NATIONAL REPORT FOR ITALY ON ELECTRONIC EVIDENCE AND VIDEOCONFERENCING

Tonolo S

Project DIGI-GUARD 2023

DIGI-GUARD

Co-funded by the European Union

Digital communication and safeguarding the parties' rights: challenges for European civil procedure – DIGI-GUARD

Project ID: 101046660 — DIGI-GUARD — JUST-2021-JCOO

National Report
Italy

Prepared by
Università degli Studi di Padova
Dipartimento di Diritto pubblico Internazionale e comunitario
Prof. Dr. Sara Tonolo

Co-funded by the European Union

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Questionnaire for National Reports

On electronic evidence and videoconferencing

This questionnaire addresses practical and theoretical aspects regarding the taking of (electronic) evidence and videoconferencing in (cross-border) civil litigation. Each partner should provide substantive answers for their respective Member State (or additional Member State, if specifically stipulated by the coordinator). Certain questions require knowledge on instruments of cross-border enforcement in the EU, particularly Regulation (EU) 2020/1783 ("Recast Taking of Evidence Regulation"). The latter questions address the interplay between national law and the EU regime on cross-border enforcement in civil and commercial matters. For useful information, especially relating to B IA and cross-border enforcement in the EU, please refer, among other sources, to:

- Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783),
- Impact assessment of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285),
- Other *travaux preparatoires* of the Recast Taking of Evidence Regulation (see e.g. https://www.europeansources.info/record/proposal-for-a-regulation-amending-regulation-ec-no-1206-2001-on-cooperation-between-the-courts-of-the-member-states-in-the-taking-of-evidence-in-civil-or-commercial-matters/)
- Council Guide on videoconferencing in Cross-border proceedings (https://www.consilium.europa.eu/en/documents-publications/publications/guide-videoconferencing-cross-border-proceedings/)
- The Access to Civil Justice portal hosted by the University of Maribor, Faculty of Law together with the results of our previous projects, especially our previous project Dimensions of Evidence in European Civil Procedure (https://www.pf.um.si/en/acj/projects/pr01/).

The structure of each individual report should follow the list of questions enumerated below, to the utmost extent possible. If authors choose to address certain issues elsewhere within the questionnaire, then they are instructed to make cross-references and specify where they have provided an answer for the respective question (e.g. "answer to this question is already provided

in 1.6."). Following the structure of the questionnaire will enable and ease comparisons between the various jurisdictions.

The list of questions is not regarded as a conclusive one. It may well be that we did not foresee certain issues that present important aspects in certain jurisdictions. Please address such issues on your own initiative where appropriate. On the other hand, questions that are of no relevance for your legal system can be left aside. If so, indicate expressly the lack of relevance and consider explaining the reason(s).

Please provide representative references to court decisions and literature. Please try to illustrate important issues by providing examples from court practice. If possible, please include empirical and statistical data. **Where the answer would be "no" or "not applicable", because something is not regulated in your national legal order, please specify how you think it should be regulated**.

Please do not repeat the full questions in your text. There is no limitation as to the length of the reports.

Languages of national reports: English.

Deadline: 31 March 2023.

In case of any questions, remarks or suggestions please contact project coordinators, prof. dr. Vesna Rijavec: vesna.rijavec@um.si and prof. dr. Tjaša Ivanc: tjasa.ivanc@um.si ; or to assist. Denis Baghrizabehi: denis.baghrizabehi@um.si.

1. General aspects regarding electronic evidence

(Note that the following definitions apply:

- *Authentic evidence: the content of evidence was indeed created or drawn by a person or entity declared to be its creator or author; authenticity refers to the genuine source.*
- *Reliable evidence: the content of evidence is true, accurate and non-compromised; reliability refers to the truth and accuracy of content.)*

1.1. Does the law of your Member State provide any definition of electronic evidence?

(If applicable, cite the definition of electronic evidence.)

Evidence is traditionally defined as a means capable of making a fact known and therefore of providing that fact and establishing its certainty, or as an instrument for convincing the judge of the facts in question. To be allowed into the proceedings, a preliminary application must be 'admissible' and 'relevant'. To be admissible, a preliminary application must not run counter to a prohibition set out by law (e.g. Article 2726 of the Civil Code, henceforth CC, relating to payments): in other words, the court must determine whether the specific measure of inquiry put forward is against the law. So-called 'atypical' evidence, which is not characterised by the CC, is also subject to the prohibitions of the law. Relevance, on the other hand, is examined from a different perspective and relates to 'the fact forming the subject of the evidence'. For the preliminary application to be admitted, the court must ascertain whether the fact sought to be proven will have an actual impact in the judgment of the case. Accordingly, facts that would have no influence on the acceptance or rejection of the application are not admitted, even if they have been proven. To allow the court to assess the relevance of the evidence, the legislature requires the application to meet minimum levels of specificity, and therefore to provide at least three different types of information: topical: WHERE; historical: WHEN; and functional: TO WHAT PURPOSE. Facts that are not specifically disputed do not have to be proven (Article 115 of the Code of Civil Procedure, henceforth CPC) [1].

In the Italian System, electronic evidence is defined by Article 1 of the "Codice dell'Amministrazione Digitale" - Code of Digital Administration, henceforth CAD, in force since 1 January 2006[2]. The CAD has been amended several times[3] and the ongoing pandemic

[1] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1

[2] Legislative Decree, 7 March 2005, No. 82 Codice dell'amministrazione digitale (O.J. No.112 16 May 2005, s.o. No. 93).

[3] Since the entry into force of Legislative Decree No. 159 of 4 April 2006, Disposizioni integrative e correttive al decreto legislativo 7 March 2005, No. 82 (Supplementary and corrective provisions to the legislative decree), laying down the digital administration code (O.J. No. 99 29 April 2006, s.o. No. 105), and Legislative Decree No. 235 30 December 2010, Modifiche ed integrazioni al decreto legislativo 7 March 2005, n. 82, (Amendments and

has been a further incentive towards a total shift in the taking of electronic evidence, as well as in the handling of claims, hearings, delivery of justice.

Article 1 of the CAD states that: "an electronic document is the computerized representation of legally relevant acts, facts or data"[4].

Arguably, this definition is not sufficiently detailed. With some adjustments, it refers to the traditional definition of a document (as 'representation of relevant acts or facts'[5] and the 'representative' theory accepted by the Italian Civil Code (henceforth CC)[6]. However, a proper examination of the topic needs to consider the electronic document as a document composed of digital data that requires hardware and software to exist[7].

Article 3 of the e-IDAS Regulation[8] confirms that an "electronic document" is any content stored in electronic form, in particular text or sound, visual or audio-visual recording.

1.2. Does the law of your Member State define of what is considered as paper document? *(If yes, please provide the definition. If not, please indicate the relevant case law.)*

Title II of Book VI of the Italian CC, which regulates the discipline of evidence, includes chapter II entitled "Documentary evidence" and the subsequent chapter IV entitled "Presumptions". While with reference to the later type of evidence, the legislator states a notion of what is meant by presumption (Art. 2727 of the Italian CC), no definition is provided for documentary evidence, only elaborating on the various categories of deeds that can be attributed to this sphere.

Scholars are divided, in part affirming that a paper document is an "instrument that allows the evaluation of the existence of a fact or act, as well as the possibility of subsuming the fact or

additions to Legislative Decree) on the Digital Administration Code, pursuant to Article 33 Law No. 69 of 18 June 2009 (O.J. n. 6 10 January 2011, s.o. No. 8); Law No. 221 of 17 December 2012, converting the Law Decree 18 October 2012, No. 179, (O.J., No. 294 of 18 December 2012, s.o. No. 208).

[4] Art. 1 of the CAD: "computer document is the computer representation of legally relevant acts, facts or data ".

[5] F. CARNELUTTI, *Documento e negozio giuridico*, in *Rivista di diritto processuale*, 1926, I, pp 181 – 220; E. BETTI, *Diritto processuale civile italiano*, Roma, 1936, p 356.

[6] On this topic, see: L. CARRARO, *Il diritto sul documento*, Padova, 1941; P. GUIDI, *Teoria Giuridica del documento*, Milano, 1950; F. CARNELUTTI, *Documento (Teoria moderna), Novissimo Digesto italiano*, VI, Torino, 1957, pp 85 – 89; C. ANGELICI, *Documentazione e documento (Diritto civile), Enciclopedia giuridica*, XIII, Roma1989, pp 1 – 9; S. PATTI, *Documento, Digesto delle discipline privatistiche, sezione civile, VII*, Torino, 1994, pp 1-13.

[7] B. SCHAFER, S. MASON, *The characteristics of electronic evidence in digital format*, in S. MASON (ed.), *Electronic Evidence*, LexisNexis Butterworths, 2012; A. MERONE, *Electronic signatures in Italian Law, Digital Evidence and Electronic Signature Law Review*, 2014, I, p.85.

[8] EU Regulation, 23 July 2014, n. 910/2014 "Regulation on electronic identification and trust services for electronic transactions in the internal market", commonly referred as the e-IDAS Regulation.

act under a normative case", or in short, is a "representation of relevant acts or facts"[9], in part that "the document represents a fact in the interpretation of the person considering the document"[10].

Italian law distinguishes between documentary and non-documentary evidence. Evidence governed by the Civil Code is referred to as 'typical'.

Documentary evidence includes:

- public documents (Articles 2699 *et seq.* of the Civil Code);
- private documents (Articles 2702 *et seq.* of the Civil Code);
- telegrams (Articles 2705 *et seq.* of the Civil Code);
- domestic files and registers (Article 2707 of the Civil Code);
- business accounting records (Article 2709 of the Civil Code);
- mechanically produced copies (Article 2712 of the Civil Code);
- copies of documents and contracts (Articles 2714 *et seq.* of the Civil Code).

Computerised documents also constitute evidence.

Non-documentary evidence includes:

- witness evidence (Articles 2721 *et seq.* of the Civil Code);
- written witness statements (Article 257-*bis* of the Code of Civil Procedure);
- confessions (Articles 2730 *et seq.* of the Civil Code);
- formal questioning (Article 230 of the Code of Civil Procedure);
- sworn statements (Articles 2736 *et seq.* of the Civil Code);
- inspections (Articles 258 *et seq.* of the Code of Civil Procedure).

1.3. How is electronic evidence categorised among means of evidence within the law of your Member State?

(In answer to this question, please explain whether electronic evidence is categorised among traditional means of evidence or if electronic evidence forms a new means of evidence. Please cite relevant provisions (esp. if electronic evidence forms a new means of evidence). If electronic evidence is categorised among traditional means of evidence, please explain the reason for this categorisation and elaborate to which category of traditional evidence electronic evidence is assigned (for example, elaborate when electronic evidence is considered a document and when it is an object of inspection). Should electronic evidence be categorised among traditional means of evidence, please also comment on possible problems regarding an analogous application of traditional evidence rules.)

[9] F. CARNELUTTI, *La prova civile,* Milano, 1992, p. 138

[10] N. IRTI, *Sul concetto giuridico di documento*, in *Riv. trim. dir. proc. civ.*, 1969, p. 498.

Electronic evidence is a new means of evidence in Italy.

Article 15, § 2 of Law 59/1997 introduces the fundamental principle of equivalence between paper and electronic documents[11]: "Gli atti, dati e documenti formati dalla pubblica amministrazione e dai privati con strumenti informatici o telematici, i contratti stipulati nelle medesime forme, nonché la loro archiviazione e trasmissione con strumenti informatici, sono validi e rilevanti a tutti gli effetti di legge". – "Acts, data and documents drawn up by the government and by private parties by electronic tools, contracts entered into in the same form, as well as their storage and transmission by electronic means, are valid and relevant for all intents and purposes of law".

Electronic evidence may raise some problems in civil proceedings, because it is subject to the same admissibility rules as records on paper, but its technical features are completely different from a document on paper: for example, the question of the integrity or authenticity of a record on paper, as will be seen, is dissimilar from those concerning digital records.

Different types of electronic evidence can be found in the Italian Civil Proceedings[12]: electronic documents (see infra par……), electronic devices for inspection, digital records of Judicial Inspection (see *infra* par…..).

1.4. Does the law of your Member State explicitly regulate that evidence or data in electronic form has evidentiary value?
(If yes, please cite the provision regulating the evidentiary value of electronic evidence (e.g., "electronic data shall not be denied legal effect or considered inadmissible as evidence in the proceedings solely on the grounds that they are in electronic form"). Please also explain if there is any presumption regarding the evidentiary value, admissibility, reliability or authenticity of electronic evidence.)

YES. Italy clearly equates the legal effects of an electronic document, signed with a digital signature, with documents written and signed on paper.

[11] Law of 25 March 1997, n.59, Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della Pubblica Amministrazione e per la semplificazione amministrativa (Delegation of powers to the Government for the conferral of functions and tasks to regions and local authorities, for the reform of the Public Administration and for administrative simplification) (O.J., n. 63, 17 March 1997, s. o., n. 56/L). This law delegates to the Council of Ministers the power to provide rules and regulations to reform public administration and simplify procedures.

[12] F. NOVARIO, *Le prove informatiche*, Torino, 2014, p. 1.

Article 15, § 2 of Law 59/1997 states the fundamental principle of equivalence between paper and electronic documents[13]: "Gli atti, dati e documenti formati dalla pubblica amministrazione e dai privati con strumenti informatici o telematici, i contratti stipulati nelle medesime forme, nonché la loro archiviazione e trasmissione con strumenti informatici, sono validi e rilevanti a tutti gli effetti di legge". – "Acts, data and documents drawn up by the government and by private parties by electronic tools, contracts entered into in the same form, as well as their storage and transmission by electronic means, are valid and relevant for all intents and purposes of law".

This legislation served to enable the use of information technology to improve the efficiency in public administration, but its implementation proceeded very slowly[14].

1.5. Does the law of your Member State explicitly differentiate between electronic and physical private documents as evidence?

(Please elaborate on whether the law of your Member State regulates electronic documents and if an electronic document has the same legal effect as a physical document. Please emphasise whether there are any provisions differentiating between electronic and physical documents. If applicable, please cite the provisions regulating electronic documents.)

NO, as already mentioned (see par. 1.4. above), Italy clearly equates the legal effects of an electronic document, signed with a digital signature, with documents written and signed on paper.

Article 15, § 2 of Law 59/1997 states the fundamental principle of equivalence between paper and electronic documents[15]: "Gli atti, dati e documenti formati dalla pubblica amministrazione e dai privati con strumenti informatici o telematici, i contratti stipulati nelle medesime forme, nonché la loro archiviazione e trasmissione con strumenti informatici, sono validi e rilevanti a tutti gli effetti di legge". – "Acts, data and documents drawn up by the government and by private parties by electronic tools, contracts entered into in the same form, as well as their

[13] Law 25 March 1997, n.59, Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della Pubblica Amministrazione e per la semplificazione amministrativa (O.J., n. 63, 17 March 1997, s. o., n. 56/L). This law delegates to the Council of Ministers the power to provide rules and regulations to reform public administration and simplify procedures.

[14] M. PIETRANGELO, *La società dell'informazione tra realtà e norma*, Milano, 2007, pp 43 – 6

[15] Law 25 March 1997, n.59, Delega al Governo per il conferimento di funzioni e compiti alle regioni ed enti locali, per la riforma della Pubblica Amministrazione e per la semplificazione amministrativa (O.J., n. 63, 17 March 1997, s. o., n. 56/L). This law delegates to the Council of Ministers the power to provide rules and regulations to reform public administration and simplify procedures.

storage and transmission by electronic means, are valid and relevant for all intents and purposes of law".

While the traditional document is recorded on paper, the electronic document is stored on different types of hardware available in alternative formats. In order to ensure and preserve evidence of a fact (such as the payment of an obligation) or to form a relevant act (such as a contract), the document will always be stored on a hardware medium on which data is recorded.

1.6. Does the law of your Member State recognise the special evidentiary value of public documents, and does this also apply to electronic public documents?
(If yes, please cite the provision regulating public documents in electronic form. Please emphasise whether any provisions differentiate between electronic and physical public documents.)

Yes. Public Documents in Italy are legal evidence, whose probative value is absolutely indisputable.

The Italian legal system attaches the greatest weight to public documents and to irrebuttable presumptions. Public documents are legal Public documents (Articles 2699 *et seq.* of the Civil Code) are documents drawn up, with the required formalities, by a notary (*notaio*) or other public official authorised to confirm their public status in the place where the document was prepared. Public documents have full value as evidence unless they are proven to be false. Barring a dispute, they constitute absolute and unconditional proof. Irrebuttable presumptions – presunzioni *iuris et de iure* (Article 2727 of the Civil Code) are even more effective, as they do not admit any proof to the contrary[16].

Similar effectiveness is attributed to the electronic public deed[17], which differs from the electronic private writing with electronic signature[18]. The electronic public deed is generally ruled by the Legislative Decree No. 110/2010[19] which modified the "Legge Notarile" – "Notarial Law", introducing Article 47*bis*, according to which the electronic public deed is a public deed digitally created and effective pursuant to article 2700 of CC.

[16] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1
[17] On this topic see: M. MIRRIONE, *L'atto notarile informatico*, in *Contratti*, 2011, p. 731.
[18] A. GRAZIOSI, *Documento informatico (diritto processuale civile)*, in *Enciclopedia del Diritto, Annali*, II, 2, Milano, 2008, p. 491.
[19] Legislative Decree, 2 July 2010, n. 110.

In addition to these types of electronic documents, mention must also be made of electronic documents without electronic signatures, which are becoming increasingly important in civil proceedings, such as files containing commercial offers aimed at consumers, travel agency brochures, bank statements, travel tickets, digital accounting records, online telegrams, organizers with a person's appointments, documents containing novels or poems. Electronic evidence also include digital documents containing the representation of facts by means of images, sound tracks and video footage, or the recording of facts by other methods, provided they are in digital format, such as X-rays, digital ultrasounds, etc. [20].

1.7. Describe the legal effects of changing the form of electronic evidence to physical.
(In answer to this question, please explain whether it is admissible to change electronic evidence (e.g., websites, social networks, or e-mail) to a physical form and, what legal effect such change has. Please also specify, whether electronic evidence is treated as a copy and whether printouts are necessary when submitting particular types of electronic evidence (e.g., websites, social networks or e-mail). If applicable, please cite the provisions relating to changing the form of electronic evidence.)

In Italy, it is possible to switch the document from digital to analogue form, i.e. through the creation of copies of digital documents by printing a pdf file on paper documents. Analogue copies of IT documents are analogue documents reproducing the content of the original IT document (Article 23 of the CAD): for example, the printed version of an IT document is an analogue copy of an IT document. In some cases, the analogue copy may be made on an IT medium, as in the case of an audiocassette reproducing the sounds of the original IT document.

1.8. Describe the legal effects of changing the form of physical evidence to electronic.
(In answer to this question, please explain whether it is admissible to change evidence in the physical form to electronic and what legal effect such a change has. If applicable, please cite the provisions relating to changing the form of physical evidence.)

It is possible to make IT copies of analogue documents, i.e. documents reproducing the content of paper documents, although not necessarily graphically identical, or IT copies by image of analogue documents after digital acquisition of the original paper document, using a digital scanner. Article 1, par. 1, of the CAD rules the electronic copies of analogue documents, stating

[20] A. AMOROSO, *Le prove informatiche*, in G.D. FINOCCHIARO, F. DELFINI (a cura di), *Diritto dell'informatica,* Torino, 2014, p. 1181.

that an electronic copy is an IT document with the same content as the analogue document from which it is taken (lett. i bis), and also ruling the "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter). A digital copy of an analogue document is a digital document that does not graphically correspond to the analogue document, but reproduces its content (lett. i bis). The "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter) are electronic documents that have the same content and the same form as the analogue document from which they are taken. They are obtained by scanning the first document and using the "*pdf format".* Article 22, par. 1, of the CAD confirms that a copy by image on IT support of an analogue document is produced through processes and tools that ensure that the IT document has identical content and form to the analogue document from which it is taken. This means that electronic copies can replace the original from which they are taken and are suitable for fulfilling all legal obligations concerning the registration of data.

1.9. Explain the rules and what is considered to be an original and what a copy (the concept of original).
(If applicable, please cite relevant provisions.)

In the Italian system of civil procedure, the difference between original and copy is very complex and difficult to explain.

The notion of original deed may be understood "*a contrario*" considering the notion of copies[21].

As far as **copies** are concerned, the CAD allows the following categories to be identified:

a) electronic copies of analogue documents;

b) analogue copies of IT documents;

c) electronic copies of IT documents;

d) electronic duplicates of electronic documents;

e) excerpts of electronic documents.

a) Article 1, par. 1, of the CAD rules the electronic copies of analogue documents, stating that an electronic copy is an IT document with the same content as the analogue document from which it is taken (lett. i bis), and also ruling the "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter). A digital copy of an analogue document is a digital document that does not graphically correspond to the analogue document, but reproduces

[21] G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile,* Milano, 2019.

its content (lett. i bis)[22]. The "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter) are electronic documents that have the same content and the same form as the analogue document from which they are taken. They are obtained by scanning the first document and using the "*pdf format"* [23]. Article 22, par. 1, of the CAD confirms that a copy by image on IT support of an analogue document is produced through processes and tools that ensure that the IT document has identical content and form to the analogue document from which it is taken. This means that electronic copies can replace the original from which they are taken and are suitable for fulfilling all legal obligations concerning the registration of data. But par. 5 of Article 22 of the CAD states that the Prime Minister shall identify by Decree certain categories of "**documenti analogici originali unici**" – "**unique original analogue documents**" that may be recorded with the certificate of conformity issued by a Notary or other public official[24]. According to the D.P.R. 2013, judicial Acts must only be recorded in analogue format for 20 years. Therefore, when a judicial Act is made in analogue form, it must be recorded in a single original[25].

b) Analogue copies of IT documents are analogue documents reproducing the content of the original IT document (Article 23 of the CAD): for example, the printed version of an IT document is an analogue copy of an IT document. In some cases, the analogue copy may be made on an IT medium, as in the case of an audiocassette reproducing the sounds of the original IT document.

c) Electronic copies of IT documents are digital documents having the same content as the original one (Article 1, par. 1 lett. i quarter of the CAD). From a structural point of view, the original IT document and the IT copy are different, as the files identifying them are composed by different bit sequences[26]. However, according to Article 20 of the CAD, each IT copy with a valid electronic signature has the same probative efficacy of the original one[27].

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[22] E.M. FORNER, *Procedura civile digitale. Prontuario teorico pratico del processo telematico*, Milano, 2015, p. 115.

[23] E.M. FORNER, *Procedura civile digitale. Prontuario teorico pratico del processo telematico*, Milano, 2015, p. 116.

[24] D. P. R., 21 March 2013, O.J., n. 131, 6 June 2013, at https://www.gazzettaufficiale.it/eli/id/2013/06/06/13A04834/sg

[25] For analogue judicial documents to be produced in original see, for example: Art. 210 CPC for evidentiary documents to be produced by order of the Judge; Art. 213 of the CPC for evidentiary information from the Public Administration; Art. 257bis of the CPC for written statements of witnesses.

[26] On the term "bit" coming from "binary digit", and its relevance in the Italian Civil Procedure, see M. SALA, *Il processo civile telematico*, Milano, 2017, p. 5.

[27] P. BERTOLLINI, *Il documento informatico e il documento analogico,* in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 88.

d) Electronic duplicates of electronic documents are IT documents reproducing the content and the same bit sequence of the original ones[28]. The electronic signature makes the document non-editable, with the consequence that each duplicate of the document will have the same bit sequence as the original document. According to Article 23-bis of the CAD, each IT duplicate has the same probative efficacy of the original one if it meets the conditions set out in Art. 71 of the CAD.

e) Excerpts of electronic documents are not defined by Law, but Italian Scholars unanimously affirm that they are partial copies of the IT document and have the same probative efficacy as full copies[29].

Finally, with regard to the notion of original, recalling briefly what we said about the notion of "**documenti analogici originali unici**" – "**unique original analogue documents**" that may be recorded with a certificate of conformity issued by a Notary or other public official (see above in this par.), it's now possible to highlight the notion of **"not unique original analogue documents" – "originali non unici"**. According to Scholars, these are documents whose content can be traced back indirectly, i.e. using written papers or other documents whose preservation is required, even if by third parties[30].

1.10. Describe the legal effects of a copy of electronic evidence within the law of your Member State.

(In answer to this question, please explain when electronic evidence is considered a copy. Please also elaborate on the legal effects of a copy of electronic evidence, and, if applicable, cite the relevant provisions. Should the law of your Member State not regulate copies of electronic evidence, please explain how the court perceives a copy of electronic evidence.)

In Italy, it is possible to make electronic copies of all digital documents in order to use them as evidence in civil proceedings, in two ways. On the one hand, it is possible to duplicate the files, which maintain the same digital sequence as the original IT document (so-called IT duplicate); on the other hand, it is admitted the possibility of making electronic copies of IT documents, which, in this case, have a different bit sequence: e.g. screenshots (i.e. digital photographic

[28] F. TESTA, *Documento informatico e PCT: cosa cambia per l'avvocato con le nuove regole tecniche*, 2015, www.ilcaso.it

[29] E. MANZO, *Gli atti* processuali, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 92; V. DI GIACOMO, *Il nuovo processo civile telematico*, Milano, 2015, p. 163.

[30] P. BERTOLLINI, *Il documento informatico e il documento analogico*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 86.

images) of Web pages consulted on a computer or a tablet, or screenshots of messages sent with a smartphone[31].

Electronic copies of IT documents are digital documents having the same content as the original one (Article 1, par. 1 lett. i *quater* of the CAD). From a structural point of view, the original IT document and the IT copy are different, as the files identifying them are composed by different bit sequences. However, according to Article 20 of the CAD, each IT copy with a valid electronic signature has the same probative efficacy of the original one[32].

2. Authenticity, reliability and unlawfully obtained electronic evidence

2.1. Are there any particular procedure, guidelines, mechanism or protocol on how the parties shall obtain electronic evidence in order to preserve their authenticity and reliability before submitting them to the court?

(If applicable, also comment on possible effects regarding the admissibility of electronic evidence if they are not obtained in accordance with such procedures or technical guidelines.)

YES, in order to obtain electronic means of evidence validly admitted by the Courts in Italy, it's necessary to follow the prescriptions established ("regole tecniche") by Decree No. 44/2011[33], so-called Regulation on the technical rules for the implementation of IT technologies in the Civil Proceedings, and the specifics rules ("specifiche tecniche") detailed by the D.M. of 28 December 2015[34]. Article 12 of the so-called Regulation on the "specifiche tecniche" states that the Electronic Judicial Acts or Electronic Judicial Documents to be presented to the office of the Bailiffs must comply the following conditions: a) the pdf format; b) the lack of active elements (as the macros, and for example the macro concerning the date of the file)[35]; c) the

[31] For some cases where this type of evidence has been taken into account see: Trib. Torino, 31 March 2015, Foro it., 2016, I, 1108; Trib. Naples, sec. Aversa, 10 August 2016, Foro it., 2016, Arch. Merito, 2016, 1952, 35

[32] P. BERTOLLINI, *Il documento informatico e il documento analogico*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile,* cit., p. 88.

[33] D.M., 21 February 2011, n. 44, *Regolamento concernente le regole tecniche per l'adozione nel processo civile e nel processo penale, delle tecnologie dell'informazione e della comunicazione, in attuazione dei principi previsti dal decreto legislativo 7 marzo 2005, n. 82, e successive modificazioni, ai sensi dell'articolo 4, commi 1 e 2, del decreto-legge 29 dicembre 2009, n. 193, convertito nella legge 22 febbraio 2010 n. 24*, in O.J., n. 89, 18 April 2011, https://www.gazzettaufficiale.it/eli/id/2011/04/18/011G0087/sg

[34] D.M. 28 December 2015, "*Modifiche alle specifiche tecniche previste dall'art 34, c1 del decreto 21 febbraio 2011, n. 44, regole tecniche per l'adozione, nel processo civile e penale, delle tecnologie dell'informazione e comunicazione, in attuazione dei principi previsti dal d.lgs. 82/2005 e successive modificazioni, ai sensi dell'art. 4, c1 e c2 del d.l. 29 dicembre 2009, n. 193, convertito nella l. 24/2010*", at https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC1204937&previsiousPage=mg_1_8_1

[35] This point has been clarified by the Note of the Italian Ministry of Justice, DGSIA (Direzione Generale per i Sistemi Informativi Automatizzati), "*Indicazioni per la creazione dell'atto principale di un deposito"*, available at https://pst.giustizia.it/PST/resources/cms/documents/Indicazioni_su_creazione_Atto_principale.pdf . On this point, see: R. ARCELLA, P. CALORIO, *Gli "elementi attivi" vietati nelle regole tecniche del PCT – ricostruzione*

transformation of a textual document, without scanning. The purpose of this disposition is to allow each party access to the documents thus produced, and also to enable the Judge to cut and paste the Acts of the Parties to include them in the final Judgment. Italian case law points out different approaches to the implementation of these rules. In some cases, Acts scanned from the original have been accepted by Bailiffs and sanctioned only for a mere irregularity[36]; in other cases, the pdf image format has not been accepted by some offices[37].

2.2. Is there any particular procedure on how the court should identify the source of electronic evidence?
(If any official guidelines, mechanisms or protocols are established within the law of your Member State to identify the source of evidence, by either the expert or the court, please mention those as well (e.g. in the case of evidence derived from cloud computing, blockchain or using AI algorithms).)

The main sources of electronic evidence are: e-mail, Web pages, phone messages, WhatsApp and other means of instant messaging and social networks (Facebook, Instagram).

To be produced in civil proceedings as electronic evidence, in Italy, they must fulfil the conditions set out in the Guidelines governing "the Formation, Management and Preservation of Computerized Documents," published by the Italian Agenzia per l'Italia Digitale (AGID), and in force since January 1, 2022, following Article 44 of the CAD, according to which "in all cases in which the law prescribes preservation obligations, even for private entities, the preservation system of electronic document ensures, for what is stored in them, characteristics of authenticity, integrity, reliability , readability, retrievability, according to the methods indicated in the Guidelines"[38].

2.3. Does the law of your Member State stipulate different rules or provisions for different types of electronic evidence? (*Please explain whether certain types of electronic evidence are presumed authentic and reliable and others inauthentic and unreliable. If applicable, please cite the provisions regarding (in)authenticity and (un)reliability of electronic evidence.)*

della normativa di riferimento e indicazioni operative, 2016, https://avvocatotelematico.studiolegalearcella.it/2016/01/19/gli-elementi-attivi-vietati-nelle-regole-tecniche-del-pct-ricostruzione-della-normativa-di-riferimento-e-indicazioni-operative/

[36] Trib. Milan, 3 February 2016, n. 1432, www.altalex.com 2016; Trib. Vercelli, 4 August 2014, www.pergliavvocati.it ; Trib. Udine, 28 July 2014, www.pergliavvocati.it

[37] Trib. Rome, 13 July 2014, *Giurisprudenza italiana*, 2015, 368.

[38] Guidelines on the formation, management and storage of computerized documents, AgID, May 2021, available at https://www.agid.gov.it/sites/default/files/repository_files/linee_guida_sul_documento_informatico.pdf

YES.

According to Article 21, par. 2, of the CAD every electronic document that is signed electronically is presumed to have been signed by the owner of the electronic signature, who has the burden of proving that he or she did not sign the document. Electronic records with a simple electronic signature are admissible, but are freely assessed by the Court based on the quality, integrity and features of digital records to store information. As stated in Article 2712 of the CC, all digital records without a qualified or advanced digital signature must be considered as **real evidence**[39].

The Court is called upon to judge the degree of reliability of the electronic system in relation to the integrity and identity of the digital record. This leads to further consequences: a record with a qualified digital signature may be subject to a voidness procedure (see above) when a party argues that its private digital key for signing digital documents has been abused by an unauthorized person, pursuant to Article 221 of the CPC. In case of positive outcome, the legal effects of the record are null and void. Another procedure, whose purpose is to object the authenticity of a private signature of a record on paper is a kind of exclusion procedure. The outcome of an exclusion procedure may lead to the exclusion of the record from legal proceeding and, consequently, the receipt of the record is not included in the proofs, part of the evaluation process carried out by the Court. The voidness as well as the exclusion procedure may not be used in the case of **real evidence**. As a consequence, the Court may ascertain the integrity and authenticity of the digital record by using other means of evidence. In this scenario, a digital record is not formally excluded from the evidence produced in the legal proceedings and the Court may still decide on the fact represented, even if a party argues on its integrity or authenticity. For example, if a digital image is produced and a defendant raises objection on its integrity because the event represented was manipulated with Photoshop, the Court may still decide on the fact depicted in the image presented. It is clear that the failed adjustment of the law of evidence to the new technological developments added legal risks because the admissibility of a digital record, the integrity or authenticity of which has been questioned, is left to the Judge's sole assessment, without legislative parameters.

In Italy, there are some questionable law cases concerning the identification of records without a qualified or advanced digital signature. For example, the username and password used by users to identify themselves to an e-mail service provider have also indicative function. Italian

[39] Cass. n. 5523/2018

Courts have repeatedly held that an unsigned e-mail message is capable of constituting a signed electronic document with an electronic signature[40]. This analysis moves from the idea that the sender, in order to create and send an e-mail, must perform an act of validation by entering his/her personal identification (username) and the password of his/her access code[41]. It is possible to argue that the identification codes used as the signature of the author should be sent to the recipient of the message and not to the provider of the e-mail service.

2.4. Does an unfamiliarity with the technical part and a (high) possibility of manipulation of electronic evidence impact its evidentiary value?
(Please elaborate on whether the technical nature and a [high] possibility of manipulation of electronic evidence have any impact on the court's assessing of the evidentiary value.)

NO, probative value is not compromised in Italy by unfamiliarity. There are several Italian judgments of merit that attribute probative effectiveness to e-mails, conversations on social networks, i.e. WhatsApp[42], sms[43], Web pages.

2.5. When should the court appoint experts to process electronic evidence?
(Please enumerate cases in which the court may or must appoint an expert when processing electronic evidence.)

In Italian civil proceedings, there are two different types of experts: the court- appointed technical expert ("Consulente Tecnico d'Ufficio" or "CTU") and the expert appointed by the parties ("CTP").

The CTU is an assistant to the judge, who performs his or her activity at the judge's request, when the lawsuit requires specific technical skills. Where doubts arise in processing electronic evidence, the Italian Judge may appoint a CTU to assess the reliability, authenticity and (un)lawful manner in which electronic evidence was obtained.

[40] Trib., Milan, sez. V, 18 October 2016, n. 11402**;** Cass., 17 July 2019, ord. n. 19155.
[41] Opinion No. 31/06 of the Council of State, issued No. 30 January 2006, regarding the draft of the Legislative Decree n. 159/2006, *Foro it.*, 2006, III, 237.
[42] Trib. Ravenna, 10 March 2017, n. 231: in this case, the Italian Judges sentenced a woman to pay back the money to her ex-boyfriend who had lent her the money to buy a car, on the evidentiary issues of the content of conversations held on WhatsApp and produced as part of the proceeding.
[43] Trib. Latina, sez. Terracina, 19 June 2006, n. 252 : in this case the sms concerning a divorce proceedings was shown on the party's mobile phone during the hearing (Art. 258 and Art. 261 of the CPC); Cass.11606/2018; Cass. 5141/2019; Cass- 17 July 2019, No. 19155.

As a general rule, an expert's report is not considered proper evidence, as it is intended to supplement the judge's work and provide him with technical information through a non-binding report. Before giving evidence, the CTU takes an oath. The judge then outlines the questions which the CTU must, in strict terms, answer through his or her expert report.

The expert then carries out the investigations commissioned by the judge. He or she provides the judge with any clarifications that he may need. When a court expert is appointed, the parties may request the assistance of CTPs. The CTPs can comment on the CTU's work and file a report, supporting or criticising the court expert's report.

Therefore, if the judge considers technical assistance on specific issues or for the entire proceedings to be necessary, he or she must issue an order appointing an expert and setting a hearing for his or her appearance. In this order, the judge also gives the parties a mandate to appoint a CTP. According to Article 61 of the Italian Code of Civil Procedure, the CTU must be chosen from the "*Albo dei Periti*" (Roll of Experts). This is a register divided into categories, each of which includes people with specific professional and technical skills. Each court has such a register and it is managed by the President of the court. The CTU must be neutral and impartial and cannot be linked to one of the parties (e.g. husband, wife or parent etc.). This also means that the CTU must not have any interest related to the proceedings or to other ongoing proceeding on the same issue.

Once appointed, the expert is obliged to accept his or her own appointment and may reject it only for well-grounded reasons to be assessed by the judge.

Therefore, although the expert is entitled to abstain from advising the court, he or she must also comply with the second paragraph of Art. 61 of the CPC. The parties may also oppose to an expert's appointment if there is a conflict of interest or lack of impartiality.

As far as electronic evidence is concerned, it's clear that its existence raises the need for an evaluation of evidence that takes into account the general laws of information technology, both in terms of verifying the authenticity of computerized documents as probative inferences and as maxims of IT experience.

For example, the Court may appoint an expert when IT devices is to be subjected to judicial inspection in cases where it is necessary to inspect a computer or other electronic device whose examination may be relevant to civil proceedings, such as in relation to the quality of the components used in a product which is assumed to be defective or in the case of industrial

infringement disputes. In these cases, the inspection may be carried out directly by the judge, but it may also be entrusted to a technical consultant expert in information technology[44].

It should be also noted that the inspection of hardware concerns the viewing of one or more electronic devices, the direct observation of which (or delegated to the technical consultant) appears necessary pursuant to Art. 118 of the CPC to know the facts of the case. In other words, the judicial inspection cannot be understood as an exploratory search for evidence potentially useful for the decision of the dispute, not yet identified and described in the judge's order because in this case the prerequisites for the application of this institution would certainly be exceeded[45].

More generally, this is a new field that cannot be dealt with without the help of experts in the field of information technology for law, so-called "Computer Forensic"[46]. Actually, these operators in Italy are a large and diverse group, with professionals whose training varies considerably, and some may not even have the necessary skills for the role they are entrusted to them with in a trial. The problem lies in the fact that there is no specific professional qualification, making it possible for anyone even with a rudimentary knowledge of the subject to enter the job market. In light of data provided by ONIF (National Digital Forensics Observatory), 72,6% of forensics consultants have a higher education degree and only 40,3% of those in this pool have a degree in information technology or a related field. With regard to training and continuing professional development, 45% have not gone completed any specifically designed university programme, 78% have no professional certification in the field. Moreover, continuing professional development tools largely consist of a combination of textbooks, dedicated websites, mailing lists, and social networks, thereby reducing training to a bare minimum. As for professional bodies, 53% of digital forensics experts are unregistered, either because there is no specific institution or because there are no degrees through which to gain access to the profession, as is the case with some programmes offered under the old system. The professional institution with the largest number of registered members is the engineering society. Of all interviewees, 42% were registered with an association of expert witnesses for

[44] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 564.

[45] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., pp. 564 – 565.

[46] On this point, in Italy see: S. ATERNO, *La Computer Forensics tra teoria e prassi: elaborazioni dottrinali e strategie processuali*, in *Ciberspazio e diritto*, 2006, p. 425; R.C. NEWMAN, *Computer Forensics. Evidence Collection and Management*, Boca Raton, 2007, p. 1; F. NOVARIO, *Computer Forensics*. *Tra giudizio e business*, Torino, 2012, p. 231 ss.

the court in whose jurisdiction they were working, but there were also cases where someone could be registered with more than one court – an option that the law, in theory, does not allow. Only 30% of the professionals interviewed were covered by professional liability insurance – although, to be fair, there is no legal requirement to obtain such cover.[47]

2.6. Who bears the costs if an expert needs to be appointed to assess the reliability, authenticity and (un)lawful manner of obtaining electronic evidence?

(Please explain the distribution of costs related to potential expert assessments and opinions on the reliability, authenticity and lawful manner of obtaining electronic evidence.)

In Italian civil procedure the basic rule for allocation of cost and fee is laid down in Article 91 paragraph 1 of the CPC. According to this provision, at the end of the proceedings the court orders the losing party to reimburse its opponent's expenses, including lawyer's fees. It is the so-called *principio della soccombenza (principle of losing the case)*, which also applies to court costs, lawyers' fees and other expenses[48].

The justification for this cost-shifting rule traditionally derives from general principles concerning the judicial protection of rights. According to those principles, as a result of litigation, the successful party should be in the same situation as if the other party had not brought or defended the claim. On the contrary, if the winning party were to bear the cost of litigation on a permanent basis, it should deduct them from what it has earned or retained through it. Therefore, even if successful, it would be in a worse position than before the beginning of the proceedings. This would constitute an infringement of the right to an effective remedy protected by Article 24 of the Italian Constitution. In the course of the case, each party bears the cost of its own procedural steps, including the taking of evidence. With respect to the other steps necessary for the continuation of the case, the court has a discretion to decide who will pay for them, unless there is a special legislative regulation (e.g. Art. 210, last paragraph, of the Code of Civil Procedure provides that if one party applies for a court order to have any specific document produced by another party, the requesting party has to bear the expenses).

[47] ONIF Survey 2015, *La professione del consulente tecnico informatico in Italia*, Rome, 28 April 2016, onif.it.

[48] The rules governing the categories and procedures for costs of legal proceedings, including legal aid, are comprehensively set out in Presidential Decree No. 115 of 30 May 2002 (Official Gazette No. 139/2002), as last amended by Legislative Decree No. 24 of 7 March 2019 (Official Gazette No. 72 of 26 March 2019 to extend legal aid to cover wanted persons subject to proceedings for the execution of a European arrest warrant), containing the Consolidated Text on legal costs (Articles 74 to 145, in particular the common provisions of Articles 74 to 89, the Special Provisions on legal aid in civil, administrative, auditing and tax proceedings, Articles 119 to 145).

Therefore, the party producing the electronic evidence for the evaluation of which has been stated the appointment of an expert must pay the costs.

2.7. What options are available to a party claiming that electronic evidence has been compromised, tampered with, manipulated or obtained illegally (e.g. by hacking into an IT system)?
(Please explain whether any special procedures are established within the law of your Member State to challenge the reliability, authenticity or manner of obtaining electronic evidence. If no special procedure exists, explain regular remedies that would apply in such a case. If applicable, cite relevant provisions, case law, guidelines or other sources regulating the procedure to challenge the admissibility of compromised electronic evidence.)

To challenge the admissibility of compromised electronic evidence, a party may argue the exclusion of a document or record from a proceeding when its integrity is questioned. Some problems may arise from the application to electronic evidence of Italian rules, clearly focused on documents on paper and records.

As we have already mentioned, according to Article 20 of the CAD, each IT copy with a valid electronic signature has the same probative efficacy of the original one, and pursuant to Article 21, par. 2, of the CAD the use of the qualified electronic and digital signature device is assumed to be due to the holder, unless he or she proves otherwise. This explains that the presumption necessarily implies a process by which the holder can and has to prove he or she did not use the device.

Thus, on the one hand, pursuant to Art.2702 of the CC, a party who disputes the authenticity of this electronic evidence may lodge a legal proceeding in order to request the nullity of the legal effects of a digital record by supporting and proving this position. Timestamps, signatures and seals may help to verify the provenance of the digital record. However, a case dealt with by the Court of Rome shows that timestamps and signature are not arguments that can be used to oppose the action of a party requesting the deletion of digital records, misused by another person[49]. In this case, the smartcard holder was able to prove that, on the day and at the time (8.50 a.m.) in which the deed of sale of the shares of the S.r.l. was "digitally" signed, he was in a place (at his fiancée's home, a circumstance confirmed by the production of the parking payment receipt) that was incompatible with the place (the counterparty's office and of the purchaser of the aforementioned shares) in which the contract was digitally signed. The Court

[49] Trib. Rome, 23 January 2017, n. 1127; see on this case: https://it.linkedin.com/pulse/e-se-qualcuno-utilizza-abusivamente-la-nostra-firma-un-comellini

reached this decision through the circumstances of the specific case: the claimant kept the parking receipt, which confirmed his fiancée's witness statement, who declared he had spent all his time with her, and during that time, the digital documents had been signed.

On the opposite side, the party claiming the truthfulness of the evidence may ask for the judicial verification according to Article 216 of the CPC. Since Article 216 of the CPC clearly indicates that verification can be achieved through any form of evidence, the validation procedure cannot be ignored in the same way as a graphic expert's report, which allows a link between the signature present on the document and its presumed author.

Therefore, if the signatory denies signing an electronic document, the other party who has an interest to rely on the disowned digital writing must be able to request a judicial verification pursuant to Articles 216-220 of the CPC. It follows that such a party may either request a judicial verification within the limits of relevance that the electronic document assumes in a different judgment, or request a legal action concerning the verification of authenticity of the document, having the burden of proving evidence of the actual use of signature device by the holder. This evidence is usually offered by the certifier, who "certificates" that the key used to sign belongs to the pair generated by signature device assigned to the signatory. To this purpose, the party will request the certifier of the digital record (Art. 1, e, f of the CAD) associated with the electronic document. Otherwise, it will be the party against whom the document has been filed that will have to overcome the presumption of the authenticity of the signature and, to this end, will have to proceed with the validation procedure.

The burden of proof shifts to the ownership of a digital or qualified signature. Since the use of the signature device can be out (even habitually) by someone who is not associated with the device, it cannot be sufficient to demonstrate that the signature was made by a third party. It will be necessary to give evidence that the device was used by somebody other than the holder, and this occurred outside of the holder's control.

In this case, the enforceability of Article 2702 of the CC and Articles 214-220 of the CPC (rules conceived for documents on paper) to electronic documents fulfils the purpose of guaranteeing the equivalence between electronic and handwritten documents, and to avoid the easy repudiation of an electronic signature by its author, and not to assign to the signature device holder those writings that are not attributable to his or her will and control.

2.8. How is the admissibility of compromised or illegally obtained electronic evidence regulated within the law of your Member State?
(Is the court bound by any rules regulating the admissibility of compromised or illegally obtained (electronic) evidence (e.g. explicit rules provided under your national legislation, rules developed through case law, etc.)? If the rules regulating the admissibility of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

As we have already said (see above), according to Article 21, par. 2, of the CAD every electronic document that is signed electronically is presumed to have been signed by the owner of the electronic signature, who has the burden of proving that he or she did not sign the document. Electronic records with a simple electronic signature are admissible, but are freely assessed by the Court based on the quality, integrity, and features of digital records to store information. As stated in Article 2712 of the CC, all digital records without a qualified or advanced digital signature must be considered as **real evidence**.

The Court is called upon to judge the degree of reliability of the electronic system in relation to the integrity and identity of the digital record. This leads to further consequences: a record with a qualified digital signature may be subject to a voidness procedure (see above) when a party argues that its private digital key for signing digital documents has been abused by an unauthorized person, pursuant to Article 221 of the CPC. In case of positive outcome, the legal effects of the record are null and void. Another procedure, whose purpose is to object the authenticity of a private signature of a record on paper is a kind of exclusion procedure. The outcome of an exclusion procedure may lead to the exclusion of the record from legal proceeding and, consequently, the receipt of the record is not included in the proofs, part of the evaluation process carried out by the Court. The voidness as well as the exclusion procedure may not be used in the case of **real evidence**. As a consequence, the Court may ascertain the integrity and authenticity of the digital record by using other means of evidence. In this scenario, a digital record is not formally excluded from the evidence produced in the legal proceedings and the Court may still decide on the fact represented, even if a party argues on its integrity or authenticity. For example, if a digital image is produced and a defendant raises objection on its integrity because the event represented was manipulated with Photoshop, the Court may still decide on the fact depicted in the image presented. It is clear that the failed adjustment of the law of evidence to the new technological developments added legal risks because the admissibility of a digital record, the integrity or authenticity of which has been questioned, is left to the Judge's sole evaluation, without legislative parameters.

2.9. Which party carries the burden of proving the (in)authenticity or (un)reliability of electronic evidence?
(Please explain whether the party producing electronic evidence carries the burden of proving such evidence authentic and reliable or whether the party who challenges electronic evidence is charged with proving its inauthenticity and unreliability.)

First of all, it should be pointed out that, in the Italian legal system, evidence is governed by two different sets of rules: the procedural rules are set out in the Code of Civil Procedure, under Articles 228 and 229, while the so-called 'substantive' rules are set out in the Civil Code, under Articles 2730 to 2735. The reason why the system is separated into substantive rules and procedural rules is the legal framework previously in force, in which the notion that evidence should be considered from both a static and a dynamic (purely procedural) perspective prevailed. The Report on the Civil Code explains, in line with the reasons just stated, that evidence is used to enforce or in general defend one's rights, and not only in legal proceedings, but also outside of them and prior to their initiation: hence the place of evidence in the codification of rights. The burden of proof is governed by the aforementioned text and not by the Code of Civil Procedure.

Thus, the allocation of the burden of proof is governed, generally speaking, by the Civil Code, which provides, under Article 2697, that *'whoever intends to enforce a right before a court must provide evidence of the facts supporting his or her claim. The party contesting the validity of those facts, or claiming that the right has changed or has been exhausted, must provide evidence of the facts supporting such objection'*. These principles therefore require the applicant to prove the facts on which his or her claim is based, i.e. the facts that have the legal effects claimed. The defendant, on the other hand, must provide evidence of facts precluding liability, or showing that a right has been exhausted or changed in such a way that the applicant's claim must be dismissed. If the applicant is unable to substantiate his or her claim, the application is dismissed, regardless of whether the defendant submits arguments and evidence in support of its defence. Article 2698 of the Civil Code renders null and void any agreement intended to transfer or alter the burden of proof in respect of an inalienable right or that makes it excessively difficult for either party to exercise its rights. Insufficient evidence harms the case of the party – be it the applicant or the defendant – that has to prove or disprove the facts, since insufficient evidence is considered equivalent to the absence of evidence[50].

[50] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1

In particular, with regard to the electronic evidence, if a party argues that a record with a qualified digital signature is null and void or must be excluded from the records of the proceedings because, for example, its private digital key to sign digital documents has been misused by an unauthorized person, within the meaning of Article 221 of the CPC, that party carries the burden of proving the circumstances concerning the voidness. As already said (see above), if the signatory denies signing an electronic document, the other party who has an interest to rely on the disowned digital writing must be able to request a judicial verification pursuant to Articles 216-220 of the CPC. It follows that such a party may either request a judicial verification within the limits of relevance that the electronic document assumes in a different judgment, or request a legal action concerning the verification of authenticity of the document, having the burden of proving evidence of the actual use of signature device by the holder.

2.10. Does the court have the discretion to challenge the authenticity and reliability of electronic evidence even if neither party objects the authenticity and reliability of electronic evidence?
(Please explain if the court can challenge the authenticity and reliability of electronic evidence ex officio, e.g. when there is a high possibility that electronic evidence has been manipulated and neither party objected the authenticity and reliability of electronic evidence.)

YES, although there are no systematic and clearly regulated processes for civil and commercial litigation when it comes to electronic documents, evidence and their evaluation. Given the still limited number of rules addressing this type of evidence as well as the various forms of electronic evidence in civil and commercial matters, which are increasing and changing everyday (see for example the use of blockchain), Judges are often left to their own inspiration in evaluating and interpreting the various forms of electronic evidence they receive. In this case, they have to decide which are the relevant elements to consider, but this is generally not an aspect covered by their legal education or procedural law courses.

As we have already said (see above par. 2.8), according to Article 21, par. 2, of the CAD every electronic document that is signed electronically is presumed to have been signed by the owner of the electronic signature, who has the burden of proving that he or she did not sign the document. Electronic records with a **simple** electronic signature are admissible, but are freely assessed by the Court based on the quality, integrity, and features of digital records to store

information. As stated in Article 2712 of the CC, all digital records without a qualified or advanced digital signature must be considered as **real evidence**.

The Court is called upon to judge the degree of reliability of the electronic system in relation to the integrity and identity of the digital record. This leads to further consequences: a record with a qualified digital signature may be subject to a voidness procedure (see above) when a party argues that its private digital key for signing digital documents has been abused by an unauthorized person, pursuant to Article 221 of the CPC, determining a free evidentiary hearing[51]. In case of positive outcome, the legal effects of the record are null and void. Another procedure, whose purpose is to object the authenticity of a private signature of a record on paper is a kind of exclusion procedure. The outcome of an exclusion procedure may lead to the exclusion of the record from legal proceeding and, consequently, the receipt of the record is not included in the proofs, part of the evaluation process.

The voidness as well as the exclusion procedure may not be used in the case of **real evidence**. As a result, the Court is entitled to assess – even without a specific claim by a party- the integrity, authenticity and reliability of the digital evidence using other means of evidence.

Moreover, in this scenario, a digital record is not formally excluded from the evidence produced in the legal proceedings and the Court may still decide on the fact represented, even if a party argues on its integrity or authenticity. For example, if a digital image is produced and a defendant raises objection on its integrity because the event represented was manipulated with Photoshop, the Court may still decide on the fact depicted in the image presented. It is clear that the failed adjustment of the law of evidence to the new technological developments added legal risks because the admissibility of a digital record, the integrity or authenticity of which has been questioned, is left to the Judge's sole evaluation, without legislative parameters.

2.11. How is the manipulation or (un)lawful manner of obtaining electronic evidence assessed by the court in the case of a challenge?

(In answer to this question, please explain whether judges are expected to assess if evidence was compromised or illegally obtained by themselves, whether an expert may or must be appointed, and whether any other rules and requirements have to be complied with.)

The manipulation or unlawful obtaining of electronic evidence may be assessed by Courts alone or by appointing an expert. For example, the judge may order an IT experiment to verify

[51] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 530-531.

whether a certain event may have occurred in digital reality, as in the case where a digital signature device contains, as attested by the signature certificate, a certain private key to verify its forgery for which the judge does not have the technical expertise, which must therefore be delegated to a technical consultant[52].

2.12. What are the consequences if the court finds that evidence was indeed compromised or obtained illegally?
(The question refers to procedural implications, e.g. the exclusion of evidence or considerations when assessing the weight of such evidence.)

If the Court finds that evidence has been compromised or obtained illegally, it may be excluded from the proceedings. As we have already said, Article 2712 of the CC states that all digital records without a qualified or advanced digital signature must be considered as **real evidence**. The Court is called upon to judge the degree of reliability of the electronic system in relation to the integrity and identity of the digital record. This leads to further consequences: a record with a qualified digital signature may be subject to a voidness procedure (see above) when a party argues that its private digital key for signing digital documents has been abused by an unauthorized person, pursuant to Article 221 of the CPC. In case of positive outcome, the legal effects of the record are null and void. Another procedure, whose purpose is to object the authenticity of a private signature of a record on paper is a kind of exclusion procedure. The outcome of an exclusion procedure may lead to the exclusion of the record from legal proceeding and, consequently, the receipt of the record is not included in the proofs, part of the evaluation process carried out by the Court. The voidness as well as the exclusion procedure may not be used in the case of **real evidence**. As a consequence, the Court may ascertain the integrity and authenticity of the digital record by using other means of evidence. In this scenario, a digital record is not formally excluded from the evidence produced in the legal proceedings and the Court may still decide on the fact represented, even if a party argues on its integrity or authenticity. For example, if a digital image is produced and a defendant raises objection on its integrity because the event represented was manipulated with Photoshop, the Court may still decide on the fact depicted in the image presented. It is clear that the failed adjustment of the law of evidence to the new technological developments added legal risks

[52] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 564.

because the admissibility of a digital record, the integrity or authenticity of which has been questioned, is left to the Judge's sole evaluation, without legislative parameters.

2.13. Does the law of your Member State enable for the parties to submit written statements of witnesses?
(*If yes, are pre-recorded oral statements of witnesses admissible as evidence?)*

Witness evidence is admitted by the court (Art. 245 of the Code of Civil Procedure); the court's order requires the witness to appear to give evidence, on pain of coercive measures and a fine for failure to appear. The court establishes the place, time and manner of taking the evidence. At the request of the party concerned, the court bailiff serves the summons on the witness. The witness reads out the undertaking to tell the truth and is then questioned by the judge – the parties may not question witnesses directly. The provision allows the court, with the consent of the parties, to take written evidence (Art. 257-*bis* of the Code of Civil Procedure). Expert witnesses are appointed by the court, which gives them the questions they must answer; they will also appear at the hearing and swear to tell the truth. As a rule, expert witnesses draw up a written report, but the court may also order them to appear and be questioned orally at the hearing (Art. 195 of the Code of Civil Procedure). The written evidence forms part of the proceedings once it is placed on the party's file, either at the time of first appearance or subsequently, subject to the time limits laid down by law (not later than the time limits set for the hearing in accordance with Art. 183 of the Code of Civil Procedure, for ordinary fact-finding procedures)[53].

Recordings of oral statements are not yet ruled in the Italian system of Civil Procedure, although they are highlighted as a positive outcome of the possible application of IT technologies to civil proceedings by many Scholars[54], in the wake of the US Civil Proceedings System[55].

3. Duty to disclose electronic evidence

[53] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1
[54] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 550; P. COMOGLIO, *Processo civile telematico e codice di rito. Problemi di compatibilità e suggestioni evolutive*, in *Riv. trim. dir. proc.*, 2015, p. 967; L. DITTRICH, *L'assunzione delle prove nel processo civile italiano*, in *Riv. dir. proc.*, 2016, p. 593.
[55] G.D. WATSON, J. WALKER, *New Trends in Procedural Law. New technologies and the Civil Litigation Process*, in 31 *Hastings Internattional & Comparative Law Review*, 2007, p. 251.

3.1. How is the duty to disclose electronic evidence regulated within the law of your Member State?
(Please explain whether there are any special rules explicitly regulating the disclosure of electronic evidence or if general rules of disclosure apply instead. Should the rules regulating disclosure of particular means of evidence (e.g. documents, physical objects, affidavits) be applied to disclosure of electronic evidence by analogy, please explain which rules are to be used under which circumstances. Include the name of the act and the article(s) containing relevant provisions.)

In Italy, there is no obligation of discovery set forth in law.

This means that the parties are not obliged to share relevant documents, unless an order to that effect is issued by a judge. Such an orders can only be issued when another party specifically requests a disclosure of a document and the judge deems such disclosure necessary. No such order may be issued by the court on its own initiative. An interested party wishing to request the disclosure of specific documents must file the request within the three consecutive terms set by the judge for filling of supplementary written submissions and evidence requests (namely, an initial term of 30 days from the date of the first hearing or any later date that the judge deems appropriate, then a further 30 days and a final term of 20 days). Each document request must:

- specifically identify the document(s) requested;
- prove that the party making the request has no access to the requested document(s) and that there are no other possible ways to get access to it; and
- explain why that document is relevant and material to the case.

The party receiving a request for documents is not obliged to disclose the requested document. In practice, disclosures only occur when the requested documents do not harm the disclosing party's case.

3.2. What is the scope of the party's duty to disclose electronic evidence within the law of your Member State?
(Please address the circumstances under which the party is required to provide electronic evidence (e.g. the evidence was obtained in a particular manner, the evidence refers to both parties, the parties brought up the evidence when testifying, etc.), the type of evidence they are required to provide (if applicable) and procedural requirements (e.g. does the party in need of evidence have to request particular evidence with an explicit motion, does the court have any

discretion when ordering disclosure, are there any time limits, etc). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

In the Italian System of Civil Procedure, the principle of Fair Trial, stated by several International Acts such as Article 6 of the European Convention on Human Rights (henceforth ECHR) or such as Article 47 of the Charter of the Fundamental Rights of the European Union and also referred to by national law, as for example by the Article 24 of the Italian Constitution, is declined in various ways[56].

The provision of a reasonable obligation of the parties to contribute fairly to the ascertainment of the facts in the course of civil proceedings meets the need to fully implement the principle of "fair trial". In fact, it cannot be denied that when only one of the parties is in possession of information and evidence decisive for the fate of the trial, the very constitutional principle of equality of arms is undermined[57] and the "right to evidence" as a fundamental right connected to the general principles of the Fair Trial[58] is at stake.

More generally, an obligation of truth in the process is defined[59], which determines, on the one hand, the obligation to clarify, at the judge's request, and, on the other hand, the prohibition to use false or altered evidence. In the context of the obligation to clarify, we may also consider the obligation to accept the inspection by the judge of disclosed documents, or the inspection of electronic documents, or electronic devices, relevant as evidence in the civil proceedings. The recent reform of Italian Civil Procedure has affirmed the need to strengthen the parties' duty to cooperate[60], for example providing for a pecuniary sanction (500 – 3000 euros) for the

[56] On this topic see: X. KRAMER, *Cross-border enforcement in the EU: mutual trust versus fair trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, 2011, 2, pp. 202 – 230; A. LEANDRO, *L'equo processo nel diritto processuale civile internazionale europeo,* in *Rivista di diritto internazionale private e* processuale, 2016, p. 22; M. ZLINSKY, *Mutual trust and Cross-border enforcement of judgments in Civil Matters in the EU: does the step-by-step approach work?* Netherland International Law Review, 2017, 64, pp. 115 – 139.

[57] M. GRADI, *Doveri delle parti e dei terzi (artt. 96, 118, 121, 210, 213 c.p.c.),* in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, Pisa, 2023, p. 31. More generally, M. GRADI, *L'obbligo di verità delle parti*, Torino, 2018, p. 259.

[58] N. TROCKER, *Il regolamento (CE) n. 1206/2001 del Consiglio del 28 maggio 2001, relativo alla cooperazione fra le autorità degli Stati membri nel settore dell'assunzione della prova in materia civile e commerciale,* in M. TARUFFO, V. VARANO, *Manuale di diritto processuale civile europeo,* Torino, Giappichelli, 2011, p. 285.

[59] M. GRADI, *L'obbligo di verità delle parti*, cit., p. 379.

[60] Art. 1, par. 21, of the Law 26 November 2021, n. 206, *Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata. (21G00229), O. J.,* n. 292, 9 December 2021, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;206. The reform was implemented by Legislative Decree 10 October 2022, No.

party refusing the inspection order (Article 118, par. 2 of the CPC), or for the party refusing to disclose documents (Article 210, par. 4 of the CPC).

3.3 Does the duty to disclose electronic evidence apply to third persons?
(Please elaborate on whether persons not directly involved in proceedings must present or disclose electronic evidence under the same conditions as the parties or whether different rules apply. If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

YES, Art. 210, last paragraph, of the CPC provides that if one party asks the court to order the production of a specific document by another party, or by a third person, the requesting party must bear the expenses. The recent reform of Italian Civil Procedure[61] has affirmed the need to strengthen the third party's duty to cooperate during the taking of evidence by providing for a pecuniary sanction (from 250 to 1,500 euros) for the third who refuses the disclosure of evidence and the inspection order (Article 118, par. 3 of the CPC).

3.4. Are there any limits to the duty to disclose electronic evidence specified within the law of your Member State?
(Does your national legislation stipulate reservations and exceptions to the duty of disclosure that would apply to (or also to) electronic evidence? On the one hand, the question refers to the right to refuse disclosure, privileges, the protection of secrecy and similar restrictions. On the other hand, it refers to measures imposed to prevent abuse in the form of fishing expeditions (requesting non-specific or broad information and evidence in the hope of gaining compromising materials) or excessive disclosure (providing an unmanageable volume of information in the hopes of confusing the parties or the court and delaying proceedings). If the rules regulating the disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

YES.

A party may refuse to produce documentation without any adverse consequences resulting therefrom, where this would cause serious damage to the party ordered to produce it or to third parties. Documentation covered by professional secrecy (*Article 200, of the Criminal Procedure Code – Codice di Procedura Penale, henceforth CPP*) generally concerns: priests; lawyers; party-appointed experts; private investigators; doctors; pharmacists; nurses; public

149, O.J. 17 October 2022 No. 243, s.o. No. 38. The Law 29 December 2022, No. 197, O.J., 29 December 2022, No. 303, s.o. no. 43 brought forward the entry into force of the Reform to 28 February 2023.
[61] Law 26 November 2021, n. 206, cit.

officers in possession of state secrets. Bank secrets are not encompassed by this provision, however courts seem increasingly keen to safeguard the privacy rights of bank's clients who are not involved in the dispute.

Moreover, the attorney has a duty to preserve the confidentiality of information obtained in the exercise of the legal profession and a corresponding right not to disclose such information. This duty has the effect of immunity from forced disclosure.

Compliance with the aforementioned duty of confidentiality towards the attorney's client is enforced by the imposition of a sanction on the non-complying attorney, which may result in a suspension from practising law for one to three years, pursuant to Article 28 of the Lawyers' Code of Conduct. However, under Italian law, confidentiality breaches do not result in the inadmissibility of the documentation produced. According to the Lawyers' Code of Conduct, it is forbidden to disclose in court both documents and correspondence between lawyers marked as confidential. However, documents filed in breach of such a ban may be still examined by the judge; communications concerning discussions on out-of-court settlements.

In-house counsels are not enrolled in the Lawyers' Bar, so they are not to be considered subject to the relevant Code of Conduct.

3.5. What are the consequences of a violation or non-compliance with the duty to disclose electronic evidence?

(Please explain whether any coercive measures or sanctions may be imposed against a party or a third person who unjustifiably refuses to comply with their duty to disclose (electronic) evidence. Does your national legislation provide for any presumptions or fictions regarding the truth of facts to be proved with undisclosed evidence? If the rules for disclosure of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

The recent reform of Italian Civil Procedure has affirmed the need to strengthen the parties' duty of cooperation[62], for example providing for a pecuniary sanction (500 – 3000 euros) for the party refusing the inspection order (Article 118, par. 2 of the CPC), or for the party refusing to disclose documents (Article 210, par. 4 of the CPC). Likewise, there is a pecuniary sanction

[62] Art. 1, par. 21, of the Law 26 November 2021, n. 206, *Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata. (21G00229)* , *O. J.*, n. 292, 9 December 2021, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;206. The reform was implemented by Legislative Decree 10 October 2022, No. 149, O.J. 17 October 2022 No. 243, s.o. No. 38. The Law 29 December 2022, No. 197, O.J., 29 December 2022, No. 303, s.o. No. 43 brought forward the entry into force of the Reform to 28 February 2023.

(250 – 1500 euros) for the third refusing the disclosure of evidence as well as the inspection order (Article 118, par. 3 of the CPC).

Moreover, Article 116, par. 2, of the CPC states that the party's unjustified refusal to comply with the order of exhibition allows the judge to infer evidence in accordance with Art. 116 of the CPC.

Some Italian Scholars consider this disposition as an insufficient "*probatio inferior*" to autonomously base the judge's decision, as per Art. 116 of the CPC, since a difference can be inferred between proofs and proof arguments; the arguments could only provide supplementary sources of the judge's conviction. This orientation confirms the possibility for the litigant to avoid defeat by failing to clarify the factual situation, by failing to produce a decisive document in its possession, by refusing to allow inspections of places or assets under its control, or by denying the examination of its person[63].

However, there is a part of Scholars who consider that the unfair behaviour of the litigant who does not provide evidence may constitute an independent element to establish a presumption and not only an element of evaluation. This orientation is preferable as it is consistent with the principle of equality of arms and with the values of due process[64], because it allows the opponent's obstructionism to be neutralised[65]. This orientation leads to a sort of "*fictio veritatis*", in which the presumption helps but does not bind the judge and can be overcome by contrary evidence. Indeed, it would be unreasonable to apply an automatic evidentiary sanction against the uncooperative party even in the presence of contrary proofs. There is no doubt that there is no certainty that with this presumptive mechanism the truth is actually reached in the trial, but it is clear that this instrument protects the party's right of defence, by nullifying the opponent's unfair conduct. Thus, a "fiction of truth" is used to safeguard the "right to the truth"[66].

3.6. Have there been any problems before the national courts in your Member State arising from differences in national regulations of the duty to disclose electronic evidence, or are such problems to be expected in the future?

[63] For an application of this orientation in Italian Case Law, see Cass. Civ., sez. Lav., 10 July 1998, No. 6709, in *Arch. Civ.*, 1998, p. 1365: in this case, in order to prove the overtime worked, an employee requested and obtained an order stating that the employer had to show documents certifying the hours worked, but the defendant not complying with the judicial order, won the case on the basis of the theory of the "*probatio inferior*".

[64] Civ. Cassation, 16 September 2021, ord n. 25064.

[65] A. LEANDRO, *L'assunzione delle prove all'estero in materia civile nell'era dell'innovazione digitale. La rifusione delle norme applicabili ai rapporti fra gli Stati membri dell'Unione europea,* Torino, Giappichelli, 2021, p. 63.

[66] M. GRADI, *Doveri delle parti e dei terzi (artt. 96, 118, 121, 210, 213 c.p.c.),* cit., p. 45.

(The answer to this question should contain an overview of any case law addressing the duty to disclose electronic evidence (or other evidence, if the same issue could arise concerning electronic evidence) in the context of cross-border proceedings, most notably any cases in which the problems resulted from national differences in the scope of the duty to disclose such evidence (e.g. a broader scope of the duty to disclose evidence in one participating Member State than in the other, privileges or exceptions existing in one Member State but not in the other, etc.). If no such case law exists, please explain any potential problems discussed in legal literature or any problems you expect to arise in practice.)

The duty to disclose electronic evidence and evidence is only strictly ruled after the recent reform of the Italian Civil Procedure, as we mentioned (see above). For this reason, there is no relevant case law. Since the Italian Supreme Court follows a very flexible notion of procedural public policy, as for example in the decision No. 1239/2017 concerning evidence acquired in a German Judgment to be recognized in Italy[67], it's unpredictable how privileges or exception to the duty to disclose evidence in other Member State may be evaluated by Italian Judges. As we have said, the duty to disclose evidence is linked to fundamental principles such as the right to defence in a fair trial, but the provision of sanctions strengthening this duty is so recent that the application of the principle within the jurisprudence is currently unpredictable[68].

4. Storage and preservation of electronic evidence

(Storage and preservation of electronic evidence refer to the preservation of electronic evidence in active cases which have not yet been concluded with a final act. For archiving electronic evidence in closed cases, see the next part of the questionnaire.)

4.1. How is the storage and preservation of electronic evidence regulated within the law of your Member State?

(Please list legal acts or other documents establishing rules for the proper storage and preservation of electronic evidence (e.g. including guidelines, protocols and instructions) and shortly indicate their content or purpose. If the relevant solutions have developed in practice, explain these as well.)

Art. 20 of the CAD states that the technical rules for the formation, transmission, conservation, copying, duplication, reproduction and validation of electronic documents, as well as those

[67] Cass. Civ., 18 January 2017, n. 1239, in *Rivista di diritto internazionale private e processuale*, 2017, 4, p. 1042.
[68] The case of national rules such as § 128a ZPO allowing the videoconferencing in case of taking evidence is different. In case of effects of a German Judgment in Italy, it seems that this rule is not relevant as public policy exception. On this point see: A. PIEKENBROCK, *Il processo civile Tedesco dal modello di Stoccarda in poi: passi avanti e indietro,* in *Giusto proc. civ.*, 2013, p. 698; M. WALLIMANN, *Der Unmittelbarkeitsgrundsatz im Zivilprozess*, Tübingen, 2016, p. 267.

concerning the generation, issuance and verification of any type of electronic signature, are established pursuant to Article 71 of the CAD. The date and time of creation of the electronic document are enforceable against third parties if they are issued in compliance with the validation technical rules.

Art. 71 of the CAD states that ".1.By decree of the Delegated Minister for Simplification and Public Administration, on the proposal of the Agency for Digital Italy- Agenzia per l'Italia Digitale[69] (henceforth AgID), in agreement with the Minister of Justice and the competent Ministers, having heard the Unified Conference referred to in Article 8 of the Legislative Decree of 28 August 1997 , No. 281, and the Guarantor for the protection of personal data in matters within its competence, the technical rules for the implementation of this Code are adopted[70].

As of 1 January 2022, the new technical rules on "the Formation, Management and Preservation of Computerized Documents," published by AGID, are in force.

The guidelines will update the technical rules of the Digital Administration Code (DAC) for the creation, registration, management and storage of electronic documents. the aim is to create a single legislative framework for these processes.

With a holistic vision covering all phases of document management, the new rules aim to facilitate the law's future adaptation to changes in digital technology. To this end, the standard includes a static text and 6 annexes that are more flexible and adaptable to technological developments. The annexes are:

- Glossary of terms and acronyms
- File and dump formats
- Process certification
- Standards and technical specifications
- Metadata

The new measures affect the overall management of electronic documents and require companies to update their internal processes and procedures.

[69] The Agenzia per l'Italia Digitale ("AgID") is the Italian supervisory body, notified to the Commission pursuant to Article 17 of eIDAS Regulation. AgID supervises qualified trust service providers established in Italy through ex ante and ex post supervisory activities and also acts as the national body responsible for establishing, maintaining and publishing national trusted lists. AgID maintains a publicly accessible list of supervisory bodies for qualified certificated providers.

[70] http://www.agid.gov.it/sites/default/files/leggi_decreti_direttive/dpcm_13_11_2014_regole_tecniche_documento_informatico.pdf -

Annex 5 makes some important changes to the use of metadata, requiring the inclusion of more fields in electronically stored documents by June 2021.

It also defines more complex metadata to ensure maximum flexibility. The aim is to improve interoperability, transparency and the preservation of documents' probative value.

The new rules define more precisely the role of the Preservation Manager, the person responsible for preserving electronic documents. They also better outline the process and infrastructure of the storage system.

EDICOML is a long-term electronic storage service that guarantees the integrity and authenticity of documents over time, providing them with probative value before third parties. EDICOM is a Qualified Trust Service Provider in compliance with the European e-IDAS regulation[71].

The application of advanced security mechanisms, such as electronic signatures and time stamps, guarantees the authenticity and integrity of documents from the moment they are stored in EDICOMLta.

Users of the EDICOMLta service can archive any type of document, including invoices, contracts, or videos. Files are stored in an agile and simple way.

4.2. Provide a short overview of requirements, standards, and protocols for properly storing and preserving electronic evidence.
(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of evidence. If there are any special rules regulating the storage of metadata, please describe them.)

In order to ensure and preserve the testimony of a fact (such as the payment of an obligation) or to form a relevant act (such as a statement of a contract) the document will always be stored on hardware – that is a physical element - media on which data are recorded. With reference to an electronic document, data are stored in binary language. This sequence of bits would be evanescent and unreadable without software capable of representing text in human-readable form. Therefore, an electronic document cannot exist without hardware and software.

Art. 3 of the Regole tecniche "Technical Rules" [72] states that:

[71] EU Regulation, 910/2014 "Regulation on electronic identification and trust services for electronic transactions in the internal market", commonly referred as the e-IDAS Regulation
[72] D.M., 21 February 2011, n. 44, cit.

2. The electronic document takes on the feature of inalterability if it is formed in such a way that its form and content cannot be altered in the holding and access phases and its static nature is guaranteed in the conservation phase.

4. In the case of an electronic document formed pursuant to paragraph 1, letter a), the characteristics of inalterability and integrity are determined by one or more of the following operations: a) signing with a digital signature or with a qualified electronic signature; b) affixing a time stamp; c) transfer to third parties by certified e-mail; d) storage on document management systems that adopt suitable security policies; e) storage in a preservation system.

4.3. Is electronic evidence stored in one central location, or is the storage decentralised?
(Please explain the "physical" location of servers or media where electronic evidence is stored, e.g. each court might be responsible for storing electronic evidence to be used before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to store electronic evidence for all (or several) courts, etc.)

In Italy, the development of the "Processo Civile Telematico – PCT – On Line Civil Trial" is generally supported by a PCT Infrastructure through the e-Justice Portal provided by the Ministry of Justice.

As far as the storage of electronic evidence is concerned, it is possible to recall the Portal of IT Justice service (http://pst.giustizia.it), based on a complex architecture in which the flows linking the authorized entities within the so-called Justice Domain are distinct from the flows communicating between the Justice Domain (judges, clerks and bailiffs) and the external authorized entities (lawyers, parties and consultants)[73]. The "Justice Domain " (Art.1 letter a) of Ministerial Decree 44/2011 is the set of software and hardware that manage proceedings and interact with the outside world.

The telematic services manager connects the authorized internal entities (magistrate, clerk, bailiff). These entities have direct access to the computerized registry of the Chancellery that contains the individual computerized files of each judicial proceeding. The "Sistema Civile Informativo Distrettuale"- "Civil Informative Distrectual System" (henceforth "SICID") is the subset of the justice domain through which the administration manages the civil proceedings. In particular, the system must guarantee: (i) the identification of the judicial office and of the subject; (ii) the performance of allowed activities (consultation, insertion, modification or

[73] Art. 5 Regolamento specifiche tecniche 2014

communication of acts or data); the fulfilled receipt of a communication; and (iii) automatic legitimation for access granted to lawyers and public officials. The main resources pertaining to the SICI are: (i) the local operator; (ii) the court file management system, (iii) the judge's console; (iv) the digital document register kept by the chancellery (the so-called repository), and (v) the access points for qualified external users.

The judge, after having drafted his or her own provisions and digitally signed them, can deposit them telematically in the registry via the "magistrate's console"; the Registry updates the computerized register (through the SICID system) and the data flow, through the telematic services, transmits the provision directly into the computerized file and the computerized register of the Registry.

In order to obtain on-line access to non-anonymous information and electronic acts, the external user must be e-Identified through strong authentication (i.e. smart card, cryptographic tokens, etc.), which is performed by an Access Point or the Italian e-Justice Portal provided by the Ministry of Justice itself.

The owner of an Access Point – which becomes responsible for the e-Identification process of its users – can be a Bar Association, a public administration or a private company (with a minimum share capital of 1 million euros). The system must comply with the security specifications defined by the Ministry of Justice, which gives explicit authorization after performing specific security checks. The architecture of synchronous services implements application-to-application interoperability: this means that queries on the Case Management System and the File System are performed by specific web services available both to the Access Points and to external software, which can thus develop their own user interfaces and/or integrate their own applications. The PCT Infrastructure also enables electronic payments, connecting both the Access Points and the Italian e-Justice Portal to the banking system through a specific infrastructure developed by AgID; a highly secure connection is created in order to return an electronic payment receipt to the payer; the receipt (an XML file digitally signed by the bank) can then be e-filed in the court as official proof of payment of court fees or other taxes; the Case Management System checks the integrity and authenticity of the receipt, ensuring its unique use by checking the central repository of all receipts.

The PCT Infrastructure is connected to the e-CODEX platform[74], which currently operates among 21 Member States[75], third countries[76] and professional associations[77], to enable cross-border transmissions: the payload from another pilot country is automatically checked and transformed into the PCT envelope in order to be transmitted directly to the Court[78].

Each court is responsible for storing the electronic evidence to be used before that very court in its own premises entered in the Italian e-Justice Portal.

4.4. Who is entitled to carry out the activities related to storing and preserving electronic evidence?

(Please explain any potential requirements or limitations on who may carry out activities related to storing and preserving electronic evidence, e.g. private vs. public entities, certification or qualification requirements, etc.)

The filing and preservation of electronic evidence in the context of IT file proceedings is a duty of the registry of each Court, pursuant to Articles 36 disp. att. Of the CPC.

With regard to the implementation of this duty, it is important to point out that the Ministry of Justice uses its own IT services manager and its own certified mail manager, as stated by the "Regolamento Specifiche" (Specifications Regulation). The telematic services manager uses

[74] The eCODEX infrastructure was developed by a broad consortium of Ministries of Justice of Member States, with the support of EU funds, between 2010 and 2016 and is now managed by a consortium of Member States and other organisations, financed by an EU grant. At present, the cross-border electronic exchange of data in the field of judicial cooperation in civil and criminal matters by means of the e-CODEX system is governed by Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the electronic cross-border exchange of data in the field of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726. See generally M. VELICOGNA, *Coming to Terms with COmplexity Overload in Transborder e-Justice: The e-CODEX Platform in the circulation of agency in E-Justice*, Dordrecht, Springer, 2014, pp. 309 – 330; M. VELICOGNA, *e-CODEX and the Italian Piloting Experience*, IRSIG-CNR Working Paper, 2015.

[75] Austria, Belgium, Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Spain, Hungary

[76] Norway, United Kingdom, Turkey, and Jersey Island.

[77] The Council of Bars and Law Societies of Europe (CCBE), and The Council of the Notariats of the European Union (CNUE).

[78] More generally on this topic see: Impact assessment of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285), of the Taking of Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0285); Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a telematic system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726, SWD (2020) 541 final 2 December 2020, par. 1.1.

the POP3, POP3S, IMAP, IMAPS and SMTP protocols to connect to the certified e-mail manager.

Article 11 of the "Regolamento Specifiche" (Specifications Regulation) rules that for each proceedings an electronic file is to be set up that collects the documents (deeds, attachments, electronically certified mail receipts) formed by anyone, as well as electronic copies of the documents; it also collects the electronic copies of the same documents when have been filed on paper. The IT file management system, implemented according to the provisions of Article 41 of the CAD, is the part of the Ministry of Justice's documentary system that deals with the storage and retrieval of all the IT documents produced, both internally and externally; it therefore provides the user systems (registration management systems, telematic service managers and tools available to magistrates) all the methods – exposed through special web services – necessary for retrieval, archiving and preservation of electronic documents, according to the legislation in force; access to the document management system takes place only through user systems, which manage the profiling and authorization logics. Access operations to the IT file are recorded in a site log file containing the following information:

a) the tax code of the person who logged in;

b) the reference to the document retrieved or consulted (identification code of the document within the document system);

c) the date and time of access.

The aforementioned log file is subject to a preservation procedure, always within the document system, for five years.

4.5. Who may access electronic evidence in a particular case and how?

(Please explain who has access to electronic evidence, which conditions must be met, and which procedure must be followed.)

Access to the consultation services takes place over a secure channel (SSL protocol) following IT identification at an access point or on the Justice telematic services portal, according to the specifications set out in Article 6 of the "Regolamento Specifiche" (Specifications Regulation); following this identification, the access point or the telematic services portal assigned grants the user a consultation role; once this operation has been performed, the tax code of the person making the access (in the http header) and the role consultation role (in the SOAP message) are transmitted to the proxy of the IT services manager; the proxy transmits the request to the web

service of the IT services manager. The system provides access authorizations with respect to the master data kept in the register management systems.

4.6. How is the accessibility of stored electronic evidence preserved over time?
(Which measures are taken to guarantee the accessibility of stored electronic evidence in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

Article 13 of the Regolamento Specifiche (Specifications Regulation) states that "Attached IT documents must be free of active elements, including macros and variable fields, and are allowed in the following formats:

a) .pdf

b) .rtf

c).txt

d) .jpg

e).gif

f) .tiff

g) .xml

h) .eml, provided that they contain files in the formats referred to in the previous letters.

i) .msg, provided that they contain files in the formats referred to in letters a to h.

2. The following compressed formats are allowed as long as they contain files in the formats provided for in the previous paragraph:

a) .zip

b) .rar

c) .arj.

Attachments may be signed with a digital signature or qualified electronic signature; in the case of compressed formats, the digital signature, if present, must be applied after compression.

Following these rules, the only way to deposit audio or video files correctly is the traditional one, i.e. by depositing them at the registry office, taking care to burn the files on CD or DVD support. In this way, what is placed on the CD or DVD after burning can no longer be modified / replaced / deleted, so no one can ever suspect that what is embedded in the optical unit may have been altered over time.

4.7. How is the transmission of electronic evidence to other courts (e.g. to an appellate court) carried out in order to preserve the integrity of evidence?
(Please explain whether there are any special procedures to be followed by another court to access the stored electronic evidence and/or protocols for transmitting such evidence intended to preserve the integrity of the evidence and to prevent any manipulation.)

The Appellant may appear before the court in the traditional way or by telematic means. Pursuant to Article 347 of the CPC, the Appellant must deposit the file of the first instance proceedings[79]. The first instance file may be: 1) entirely analogue; 2) partly analogue and partly digital; 3) entirely digital.

In the first case, if the Appellant intends to deposit an IT file, he or she must transform the analogue files into digital files, getting a certificate of conformity pursuant to Article 16 *decies* and Article 16 *undecies* of the Law Decree n. 179/2012[80].

In the second case, if the Appellant intends to deposit an entirely IT file, he or she must transform the analogue files, present in the file of the first instance proceedings into digital files.

In the third case, the Appellant must obtain electronic duplicates (see above par.…) of the electronic documents present in the file of first instance proceedings[81]. It should be pointed out that the formation of the proceeding file is a duty of the registry of each Court before which the proceedings are pending pursuant to Article 168, par. 2 of the CPC. The creation of the IT proceeding file in the telematic process is a means of facilitating the management of and access to the procedural acts and documents of the trial with respect to all the protagonists of the same. The technology should facilitate not only access to data and consultation by external users, but could also improve the filing and exchange system between the various judicial offices to make the work of internal users more efficient[82].

4.8. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa?
(Please describe rules regarding the possibility of a conversion from electronic form to physical and from physical form to electronic when storing evidence.)

[79] For some criticism made by Scholars, see G. RUFFINI, *Sulla c.d. reversibilità dell'acquisizione probatoria documentale*, in *Riv. dir. proc.*, 2015, p. 1090.
[80] Law Decree 18 October 2012, No. 179, (O.J., No. 294 18 December 2012, s.o. No. 208), cit., on which see above par…Generally see E. FORNER, *Guida pratica alle impugnazioni*, at www.ilprocessotelematico.it; A. RICUPERATI, *Appello (PCT)*, at www.ilprocessotelematico.it
[81] E. FORNER, *Guida pratica alle impugnazioni*, at www.ilprocessotelematico.it; A. RICUPERATI, *Appello (PCT)*, at www.ilprocessotelematico.it
[82] A. BUONAFEDE, *Il fascicolo informatico*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 175.

As already said (see above par….), in Italy it is possible to switch the document from digital to analogue form, i.e. through the creation of copies of digital documents by printing a pdf file on paper documents. Analogue copies of IT documents are analogue documents reproducing the content of the original IT document (Article 23 of the CAD): for example, the printed version of an IT document is an analogue copy of an IT document. In some cases, the analogue copy may be made on an IT medium, as in the case of an audiocassette reproducing the sounds of the original IT document.

Likewise, it is possible to make IT copies of analogue documents, i.e. documents reproducing the content of paper documents, although not necessarily graphically identical, or IT copies by image of analogue documents after digital acquisition of the original paper document, using a digital scanner. Article 1, par. 1, of the CAD rules the electronic copies of analogue documents, stating that an electronic copy is an IT document with the same content as the analogue document from which it is taken (lett. i bis), and also ruling the "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter). A digital copy of an analogue document is a digital document that does not graphically correspond to the analogue document, but reproduces its content (lett. i bis). The "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter) - are electronic documents that have the same content and the same form as the analogue document from which they are taken. They are obtained by scanning the first document and using the "*pdf format"*.

Article 22, par. 1, of the CAD confirms that a copy by image on IT support of an analogue document is produced through processes and tools that ensure that the IT document has identical content and form to the analogue document from which it is taken. This means that electronic copies can replace the original from which they are taken and are suitable for fulfilling all legal obligations concerning the registration of data.

5. Archiving of electronic evidence

(Archiving of electronic evidence only refers to the preservation of electronic evidence in closed cases that have already concluded with a final act. Please include all information regarding the storing and preserving of electronic evidence in active cases in the preceding part of the questionnaire.)

5.1. How is the archiving of electronic evidence regulated within the law of your Member State?

(Please list legal acts or other documents establishing rules for the proper archiving of electronic evidence (e.g. including guidelines, protocols, instructions) and shortly indicate their content or purpose. If relevant solutions have developed in practice, explain these as well. If the rules regulating the archiving of electronic and non-electronic evidence differ, please emphasise and evaluate the distinction.)

The issue of archiving electronic documents, especially considering the duties of private parties, including also lawyers, has been greatly innovated by the "Simplifications Decree" – "Decreto Semplificazioni" (Art. 35)[83], which added paragraph 1-ter to Art. 44 of the CAD to state that: "in tutti i casi in cui la legge prescrive obblighi di conservazione, anche a carico di soggetti privati, il sistema di conservazione dei documenti informatici assicura, per quanto in esse conservato, caratteristiche di autenticità, integrità, affidabilità, leggibilità, reperibilità, secondo le modalità indicate nelle Linee Guida" - "in all cases in which the law prescribes preservation obligations, even for private entities, the electronic document preservation system ensures, for what is stored in them, characteristics of authenticity, integrity, reliability , readability, retrievability, according to the methods indicated in the Guidelines"[84].

Similarly to the public administration, private individuals, and in particular lawyers, must equip themselves with storage systems that comply with the law and cannot limit themselves to a backup in a local folder.

The guidelines require the use of a system that complies with the ISO 14721 OAIS[85] standard of 2012 and the ETSI TS recommendations 101 533-1 v. 1.2.1[86], for the storage of electronic documents.

These are the prescriptions to ensure compliance with the characteristics of authenticity, integrity, reliability, readability and availability required by Art. 44 of the CAD.

It is also necessary to recall Art. 2961 of the Italian CC, which rules the obligation to preserve files relating to judicial proceedings and to professional liability for at least three years, in relation to which the ten-year limitation period runs from the moment in which the decision becomes definitive.

These rules also apply to electronic evidence and therefore the lawyer has the duty, but also the interest, to preserve digital documents according to the CAD rules.

[83] Law Decree n. 76/2020.
[84] Linee guida sulla formazione, gestione e conservazione del documento informatico, AgID, May 2021, available at https://www.agid.gov.it/sites/default/files/repository_files/linee_guida_sul_documento_informatico.pdf
[85] Open Information System for Archiving - Sistema informativo aperto per l'archiviazione.
[86] Requirements for implementing and managing secure and reliable systems for the electronic storage of information.

With regards to the case of the lawyer's professional liability, it is worth noting the case-law of the Italian Supreme Court, which provides that "the value of the legal proof of the IT medium is subject to compliance with the technical rules of production and storage of the same"[87]. The lawyer can therefore be certain of providing effective proof of the fulfilment of his/her duties only if he/she has complied with the rules concerning the storage of electronic documents.

5.2. Shortly explain the requirements, standards and protocols for properly archiving electronic evidence.
(Please provide a summary of requirements, standards and protocols established to preserve and secure the reliability, authenticity, confidentiality and quality of electronic evidence. If there are any special rules regulating the archiving of metadata, please describe them.)

The legislative provisions cited to ensure the reliability, authenticity, confidentiality and quality of electronic evidence are substantially based on the archival science, which has defined three requirements a trustworthy record should have: accuracy, authenticity and reliability. According to the Society of American Archivists glossary, accuracy is defined as "the degree of precision to which something is correct, truthful and free from error or distortion, whether by commission or omission"[88]. Reliability is defined as "the degree to which a record can be considered reliable depends on the level of procedural and technical control exercised during its creation and management in its active life". To achieve reliability, a record must have three additional features: completeness at the time of creation, consistency with the rules of creation and the so-called naturalness. In order to be complete, a record must comply with the formal features required for that kind of document, which make it capable of generating legal consequences. For example, a sale agreement requires the mention of the parties, the subject of the sale agreement, its price, the date of creation and the parties' signatures. Naturalness refers to the fact that the materials accumulate from a routine process[89].
Authenticity is defined as "the trustworthiness of a record as a record; i.e. the quality of record establishes that it is what it is claimed to be and that it is free of tampering and corruption"[90]. Furthermore, a record must have been created by the individual represented as the creator. The presence of a signature, whether it be physical or digital, serves as a test for authenticity because

[87] Cass., n. 3912/2019
[88] Society of American Archivists Glossary, available at https://www2.archivists.org/glossary/terms/a/accuracy .
[89] Society of American Archivists Glossary, available at https://www2.archivists.org/glossary/terms/a/archival-nature .
[90] R. PEARCE-MOSES, *Authenticity InterPares Trust Terminology Database*, available at https://interparestrust.org/terminology/term/authenticity/en

the signature identifies the creator and establishes a relationship between the creator and the record. Accordingly, there are two preconditions for authenticity: identity and integrity of the record. In Italy, an advanced or qualified digital signature guarantees the creator's identity, the record's integrity and inalterability.

5.3. Is electronic evidence archived in one central location, or is archiving decentralised?
(Please explain the "physical" location of archives, e.g. each court might be responsible for archiving electronic evidence collected before that very court on their own premises/on their own servers; or some central agency, department or organisation might be authorised to archive electronic evidence for all (or several) courts, etc.)

As we have already mentioned (see above par. 4.3.), analogue and digital documents can still be used in Italy. Each court is responsible for archiving analogue and electronic evidence collected before that very court.

As far as the storage of electronic evidence is concerned , it is possible to recall the Portal of IT Justice service (http://pst.giustizia.it), based on a complex architecture in which the flows linking the authorized entities within the so-called Justice Domain are distinct from the flows communicating between the Justice Domain (judges, clerks and bailiffs) and the external authorized entities (lawyers, parties and consultants)[91]. The "Justice Domain " (Art.1 letter a) of Ministerial Decree 44/2011 is the set of software and hardware that manage proceedings and interact with the outside world. More generally, in Italy, the development of the "Processo Civile Telematico – PCT – On Line Civil Trial" is generally supported by a PCT Infrastructure through the e-Justice Portal provided by the Ministry of Justice.

5.4. Who may carry out the archiving of electronic evidence?
(Please explain any potential requirements or limitations on who may carry out the archiving, e.g. private vs. public entities, certification or qualification requirements, etc.)

When we produce a document, we certainly keep it on our systems or in our management system for a certain period of time, especially since we may need to consult it often and therefore it can may be useful to have it at hand. This phase, in which the document is "stored" for a short period of time, but ready to be retrieved and used when needed, is called **storage**.

[91] Art. 5 Regolamento specifiche tecniche 2014 (Technical Specifications Regulation)

This is the same as keeping documents on paper on the shelf behind your desk that you need to consult quickly.

However, as time passes, the closing of some projects and the opening of others, documents accumulate and we no longer need to consult them frequently: the risk is that they are not looked after properly, are lost or damaged unintentionally. Therefore, the most logical step is to identify the documents that are still important, especially for legal purposes, but not necessary for daily business, and to place them in a safe and secure area of the office, accessible only to authorized personnel: this is the proper way to preserve them.

The purpose of preservation in general, and of **digital preservation** in particular, is to protect documents for a medium to long period of time in a secure environment from which they can be retrieved when needed, following well-structured and traceable procedures.

In theory, digital preservation of documents can be done at home. In practice, however, the issue is not so simple, because creating a preservation system that complies with industry standards, as well as being efficient and secure, requires a large investment in financial resources, technology, and expertise. The best way to do this is to rely on a specialised preservation provider who offers an outsourced digital preservation service and has high standards of quality, reliability, and security. Indeed, only a **specialised preservation provider** can guarantee that a digital preservation system is based on infrastructures capable of ensuring, first and foremost, the logical and physical security of the electronic documents entrusted to it. The existence of **international standards and certifications,** which require preservation service providers to undergo periodic audits, is a guarantee for users of these services.

However, digital preservation is a complex process that requires the synergistic use of multiple skills. It is not just a matter of IT security; it is essential to have a service with the appropriate skills in **digital archiving**[92].

5.5. Must electronic evidence be archived indefinitely, or must it be deleted or destroyed after a certain period? How is the accessibility of archived electronic evidence preserved over time?

(As electronic evidence is generally kept in an archive for an extended period of time, which measures are taken to guarantee its accessibility in line with the evolution of technology? E.g. when old storage media (VHS, floppy disks, etc.) are no longer used or new, more secure types of storage media become available.)

[92] https://www.doxee.com/products/paperless-experience/digital-preservation/

As we have already said (see above par….), Article 44 of the CAD states that in all cases in which the law prescribes preservation obligations, including private entities, the electronic document preservation system shall ensure, for what is stored in them, characteristics of authenticity, integrity, reliability, readability, retrievability, according to the methods indicated in the Guidelines[93].

Similarly to the public administration, private individuals, and in particular lawyers, must equip themselves with storage systems in compliance with the law and cannot limit themselves to a backup in a local folder.

The guidelines provide for the need to use a system that complies with the ISO 14721 OAIS[94] standard of 2012 and with the ETSI TS recommendations 101 533-1 v. 1.2.1[95], for the storage of electronic documents.

These are the prescriptions that ensure compliance with the characteristics of authenticity, integrity, reliability, readability and availability required by Art. 44 of the CAD.

It is also necessary to recall Art. 2961 of the Italian CC, which sets out the obligation to preserve at least three year for files relating to judicial proceedings and professional liability, in relation to which the ten-year limitation period begins to run from the moment the decision becomes definitive. These rules also apply to electronic evidence and therefore the lawyer has the duty, but also the interest, to keep the digital documents according to the CAD rules.

Moreover, in some cases, digital preservation is a legal requirement**,** which companies and professionals cannot avoid. In particular, according to Italian law it is mandatory to preserve documents of fiscal or tax relevance, such as invoices (issued and received), purchase orders, accounting books such as VAT registers, company books, inventory books, or journal books, as well as all VAT-relevant declarations, for at least 10 years. In the event of audits by the tax authorities, these documents must be kept until the end of the audit, i.e. even beyond the minimum limit of 10 years. Furthermore, with regard to **contracts**, the Civil Code prescribes that they must be kept for at least 10 years, to be counted from the moment when the legal effects of the contracts cease. The Italian LUL (Libro Unico del Lavoro) document can also be produced and stored digitally and must be kept for at least 5 years. Finally, it may be useful to

[93] Linee guida sulla formazione, gestione e conservazione del documento informatico (Guidelines on the formati on, management and storage of computerized documents), AgID, May 2021, available at https://www.agid.gov.it/sites/default/files/repository_files/linee_guida_sul_documento_informatico.pdf

[94] Open Information System for Archiving - Sistema informativo aperto per l'archiviazione.

[95] Requirements for implementing and managing secure and reliable systems for the electronic storage of information.

keep documents in the storage system for a longer period than the minimum period prescribed by law, in relation to specific needs and purposes of companies and always in compliance with the GDPR rules on the **processing of personal data**.

5.6. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa? *(Please describe rules regarding the possibility of conversion from electronic form to physical and from physical form to electronic when archiving evidence.)*

As already said (see above par….), in Italy it is possible to switch the document from digital to analogue form, i.e. through the creation of copies of digital documents by printing a pdf file on paper documents. Analogue copies of IT documents are analogue documents reproducing the content of the original IT document (Article 23 of the CAD): for example, the printed version of an IT document is an analogue copy of an IT document. In some cases, the analogue copy may be made on an IT medium, as in the case of an audiocassette reproducing the sounds of the original IT document.

Likewise, it is possible to make IT copies of analogue documents, i.e. documents reproducing the content of paper documents, although not necessarily graphically identical, or IT copies by image of analogue documents after digital acquisition of the original paper document, using a digital scanner. Article 1, par. 1, of the CAD rules the electronic copies of analogue documents, stating that an electronic copy is an IT document with the same content as the analogue document from which it is taken (lett. i bis), and also ruling the "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter). A digital copy of an analogue document is a digital document that does not graphically correspond to the analogue document, but reproduces its content (lett. i bis). The "copie per immagine su supporto informatico" – "copies by image on IT support" (lett. i ter) are electronic documents that have the same content and the same form as the analogue document from which they are taken. They are obtained by scanning the first document and using the "*pdf format".* Article 22, par. 1, of the CAD confirms that a copy by image on IT support of an analogue document is produced through processes and tools that ensure that the IT document has identical content and form to the analogue document from which it is taken. This means that electronic copies can replace the original from which they are taken and are suitable for fulfilling all legal obligations concerning the registration of data.

6. Training on IT development

6.1. Are the judges, court personnel or other legal practitioners required to undergo any training on technological developments relevant to taking, using and assessing electronic evidence?
(Please explain whether there are any official requirements for judges or other professionals to undergo training aimed specifically at improving their skills related to technological aspects of taking evidence, and if any such trainings (voluntary or mandatory) are provided by ministries, state agencies or other entities.)

As we have already said (see above), given the still limited number of rules dealing with electronic evidence in civil and commercial matters, which are increasing and changing day by day (see for example the use of blochchain), Judges have often been left to their own inspiration in evaluating and interpreting the various forms of electronic evidence they receive. In this case, they have to decide which are the relevant elements to consider, but this is generally not an aspect covered by their legal education or procedural law courses.

As far as Italy is concerned, a recent research paper highlights that, despite the full support to the computerisation process of the system — which is considered likely to produce a very positive impact in terms of speed and certainty — the reference scenario is not well suited to accommodate the change. Notably, UNEP staff stresses that, at present, the available resources are by no means adequate to support a rapid adaptation to the digitalisation of the cross-border procedure and that a significant investment in IT equipment would be necessary[96]. In addition, the urgent need for intensive training in the use of ICT tools, in which Italian agencies staff are currently severely lacking, is unanimously emphasised. In general, issues related to the training of practitioners are consistently reported as crucial, not only with regard to IT skills. On this concern, it is also necessary to mention the European Judicial Network in civil and commercial matters, established by Decision No. 2001/470/EC of the European Parliament and of the Council of 28 May 2001[97], which entered into force on 1 December 2002, and amended by Decision No. 568/2009/EC of the European Parliament and of the Council of 18 June 2009: it is a flexible and non-bureaucratic structure, which operates on an informal basis and aims to

[96] It should be noted that to date there is not even a proper case management system, as the one currently in use at each UNEP (Gestione Servizi UNEP—GSU web) does not cover procedures that fall within the scope of the Service Regulation. These procedures are managed through separate electronic registration systems (in many cases only an excel file), which do not allow for keeping a scanned copy of documents or for keeping proper statistics (e.g., incoming and outgoing flows)
[97] O.J., n. L 174, 27 June 2001.

facilitate and improve civil judicial cooperation by facilitating the knowledge and practical application of EU instruments by judicial bodies in cross-border disputes.

The Judicial Network, which has been operating also in Italy for several years, is made up of contact points designated by the Member States, central bodies and central authorities envisaged by European regulatory acts, international instruments to which the Member States participate or rules of domestic law in the sphere of judicial cooperation in civil and commercial matters, liaison magistrates with responsibilities in the field of judicial cooperation in civil and commercial matters, any other judicial or administrative authority competent for judicial cooperation in civil and commercial matters whose membership of the network is deemed appropriate by the respective Member State. It also involves the professional associations representing at national level, in the Member States, the operators of justice who contribute directly to the application of international instruments relating to judicial cooperation in civil and commercial matters.

The Judicial Network also operates in Italy and is based at the Department of Justice Affairs of the Ministry of Justice. Long sensitive to digitization issues, it makes use of the recently created web portal Aldricus, where information and materials of interest converge (regulations, internal, international and supranational jurisprudence, links to sites of interest). This portal was set up as part of the European project Ejnita-building bridges and is developed by a consortium made up of the Ministry of Justice, the National Council of Notaries, the High School of Magistrates, the University of Ferrara and the University Catholic Milan. The Portal collects regulations and other documentation on judicial cooperation in civil matters, as well as a blog with reports on current affairs, especially jurisprudential, in the sector. It aspires to become the point of reference for all legal operators (magistrates, notaries, lawyers, registrars and more) working in this sector: a dematerialized place that acts as a bridge between different institutions and operators, as recalled by the project's title - "building bridges" - which signals precisely the desire to facilitate the exchange of information and the sharing of good practices. The project ended in January 2022, but the partners recently drew up a Memorandum of Understanding to maintain mutual collaboration and to exploit and implement this important digital tool to support the Network's contact points and operators in the field of judicial cooperation in civil and commercial matters.

7. Videoconference

7.1. In general, does the law of your Member State provide for videoconference technology to be used in civil proceedings?
(If you answered in the affirmative, please list the legal grounds (e.g. "Art. 100 of the Civil Code"). Please indicate when the legal grounds entered into force (e.g. 01.02.2010) and specify any amendments to the legal grounds. If an online (official or unofficial) English translation of the relevant provisions exists, please provide the URL (link). If there are "soft-law" instruments (e.g. guidelines) that supplement rules on conducting the videoconference, then please specify them.)

YES.

Following the recent reform of the Code of Civil Procedure, the new Art. 127 *bis*, par. 3, of the CPC (*Hearing through audio-visual links*) provides that the judge may order, inter alia, in the cases and according to the provisions of Art. 127 bis of the C.P.C., that the hearing takes place through remote audio-visual connections. Article 127 bis par. 1 of the CPC establishes that "the conduct of the hearing, including public hearing, through remote audio-visual connections may be ordered by the judge when the presence of persons other than the defenders, the parties, the public prosecutor and the judge's auxiliaries is not required". Article 127 *bis* par. 2 of the CPC establishes that "The provision referred to in the first paragraph shall be communicated to the parties at least fifteen days before the hearing. Any of the constituted party may, within five days of the communication, request that the hearing be held in person. The judge shall decide within the following five days by a non-appealable decree, by which he or she may also order that the hearing be held in the presence of the parties who have requested it and by audio-visual link for the other parties. In this case, the possibility for the latter to participate in the presence remains" (hybrid hearing)[98]. Article 127 bis, par. 3, of the CPC states that "If there are particular reasons of urgency, ascertained by the Judge, the time limits referred to in the second paragraph may be shortened".

7.2. Does the law allow for videoconference technology to be used solely for the taking of evidence or also for conducting other procedural stages of the hearing? Videoconference in your Member State may be used for:
a) Witness testimony
b) Expert witness testimony
c) Inspection of an object (and/or view of a location)
d) Document (document camera)
e) Party testimony

[98] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 209.

f) Other means of evidence (please elaborate)
g) Conducting the hearing in broader/general terms (please elaborate)
(Specify whether videoconference technology can be used only for the taking of evidence by highlighting the categories of evidence. Please note that some Member States may not use the same categorisation of evidence or contain all above categories (e.g. party testimony). In such cases, please approximate your answer and provide additional explanation if needed. If the technology can be used in other stages of the procedure, please specify the scope of the technology's use.)

In Italy, Art. 127 *bis* par. 1 states that Hearing by audio-visual links may be ordered by the Judge when the presence of persons other than the defenders, the parties, the public prosecutor and the judge's auxiliaries is not required (see above par. 7.1.), it's discussed whether the taking of evidence can't be realized through videoconference technology. Some Scholars affirm that it is not possible, considering the content of the rule in question[99], other Scholars seem in favour of the opposite solution, also because with the application of the new technologies "de visu" contact with the witness is assured by videoconferencing programmes[100]: the judge examines the witness, asking direct questions concerning the facts admitted as relevant to the proceedings and any questions on the same facts requested by the parties' lawyers during the examination; video-conferencing, although not expressly provided for in the Code of Civil Procedure, is not excluded. Article 202 of the CPC provides that, when ordering the taking of evidence, the court shall 'establish the time, place and manner of obtaining evidence', which allows a court to order the hearing of a witness by video-conference. Article 261 of the CPC also provides that the court may order video recording that requires the use of mechanical means, tools or procedures[101].

The general conduct of the hearing is also ruled by Art. 196-*duodecies* disp. att. Of the CPC, according to which the hearing pursuant to Art. 127-*bis* of the C.P.C. is required to use procedures suitable to safeguard the discussion and to ensure the effective participation of the parties and, if the hearing is not public, its confidentiality. in the minutes of the hearing, the identity of those present must be ascertained and it must be ensured that there are no connections with non-legitimized parties even in places where legitimized ones are connected. The parties present keep the video function active throughout the hearing.

[99] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 209.
[100] F. CARPI, *Nuove tecnologie e prove,* in *Riv. trim. dir. proc. civ.*, 2021, p. 47.
[101] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1

Remote connections are ensured through the use of technological and instrumental systems already in use by the judicial administration.

In Italy, the videoconference hearing is also provided for in the case of remote examination of the interdict and the incapacitated (Art. 453-bis CC. and 54 of the C.P.C., which provides that "Having assessed all the circumstances, it may order that the hearing be held by remote audio-visual connection, identifying the appropriate methods to ensure the absence of conditioning").

7.2.1. If the law allows for (remote) view of location, how would such a videoconference be practically implemented?
(E.g. does the court appoint a court officer to operate the audiovisual equipment on site? For example, suppose there is a dispute between parties regarding the border/boundary between their immovable properties and the court needs to view the alleged border/boundary. Does a court officer carry the technical equipment to the site and follow instructions from the court, regarding the viewing angles etc.)

Article 261 of the CPC also provides that the court may order video recording requiring the use of mechanical means, tools or procedures during the Judicial Inspection[102] of places, documents, or objects[103]. This possibility can now be implemented through electronic and computer techniques, or through photographs and/or films on digital files. Mechanical reproductions made by IT means must be stored on IT media that are annexed to the written report of the preparation of the evidence to be included in the file of the case[104].

7.3. Which applications (software) are used for videoconferencing in civil court proceedings?
(Please investigate whether the courts use multiple applications.)

In choosing a platform for video-hearings, data-security is of particular importance. Therefore, in Europe, Zoom and other private systems are regarded with mistrust[105] because of data protection reasons, despite their stability and user-friendliness.

In Italy, the procedural rules adopted in the wake of the Covid-19 health emergency have expanded the possibility of using video-hearings. Following Law Decree No. 18 of 17 March 2020, the DGSIA Act stated that not only the specific secure tools provided by the Ministry of

[102] G. BALENA, *voce Ispezione Giudiziale. I) Diritto processuale civile*, in *Enc. Giur.*, XVII, Roma, 6.
[103] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1
[104] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 561.
[105] The use of Zoom ist fobidden for example in Finish and German courts.

Justice could be used during the pandemic, but also the Microsoft Teams or Skype for Business applications[106].

7.3.1. Are the applications (see Question 7.3.) commercially available?
(If so, specify whether they are specially modified for use in court proceedings.)

YES, the applications described in Question 7.3. are commercially available, but the connections made with the two programs on office or personal devices use Ministry of Justice infrastructure or data centre areas reserved exclusively for the Ministry of Justice.

7.3.2. Are the applications (see Question 7.3.) interoperable with other applications?
(e.g. can a subject, using application X, join a videoconference, which is conducted via application Y)

YES.

Teams offers collaboration, chat, call and meeting features. Chat, call and meeting functionalities have always been available in Skype for Business. Depending on the configuration chosen when provisioning Teams, these functionalities may overlap with those provided by Skype for Business for a given user. The default coexistence mode for local users is Islands. Islands mode allows the user to run Teams alongside with Skype for Business with similar functionality available in both clients, i.e. overlapping functionality. However, a user may be assigned other coexistence modes to prevent this feature from overlapping, in which case interoperability between Teams and Skype for Business is available. For example, if you have significant Skype for Business Server resources on-premises with a complex Enterprise Voice deployment, but want to enable users to use Modern Meetings as quickly as possible, you might consider using Skype for Business with Collaboration mode and Teams meetings[107].

7.3.3. Does the application allow a text-based chat function during the videoconference; does it allow screen sharing and sharing of documents?
(whether and to what extent the court can restrict these functions (e.g., the parties can talk at any time, but only share their screen if permitted by the court.)

[106] Act DGSIA, 20 March 2020, available at https://www.consiglionazionaleforense.it/documents/20182/681053/provvedimento_organizzativo_dgsia+%2820-3-2020%29.pdf/7e1f5b06-5b64-42a1-91fa-7a1f2e7c0113

[107] https://learn.microsoft.com/it-it/microsoftteams/teams-and-skypeforbusiness-coexistence-and-interoperability

YES, the applications used in Italian Civil Proceedings allow the chat function and the screen sharing, but since Legislative Decree No. 149/2022 confirms the provisions of the DGSIA Act considered above and is in force since 1 March 2023, the application of the chat function (whether the parties may enter their deductions), and the possibility of sharing documents during the videoconference hearing is still unclear[108].

7.4. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when taking evidence?
(E.g. may the court order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; only with the consent of the person providing testimony; at the request of (both) parties; only in exceptional circumstances etc.)

In Italy, as already said (see above….), Art. 127 *bis* par. 1 states that Hearing by audio-visual links may be ordered by the Judge, when the presence of persons other than the defenders, the parties, the public prosecutor and the judge's auxiliaries is not required (see above par. 7.1.). It's discussed whether the taking of evidence can't be realized through videoconference technology. Some Scholars affirm that it is not possible, considering the content of the rule in question[109], other Scholars seem in favour of the opposite solution, also because with the application of the new technologies "*de visu*" contact with the witness is assured by videoconferencing programmes[110]: the judge examines the witness, asking direct questions concerning the facts admitted as relevant to the proceedings and any questions on the same facts requested by the parties' lawyers during the examination; video-conferencing, although not expressly provided for in the Code of Civil Procedure, is not excluded. Article 202 of the CPC provides that, when ordering the taking of evidence, the court shall 'establish the time, place and manner of obtaining evidence', which allows a court to order the hearing of a witness by video-conference. Article 261 of the CPC also provides that the court may order video recording that requires the use of mechanical means, tools or procedures[111].

[108] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 215.
[109] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 209.
[110] F. CARPI, *Nuove tecnologie e prove,* in *Riv. trim. dir. proc. civ.*, 2021, p. 47.
[111] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1

Moreover, in employment proceedings, Article 422 of the CPC provides for the audio-recording of evidentiary declarations made by the party, but the lack of personnel at the Judicial offices has vanished this disposition and no case law can be cited on this concern[112]. Furthermore, we must emphasize the lack of rules on the implementation of this disposition, which leaves the Judge completely responsible for the technical solution of recording.

7.5. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when conducting hearings?
(E.g. whether the court may order the use of the technology on its own motion (ex officio); with or without consulting the parties; only with the consent of (both) parties; at the request of (both) parties; only in exceptional circumstances etc.)

In Italy, as already said (see above….), Art. 127 *bis* par. 1 CPC states that Hearing by audio-visual links may be ordered by the Judge, when the presence of persons other than the defenders, the parties, the public prosecutor and by the judge's auxiliaries is not required.

The Court may therefore order the use of technology *ex officio*, or also at the request of the parties. Article 127 *bis* par. 2 of the CPC in fact establishes that "The provision referred to in the first paragraph shall be communicated to the parties at least fifteen days before the hearing. Any of the constituted party may, within five days of the communication, request that the hearing be held in person. The judge shall decide within the following five days by a non-appealable decree, by which he or she may also order that the hearing be held in the presence of the parties who have requested it and by audio-visual link for the other parties. In this case, the possibility for the latter to participate in the presence remains" (hybrid hearing)[113].

7.6. If the court orders the use of the technology, may the parties oppose that decision? If so, how do the parties make their opposition clear (e.g. appeal)?

If the Court orders the use of technology, the parties may oppose the decision and request the hearing in person. In this case, the judge shall make a non-appealable decree, by which he or she may order that the hearing be held in the presence of the parties who have requested it and

[112] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 551.
[113] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 209.

by audio-visual link for the other parties. The decree is non-appealable so as not to prolong the duration of the proceedings[114].

7.7. Does the law of your Member State provide that courts can, in civil procedure cases, impose coercive measures against a witness or a party to provide testimony?
(Explain also if the rules differ for videoconference testimony.)

Under Italian Law, testimony refers exclusively to statements made in Court by third parties (witnesses), which means that neither the statements made by the parties to the action nor the expert opinions are considered testimony (since experts are considered auxiliary offices of the Court).

Article 255 of the CPC states that if the duly summoned witness does not appear, the Judge may order a new writ of summons to accompany the witness to the same or a subsequent hearing. In the same order, he or she condemns the witness to a fine of not less than 100 euros and not more than 1,000 euros. In the event of further failure to appear without justified reason, the judge orders the witness to be accompanied to the same or a subsequent hearing and sentences the witness to a fine of not less than 200 euros and not more than 1,000 euros.

If the witness is unable to appear or is exempt from it by law or international conventions, the judge goes to the witness's home or office; and, if these are outside the district of the court, he or she delegates the examining magistrate of the place.

As we have said (see above par….) videoconferencing is not possible in Italy for taking of evidence.

More specifically, I would like to point out that in Italy parties cannot testify but only render a confession. The statements of the parties may have a special evidentiary value when they take the form of a confession or an admission made during the so-called formal interrogatory (interrogatorio formale) as well as when they are issued under oath. As far as confession is concerned (art. 2730, par. 5 CC), it is the statement made by a party as to the truth of a fact that is unfavorable to the party and favorable to the opponent. A confession can be rendered in Court or out of Court: in either case the probative value of the confession is conditional upon a few requirements that must be met by the party, who must be competent to dispose of the rights in

[114] C. DELLE DONNE, *Udienze*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 78.

issue or, in case of an out of court confession, must have made his/her statement to his opponent or to an agent of his/her opponent.

Finally one party may be challenged by the other to take the decisory oath – "giuramento decisorio"- ruled by Art. 2736 CC. The decisory oath may be admitted if in the case the facts to be proved by the oath are "decisive", as, once they are established, they allow the Court to decide the whole case or part of it. Art. 2739 CC lists some circumstances making the decisory oath inadmissible: for instance, the decisory oath cannot be used to prove a contract whose validity is conditional upon its written form; neither can the oath concern an illegal act or omission. If all the legal conditions are met the decisory oath is conclusive and irrefutable evidence: the other party can neither prove the contrary of the facts sworn to, nor does he have any forms of appeal allowing him to attack the judgment issued upon a decisory oath that later was ascertained as false. The decisory oath is a "legal evidence" whose probative value is absolutely indisputable, even one of the party who swore the oath is later convicted of perjury.

7.7.1. Under which circumstances may a witness refuse testimony?
(Explain also if the rules differ for videoconference testimony.)

Nobody can refuse to testify as a witness, except the parties' spouses, their relatives in the ascending and descending lines, siblings and relatives by marriage in the same line and degree as well as their adoptive parents or children. The right to refuse to testify continues after the termination of marriage or of the relationship of adoption (art. 247 cpc).

Refusal to give evidence is not acceptable in family status cases, except divorces.

The court should inform the witness of his right to refuse to testify and to refuse to answer questions before hearing the witness. The reasons for the refusal to give evidence (submitted in writing or orally, with reference to statutory causes) are verified by the court.

A statement of the refusal to give evidence may be revoked. However, after giving evidence the witness cannot use the right to refuse, unless he was not previously instructed that he had such a right.

The witness may also refuse to answer questions if the testimony could expose him or his relatives (their spouses, relatives in the ascending and descending lines, siblings, relatives by marriage in the same line and degree as well as their adoptive parents or children) to criminal

liability, disgrace or severe and direct financial damage or if it would involve the infringement of a material business secret.

The prevalent view holds that the term 'relatives' does not extend to persons actually living together as a couple (cohabitation)[115].

A priest may refuse to give evidence regarding facts confided to him through confession.

There is some debate in Italy as to how videoconference testimony works, but in the event that it can be admitted, the rules are actually those set out in the CPC.

7.7.2 Does the law of your Member State allow for cross-examination?
(Explain also if the rules differ for videoconference testimony.)

NO.

In Italy, lawyers are not allowed to cross-examine witnesses in court and the parties' consultants may only communicate with the witnesses through the judge. A witness is heard by the court. Parties have the right to be present when witnesses are examined and to put questions to them. The judge is the only person entitled to ask questions and seek clarifications of the disputed facts, formulated by the parties in specific articles about which the witnesses are questioned by the judge (Art. 244 CPC).

7.8. If videoconference technology is used to conduct hearings, how (if at all) can the court and/or parties terminate the use of videoconference technology and revert to regular (on-site) proceedings?
(Please explain the powers of the court and the parties in relation to choosing to conduct regular proceedings after the court has already decided that the hearing will be conducted through videoconference.)

Following the recent reform of the Code of Civil Procedure the new Art. 127 *bis*, par. 3, of the CPC (*Hearing through audio-visual links*) provides that the judge may order, inter alia, in the cases and according to the provisions of Art. 127 bis of the C.P.C., that the hearing takes place through remote audio-visual connections. Article 127 bis par. 1 of the CPC establishes that "the

[115] https://e-justice.europa.eu/76/EN/taking_of_evidence?POLAND&member=1

conduct of the hearing, including public hearing, through remote audio-visual connections may be ordered by the judge when the presence of persons other than the defenders, the parties, the public prosecutor and the judge's auxiliaries is not required". Article 127 *bis* par. 2 of the CPC establishes that "The provision referred to in the first paragraph shall be communicated to the parties at least fifteen days before the hearing. Any of the constituted party may, within five days of the communication, request that the hearing be held in person. The judge shall decide within the following five days by a non-appealable decree, by which he or she may also order that the hearing be held in the presence of the parties who have requested it and by audio-visual link for the other parties. In this case, the possibility for the latter to participate in the presence remains" (hybrid hearing)[116]. Article 127 bis, par. 3, CPC states that "If there are particular reasons of urgency, ascertained by the Judge, the time limits referred to in the second paragraph may be shortened".

7.9. Does the law (or best practice) provide, that the court should – before ordering the use of videoconference technology – check (please elaborate):
a) the internet connection availability (and/or speed) of the persons involved in the videoconference;
b) the technical equipment of the persons involved in the videoconference;
c) the technical literacy of the persons involved in the videoconference;
d) the physical capacity of the persons involved in the videoconference (e.g. if they are located in the Member State, their health status (hospitalisation; vocalisation, hearing and seeing));
e) other (please specify)?
(In addition, please specify if the court has to conduct a "test" session" before the actual videoconference.)

The rules concerning videoconferencing technology are laid down in the Protocol signed by the National Forensic Council – Consiglio Nazionale Forense (henceforth CNF) on the one side and the Superior Council of Magistracy – Consiglio Superiore della Magistratura (henceforth CSM)[117].

Article 2 - Conduct the hearing remotely - states that: Art. 83 - paragraph 7 lett. f) - Legislative Decree n.18/2020 provides that "the judge shall record in the minutes the methods by which he

[116] A. BONAFINE, *Processo telematico*, in R. TISCINI (a cura di), *La riforma Cartabia del processo civile, Commento al D. lgs. 10 ottobre 2022, n. 249*, cit., p. 209.

[117] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

or she ascertains the identity of the participants and, in the case of parties, their free will. All further operations shall be noted in the minutes".

In the minutes of the hearing, the judge evaluates the declaration of the identity of the attorneys of the parties present (also by virtue of substitution by oral or written proxy for the qualified trainee, pursuant to Art. 14 co. 2 Law No. 247/2012) and of the parties, as well as the presence, in the room from which the connection is made, of additional persons entitled to participate (such as trainee judges, trainee attorneys); takes note of the express declaration of the parties' lawyers as to how the assisted party will participate in the hearing and of the declaration that there are no connections, either by the lawyers or by their clients, with unauthorized persons; as well as of the declaration by the party connecting from a place other than the one from which the defender is connected that there are no unauthorised persons physically present; adopts the measures envisaged by the current legislation for the non-appearance of the parties, after verifying the clerk's office has duly communicated the order setting the hearing containing the link; the judge, the parties' attorneys and the parties, if connected from a separate place, must keep the video function activated for the entire duration of the hearing; the judge will regulate the use of the audio function to give the floor to the defenders or the parties; recording of the hearing is prohibited; where possible, the management of the start and execution of the hearing will be carried out by the Bailiff remotely connected to the same application; if necessary, the same clerk, using the "hearing console" may also take care of the verbalization; the production of documents in the hearing, for which it has not been possible to file them electronically in the console, may take place through the possible use of screen sharing tools - always if expressly authorized by the judge - and will be valid as a mere exhibition, with need to regularize the filling subsequently in compliance with the PCT regulations; the deductions of the parties may be admitted by the judge through the use of chat or other text sharing tools; in the event of malfunctions, involuntary disconnections and impossibility of restoring, the judge must postpone the hearing, having the parties served with the minutes of the hearing containing the postponement; at the end of the hearing, the judge will invite the parties' attorneys to declare on the minutes that they actually participated in the hearing in compliance with the adversarial process and to certify that the hearing itself was duly carried out using the application; the judge will read the minutes of the hearing, possibly also sharing the minutes editor's window at the console during the hearing itself; if, at the end of the discussion, it is necessary to take contextual decisional measures, subject to the council chamber, for which the law requires the reading to

the parties in the hearing, the judge interrupts the connection by suspending the hearing remotely (for the virtual entrance into the council chamber), indicating, with the agreement of the prosecutors of the parties, the time for the continuation of the hearing remotely through the use of the application for the reading the device, unless the parties agree to be exempt from being present at the hearing at the time of reading (to overcome the objective difficulty of determining the duration of the council chamber a priori and avoid the parties the inconvenience of suffering any subsequent time delays); in order to allow hearings to be held remotely, the DGSIA guarantees, effectively and promptly, the necessary technical assistance to individual magistrates or clerks who assist the judge in the hearing also through the toll-free number 800 868 444; guarantees professional and honorary magistrates the hardware and software equipment necessary for the handling of disputes by remote connection; check that the link relating to the start-up of the "virtual room" has been received by all magistrates, trainees, honoraria, clerks.

7.10. Does the law (or best practice) offer special safeguards for vulnerable persons?
(Please explain whether the use of the videoconferencing technology must follow any special rules for vulnerable partakers (e.g. children; persons with illness; persons located in hospitals; whistle-blowers; elder persons).)

As we have said (see above par….), in Italy, the videoconference hearing is ruled also in the case of remote examination of the interdict and the incapacitated (Art. 453-bis of the CC. and 54 of the C.P.C., which provides that "Having assessed all the circumstances, the Judge may order that the hearing be held by remote audio-visual connection, identifying the appropriate methods to ensure the absence of conditioning").
In this case, the videoconferencing seems suitable to fulfil the protection of vulnerable persons, allowing Judges to evaluate their situation without eradicating them from their familiar environment.

7.11. Does the law of your Member State provide:

a) The location of the persons engaged in the videoconference (i.e. where the videoconference must or may be conducted) and the use of virtual filters and backgrounds?
(Member States' laws may allow only for court2court videoconference; other laws may not contain restrictions and the partakers may enter the videoconference from the location of their choice; explain whether, for example, a person may join the videoconference through their

mobile device from their domicile or a car etc. Explain whether a person may use filters or change the background/backdrop. If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

YES.

The recent reform of the Italian Code of Civil Procedure[118] has introduced the new Article 196-*duodecies* of the CPC, stating that "the place from which the judge connects is considered the hearing room for all intents and purposes and the hearing is considered held in the judicial office before which the proceeding is pending".

This is the end point of an evolution started during the pandemic situation, when, to overcome the problems arising from Covid – pandemic, Law Decree No. 20/2020 was adopted, stating that the hearing could be conducted by videoconference but the Judges had to connect themselves from their office at the Court (not from home for example). Since this disposition was widely criticized[119], especially because it differed from the rules adopted for Criminal and Administrative Courts, and did not correspond to necessity or usefulness reasons, it was amended with the last reform.

Thus, in the context of the videoconference hearing in Italian Civil Proceeding – as we have said, videoconferencing is not possible for taking of evidence - all the participants may enter by videoconference from a place of their choice. There are no rules about filters or background.

aa) How does the law sanction a person who does not conduct the videoconference at the designated location?

Italian law doesn't state (as we have said above – see par…) that the videoconferencing must be conducted in a designated location.

ab) Are there any rules for the inspection of the location where the person heard is situated and the privacy it offers?

[118] Art. 1, par. 21, of the Law 26 November 2021, n. 206, *Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata. (21G00229), O. J.*, n. 292, 9 December 2021, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;206. The reform was implemented by the Legislative Decree 10 October 2022, No. 149, O.J. 17 October 2022 No. 243, s.o. No. 38. The Law 29 December 2022, No. 197, O.J., 29 December 2022, No. 303, s.o. No. 43 brought forward the entry into force of the Reform to 28 February 2023.

[119] G. COSTANTINO, *La Giustizia da remoto: Adelante... con juicio (seconda parte)*, 2020, at www.giustiziainsieme.it

(If the person is situated at a private location, does the person have to "show" the court whether any other person is present at the location and/or – where (professional/business) secrecy is involved – whether the location offers sufficient privacy. Must the location adhere to any form of decency or décor? If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

No

ac) Suppose a person lives in a one-room apartment with family or a room rented with friends, and cannot find another suitable location. Does the law allow the presence of family members, roommates etc. in such cases? If yes, do these persons have to identify themselves?

NO, they don't have to identify themselves during the videoconference hearing, but they can't be present during the videoconference hearing, because according to Art. 196-*duodecies* disp. att. of the CPC, and Art. 127-*bis* of the C.P.C. the identity of those present must be ascertained within the hearing- record, and it must be ensured that there are no connections with non-legitimized parties even in the places where the legitimized ones are connected. The parties present keep the video function active throughout the hearing.

b) the time when the videoconference may be conducted?
(Member States' laws may provide that videoconferences should not take place before e.g. 06:00 and no later than e.g. 18:00; does the law provide rules for videoconferencing if the persons are located in different time zones? If possible, please specify if the rules differ for the two forms of a videoconference, i.e. when taking evidence and when conducting the hearing.)

NO, Italian Law doesn't state specific rules about the time of the videoconference hearing.

c) the apparel and conduct of the persons taking part in the videoconference?
(Member States' laws may compel partakers to dress or conduct themselves in a special manner (e.g. toga outfit; standing in attention of the judge); please explain how these rules or traditions are followed if videoconference technology is used. If possible, please specify if the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

NO, Italian Law doesn't state specific rules about this concern. The gown is not mandatory even in the Tribunal hearings.

d) the identification of the persons taking part in the videoconference?
(If the videoconference takes place in a court2court setting, this concern is usually dispelled, since court officials may check the identity; however, checking the identity of a person entering the videoconference from a private location may be troublesome. If possible, please specify if

the rules differ for the two forms of videoconference, i.e. when taking evidence and when conducting the hearing.)

Pursuant to Art. 196-*duodecies* disp. att. of the CPC, and Art. 127-*bis* of the C.P.C. the identity of those present must be ascertained in the minutes of the hearing, and it must be ensured that there are no connections with non-legitimized persons even in the places where the legitimized ones are connected.

7.12. Can (or must) a videoconference be recorded?

NO, pursuant to Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM) on the other hand[120].

7.12.1. Does the recording of a videoconference contain video feedback from all cameras in the court or only the camera in focus?

(Many software applications pin or highlight only one of the persons during the videoconference and close or minimize other (usually non-active) persons. A recording might thus capture only the actions of one person at a time.)

The recording of a hearing by videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM) on the other hand[121].

7.12.2. Which persons are shown on video during the videoconference?

(I.e. which persons have a camera pointed at them and can be seen on the screen; e.g. judge, party, advocate, expert witness, interpreter, court staff, witness, public.)

The recording of a hearing videoconference is not allowed in Italy.

Pursuant to Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates

[120] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[121] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

– Consiglio Superiore della Magistratura (henceforth CSM)[122] on the other hand, the judge, the parties' attorneys and the parties, if connected from a separate place, must keep the video function activated throughout the hearing; the judge will regulate the use of the audio function to give the floor to the defenders or the parties.

7.12.3. How (which medium and format) and where is the footage of the videoconference stored and later archived?

(For example, it may be stored on a local machine or at a remote server.)

The recording of a hearing videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura – (henceforth CSM)[123] on the other hand.

7.12.4. Does the footage of the videoconference enter the record of the case?

The recording of a hearing videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura – (henceforth CSM) [124] on the other hand.

7.12.5. Who has access to view the footage after it has been recorded?

The recording of a hearing videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth

[122] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[123] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[124] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM)[125] on the other hand.

7.12.6. Presume that the proceedings have concluded at the first instance and an appeal or other recourse has been submitted by the party. May the second instance court access and view the recording of the videoconference?

The recording of a hearing videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM)[126] on the other hand.

7.12.7. If the court orders *ex post* transcription of the hearing, does the court reporter write the Minutes of the case by transcribing the footage of the videoconference or is there a separate audio log for transcription?

The recording of a hearing videoconference is not allowed in Italy under Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura – (henceforth CSM)[127] on the other hand.

7.13. Concerning court interpreters – does the law (or best practice) provide for successive or simultaneous interpretation during the videoconference?

Article 122 of the CPC states that the use of the Italian language is mandatory throughout the whole process. When someone who does not know the Italian language must be heard, the judge may appoint an interpreter. Before carrying out his or her duties, the interpreter takes an oath before the judge to faithfully fulfil his or her duties. Applying the similar rules concerning the

[125] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[126] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[127] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

Technical Consultancy, interpreters can take the oath by videoconference and connect to the hearing from a place of their choice.

7.13.1. Where is the interpreter located during the videoconference?
(E.g. in the court room; in the room with the person being heard etc.)

Interpreters can connect to the hearing from a place of their choice.

7.14. Immediacy, equality of arms and case management

Orality represents one of the inspiring principles of contemporary Italian civil Proceedings[128]. The declaratory civil trial, aimed at the judicial assessment of substantial subjective rights in need of protection, is structured as a complex and articulated cognitive activity that the magistrate carries out in the contradictory between the parties, who have the task of proposing the application, raising the objections, attaching the historical facts relevant to the decision, and proposing the evidence they intend to use to demonstrate the truth of these facts. Depending on the juridical forms by which the above-mentioned case material is deduced at the process, it is possible to distinguish between written and oral process: in the former, the form of deductions is mainly written; in the latter, however, the form of deductions is mainly oral.

The contrast between written and oral process, however, should not be understood in an absolute sense. As traditional doctrine notes, no process is only written or only oral. Rather, it is necessary to verify which of the two forms prevails over the other and even more the function that is assigned to the two different forms within the process. Even in oral process, in fact, writing has the primary task of preparing the treatment of the case, announcing the defences the parties intend to avail themselves. Typical expression of this function are the documents introducing the dispute, or the act by which the plaintiff proposes the question. Even in the coexistence of written and oral moments, however, orality effectively becomes the inspiring principle of the process when it is combined with two other fundamental principles: that of immediacy and that of concentration[129].

The principle of immediacy requires the judge to be in direct contact with the parties. Application of this principle is, for example, the rule according to which the deliberating judge

[128] P. CALAMANDREI, *Processo e democrazia*, Padova, 1954.
[129] P. CALAMANDREI, *Istituzioni di diritto processuale civile*, Padova, 1943, p. 9.

must be the same one who attended the discussion on the case. The principle of concentration, on the other hand, requires that the time frame within which the various procedural activities necessary to make the case ready for a decision take place be as short as possible. As is obvious, the beneficial effects of the principle of orality cannot be produced if a long period of time elapses between the various hearings. The passage of time will inevitably fade the judge's and the parties' memories and their attention will necessarily turn to the procedural records. Orality requires a good knowledge of the case on the part of the judge, so as to be able to decide the questions posed by the parties, ask them for the necessary clarifications, solicit the cross-examination, and avoid deciding questions of procedure by an order outside the hearing. In reality, this principle is widely attacked, on the one hand by an increasing technical complexity of disputes in an international interconnected society governed at all levels by complex mechanisms[130], on the other hand by the PCT, identifying a possible risk according to some Authors[131] in the lightening of the dialogue among Judge, Parties, Consultants, Witnesses, etc.

7.14.1. How does the law of your Member State generally sanction an infringement of the principle of immediacy?

Orality and immediacy have for decades represented the as yet unrealized aspiration of the civil process and at the same time the stimulus for its reform. These are the premises of the recent reform of the Italian Civil Proceedings.

It is difficult to highlight sanctions for infringing the principle of immediacy in the Civil procedure. For example, Article 174 of the CPC implicitly recalls the principle of immediacy, stating that in first grade proceedings, only in the event of absolute impediment or serious service requirements of the appointed Judge, he or she may be replaced by decree of the president of the Tribunal [79 disp. att.]. The same Judge, after taking the evidence, reading the acts and hearing the parties, must submit the decision to the Tribunal, by virtue of the principle of immediacy. However, the CPC considers the case of substitution, when it is indispensable, also for the performance of individual procedural acts.

[130] This correspondence is confirmed, on the ground of the preliminary investigation, by the central role of the official technical consultancy, necessary to ascertain the facts of the case. In these cases, the oral discussion is difficult to achieve: both the parties and the judge prefer to have time to study and write their respective deeds and provisions.

[131] E. ZUCCONI GALLI FONSECA, *L'incontro tra informatica e processo*, in *Riv. trim. dir. e proc. civ.*, 4, 2015.

7.14.2. Does the law of your Member State specify any special aspects regarding the principle of immediacy when using videoconferencing technology?

No, Italian Law doesn't lay down specific rules on the principle of immediacy in the use of videoconfering technology, but Italian Scholars are debating whether or not the videoconferencing technology is consistent with the principle of immediacy.

At present, the prevailing opinion is that video recording of oral evidence is not admitted in order to guarantee the immediacy principle[132], but some Scholars argue that video recording is not in contrast with this principle and could be a very useful tool for a decision that preserves the living voice of witnesses and parties[133]. The digital documentation of the result of the oral evidence has a twofold advantage: on the one hand, it allows for a certainly faithful and accurate recording of the questions and answers posed by the Judge and given by the parties and witnesses, avoiding the risk of inaccurate or incomplete transcript, on the other hand, audio-visual recording avoids having to pause during the hearing in order to write down the answers correctly, thus giving greater spontaneity to the testimony and interrogation.
Moreover, the recorded answers of the parties and witnesses would also allow for so-called "secondary orality"[134], allowing, at the time of Italian snail-trials, a limited time interval between the examination of the oral evidence and the formation of the judgment[135].

7.14.3. Have your courts dealt with cases alleging an infringement of the principle of immediacy or the impartiality of judges in videoconference proceedings?
(If so, please provide the core of the legal question addressed and the resolution, as well as citations.)

No, there is currently no case-law on this concern.

7.14.4. How do parties (and their advocates) express objections or pose questions during a videoconference?
(This may be especially important when "leading questions" are posed.)

[132] P. COMOGLIO, *Processo civile telematico e codice di rito. Problemi di compatibilità,* cit., p.967.
[133] M. GRADI, *Le prove,* in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile,* cit., p. 550.
[134] G. TARZIA, *Problemi del contraddittorio nell'istruzione probatoria civile*, in *Riv. dir. proc.*, 1984, p. 653; F. CARPI, *L'avvocato telematico e i tentativi per eliminare l'arretrato giudiziale,* in *Riv. trim. proc. civ.*, 2014, p. 1612.
[135] M. GRADI, *Le prove,* in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile,* cit., p. 550.

Pursuant to Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM)[136] on the other hand, the judge, the parties' attorneys and the parties, if connected from a separate place, must keep the video function activated throughout the hearing; the judge will regulate the use of the audio function to give the floor to the defenders or parties.

7.14.5. How does an inspection of an object take place during a videoconference?

(For example, imagine a court has to examine a knife, which was submitted as evidence by a party in physical form to the court.)

Article 261 of the CPC provides that the court may order video recording requiring the use of mechanical means, tools or procedures during the Judicial Inspection[137] of places, documents or objects[138]. This possibility can now be done by means of electronic and computer techniques, or by taking photographs and/or films on digital files. Mechanical reproductions made by IT means must be stored on IT media that constitute annexes to the written report of the preparation of evidence to be included in the case file[139].

7.14.6. Can documents only be presented by means of a document camera or also through the use of file/screen sharing in the videoconference application?

Pursuant to Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM)[140] on the other hand, the production of documents at the hearing, for which it was not possible to file them electronically on the console, may take place through the possible use of screen-sharing tools - always if expressly authorized by the judge - and will be valid as a mere exhibition, with the need for subsequently

[136] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

[137] G. BALENA, *voce Ispezione Giudiziale. I) Diritto processuale civile*, in *Enc. Giur.*, XVII, Roma, 6.

[138] https://e-justice.europa.eu/content_taking_of_evidence-76-it-maximizeMS_EJN-en.do?member=1

[139] M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo civile telematico nel sistema del diritto processuale civile*, cit., p. 561.

[140] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

regularisation of the filing in compliance with the PCT legislation; deductions by the parties may be admitted by the judge through the use of chat or other text-sharing tools.

7.14.7. During the videoconference, does the application (software) highlight only the person actively speaking or are all participants visible at all times (and at the same size)? *(Often, the application will minimize or close the video of the person who is not active (speaking) during the videoconference.)*

Teams and Skype for business applications – adopted in Italy during the pandemic and now confirmed for videoconferences during hearings in civil proceedings[141] - usually minimise the video of the person who is not speaking during the video conference.

7.14.8. Suppose that the connection becomes unstable, and the quality of the audio and/or video feed drops. One of the parties considers that the quality does not allow for correct testimony. Consider also that the video feed breaks down before or in the middle of the videoconference and only the audio feed is available. What options do the court and parties have in regards to the continuation of the videoconference? Can a continuation in such circumstances constitute grounds for appeal?

Pursuant to Article 2 of the Protocol signed by the National Council of Lawyers – Consiglio Nazionale Forense (henceforth CNF) on the one hand and the Superior Council of Magistrates – Consiglio Superiore della Magistratura (henceforth CSM)[142] on the other hand, in the event of malfunctions, involuntary disconnections and impossibility of reset, the judge must postpone the hearing, having the parties notified of the hearing report containing the postponement; at the end of the hearing, the judge will invite the parties' attorneys to state on the minutes that they actually participated in the hearing in compliance with the adversarial process and to certify that the hearing itself was duly conducting using the application; the judge will read the minutes of the hearing, possibly also sharing the minutes editor's window at the console during the hearing itself.

[141] Act DGSIA, 20 March 2020, available at https://www.consiglionazionaleforense.it/documents/20182/681053/provvedimento_organizzativo_dgsia+%2820-3-2020%29.pdf/7e1f5b06-5b64-42a1-91fa-7a1f2e7c0113

[142] Available at https://www.consiglionazionaleforense.it/documents/20182/690272/Protocollo+per+udienze+civili.pdf/91739779-768d-4f12-9ea0-9bd114723373?t=1586507058000

7.14.9. If one party enjoys a better audio-visual experience due to better technical equipment and/or internet connection than the other, and the court allows the continuation of the proceedings, can the other party allege a breach of equality of arms?

Oblikovano: angleščina (Združene države)

Yes, one party may argue that the other one enjoyed a better audiovisual experience during the hearing, but, pursuant to Article 2697 of the CC, the party alleging a breach of equality of arms must prove this situation (problematic technical equipment, difficult internet connection) with respect to the counterparty's situation, and this is not an easy procedure.

Moreover, as we have already mentioned (see above par….) at the end of the hearing, the judge will invite the parties' attorneys to declare in the minutes that they actually participated in the hearing in compliance with the adversarial process and to certify that the hearing itself was duly carried out using the application. Therefore, if a party has a worse audio-visual experience, that party's attorneys should first point this out in the minutes of the hearing.

7.14.10. During the videoconference, the court suspects that a person being heard is receiving outside help/suggestions or is under duress. Can the court order the person to turn the camera and show the apartment or share their screen? Can the court request the person to shut down other technological devices in their vicinity during the videoconference? Can the court request that other persons be removed from the location of the videoconference?

The Judge is responsible for the managing of the hearing and must guarantee the fundamental principle of impartiality. Moreover, as stated in Art. 196-*duodecies* disp. att. of the CPC, and in Art. 127-*bis* of the C.P.C., the identity of those present must be ascertained in the minutes of the hearing, and it must be ensured that there are no connections with non-legitimized subjects even in the places where the legitimized ones are connected. The Judge may therefore request the person under suspicion to receive suggestions from outside to turn the camera and show the flat, or to share the screen, etc.

7.15. Does the law (or best practice) provide any special rules for the participation of the party's advocate (e.g. together with the party at the same location, or in separate locations)?

Oblikovano: angleščina (Združene države)

NO, the party's lawyers may connect to the hearing from a place of their choice.

7.16. Are there any special rules pertaining to the distribution of costs in case of videoconferencing?

(Generally, a videoconference will have the effect of reducing the costs of the proceedings; nevertheless, does the law provide special rules on who bears the costs if, for example, one party opposes the videoconference but the court decides on it anyway? Are there special rules regarding the bearing of costs incurred for technical equipment? Are there special rules regarding the bearing of costs for interpreters?)

In general, videoconferencing has the effect of reducing the costs of proceedings; this is one of the reasons why it was introduced in Italy as well as in other European countries during the pandemic emergency.

Hearings by videoconference don't entail high costs and if a party opposes to the videoconference, the Judge declares the hearing hybrid. As with videoconferencing, the Judge will follow the general rules on trial costs for a possible technical consultant, or interpreter.

On this concern, in Italian civil procedure, as we have already said (see above par….), the basic rule for allocation of the cost and fee is laid down in Article 91 paragraph 1 of the CPC. According to this provision, at the end of the proceedings the court orders the losing party to reimburse its opponent's expenses, including lawyer's fees. It is the so-called *principio della soccombenza (principle of losing the case)*, which also applies to court costs, lawyers' fees and other expenses[143].

Oblikovano: angleščina (Združene države)

The justification for this cost-shifting rule traditionally derives from general principles concerning the judicial protection of rights. According to those principles, as a result of litigation, the successful party should be in the same situation as if the other party had not brought or defended the claim. On the contrary, if the winning party were to bear the cost of litigation on a permanent basis, it should deduct them from what it has earned or retained through it. Therefore, even if successful, it would be in a worse position than before the beginning of the proceedings. This would constitute an infringement of the right to an effective remedy protected by Article 24 of the Italian Constitution. In the course of the case each party bears the cost of its own procedural steps, including the taking of evidence. With respect to the other steps necessary for the continuation of the case, the court has a discretion to decide who will pay for them, unless there is a special legislative regulation (e.g. Art. 210, last paragraph, of the Code of Civil Procedure provides that if one party applies for a court order to have any

[143] The rules governing the categories and procedures for costs of legal proceedings, including legal aid, are comprehensively set out in Presidential Decree No. 115 of 30 May 2002 (Official Gazette No. 139/2002), as last amended by Legislative Decree No. 24 of 7 March 2019 (Official Gazette No. 72 of 26 March 2019 to extend legal aid to cover wanted persons subject to proceedings for the execution of the European arrest warrant), containing the Consolidated Text on legal costs (Articles 74 to 145, in particular the common provisions of Articles 74 to 89, Special provisions on legal aid in civil, administrative, auditing and tax proceedings, Articles 119 to 145).

specific document produced by another party, the requesting party has to bear the expenses). Therefore, the party producing the electronic evidence for the evaluation of which has been stated the appointment of an expert must pay the costs.

7.17. How does the law guarantee the publicity of videoconference hearings?
(Please also explain legal measures to avoid problems that could arise due to the public nature of the hearing (e.g. too many participants in the video conference).)

According to the case law of the European Court of Human Rights, a video-hearing does not necessarily violate fair trial rights[144]. Access to hearings is important for both citizens and the media to inform and empower the judiciary. But what does "public hearing" mean for video-hearings? This is another question, which shows how the judiciary, which has had its work done in a physical place, a courtroom, has to find a new place and a new concept of access to it.

Oblikovano: angleščina (Združene države)

7.18. The Recast Regulation (EU) 2020/1783 on the taking of evidence in civil or commercial matters provides in Article 20 the primacy of direct taking of evidence through videoconference if the court considers the use of such technology to be "appropriate" in the specific circumstances of the case. What do you consider would fall in the category of "inappropriate"? In addition, should form N in Annex I of said Regulation be supplemented in your opinion (explain how and why)?

The new procedure ruled by Article 20 of the EU Regulation 2020/1783 aims at speeding up and reducing costs of taking evidence in cross-border civil or commercial disputes within the European Union, as well as ensuring a high level of data security and protection, safeguarding the rights of the addressees and respecting privacy and personal data. It has been in force for 7 – 8 months, so we have no relevant case-law yet.

Some problems with the implementation of this rule may arise due to the application of another EU Act: the EU Regulation on Small Claims[145]. According to this act, the procedure starts with

[144] ECtHR 5 October 2006, Case No. 45106/04, Marcello Viola v. Italy.

[145] The consolidated version of the ESCP Regulation is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02007R0861-20170714. For an overview of the aims and contents of the ESCP Regulation, cf. HAZELHORST, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial*, Cham, Springer, 2017, p. 383-397; KRAMER, *European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects*, in HESS, BERGSTRÖM, STORSKRUBB (eds.), *EU Civil Justice. Current Issues and Future Outlook*, Oxford-Portland, Hart, 2015, p. 97-122; KRAMER, *The European Small Claims Procedure. Striking the Balance between Simplicity and Fairness in European Litigation*, in "Zeitschrift für europäisches Privatrecht", 2008, p. 355-373; MCELEAVY, *Current Developments – Private International Law*, in "International and Comparative Law Quarterly", 2008, p. 449-465.

the claimant filling the standard form A (Annex 1 of the ESCP Regulation) and filing it, through the means of communication allowed in the Member State concerned, with the competent court, together with a description of the evidence supporting the claim and any relevant documents[146]. The claimant must also pay the court's fees due in the Member State concerned. Art. 15a(2) of the ESCP Regulation provides that "Member States shall ensure that parties may pay court fees by means of remote payment methods". Unless the claim is deemed unfounded or inadmissible by the competent court, within 14 days from the receipt of claimant's form A, the court will serve on the defendant "a copy of the claim form and, where applicable, the supporting documents, together with the reply form so completed"[147]. Art. 13(1) of the ESCP Regulation provides that the service of documents may be effected by mail with acknowledgment of receipt or by electronic means. Within 30 days after service of the claim form, the defendant may submit a response using form C (Annex 3 of the ESCP Regulation), accompanied, where appropriate, by supporting documents[148].

The defendant has the full range of options usually available in ordinary civil trials at their disposal: he or she may choose not to answer, or he or she may contest the competence of the court, challenge the applicability of the Regulation (for instance by contesting the value of the claim proposed by the claimant), answer on the merits or propose a counterclaim. Within 14 days after receipt of the defendant's response, the court must send the response and any documents to the claimant[149], who has another 30 days to submit his or her answer[150]. If the court concludes that the claim (alone or with the counterclaim) exceeds the monetary threshold set for the applicability of the Regulation, the court will proceed in accordance with national procedural rules, unless the claimant withdraws the claim[151]. If, by contrast, the court concludes that it is allowed to proceed – even in cases where the court […] has not received an answer from the party concerned within the time limits"[152] –, the court will have to decide whether to issue the judgment solely on the basis of the written evidence submitted by the parties, or whether to request further details, take evidence or summon the parties to an oral hearing, which

Oblikovano: angleščina (Združene države)

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[146] See art. 4(1) of the ESCP Regulation.
[147] Art. 5(2) of the ESCP Regulation.
[148] Art. 5(3) of the ESCP Regulation.
[149] Art. 5(4) of the ESCP Regulation.
[150] Art. 5(6) of the ESCP Regulation.
[151] Art. 4(3) and art. 5(7) of the ESCP Regulation.
[152] Art. 7(3) of the ESCP Regulation.

could be held online[153]. In any case, the procedure will be concluded within 30 days after the oral hearing (if held) or after the judge has received all the necessary information for the ruling[154]. In case the Court decides to proceed in accordance with national procedural rules, it could argue that the videoconference hearing is not consistent with taking of evidence, as stated for internal proceedings. However, it's to be hoped that the application of the EU Evidence Regulation will push the Italian Courts to generalize the videoconference hearing, as suggested by many Scholars and as consistent with the fundamental principles of fair trial.

Regarding the question on Form N in Annex I of the EU Regulation 1784/2020, it seems generally consistent with Italian Civil Proceedings principles. Maybe some information on the age of the person to be heard to guarantee the respect of the fundamental interests of the minor to be heard according to the guarantees provided by Italian law.

Lasty, it should be pointed out that the Italian version of Art. 20 par. 2 of EU Regulation 1783/2020 mistakenly indicates the central authority of the **requesting** State as being competent to agree with the requesting authorities on the practical arrangements for examining witnesses by videoconference or other communication technologies[155], whereas it's clear that the rule deals with the central authority of the **requested** State[156] both because it is clear that the dialogue on the taking of evidence takes place between different States, and because this solution is confirmed by comparing the Italian version of Art. 20, par. 2, with the other language versions[157] and with the recital No. 21 which, again in the Italian version[158], clarifies the rationale of Art. 20.

Oblikovano: angleščina (Združene države)

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[153] See arts. 8 and 9 of the ESCP Regulation.

[154] See art. 7(2) of the ESCP Regulation.

[155] Articolo 20, par. 2. "La richiesta di assunzione diretta delle prove utilizzando videoconferenza o altra tecnologia di comunicazione a distanza dev'essere presentata utilizzando il modulo N di cui all'allegato I. L'autorità giudiziaria richiedente e l'organo centrale o l'autorità competente dello Stato membro richiedente, o l'autorità giudiziaria incaricata di fornire assistenza pratica nell'assunzione diretta delle prove concordano le modalità pratiche dell'esame.""

[156] A. LEANDRO, *L'assunzione delle prove all'estero in materia civile,* cit., pp. 75 – 76.

[157] See for example the French version of Art. 20, par. 2: "La demande de procéder à l'exécution directe d'une mesure d'instruction en utilisant la vidéoconférence ou d'autres technologies de communication à distance est soumise au moyen du formulaire N qui figure à l'annexe I. La juridiction requérante et l'organisme central ou l'autorité compétente de l'État membre requis, ou la juridiction chargée de fournir une assistance pratique pour l'exécution directe de la mesure d'instruction, s'accordent sur les modalités pratiques de l'audition." See also the German version: Art. 20.2: " Ein Ersuchen um unmittelbare Beweisaufnahme per Videokonferenz oder mittels einer anderen Fernkommunikationstechnologie wird unter Verwendung des Formblatts N in Anhang I gestellt. Das ersuchende Gericht und die Zentralstelle oder die zuständige Behörde des ersuchten Mitgliedstaats oder das mit der praktischen Unterstützung bei der unmittelbaren Beweisaufnahme beauftragte Gericht vereinbaren die praktischen Modalitäten der Vernehmung".

[158] Recital 21: »Attualmente le moderne tecnologie della comunicazione non sono sfruttate appieno, per esempio la videoconferenza, che è uno strumento importante per semplificare e accelerare l'assunzione delle prove. Qualora

Oblikovano: angleščina (Združene države)

le prove debbano essere assunte tramite l'esame di una persona in qualità di testimone, parte in un procedimento o perito presente in un altro Stato membro, l'autorità giudiziaria richiedente che disponga della tecnologia della videoconferenza o di altra tecnologia di comunicazione a distanza e ritenga appropriato usarla considerate le circostanze specifiche della fattispecie e il corretto svolgimento del procedimento dovrebbe assumere le prove direttamente mediante videoconferenza o tale altra tecnologia. La videoconferenza potrebbe inoltre essere usata per ascoltare un minore come previsto dal regolamento (UE) 2019/1111. Tuttavia, se l'organo centrale o l'autorità competente dello Stato membro richiesto ritiene che siano necessarie talune condizioni, l'assunzione diretta delle prove dovrebbe essere effettuata a tali condizioni a norma del diritto di tale Stato membro. L'organo centrale o l'autorità competente dello Stato membro richiesto dovrebbe poter rifiutare in tutto o in parte l'assunzione diretta di prove se contraria ai principi fondamentali del diritto di tale Stato membro".

Instructions for contributors

1. References

As a rule, specific references should be avoided in the main text and, preferably, should be placed in the footnotes. Footnote numbers are placed after the final punctuation mark when referring to the sentence and directly after a word when referring to that word only. We humbly invite our authors to examine carefully our sample references which are preceded by [-]. These sample references put the theory of our authors' guidelines into practice and we believe that they may serve to further clarify the preferred style of reference.

1.1. Reference to judicial decisions

When citing national judicial authorities, the national style of reference should be respected. References to decisions of European courts should present the following form:

[Court] [Date], [Case number], [Party 1] [v] [Party 2], [ECLI] (NB: the "v" is not italicised)

- ECJ 9 April 1989, Case C-34/89, Smith v EC Commission, ECLI:EU:C:1990:353.
- ECtHR 4 May 2000, Case No. 51 891/9, Naletilic v Croatia.

1.2. Reference to legislation and treaties

When first referring to legislation or treaties, please include the article to which reference is made as well as the (unabbreviated) official name of the document containing that article. The name of a piece of legislation in a language other than English, French or German should be followed by an italicised English translation between brackets. In combination with an article number, the abbreviations TEU, TFEU, ECHR and UN Charter may always be used instead of the full title of the document to which the abbreviation refers. If the title of a piece of legislation constitutes a noun phrase, it may, after proper introduction, be abbreviated by omission of its complement. Thus:

- Art. 2 Protocol on Environmental Protection to the Antarctic Treaty (henceforth: the Protocol).
- Art. 267 TFEU.
- Art. 5 Uitleveringswet [Extradition Act].

1.3. Reference to literature

1.3.1 First reference

Any first reference to a book should present the following form: [Initial(s) and surname(s) of the author(s)], [Title] [(Publisher Year)] [Page(s) referred to]

- J.E.S. Fawcett, The Law of Nations (Penguin Press 1968) p. 11.

If a book is written by two co-authors, the surname and initials of both authors are given. If a book has been written by three or more co-authors, 'et al.' will follow the name of the first author and the other authors will be omitted. Book titles in a language other than English, French or German are to be followed by an italicised English translation between brackets. Thus:

- L. Erades and W.L. Gould, The Relation Between International Law and Municipal Law in the Netherlands and the United States (Sijthoff 1961) p. 10 – 13.
- D. Chalmers et al., European Union Law: cases and materials (Cambridge University Press 2010) p. 171.

- F.B. Verwayen, Recht en rechtvaardigheid in Japan [Law and Justice in Japan] (Amsterdam University Press 2004) p. 11.

1.3.2 Subsequent references

Any subsequent reference to a book should present the following form (NB: if more than one work by the same author is cited in the same footnote, the name of the author should be followed by the year in which each book was published):

[Surname of the author], [supra] [n.] [Footnote in which first reference is made], [Page(s) referred to] Fawcett, supra n. 16, p. 88.

- Fawcett 1968, supra n. 16, p. 127; Fawcett 1981, supra n. 24, p. 17 – 19.

1.4. Reference to contributions in edited collections

For references to contributions in edited collections please abide by the following form (NB: analogous to the style of reference for books, if a collection is edited by three or more co- editors only the name and initials of the first editor are given, followed by 'et al.'):

[Author's initial(s) and surname(s)], ['Title of contribution'], [in] [Editor's initial(s) and surname(s)] [(ed.) or (eds.)], [Title of the collection] [(Publisher Year)] [Starting page of the article] [at] [Page(s) referred to]

- M. Pollack, 'The Growth and Retreat of Federal Competence in the EU', in R. Howse and K. Nicolaidis (eds.), The Federal Vision (Oxford University Press 2001) p. 40 at p. 46.

Subsequent references follow the rules of 1.3.2 supra.

1.5. Reference to an article in a periodical

References to an article in a periodical should present the following form (NB: titles of well- known journals must be abbreviated according to each journal's preferred style of citation):

[Author's initial(s) and surname(s)], ['Title of article'], [Volume] [Title of periodical] [(Year)] [Starting page of the article] [at] [Page(s) referred to]

- R. Joseph, 'Re-Creating Legal Space for the First Law of Aotearoa-New Zealand', 17 Waikato Law Review (2009) p. 74 at p. 80 – 82.
- S. Hagemann and B. Høyland, 'Bicameral Politics in the European Union', 48 JCMS (2010) p. 811 at p. 822.

Subsequent references follow the rules of 1.3.2 supra.

1.6. Reference to an article in a newspaper

When referring to an article in a newspaper, please abide by the following form (NB: if the title of an article is not written in English, French or German, an italicised English translation should be provided between brackets):

- [Author's initial(s) and surname(s)], ['Title of article'], [Title of newspaper], [Date], [Page(s)]: T. Padoa-Schioppa, 'Il carattere dell' Europa' [The Character of Europe], Corriere della Serra, 22 June 2004, p. 1.

1.7. Reference to the internet

Reference to documents published on the internet should present the following form: [Author's initial(s) and surname(s)], ['Title of document'], [<www.example.com/[...]>], [Date of visit]

- M. Benlolo Carabot, 'Les Roms sont aussi des citoyens européens', <www.lemonde.fr/idees/article/2010/09/09/les-roms-sont-aussi-des-citoyens-europeens_1409065_3232.html>, visited 24 October 2010. (NB: 'http://' is always omitted when citing websites)

2. Spelling, style and quotation

In this section of the authors' guidelines sheet, we would like to set out some general principles of spelling, style and quotation. We would like to emphasise that all principles in this section are governed by another principle – the principle of consistency. Authors might, for instance, disagree as to whether a particular Latin abbreviation is to be considered as 'common' and, as a consequence, as to whether or not that abbreviation should be italicised. However, we do humbly ask our authors to apply the principle of consistency, so that the same expression is either always italicised or never italicised throughout the article.

2.1 General principles of spelling

- Aim for consistency in spelling and use of English throughout the article.
- Only the use of British English is allowed.
- If words such as member states, directives, regulations, etc., are used to refer to a concept in general, such words are to be spelled in lower case. If, however, the word is intended to designate a specific entity which is the manifestation of a general concept, the first letter of the word should be capitalised (NB: this rule does not apply to quotations). Thus:
- [...] the Court's case-law concerning direct effect of directives [...]
- The Court ruled on the applicability of Directive 2004/38. The Directive was to be implemented in the national law of the member states by 29 April 2006.
- There is no requirement that the spouse, in the words of the Court, 'has previously been lawfully resident in another Member State before arriving in the host Member State'.
- Avoid the use of contractions.
- Non-English words should be italicised, except for common Latin abbreviations.

2.2. General principles of style

- Subdivisions with headings are required, but these should not be numbered.
- Use abbreviations in footnotes, but avoid abbreviations in the main text as much as possible.
- If abbreviations in the main text improve its legibility, they may, nevertheless, be used. Acronyms are to be avoided as much as possible. Instead, noun phrases are to be reduced to the noun only (e.g., 'the Court' for 'the European Court of Human Rights'). If this should prove to be problematic, for instance because several courts are mentioned in the text (e.g., the Court of Justice and the European Court of Human Rights), we ask our authors to use adjectives to complement the noun in order to render clear the distinction between the designated objects (e.g., the Luxembourg Court/the European Court and the Strasbourg Court/the Human Rights Court). As much will depend on context, we offer considerable liberty to our authors in their use of abbreviations, insofar as these are not confusing and ameliorate the legibility of the article.
- In English titles, use Title Case; in non-English titles, use the national style.

2.3. General principles of quotation

- Quotations are to be placed between single quotation marks, both in the main text and in the footnotes (thus: 'aaaaa').
- When a quotation forms part of another quotation, it is to be placed between double quotation marks (thus: 'aaaaa "bbbbb" aaaaa').
- Should a contributor wish to insert his own words into a quotation, such words are to be placed between square brackets.
- When a quotation includes italics supplied by the contributor, state: [emphasis added].