

**FRA Expert meeting on digitalisation and justice: fundamental rights guidance
28 November 2023, FRA premises, Vienna**

SUMMARY OF ECBA INTERVENTION

We are aware that experts discussed various topics during the day, such as the e-filing of documents with the issues related to accessibility and defence rights, and the solution of ensuring a mixed system where physical files should be still an option; remote hearings/videoconferencing then, if they have allowed continuity of judicial activity in emergency situations such as during the Covid-19 pandemic, due to the impact they have on the right to a fair trial should be limited as much as possible and, in any case, the right of attending in person should be ensured; the use of AI to enhance legal research could help the efficiency and support judges but, at the same time, can affect the rights of the defendant to a fair trial so that the use of AI should be limited and the human review on its findings should always be provided; digitalization opportunities for translation and interpretation and the use and dangers of handling big data.

In addition to this, ECBA, represented by expert members Stefanie Schott and Federico Cappelletti, highlighted, among others:

- the e-filing of documents with the issues related to accessibility and defence rights, and the solution of ensuring a mixed system where physical files should be still an option¹.

¹ E.g. In the Italian experience, the new Article 111-bis(1) of the Code of Criminal Procedure provides for the mandatory and exclusive use of the Criminal Deposit Portal by the defence lawyer at every stage and level of the proceedings for the filing of the largest number of deeds, pleadings, applications and documents.

Such regime allows exceptions with respect to deeds and documents that "by their nature or due to specific procedural requirements, cannot be acquired in electronic copy" (third paragraph) and with respect to acts performed personally by the parties. The aim of these provisions is to preserve the effectiveness of access to justice and the right of defence for persons without sufficient digital training or the availability of adequate means of access to the digital network who, therefore, may continue to file deeds and documents in hard copy.

As pointed out during the experts' meeting, however, in everyday practice, disruptions of the Criminal Deposit Portal are quite common causing issues for defence lawyers and, consequently, for the effectiveness of the right of defence. As evidence for this, on 30 November last, the Ministry of Justice announced that the possibility, which was originally envisaged until 31 December 2023, for defence lawyers to file documents also by certified electronic mail and in hard copy, will be extended until 31 December 2024, in order to further develop and test the portal.

- the critical issues of predictive justice systems in use by many police forces in the Member States with regard to potential violations of the principle of presumption of innocence, sharing first-hand experiences²;
- further tension profiles concerning the full and effective exercise of the right of defence jeopardised by the inaccessibility to the proprietary algorithm at the heart of the predictive justice programme, with significant impact also on the effectiveness of the remedies underlying the control of a reasoning path that could turn out to be, for this very reason, lacking or apparent;
- the shortcomings of the newly adopted e-evidence Regulation make it plain that the instrument was designed primarily with the interest of law enforcement authorities in mind with a high risks of abuse and fundamental rights violations;
- the need to adopt appropriate safeguards to ensure that data processed and shared via EU police and judicial cooperation mechanisms cannot be subject to a blanket assertion of national defence secrecy as done by the French authorities in the Encrochat case, which undermines EU defence rights, starting with the proposal to revise Europol's mandate. More broadly, it is deemed necessary to provide for the regulation of encrypted communication services by updating the Electronic Communications Code: the aim would be to provide a list of encrypted platforms authorised to issue the service, whose operators would undertake to cooperate with the police authorities to develop solutions for identifying and blocking users using the platforms to commit crimes, while at the same time ensuring a greater transparency on how this type of data is collected. From a supranational point of view, the drafting of uniform legislation on the circulation of digital data would be welcome;

² Examples in use by Italian law enforcement agencies are the Keycrime software, which is able to statistically predict when and where a certain criminal activity may occur on the basis of an algorithm to abstract crime series, or the X-LAW application for predicting theft and robbery.

These software can have the potential to generate bias and discriminate. And again, the possibility that the use of certain personal data resulting from an analysis whose outcomes are determined by algorithms, may negatively affect not only the right to privacy but also the principle of the presumption of innocence as it relates to the right to remain silent (*nemo tenetur se detegere*) as derived from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

- the need to improve the digitalization of national proceedings as a topic related to the issuing of orders and certificates in the framework of the EU judicial cooperation in criminal matters instruments fostering the interoperability between national judicial system and at the same time enabling a greater role for defence in accessing and using digitised processual tools (starting with full access to case file materials. It frequently happens, in fact, that in many MSs the certificate is mostly completed digitally, then printed, signed, and stamped by the issuing authority, then scanned up and sent via email (in the future: e-Codex). This is a time-consuming and cumbersome activity that can be avoided by using Digital Signatures according to the eIDAS Regulation;

- in particular the great importance of the right of the accused to be present in person at hearings and trials and possible difficulties with regard to the examination of witnesses by video, in accordance with the European Criminal Bar Association statement issued In September 2020 setting out [principles on the use of video-conferencing in criminal cases in a post-COVID-19 world](#) and the need for guidelines defining a common minimum quality standard for remote hearings/videoconferencing in criminal proceedings.

- the difficulty and necessity of doing justice to the sometimes major differences between the legal systems of the European Member States in the area of criminal procedural law.

Transparency, accountability, equality of arms and access to justice are some of the keywords that surfaced from the expert meeting as a balance between digitalisation and the protection of fundamental rights, including the rights of defence, to a fair trial, privacy and non-discrimination.

ECBA recognises the absolute relevance of FRA in the framework of the EU legislative process and believes that this type of programme can be of absolute benefit for a process of digitalisation of justice that is both efficient and respectful of fundamental rights.

The European Criminal Lawyers as of now declare their readiness to be involved in the next steps of the project and in general open to the widest collaboration with FRA.