Editorial

by **Enguerrand Marique** *

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1 Over the last twenty years, justice systems have increasingly experimented with digitalization. This phenomenon has been praised for its ability to gather and process vast amounts of information, foster innovation, and offer cost-effectiveness. All of these features should improve the smooth functioning of the European market by contributing to secure economic transactions, as they are expected to solve disputes expeditiously and inexpensively. However, digitalization meets with resistance due to its drawbacks (especially, unequal access to digital tools, biases, and replications of past solutions).

2 The European Union has made continuous efforts to modernise judicial procedures in Europe through the advancement of digitalization, as exemplified by the adoption of Regulation 861/2007[1] and Reglation 2020/1783[2]. However, the emergence of new technologies brings with it the need for ongoing assessment of their impact – as evidenced by the cautionary approach taken in the Artificial Intelligence Act proposal, which allows the use of Artificial Intelligence (hereafter 'AI') only when strict conditions are met.[3]

3 Concurrently, private players within the digital industry have pro-gressively assumed roles as dispute resolution agents. Platforms must solve the issues that arise with their users, between their users, as well as between users and third parties (such as copyrights dis-putes). While the e-commerce Directive[4], adopted in 2000, had long been regulating (or exempting from liability) digital intermediaries, it failed to address this particular role of private entities. In 2022, the European Union chose to address the issue and imposed new re-quirements on digital platforms – mostly of a procedural nature, in order to facilitate online dispute resolution, as well as to offer mini-mal safeguards. These issues are now (partially) dealt with in the Digital Services Act (hereafter 'DSA')[5].

4 These various developments have raised a set of questions, which were compiled in a call for papers in June 2022, resulting in the publication of the present special issue on Administration of Justice in

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1 European Parliament and Council Regulation 861/2007 establishing a European Small Claims Procedure, *OJ L* 199, 31 July 2007, p. 1–22.

2 European Parliament and Council Regulation 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), *OJ L 405*, 2 December 2020, p. 1–39.

3 European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act, Com/2021/206 Final, 21 April 2021.

4 European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L 178,* 17 July 2000, p. 1–16.

5 European Parliament and Council Regulation 2022/2065 on a Single Market For Digital Services, *OJ L 277*, 27 October 2022, p. 1–102.

the Digital Era. Part 1 of the present issue contains a series of papers directly addressing the digitalization of administration of justice at the European level. Part 2 offers a number of regular JIPITEC articles, not making part of the call for papers, but nonetheless, also prompting contemplation of the evolving role of courts and judges in a digital era.

Part 1. Administration of Justice in a Digital Era

5 Kalliopi Terzidou sets the stage for the use of AI in the European Union for court administration. This contribution reviews the definitions and typologies that have been applied to the concept of AI and how these approaches influence the perception of this technology in procedural laws. For instance, this form of *intelligence* should be rather conceptualized as a "thinking" tool that therefore can only support the "thinking" process of judges by providing arguments that judges and courts could add in their decision-making thoughts. This contribution argues that the integration of AI applications in courts must be subject to supervision and regulation. Both the EU and its Member States should keep an interest in the management, development, and implementation of this high-risk use of AI.

6 Within this large framework, Jura Golub evaluates the use of artificial intelligence in detecting deception or assessing the credibility in witnesses and experts' testimonies delivered through videoconferencing systems. While the taking of evidence is normally left to Member States procedural autonomy, Regulation 2020/1783 facilitates cooperation in the cross-border taking of evidence in civil matters, which favours videoconferencing for immediacy and simplicity. However, non-verbal cues are often more challenging to discern when a videoconferencing system stands between the witness and the judges or lawyers. The author conducts an assessment of the compliance of AI use in this context with fair trial principles, protection of personal data, as well as with the current proposal for an Artificial Intelligence Act. The author emphasizes the need for transparency as well as the need for a harmonized and consistent approach to the use of AI in the cross-border evidence collection with videoconferencing.

7 Federica Casarosa examines the role of platforms in content moderation policies and identifies the risks to freedom of expression that arise from these practices. This researcher then proceeds to answer the question of how the DSA seeks to mitigate these risks by providing for new procedural remedies against account suspension and termination, content removal, as well as monetization restrictions. These external, out-of-court, remedies are accompanied by procedural guarantees. On the one hand, the DSA stipulates the independence, impartiality and expertise required in the decision-making process. On the other hand, it establishes standards for accessibility, transparency, and fairness of the procedure. The dispute settlement bodies should receive an accreditation that certifies that these guarantees are being complied with. The author also calls for clarification on this accreditation process.

8 Within the context of platforms' content moderation policies, Pieter Wolters and Raphaël Gellert examine the notice-and-action mechanisms on digital platforms. Under the e-commerce Directive, online hosting services providers (i.e. digital platforms) were indeed exempt of liability for information created by third parties if they met two conditions. First, these providers had to remain passive and neutral, i.e. not modify or optimize the content. Second, they had to remove illegal content when they become aware of its illegal nature. However, the e-commerce Directive failed to provide procedures for notifying this illegal character, meaning that an individual had potentially to notify the infringement by post, and led to an underenforcement of compelling legislations on digital platforms. To address this issue, the DSA proposes a new notification procedure that compels digital platforms to act. The authors explore how this new procedure can protect victims while safeguarding fundamental rights (including the issues identified by Casarosa) as well as the economic interests of digital platforms. The authors conclude that there are still some gaps in the system, but that the DSA significantly improves the practices of moderation of online content.

9 Gregory Chan and Tan Yan Shen explore the outcome of online dispute resolution procedures and identify the gap that emerges between the policies and the resolution of cases across platforms. In terms of procedure, the authors examine the inequality of arms between the litigants, as buyers are often given more power than sellers on marketplaces. They also address the issue of disproportionate penalties resulting from ODR procedures. Indeed, platforms take sometimes a black-and-white approach to sanctioning users of the platforms, rather than adopting a more nuanced stance. The contributors also regret the lack of a uniform interpretation principle of the contracts between the users and the platforms, as well as between users themselves. They argue that ODR, therefore, hinders the consistent and systematic implementation of the law. Consequently, the authors recommend classifying the types of disputes that may arise and applying uniform guiding principles for assessing the merits of claims across platforms for the same types of disputes.

Part 2. Other articles on digital issues

10 The second part of this issue presents four articles not related to the call for papers on the administration of justice in the digital era. Nonetheless, they are also connected in some respects to the issues of delegating decision-making powers, implementing self-enforcing rules that remove the judge from the process, and to argumentative and interpretative techniques that judges need to use in the new digitalized context.

11 Considering the Copyright in the Digital Single Market Directive[6] ('CDSMD'), Martin Senftleben shows how the EU lawmaker has outsourced the protection of users' fundamental rights to private parties. The author addresses potential corrective measures that might mitigate this delegation of protection to the industry, including user complaint mechanisms, safeguards implemented in the CDSMD, Member States transposition measures seeking to address this issue, as well as the audit reports that the very large online platforms need to go through and submit to the European Commission under the Digital Services Act.

12 Dário Moura Vicente explores the issue of disinformation on the Internet. After examining the European Action Plan against Disinformation, the author analyses a specific instrument that was adopted in Portugal at the time of its presidency of the European Union: the *Portuguese Charter of Human Rights in the Digital Era*, which includes a right to protection against misinformation. The article providing for such a right raised serious constitutional concerns due to its potentially disproportionate effects on freedom of expression and information, and was eventually amended, leaving just a general duty of the State to protect society against disinformation. The author goes on by examining the role of self-regulation in this area and the protections from liability for online intermediaries, initially set forth in the e-Commerce Directive and now in the Digital Services Act, as well as the duties of care the DSA provides for.

13 Matteo Frigeri undertakes to assess the evolution of Design law regarding *digital files* that support 3D-printing processes, and particularly whether the online sharing of said files can be considered as *use of a design* under the Design Regulation[7] and thus a potential act of infringement. The author explores the relevant literature, case law and legislative history in this regard, suggests possible solutions, and examines how this issue is addressed by the current proposal put forward by the European Commission to update the existing legal framework.

14 Last but not least, Sergey Kasatkin researches the issue of automated execution of contracts, as exemplified by smart contracts. In such scenarios, there is in principle no need to call for the intervention of a judge in cases of non-compliance with contract terms. Rather, an automation code executes the terms of the signed contract. However, as the author notes, the code behind the automation is not always accessible to lay people, and the terms of the contract are not always provided in writing. The article underscores the importance of the White Paper that commonly accompanies a smart contract (especially in the case of Initial Coin Offerings), which plays a key role in the implementation of the contract.

6 European Parliament and Council Directive 2019/790 on copyright and related rights in the Digital Single Market, *OJ L 130*, 17 May 2019, p. 92–125.

7 Council Regulation 6/2002 on Community designs, *OJ L 3*, 5 January 2002, p. 1–24.