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A digital justice system – demands and proposals of the German legal profession

The Bundesrechtsanwaltskammer (The German Federal Bar, BRAK) is the umbrella organisation of the self-regulatory bodies of the German lawyers (*Rechtsanwälte*)¹. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Position

The BRAK welcomes the discussions on the digitalisation of justice and the willingness of all stakeholders to push forward with the steps of digitalisation already implemented in Germany. The legal profession, represented by the BRAK, has already made a decisive contribution to this process with the establishment and operation of the special electronic mailbox for lawyers (*besonderes elektronisches Anwaltspostfach*, beA). As of 1 January 2022, the use of the beA is mandatory for all lawyers. As the largest professional group in the administration of justice, the legal profession is thus both a pioneer and a guarantor for the proper functioning of a "digital justice system".

The potential associated with digitalisation must be used to safeguard and strengthen access to justice for all. The standard by which the fundamentally desirable digitalisation of justice will have to let itself be measured against, is, in how far it makes access to justice easier, not more difficult. Thanks to digitalisation, it must be possible to grant access to justice more effectively and, most importantly, more quickly. The simplification of administrative processes through digital solutions not only helps reduce bureaucracy, at the same time it facilitates access to the courts and thus to the law for those seeking justice - under conditions yet to be defined together with the legal profession. However, offering digital concepts for citizens requires that electronic legal transactions are developed further on a continuous basis and throughout the country, that they are user-friendly and secure, and that they take into account the interests of the legal profession. Only then can the welcome goal of making court proceedings more citizen-friendly, effective and resource-efficient, actually be achieved.

Thus, in order to actually make the advantages of digital technologies usable for those seeking justice, an efficient, nationwide digital infrastructure is needed first. It must

¹ In the interest of better readability, no explicit differentiation is made in gender-specific personal designations. The masculine form chosen in the following includes all genders equally.

also be ensured that all citizens can use the services of the justice system in an IT-secure and data – protection compliant manner. It is also indispensable that those seeking justice can consult a lawyer at any stage of the proceedings, if they so wish. Digital solutions must also be directly usable by lawyers for their clients. This is because lawyers - unlike digital query systems - carry out preliminary checks, provide comprehensive individual advice to citizens and separate the essential from the nonessential in advance: they give the potential claim the right direction, which in turn reduces the burden on the courts.

The BRAK therefore calls for:

- 1. better equipment and technical infrastructure throughout the country,**
- 2. consistent implementation and further development of electronic legal transactions,**
- 3. establishment of a justice portal and**
- 4. use of digital procedures to strengthen access to justice.**

The BRAK furthermore strongly opposes:

- 5. the introduction of structured templates for written party submissions (*strukturiertes Parteivortrag*)**

and puts forward considerations on

- 6. the use of artificial intelligence.**

The BRAK's demands and proposals in detail:

1. Equipment / technical infrastructure / organisation of the justice system

- Plans regarding digital proceedings take the second step before the first: The justice system's shortcomings – in terms of technology, staff and material equipment – must not be shifted onto the backs of the legal profession and the parties by providing the courts with 'digital means to reduce their workload'. The technical equipment is still not satisfactory everywhere and, moreover, is not being used sufficiently, which is impressively demonstrated by the BRAK's COVID 19 surveys. They show that the position papers of the BRAK's working group on safeguarding the rule of law have still not been sufficiently implemented. Also, some of the judicial system's specialized IT procedures (*Fachverfahren*) have not yet adequately implemented the legal requirements.
- IT procedures used in the judicial justice system must be adapted to meet the requirements of electronic legal transactions. Essential points here are the direct accessibility of the competent judge or public prosecutor by means of electronic legal transactions and the daily update of address data in the IT procedures by linking them to the identity management system SAFE's directories (Secure Access to Federated e-Justice/e-Government). It is not acceptable that, at many courts, messages transmitted via the beA reach the judge more slowly than fax messages and that the beA designated in a particular case (§ 130 no. 1a Civil Code of Procedure, *Zivilprozessordnung*, ZPO), is neither registered nor addressed with regard to transmissions and service in the IT procedure.
- In principle, a national standardised videoconferencing system that also enables confidential exchanges between lawyers and their clients would be welcome.
- On the part of the justice system, a rapid transition to the active use of electronic legal transactions is necessary; procedural management must be improved, a demand the BRAK

has made repeatedly in recent years.

- Within the justice system, organisation must be more strongly oriented towards increasing digitalisation. This includes, inter alia, a nationwide provision of training courses on the use of electronic legal transactions, sufficient user support as well as the introduction of concepts that ensure that electronic incoming mail reaches the responsible processors (judges, public prosecutors, registry) directly and electronically.

2. Electronic legal transactions

Electronic legal transactions must be implemented consistently and further optimised continually. On the part of those seeking justice, the goal should be a procedure optimised to the lawyers' needs. For the courts, this would offer the advantage of facilitating their work since the facts and the legal questions of a case would be prepared by lawyers and because they would communicate with the help of communication tools they have developed in a coordinated process, adapted to the respective requirements. The focus of all considerations must be safeguarding access to justice for all those seeking justice and whose interests are represented by the legal profession. Electronic legal transactions must therefore only have a function that serves this principle. The administration of justice must remain human, so that citizens continue to accept it. Therefore, in addition to electronic communication, direct person-to-person communication is important. In this respect, the following must be taken into account:

- The legal profession is part of electronic legal transactions and must be involved in its further development. Therefore, it is imperative that requirements regarding the legal and technical implementation of the administration of justice's digitalisation are not drawn up by those who are responsible for the digital technology, but by those who effectively practice the administration of justice, i.e. judges, judicial officers, registrars, lawyers and notaries. Specifications regarding the format of electronic documents sent by the legal profession must be developed together with the legal profession and must not be prescribed unilaterally by the judiciary.
- In a consultation paper published on 15 October 2021, the future federal government maintained:

"The administration is to become more agile and more digital. We will consistently view it from the citizens' perspective. We will always take into consideration adequate digital applications and implement them. To this end, we want to subject laws to a digitalisation check. The federal government's digital policy strategy will be redesigned (including AI strategy, data strategy, blockchain strategy). Competences within the federal government will be reorganised and bundled. We are committed to driving forward the gigabit expansion."

In this respect, the BRAK calls for the legal profession to be involved in the envisaged digitalisation check, which the BRAK also considers as urgently needed. In order to carry out digitalisation checks, especially with regard to the adjustment of substantive and procedural provisions to electronic legal transactions and their further development,

an expert commission consisting of representatives of the federal government, the *Länder*, the judiciary and the legal profession should therefore be established, which will develop concrete proposals for amendments based on practical experience.

- The BRAK already suggests the following as possible **topics** for this expert commission, which is to be set up with the involvement of the legal profession:

Further adjustments in procedural and substantive law must be discussed: Questions of service must be clarified, special features in summary proceedings must be determined, questions regarding the submission of originals, copies and certified copies must be resolved. Further questions arise with regard to the digitalisation of the law on compulsory execution, the review of written form requirements in substantive law, with regard to electronic court cost advances, with regard to the introduction of electronic evidence, the preparation of verbatim minutes, possibly using voice recognition systems, etc. The BRAK is happy to discuss these issues at any time.

- Furthermore, thought should already be given to further technical developments, especially with regard to the practical adaptation of formalities (formats, structural data, etc.), the exchange between counsel and the courts via communication platforms, e.g. on postponements, delays, applications for extensions of time limits, etc., which are connected to the EGVP infrastructure (Electronic Court and Administration Mailbox, *Elektronisches Gerichts- und Verwaltungspostfach*, EGVP). A filing platform for uploading and downloading electronic documents should be developed which makes the transmission of electronic documents in a ratio of 1:1 dispensable, without this entailing joint work on the documents ("online court file").
- In particular on the topic of communication platforms, the BRAK notes the following with regard to issues that are currently being discussed more intensively:

We broadly welcome the establishment of an electronic "chat platform" (*elektronischer Nachrichtenraum*). Care is to be taken though to design this chat platform in such a way that lawyers can effectively work with it and the use of this chat platform must not be mandatory. It must not be another communication channel that requires monitoring. All parties to the proceedings should receive a notification as soon as a new message has been posted on the chat platform. Access to the e-file should be made possible and expanded. A connection of such a chat platform to the EVGP infrastructure, including access via the beA, seems to be reasonable and appropriate.

In this context, the use of the judiciary's file inspection portal should also be expanded. Lawyers should be increasingly enabled to access the electronic file by making it available on the file inspection portal, which will be connected to the beA system in the near future. Access should not only be granted to the courts' procedural files, but also to supporting files provided by public authorities, files of the previous instances or electronic evidence.

3. Creation of a justice portal

The objective to facilitate access to justice by creating online portals and virtual legal application offices (*Rechtsantragsstellen*) for those seeking justice, is an effective way to achieve greater proximity to the citizen; it is thus a welcome objective.

- In this context, all parties to the proceedings must have access to all proceedings, including proceedings before the register courts.

- It is imperative to avoid the exclusion of individual population groups. Since the use of a justice portal requires knowledge in the use of digital media, a suitable terminal device and knowledge of German, the analogue system must remain available as an alternative option for all citizens who do not meet the technical and/or language requirements.
- Necessary pre-structuring and filtering must not lead to a restriction of the right to be heard with regard to consumers who have not received any advice.
- Online portals or virtual legal application offices must only be offered in areas where there is no obligation to consult a lawyer. Moreover, It must be possible to consult a lawyer at any time.
- Justice portals and virtual legal application offices must be clearly distinguished from lawyers' advice and legal advice centres (obligation to inform and to explain) and must provide clear information that online legal application offices must not provide legal information. There is an express duty to inform the citizen.
- The following applications which already exist or are yet to be developed, should be integrated into the justice portal: online proceedings, video hearings, a file inspection portal, a platform for submissions, a register of legal titles, a register of powers of attorney, databases etc..
- Secure authentication to the system (using the SAFE directory and the EGVP infrastructure) must be ensured.

4. Digital proceedings

4.1 Hearings through videoconferencing

- When designing and implementing justice portals or virtual legal application centres, it is imperative to involve lawyers in order to avoid that the justice system becomes too one-sided and anti-consumer in nature.
- The use of hearings via videoconferencing in civil courts and specialized courts should be intensified. An exception must be made with regard to criminal law. This is required in particular by the overriding importance of the principle of immediacy.
- There must be an entitlement to a video hearing if the parties as controllers (*Parteiherrschaft*) of the civil process (civil proceedings = party proceedings) agree to a video hearing and no witness examination is scheduled. Evidentiary hearings with witness and expert hearings are to take place in presence, on the basis of a general rule subject to exceptions, unless all parties involved give their consent to the video hearing or an exception is provided for by law. In such cases, it is necessary to make procedural adjustments.
- Whether the court may move to another location, i.e. outside the courtroom, is a matter to be discussed with the participation of the legal profession; it is vital that the decision-making court, in its respective composition, can be seen in full, that the background is professionally designed and that modern technical equipment as well as good image and sound transmission are ensured.
- As far as virtual hearings are concerned, the participation of the public must be ensured. One suggestion to be taken into consideration would be to make the virtual hearing accessible by means of a live stream in the courthouse.

- The imperative preparation of a written verbatim report is generally welcomed in cases where the content has not already been recorded in the framework of a virtual hearing and is thus not known. The court should still be able to draft its own verbatim report of the outcome of a settlement hearing, for example. In judicial criminal proceedings, however, the documentation in relation to main proceedings must be produced in the short-term, considering there might be an appeal.
- Break-out rooms must be provided to ensure deliberations between the parties and their counsel remain confidential.
- In terms of the law on costs, we call for the deletion of no. 9019 of the Annex to the German Court Costs Act (*Gerichtskostengesetz - Kostenverzeichnis, GKG-KV*), in order to provide more incentives to participate in video hearings.

4.2 Online proceedings

- Online proceedings lend themselves especially to consumer protection cases, in particular cases that are straightforward, standardisable and characterized by a low threshold. In order to determine suitable areas of law and potential types of proceedings, a legal definition is needed, which at the same time establishes legal certainty with regard to areas of law that are unsuitable from the outset.
- The jurisdictional amount in dispute for online proceedings should initially be based on the limit provided by § 495a of the Code of Civil Procedure (600 euros), since according to the German Federal Statistical Office, in 2019, the amounts in dispute in cases settled by district courts were below 600 euros in 34.7% of the cases. An adjustment at a later stage may have to be discussed on the basis of experience.
- It must be possible to call in a lawyer at any stage of the proceedings. In addition, it must also be possible for lawyers to use online procedures, for example by means of a "lawyer button".
- There must be no obligation to use online procedures. Analogue alternatives must be maintained for those who lack the technology that is necessary to use digital solutions. This is the only way to ensure equal access to justice for all population groups. It must be possible to switch to the analogue alternative at any time without justification (opt-out).
- The legal profession, as experts in practicing the law, must be involved in designing all input and query masks. Where the parties are represented by lawyers, care must be taken in relation to query systems to ensure that the party submissions are not subject to a given structure.
- The transition from the online procedure to the regular procedure must be possible at any time under clearly defined conditions; a low value in dispute is not synonymous with limited case complexity and simple structure.

4.3 Use of chatbots by legal application offices (*Rechtsantragsstellen*)

There are no fundamental objections to the use of chatbots for legal applications, as long as the following aspects are taken into account:

- Citizens seeking justice must be adequately informed at all times about the use of AI-based "guidance systems".
- The use of chatbots must only serve to optimise and accelerate formal application processes.

- The court itself must not provide legal advice via the chatbots.
- The possibility of consulting a lawyer must be pointed out at every stage of the proceedings.
- The use of chatbots must not lead to an introduction of pre-structured submissions through the backdoor. It must remain possible to make longer submissions should a party wish to do so. Otherwise, the party's particular legal situation would not be taken into account adequately.
- Query and input masks must not lead to an inadmissible restriction of the right to be heard as provided under Article 103 (1) of the German Basic Law (*Grundgesetz*, GG) by limiting the possibilities to pursue justice to the options dictated by the justice system. For citizens who lack the technical infrastructure to use the justice system's online access, it must remain possible to go to their local legal application office.
- This must also apply to applications for legal advice aid (*Beratungshilfe*).

5. The BRAK firmly rejects the introduction of the 'structured submission'

- We reject the introduction of a basic document (*Basisdokument*) since this would entail an infringement of the right to be given a fair legal hearing as stipulated in Article 103 (1) GG, of the principle of production of evidence (*Beibringungsgrundsatz*) and the principle that the parties delimit the subject-matter of proceedings (*Dispositionsmaxime*). A structured submission would not lead to more efficiency either, since the courts would have to monitor submissions and check for changes to the proceedings (modification/withdrawal of claims) continuously, which requires a considerable amount of time and effort. Moreover, the development of the facts relevant to the decision must remain an original task of the civil judge and must not be transferred to the legal profession.
- As an alternative, the BRAK proposes an (electronic) schedule of annexes, i.e. a separate document next to the pleadings, presenting, for example, party submissions including suggested evidence and annexes in chronological order. By establishing an index of keywords, an increase in processing efficiency could be ensured.

6. Use of artificial intelligence (AI)

Proposals to improve and develop digitalisation must go beyond considerations of online procedures and anticipate further developments in the field of AI. The assessment of AI depends on the intended use on the one hand, and on the type of AI used on the other.

- With regard to AI that supports decision-making, there are no overriding concerns as long as the parties involved are sufficiently informed about whether and which AI system is used to support judicial decision-making (obligation to inform and to explain).
- As far as AI that replaces decision-making is concerned, the BRAK considers it fundamentally impossible due to the requirement that decisions must be rendered by the courts (*Richtervorbehalt*) and due to the right to one's lawful judge. In civil or administrative court disputes, however, parties could be given the option of voluntarily submitting to an automated decision, provided that it is contestable and can thus be subjected to the decision by a human judge; just as parties have the option of submitting to mediation within the court and accepting its result as the final settlement or rejecting it and insisting on a decision by human judges. In this respect, the provisions of Article 22 GDPR can also be a guideline for judicial decisions rendered by AI systems.

- The use of AI in criminal proceedings and enforcement proceedings following a criminal conviction must remain excluded.

The German Federal Bar will follow further developments in the area of digitalisation with a critical eye and will contribute with constructive proposals.
