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Judicial cooperation and coronavirus: *the law must go on*

Introduction

In order to combat the spread of the coronavirus (Covid-19), several countries have taken measures that have a strong impact on the organization of their internal judicial systems¹. The measures are not uniform and consistent within the EU, but each Member State regulates autonomously the management of judicial workload and the internal organization of its judiciaries during this period of crisis.

Focusing on civil justice only, let's briefly analyze three paradigmatic examples: Italy, France and Germany.

In Italy, the Government's Law Decree No 18 of 17 March 2020², then passed by the Parliament as Law No 27 of 24 April 2020³, regulates the matter providing for the mandatory postponement of civil hearings scheduled during the period of emergency (09/03-11/05), except for those dealing with urgent cases. These should be held through remote connections⁴ or by using written procedures. In addition, local courts shall adopt their own organizational measures on the management of judicial workload. Namely, for the period between 11/05 and 31/07⁵, the Heads of the judicial offices shall adopt a series of measures⁶ to avoid close gatherings and contacts between people within each office space. Further, time limits in civil proceedings have been suspended for the period 9/03 to 11/05.⁷

In France, the Ordonnance No 2020-304 of 25 March 2020⁸ stated that all civil hearings not concerning urgent issues should be cancelled or postponed. To limit the spread of the virus some exceptional measures may be taken by courts dealing with urgent cases, such as: where a court cannot work, another court can be designated; a single judge may deal with the case instead of a group of three; hearings should be held through remote connections or by using written procedures; the number of people participating in a hearing may be limited; and any type of means of communication can be used for the judge to inform/hear the parties. Moreover, the Ordonnance No 2020-306 of 25 March 2020⁹ extended procedural time limits within civil proceedings expiring between 12/03 and the end of the state of emergency period (expected to finish on 24/05) of 1 month (i.e., to 24/06). At the end of the

¹ For an overview on these measures see E. Van Gelder, X. Kramer and E. Themeli, Access to justice in times of corona, in conflictoflaws.org, 7 April 2020.

² <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg>.

³ <https://www.gazzettaufficiale.it/eli/id/2020/04/29/20G00045/sg>.

⁴In this regard see F. Valentini, In difesa dell'udienza da remoto, in judicium.it, 29 April 2020; G. Marinai, F. Santinon, Il dl n. 11 del 2020 e l'udienza in videoconferenza: un'opportunità anche per il futuro, in *Questione Giustizia*, 16 March 2020.

⁵ See the Law Decree No 28 of 30 April 2020 <https://www.gazzettaufficiale.it/eli/id/2020/04/30/20G00046/sg>.

⁶ D. Cerri, Emergenza e provvedimenti dei capi degli uffici: il caso pisano, in judicium.it, 8 April 2020.

⁷ For a more detailed view on the Italian situation see V. Lombardi, Sul recente (e caotico) intervento legislativo in materia di giustizia civile, in judicium.it, 23 March 2020; A. Panzarola – M. Farina, L'emergenza coronavirus ed il processo civile. Osservazioni a prima lettura, in giustiziacivile.com, 18 March 2020; G. Chiapponi, The Impact of Corona Virus on the Management of Judicial Proceedings in Italy, in eapil.org, 13 March 2020; G. Scarselli, Interpretazione e commento del decreto legge 8 marzo 2020 n. 11 di differimento delle udienze e sospensione dei termini processuali civili per contrastare l'emergenza da COVID 19, in judicium.it, 9 March 2020.

⁸ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755577&dateTexte=20200406>.

⁹ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755644>.



aforementioned period, all time limits resume normally, but from that moment they can run for a maximum period of 2 months (24/08).¹⁰

What strikes most in Germany, compared to the Italian and French situation, is that the specific legislation enacted to alleviate the effects of Covid-19 did not address any issue related to the functioning of civil proceedings during this period of crisis. It is for the respective courts and judges to decide what measures should be taken in each individual case. The provisions of the German code of civil procedure (ZPO) regulate the extension of time limits, stay of proceedings and the *restitutio in integrum* and will be applied by courts during the Covid-19 crisis.¹¹

These measures have a general disrupting effect on the functioning of the judiciaries across the EU. The underlying approach common to all EU Member States – not only Italy, France, and Germany – to the administration of civil justice during this period includes the following measures¹²: hearings have been postponed except for some urgent issues; remote oral hearings via video conferencing and written procedures have been strongly promoted; and time limits for bringing a legal actions and taking other procedural steps within the proceedings have been suspended, interrupted or extended.

Against this backdrop, one may wonder what are the consequences of this emergency situation for European civil justice. Did national authorities implement any procedural measures concerning the application of the legal instruments of judicial cooperation in civil matters?

It is clear that the Covid-19 crisis creates an exceptional situation which presents significant challenges for citizens and authorities alike, and may create situations where respecting the obligations set out by Union law is temporarily excessively difficult or altogether impossible.

First, there are implications for two instruments of judicial cooperation in civil matters, the Service Regulation¹³ and the Regulation on the taking of evidence¹⁴. Further, in the field of family law, child abduction and protection proceedings are strongly influenced. Finally, the impact on EU time limits is particularly significant.

The cross-border service

Under the current circumstances of Covid-19, the service of documents has significantly slowed down in most of the Member States. This may entail a disrupting effect in the functioning of the service Regulation. Namely, the Service Regulation provides for a procedure for the cross-border service of documents in civil and commercial matters via designated "transmitting agencies" and "receiving agencies" between EU countries. During this period of crisis, Member States communicated important information about the provisional functioning of their authorities

¹⁰ For a more detailed view on the French situation see L. Cadiet, Un état d'exception pour la procédure civile française à l'épreuve du coronavirus, in *judicium.it*, 20 April 2020; R. Raffly, M. Boccon-Gibod, L'incertitude de la fin de la « période juridiquement protégée », in *lescluddesjuristes.com*, 20 April 2020; S. Amrani-Mekki, La part du droit (et de la justice) dans l'angoisse contemporaine. La computation des délais, in *leclubdesjuristes.com*, 30 March 2020; B.Poyet, L'assouplissement des règles de communication des conclusions et des pièces en temps de crise sanitaire, in *lescluddesjuristes.com*, 3 April 2020.

¹¹ For a more detailed view on the German situation see B. Windau, Corona and the German Courts – A Tale in Three Acts, in *disputeresolutiongermany.com*, 28 March 2020.

¹² Some general information on the Impact of Covid-19 virus on the justice field throughout the EU may be found at https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do; <https://www.coe.int/en/web/cepej/compilation-comments>.

¹³ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [2007] OJ L324/79.

¹⁴ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.



in the European Judicial Network (EJN) portal. The general trend is that service may be postponed if not urgent and electronic service, where possible, should be prioritized.

Delays and practical burdens may follow in receiving and transmitting documents between Member States due to a potential suspension of work of national courts and authorities. Some time limits (e.g. those laid down in Art. 6¹⁵ or Art. 7¹⁶ of the service Regulation) may not be respected because of the exceptional circumstances at hand. The respect of these deadlines is mandatory and their expiry may lead to irremediable breaches for authorities, courts and citizens. Negative consequences would be particularly striking whether the documents to be transmitted across the EU deal with urgent cases.

In this regard, is it appropriate to pay attention to the recent Commission's proposal for the future Recast of the Service Regulation¹⁷. To increase efficiency and speed in cross-border judicial proceedings, the proposal considers of utmost importance the introduction of a new provision creating a new means of transmission and service of judicial documents, the electronic service (Article 15a)¹⁸. Such an option would perfectly fit the current emergency situation of Covid-19 with regard to cross-border-service across the EU. The possibility to effect service of documents directly through electronic means would ensure a more effective and faster transmission of documents to other Member States without any risk for the health of people involved. In light of the above, it is clear that time has come for the introduction of electronic service in the EU. The impact of such a kind of provision on the emergency situation of Covid-19 shows the key role that electronic service may play for the future development and improvement of effective cross-border service within the EU.

The cross-border taking of evidence

Similar considerations may be made regarding the taking of evidence across the EU. As it occurred for the service of documents, Member States communicated in the EJN portal how the Covid-19 virus affected the implementation of the evidence Regulation (Regulation (EC) No 1206/2001). For instance, Germany communicated that the question of whether or not to execute a request for the taking of evidence is subject to the discretion of the judge and will be decided on a case-by-case basis, while France stated that the taking of evidence requests should be performed by electronic means and their execution will be postponed to the end of the emergency state.

The taking of evidence is crucial for cross-border judicial proceedings to continue. In times of Covid-19, as borders are closed and travel is hampered, obtaining evidence in another Member State may result particularly burdensome. Thus, the difficulty to make a request to obtain evidence and its delayed execution may entail negative consequences for an efficient gathering of evidence in a cross - border setting.

To overcome these difficulties, Member States should make further use of communication technology, such as videoconferences and teleconferences, as provided for in Art. 10 (4) and Art. 17 (4) of the evidence Regulation. This approach allows overcoming the distance between the courts, the parties, their representatives and any witnesses. The use of technology offers likely reductions in time, cost, inconvenience, environmental impact of travelling to court, and most importantly increases the safety for the health of persons involved. Nevertheless,

¹⁵ According to Art. 6 of the service Regulation “On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form set out in Annex I”.

¹⁶ According to Art. 7 of the service Regulation “The receiving agency shall take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt...”.

¹⁷ Proposal of the European Commission for a Regulation of the European parliament and of the Council amending 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).

¹⁸ See A. Anthimos, Towards a New Service Regulation – Some reflections, in *ecipil.org*, 19 February 2020.



within the context of the European Union, despite the strong support for enlarged use of videoconferences and teleconferences, their application remains inconsistent between the Member States.

The current situation clearly shows the true potential that the use of technology may have in the taking of evidence abroad. Further implementing the use of technology and developing a uniform approach between the Member States would certainly allow a more effective and proper cross-border taking of evidence within the EU.

Along these lines, in the field of evidence, a very recent development at the level of the Hague Conference on Private International Law (HCCH) should be highlighted. Few days ago, the HCCH announced the publication of the Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention¹⁹. It provides for guidance on the use of video-link technology in the cross-border taking of evidence under the Evidence Convention. It encourages Contracting States and everyone involved in cross-border litigation to make use of videoconference in the taking of evidence abroad.

This publication comes in very handy with the current crisis caused by Covid-19. These practices seek to enable users of the Evidence Convention to make the best possible use of technology currently available. This situation poses a new and challenging opportunity for the Contracting States: this seems to be the right moment to trust and increase the use of technology in order to maximize the benefits of using video-link technology in the taking of evidence abroad.

International child abduction and protection

Furthermore, another example of the issues connected with the effectiveness of judicial cooperation in civil matters (family matters in this case) within the EU in times of Covid-19 relates to the international child abduction and protection of children. This matter is regulated by the Regulation²⁰ No 2001/2003 ('Brussels II bis Regulation') and the 1980 Hague Convention on international child abduction²¹.

Travel restrictions, health risks, and life limitations have direct implications for countless families. As authorities or courts activities are seriously disrupted or even standstill, many practical and legal issues can arise in such a sensitive subject as child abduction.

Member States should therefore actively cooperate in promoting the best responses and solutions in order to guarantee effective safeguards for children and families involved in proceedings in the context of the Brussels II bis Regulation.

With regard to the Brussels II bis Regulation, several Member States communicated in the EJN portal some general information on the temporal functioning of international child abduction and protection proceedings in their systems to facilitate cooperation. As core rights of the parties underlie these proceedings, Member States aim at ensuring, to the most possible extent, their regular functioning. For instance, Germany communicated that the Federal Office of Justice, as the German Central Authority under the Brussels II bis Regulation, has reduced physical presence to protect the health of its staff, but fully operates on reduced capacity. The French central authority caseworkers telework and continue to deal with ongoing cases and new requests received by e-mail. For urgent requests, caseworkers will be physically present in the office. Further, for cases reported as urgent some French courts hold hearings, while other courts prefer postponing. In any case, enforcement of decisions is postponed to the end of the health crisis, except for specific cases.

Against this background, a core issue which may potentially arise deals with the rule that denies the possibility to refuse the return order of an abducted child according to art. 11 (4) of the Brussels II bis Regulation. This provision

¹⁹ See <https://assets.hcch.net/docs/569cfb46-9bb2-45e0-b240-ec02645ac20d.pdf>; for a brief comment on this guidance see M. Celis, *Useful reading in times of corona and just released: The Guide to Good Practice on the Use of Video-Link under the HCCH 1970 Evidence Convention*, in *conflictoflaws.net*, 17 April 2020.

²⁰ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1.

²¹ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.



should be read in conjunction with Art. 13 (b) of the 1980 Hague Convention stating that the requested court may justify the non-return of the abducted child if there is “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”. Upon the assessment of such grave risk for the child, the court addressed under art. 11 (4) of the Brussels II bis Regulation may not refuse to return a child on the basis of Art. 13 (b) of the Hague Convention “if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”.

Two interconnected questions on the interpretation of these provisions come to the fore. On the one hand, it is questionable whether the dangers related to the spread of Covid-19 fall within the definition of “grave risk” of art. 13 (b) of the Hague Convention, thus precluding, as such, the return of a child in the State of his or her habitual residence. On the other hand, it is unclear how the “adequate arrangements” described in Art. 11 (4) of the Brussels II bis Regulation should be defined during the emergency of Covid-19.

A case by case analysis is demanded to the requested court. The risks for the child in case of return in the context of the pandemic situation should be carefully assessed. The possibility that the court would recognize a potential physical and psychological harm for the child on the basis of Art. 13 (b) is highly predictable. First, there could be a physical danger of contamination with Covid-19. Second, the psychological integrity of the child could be at risk due to the considerable degree of fear, worry, and concern that the virus produced in the population (the feeling of anxiety and stress may also be higher whether he or she has to face a travel).

Despite the situation at hand, a judgment²², delivered on 31 March 2020 by the High Court of England and Wales (Family Division) allowed the return of a child in his country of residence.²³ The upcoming case law of courts will show if there is a margin (as I wonder) for denying the return of a child assuming the existence of a “grave risk” for him or her.

Further, it should be investigated the role of the terms “adequate arrangements” laid down in Art. 11 (4). A court may not oppose the return of a child if adequate safeguards are provided to ensure the protection of the child after his or her return. As we are facing an emergency situation varying from State to State, it is very difficult to generalize the interpretation of these safeguards and establish uniform criteria. Again, the future case law of courts across the EU will contribute to develop relevant hints.

Moreover, another important stage of child abduction proceedings connected with the issuing of non-return orders, concerns the hearing of the child. According to Art. 11 (2) of the Brussels II bis Regulation the court addressed when issuing a non-return order on the basis of Arts. 12 and 13 of the 1980 Hague Convention, shall guarantee to the child the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

In the context of Covid-19, because of the potential risks for the health of the child, may some limitations to his or her right to be heard be considered?

The right to be heard of the child plays a key role in child abduction proceedings: indeed, his or her view may firmly influence the decision of the judge and reduce the risk of being manipulated by the parents. The right of the child to express his or her opinion represents one of the fundamental procedural guarantees within the proceedings. Its importance has also been stressed in the new text of the Brussels II bis Recast²⁴, which increased and reinforced the guarantees surrounding the latter right (see Art. 26 read in conjunction with Recital 39). In light of the above, it can arguably be affirmed that it is not admissible, even in a situation of emergency, to deny to the child the right to be heard. Where available, online tools to conduct the hearing should be used and promoted. However, a lack of operational tools not ensuring the procedural guarantees within the proceedings may eventually justify the physical presence of the child before the court despite the crisis of Covid-19.

²² See <https://www.bailii.org/ew/cases/EWHC/Fam/2020/834.html>.

²³ For a comment on this decision see N. Rusinova, Child abduction in times of corona, in *conflictoflaws.net*, 16 April 2020.

²⁴ Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) adopted on 24 May 2019.



Time limits of EU Civil procedure

To conclude, other relevant implications for judicial cooperation in civil matters may derive from the suspension of procedural time limits in most of EU Member States. Due to the emergency of Covid-19, national legislators introduced temporal measures suspending domestic time limits. In this respect, the European legislator did not provide for any particular rule on the suspension of time limits laid down in EU instruments of civil procedure. On the other hand, national legislators are not competent to suspend time limits laid down in EU law.

Thus, one may wonder whether the time limits provided for in European civil procedural instruments are still running or they are suspended too.

It should be noted that the expiry of some time limits provided by EU instruments might entail negative procedural consequences, which may undermine in an irreversible way the rights of the parties in the proceedings.

Some examples have been reported in the EJN portal. For instance, Art.15 (5) of the Brussels II bis Regulation sets a 6 weeks time limit for another court to accept jurisdiction, resulting otherwise in the court first seized to continue to exercise jurisdiction; Article 6 of the Service Regulation sets a one week time limit for the recipient to refuse the service of a document; Article 19 (2) of the Maintenance Regulation²⁵ establishes a 45 days time limit to apply for a review of a maintenance decision, and so on.

These examples show that the non-respect of time limits due to the complete or partial suspension of the work of courts may lead to irreversible consequences in the proceedings such as determining the jurisdiction of a court, accepting a document or not appealing a decision. This is profoundly unfair. Thus, depending on the specific circumstances at hand, it may be justified for domestic courts, aiming at preserving the procedural guarantees of the parties, not to count the duration of the crisis in the assessment of EU procedural time limits.

But how and on which legal basis may the courts addressed affirm that the suspension of time limits applies also to deadlines provided by EU law?

Useful indications may come from an instrument of judicial cooperation in criminal matters, the Framework Decision on the European arrest warrant and the surrender procedures between Member States²⁶. According to Art. 23 paragraph 3 and 4 of the latter instrument, time limits for surrender of the person in the execution of an arrest warrant may be suspended due to force majeure (paragraph 3) or serious humanitarian reasons (4). In such a way, the EU legislator explicitly provided exceptional reasons for national courts executing an arrest warrant to suspend time limits and postpone surrender of a person.

In light of this, a question arises: why are not time limits provided for in instruments of judicial cooperation in civil matters protected in the same way than those laid down for surrender of a person in the execution of an arrest warrant?

Even if not directly legally affecting deadlines provided by EU instrument of civil procedure, the example coming from the Framework Decision 2002/584/JHA may represent an important point of reference for national courts in order to address the problem of the suspension of EU time limits in civil judicial proceedings. In this regard, may an interpretation based on *analogia legis* be the right solution? It should be carefully assessed whether this solution is legally sound, however national judges may take the opportunity to refer a preliminary ruling to the Court of justice on the interpretation of EU time limits

The issues mentioned above describe only a few problematic situations which may affect judicial cooperation in civil matters during these emergency times. The list referred to is not exhaustive, but aims at reflecting the most representative issues disrupting the functioning of judiciaries across the EU.

²⁵ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

²⁶ Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.



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Even in a period of crisis, where there are many risks at stake for the health of the population, it is important to ensure a proper administration of justice. Hence, the objective is to guarantee an effective and efficient functioning of the judicial systems of Member States not only at a national level, but also, at the EU level: *the law must go on.*