

Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU

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Introduction

The use of information and communication technology for the purpose of judicial proceedings is a topical issue in Europe. Some EU member states had already started many years ago to implement information and communications technology (ICT) applications within the courts and judicial proceedings.¹ This ranges from the basic digitalization of court administration to an advanced use of videoconferencing and the full online handling of procedures. Other member states are still in their relative infancy in implementing ICT within the judiciary. The overriding aim of these initiatives evidently is to achieve a better administration of justice.² Developments in the member states run parallel to and are in part influenced by those at the pan-European level.

In the European Union, e-justice has been on the agenda of the policy-maker for over a decade. The European Commission has invested in the setting up of legal atlases containing information for legal professionals and EU citizens and business; these currently are incorporated in the European e-Justice Portal.³ The Commission has also been active in encouraging videoconferencing, the electronic transmission of documents, the connection of criminal records, and the setting up of databases and registers. In the first multi-annual European e-Justice Strategy (2008), the Commission stressed the need

to create synergies of the initiatives at the European and national level.⁴ The current Strategy on European e-Justice for 2014–2018 emphasizes the key role of the European e-Justice Portal, and outlines the objectives, modes, and measures of implementation.⁵

A leading pan-European project is e-Codex, which aims at improving cross-border access to justice for citizens and business and at enhancing the interoperability between legal authorities in the EU.⁶ Its participants and partners currently include governments from over 20 European countries as well as a number of associations and research institutes.

The overriding aim of e-justice at the EU level is to improve access to justice, in particular for cross-border cases in civil and commercial matters, and, more recently, to enhance administration and collaboration in criminal matters. The focus of the present paper is on cross-border civil procedure. In recent years, several uniform civil procedures, notably the European order for payment and the European small claims procedure have been established. In these procedures, the use of ICT is encouraged, and has, to a certain extent, been operationalized. As part of a package to encourage alternative dispute resolution (ADR), a regulation on online dispute resolution (ODR) has been established recently. The implementation of e-justice at the European level has its limits, however, as it generally requires the cooperation of the member states, and creating legal and technical interoperability is challenging. At the same time, e-justice may pose challenges for procedural justice as a result of the often one-sided focus on efficiency of justice.

This paper discusses developments in e-justice in the EU, focusing on its implementation in cross-border civil litigation and adjudication. It questions the impact of e-justice on access to justice—as guaranteed by Article 6 of the European Convention on Human Rights and by Article 47 of the EU Charter on Fundamental Rights—its legal and practical limitations, and procedural challenges. As a full discussion of this topic would merit a monograph, and the literature on specific ICT applications and digital procedures is abundant, this paper can only offer a bird's-eye view from the perspective of European civil procedure. Section 2 discusses the EU policy and legislative framework of e-justice, while Section 3 focuses on the implementation of ICT in the European debt-collection procedures and the new ODR platform. In Section 4, the impact on access to justice as well as the limits and challenges of e-justice in the EU context is assessed, and Section 5 concludes the paper.

e-Justice in the EU: Policy Perspectives

Policy Framework and Initiatives

The activities of the European Union in the area of e-justice are linked to developments at the national level, where ICT plays an important role in public administration (eGovernment) and the administration of justice. A European framework for e-commerce was established in 2000,⁷ and was followed by the initiation of EU activities on eGovernment.⁸ As part of the Digital Agenda for Europe (one of the pillars of the Europe 2020 Strategy), the European Commission employs a diverse range of activities aiming at supporting a digital single market, enhancing interoperability, strengthening trust and security, investing in research and innovation, and securing ICT-enabled benefits for EU society.⁹

The advancement at the EU level depends to a large extent on the willingness and the advancement as regards ICT of the member states. In the present European e-Justice Strategy, voluntary participation is once again taken as the starting point, except for the EU legislative instruments that require the implementation of a specific project or ICT application.¹⁰ European e-justice is based on decentralization and interoperability, and it covers projects with a European dimension in the area of civil, criminal, and administrative law.¹¹ As is also highlighted in this policy document, the main achievement has been the e-Justice portal, launched in 2010.¹² This website—“the one-stop shop” for European citizens and legal professionals—currently includes over 12,000 pages of content on EU and national law in all the official languages of the EU. It also has several interactive features, including dynamic electronic forms, a portal wizard to help choose among available European procedures, and language tools. Another noteworthy feature is the introduction of the European Case Law Identifier (ECLI), presenting a uniform format for case law for all member states’ and EU courts.¹³ In 2015, the Council adopted a recommendation to promote the use and sharing of best practices in cross-border videoconferencing in the member states, with a view to improving interoperability.¹⁴

Civil Justice and Facilitating Cross-Border Litigation

The focal point of e-justice in the field of civil law is the enhancing of access to justice in cross-border cases. This in part results from the specific competence of the European Union in “civil matters having cross-border implications,” as laid down in Article 81 of the Treaty

on the Functioning of the European Union (TFEU) concerning judicial cooperation in civil matters.¹⁵ Despite a certain degree of harmonization, civil procedures differ greatly in the member states, and potential litigants having to enforce cross-border claims may still face legal and practical obstacles. These result, *inter alia*, from having to establish international jurisdiction, the need for cross-border service of documents, the taking of evidence, enforcement, diverging domestic procedures, and having to incur additional costs for local legal representation, the translation of documents, and travel expenses.

Traditional private international law instruments, and most significantly what is currently the Brussels I-bis Regulation, have introduced harmonized rules for international jurisdiction and the recognition and enforcement of judgements.¹⁶ In the past 16 years, nearly 20 additional instruments have been established under the heading of judicial cooperation in civil matters, dealing with specific procedural law issues or the applicable law.¹⁷ For procedural aspects, the regulations on the service of documents¹⁸ and the taking of evidence¹⁹ may be mentioned. More recently, three uniform European civil procedures have been established: the European order for payment procedure, the European small claims procedure, and the European account preservation order.²⁰ These procedures are intended to support effective recovery of debts in cross-border cases.

These legislative instruments on procedural law contain provisions that facilitate, encourage, and rely on the use of ICT. This operates at three different levels. First, through the European e-Justice Portal, electronic access is provided to the text of the instruments, to the standard forms (e.g., for filing a request for the service of a document or enforcement of a judgment in another member state), and to relevant national rules and information on implementation of EU law in the member states. In addition, electronic databases for case law and registers, including a European business register and an insolvency register, have been set up. Second, the instruments support electronic communication and communication by other technological means between judicial authorities, and between the parties and judicial or extra-judicial bodies. This includes the online submission of documents as well as videoconferencing for the purpose of evidence taking and oral hearings.²¹ Third, and most far-reaching, is the full online conduct of European civil procedures. To date, the latter has only materialized in a few member states with regard to the European order for payment procedure.²²

European Civil Procedure and the Use of ICT

Uniform Civil Procedures and Facilitating Technology

This section focuses on two European procedures introducing new models that enable the use of ICT in different stages of the process: namely, the European order for payment and small claims procedure.²³ In particular, the first one is designed to enable a full electronic handling of the procedure. The third European civil procedure—the European account preservation order—also fosters electronic communication, and relies on an online information system. This new procedure will not be discussed further, however, since it will only come into force in January 2017, and no practical information on its implementation and application is yet available.

1. European Order for Payment and Small Claims Procedure

The European order for payment procedure (applicable since December 12, 2008) and the European small claims procedure (applicable since January 1, 2009) were developed to make cross-border debt collection within the European Union more effective.²⁴ Although most member states already had specific procedures for these types of claims, the great divergence between domestic procedures and their limited application in cross-border cases justified the introduction of these first European civil procedures.²⁵ They are optionally available to the claimant in cross-border cases, in which at least one of the parties is domiciled or habitually resident in a member state other than that of the court or tribunal seized.²⁶

The European order for payment procedure is a one-sided procedure for the collection of uncontested debts.²⁷ Upon the applicant's request, a European order for payment is to be issued by the seized competent court, ordinarily within 30 days.²⁸ If the debtor does not oppose the order within a prescribed period of 30 days after it has been served, the payment order must be declared enforceable, and can be enforced throughout the EU.²⁹ The European small claims procedure is an adversarial procedure that is currently available for claims with a value up to €2,000.³⁰ Following the adoption of a regulation amending the small claims procedure, this threshold will be raised to €5,000 in July 2017.³¹

The European regulations contain rules to simplify the procedure, and are conducted by means of standard forms, including a claim form, a correction form, an answer form (small claims), the

order for payment issue form, the opposition form (order for payment), and a form for enforcement. Along with a number of other features that facilitate the use of ICT, this standardization makes these procedures particularly suitable for digitalization.

The remainder of this section will focus on the legal framework for ICT and its use in these procedures.³² It should be noted that the available information on the actual use of these procedures in the member states is limited due to a lack of comprehensive empirical data, in particular in relation to the European small claims procedure. As is clear from a number of studies,³³ and from the Commission report on the application of the European small claims procedure, dating from November 2013, this procedure is seldom used in the member states.³⁴ To extend the use of the procedure and to improve its functioning, the European Commission put forward a proposal to revise it.³⁵ At the end of 2015, the new regulation was adopted and it will take effect on July 14, 2017.³⁶ The European order-for-payment procedure is more successful, as is confirmed by the report of the European Commission on the application of this procedure, published in October 2015.³⁷

2. Access: Online Information, Dynamic Forms, and Submission

The use of both European procedures is facilitated by two key factors within the EU e-justice program: information and relevant standard forms are electronically accessible, and the regulations facilitate the electronic submission of the forms through which communication between the agents (primarily parties and courts) in these procedures is conducted. Basic information on these European procedures is available on the European judicial atlas for civil matters (currently linked to the e-Justice portal), which has a separate section on each procedure. Apart from providing general information and links to the text of the regulations and the standard forms, the atlas provides relevant information per member state (e.g., the courts having jurisdiction, accepted means of submission of documents, and language requirements), which appears when one clicks on the competent member state on a map.

The European e-Justice Portal has a section entitled “dynamic forms,” which includes a wizard that assists users in deciding whether and which of the two European procedures can be used.³⁸ It includes separate sections on the two procedures with a brief explanation, a link to the practice guides that have been developed

for these procedures, and links to the standard forms of the European order for payment³⁹ and to the European small claims procedure.⁴⁰

The standard forms are of essence for simplifying access to the European procedures and standardizing their application in the national court having jurisdiction.⁴¹ Since legal representation is not compulsory in these European procedures,⁴² they are developed as “do it yourself” procedures. Clicking, for instance, on application form A for the European order-for-payment procedure leads to a map of the EU. Selecting the country to which the applicant wants to send his or her form leads to brief information on how the form can be sent (by post, directly to the court, by fax, email, or another electronic means), and in which language(s) the application should be made. Short explanations guide the user in filling out the form. In addition, the European small claims regulation requires member states to provide practical assistance in completing the forms.⁴³ However, in practice this assistance is not always available, and it often has an ad hoc character.⁴⁴

As far as possible, the standard forms use closed encoded fields that can be ticked. On completion, the form can be sent to the competent court or judicial body within the member state selected. A PDF can be generated, and the user is reminded as to which language(s) the selected member state accepts. The user can select a language, and the standard items in the form are translated into the chosen language. The open fields are not translated, in particular the description of the evidence, and, for the small claims procedure, a factual description of the basis of the claim as well as evidential documents to be enclosed. Since this information is crucial for the court to have an understanding of the case and the claim, the claimant should provide for a proper translation. Only a few member states accept forms in a language other than their official language(s).

As regards the submission of the application form (order for payment) or the claim form (small claims) and other documents, the regulations provide that this can be done in paper form (directly to the court or by post), or “by any other means of communication,” including electronically, as far as available in the member state concerned.⁴⁵ The European order-for-payment regulation adds that if the application is submitted electronically, it has to be signed by an e-signature in accordance with the EU Electronic Signatures Directive.⁴⁶ The regulations, therefore, do not oblige member states to have the legal and technical possibility of receiving electronic applications. Currently, more than half of the member states enable

an electronic submission of the application for a European order for payment, by e-mail, or through an electronic filing system.⁴⁷ Almost half of the member states allow for the electronic submission of the claim in the European small claims procedure.⁴⁸ It is to be expected that this number will gradually increase, since a number of member states are currently developing electronic communication systems.

3. Electronic Handling of the European Order for Payment

The European order-for-payment procedure is designed with a view to maximizing its efficiency and enabling electronic processing.⁴⁹ For instance, it is not required that evidence to support the claim be submitted along with the application form; the essence of this procedure is to establish that the claim is uncontested rather than to prove its existence.⁵⁰ To this end, the defendant is informed that the order is issued solely on the basis of the information provided by the claimant.⁵¹ The defendant can oppose by filing a simple opposition form within 30 days, and in which case the procedure will continue as an adversarial procedure under the domestic rules of the competent member state.⁵² The regulation specifically provides that the examination of the application may take the form of an automated procedure.⁵³ It is submitted that a fully automated processing without a human interface seems somewhat at odds with a *prima facie* examination of the merits to exclude clearly unfounded claims or inadmissible applications, as indicated by the regulation.⁵⁴ In addition, the regulation enables the electronic service of documents, in particular the order for payment.⁵⁵ According to the 2015 Commission report on the application of this regulation, the electronic service of documents under this regulation is not yet a reality.⁵⁶

To operationalize a fully electronic procedure takes considerable time and requires a legal and technological infrastructure. A number of member states have concentrated the handling of this procedure in one specific court or authority, which may simplify the practical implementation of an electronic order for payment. In 2009, Austria and Germany implemented a successful pilot for the electronic handling of the procedure between these two countries.⁵⁷ This also serves as a model for other member states. In a brochure from the Austrian government, the functions are described as follows:

The simple processing of applications by input of data form A and the computerised production of subsequent printed forms

and procedural steps; the essential details of the case are readily available in a “register” (table); all procedural steps are set out in order in a “register” (table); all further steps such as correspondence and notes are performed from the list of contents; autotext can be freely set and saved for all purposes; procedural forms and decisions can either be printed and distributed by mail or electronically transmitted via the ERV (Electronic Legal Communication).⁵⁸

The European order for payment procedure was also the first test case to be piloted within the e-Codex project.⁵⁹ The nine member states that currently participate in this pilot enable the electronic exchange of documents (application form, correction form, order for payment form, and so on) either as sending state, receiving state, or both.⁶⁰ The electronic sending of the (application) forms, which from the perspective of the user is the biggest advancement, is possible either through the European e-Justice Portal or the national portals.

4. Use of Technology in the European Small Claims Procedure and Revision

The European small claims procedure is designed as a low-threshold procedure for the collection of small claims by both consumers and (small) businesses.⁶¹ The electronic processing of the procedure is more complicated due to its adversarial nature, requiring more extensive information on the case, the submission of evidence, and a more intensive exchange of documents among the three actors (claimant, court, and defendant). Following the European order for payment procedure, the small claims procedure is currently piloted under the e-Codex project in six participating member states.⁶² The aim is to facilitate the electronic submission of claims, as enabled by the regulation (see the section on “Access: Online Information, Dynamic Forms, and Submission,” above), and, in general, the digital communication between the court and the parties.

To reduce the costs and time inherent to oral hearings in the cross-border context, the regulation prescribes that the European small claims procedure is in principle to be conducted in writing.⁶³ To secure the right to be heard, as embedded in Article 6 of the European Convention on Human Rights⁶⁴ and in Article 47 of the EU Charter of Fundamental Rights, the court, according to Article 5 of the regulation, is to “hold an oral hearing if it considers this to be necessary or if a party so requests.” It may only refuse a party’s request if an oral

hearing is “obviously not necessary for the fair conduct of the proceedings.” To decrease costs and to save the time and trouble resulting from parties having to appear in a foreign court, the regulation provides that the required oral hearing may be held through videoconferencing or other communication technology (e.g., Skype).⁶⁵ The same goes for the taking of evidence—the hearing of witnesses or experts.⁶⁶ This possibility is subject to the technical means available in the member states, the majority of which do have audio and video equipment available in all or some of their courts. Detailed data on the actual use are not available, however, but it seems that the use of videoconferencing within this procedure is very limited.⁶⁷

The new regulation amending the small claims procedure which will take effect in July 2017, aims at making the procedure more attractive by, *inter alia*, extending the scope of the procedure⁶⁸ and increasing the use of ICT. A first amendment is that the postal service of documents, which is the primary prescribed method of service under this regulation, is extended to the electronic service of documents.⁶⁹ Whether it will be used depends upon the technical means and the admissibility under the law of the member state involved. The recitals of the new regulation also express that for all other written communications between parties, other persons involved in the proceedings, and the courts, “electronic means should be used as the preferred means to the extent possible, where such means are available and admissible.”⁷⁰

A second amendment is that member states are to ensure that the remote payment of court fees is possible. Member states should offer at least one of the following means of payment: (a) bank transfer; (b) credit- or debit-card payment; or (c) direct debit from the claimant’s bank account.⁷¹ This amendment is certainly to be welcomed, since in a number of member states only payment in cash, stamps, or by cheque is possible, or other practical obstacles exist that make payment problematic.⁷²

A third amendment that was proposed by the European Commission involved imposing an obligation to use videoconferencing, teleconferencing, or other means of distance communication for the purpose of oral hearings and the taking of evidence, where the person to be heard was domiciled in another member state.⁷³ However, this met with resistance since it would force member states to have the necessary technical infrastructure in all the local courts having competence in this procedure. It would also interfere with

the discretion of the judge to hold oral hearings in a way that was regarded most suitable. A new recital underlines in a less obligatory way that member states should promote the use of distance communication technology. It provides that arrangements should be made such that the competent courts are appropriately equipped in order to ensure the fairness of the proceedings and refers to the above-mentioned Council recommendation on cross-border video-conferencing.⁷⁴ Article 8 of the new regulation provides that oral hearings “shall be held by making use of any appropriate distance communication technology” as far as these are available and unless the use of such technology “is not appropriate for the fair conduct of the proceedings.”

The New ODR Regulation: Creating an Online ADR Platform

Promoting the use of alternative methods of dispute resolution has been a focal point in EU civil justice. As yet it has met with only limited success, although in some member states well-functioning ADR mechanisms are in place.⁷⁵ A directive of 2008 regulates a number of issues regarding cross-border mediation,⁷⁶ and in 2013, two related instruments were adopted to more actively enhance the use of ADR in both in cross-border and domestic consumer disputes.⁷⁷ The first one, a directive on consumer ADR, provides the legal framework obliging member states to enable consumers and traders to submit their disputes to ADR.⁷⁸ It outlines the principles of ADR (including impartiality, transparency, effectiveness, fairness, and liberty), and provides rules on information to the consumer and on cooperation among ADR entities.

More important for the present paper is the second instrument, a regulation on consumer ODR that provides tools “facilitating the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes.”⁷⁹ It applies only to disputes arising out of online contracts.⁸⁰ The European Commission has developed an *ODR platform* (single point of entry) pursuant to this regulation that has been operational since February 2016.⁸¹ This platform links to the national ADR entities that are authorized in accordance with the directive on consumer ADR. The main functions of the ODR platform are to provide an electronic complaint form; to inform the respondent; to identify the competent ADR entities and transmit the complaint to the agreed entity; to offer a free-of-charge electronic case management tool; to provide translations; to provide an

electronic form to the ADR entity to submit information and the result of the ADR; to provide information; and to generate data.⁸² Each member state has designated an ODR-contact point, hosting at least two advisers, who—particularly in cross-border cases—provide assistance in the use of the ODR platform.⁸³

By means of this platform, consumers can, free of charge, submit their complaints online by filling out a standard form.⁸⁴ The completed complaint form will be processed and transmitted to the trader, informing the latter that parties have to agree on ADR and on the competent ADR entities. The trader should indicate within 10 days whether he or she is obliged to use a specific ADR entity (e.g., for a specific branch of business) or is willing to accept one of the identified ADR entities.⁸⁵ If parties agree to ADR and on the ADR entity, the complaint will be automatically transmitted to the ADR entity. If this entity agrees to deal with the dispute, it must finalize the dispute within 90 days, and will communicate the outcome through the platform.⁸⁶ It is not compulsory to conduct the ADR procedure itself through the platform, but in any case it cannot require the physical presence of the parties or their representatives.

It is to be hoped that the ODR platform will function well and that potential users will find their way to it in order to have an added value to the existing plethora of national ADR systems and—limited—ODR mechanisms, and to the traditional or partially online court procedures.

Enhancing Access to Justice and Procedural Challenges of ICT

Legal Framework and Potential of ICT for Access to Justice

Access to justice in Europe is guaranteed by Article 6 of the European Convention on Human Rights and by Article 47 of the EU Charter of Fundamental Rights. This not only requires *de lege* access to justice but also effective access to justice in fact.⁸⁷ In past years, the European institutions and many of the member states have made a substantial effort to create a legal framework and to invest in the technical infrastructure with the aim of enabling the use of ICT. These are important contributions to realizing access to justice since they make legal sources more accessible and enable the electronic submission of claims.

The European e-Justice Portal has been developed as a one-stop shop for justice in the EU. It provides extensive information on EU and national law as well as access to, *inter alia*, business and

insolvency registers, and it includes several interactive features. Regulations in the area of European civil procedure provide the legal framework to serve documents, take evidence, exchange documents between legal authorities in the member states, submit claims, and conduct procedures using electronic and other technological means.⁸⁸ Within the cross-border context, the European order for payment procedure and the small claims procedure contribute to access to debt recovery by laying down a uniform procedure to be conducted by means of standard forms. The forms are designed to support the do-it-yourself character of these procedures, so that professional legal support is in principle not needed. These forms are electronically available in all official languages of the EU, and the e-Justice portal is equipped with a translation tool.⁸⁹ The e-Codex project and a number of small-scale private initiatives contribute to furthering the required technological infrastructure and interoperability for the purpose of European procedures.

The ODR regulation, operationalized by the ODR platform, adds yet another layer to dispute resolution in the EU.⁹⁰ It facilitates the online request for ADR, primarily by consumers, and the transmission to the respondent and eventually the ADR entity, as well as communication of the outcome. This process is aided by information on and the identification of competent ADR entities within the member states, by the translation of documents, and by online access to designated ODR contact points within the member states.

Limits of e-Justice in European Civil Procedure

The development of e-justice in the EU faces a number of limits and practical problems. A legal limitation is the dominantly voluntary nature of EU member states' participation. As the present European e-justice strategy also stresses, "Voluntary participation in European e-Justice projects is at the discretion of each individual Member State."⁹¹ The exception is when a legislative instrument "includes a requirement to implement a specific project in the context of the European e-Justice system." As was discussed above, most provisions on information and communication technology in the European civil procedure instruments only enable the use of these means, and do not oblige member states to have them in place.⁹² The fact that member states want to stay in control was once again made clear by the rejection of the proposal imposing the obligation to use video-conferencing or other distance means for the purpose of the oral

hearing and the taking of evidence in the European small claims procedure.⁹³ For instance, the Dutch government was of the view that the use of videoconferencing could only be strongly encouraged by the regulation, and wanted to ensure that there was no interference with Dutch developments to introduce digitalization in court proceedings.⁹⁴ In some member states, for instance in France, several hundred local courts have jurisdiction for this procedure, and it would require structural investments to have the necessary equipment available in all these courts, or a reform of the national territorial jurisdiction system. Implementation of the ODR regulation is politically easier in that regard, since the European Commission is responsible for operation of the ODR platform and the costs incurred, and it requires little in the way of structural investments on the part of individual member states.

The technical and practical challenges facing the present e-justice framework in Europe are of considerable complexity and only a few can be highlighted here. Substantial efforts have been made in recent years to increase technical interoperability, as the European civil procedures only provide a common legal framework. At the grassroots level, this has to be made functional and applied by the member states, by their multiple courts and other judicial bodies, by legal practitioners, and by the end users. The member states have considerable legal procedural diversity and different levels of advancement in implementing ICT.

Particularly in the first years of the applicability of the European procedures, there were many technical and practical shortcomings in the use of the standard forms, including difficulties saving the form⁹⁵ and dysfunctional links to the forms used on websites of the member states.⁹⁶ Since then, most problems—though not all of them—have been resolved. As was mentioned above in the discussion on the reform of the European small claims procedure, parties face difficulties in paying court fees.⁹⁷ The same applies to the European order-for-payment procedure. Transparency is also an issue as regards what technical means are available in the different member states. Another problem with respect to the European e-Justice Portal is that information is not always up to date, especially as far as information on the member states is concerned, and that not all tools are user friendly.

Another practical issue in the EU context is that of language diversity. Multilingualism lies at the foundation of the EU's cultural

diversity, and it is also crucial in the single digital market. There are currently 24 official languages in the EU, and all legal sources, relevant information, and regular updates to these, including those on the e-Justice portal, have to be available in all these languages. Apart from the translation and interpretation problems this poses, it makes cross-border litigation challenging. Despite calls for a more liberal approach, most member states only accept legal documents in their own official language(s). The European civil procedure regulations partly tackle the issue by limiting the need for translation, while the availability of the standard forms in all languages, along with the language tools on the e-Justice portal, greatly assist in overcoming language-related obstacles. However, the translation is limited to the form's closed fields; this, for instance, leaves the claimant responsible for the translation of the factual description and basis of the claim as well as of any attachments that require translation in the European small claims procedure.

To illustrate some of the issues, I conducted a brief experiment. I instructed a student assistant—who had no specific knowledge on the topic—to use the wizard on the dynamic forms section of the e-Justice portal, and to fill out the European small claims form.⁹⁸ My fictitious case was a claim for compensation under EU law due to a delayed flight, a typical European small claims case where a Dutch consumer had booked a flight from Brussels (Belgium) to New York with a French airline. It took the student considerable time and effort to locate the wizard on the portal in order to determine which European procedure applied, although the application itself was easy. I directed him to file the claim in France, but also asked whether he would be able to easily determine by himself which court(s) would have international jurisdiction. He reported the following issues. In the first section of the form regarding information on the claimant and respondent, there was a notification that in “some Member States” the inclusion of only the P.O. box number of the defendant was not sufficient, and that the document would not be served. Information was lacking with regard to which countries this concerned, and what the consumer was supposed to do if he only had a P.O. box number. Regarding the question as to the ground on which the court addressed was regarded as having international jurisdiction, on the basis of my directions the student understood he would have to tick the “domicile of the defendant” because this would lead to France. But without my directions, he would have ticked “domicile

of the consumer” instead, which would lead to the Dutch courts. However, in this case the Dutch courts would not have jurisdiction pursuant to the Brussels I-bis Regulation and the case law.⁹⁹ The information provided for this item (including a link to the European Judicial Atlas) is not sufficient and transparent enough for an average consumer. In addition, the student considered the question difficult as to whether costs of the procedure and legal interest were claimed, as information on what costs could be claimed and when legal interest could be claimed was not readily available. One of the last steps was to select the competent court within the chosen member state. Based on the postal code of the airline in my fictitious case, two French courts were mentioned; however, it was not clear whether the form could in fact be sent to either of them. In the end, it was possible to generate a PDF, and it was indicated which languages were accepted by the selected member state; the language could be chosen from a dropdown menu (which included all languages, not only the ones allowed). The form including the questions and tick-box answers was translated, but the open fields remain in Dutch—and the user was not notified of this. After the PDF was created, it was not clear how the claim form could be sent; this was indicated only at the beginning when France was pre-selected, but this information was no longer displayed at the end.

Efficiency and Procedural Challenges

To conclude this section, certain procedural challenges to the ongoing development of e-justice in the EU will be addressed briefly. The main goal of introducing ICT in European civil procedure is to increase the efficiency of procedures. Although this is an important aspect of guaranteeing access to justice and a fair trial, and also considering that procedural delays are still a major problem in many member states, a one-sided focus on the overall efficiency of justice bears the risk that one could lose sight of the quality of individual justice. To state the obvious, fast and cheap procedures are not necessarily good ones.

The European debt-collection procedures and the digitalization of litigation and adjudication largely rely on active consumers and traders who are able to locate and apply the relevant information, and to pursue claims in principle without the help of legal professionals. Though the e-Justice portal and the standard forms are generally user-friendly, not all relevant information is easily traceable.

Information provided by member states is often limited, only accessible in the local language (since reference is made to applicable national provisions), and may be outdated. This may also result in an information asymmetry between consumers and small businesses on the one hand, and bigger companies on the other. Using the European procedures also requires an assessment of particular legal and more complex practical issues, including international jurisdiction, procedural costs, and interest. This may also explain why in fact the European small claims procedure is still seldom used, and why the European order for payment is often used by repeat players that are bigger professional parties.

A final point to be made is that standardization through the online forms makes procedures more rigid. The format of the European order for payment procedure leaves little room for an assessment beyond the limited information in the closed forms. From the Dutch perspective, it has been argued that this procedure offers less protection to debtors than domestic law.¹⁰⁰ The case law of the European Court of Justice shows that in some cases debtor protection beyond the strict context of the regulation is required.¹⁰¹ The forms of the European small claims procedure leave limited room for a genuine adversarial procedure, and the lack of oral hearings limits the possibility of reaching the core of the dispute in more complex cases, or of establishing a settlement.¹⁰² Videoconferencing may solve some of the issues, but the lack of a live human interface is sometimes regrettable and may impoverish proceedings.

Conclusion

This paper discussed developments in e-justice in the European Union, zooming in on uniform civil procedures for cross-border debt collection and the ODR regulation and platform. Specifically within the cross-border context, European debt-collection procedures aim to increase access to justice by introducing uniform and form-based procedures facilitated by technological means. The new ODR platform is expected to boost ADR in the EU as well as to facilitate the process by means of the online submission and handling of the request.

The new European legal framework and the technological advancements support access to justice and may trigger procedural innovation, though this often depends upon the voluntary compliance of the member states and the technical means available in them.

Challenges for e-justice in the EU include the reality of having to deal with 24 official languages, access to accurate information, and the user-friendliness of the systems. It is submitted that, in general, efforts to advance European electronic procedures and ODR are a valuable contribution to access to justice. However, great care should be taken to prevent the legal and factual complexity and individual procedural justice from becoming lost in translation for the sole purpose of efficiency.

Notes

- 1 For instance, Austria and Germany introduced an automated handling of their payment procedure (*Mahnverfahren*) from the 1980s, followed by the implementation of fully electronic procedures from the 1990s. In England, the Money Claim Online (MCOL) system was initiated in 1999. Some of the national procedures and experiences are reported in *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, ed. Francesco Contini and Giovan Francesco Lanzara (New York: Springer, 2014) (in particular chapters 4–7).
- 2 Marco Velicogna, “Justice Systems and ICT: What Can Be Learned from Europe?,” *Utrecht Law Review* (2007) at 129.
- 3 European e-Justice Portal, online: <<https://e-justice.europa.eu>>.
- 4 European Commission, *Towards a European e-Justice Strategy*, COM (2008), 329 final.
- 5 European Commission, *Strategy on European e-Justice (2014-2018)*, Official Journal 2013, C376/06, 21 December 2013, followed by European Council, *Multiannual European e-Justice Action Plan 2014-2018*, Official Journal 2014, C182/2, 14 June 2014.
- 6 See “e-codex: About the Project,” e-Justice Communication via Online Data Exchange, online: <www.e-codex.eu/>. For an institutional and technical introduction, see Marco Velicogna, “Coming to Terms with Complexity Overload in Transborder e-Justice: The e-Codex Platform,” in *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, ed. Francesco Contini and Giovan Francesco Lanzara (New York: Springer, 2014) at 309.
- 7 Directive 2000/31/EC on electronic commerce, *Official Journal* 2000, L178/1.
- 8 See European Commission, *Towards interoperability for European public services*, COM (2010) 744 final.
- 9 See European Commission, “Digital Agenda for Europe,” online: <<https://ec.europa.eu/digital-agenda/en>>.
- 10 European Commission, *Strategy on European e-Justice*, *supra* note 5.
- 11 *Ibid.* at 9.

- 12 Ibid. at 8.
- 13 Currently 11 member states have implemented ECLI (status as of 1 November 2015).
- 14 Council Recommendation, *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*, Official Journal 2015, L C 250/1.
- 15 This provides that the EU needs to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements and of decisions in extrajudicial cases.
- 16 Regulation No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), *Official Journal* 2012, L 351/1. This regulation was preceded by another one, which in turn relied on the Brussels Convention of 1968.
- 17 For an overview, see, *inter alia*, Xandra Kramer, *European Private International Law: The Way Forward, In-depth analysis European Parliament*, Research Report for the JURI Committee (Brussels: European Parliament, 2014), at 12–14, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2502232>.
- 18 Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, *Official Journal* 2000, L 324/9.
- 19 Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters, *Official Journal* 2001, L 174/1.
- 20 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure, *Official Journal* 2006, L 399/1; Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, *Official Journal* 2007, L 199/1; Regulation 664/2014 creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, *Official Journal* 2014, L 189/59. The latter will be applicable as of 18 January 2017.
- 21 For the electronic filing of documents, see Article 7 European Order for Payment Regulation and Article 4 European Small Claims Regulation, and for videoconferencing, Articles 10 and 17 Evidence Regulation and Article 8 European Small Claims Regulation.
- 22 See section on “Legal Framework and Potential of ICT for Access to Justice.”
- 23 See section on “The New ODR Regulation: Creating an Online ADR Platform.”

- 24 They are applicable in 27 of the 28 EU member states. Due to Denmark's special position under the judicial cooperation section of the TFEU, these regulations are not applicable in Denmark.
- 25 See recitals 7–8 to the European Order for Payment Regulation and recital 7 of the European Small Claims Regulation and Article 1 of both regulations.
- 26 As defined in Article 3 European Order for Payment Regulation and the European Small Claims Regulation.
- 27 Article 2 European Order for Payment Regulation.
- 28 Article 12 European Order for Payment Regulation.
- 29 Articles 16, 18, 19, and 20 European Order for Payment Regulation.
- 30 Article 2 European Small Claims Regulation.
- 31 Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, *Official Journal* 2015, L 341/1. The Commission proposal was to raise the threshold to €10,000, but this was not adopted.
- 32 On aspects of semantic interoperability in relation to these procedures, see Marta Poblet et al., "Building Semantic Interoperability for European Civil Proceedings Online," in *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, ed. Francesco Contini and Giovan Francesco Lanzara (New York: Springer, 2014) at 287.
- 33 See, *inter alia*, a report by the European Consumer Centre, *ECC-Net Small Claims Procedure Report*, (September 2012), online: <http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf>. For an empirical study conducted in the Netherlands, see Xandra Kramer and Elena Alina Ontanu, "The Functioning of the European Small Claims Procedure in the Netherlands: Normative and Empirical Reflections," *Nederlands Internationaal Privaatrecht* 3 (2013) at 319.
- 34 European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure*, COM(2013) 795 final, 19 November 2013, in particular at 2–3.
- 35 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure and Council Regulation (EC) 1896/2006 of the European Parliament, COM(2013) 794 final.
- 36 Regulation (EU) 2015/2421, *supra* note 31.
- 37 European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on*

- the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure*, COM(2015) 495 final, 13 October 2015 (in particular at 3–4 and the Annex).
- 38 European E-Justice Portal, “Dynamic Forms” (6 August 2016), online: <https://e-justice.europa.eu/content_dynamic_forms-155-en.do>.
- 39 European E-Justice Portal, “European Payment Order Forms” (6 August 2016), online: <https://e-justice.europa.eu/content_european_payment_order_forms-156-en.do>.
- 40 European E-Justice Portal, “Small Claims Forms” (6 August 2016), online: <https://e-justice.europa.eu/content_small_claims_forms-177-en.do>.
- 41 See also Marco Mellone, “Legal Interoperability in Europe: An Assessment of the European Payment Order and the European Small Claims Procedure,” in *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, ed. Francesco Contini and Giovan Francesco Lanzara (New York: Springer, 2014) at 245.
- 42 Article 24 European Order for Payment Regulation; Article 10 European Small Claims Regulation. This is regardless of the domestic rules on legal representation in the Member State addressed.
- 43 Article 11 European Small Claims Regulation provides that the Member States must ensure that the parties can receive practical assistance in filling in the forms.
- 44 See also European Commission report, European Small Claims Regulation, *supra* note 8 at 7.
- 45 See Article 7(5) European Order for Payment Regulation, “in paper form or by any other means of communication, including electronic, accepted by the Member State of origin and available to the court of origin;” Article 4(1) European Small Claims Regulation, “directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced.”
- 46 Article 7(6) European Order for Payment Regulation, referring to Article 2(2) of Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures *Official Journal* 2000, L 13/12.
- 47 Information provided on the European e-Justice Portal and the European Judicial Atlas (14 Member States as of 6 August 2016). See also European Commission report, European Order for Payment Regulation, *supra* note 37 at 6.
- 48 Based on information on the European e-Justice Portal and the European Judicial Atlas (13 Member States as of 6 August 2016). See also European Commission report, European Small Claims Regulation, *supra* note 34 at 4–5.

- 49 For a more in-depth analysis by the present author, see Xandra E Kramer, "Enhancing Enforcement in the European Union: The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, the Netherlands, and England," in *Enforcement and Enforceability. Tradition and Reform*, ed. C H van Rhee and A Uzelac (Oxford: Intersentia, 2010) at 17.
- 50 Article 7(e) European Order for Payment Regulation.
- 51 Article 12(4) European Order for Payment Regulation.
- 52 Articles 16 and 17 European Order for Payment Regulation.
- 53 Article 8 European Order for Payment Regulation. Recital 16 of the preamble adds that the examination does not need to be carried out by a judge.
- 54 Recital 16 provides that the information in the application form, including the description of the evidence, "would allow the court to examine prima facie the merits of the claim and inter alia to exclude clearly unfounded claims or inadmissible applications," and Article 8 prescribes the examination to assess whether the claim appears to be founded.
- 55 Article 13(d) (service with acknowledgement of receipt) and Article 14(1) (f) (service without proof of receipt) European Order for Payment Regulation. However, direct service of an order by a court on a party in another Member State is not possible pursuant to the Service Regulation; see also the European Commission report, *European Order for Payment Regulation*, *supra* note 37 at 8.
- 56 Ibid.
- 57 See European Public Sector Award, "Project for electronic Processing of the European Order for Payment Procedure" (13 March 2013), online: <www.epsa-projects.eu/index.php?title=Project_for_electronic_processing_of_the_European_order_for_payment_procedure>.
- 58 Republic of Austria, Federal Ministry of Justice, "The Use of IT within Austrian Justice" (29 January 2014), online: <<https://www.justiz.gv.at/web2013/file/8ab4ac8322985dd501229ce3fb1900b4.de.o/itbrosch%C3%BCre-en.pdf>>.
- 59 See e-Codex, "European Order for Payment," online: <www.e-codex.eu/pilots/european-order-for-payment.html>. In August 2015, a new pilot between Germany and Greece was initiated. For the implementation of the e-Codex pilot in Greece, see George Pangalos, Ioannis Salmatzidis, and Ioannis Pagkalos, "Using IT to Provide Easier Access to Cross-Border Legal Procedures for Citizens and Legal Professionals: Implementation of a European Payment Order E-CODEX pilot," *International Journal for Court Administration* 6:2 (2014) at 43.
- 60 See also European Commission report, *European Order for Payment Regulation*, *supra* note 37 at 6.

- 61 For an extensive analysis by the present author, see Xandra Kramer, "The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation," *Zeitschrift für europäisches Privatrecht* 2 (2008) at 355.
- 62 See e-Codex, "Small Claims," online: <www.e-codex.eu/pilots/small-claims.html>.
- 63 Article 5 European Small Claims Regulation.
- 64 The European Court of Human Rights ruled that the right to an oral hearing is not absolute. See ECtHR 12 November 2002, no. 28394/95 (*Dory v Sweden*), online: <<http://www.echr.coe.int/echr/>>. The court ruled that in having regard to the demands of efficiency and economy, a court may abstain from an oral hearing if the case can be adequately resolved on the basis of the case file and the parties' written observations. See also Kramer, *supra* note 6 at 371.
- 65 Article 8 European Small Claims Regulation.
- 66 Article 9(1) European Small Claims Regulation.
- 67 European Commission, *Proposal amending the European Small Claims Regulation*, *supra* note 36 at explanatory memorandum.
- 68 See section on "Legal Framework and Potential Of ICT for Access to Justice" and note 31. The monetary ceiling will be raised to €5,000. The Commission's proposal to extend the definition of "cross-border cases" was not adopted.
- 69 To this end, Article 13 *amending* the European Small Claims Regulation (Regulation (EU) 2015/2421) provides that the claim form and the judgment are to be served by postal service or by electronic means, where such means are technically available and the party has accepted to be served by electronic means or is according to national law obliged to accept these.
- 70 Recital 8 *amended* European Small Claims Regulation.
- 71 Article 15a *amended* European Small Claims Regulation.
- 72 European Commission, *proposal amending the European small claims regulation*, *supra* note 36 at explanatory memorandum, 8. See also Gar Yein Ng, "Testing Transborder Civil Procedures in Practice: Findings from Simulation Experiments with the European Payment Order and the European Small Claims Procedure," in *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, ed. Francesco Contini and Giovan Francesco Lanzara (New York: Springer, 2014), 265 at 274–75.
- 73 European Commission, *Proposal amending the European small claims regulation*, *supra* note 36 at explanatory memorandum, 7–8.
- 74 See section on "The New ODR Regulation: Creating an Online ADR Platform" and note 15.

- 75 For an extensive comparative study, see Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, eds., *Consumer ADR in Europe* (Oxford: Hart Publishing, 2012).
- 76 Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, *Official Journal* 2008, L 136/3.
- 77 Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), *Official Journal* 2013, L 165/63; Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), *Official Journal* 2013, L 165/1. For an overview of these instruments, see Michael Bogdan, "The New EU Regulation on Online Resolution for Consumer Disputes," *Masaryk University Journal of Law and Technology* 9:1 (2015) at 155.
- 78 It applies to C2B disputes, and only where national law permits B2C disputes.
- 79 Article 1 Regulation on consumer ODR. For further details on this regulation, and in relation to other developments on ADR, see Pablo Cortés and Arno R Lodder, "Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress," *Maastricht Journal of European and Comparative Law* 21:1 (2014) at 14.
- 80 Article 4(1)(e) Regulation on consumer ODR.
- 81 See <<https://webgate.ec.europa.eu/odr/>>.
- 82 Article 5(4) Regulation on consumer ODR.
- 83 Article 7 Regulation on consumer ODR.
- 84 Article 8 Regulation on consumer ODR.
- 85 Article 9 Regulation on consumer ODR.
- 86 Article 10 Regulation on consumer ODR.
- 87 As already recognised in old case law of the European Court on Human Rights: *Golder v United Kingdom*, ECtHR (1975) Series A, No. 18, and *Airey v Ireland*, ECHR (1979) Series A, No. 32. See also Article 47(3) of the EU Charter where explicit reference to effective access to justice is made in the context of legal aid.
- 88 See in particular sections on "The New ODR Regulation: Creating an Online ADR Platform" and on "Legal Framework and Potential of ICT for Access to Justice."
- 89 See section on "Legal Framework and Potential of ICT for Access to Justice."
- 90 See section on "Limits of e-Justice in European Civil Procedure."
- 91 European Commission, *Strategy on European e-Justice*, *supra* note 5; see section on "Uniform civil procedures and facilitating technology."

- 92 See sections on “The New ODR Regulation: Creating an Online ADR Platform” and on “Enhancing Access to Justice and Procedural Challenges of ICT.”
- 93 See section on “Legal Framework and Potential of ICT for Access to Justice.”
- 94 Dutch Parliamentary Documents (*Tweede Kamer*), file 22 112, no. 1758.
- 95 See, e.g., on a simulation in Italy, Gar Yein Ng, *supra* note 72 at 270–71.
- 96 See, e.g., on experiences in the Netherlands, Kramer and Ontanu, *supra* note 33 at 21.
- 97 See section on “Legal Framework and Potential of ICT for Access to Justice.”
- 98 The experiment was carried out on 5 November 2015 by a third-year bachelor student at Erasmus School of Law, who had not yet done a course on private international law or on international litigation.
- 99 CJEU 9 July 2009, Case C-204/2008, ECR 2009 I-6073 (*Rehder v Air Baltic Corporation*). Research on experiences in the Dutch courts also exposed difficulties in establishing jurisdiction in consumer cases; see Kramer and Ontanu, *supra* note 33 at 325. The jurisdiction rules on consumer cases are difficult, since particular cases, including the booking of a flight, are excluded from the consumer section in the Brussels I-bis regulation.
- 100 Xandra Kramer, “European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects,” in *EU Civil Justice: Current Issues and Future Outlook*, ed. Burkhard Hess et al. (Oxford: Hart Publishing, 2016), 99 at 109–10 (with further references to research carried out by the present author for the Dutch Ministry of Security and Justice [report in Dutch]).
- 101 CJEU 14 June 2012, Case C-618/10, ECR (*Banco Español de Crédito*), ECLI:EU:C:2012:349; CJEU 4 September 2014, joined cases C-119/13 and C-120/13 (*Eco Cosmetics*), ECLI:EU:C:2014:2144.
- 102 See Kramer and Ontanu, *supra* note 33 at 325–26, 328 (relying on interviews conducted at Dutch courts).

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