Obywatel w centrum działań e-administracji w Unii Europejskiej

Citizen-centric e-Government in the European Union

REDAKCJA / EDITED BY

Sławomir Dudzik · Inga Kawka · Renata Śliwa

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Aleksandra Sołtysińska[1]

Digitalisation of Criminal Justice

Abstract: Digitisation of the judiciary is one of the elements of building e-government to make it easier for EU citizens to access public services. Electronic tools can be applied in all areas related to criminal justice and concern: serving, conducting, preserving and transmitting evidence, organizing remote trials, participating in procedural actions, registering hearings and operating databases. Electronic tools support judicial cooperation in criminal matters and speed up the process of information exchange. However, in preparing regulations for the digitisation of justice, national and EU legislators should keep in mind the need to comply with fair trial standards, especially the right to a defense.

Keywords: digitalisation of criminal justice, video-conferencing in criminal proceedings, electronic tools in criminal proceedings and cooperation in criminal matters

Cyfryzacja wymiaru sprawiedliwości w sprawach karnych

Abstrakt: Cyfryzacja wymiaru sprawiedliwości stanowi jeden z elementów budowania e-administracji w celu ułatwienia obywatelom UE dostępu do usług publicznych. Narzędzia elektroniczne mogą mieć zastosowanie we wszystkich obszarach związanych z wymiarem sprawiedliwości w sprawach karnych i dotyczyć: doręczania, przeprowadzania, zabezpieczania i przekazywania dowodów, organizacji zdalnych rozpraw, uczestnictwa w czynnościach procesowych, rejestracji rozpraw i funkcjonowania baz danych. Narzędzia elektroniczne wspomagają współpracę sądową w sprawach karnych i przyspieszają proces wymiany informacji. Przygotowując regulacje dotyczące cyfryzacji wymiaru sprawiedliwości, ustawodawca krajowy i unijny powinni jednak mieć na względzie konieczność

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przestrzegania standardów dotyczących sprawiedliwego procesu, a zwłaszcza prawa do obrony.

Słowa kluczowe: cyfryzacja wymiaru sprawiedliwości w sprawach karnych, videokonferencja w sprawach karnych, narzędzia elektroniczne w postępowaniach karnych i współpracy w sprawach karnych

1. Introduction

The purpose of this article will be to present the EU projects on the digitization of criminal justice and on judicial cooperation in criminal matters, as well as Polish regulations on the possibility of using electronic tools in the criminal proceedings and within the framework of cooperation with other EU Member States in criminal matters. The implementation of electronic tools in criminal proceedings must be considered from the EU and national perspectives. The development of cross-border cooperation and the need to exchange information and contacts makes it necessary for national digitalisation projects to correlate not only with the requirements of interoperability but also to ensure standards based on fundamental rights.

According to Article 67 TFEU[2] access to justice and facilitating cooperation between Member States are among the main objectives of the EU's area of freedom, security and justice. The EU shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. The Charter of Fundamental Rights in its Article 47 guarantees right to an effective remedy and to a fair trial.[3] In the past decade the European Commission and the Member States have acknowledged the need for effective justice systems and have taken a number of initiatives that have produced positive results as regards the digitalisation of justice. To date, criminal judicial cooperation in the EU is based on the use of electronic tools to transfer information, and an example of successful cooperation is the Schengen Information System, which allows information on wanted persons and objects to be easily placed and then read. Judges in the EU are also successfully using electronic tools prepared by the European Judicial Network, an example of which is the Atlas platform that allows them to identify competent judicial authorities to cooperate with in order to execute European arrest warrants or to question witnesses.

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[2] The Treaty on the Functioning of the European Union, consolidated version: OJ C 326, 26.10.2012, p. 47-390.

[3] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391-407.

The latest plans of the European Commission are presented in the Communication "Digitalisation of justice in the European Union. A toolbox of opportunities"[4] and on 1 December 2021, the European Commission submitted a proposal for a new regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.[5] The need to speed up work on the development of digitalisation of the judiciary was recognized after the outbreak of the epidemic caused by the COVID-19 virus. The latest Polish regulations on the possibility of using electronic tools in the criminal proceedings, especially video-conferencing, appeared exactly as a response to the problems associated with the epidemic. It can even be said that the epidemic caused by the COVID-19 virus changed the approach to electronic tools and the scope of their use.

2. EU-initiated development of criminal justice digitalisation

In the aforementioned Communication "Digitalisation of justice in the European Union. A toolbox of opportunities" the European Commission stressed that the recent "2020 Strategic Foresight report"[6] recognised the crucial importance of the digital transformation of public administrations and justice systems throughout the EU. In the July 2020 Security Union Strategy, the European Commission committed to actions to ensure law enforcement and justice practitioners can better adapt to new technology, in particular by having access to new tools, acquire new skills and develop alternative investigative techniques.[7] The Council Conclusions "Access to justice – seizing the opportunities of digitalisation"[8] of 13 October 2020 set out specific proposals for the mutual reinforcement of policies relating to effective access to justice and digitalisation.

In order to take full advantage of the benefits of digital technologies in judicial proceedings, the Communication issued by the European Commission has two objec-

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4 Communication from the Commission to the European Parlament, the Council, the European Economic and Social Committee and the Committee of the Regions "Digitalisation of justice in the European Union. A toolbox of opportunities" 2.12.2020, COM/2020/710 final (further: the Communication).

5 Proposal for a regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM(2021) 759 final.

6 https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/strategic-foresight/2020-strategic-foresight-report_en (10.10.2022).

7 COM/2020/605 final.

8 OJ C 342I, 14.10.2020, p. 1.

tives: at the national level, it aims at further supporting Member States to move ahead their national justice systems towards the digital era, by enhancing the cooperation and digital uptake of the different national judicial authorities, for the full benefit of citizens and business; and at the European level it aims at further improving cross-border judicial cooperation between competent authorities.[9]

In preparing this Communication on the digitisation of justice, the European Commission has used the data it has collected so far regarding the progress of the implementation of electronic tools. The European Commission noticed that the results portray a very varied landscape across the Member States. The development of digitisation and the degree of use of electronic tools varies from country to country as well as from one area of the judiciary to another. One area where a slow pace of digitalisation has been encountered relates to registers and databases. Another issue in EU justice is the persisting use of paper files, which continues to dominate national and cross-border judicial proceedings.[10]

As a side note, it is worth noting that the use of paper versions of court records and other documents not only hinders their remote transfer in the context of criminal judicial cooperation but may involve a restriction of the right to defense. Polish attorneys argue that difficulties in execution of the right to defense arise especially when using the voluminous files of pre-trial proceedings conducted by the prosecutor. Once an indictment is filed, paper case files are made available to the accused and defense attorneys in the court reading room. Defenders and the accused must prepare for themselves copies of relevant documents that do not exist in electronic form. At the trial stage, on the other hand, all trial records are available the day after they are posted in the computer system of the court in question. Defense counsel and the accused, as well as other parties to the proceedings, can read them anywhere by logging into the system. It seems that the preparation of electronic versions of the most important pre-trial documents would significantly speed up the process and facilitate not only the defense but also the work of the judge, since court case files cannot be taken out of the court building.

Timely access to case files in the pre-trial stage of criminal proceedings is protected by Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[11] and remote access to case files could support effective implementation of that right. Defence lawyers must be granted access not only to the European arrest warrant form,

9 The Communication, p. 2.
10 *Ibidem*, p. 4.
11 OJ L 142, 1.6.2012, pp. 1-10.

but also to all essential documents underlying the national arrest warrant on which an warrant is based. Access to case files in the issuing state is particularly essential to enable effective dual defence in European arrest warrant proceedings.[12] Digitalisation should also be used to promote dual legal representation in compliance with Article 10(4) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings.[13]

The European Commission concluded in its Communication, that lack of forward planning and coordination have led to the creation of a variety of national IT tools, resulting in challenges for achieving swift cross-border interoperability. It is therefore essential that agencies and bodies such as the EU Agency for Criminal Justice Cooperation (Eurojust), the European Public Prosecutor's Office (EPPO), the European Anti-Fraud Office (OLAF) and the European Union Agency for Law Enforcement Cooperation (Europol) agree on a common approach that ensures smooth and secure cooperation with Member States, while complying with the applicable legal framework, in particular as regards personal data protection.[14] The December 2020 Council conclusions on "The European arrest warrant and extradition procedures – current challenges and the way forward" underlined that digitalisation should play a central role in the operation of the European arrest warrant.[15]

In the Communication under review, the European Commission prepared a toolbox for the digitalisation of justice consisting of 4 categories:

1. financial support to Member States;
2. legislative initiatives, to set the requirements for digitalisation in order to promote better access to justice and improved cross-border cooperation;
3. IT tools, which can be built upon in the short to medium term and used in all Member States - it is important that existing and new IT tools are interoperable by default, accessible for persons with disabilities, user-centred, fast, secure, reliable, resilient and data-driven and ensure privacy, data protection and transparency;

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12 FairTrials, *Briefing Paper on the Communication on Digitalisation of Justice in the European Union*, 2021, https://www.fairtrials.org/app/uploads/2021/11/DIGITALISATION-OF-JUSTICE-IN-THE-EUROPEAN-UNION.pdf (10.10.2022).

13 OJ L 294, 6.11.2013, pp. 1-12.

14 The Communication, p. 5.

15 Council conclusions "The European arrest warrant and extradition procedures – current challenges and the way forward" 2020/C 419/09OJ C 419, 4.12.2020, pp. 23-30.

4. promotion of national coordination and monitoring instruments which would allow regular monitoring, coordination, evaluation and exchange of experiences and best practices.[16]

The toolbox comprises binding and non-binding measures. In the European Commission opinion mandatory digitalisation seems necessary, for example, in the area of cross-border judicial cooperation procedures, to enable effective and swift cross-border communication.

The European Commission also referred to recent studies,[17] that have found that judicial authorities are increasingly adopting artificial intelligence-based applications. Of particular interest in the field of justice are the anonymisation of court decisions, speech-to-text conversion and transcription, machine translation, chatbots supporting access to justice and robot process automation.

The Commission considered[18] that certain uses of artificial intelligence applications in the justice sector pose particular risks to fundamental rights. This perspective was shared by stakeholders such as European and national bar associations, legal practitioners, academics and civil society organisations in their reactions to the open public consultation on the AI white paper February-June 2020.[19]

The European Commission proposed better IT tools for access to information through the interconnection of registers. The Member States have exchanged criminal records information since April 2012[20] using reference implementation software made available by the European Commission. This approach was strengthened in April 2019, with the adoption of a Regulation (EU) 2019/816[21] establishing a centralised system for identifying Member States holding conviction information on non-EU

16 The Communication, p. 6.

17 The staff working document accompanying the Communication and the European Commission, Directorate-General for Justice and Consumers, *Study on the Use of Innovative Technologies in the Justice Field*, 2020, https://op.europa.eu/en/publication-detail/-/publication/4fb8e194-f634-11ea-991b-01aa75ed71a1/language-en (10.10.2022).

18 The Communication, pp. 12-13.

19 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12270-White-Paper-on-Artificial-Intelligence-a-European-Approach/public-consultation (10.10.2022).

20 On the basis of Council Framework Decision 2009/315/JHA, OJ L 93, 7.4.2009, p. 23 and Council Decision 2009/316/JHA, OJ L 93, 7.4.2009, p. 33.

21 Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, OJ L 135, 22.5.2019, p. 1.

nationals and stateless persons (ECRIS-TCN). The mentioned system is now being developed by eu-LISA.

The European Commission is correctly pointing out the need to improve the exchange of criminal records since the Council Framework Decision 2008/675 of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings[22] explicitly orders national courts to take into account of convictions in the Member States of the European Union in the course of new criminal proceedings.

Which is also important, Directive (EU) 2015/849[23] requires Member States to interconnect their national beneficial ownership registers. The European Commission considers that the beneficial ownership registers interconnection system (BORIS) will serve as a central search service for all related information. This will enhance transparency of beneficial ownership in view of better prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[24]

In the opinion of the European Commission, another useful tool is video-conferencing. Whenever possible, Member States should recur to the use of video-conferencing. The use of video-conferencing in judicial proceedings, where permissible by law, substantially reduces the need for burdensome and cost-intensive travel and may facilitate proceedings. While many video-conferencing solutions are already used at national level, the 2019-2023 Action Plan European e-Justice[25] cites the use of video-conferencing in cross-border proceedings as a priority. The use of video-conferencing should not infringe the right to a fair trial and the rights of defence, such as the rights to attend one's trial, to communicate confidentially with the lawyer, to put questions to witnesses and to challenge evidence.

The European Court of Human Rights (further: ECtHR) generally recognizes that video-conferencing as a form of participation of the accused in criminal proceedings is generally compatible with the concept of a fair and public trial. However, in the ECtHR's view, the use of this technology must in each case serve a legitimate purpose,

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22 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, pp. 32-34.

23 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, pp. 73-117.

24 The Communication, p. 16.

25 2019-2023 Action Plan European e-Justice, OJ C 96, 13.3.2019, p. 9.

and the procedures for the accused's explanations and participation in the trial must comply with the requirements of a fair trial, as set forth in Article 6 of the ECHR,[26] and ensure the accused's effective right to defense. In particular, the accused must be able to follow the proceedings and be heard without technical hindrance, and must be able to communicate effectively and confidentially with his or her defense counsel.[27] The foundations of the standard of a fair remote hearing were laid by ECtHR case law in Italian cases, most notably in Viola v. Italy[28] and Asciutto v. Italy.[29]

Moreover, in many of its rulings, the ECtHR has pointed out as an argument for the admissibility of video-conferencing the fact that it is an important instrument of international legal assistance, and the literature recommends its use as an effective instrument of judicial cooperation in, for example, European arrest warrant cases. During the COVID-19 outbreak in European justice systems, video-conferencing became the only possible form of hearing that provided relative protection for the court and the participants in the proceedings from contracting the virus.

Activities for which video-conferencing is an unhelpful form include judicial confrontation of witnesses or defendants because of the psychological implications of judicial assessment of the credibility of the confronted trial participants, not limited to simply checking the logical, internal consistency of the content of each statement. Experience in the use of video-conferencing also shows that it is more effective if it is carried out at the request of the parties and trial participants, rather than by an arbitrary decision of the court.[30]

The European Commission has an idea to make e-CODEX the gold standard for secure digital communication in cross-border judicial proceedings. Together with the Communication, the European Commission adopted a legislative proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil, commercial and criminal proceedings (e- CODEX system) and amending Regulation (EU) 2018/1726.[31]

e-CODEX is the main tool for establishing an interoperable, secure and decentralised communication network between national IT systems in cross-border civil and criminal proceedings. It is a software package that enables connection between

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26 European Convention on Human Rights, Rome 4 November 1950.

27 C. Kulesza, *Rozprawa zdalna oraz zdalne aresztowanie w świetle konwencyjnego standardu praw oskarżonego*, "Białostockie Studia Prawnicze" 2021, vol. 26, no. 3, p. 207; A. Lach, *Udział oskarżonego w czynnościach procesowych w drodze videokonferencji*, "Prokuratura i Prawo" 2009, vol. 9, pp. 29-30.

28 ECtHR judgment of 5 October 2006 in Marcello Viola v. Italy, application no. 45106, HUDOC.

29 ECtHR judgment of 27 November 2007 in Asciutto v. Italy, application no. 35795/02, HUDOC.

30 C. Kulesza, *Rozprawa zdalna…*, pp. 211-212.

31 COM/2020/712 final.

national systems, allowing users, such as judicial authorities, legal practitioners and members of the public, to send and receive documents, legal forms, evidence and other information in a swift and safe manner. It is intended to underpin the decentralised IT system to be established in the context of the new regulations concerning service of documents and taking of evidence.[32]

In its Communication on the digitalisation of justice in the EU the European Commission identified the need to modernise the legislative framework of the Union's cross-border procedures in civil, commercial and criminal law, in line with the "digital by default" principle, while ensuring all necessary safeguards to avoid social exclusion. The e-Justice Communication via On-line Data Exchange (e-CODEX) system is the main tool of this type developed to date.

The European Commission adopted the proposal for the Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.[33] This Regulation should cover the digitalisation of written communication in cases with cross-border implications falling under the scope of the European Union legal acts in civil, commercial and criminal matters. These acts should be listed in Annexes to this Regulation. For the purposes of this Regulation, Member States should be able to use instead of a national IT system, a Commission-developed software.

The analysis of the Communication presented above indicates that the European Commission intends to take significant steps to accelerate the digitalisation of justice to be served by the discussed legislative proposals and technical support to Member States. Such an approach is important especially from the perspective of the development of judicial cooperation between Member States and important to ensure the same standards of protection for participants in judicial proceedings.

3. Polish regulations on the rules of conducting a remote trial

Polish regulations on conducting trials in criminal cases using electronic tools that allow participation via video-conferencing are not fully clear and provoke many questions in terms of interpretation as well as justification for the legal solutions.

[32] The Communication, p. 16.
[33] COM/2021/759 final.

Article 374 of the Code of Criminal Procedure[34] – regarding the presence of the accused at the trial – was modified by the Law of 19 June 2020 on interest rate subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of the arrangement in connection with the occurrence of COVID-19.[35] The purpose of the introduction of Article 374 § 3-9 of CCP was to implement "the needs for speeding up the proceedings, reducing the inconvenience for the participants and limiting the risks associated with the state of epidemics or a state of epidemic emergency."[36] The Polish legislator also pointed out that "conducting a procedural action or participating in a procedural action remotely does not violate the principle of directness" and in support of this thesis cited the Supreme Court's decision of 7 August 2013, II KK 153/13,[37] which expressed the view that:

> In accordance with the principle of directness, it is necessary to strive in the course of the proceedings for the court to come into direct contact with individual evidence. Witnesses should give their testimony in the course of the hearing before the court, answering the questions of the parties and the judge. Such direct contact with the evidence allows the judge to evaluate it most fully. However, absolute adherence to this principle would result in a number of cases in which it would not be possible to issue a ruling. Hence, the legislator introduced provisions in CCP that constitute exceptions to the principle of directness.

According to the Polish legislator, the principle of directness regarding the hearing of witnesses and the taking of evidence at the trial will be guaranteed in the case of a procedural action carried out with the use of devices allowing for the direct and simultaneous transmission of images and sound.

The first directive of the principle of directness, which prescribes that evidence be taken at trial, is satisfied. The party, including the accused, is not present in the courtroom, but according to Article 374 § 4 of CCP, the case is heard at trial, only that the party is in another place, and contact with the court is made using technical devices that allow real-time participation in the taking of evidence through the transmission of video and audio. The party attending in another place sees and hears

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34 Act of 6 June 1997 Code of Criminal Procedure, consolidated text: "Journal of Laws" 2022, item 1375 (further: CCP).

35 "Journal of Laws" 2021, item 1072, as amended.

36 Ninth Legislature, Sejm. print No. 362 Explanatory Memorandum to the Law of 19.06.2020 on interest rate subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of the arrangement in connection with the occurrence of COVID-19.

37 LEX No. 1356410.

everything that happens in the courtroom, and has direct contact, making it possible, for example, to ask questions.[38]

In the case of the second directive of the principle of directness recommending direct contact between the court and the evidence, the question arises as to whether a hearing by video-conference provides such contact. Due to the direct transmission of video and audio, the court can see and hear the parties, including the accused, and observe their behavior during the trial activities, including the accused's explanations. The court has similar opportunities for sensory contact with the evidence as during the hearing in the courtroom. From this point of view, the court's perception of the behavior of a witness or party is similar to that during direct contact, although not identical. Difficulties in contact may arise primarily due to technical interference, but limitations due to the inability to establish personal contact with the witness are also important. The essence of the analyzed directive of the principle of directness is generally satisfied, but in the case of the most valuable evidence, in the conduct of which direct contact is important, the court should strive to conduct it in the courtroom or through a delegated judge. In conclusion, it must be said that formally, in the case of a remote hearing, the court does not have direct contact with the person being heard, however, thanks to technical devices, the purpose of this directive is achieved in most cases.

The remote method of questioning makes it possible to fully implement the third directive of the principle of directness, as the court has the opportunity to use primary evidence. The remote form of the trial does not limit the principle of directness, while it hinders the principle of the right to defense when the defense counsel is in the courtroom and the accused is outside it. In such a procedural situation, telephone contact between the defense counsel and the accused is provided. However, this form of communication does not fully compensate for the lack of direct contact, which at least makes it possible to consult in the course of the taking of evidence, making it possible to react in real time to the statements of those being questioned. The remote hearing therefore limits the way the defense is conducted.[39]

CCP defines the scope of subjects of a remote hearing, as well as indicating the conditions for holding it. The catalog of subjects for which the trial can be conducted remotely is closed. In this form, the trial may be attended by the prosecutor and other parties: the accused, the subsidiary or private prosecutor. Article 374 § 4 of CCP does

[38] D. Świecki [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Code of Criminal Procedure. Volume I. Commentary updated*, LEX/el. 2022, Article 374.

[39] *Ibidem*, Article 374.

not mention the procedural representatives of the parties. The defense counsel may also participate in the remote trial, but this is allowed only if the trial is conducted in this form for the accused deprived of liberty. The defense counsel then participates in the trial at the place of residence of the accused. However, in such a case, the defender has a choice, as he can also appear in the courtroom. Then both his and the court's contact with the accused is in remote form. On the other hand, the participation of the attorney representing the victim is not envisaged in this form, although with regard to the subsidiary or private prosecutor, when they are deprived of liberty, the hearing in this form can be held.

It seems that the content of Article 374 § 3-9 of CCP has not been sufficiently thought out by the Polish legislator. The situation of the parties to the proceedings has been unreasonably differentiated and the legal solution adopted insufficiently allows the use of the benefits of the possibility of using electronic tools. The first question concerns the possibility of remote participation in the trial by a public prosecutor other than the prosecutor. The literature[40] suggests that by using the word "prosecutor" the Polish legislator excluded the possibility of applying this form of participation in the trial to non-prosecutorial public accusers such as police officers. The combination of the fact that the accused is deprived of his liberty with the right of his counsel to participate in the trial by video-conference is also little understood. The second important question concerns the prosecutor's privilege – at his motion he can participate remotely in the trial while the other parties do not have the right to make such a request. Meanwhile, it seems legitimate to argue that since the parties have the right to participate in the trial - except when their presence is mandatory – they should also be able to choose whether they want to participate remotely or stay in the courtroom.[41]

Participation via video-conference is not always regarded as equivalent to being physically present at a trial. We can find opinions that a trial where a defendant is only allowed to appear remotely is considered trial *in absentia* for the purposes of execution of the European arrest warrant.[42] Therefore on a national level, remote hearings should not be imposed without the accused's consent.

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40 *Ibidem*, Article 374.

41 Ł. Brzezowski views the differentiation of the parties' situation a little differently – *Udział prokuratora w rozprawie i posiedzeniu zdalnym*, "Prokuratura i Prawo" 2021, vol. 3, pp. 45-46.

42 H. Brodersen, V. Glerum, A. Klip, *Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person*, pp. 66-67, https://www.inabsentieaw.eu/wp-content/uploads/2020/02/InAbsentiEAW-Research-Report-1.pdf (10.10.2022).

The organization of the trial in remote form is regulated by Article 374 § 5 of CCP. It is required that a court referendary or an assistant judge employed by the court in whose district the party resides be present at the place of residence of one of the subjects listed in Article 374 § 4 of CCP: the accused, the subsydiary or private prosecutor who are deprived of liberty. The introduction of the condition of the presence of one of these persons at the place where the party resides, without specifying that it is the seat of the court, means that it can be a separate room outside the seat of the court, but also a room in the court outside the courtroom. In the remote trial formula, the court is in the courtroom, so the trial takes place in two places, i.e. in the courtroom and in the party's room, which can be located at the court seat or outside it. In addition, the party's venue may be the seat of another court in whose district the party resides, in which case an employee of that court is present at the party's location. It can also be a place other than the seat of the court in which the party resides, such as a detention center or prison, but the court employee indicated in Article 374 § 5 of CCP must also be present at this place. It is surprising why the Polish legislator requires the presence of the most qualified court personnel instead of secretarial staff or reporters. The analyzed regulation also ignores the possibility of participation of a representative of the prison service instead of a court employee. Prison service representatives are on site at the prison when, meanwhile, a court employee would have to come, which in the case of large cities and the distances between the court and the prison will be problematic.

Article 374 § 7 of CCP regulates how defense counsel can contact the accused when defense counsel is in the courtroom and the accused is elsewhere. In such a situation, either the accused or the defense counsel may file a motion to order a break in the hearing in order to make contact by telephone. The condition for granting this request is that it serves the purpose of exercising the right of defense. According to the Helsinki Foundation for Human Rights, Article 374 § 7 of CCP leaving in the hands of the court the ability to decide when contact between defense counsel and the client is reasonable, will constitute a straightforward way to violate the right to defense, and this regulation is difficult to reconcile not only with the requirements posed by Article 6 § 3(c) of the ECHR, but also with the requirements of Directive 2013/48/EU.[43]

On the other hand, in the opinion of FairTrails speaking to a lawyer by phone or video-conference is not a replacement for in-person counsel. Lawyers' ability to fulfil key aspects of their role is limited if a lawyer is only able to communicate with

[43] C. Kulesza, *Rozprawa zdalna…*, p. 216.

the accused remotely. Lawyers are less able to ensure that the accused's rights are properly respected, and to prevent coercion or ill-treatment. FairTrials indicates that there is limited possibility for confidential interaction between lawyers and accused persons during remote hearings. In the light of the mentioned Directive 2013/48/EU and Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[44] this can have serious implications for both the effectiveness of legal assistance and a defendant's ability to understand and be actively involved in the hearing.[45]

4. Polish regulations on the taking of evidence using video-conferencing

According to the wording of Article 177 § 1a of CCP, the questioning of a witness may be carried out with the use of technical devices that allow this activity to be carried out at a distance with simultaneous direct transmission of video and audio. In proceedings before the court, a court registrar, an assistant judge or a clerk employed by the court in whose district the witness resides shall participate in the activity at the place where the witness resides. The presence of a court employee is understandable, as the identity of the witness and the conditions under which the interrogation will take place must be identified. At the place of residence of a witness examined by video-conference, a prison service officer may be present instead of a court employee – if the witness is in a penitentiary or detention center. If a witness who is a Polish citizen resides abroad, a consular officer may be present during the questioning.

In a situation where the identity of the witness has been confirmed and the conditions of his questioning are not in doubt, it seems that during the subsequent questioning of the same person by the same court, the presence of a court employee is unnecessary, and the witness could testify via video-conference while being in any place. In more complicated cases, the time of questioning a witness is long and for this reason divided into parts.

In the same way as questioning a witness, the procedural action of asking questions of experts or taking explanations from the accused, whose presence at the trial is mandatory, can be carried out.[46] Video-conferencing is useful especially when questioning the experts who prepared the opinion in the case. Often, opinions are prepared

44 OJ L 65, 11.3.2016, pp. 1-11.
45 FairTrials, *Briefing…*
46 Articles 197 § 3 and 377 § 3 of CCP.

by experts from cities other than the seat of the court, and the use of electronic tools makes it possible to speed up the procedural action of questioning experts. When questioning experts, the presence of a court employee should be the exception and not the rule. First of all, it is more convenient for experts working at scientific institutes to connect remotely from their place of work, and secondly, in this case, problems of identification are usually not encountered. It therefore seems advisable to amend the provisions under review.

5. Conclusions

Digitisation of the judiciary is one of the elements of building e-government to facilitate citizens' access to public services. The digitisation of the judiciary, viewed from the perspective of the legislator, requires the introduction of legal regulations on the principles of using electronic tools and securing the fundamental rights of participants in judicial proceedings. The rules for the use of electronic tools should facilitate the conduct of criminal trials, and if only the parties request it their participation in the hearings can be remote if only in a specific case it does not impede the procedural activities. Most EU citizens are accustomed in their daily lives to using tools that allow remote communication. However, the digitisation of justice must not leave digitally excluded persons on the sidelines. Digitisation of justice is extremely important from the perspective of developing judicial cooperation in criminal matters, so that access to documents, databases and evidence does not cause unnecessary delay. In conclusion, the development of electronic tools in the criminal justice system poses many new challenges for the legislature and judicial authorities, which should be solved soon.

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Monografia powstała jako druga w serii dotyczącej e-administracji – *Krakow Jean Monnet Research Papers* – w ramach realizowanego przez Katedrę Prawa Europejskiego Uniwersytetu Jagiellońskiego projektu Jean Monnet Module pt. „E-administracja – europejskie wyzwania dla administracji publicznej w państwach członkowskich UE i krajach partnerskich/eGovEU+".

Książka przedstawia analizę wdrożenia i funkcjonowania e-administracji w Polsce i w Europie ze szczególnym uwzględnieniem wpływu technologii informacyjno-komunikacyjnych na działalność administracji publicznej na rzecz obywateli. Monografia ukazuje również zagrożenia związane z transformacją cyfrową administracji oraz konieczność uwzględnienia centralnego miejsca człowieka w tym procesie.

Monografia adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim oraz do praktyków. Mamy nadzieję, że publikacja poszerzy wiedzę na temat cyfryzacji administracji oraz zachęci do dalszych studiów w tej dziedzinie.

The monograph was developed as the second in a series on e-government – *Krakow Jean Monnet Research Papers* – as part of the Jean Monnet Module project, implemented by the Chair of European Law of the Jagiellonian University entitled "E-government – European challenges for public administration in EU Member States and partner countries/eGovEU+."

The book presents an analysis of the implementation and functioning of e-government in Poland and Europe, with particular emphasis on the impact of information and communication technologies on the activities of public administration done for the benefit of citizens. The monograph also shows the threats related to the digital transformation of administration and the need to acknowledge the central place of a human in this process.

The monograph addresses researchers dealing with administration, administrative and European law, and practitioners. We hope the publication will broaden the knowledge about the digitization of administration and will encourage further studies in this field.

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