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THE IMPACT OF FURTHER DIGITALISATION OF EU CIVIL JUDICIAL COOPERATION ON NATIONAL PROCEDURAL LAWS: A CASE STUDY OF HUNGARY

The Member States of the European Union are continuously striving for an ever-wider digitalization of judicial cooperation in accordance with the principle of "digital by default". From 1 May 2025 onwards, e-communication will become a priority and in many EU proceedings to facilitate oral hearings in proceedings in civil, commercial and criminal matters with cross-border implications the optional use of videoconferencing or other distance communication technology will be available.

With regard to EU proceedings, it is the responsibility of the Member States (MS) to fill in procedural issues not covered by EU law with national law, provided that this does not undermine the principles of equivalence and effectiveness of EU law. EU MSs are bound by the Charter of Fundamental Rights of the EU and all EU MSs are party to the European Convention on Human Rights.

In light of the above, MS should adapt their national procedural law to the new EU digital procedural possibilities, while considering the fundamental rights jurisprudence of both the Luxembourg and Strasbourg Courts. The national legislator can respond either by creating specific procedural rules or by adapting the general rules of national law. The need for more extensive use of digital solutions is also apparent in national procedures. In this framework, a case study focusing on Hungary will be presented. Therefore, the modification of the general rules is the way to go, which can also contribute to even greater harmonisation of national procedural laws in the MSs, indirectly.

Keywords: digitalization of civil procedure, e-justice, EU law, judicial cooperation, videoconferencing.

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1. INTRODUCTION

The advent of novel social phenomena invariably gives rise to alterations in the legal landscape. The phenomenon of wider digitalisation is reflected not only in legal relations, but also in procedural law. This is due to evolving societal expectations of justice and a growing emphasis on its role as a service. The prevailing expectation in a digital society is that services should be readily accessible, even via online, and delivered expeditiously.

This paper examines a narrow slice of the challenges facing e-justice, namely the use of videoconferencing as a digital mode of in person representation in civil proceedings. The utilisation of videoconferencing systems in legal proceedings is not a recent development; however, the widespread adoption of online videoconferencing tools in civil litigation represents a novel phenomenon that has emerged as a regulatory challenge in the aftermath of the pandemic (Sanders, 2021).

This paper introduces a comprehensive set of digital rules for civil judicial cooperation in the EU. Then, the fundamental rights issues of virtual presence will be introduced based on the ECtHR case law. Finally, the provision of presence by means of online videoconferencing will be explained using the example of Hungary, to demonstrate how it differs from the 'traditional' digital presence rules.

2. THE DIGITAL TRANSFORMATION OF THE EU'S JUDICIAL COOPERATION

The primary aim of European integration was to establish closer economic cooperation between Member States and to create a single internal market. (Liargovas & Papageorgiou, 2024, pp. 29-30). Cooperation in justice and home affairs was not originally provided for in the Treaty of Rome. Although there was no primary legal basis for judicial cooperation, practical reasons, such as the practical operation of the four freedoms (freedom of goods, services, capital and people), and the effective resolution of cross-border disputes, required cooperation between Member States in justice (Stone Sweet, 2004, p. 30). With the entry into force Treaty of Maastricht on 1 November 1993, judicial and judicial cooperation was emphasised as part of the third pillar. The Treaty of Amsterdam, which entered into force on 1 May 1999, transferred most justice and home affairs matters to the first pillar, including judicial cooperation in civil matters and made the maintenance and development of an area of freedom, security and justice one of the objectives of the Union (Kende & Szűcs, 2009, p. 770).

The initial formulation of the periodic objectives of judicial cooperation in both civil and criminal matters was, of course, conducted by the European Council in the so-called Presidency Conclusions, which were named after the city in which they were held. It was within the context of these programs, namely Tampere (European Council, 1999), The Hague (European Council, 2005) and Stockholm (European Council, 2010), that the overarching objectives of European judicial cooperation were established. These programmes have enabled the European Council to further extend the organisational and substantive framework for judicial cooperation, as set out in both the Treaty of Nice and the Treaty of Lisbon, at both primary law level and secondary law level, at both the level of regulations and directives, by setting out new and additional objectives (Mohay, 2020, p. 598).

The Treaty of Lisbon has facilitated the establishment of strategic guidelines in the area of freedom, security, and justice by the European Council (TFEU, 2012, Art. 68). These guidelines are formally designated as the "Guidelines for the European Union's Action in the Field of Freedom, Security and Justice". These "post-Stockholm" strategic guidelines continue to set out the strategic objectives of judicial cooperation, but on an explicit Treaty basis and with a view to a legislative structure that goes beyond the pillar system.

The primary legal basis for judicial cooperation in civil matters is Article 81(1) of the Treaty on the Functioning of the European Union (TFEU), which is based on the principle of mutual recognition of decisions between Member States. Paragraphs 2 and 3 of the Article delineate the areas in which the Union may exercise shared competence with the MS', define the EU's legislative procedural order, i.e. which matters are subject to the ordinary legislative procedure and which to the special legislative procedure, and lay the basis for cooperation in cross-border family law matters.

In the context of this mandate, a series of legal instruments have been adopted in alignment with the objectives set by the European Council, initially in programmes and subsequently in strategic guidelines, on jurisdiction (e.g. the so-called Brussels Regulations), applicable law (e.g. the so-called Rome Regulations), procedural issues (e.g. the taking of evidence, service of documents), alternative European procedures (e.g. the European Small Claims Procedure), the establishment of a cooperation body and associated matters.'

The objectives delineated in these European Council programmes have been translated into concrete EU legal instruments, adopted based on action plans adopted by the Justice and Home Affairs Council, composed of the competent ministers of the Member States, and legislative proposals initiated by the Commission. The introduction of these instruments extends well beyond the scope of this study.

A significant objective of the European Union's civil judicial cooperation is to address cross-border disputes with greater efficiency and expediency (art. 81 of TFEU). In this regard, the EU legal framework has instituted several measures to encourage the integration of contemporary technologies, such as videoconferencing, within judicial processes. Furthermore, the EU has progressively facilitated the utilisation of videoconferencing for EU legal instruments, of which the use in the taking of evidence has been of the greatest importance.

EU law has previously allowed for the transmission of requests by any appropriate means in the framework of the getting evidence in a technology-neutral manner (Art. 6 of Council Regulation (EC) No 1206/2001, 2001) and has not precluded Member States from concluding bilateral or multilateral agreements to further facilitate the taking of evidence, provided that they are compatible with this Regulation (par 33. of Court of Justice of the European Union, 2012). The applicable Regulation on the Taking of Evidence, which has been partly revised in the spirit of digitisation, already oblige, as a general rule, that all communication and exchange of documents should be carried out through a secure and reliable decentralised IT system, such as e-CODEX. On the other hand, with detailed procedural rule, greater emphasis will be placed on the possibility of taking evidence by videoconference.

It is important to underline that the hearing of a party cannot be considered as an evidentiary hearing, and therefore the regulation on the taking of evidence could not be used as a basis for hearing opposing parties by videoconference.

The hearing of the parties is made possible by Digitalisation Regulation in judicial cooperation (European Parliament & Council, 2023), applicable from 1 May 2025, that allows the parties to be heard via videoconference in another Member State without requiring the consent of the other Member State, as for the taking of evidence in the Regulation on the taking of evidence (Art. 19 of EU Regulation 2020/1783).

The Regulation will implement the 'digital by default' principle in cross-border civil, commercial and criminal proceedings (European Commission, 2020). The Regulation provides for the possibility of written electronic communication in judicial cooperation procedures in civil and commercial matters, both between authorities and between natural or legal persons and the competent authorities, and extends the possibilities of hearing by videoconference or other means of telecommunication. This specific mode of hearing is briefly described below.

Instead of the more ambitious scope of the draft Regulation, which covers almost all EU proceedings (European Commission, 2021), the Regulation allows for a narrower scope of cross-border EU proceedings, such as the taking of evidence, the European Small Claims Procedure, and the temporary freezing of accounts, where one of the parties or their representative is in another Member State, to be heard by the court or tribunal by videoconference or other telecommunication technology, at their request or of its own motion (Art. 5(1) Regulation 2023/2844). This provision will make it possible to "hear" parties in cross-border civil and commercial cases by remote hearing, whether by videoconference or other means of telecommunication.

The Regulation defines videoconferencing as an audiovisual transmission technology that allows two-way and simultaneous visual and audio communication, thus enabling visual, audio and verbal interaction (Art. 2(6) of Regulation 2023/2844). However, there is no definition of other telecommunications technology or definition of its content, which is the reason for the technology neutrality of the Regulation. However, the question may arise whether voice-only communication can be considered as an acceptable means of communication. The Regulation maintains the rule that the procedure for conducting hearings by 'videoconference or other means of telecommunication' is governed by the law of the Member State where the videoconference takes place (Art. 5(4) of Regulation 2023/2844).

The Regulation provides for the possibility for the parties to take part by videoconference without the intervention of any other body in specific proceedings. This criterion can be met by the rules on simplified telecommunications presence described below. According to the rules of Hungarian law, as will be described, simplified telecommunication presence by voice communication only cannot be implemented.

3. FUNDAMENTAL RIGHTS ISSUES IN VIDEOCONFERENCING

From the legal point of view, the application of a videoconference system ensures the accessibility of the procedure, the presence of the party, the equality of arms, and the publicity of the hearings. These topics fall within the scope of right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the Charter) and also fall under the right to a fair trial granted by Article 6 of European Convention on Human Rights (Handbook on European law relating to access to justice, 2016, p. 178).

The Court of Justice of the European Union (CJEU) has undertaken to consider the case law of the European Court of Human Rights (ECtHR) under Article 52(3) of the EU Charter of Fundamental Rights when the rights in the Charter and the Convention are identical. This legal framework expressly provides that the CJEU is obliged to follow the practice of the ECtHR when interpreting rights "having the same meaning and scope" as those guaranteed by the Convention. Given that there has not yet been a CJEU decision based on Article 47 of the Charter in a civil case, I will now refer to the relevant practice of the ECtHR, although it is not possible to avoid referring to decisions in criminal cases in this context (Mason, 2020).

The first time when the ECtHR examined the compatibility of the use of a video link with the right to a fair trial was in 2006, in the case of *Marcello Viola v. Italy* (ECtHR 2006-XI 123). This case became the origin of the cases, where the question involves the use of a videoconference system. The case is based on a criminal procedure. Applicant was accused of serious crimes, and was subject to restricted prison regime. Alleged violation was that he was forced to use videoconference on his hearing, which created difficulties for his defence.

The general finding of the ECtHR was that the defendant's participation in the proceedings by videoconference as such is not contrary to the Convention, if it serves a legitimate aim and if the arrangements for the giving of evidence are compatible with the requirements of respect for due process. The ECtHR found that the use of videoconference was compatible with the right to a fair trial, because the use of a special hearing method was reasonable, *inter alia*, because of safety measures and to comply with the "reasonable time" requirement. The use of video link was applied only in the appeal hearings, which did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and the applicant had an opportunity to exercise the rights and entitlements. Furthermore, it pointed out there were no technical issues involved, because there were no times when the defence sought to bring to the attention of the court difficulties of hearing or seeing.

The ECtHR in the case of *Sakhnovskiy v. Russia* (ECtHR Application no. 21272/03) cited the above-mentioned findings in connection with the effective presence of an appellate hearing via video conference. The subject of the case concerned the accused applicant's right to communicate with his lawyer. In this aspect, the case introduced new findings. In connection with the right to communicate with a lawyer, the ECtHR emphasised that the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and if a lawyer could not confer with his client and receive confidential instructions from him without the risk of surveillance, his assistance would lose much of its usefulness. 15 minutes to communicate with their newly appointed lawyer immediately before the hearing deemed insufficient and incompatible with the right to a fair trial. In connection with the video link, which was installed and operated by the state, the ECtHR found questionable the sufficient privacy of the communication and accepted that the applicant might legitimately have felt ill at ease when he had a discussion with his lawyer.

In the case of *Trepashkin v. Russia* (No. 2) (ECtHR Application no. 14248/05) the ECtHR notes that the Convention case-law under Article 6 does not require the same

level of guarantees in the court of appeal as at the trial stage. In the certain case, the ECtHR reiterates the reasoning of an admissibility decision (ECtHR Application no. 26260/02) which says that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole. Here, the ECtHR found no violation of Article 6 in a case where the applicant's presence on the appellate hearing was ensured by a video link, under circumstances where no malfunction of the IT system was found, and the right to effective defence was ensured.'

The first case, where the use of videoconference was examined in connection with a civil case, was the case of *Vladimir Vasilyev v. Russia* (ECtHR Application no. 28370/05). In connection with the question of the in person presence on the hearings, the ECtHR pointed out the difference between the criminal and civil cases. It pointed out that the right to a fair trial does not guarantee the right to be heard in person at a civil court, but a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side. The ECtHR determined that the national court had not considered how to facilitate effective participation by the applicant, even though their presence was necessary, considering the subject of the case. The ECtHR concluded that, despite the existence of alternatives, the national court had not ensured sufficient options for the applicant's involvement. In the ECtHR's view, to hold a session by a video link would have been an appropriate option.

In the case of *Yevdokimov and Others v. Russia* (ECtHR Application no. 27236/05, and others), the ECtHR reiterated its finding that the use of a video link could be an obvious solution to conduct civil proceedings, where the personal hearing of a party is required. The personal hearing of a party may be required if the claim involves the party's personal experience and, accordingly, whether the court needs to take oral evidence directly from the party. The ECtHR cited its findings taken in the above-mentioned criminal based cases and expressed that the use of videoconference can be compatible with Article 6 if; the party can follow the proceedings, see the persons present and hear what is being said, but also can be seen and heard by the other parties, the judge and witnesses, without technical impediment.

In the case of *Gorbunov and Gorbachev v. Russia* (ECtHR Application no. 43183/06 and 27412/07), the ECtHR reiterated the described findings. The poor connection of video conference prevents the party to follow the proceedings in an adequate way if the only way of communication between the applicant and his lawyer carried out on a video-conference system installed and operated by the state results in the lack of confidential communication between them. These circumstances, based on the lack of effective presence and the lack of right to communicate with the lawyer, result in the infringement of the right to a fair trial.'

In the case of *Sakhnovskiy v. Russia* (No. 2) (ECtHR Application no. 39159/12), which is based on the alleged lack of confidential communication between the applicant and his lawyer, the ECtHR pointed out, that it took into consideration the fact, that the state did not provide any evidence that the video link was secured against any attempt at interception, nor did they offer any explanation why it was not possible to organise at least a telephone conversation.

Based on the cited case law of the ECtHR, it seems the use of a videoconference system is an “appropriate option” and “obvious solution” to conduct civil proceedings. As the cited cases also show, the use of a videoconference system always comes together with some restrictions of rights and opportunities for the parties. The interference of the restrictions with Article 6 of the Convention depends on the question of the proportionality. A restriction because of the special way of the hearing can conform with the right of a fair trial if, within the circumstances of the exact case, the restriction is proportional regarding the influenced right.

Although the question is complex, the legal aim and the compatibility with the requirements of respect for due process are the universal measures of the proportionality.

The legitimate aim can be varied, as the examined cases show that the safety measures and the compliance with the reasonable time requirement can be a legitimate aim.

The party’s right to an effective presence, as a part of respect to due process, is handled differently in criminal and civil cases, and also in the different stages of the procedure. In civil cases, the in person hearing of the party is not essential, if his side is presented effectively in another way. The guarantees of Article 6 at the different procedural levels of the remedy do not require the same level as at the first instance. The mentioned specialties of the civil cases and the different stages of the procedure lower the threshold of what can be deemed as a legitimate aim to find the use of videoconference systems.

4. SIMPLIFIED TELECOMMUNICATIONS PRESENCE IN CIVIL CASES, THE NEW HUNGARIAN LEGISLATION

Act XVII of 2024 on the Amendment of the Acts on Judicial Matters (the "Amendment Act") amended the Code of Civil Procedure in two respects, with effect from 9 July 2024 regarding the use of videoconferencing. On the one hand, it has extended the possibilities of recording minutes and allows the recording of minutes by continuous recording at all stages of the proceedings. On the other hand, it has introduced a new legal instrument on the use of electronic communications networks and, in the interests of simplification, has introduced a simplified telecommunications presence besides the hearing by electronic communications network.

Hearing by electronic communications network is not a new legal instrument in Hungary. It was introduced by the amendment to the Code on Civil Procedure of 1952, in force since 4 December 2015, with a new type of hearing, the rules for the use of the closed telecommunications network. Introducing this new legal instrument was in line with the ongoing digitalisation of certain non-litigious and litigious proceedings, and the "digitalisation" of participation in hearings was a logical consequence of the increasingly widespread and gradually mandatory use of electronic written communication with courts. In criminal proceedings, the possibility of being heard via a closed telecommunications network was introduced in 2003. The creation of rules for remote hearings in civil proceedings, explicitly mentioned in the Explanatory Memorandum of the new instrument, is linked to EU law. The Explanatory Memorandum points out that the first Regulation on the taking of evidence (Council Regulation (EC) No 1206/2001, 2001), which has substantially applied since

1 January 2004, already provided for the possibility of taking evidence by videoconference and that, in the light of these rules, several EU Member States have made it possible to take evidence by videoconference in civil cases without a foreign element.

The existing Code on Civil Procedure has maintained the legal institution and has kept it under the name of hearing by means of an electronic communications network, with the essential characteristic of hearing by means of a closed telecommunications network, with procedural clarifications.

A judge or assistant judge may order a hearing via electronic communications network (ECN) for expediency, cost-saving, or witness protection. Such hearings can involve parties, witnesses, experts, or objects and must use devices transmitting simultaneous video and audio between the court and a connected location. The person to be heard must appear in a designated room with representatives of the hosting body present. The ECN must enable clear visibility of all participants and the hearing room for the chairperson, ensure confidentiality for closed hearings, and allow distortion of the image or voice of the person being heard if required. Minutes must document the hearing's conditions, including any technical issues and their resolution. Public access is limited to authorised individuals, excluding assisting staff from the hosting authority.

The above legislative decision was embodied in the Amendment Act, which, as of 9 July 2024, extended Chapter XLVII of the Code on Civil Procedure on the use of electronic communications networks by regulating simplified telecommunications presence. As seen from the explanatory memorandum of the amendment, the legislative aim was to simplify the procedure. Although the explanatory memorandum mentions only criminal proceedings among the positive experiences of the use of electronic means, the impact of e-trial, which also applies in civil proceedings because of the COVID-19 pandemic, as described above, cannot be ignored. Furthermore, the change in circumstances outside the legal sphere, where participation by electronic means has become generally accepted because of the pandemic.

The rules of simplified telecommunications presence (STP) are based on the rules of hearing via electronic communications network (ECN) as background rules, but include simplifications and the necessary guarantee-rules resulting from these simplifications. The differences can be summarised as follows.

A hearing through the ECN may be ordered on the motion of a party or ex officio if it is justified by the need to expedite, simplify or reduce the costs of the proceedings or to protect the personal rights of the witness. For this purpose, a separate room in another court or other body, typically a penalty enforcement institute or a consulate, must be provided, equipped with a special videoconferencing system which ensures that all persons present at all relevant locations during the hearing are fully visible, that the person being heard can be well focused, that the judge conducting the hearing can check all points of the other location and that it is suitable for conducting a secret hearing.

In comparison, the use of STP requires the prior consent of the person interviewed. An order to conduct a hearing by the STP, even in one of the conditions, is only possible if the judge considers it appropriate. What is relevant in this context is whether the court considers that the hearing can be conducted without the presence of the person or a hearing by ECN. There is no need to comply with any special conditions in relation to the videoconferencing

equipment used, as has been shown in the case of the ECN, nor is it necessary to provide multiple camera images together or to allow a secret connection. However, regarding the hearing room, it is a condition that only the person to be heard or a person authorised by law to be present, such as a lawyer, guardian, custodian, sponsor, may be present at the hearing.

The identification process is consistent across both procedures, relying on statements from the party to be heard and legally verified documents, and sealed processing must be ensured. Identification under the STP follows the ECN hearing procedure but also requires identifying circumstances that may prevent conducting an STP. Grounds for exclusion include doubts about identity, voluntariness, or external influence, as well as the presence of unauthorised individuals or inability to verify conditions. To assess these exclusions, the presence of participants and the hearing location must be checked, and grounds for exclusion verified during proceedings by the hearing conductor.

There is no restriction on the number of persons who may be involved in any procedure, several ECN sites may be involved, and several persons may be present via STP. The provisions on the publicity of the hearing apply in both cases, in that publicity must be provided at the designated hearing venue.

5. CONCLUSION

Judicial cooperation in civil matters has already followed technological evolution (van den Hoogen, 2008, p. 65). Using videoconferencing devices, including online videoconferencing devices, which eliminated the need for further intervention of a seized court or other authority in the direct contact between the court and the party, is becoming more and more widespread and involves legal challenges (Fekete, 2023). It has been noted that, in the context of videoconferencing, the hearing of a party no longer depends upon the consent of the Member State of residence of the party, nor does it require the procurement of costly special videoconferencing equipment. However, in the context of evidence collection, at least tacit consent from the Member State concerned by the procedure is required.

The utilisation of videoconferencing facilities in civil proceedings within EU MS is subject to the overarching provisions of EU law, complemented by the detailed rules of national legislations. In principle, videoconferencing must comply with the right to a fair trial, in cross-border civil proceedings as enshrined in the Charter, in purely domestic contexts as protected by the ECHR and interpreted through the case law of the ECtHR.

These innovative procedures contribute to ensuring that justice is delivered in a more efficient and accessible manner. Concurrently, the advent of virtual presence invariably gives rise to novel and distinct scenarios about legal interpretation (Susskind, 2019, p. 55). These include the admissibility of virtual presence, issues of identification, and the feasibility of effective participation. Avoiding abuses and finding a uniform solution acceptable to both the CJEU and the ECtHR will be based on the past case law described and future experience of current proceedings, which will need to be monitored and, where necessary, legislative and jurisprudential consequences drawn. This could be considered as one of the fundamental elements in the harmonisation of national procedural law within Member States, establishing the foundation for a unified EU digital civil procedural law.

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