a fair trial and access to justice by providing additional, faster means of communicating with courts and faster judicial proceedings.

It could lead to more exchanges of personal data but would provide rules for these exchanges in full compliance with data protection rules. While Regulation (EU) 2016/679 (General Data Protection Regulation) will fully apply, the initiative could define how responsibilities are allocated to data processors and controllers.

The initiative would ensure citizens' right to access justice is fully respected - including for disadvantaged groups or vulnerable people. A combination of institutional, organisational and financial measures would be put in place to facilitate disadvantaged court users' access to a digital justice system.

To ensure victims' rights are not undermined, the initiative would ensure paper-based communication remains available for all.

In most cross-border civil law cases, applicants are often deterred from claiming their rights by language barriers, as well as their unfamiliarity with remote foreign procedures. The possibility for citizens and companies to submit online applications using pre-configured multilingual forms, and get online help in their own language, would

<p><i>greatly improve their access to justice.</i></p> <p><i>The initiative must, however, ensure that the use of digital technologies does not undermine the right to a fair trial and effective legal remedy, especially:</i></p> <ul style="list-style-type: none"> • <i>equal opportunity for both parties to make their case (equality of arms)</i> • <i>the right to have knowledge of/comment on all evidence and observations filed (adversarial proceedings)</i> • <i>the right to a public hearing</i> • <i>in criminal proceedings, not interfering with the rights of the defence, including access to a lawyer and the case file.</i>
<p>Likely impacts on simplification and/or administrative burden</p>
<p><i>Ultimately, the initiative would simplify procedures and reduce administrative burden. Use of new technologies would allow for faster and more efficient functioning of justice systems in cross-border cases. It would decrease costs of judicial procedures.</i></p>
<p>D. Evidence Base, Data collection and Better Regulation Instruments</p>
<p>Impact assessment</p>
<p><i>An Impact Assessment will be launched (in Q1 2021) to help prepare this initiative and inform the Commission's decision.</i></p>
<p>Evidence base and data collection</p>
<p><i>The Commission already has a considerable amount of data on digitisation of justice in the EU:</i></p> <ul style="list-style-type: none"> • <i>EU Justice Scoreboard⁷</i> • <i>Rule of Law report⁸</i> • <i>Council of Europe's European Commission for the efficiency of justice (CEPEJ)⁹</i> • <i>questionnaire sent to EU countries by the Council General Secretariat¹⁰</i> • <i>Digital Criminal Justice Study¹¹.</i> <p><i>The Commission' Communication on digitalisation of justice in the EU – A toolbox of opportunities, is accompanied by a Staff Working Document, which shows the current use of digital tools for cross-border judicial cooperation in different EU countries¹².</i></p> <p><i>The Commission will carefully assess what further data might be needed. For over a decade, it has been working on e-Justice policy with different stakeholders, who may also provide additional data.</i></p>
<p>Consultation of citizens and stakeholders</p>
<p><i>The initiative will use the Better Regulation Guidelines and Toolbox, including:</i></p> <ul style="list-style-type: none"> • <i>a consultation strategy, to ensure a wide range of stakeholders are addressed.</i> • <i>a public consultation, running for at least 12 weeks, starting in Q1 2021. Questions will be available (and replies allowed) in all official EU languages. The questionnaire would be accessed through the Commission's central public consultation page¹³ and through the DG JUST website. a synopsis report (summarising all consultation activities' results) – published on the consultation page after the consultation has closed.</i> • <i>possible targeted consultations with relevant stakeholders.</i>
<p>Will an Implementation plan be established?</p>
<p><i>Yes. While the objectives of the initiative would be best met by a Regulation (as a directly applicable act), the development of common digital channels between EU countries will be followed very closely to ensure they are fully interoperable. It would therefore be important to ensure the practical steps taken to establish these channels are coordinated at EU level.</i></p> <p><i>Finally, the Regulation is likely to include transitional provisions, leaving national authorities time to fully apply it. They should receive appropriate assistance during this transition.</i></p>

⁷ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en

⁸ https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en

⁹ See information about the report here: <https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems>

¹⁰ <https://data.consilium.europa.eu/doc/document/ST-10836-2019-REV-4/en/pdf>

¹¹ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/relevant-studies_en

¹² SWD(2020) 540 accompanying the Communication on the digitalisation of justice in the EU.

¹³ <https://ec.europa.eu/info/law/better-regulation/have-your-say>

