

Recommendations on the use of videoconferencing in cross-border proceedings

Dražen Jelenić

Allow me to preface by commending the Project Team for an outstanding job.

In my presentation, I will briefly address the recommendations that deal directly with videoconferencing, or indirectly imply its use, in addition to what has already been said by Prof. Maria del Jimeno Bulnes yesterday.

First of all, I would like to emphasize that I fully support all recommendations related to the use of videoconferencing in the application of legal institutes deriving from the Directive on EIO and the Framework Decision on EAW.

The results of the Project give us a clear vision of what EU legislators as well as MS's legislators should do to promote the use of videoconferencing as a tool for ensuring the presence of the accused person at the trial, or for enabling the interrogation of the accused at the trial by videoconference.

However, taking into account that in both cases such a method of participation or questioning of the accused can only be an option, with the interventions of both legislators, raising the awareness of legal practitioners participating in trials (prosecutors, lawyers and judges) about such a possibility through training, with all its advantages and limitations, plays an important role in the implementation of videoconferencing.

It would be much easier to implement the idea of the defendant's participation via videoconference in judicial cooperation procedures if it were also accepted in exclusively domestic procedures. However, now, the number of MSs that allow such participation of defendants in trials in domestic proceedings is very limited.

Of course, it is questionable whether ensuring the presence of the accused in trials with an international component at EU level should be prescribed by the European Investigation Order Directive or some other legal instrument. For the latter, whether it should be an existing one such as the 2000 Convention or a new one. Personally, I am in favour of such a method of participation not being part of the

European Investigation Order Directive, due to its primarily evidentiary character. It seems to me that there are almost no situations in which the purpose of the presence of the accused in the trial via videoconference can be reduced solely to questioning for the purpose of gathering evidence, without affecting her/his participation and giving various statements with the aim of her/his defence. The latter goes far beyond the evidentiary purpose of testimony, and includes the right to ask questions of co-accused, witnesses and experts; to propose the presentation of evidence; and to comment on the content and legality of the evidence presented.

Especially since after the judgment in the *Delda* case, it is quite clear that the participation of the accused through the application of the EIO, via videoconference, is permitted solely for evidentiary purposes.

Heaving in mind its complexity, participation in the trial by videoconferencing, which imply legal solutions in parallel with technical ones, should be deal with a separate, new, piece of EU legislation.

In any case, and while respecting all procedural guarantees given to the accused, in MSs that allow trial *in absentia*, it should be possible to allow his participation via videoconference as an exception before this ultimate exception. This is especially true if the accused is in another MS, which may be one of the conditions for the application of such an exception to her/his direct physical participation of the accused in the trial.

In contrast to mere participation, which then also allows for participation without physical presence, there is an understandable need for the state to demonstrate state authority by insisting on the physical presence of the accused in the trial, especially for serious crimes, so that public trials for such crimes also achieve their deterrent purpose towards everyone else. Therefore, trials in which the accused participates via videoconference, in addition to being an exception in themselves, should certainly be at least possible for minor crimes and in proceedings for crimes that, under domestic law, do not require the personal physical presence of the accused after he has had the opportunity to respond to the charges. This is also because such trials are, in general, least time consumed and the statute of limitations for such crimes also comes on early.

When it comes to the EAW and the recommendations that the issuing judicial authorities of the MS should consider requesting a videocall hearing of the requested person, once the requested person is arrested in the executing Member State, and that the EU legislator consider amending Article 24 of the EAW Framework Decision to provide for interrogation via videoconferencing in postponed cases instead of the temporary surrender, in both cases, also according to the provisions of the Framework Decision, such a decision must have been based on an agreement of the issuing and of the executing state. Therefore, in order to speed up this procedure, the issuing MS should (be able) to state in the EAW form itself whether it wants to interrogate the requested person or it prefer her/his temporary surrender. And if the hearing is decided, to indicate that it can also be conducted via videoconference, as well as to provide contact information for the person responsible for organizing the videoconference if it is a person different from the one listed in the form as a representative of the judicial authority which issued the warrant.

The recommendations are, furthermore, a consequence of the clearly detected condition that the use of videoconferencing in all the above situations will only be possible if Member States ensure that judicial authorities have access to secure videoconferencing tools that include a robust, encrypted infrastructure and dedicated communication lines, protecting judicial communications from external interference and ensuring confidentiality. This includes the obligation to ensure the presence of a judicial authority and/or a legal professional at the place where the person being questioned is. In other words, taking all the technical and legal security measures that exist for physical participation in courtroom, and mapping them into the virtual space, while ensuring that authenticity is established. In addition, the system should be such that it allows for the recording of all actions carried out through it so that their legality and authenticity can be reviewed in later stage.

But, in addition to the recommendations directly related to the application of videoconferencing as a mean for ensuring effectiveness and proportionality, the result of the Project are two more recommendations that, if implemented, should include the possibility of using videoconferencing, like previous ones, while meeting the recommended security requirements.

This primarily refers to the recommendation to the MS that have not yet done so to (consider?!) provide a legal basis for hearing the requested person and/or a temporary transfer of the requested person, both as foreseen in Article 18 of the EAW Framework Decision.

Furthermore, the recommendation to widen the scope of Article 18 in order to allow the hearing of a requested person against whom an execution-EAW is issued pending the decision on the execution of that EAW logically includes and builds on the request from the previous recommendation for the hearing of a requested person for the prosecution purposes via videoconference. Indeed, such a person should be given the opportunity to inform the issuing MS in the most effective way possible before the decision on the EAW of circumstances that may be of significance for the possible postponement of the sentence and thus lead to the withdrawal of the EAW. Or to plead for forwarding the judgment instead of surrendering him.

Likewise, recommendations that:

- the authorities of all Member States in case of a sentenced person temporary staying in another Member State, consider the practice of having her/him report to, and keep in contact with the probation officer remotely;**
- the national legislators agree with the practice, or regulate it on bilateral bases, of interrogating a national of another Member State who travels or temporarily resides in another Member State, exercising her/his right to free movement, at a consulate of that Member State located in their territory; and**
- meetings between competent authorities of different Member States are put in place in order to exchange ideas, information and knowledge,**

in their eventual fulfilment, they should also include the possibility of making these contacts through a video conference connection. Considering the nature of these contacts, however, when establishing such connections, it is not necessary to satisfy all the previously listed conditions for their security level, but they could also be achieved through publicly available video calling platforms. Of course, the formality and security of contacts between individuals

under investigation from consulates and their home countries is primarily in the hands of those countries and depends on their legal needs and technical capabilities.

Reading the recommendations that either *expressis verbis* or indirectly call for the introduction of videoconferencing in the implementation of judicial cooperation instruments such as EIO and EAW, it seems that in parallel with the development of a legislative idea on how to do this, a kind of (videoconferencing) network should be developed in the MS. It would consist of three segments - technical, human and organizational. The technical segment would consist of a unified secure network of videoconferencing devices (hardware and software). The human segment consists of teams of persons, on the one hand, responsible for the execution of instruments of judicial cooperation, and on the other hand, trained to handle these devices. While the organizational segment would imply the determination of the appropriate number of competent judicial bodies in which these tasks would be performed for a particular MS, heaving in mind costs of procuring and maintaining such net of devices.

At the very end, it would be interesting to hear what IT experts would have to say about all this issues. But let us leave it to the some other future Project.

Thank you for your attention, and I'm looking forward to discussion.