


Editorial of dossier “Digitalisation and criminal justice: procedural aspects” – An introductory overview

Editorial do dossiê “Digitalização e justiça penal: aspectos procedimentais” – Uma introdução geral

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ABSTRACT: The article, in addressing the issue of the digitalisation of criminal proceedings, focuses on three areas: creation, filing and storage of deeds and legal acts; means for the execution of notifications; remote participation in procedural activities and, in particular, hearings. This perimeter coincides with that of the call for papers at the origin of the seven contributions collected in this special issue of the RBDPP. The aim is to provide, also in the light of the Italian experience, an introductory overview of the issues raised by digital transition and a starting point for future reflection.

KEYWORDS: Criminal proceedings; native digital acts; digital dossier; notifications; videoconference.

RESUMO: O artigo, ao abordar a questão da digitalização dos processos criminais, concentra-se em três áreas: criação, autuação e armazenamento de documentos e atos jurídicos; meios para a execução de notificações; participação remota em atividades processuais e, especialmente, audiências. Esses debates coincidem com o da chamada de artigos que resultou nas sete contribuições coletadas para esta edição especial da RBDPP. O objetivo é fornecer, também à luz da experiência italiana, uma visão introdutória das questões levantadas pela transição digital e um ponto de partida para futuras reflexões.

PALAVRAS-CHAVE: processo penal; atos digitais; atos digitais; notificações; videoconferência.

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1. TELEMATIC CRIMINAL PROCEEDINGS: THE SUBJECT AREAS.

It is well known that the relationship between criminal justice and new technologies can be explored through different perspectives. In order to identify a specific thematic area in this multifaceted field, the concept of telematic proceedings appears to be particularly useful. The label refers to the use of Information and Communications Technologies (ICT) to regulate the «development, transmission and exchange of “information flows”» that characterise the criminal process².

In this respect, for a long time the regulatory approach has been very cautious, almost insensitive to the innovations resulting from technological progress. The doctrine has also been sceptical, inspired by the fear of a change in the fundamental principles of criminal procedure and a weakening of guarantees³.

Against this background, the COVID-19 pandemic was undoubtedly a turning point. The need to avoid the paralysis of judicial activities made it essential to adopt a specific regulation concerning digitalisation⁴. However, this development was driven by urgency, especially in the first phase and this has led to choices which were not always thoughtful and well pondered. In any case, from that moment on many European⁵ and Latin American countries have shown great openness to the use of digital tools in criminal proceedings⁶.

² See GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica: Alla ricerca di un processo penale “virtuoso”*. Milano: Wolters Kluwer-Cedam, 2022, p. 2.

³ See GALGANI, Benedetta. Digitalizzazione del processo penale: riflessioni sul dover essere di una nuova “cartografia”. Available at: www.discrimen.it. Accessed on: 30.5.2024, p. 3 f.

⁴ See DI PAOLO, Gabriella. “Riforma Cartabia” e digitalizzazione del processo penale. Verso una non più rinviabile opera di ammodernamento della giustizia penale. *Rivista italiana di diritto e procedura penale*, 2022, p. 90 f.

⁵ See European Commission for the Efficiency of Justice (CEPEJ). *European judicial systems CEPEJ Evaluation Report 2022*, Part 1. Available at: www.coe.int/en/web/cepej/special-file-report-european-judicial-systems-cepej-evaluation-report-2022-evaluation-cycle-2020-data-. Accessed on: 25.5.2024, p. 111 f.

⁶ See ARELLANO, Jaime; CORA, Laura; GARCÍA, Cristina; SUCUNZA, Matías. *Estado de la Justicia en América Latina bajo el COVID-19: Medidas generales*

Beyond the specific solutions that national legislators have elaborated and progressively developed, the relevant fact is a change in the culture. The experience gained in the 2020-2022 period has made it possible to identify the positive aspects of digitalisation in terms of efficiency and simplification of criminal justice. Based on these premises, a new course has been set with the aim of rationalising and stabilising the measures introduced during the health crisis. With this in mind, it has become necessary to draw up a discipline that is organic and coherent in order to make up inconsistencies and gaps in the legislation adopted during the pandemic period⁷.

The legislative policy direction that has emerged is in line with the path traced by the European Union's initiatives. In particular, action plans on e-Justice have been adopted on a regular basis since 2014⁸. The most recent one covers the period 2024-2028⁹ and, in the light of the main pieces of legislation already in force¹⁰, reiterates that the main objectives

adoptadas y uso de TICs en procesos judiciales. Justice Studies Center of the Americas. Available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/5648/REPORTECEJA_EstadodelajusticiaenALbajoelCOVID19_20mayo2020.pdf?sequence=5&isAllowed=y. Accessed on: 20.5.2024.

⁷ See DELVECCHIO, Francesca. L'informatizzazione della giustizia penale. *Diritto penale contemporaneo*, Riv. trim., 2021, no. 2, p. 61 f.; GIALUZ, Mj-tia; DELLA TORRE, Jacopo. *Giustizia per nessuno: L'inefficienza del sistema penale italiano tra crisi economica e riforma Cartabia*. Torino: Giappichelli, 2022, p. 294 f.

⁸ See GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica: Alla ricerca di un processo penale "virtuoso"*. Milano: Wolters Kluwer-Cedam, 2022, p. 12 f.

⁹ Council of the European Union, *European e-Justice Strategy 2024-2028*. Available at: <https://data.consilium.europa.eu/doc/document/ST-15509-2023-INIT/en/pdf>. Access on: 26.5.2024.

¹⁰ Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; Regulation (EU) 2020/1784 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system); Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings; Regulation (EU) 2023/2844 on the digitalisation of judicial cooperation and

to be pursued concern three areas: access to information in the field of justice; electronic communication between judicial authorities, citizens and legal professionals; interoperability of computerised legal systems.

In the context of the strategy to be implemented, it is clear that the cooperation between States is of central importance and that, in this perspective, the adoption of computerised procedures for data exchange is easier when national systems have developed similar technological solutions. This is the reason why the e-Justice action plan applies to the Member States and «should serve as an inspiration for all European Union actors involved in the process of digital transformation in the field of justice»¹¹. And then there is another important aspect to be considered: as digitalisation «aims to facilitate and improve access to justice, make the judicial system more effective and efficient, while facilitating the work of justice professionals, and bring it closer to the citizens»¹² it undoubtedly fits the European goals in terms of growth and development.

The purpose of this editorial is to provide an overview of the issues underlying the thematic areas that represent the pillars of the digital transition in criminal justice, also in the light of the reflections that have taken place in Italy after the Legislative Decree no. 150 of 10 October 2022 has entered into force: creation, filing and storage of deeds and legal acts; means for the execution of notifications; remote participation in trial activities and, in particular, hearings.

2. A FEW ESSENTIAL CRITERIA FOR A BALANCED DIGITAL TRANSITION.

In order to define the conditions for a balanced transition towards a digitalised criminal proceedings, the starting point is to emphasise that the role of technology must be an auxiliary one. It shall support the

access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

¹¹ Council of the European Union, *European e-Justice Strategy 2024-2028*. Available at: <https://data.consilium.europa.eu/doc/document/ST-15509-2023-INIT/en/pdf>. Accessed on: 26.5.2024, p. 8.

¹² Council of the European Union, *European e-Justice Strategy 2024-2028*. Available at: <https://data.consilium.europa.eu/doc/document/ST-15509-2023-INIT/en/pdf>. Accessed on: 26.5.2024, p. 4.

execution of activities and duties – especially those related to decision-making – without ever being a substitute for the human factor¹³.

This premise is highly topical in light of the growing and unstoppable development of operational tools based on the use of Artificial Intelligence (AI)¹⁴. Criminal proceedings are no stranger to these new technological frontiers, as demonstrated by the Act on AI that has just been approved by the European Parliament and Council¹⁵.

In general terms, the aim is to promote «the uptake of human centric and trustworthy artificial intelligence, while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter» of Fundamental Rights of the European Union (art. 1).

With specific reference to the justice sector, Recital 61 states that «the use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making process must remain a human-driven activity». Consistent with this basic approach is the decision to classify as high-risk and thus subject to special measures «AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution» (art. 6 paragraph 2 and Annex III, paragraph 8 (a)).

¹³ See GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica: Alla ricerca di un processo penale "virtuoso"*. Milano: Wolters Kluwer-Cedam, 2022, p. 2; SIGNORATO, Silvia. A New Right in Criminal Procedure Implied by Human Dignity: The Right to Non-Automated Judicial Decision-Making. *Journal of Eastern European Criminal Law*, 2020, no. 2, p. 9 f.

¹⁴ See BRIGHI, Raffaella (ed.). *Nuove questioni di informatica forense*. Roma: Aracne, 2022, p. 303 f.; CONTISSA, Giuseppe; LASAGNI, Giulia. When it is (also) Algorithms and AI that decide on Criminal Matters: In Search of an Effective Remedy. *European Journal of Crime, Criminal Law and Criminal Justice*, 2020, no. 3, p. 280 f.; QUATTROCOLO, Serena. *Artificial Intelligence, Computational Modelling and Criminal Proceedings: A Framework for A European Legal Discussion*. Cham: Springer, 2020.

¹⁵ The final draft (*European Parliament "Corrigendum" of 16th April 2024*) of the AI Act unanimously endorsed by the European Union's Member States is available at www.artificialintelligenceact.eu/the-act/. Access on: 25.5.2024.

On this point, Recital 61 emphasises that this classification is justified in the light of the need to deal with the risk of «potential biases, errors and opacity»; it adds, however, that «AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks» are not included in the scope of application. A trace of this distinction can be found in art. 6 paragraph 3, according to which «by derogation from paragraph 2, an AI system referred to in Annex III shall not be considered to be high-risk where it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making».

The wording of the latter provision – based on the concept of “significant risk” – is less stringent than Recital 61 and seems to broaden the category of non-high-risk systems that can be used in the administration of justice. In addition to this aspect, it should be noted that the “other risk” classification does not imply a radical prohibition, since the use (with the necessary safeguards) of AI tools seems to be permitted, even to assist in the drafting of judicial decisions provided that the judge takes the authorship and the responsibility of the legal act¹⁶.

Once the areas of intervention and their limits have been identified, attention should be focused on the criteria that should guide the legislator in addressing the challenges posed by the digitalisation of criminal proceedings.

First of all, it is necessary to establish the legal basis through the enactment of general provisions. In this way, the foundations will be laid for an “ecosystem” where new and old principles and rules can happily cohabit¹⁷.

¹⁶ See CAIANIELLO, Michele; PUGLIESE, Antonio. *Manifesto per la giustizia penale digitale: il processo penale telematico*. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 209.

¹⁷ See CAIANIELLO, Michele; PUGLIESE, Antonio. *Manifesto per la giustizia penale digitale: il processo penale telematico*. In CAIANIELLO, Michele;

A second guiding criterion can be defined in terms of technological neutrality and is justified by the rapid pace of progress in the digital world: solutions developed today may become obsolete in a short period of time, with the effect that adaptation is required. For this reason, the discipline must not be linked to a specific medium, but to the objectives that the digital instrument must be able to guarantee. In this sense, to ensure that legislation keeps pace with technological development “open” rather than “rigid” provisions should be preferred and it is up to secondary sources of law (governmental regulations) to discipline technical aspects, which may be subject to frequent updates over time¹⁸.

Finally, when it comes to the organisational level, the importance of the role played by the State must be emphasised. In several sectors, the intervention of private bodies in charges of high-technology services seems unavoidable. In this perspective, in order to protect the public interest and the rights involved in the criminal proceedings, it is essential that the State is able to exercise an effective supervisory role¹⁹.

3. CREATION, FILING AND STORAGE OF DEEDS AND LEGAL ACTS.

The first subject to be considered is formation, filing and storage of deeds and legal acts.

At the methodological level, a perspective that encompasses all procedural activities should be adopted in this specific area. This is essential for realising the benefits of efficiency and simplification. At the same time, however, it may be appropriate to observe a criterion of

GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 167.

¹⁸ See GALGANI, Benedetta. ...along came il processo penale telematico. Le disposizioni generali sugli atti. In CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 404.

¹⁹ See CAIANIELLO, Michele; PUGLIESE, Antonio. Manifesto per la giustizia penale digitale: il processo penale telematico. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 170.

progressiveness, in the sense of a gradual implementation of digitalisation. In particular, given the conditions that need to be met before the new mechanisms become operational – organising administrative offices, staff training and implementation of IT technologies – a step-by-step approach seems to be wise and helpful²⁰, also in order to prevent the risk of a new wave of skepticism towards digitalisation and the new rules that go in that direction.

As for the merits, the basic step to be taken is establishing that acts requiring written form are to be performed digitally, signature included²¹. Adherence to this model requires clear and consistent choices: the rule must be that deeds need to be digital native; only in exceptional cases the use of analogue methods for drawing up legal acts should be permitted.

Documents, understood as evidence, meaning that they are created outside the criminal proceedings and for autonomous purposes, are excluded from this approach. Therefore, they retain their original shape which may well be analogue. It can only be required digital conversion whenever possible.

It is assumed that the filing of deeds and legal acts should be also done by digital means. At the operational level, the best option is to develop a portal that allows the parties to “upload” deeds and legal acts after having gained access to it by means of personal credentials in order for them to be acquired to the digital dossier²².

²⁰ See CAIANIELLO, Michele; PUGLIESE, Antonio. Manifesto per la giustizia penale digitale: il processo penale telematico. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 176.

²¹ See SIGNORATO, Silvia. La gestione telematica dell’atto processuale nel dedalo del processo penale. In CATALANO, Elena Maria; KOSTORIS, E. Roberto; ORLANDI, Renzo (ed.), *Riassetti della penalità, razionalizzazione del procedimento di primo grado, giustizia riparativa*, Torino: Giappichelli, 2023, p. 58 s.

²² See GIALUZ, Mjtia; DELLA TORRE, Jacopo. *Giustizia per nessuno: L’inefficienza del sistema penale italiano tra crisi economica e riforma Cartabia*. Torino: Giappichelli, 2022, p. 301.

This option would make it possible to overcome the problems that may arise when using certified electronic mail (CEM) to file legal acts²³, especially if the filing activity is subject to strict regulation. In this sense, the most relevant case is that of appeals: in the various systems failure to comply with the rules regarding presentation is usually sanctioned by inadmissibility. The Italian experience is significant in this respect. Under the transitional provisions of article 87-*bis* of Legislative Decree no. 150 of 10 October 2022, for certain categories of acts – including appeals – the filing consists in sending it to the certified electronic mail addresses indicated for each judicial office in a special regulation of the Ministry of Justice; the appeal is inadmissible if it is sent to a certified electronic mail address which, according to the Ministry of Justice’s regulation, is «not referable» to the judicial body that issued the appealed decision²⁴. On this point, the Court of Cassation has clarified that sending the appeal to an address not included in the Ministry of Justice’s regulation will undoubtedly render the appeal inadmissible²⁵. It should also be noted that, according to a very strict approach, an appeal will also be inadmissible if it is sent to an address other than the one specifically designated for the receipt of appeals within the receiving office²⁶. In this respect, the Court of Cassation has held that a different interpretation, based on the adequacy of the mailing to “achieve the purpose”, would have the effect of complicating the procedure and lengthening its duration. This is an overly rigid position, which is contradicted by the wording of Article 87-*bis* Legislative Decree no. 150 of 10 October 2022. It is emblematic of an unbalanced approach in favour of efficiency, resulting in the right to defence being sacrificed.

²³ See GALGANI, Benedetta. ...along came il processo penale telematico. Le disposizioni generali sugli atti. In CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 417.

²⁴ See TRABACE, Cesare. Il deposito telematico delle impugnazioni prima durante e dopo l'emergenza epidemiologica. *Archivio penale*, 2023, no. 1, p. 23 f.

²⁵ Court of Cassation, sec. IV, 14 November 2023, no. 48804, Pezzella, in *C.E.D.*, no. 285399.

²⁶ Court of Cassation, sec. II, 21 February 2024, no. 11795, Martorano, in *C.E.D.*, no. 286141.

In line with the criterion of technological neutrality, general provisions on the creation and filing of documents should not specify the tool to be used. It is essential that they set out the requirements to be met²⁷.

As for the drafting of acts, the digital shape must be such as to guarantee the authenticity, integrity, readability, interoperability and, where required by law, the secrecy of the act. As regards filing, the relevant function is of making the act official and known to the judicial authority and parties. Accordingly, certainty of the transmission – also with reference to chronological aspects – and of the identity of the sender and the addressee shall be ensured.

The option of digitalisation must be balanced – as mentioned above – by providing for exceptional cases in which deeds may be drawn up and filed in analogue form and then digitally converted.

These cases must be rigorously formulated. Vague and imprecise clauses (e.g. based on unspecified procedural reasons) should be avoided in order to prevent the risk of the general rule being circumvented.

The aspect worthy of attention is related to the impact that the use of digital modalities may have on the exercise of the defence rights, especially those which involve an active role on the part of the defendant. In fact the accused may not have the necessary skills or technical equipment. In such circumstances there would be a concrete risk of breach of the right to defence. For this reason, the first exception should be related to acts carried out by the defendant in person. This category includes: *a*) acts that are prerogative of the accused, who may authorise his lawyer to perform them by issuing a special authorization²⁸; *b*) acts that the defendant is entitled to perform by his own, i.e. without the indispensable “mediation” of the defence lawyer²⁹.

²⁷ See CAIANIELLO, Michele; PUGLIESE, Antonio. *Manifesto per la giustizia penale digitale: il processo penale telematico*. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 189.

²⁸ For example, in Italian criminal procedure, the request for the abbreviated proceedings (art. 438 co. 3 CCP).

²⁹ Such as the filing of an appeal against a first instance decision in Italian criminal procedure (art. 571 co. 1 CCP).

A second exception should concern those acts which parties are allowed to perform directly before the court without need for prior notice. In these cases, the decision to exclude the use of analogue methods would result in preventing the exercise of a right provided for by law. For the same reason, it is unacceptable to envisage an implicit abrogation of the provision which allow an act to be presented in court³⁰. It is true that in the abovementioned cases the coexistence between digital and analogue persists, which is something that could potentially slow down the digital transition; however, the principle of legality and the rights of the parties are of paramount importance.

Finally, the possibility of a malfunction of the computer systems for the filing of deeds must be taken into account. The head of the competent ministerial or judicial office must certify such exceptional situation, so that those affected can be informed in good time. And it should be granted the possibility to create and file legal acts in analogue mode for the duration of the disruption.

Compliance with the digital model means that deeds and legal acts, once they have been created and filed, are entered and stored in a digital dossier.

In addition to the principle of technological neutrality, the following requirements must be guaranteed: authenticity, integrity, accessibility, interoperability and ease of telematic consultation. In particular, the latter aspect should be designed with a view to strengthening the effectiveness of the right to defence: the aim is to overcome the difficulties associated with managing paper-based files in order to provide the defendant with a complete and updated set of acts that are easy to consult³¹.

³⁰ CAIANIELLO, Michele; PUGLIESE, Antonio. Manifesto per la giustizia penale digitale: il processo penale telematico. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 195.

³¹ See GALGANI, Benedetta. ...along came il processo penale telematico. Le disposizioni generali sugli atti. In CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 422.

On a practical level, the digital dossier is a “virtual container” in which deeds and acts can be grouped into two categories, namely: a) those that are native digital (only available in this format); b) those that are analogue in origin and filing, but are subsequently converted into a digital copy.

At the same time, it is essential to consider the structure of the criminal proceedings, paying particular attention to the relationship between the investigation stage and the trial. These two phases are strictly separated in systems inspired by the adversary model: the trial judge, unlike the parties, cannot have access to the investigation acts. This because, in principle, the decision must be based on the evidence gathered during the trial, through cross-examination and in accordance with the principles of orality-immediacy. This fundamental principle of separation between investigation and trial phases must continue to be guaranteed in the “new era” of digital case-file management³². This means that, at the beginning of the trial the case-files become two: one containing the investigation acts and accessible only to the parties; the other gathering the acts collected during the trial and accessible also by the judge.

4. NOTIFICATIONS.

There are two aspects to be taken into account when considering the relationship between notifications and digitalisation. On the one hand, these are activities that are of fundamental importance in implementing a strategy aimed at achieving the desired efficiency; on the other hand, they are an instrument of knowledge that is indispensable for the exercise of the rights attributed to the parties in the proceedings³³. Therefore, a careful balance needs to be struck between the various interests involved.

³² See GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica: Alla ricerca di un processo penale “virtuoso”*. Milano: Wolters Kluwer-Cedam, 2022, p. 346.

³³ See NICOLICCHIA, Fabio. Domicilio digitale e notificazioni. In CASTRO-NUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 430.

In order to take advantage of the possibilities offered by technology in this area, the rule should be that service is to be effectuated by electronic means. As a result, the traditional methods, i.e. hand delivery and dispatch by post, become residual.

In view of the function associated to the service, particular care must be taken in defining the requirements to be met by the technical means in use. They concern the identity of those sending and receiving, the integrity of the transmitted act and the certainty, including certainty on timeliness, of transmission and receipt³⁴. This last profile highlights the central issue: verification of the effectiveness of e-service. At this stage, the simplest solution is based on the notion of a digital domicile³⁵, which is “attached” to a certified electronic mail (CEM) address³⁶.

Against this background, while it is understood that notifications concern a number of persons, the focus should be on the defendant and his lawyer.

For the lawyer, communication sent by digital means may be considered physiological, provided that certain conditions are met. In particular, the reference is to the obligation, which has now become widespread in many legal systems, for legal practitioners to have a CEM address that is included in a public list.

However, these considerations should not lead to an underestimation of the notifications to be made to the defendant. In this respect, a wise approach consists in admitting that communications addressed to the accused are delivered to the lawyer, but only once the defendant’s knowledge of the nature of the accusation against him/her has been ensured³⁷.

³⁴ See ALONZI, Fabio. La rinnovata disciplina delle notificazioni. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 271.

³⁵ See GALGANI, Benedetta. *Forme e garanzie nel prisma dell’innovazione tecnologica: Alla ricerca di un processo penale “virtuoso”*. Milano: Wolters Kluwer-Cedam, 2022, p. 343.

³⁶ It presents a higher degree of guarantee but is much less common to use an address with a qualified certified delivery service as defined by article 44 Regulation (EU) 910/2014 (so-called eIDAS).

³⁷ With reference to the changes introduced into the Italian procedural system by Legislative Decree no. 150 of 10 October 2022 see ALONZI, Fabio. La

Of course, such mechanism, that takes advantage of the CEM service system, is much more efficient. At the same time, there are some critical aspects that need to be addressed. It places specific burdens on the lawyer and the assisted person: the former must be meticulous and timely in informing the latter, who must behave diligently and always be available to enable constant “dialogue”. These conditions are quite common when the accused is represented by a trusted lawyer and much less common when the lawyer is a court-appointed lawyer one³⁸.

Another problem stems from the fact that, as a general rule, citizens – unlike legal professionals – are not required to have a CEM address. Consequently, no public lists are compiled for judicial authorities to consult. Hence, telematic transmission can only take place if the defendant declares a digital domicile, thus manifesting a willingness to receive notifications at the “place” represented by the CEM mailing box.

On a different note, it has to be considered whether notifications by digital means are capable of ensuring effective knowledge of the procedural act.

From this point of view, the approach should not be one of *a priori* mistrust. From a certain perspective, the mechanism based on the CEM system offers greater guarantees than the traditional one, in particular in those procedural systems (e.g. the Italian one³⁹) which, in the case of service by post, allow third parties to collect the notice addressed to the defendant. On the other hand, it has to be taken into account the possibility of temporary disruptions of the CEM box⁴⁰. These circumstances should

rinnovata disciplina delle notificazioni. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 276 f.

³⁸ See ALONZI, Fabio. La rinnovata disciplina delle notificazioni. In CAIANIELLO, Michele; GIALUZ, Mitja; QUATTROCOLO, Serena (ed.), *Il procedimento penale tra efficienza, digitalizzazione e garanzie partecipative*. v. I. Torino: Giappichelli, 2024, p. 281.

³⁹ See NICOLICCHIA, Fabio. Domicilio digitale e notificazioni. In CASTRO-NUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 440.

⁴⁰ See SIGNORATO, Silvia. La gestione telematica dell’atto processuale nel dedalo del processo penale. In CATALANO, Elena Maria; KOSTORIS, E. Roberto;

be carefully evaluated, especially when the court has to decide whether to proceed in the absence of the defendant. In fact, there is the risk that the non-appearance of the accused is due to a lack of knowledge of the hearing. In view of this scenario and bearing in mind the importance, recognised also at the European level⁴¹, of the defendant having actual and proper knowledge of the summons, there should be a requirement that the delivery of this act has to be in person.

5. AUDIO-VISUAL LINKS.

Audio-visual links are one of the oldest forms of ICT use in the criminal justice field. In many jurisdictions, they were already regulated before the COVID-19 pandemic. However, undoubtedly the experience gained since 2020 has been a turning point in favour of remote participation in court activities and, in particular, hearings.

The use of video links as a means of participating in the proceedings goes to the “heart” of the fair trial clause due to its problematic relationship with the rights of defence and the adversarial principle.

At the outset, it has to be said that videoconferencing is a very broad concept as it refers to a number of different settings and options. To frame the issue, it is useful to consider two perspectives: one based on the subjects allowed to participate remotely; the other focused on the procedural activities and hearings that can be conducted by videoconference.

As for the first perspective, the most advanced option is the so-called “dematerialised” or virtual hearing: there is no physical courtroom⁴² and the hearing consists of a sum of virtual connections bringing together the parties, the judge, the witnesses etc. This model seems to exceed the

ORLANDI, Renzo (ed.), *Riassetti della penalità, razionalizzazione del procedimento di primo grado, giustizia riparativa*, Torino: Giappichelli, 2023, p. 65.

⁴¹ See QUATTROCOLO, Serena; RUGGERI, Stefano (ed.). *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*. Cham: Springer, 2019.

⁴² See GALGANI, Benedetta. *Forme e garanzie nel prisma dell'innovazione tecnologica: Alla ricerca di un processo penale “virtuoso”*. Milano: Wolters Kluwer-Cedam, 2022, p. 240.

limits of what is reasonable in terms of a gradual and balanced digital transition. Less radical choices that retain the centrality of the courtroom with the physical presence of the judge are certainly preferable.

Through the subjective view angle, there is a whole range of possible solutions that cannot be discussed in detail here. However, it is important to set a few basic rules. In particular, the equality of arms principle should be guaranteed. In this sense, problems arise if the discipline is asymmetrical, in the sense that it requires the physical presence of the prosecutor but not that of the defence counsel, who may be connected to the courtroom by means of an audio-visual link. In this situation, there would be an imbalance to the benefit of the prosecution and against the defence since the parties do not have equal opportunities to support their case. Thanks to the fact of being in the same – physical – place as the judge, the public prosecutor may be able to play a more incisive role and have greater influence over the decision⁴³.

Having said that, we now have to take into account the delicate position of the defendant. On the criminal justice scene, they are the main actor: they have been charged and their freedom is at stake. In this perspective, the approach to be adopted is one of caution and careful consideration of the reasons that allow to renounce to the physical presence of the accused in their proceedings, on the one hand, and of the capability of videoconferencing to ensure a full understanding of what is happening in the courtroom, the confidentiality of communications between lawyer and client and all the other rights which may be affected by the use of audio-visual links, on the other hand⁴⁴.

As for the first aspect (the second one will be discussed later), the grounds for allowing the defendant to participate remotely should be related to interests worthy of protection, such as the need to guarantee public safety. For instance, the use of audio-visual links

⁴³ See NEGRI, Daniele. Atti e udienze “a distanza”: risvolti inquisitori di una transizione maldestra alla giustizia digitale. In CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 454 f.

⁴⁴ See CURTOTTI, Donatella. *I collegamenti audiovisivi nel processo penale*. Milano: Giuffrè, 2006, p. 301 f.

may be admitted in criminal proceedings against organised crime when the accused is detained and ensuring their physical presence in the courtroom would put the public order at risk. On the contrary, the need to speed up the proceedings and avoiding delays should not be considered legitim aims⁴⁵.

Turning to the other perspective, based on the different stages and activities of the proceedings, here the assessment is highly discretionary, as it is a matter of “weighing” the various contexts to determine whether or not they are compatible with the use of audio-visual links. However, undoubtedly the main concerns are related to the trial hearing and, in particular, to the taking of evidence which may be affected by the use of audio-visual links in many different ways. Consider the following situations: the defendant being examined is not physically present at the hearing; during the examination of the witness, one (or more) of the parties are participating by means of videoconference; the source of testimonial evidence is connected from a place other than the courtroom. Each presents risks of circumvention or at least weakening of fundamental rights. In this sense, problems arise regarding the right to confrontation, especially in the systems which adhere to a “strong” conception of this right (i.e. a conception that interpret the confrontation clause in close connection with the principles of orality and immediacy) and infer from it the necessity of a direct and un-mediated relationship between the judge, the parties and the sources of evidence. If these persons are not gathered in the same physical place because they are participating in the hearing remotely, the “face-to-face” confrontation loses its strenght and eye-contact between the witness and, respectively, the parties and the judge, is lost. Indeed, the significance of orality and immediacy should

⁴⁵ See CURTOTTI, Donatella. Le modifiche alla disciplina della partecipazione al dibattimento a distanza. In BACCARI, Gian Marco; BONZANO, Carlo, LA REGINA, Katia; MANCUSO Enrico Maria (ed.), *Le recenti riforme in materia penale*. Milano: Wolters Kluwer, 2017, p. 520; SIGNORATO, Silvia. L'ampliamento dei casi di partecipazione a distanza dell'imputato tra logiche efficientistiche e menomazioni difensive. Available at: www.lalegislazionepenale.eu/wp-content/uploads/2017/11/S.-Signorato-Lampliamento-dei-casi-di-partecipazione-a-distanza.pdf. Accessed on 20.5.2024, p. 10 f.

not be limited to the possibility of asking questions to the witness: the co-presence in the courtroom is also relevant⁴⁶.

In light of this, it should be provided that, except for the cases where the use of audio-visual links is grounded on public safety reasons, participation by means of videoconference is subjected to the will of the parties⁴⁷. This way, it is up to the parties to decide whether a direct and unmediated relationship with the source of evidence is necessary or not.

Finally, a look at the technical and organisational aspects. On this point, there is a fairly broad consensus on the essential conditions that must be in place when audio-visual connection is activated: participation in the procedural activity or hearing should be effective. In this regard, the *Guidelines on videoconferencing in judicial proceedings* drawn up by the European Commission for the Efficiency of Justice (CEPEJ) recommend that the public authorities should ensure «as much as possible a true-to-life hearing experience»⁴⁸. This implies «the use of systems that allow two-way and simultaneous communication of image and sound enabling visual,

⁴⁶ See NEGRI, Daniele. Atti e udienze “a distanza”: risvolti inquisitori di una transizione maldestra alla giustizia digitale. In CASTRONUOVO, Donato; DONINI, Massimo; MANCUSO Enrico Maria; VARRASO, Gianluca (ed.), *Riforma Cartabia: La nuova giustizia penale*. Milano: Wolters Kluwer CEDAM, 2023, p. 457 f.

⁴⁷ See European Commission for the Efficiency of Justice (CEPEJ). *Guidelines on videoconferencing in judicial proceedings*. Available at: <https://edoc.coe.int/en/efficiency-of-justice/10706-guidelines-on-videoconferencing-in-judicial-proceedings.html>. Accessed on: 25.5.2024, p. 14: «21) If legislation does not require the free and informed consent of the defendant, the court’s decision for his or her participation in the remote hearing should serve a legitimate aim. 22) The legitimate aim of remote hearing in criminal proceedings should be based on such values as the protection of public order, public health, the prevention of offences, and the protection of the right to life, liberty, and security of witnesses and victims of crimes. Compliance with the right to a trial within a reasonable time can be considered by the court in particular at stages in the proceedings subsequent to the first instance».

⁴⁸ See European Commission for the Efficiency of Justice (CEPEJ). *Guidelines on videoconferencing in judicial proceedings*. Available at: <https://edoc.coe.int/en/efficiency-of-justice/10706-guidelines-on-videoconferencing-in-judicial-proceedings.html>. Accessed on: 25.5.2024, p. 17.

audio, and verbal interaction»⁴⁹. In addition, a technical support system should be established for monitoring, reporting and troubleshooting videoconference interruptions or other malfunctions.

As far as the defendant is concerned, the meaning of “effective participation” is enriched with an additional profile: the possibility to communicate confidentially with the lawyer. In this sense, it has repeatedly been stated by the European Court of Human Rights that «an accused right to communicate with his advocate out of hearing of a third person is part of the basic requirements of the fair trial in a democratic society and follows from article 6 paragraph 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness»⁵⁰.

It follows that the lawyer should be given the opportunity to be in the place where the defendant is, or, alternatively, to use confidential lines to communicate with his/her client. This is an essential condition for the remote participation of the defendant in her own criminal proceedings to be in accordance with the fair trial clause, to the extent that, in the event of non-compliance, the European Court of Human Rights would be of the opinion that there had been an infringement of article 6 ECHR, irrespectively of any further assessment. This is clear from the reasons given by the Grand Chamber in the *Sakhnovskiy v. Russia* judgement. Having found that, in the case at hand, the defendant had not been guaranteed the possibility of consultation with his lawyer through a confidential and secure (from the risk of control by third parties) line, the European Court of Human Rights declared that there had been a violation of article 6 paragraph 3 (c) ECHR, without addressing the merits of the other complaints raised by the applicant with regard to the (in)effectiveness of participation by means of videoconference⁵¹.

⁴⁹ With reference to the Italian regulation see Constitutional Court, 14 July 1999, no. 342. Available at: www.giurcost.org/decisioni/1999/0342s-99.html. Accessed on 20.5.2024.

⁵⁰ European Court of Human Rights, 5 October 2006, *Marcello Viola v. Italy*, § 61. See also European Court of Human Rights, 27 November 2007, *Asciutto v. Italy*, § 60.

⁵¹ European Court of Human Rights, Grand Chamber, 2 November 2010, *Sakhnovskiy v. Russia*, § 108.

6. CONCLUSION: ABOUT THIS SPECIAL ISSUE OF THE RBDPP.

The scenario outlined above was the inspiration for this special issue of the RBDPP and the associated call for papers. The idea was to gather contributions that, in the light of the different national experiences, could provide different perspectives on the perceived opportunities and critical issues tied to the digitalisation of the criminal proceedings with particular reference to the abovementioned thematic areas, as well as different strategies as to how it is possible to combine efficiency and guarantees in this delicate field.

The dossier includes seven papers that have passed the editorial filters and peer review. They are written in English and Spanish and examine the discipline and experiences of both European (Italy, Poland and Spain) and Latin America (Brazil, Chile and Mexico) countries. Some of them focus on the use of video links for the participation in hearings, in particular in order to assess their relationship with the principle of orality-immediacy (Biral; Badowiec; González Postigo); others take a broader perspective and, in line with the call for papers, cover the different areas of the criminal procedure which are affected by digitalisation (Planchadell-Gargallo; Perilla Granados; Sakowicz and Zieliński; Xavier). The plurality of the systems considered gives the dossier a transnational dimension, which has the merit of laying the foundations for future reflections, including those inspired by a comparative approach.

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