

A few developments on the modernisation of the service of judicial and extrajudicial documents and the taking of evidence in the European Union

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This year has been marked by the high number of EU instruments that have been adopted (and entered into force) or that have started to apply in the European Union, which are directly or indirectly related to the modernisation of the service of judicial and extrajudicial documents and the taking of evidence in civil or commercial matters.

These developments include three (full-fledged) *regulations* and two *Commission implementing regulations*. In addition, two *Commission implementing decisions* were adopted on 20 December 2022 concerning a related topic (*i.e.* e-CODEX). We have previously reported on this [here](#) and [here](#). While the great number of EU instruments in this field and their interrelationship can be daunting to a non-European, they seem to provide a smooth and flexible way forward for EU Member States.

Undoubtedly, such legislative efforts attest to the commitment of EU institutions to modernise this area of Private International Law, in particular by making the electronic transmission of requests for service and the taking of evidence, as well as other communications, a reality at least from 2025 onwards (for more information, see below).

In my view, this goes beyond anything that currently exists among States (at any level) regarding judicial cooperation as the electronic transmission of requests for both service and the taking of evidence is usually done in a piecemeal approach or lacks the necessary security safeguards, including data protection. Having said that, and in the context of cross-border recovery of maintenance obligations, there exists a state-of-the-art electronic case management and secure

communication system that is coordinated by the Permanent Bureau of the HCCH: iSupport.

On 1 July 2022 **two recast Regulations** started to apply in the European Union:

1. Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast). See, in particular, Articles 5 (means of communication), 6, 19 (electronic service), 25, 27 and 28;
2. Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast). See, in particular, Articles 7 (transmission), 8, 12(4), 19 (direct taking of evidence), 20 (videoconferencing), 25, 27 and 28.

These two regulations modernise this field in **two distinctive ways**.

First and foremost these regulations contain provisions dealing with the means of communication to be used by transmitting agencies, receiving agencies, courts and central bodies through a **secure and reliable decentralised IT system**. This primarily intends to replace the cumbersome paper transmission of requests and other documents and in this way, speed up proceedings.

For those of you who are wondering what a “decentralised IT system” is, please note that it has been defined in both recast versions as a “network of national IT systems and interoperable access points, operating under the individual responsibility and management of each Member State, that enables the secure and reliable cross-border exchange of information between national IT systems”.

Secondly, these regulations provide for the **actual service by electronic means and the taking of evidence by videoconferencing** or other distance communications technology. The Service Regulation has included a provision regarding electronic service of documents by allowing this to take place by means of qualified electronic registered delivery services (see EU Regulation (EU) 910/2014) or by email, both requiring (thankfully and rightfully, I must note) the prior express consent of the addressee; on the other hand, the Evidence Regulation provides for the direct taking of evidence by videoconferencing or other distance communication technology.

With respect to the implementation of the decentralised IT system, **two Commission Implementing Regulations** were adopted and entered into force in 2022:

1. Commission Implementing Regulation (EU) 2022/423 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1784 of the European Parliament and of the Council;
2. Commission Implementing Regulation (EU) 2022/422 of 14 March 2022 laying down the technical specifications, measures and other requirements for the implementation of the decentralised IT system referred to in Regulation (EU) 2020/1783 of the European Parliament and of the Council.

It should be noted that the decentralised IT system as an *obligatory* means of communication to be used for the transmission and receipt of requests, forms and other communication will start applying from **1 May 2025** (the first day of the month following the period of three years after the date of entry into force of the *Commission Implementing Regulations* above-mentioned).

Interestingly, Recital 3 of the *Commission Implementing Regulations* indicates that “[t]he decentralised IT system should be comprised of the back-end systems of Member States and interoperable access points, through which they are interconnected. **The access points of the decentralised IT system should be based on e-CODEX.**” Designating e-CODEX as the system on which access points *should* be based is in my view a breakthrough, given the apparent ambivalent feelings of some regarding such system.

The Annexes of these *Commission Implementing Regulations* provide more information as to the specificities of the system and indicate that:

- “*The **Service of Documents (SoD)** exchange system is an e-CODEX based decentralised IT system that can carry out exchanges of documents and data related to the service of documents between the different Member States in accordance with Regulation (EU) 2020/1784. The decentralised nature of the IT system would enable data exchanges exclusively between one Member State and another,*

without any of the Union institutions being involved in those exchanges.”

- *“The **Taking of Evidence (ToE)** exchange system is an e-CODEX based decentralised IT system that can carry out exchanges of documents and messages related to the taking of evidence between the different Member States in accordance with Regulation (EU) 2020/1783. The decentralised nature of the IT system would enable data exchanges exclusively between one Member State and another, without any of the Union institutions being involved in those exchanges.”*

This takes us to the new EU instruments relating to e-CODEX.

As a matter of fact, a **brand-new Regulation on e-CODEX** has entered into force this year:

- Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 (Text with EEA relevance).

This regulation explains **e-CODEX** in detail and specifies that the *European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)* will take over the administration of e-CODEX.

In particular, I would like to highlight Recitals 7 and 8 of the Regulation (EU) 2022/850, which explain what e-CODEX is and which read as follows:

*“(7) The e-CODEX system is a tool specifically designed to facilitate the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters. In the context of increased digitalisation of proceedings in civil and criminal matters, the aim of the e-CODEX system is to improve the efficiency of cross-border communication between competent authorities and to facilitate citizens’ and businesses’ access to justice. **Until the handover of the***

***e-CODEX system to the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)**, established by Regulation (EU) 2018/1726 of the European Parliament and of the Council, the e-CODEX system will be managed by a consortium of Member States and organisations with funding from Union programmes (the ‘entity managing the e-CODEX system’).*

“(8) The e-CODEX system provides an interoperable solution for the justice sector to connect the IT systems of the competent national authorities, such as the judiciary, or other organisations. The e-CODEX system should therefore be viewed as the preferred solution for an interoperable, secure and decentralised communication network between national IT systems in the area of judicial cooperation in civil and criminal matters.”

As previously indicated, two **Commission Implementing Decisions** have been adopted this week:

- Commission implementing decision (EU) .../... of 20.12.2022 on the technical specifications and standards for the e-CODEX system, including for security and methods for integrity and authenticity verification;
- Commission implementing decision (EU) .../... of 20.12.2022 on the specific arrangements for the handover and takeover process of the e-CODEX system.

The Annexes of the *Commission Implementing Decisions* are particularly interesting as they provide all the specificities of the system and its handover.

All in all this looks very promising to the long-awaited modernisation of this field in the European Union.