Digitalizing the commercial courts: between promises and pitfalls

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1 Introduction

Various authors[1] have been conceiving digitalization as a way to modernize justice and improve legal issues, i.e. address delays, increase legal security and make justice cheaper and accessible for all. Access to justice is particularly important in this view since it often determines the enforcement and protection of other rights.[2] In other words, unequal access to justice threatens social cohesion.[3] It is also argued that automating their working process can lighten judges' and court clerks' workload[4]; fasten the diffusion of information while increasing its centralization and transparency; reduce printing costs and paper mailing tasks; and facilitate communication between stakeholders.[5] Digital technologies would therefore increase the confidence of every citizen in the judicial institution,[6] while designing tomorrow's courts and lawyers.[7]

Such normative and techno-determinist discourse[8] has justified several central and integrated projects carried out in Belgium since 1998 in order to increase effectiveness, efficiency and transparency, as well as access *to* and trust *in* the judicial system. Unfortunately, these projects failed owing to insufficient results and the absence of a change management strategy.[9] In 2015, the former minister of justice adopted a decentralized methodology to accelerate the digital transformation – or "modernization"[10] – of the Belgian justice system. His plan called for the cooperation of legal professions, and for their *enrolment* in the design, development and implementation of digital tools,[11] as described in Section 4. This

1 Rabinovich-Einy & Katsh 2016; Kobayashi & Ribstein, 2011; Ní Aoláin, p. 92: "The defence of access rights, and litigation related to them, can be seen as a litmus test of a society's ability to respond to extremity, and a place where the resistant quality of law is tested."
2 Fierens 2020.
3 Menon 2020.
4 Mason 1978.
5 Susskind 2021; Sourdin, Li, & McNamara 2020; Van den Branden 2019. An essential tool for maintaining accessibility to courts and tribunals at a time when budgetary savings are forcing court clerks to offer less availability to litigants.
6 Eridman & De Leval 2004.
7 Susskind 2013; Susskind 2021; SPF Justice 2017.
8 Dubois & Schoenaers 2019a.
9 Poullet & Mougenot 2017.
10 Latour 2012.
11 Callon 1984; Dubois, Mansvelt & Delvenne 2019b; Vanderstichele 2017a.

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is how the Central Solvency Register, named *RegSol* (or the *Register)*, was designed, developed and launched within the commercial courts in April 2017.[12]

RegSol is a digital platform that allows the registration and conservation of insolvency cases (bankruptcy and legal reorganization procedure),[13] the centralization and exchange of data between the different stakeholders of a bankruptcy procedure.[14] *RegSol* is the first tool resulting from the cooperation between French- and German-speaking Bars (Avocats.be), the Dutch-speaking Bars (OVB)[15] and the minister of justice. This cooperation did not involve the court practitioners' participation. In 2016, the legislature decided to adapt the judicial code and the law of 8 August on bankruptcy in order to introduce this Central Solvency Register.[16] It also appointed the Bar Associations as sole managers of this *Register*. By reducing the number of paper claims to be handled by the registry, the proceedings of unpaid claims are expected to be faster and less costly. The minister of justice emphasized that "these investments [...] represent 200,000 fewer claims for the registries to process in paper form. This will make the procedure faster and cheaper overall".[17] Belgian lawyers quickly adopted *RegSol*, and most of them seemed to be – and still are – enchanted by it. But several magistrates and court clerks keep complaining about problems and breakdowns with the platform. We have considered *RegSol* as a tracer of the power relations between legal professions taking part in the modernization of justice. Taking into account the design, development and maintenance of this platform, what are the different attitudes of these groups towards the strategies to digitalize (access to) justice. What objectives and obstacles do they attribute to *RegSol*? In doing so, we provide informative, empirical insights into the dynamics of the (lack of) cooperation between legal professions.

Some of the obstacles faced by *RegSol* can be illuminated by a sociological approach. We will therefore adopt a social constructionist perspective[18] to describe and analyse three distinct but interdependent phases through which the platform has been designed, developed and implemented. This will help us to grasp some of the decisions that have gradually influenced the contrasting attitudes of the various groups of actors involved. By doing so we will also analyse the *enrolment*[19] of the Bar Associations and the *non-enrolment* of court practitioners as a critical factor,

12 Vanderstichele 2017b.
13 www.diplad.be/en-GB/t/27/RegSol.aspx (last accessed on 23 March 2022).
14 Art. 5/1. de la loi du 8 AOUT 1997 – CODE DE COMMERCE LIVRE III – Loi sur les faillites.
15 Two organizations bring together all the Bars of the Flemish-, French- and German-speaking parts of the country. These are the *Orde van Vlaamse Balies* (OVB) and *Avocats.be* (for the French- and German-speaking Bar Associations).
16 Loi modifiant le Code judiciaire et la loi du 8 août 1997 sur les faillites en vue d'introduire le Registre Central de la Solvabilité. Available on https://etaamb.openjustice.be/fr/loi-du-01-decembre-2016_n2016009610.html (last accessed on 24 March 2022).
17 *Ibidem*.
18 Czarniawska 2003.
19 Callon 1984.

explaining how some actors can happily adopt the tool, while others experience more difficulties.

While some contributions have already looked at how new technologies can redefine legal professions[20] and while much attention has also been paid to the legal regulation of new technologies,[21] far less has been written about how new technologies' design, development and management can impact courts' practices and organization.[22] Five years after its introduction, this platform requires an empirical analysis of its design, development and implementation among and by different groups of actors in order to assess its contrasting impact on their working context. This case study will thus provide an empirical understanding of the genesis and uses of a platform that is supposed to make justice more accessible and efficient.

2 Qualitative methodology and theoretical frameworks

This study of *RegSol*'s design, development and implementation draws on a qualitative methodology. In addition to grey and scientific literature reviews on legal technologies in the judicial system, our study builds on previous work carried out between 2018 and 2020[23] and extends it with two case studies that have been conducted in a big (*Alpha*) and in a small (*Delta*) commercial court between November 2021 and February 2022. In total, 12 on-site observation and 32 semi-structured interviews were conducted with lawyers (n = 4), computer and financial specialists (n = 2), court clerks (n = 7), court registry members (n = 5), consular judges (n = 4), magistrates (n = 5) and curators (n = 5) in Alpha (n = 15) and Delta courts (n = 11). The interview grid consisted of three main sections, devoted, respectively, to (i) the professional practices of the interviewees, (ii) the uses they were making of *RegSol* and (iii) the advantages and disadvantages of this tool for their professional practices and working context. During the interviews, some details were asked about the development process of the tool, its speeding and adoption, the adaptation of practices, interactions, procedures and work routines. Every interview was conducted in French and then translated into English for the purpose of this article and lasted between one hour and two-and-a-half hours. Every interview provided both a descriptive account and a meaningful interpretation of the interviewees' working experience and working context. A thematic content analysis was then carried out using the Corpus© tagging software of the University of Liège.[24] In addition to this empirical material, web and documentary searches were conducted to collect some "managerial discourse" relating to *RegSol*, including online publications as well as policy documents, technical manuals, minutes drawn up by Bar Associations, blog posts, interviews in

20 Dubois 2021; Jones & Pearson 2020; Skjølsvik, Breunig & Pemer 2018.
21 Brownsword 2008.
22 Donoghue 2017; Brayne & Christin 2021.
23 Dubois & Mansvelt & Delvenne 2019b.
24 https://corpus.lltl.be.

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the press and posts on LinkedIn. These documents present "who" or "what" *RegSol* is, help "discover" the platform and "tell" more about its uses. This qualitative material has been examined through textual analysis, using open coding techniques to identify recurrent themes and two conceptual frameworks to inform the analysis of *RegSol*'s genesis and uses.

First, the sociology of translation developed by Michel Callon[25] helps us in accounting for this process. Callon identifies four phases in the collective creation of such a tool. Everything begins with a "*problematization phase*", where the actors involved agree on the problem to be addressed.

> Each entity enlisted by the problematisation can submit to being integrated into the initial plan, or inversely, refuse the transaction by defining its identity, its goals, projects, orientations, motivations, or interests in another manner.[26]

This moment is important because it is the starting point of a project, and it binds the actors to the project. *Interessement* is the second phase. "To interest other actors is to build devices which can be placed between them and all other entities who want to define their identities otherwise."[27] The third phase is that of *enrolment*, defined by Callon as "the device by which a set of interrelated roles is defined and attributed to actors who accept them".[28] The fourth and last phase is the *mobilization* of allies to expand and densify the network they have begun to develop around the interessement device. But mobilization remains uncertain: "Will the masses [...] follow their representatives?"[29] This empirical-conceptual framework is based on the postulate that innovation emerges in a network populated by human and non-human entities.[30] The translation process emphasizes the continuous displacements of goals, interests, devices, human beings, objects and inscriptions.[31] Throughout a translation process, some actors redefine their short-term interests to align with those of other stakeholders. Other actors (or *translators*) occupy a central position among these stakeholders (*inter-esse*) in order to formulate a common objective that creates meaning (problematization), overcomes divergent interests and redefines identities (*interessement*), roles (*enrolment*), behaviours and positions (*mobilization*).

According to Callon, if some actors "can submit to being integrated into the initial plan", others can "refuse the transaction by defining [their] identity, [their] goals, [...] motivations, or interests in another manner".[32] To better understand how some actors refuse a transaction, we will borrow from Hirscham's triptych of

25 Callon 1984.
26 *Ibidem*, p. 207.
27 *Ibidem*, p. 208.
28 *Ibidem*, p. 211.
29 *Ibidem*, p. 214.
30 Akrich, Callon & Latour 1988.
31 Callon 1984, p. 223.
32 *Ibidem*, p. 207.

reactions to dissatisfaction: exit, voice and loyalty.[33] The option of exit occurs when individuals choose to escape from the dissatisfying situation instead of actively seeking to improve it. In this case, they prefer to put an end to what they perceive as an unproductive relationship. Hirschman also underlined that by exiting, people effectively relinquish their ability to use the voice strategy – that is, exiters have no chance of influencing management's actions from the outside. They will not be able to benefit from any future improvements either. The second strategy is voice. It entails discontent of the situation directly to the management or authorities with the hope of recovery. Hirschman perceives voice as helpful: it is constructive, striving to improve the entity while respecting the legitimacy of the current authority. The third strategy is what Hirschman calls loyalty. It refers to an individual who does not exit regardless of his or her underlying reasons to remain in a deteriorating situation. In our particular case study, court practitioners have from the outset expressed their dissatisfaction with the cooperation agreement between the minister of justice and the legal professions. They felt that this agreement was threatening the independence of the judiciary, and they now feel that *RegSol* updates these risks. As we will see further, this is why they did not take part in the design and development of the platform and are struggling to use it.

3 The rise of a new necessity: a digital justice

In the last 20 years, digitalization has often been conceived as beneficial to improving universal access to justice.[34] A first argument put forward by various authors is that digital technologies would enable the justice system to reduce the "justice gap",[35] which is defined as "the disparity between the legal needs of low-income persons and the resources available to meet those needs".[36] According to this argument, technology can provide people with quick, affordable and equitable legal solutions, even if "the rush to digitalisation [might lead to ignoring] due process and transparency in the name of efficiency".[37] A second argument put forward by policymakers is that digital technologies can lighten judges' and court clerks' workload through the automation of their working process.[38] Improving productivity in the courts is of the greatest importance as governments seek ways of meeting with escalating demands for services with increasingly limited resources. This is even more important in the case of commercial courts as the European Commission specifies that efficient judicial systems are essential for the functioning of the internal market and a prerequisite for economic growth.[39] A third argument

33 Hirschman 1970.
34 Salmerón-Manzano 2021.
35 Menon 2020.
36 Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 6 (June 2017) ('LSC Report').
37 Schmitz 2019.
38 Mason 1978; Dumoulin & Licoppe 2016; Procopiuck 2018; Geens 2017.
39 European Commission 2020.

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is that new technologies can hasten the diffusion of legal and judicial information while increasing its centralization and transparency.[40]

These arguments are promoted by the European institutions. In fact, digital technologies have become an integral part of the European judicial systems, especially in their practices of writing, researching and archiving legal texts, court records, judicial files and sources of legislation.[41] But the European Commission goes further by insisting that

> ICTs must be tools or means to improve the administration of justice, to facilitate the access of litigants to the courts and to reinforce the guarantees offered by Article 6 of the ECHR, namely access to justice, impartiality, independence of the judge, fairness and reasonable time for proceedings.[42]

According to this normative discourse, digital technologies can automatically increase the confidence of every citizen in the judicial institutions, while designing tomorrow's courts and lawyers.[43] But despite the breadth of these discourses, digital technologies remain under-exploited in the Belgian judicial system. The European Commission for the Efficiency of Justice ranks Belgium 35th among the 47 countries evaluated, according to their overall level of involvement with ICTs.[44]

In 2001, drawing on the recommendation of the Council of Europe,[45] Belgium has launched a major project aimed at managing all legal proceedings through a single application.[46] Unfortunately, this project failed.[47] In 2008, the idea of a major application, reflecting a single global strategy, was replaced by a modular and cooperative strategy.[48] This plan was addressing the diverse interests and needs of the judicial actors working in different jurisdictions. This is how a variety of home-made innovative tools and software have been crafted locally by some passionate magistrates and court clerks. Several small modules were then developed, independently of each other.[49] This observation is especially accurate within commercial courts.

40 Germain 2007; Dubois & Pelssers 2021b.
41 Council of Europe 2020.
42 Advisory Opinion 2011 No. 14 of the CCJE, Justice and information technologies, adopted at the 12th plenary meeting, Strasbourg, 7-9 November 2011, available at: https://wcd.coe.int (last consulted on 13 April 2022).
43 Susskind 2013; SPF Justice 2017.
44 CEPEJ 2018, p. 100.
45 Recommendation Rec (2001)3 of the Committee of Ministers to member states on the services of courts and other legal institutions provided to citizens through new technologies, 28 February 2001, available on https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2aab.
46 Verougstraete 2007.
47 Various reasons have been presented to explain this setback: the poor quality of work provided by the company in charge of the project, the lack of coordination of the judiciary, the resistance of the judicial practitioners to the project, the inadequacy of the method of change adopted to tackle the ambitiousness of the project that was intended to be global. See Wynsdau & Jongen 2015.
48 Dubois & Mansvelt & Delvenne 2019b.
49 Mougenot 2015.

The commercial court has exclusive jurisdiction to hear actions and disputes directly related to insolvency proceedings, such as bankruptcy and judicial reorganization.[50] These proceedings play a key role in market regulation[51] as they involve companies that still have assets, but they are complex as they bring together various groups of actors: the litigants are legal entities or natural persons wanting to file for bankruptcy (or restructuring) or being cited in bankruptcy; the court registry is the administrative hub centralizing documents, managing the cases at each stage of the procedure and appointing curators; curators are lawyers representing the bankruptcy entity and the creditors and ensuring the good management of the case; magistrates and lay judges – named consular judges – examine the file at the end of the process during several hearings. Each chamber of the court is composed of one professional judge and two consular lay judges, the latter being private entrepreneurs, company administrators, accountants, auditors, etc. They assist the professional judge by giving him or her the opportunity to discuss the case, bringing in their own business experience. Consular judges represent "the real world" within the court. As a judge said, "[F]or us, they have a great added value because they have a large and deep field experience."[52] Through discussions, they allow the law to be adjusted to contingent business practices, shaping decisions that are based on legal and business norms and information. By subjecting the law to debate between justice (magistrates) and business practitioners (consular judge), the decision issued by the court serves not only to "render justice" (*justice*, in French) but rather to render "fairness" (*justesse*, in French). The court is constantly seeking a balance between legal prescriptions and commercial norms. Insolvency files go through different chambers (between three and five depending on its complexity) and are part of a non-linear process as they are continuously passed back and forth between these multiple actors. Hence, the bankruptcy and restructuring procedures are complex and lengthy and therefore constitute a heavy financial and administrative burden for the court. This is especially so when compared with other insolvency procedures, such as liquidation and dissolution, which include companies with no assets, that are managed within one hearing, without involving any curator.

As previously mentioned, the complexity of the procedure is also reflected by a profusion of heterogeneous, handcrafted and non-integrated digital tools. As we will later (see *infra*, Section 4), *RegSol* itself was engendered by a home-made tool called *FailManager*. This tool had been developed and used by the consular judges in Gent since 2011. It enabled them to store and share copies of local files with the different parties in the bankruptcy.

In addition to not being integrated, most of these tools do not communicate with each other. They each intervene at specific and different moments of the insolvency procedure. This forces the court workers to keep a paper file as a basic legal reference

50 www.tribunaux-rechtbanken.be/fr/tribunaux-et-cours/tribunal-de-lentreprise (last accessed 23 March 2022).

51 Frade, Fernando & Conceição 2020.

52 Extract from an interview with a magistrate, 25 November 2021, Alpha Court.

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all along the process and then to convey each of these tools independently when the procedure requires it. This heterogeneity reflects the absence of a common digitalization policy for the courts but also the local and spontaneous initiatives of different practitioners to make their everyday work easier. Developed at different times and by different actors, each tool fulfils a unique function, and relies on specific technologies that make them incompatible.

Nonetheless, each tool, including the *Register*, has been developed to bring benefits such as an easier and faster access to a more transparent, efficient, effective justice. These values are particularly important in the context of insolvency and restructuring procedures: access to courts and legal information, centralization and transparency (file tracking) are essential factors to maintain equality between creditors.[53] Electronic access to the file also gives the opportunity to insolvency practitioners, in general, but especially consular judges and curators, to monitor and produce operations in just a few clicks. The effectiveness of such procedures maximizes their outcomes and responds to market temporality.[54]

4 Designing a new tool: is the *enrolment* of professional bodies a solution?

To understand how *RegSol* was shaped, it is necessary to go back to the Belgian policy aiming to modernize justice through digitalization. In 2016, the former minister of justice, Koen Geens, decided to strengthen and materialize the modular and cooperative strategy launched in 2008.[55] To do so, he chose to formally *interest*, *enrol* and *mobilize* legal professions[56] towards the digital transformation of the Belgian justice system. His aim was to improve access to and efficiency of justice in a context of public budget shortages. The Bar Associations (OVB and Avocats.be), the notary's office and the bailiffs immediately became enthusiastic about the minister's plan, but the judiciary actors and the central administration were rather reluctant. They were concerned and upset about the idea that an IT service traditionally performed by the public administration could be outsourced to the private sector. Despite the opposition of the judiciary, a protocol agreement bringing together the minister of justice, his administration, as well as the representatives of the Bar Associations (OVB and Avocats.be), the notary's office and the bailiffs, was signed on 22 June 2016. As for the colleges of the Public Prosecutor's Office and the judiciary, they refused to sign the cooperation protocol, mainly because of a disagreement with what some of them described as a "private-public partnership".

> More and more private operators are taking part to the management of procedures that were traditionally and purely the responsibility of the judiciary.

53 Frade, Fernando & Conceição 2020.
54 Dubois & Mansvelt & Delvenne 2019b.
55 *Ibidem*.
56 Callon 1984; Dubois & Mansvelt & Delvenne 2019b.

> Judges are not very favourable to such initiatives. I think that the State should ensure the public service of justice, and not private actors. (Judge, April 2018)

This reason is exemplified by a magistrate in the following excerpt:

> The goal of a private firm is to produce money and profit, while the goal of the court is to provide the best and broadest public service possible in the shortest possible time. These objectives are diametrically opposed. For the Joint Bar Associations, it's more profitable if there is less service, and for justice, it doesn't matter how much money is there: all the cases should be processed equally. (Magistrate, 24 February 2022, Court Delta)[57]

While the judiciary first chose to *voice* its discontent with the plan of the former minister of justice, it was not heard. It did not manage to lead the latter to adapt his initial strategy to its requests. Hence, it decided to not sign the protocol agreement, *exiting* what it perceived as an unthinkable deal between public and private actors.

Despite the *exit* of the judiciary, the *interessement* of the other legal professions enabled the minister to finally succeed in advancing in the digitalization of the Belgian justice system. The 2016 protocol led them to design and develop several tools. Among them, the Bar Associations positioned themselves as leaders in the design and development of *RegSol*. According to the Bar Associations, this project aims

> to make justice more efficient and to improve the citizen's access to justice within the framework of a democracy concerned with offering an efficient and accessible judicial system to all.[58]

From a technical point of view, *FailManager* inspired the Bar Associations. The existence of this already widely used tool motivated them to design and develop a similar tool for all the Belgian commercial courts, which they named *RegSol*. The Joint Bar Associations then adopted a specific financial and organizational strategy. They first decided to outsource the design and development of *RegSol* to a private company, named NV Aginco. The Joint Bar Associations acted as a relay between this company and the end-users to implement the solutions. And they delegated the supervision of *RegSol*'s development to Diplad, an IT firm that was founded in 2014, within the Flemish Bar Association (OVB). Both Bar Associations pre-financed the platform. Their business model was based on fees in order to manage bankruptcy cases and claims filing.[59] By doing so, the Bars opted for an entrepreneurial approach. On the one hand, this entrepreneurial attitude benefits

57 The reasons behind the concerns of judges and public administration will be further explored in the next paragraph.

58 Avocats.be press release of 4 September 2018. Available on https://avocats.be/fr/actualites/avocatsbe-et-lovb-continuent-de-soutenir-la-digitalisation-de-la-justice (last accessed on 23 March 2022).

59 www.diplad.be/en-GB/t/27/RegSol.aspx (last accessed on 23 March 2022).

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its members. Lawyers have an interest in evolving in a digitalized environment and in using faster and more transparent electronic communication tools:

> From a competitive point of view, the big international law firms represent an immediate threat to the majority of our members. If Justice does not modernize quickly, it is the survival of our profession that is at stake. Not only must we try to adapt to technological progress, but we must also try to participate in their development rather than undergo it. (Lawyer, January 2016)

On the other hand, investing in an infrastructure such as *RegSol* requires a financial balance to be found. They justify this risky operation by insisting on its necessity:

> [Investing] is not part of our legal mission, but if we don't do it, the risk is that nothing will happen. (Comments from the former IT commissioner of Avocats.be, 16 June 2017)[60]

However, the Bars are experiencing some structural budgetary difficulties:

> [It] was anticipated that IT projects would be revenue generating in the future, so past budgets were voted on the basis of loans to be taken out and therefore repaid at some point. However, not all of the estimated revenues have been realized. But the loans must be repaid. (The treasurer, the administrator in charge of IT projects and the financial and human resources director of Avocats.be)[61]

At this stage we understand the controversies that have animated *RegSol* from the beginning. In 2016, the judiciary criticized the minister's strategy of involving legal professions in the "modernization" of justice. They saw the risk of transferring ownership and control of justice from public to private. Their reluctance was then reinforced by the entrepreneurial role adopted by the Bar Associations. By relying on private partners to design *RegSol* and by defining a business model to finance the tool, they were adopting a logic of privatization of justice that could not satisfy the judiciary. These controversies also characterize *Regsol*'s development and implementation processes. The non-alignment between the different stakeholders in the design process is the first obstacle in the creation of an efficient tool oriented towards access to justice.

60 http://trends.levif.be/economie/lawyerz/quand-les-avocats-comblent-eux-memes-les-carences-de-la-justice/article-normal-677983.html (last accessed on 13 July 2022).

61 https://latribune.avocats.be/fr/presentation-du-budget-2020-davocatsbe (last accessed on 13 July 2022).

5 Development challenges: legitimacy of *RegSol* and the Joint Bar Associations?

The development of *RegSol* took place between the signature of the protocol agreement in 2016 and its official launch on 1 April 2017. By taking the lead on the design and conception of *RegSol*, the Joint Bar Associations position themselves as project leaders, working to translate the protocol into a concrete and efficient platform. To achieve this goal, they tried to define a common goal that makes sense to all stakeholders, overcomes divergent interests and considers the different needs.

5.1 From lawyers' enthusiasm to the disenchantment of court practitioners

On that level, the Bar Associations seem to have successfully interested, enrolled and mobilized some users, especially creditors and curators. They have completely integrated the tool into their habits and are propagators of the initial *script*.[62] The creditors are unanimously convinced that the tool serves their best interests and meets their needs, especially via the online filing of claims and the remote file monitoring. The curators are, first and foremost, lawyers, whose representatives (Joint Bar Associations) have been designing and developing the tool. To put it briefly, *RegSol* was created by them and for them. This sheds light on their favourable opinion towards the tool and its easy integration into their practices:

> The physical file in its paper version immediately became obsolete and is a hindrance to the principle of transparency of the procedure on the one hand and to the speed of communication on the other. And then *RegSol* considerably increases our access to the files, to the registry, and to the court. This centralisation allows us to work more efficiently. (Lawyer, 05 June 2018).

The Joint Bar Associations have also worked to *mobilize* their members through some training sessions, conferences and consciousness-raising workshop.[63] Once *mobilized*, lawyers became *RegSol*'s advocates and users, densifying its network… among lawyers and curators. However, the Joint Bar Associations did not manage to *interest* the judiciary, i.e. magistrates and court clerks.

Part of the explanation lies in the critical attitude of the magistrates towards the protocol (*non-interessement* and *exit*), followed by their passive behaviour during the development of the tool (*non-enrolment*). This resignation did not allow the Bar to take into consideration the specific needs of magistrates and court clerks, so the platform has not been adapted to their working contexts. Their *mobilization* was therefore jeopardized, and this explains, in part, their lack of satisfaction and adhesion.

But another part of the explanation may also lie in the lack of effort by the Joint Bar Associations to *enrol* and *mobilize* the court practitioners. Indeed, one of the

62 Akrich 1987.
63 Dubois & Mansvelt & Delvenne 2019b.

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Bar Associations' administrators acknowledges that "there may have been too little attention paid in the first instance to consulting with the court professionals themselves on how to handle a bankruptcy case".[64] By considering the needs and interests of some users more than others, the specific working context of registries and commercial courts might have been somehow neglected while developing the platform. Upstream, the Bar Associations did not manage to *problematize* the project in a way that made sense to judges and court clerks. These discrepancies are then reflected in the development process of the tool and in the technical choices. On the other side, by choosing the *exit* strategy in 2016, magistrates and court clerks reduced their chances to comment and influence *RegSol*'s development. This, in turn, prevented their needs and interests from being taken into account at this stage.

5.2 Judicial independence threatened by entrepreneurial problematization?

This vicious circle reinforces the reluctance of the judiciary to introduce *RegSol*. After having *exited* the protocol agreement, they adopt a *voice* posture in some professional forums and during the interviews to denounce the tool's dysfunctions. Their arguments centre mainly on a triple loss of independence for the judiciary. First, they point out the top-down and external imposition of a normative and techno-determinist discourse, stipulating the need to digitize justice, no matter how. In 2017, *RegSol* was imposed by the legislature while the justice system had no control over the strategic and technical choices to be made. This leads to their second argument, according to which the Bar Associations own and control the tool, which induces a dependency relationship of the judicial actors vis-à-vis the Bars. "The courts and the (economic) companies depend on the [Joint Bar Associations] and their private partners for the proper handling of bankruptcy cases".[65] And if judicial actors request any adaptation of the tool to better suit their needs, they depend also on the goodwill of the Bars. According to magistrates, "the courts should rather decide on the development priorities and the modification to be made".[66] A third matter of concern raised by the magistrates relates to the implicit transfer of the data ownership to the Bar Associations… and their private partners, such as Diplad and NV Aginco. They fear that these private companies can extract information for commercialization. Some even fear that the Bars will develop a new business model around the sale of economical-financial data.

Let us dwell for a moment on this last observation. Prior to 2017, the organization of the data and its ownership were not questioned. The links between the various files were located mainly in the judges' brain and sometimes inscribed in the case law summaries published in some legal journals.[67] Since 2017, however, *RegSol*

64 Extract from an interview with one of the Bar Associations' administrators, 16 December 2021.
65 Vanderstichele 2017a.
66 Extract from an interview with a magistrate, 04 November 2021, Court Alpha.
67 Vanderstichele 2017b.

collects all the data and documents related to insolvency proceedings,[68] such as the companies' identity, their economic activity and the list of creditors. This data will be kept by the Administrator for 30 years from the date of the judgment to the closure of the insolvency file.[69] By appointing the Bar Associations as joint managers of the *Register*, "the law implicitly establishes a transfer of (1) the organization of the solvency register, (2) the administration of its data and (3) certain property rights relating to the data".[70] It seems clear that this data and the models that can be derived from it are very valuable to private associations and policymakers. The Bankruptcy Code makes no explicit provision about the ownership of this data. This means that the Joint Bar Associations are free to organize the data, provide access to the data and exploit the data. As Vanderstichele explains, "the joint Bar Associations therefore can behave like a full owner and sell the data for profit, provided they respect the privacy laws".[71] Hence, the Manager (the Bars) may publish or communicate information from insolvency proceedings and decisions, free of charge or against payment, without violating the General Data Protection Regulation.[72] *RegSol* marks the transition from a centralized government (where the courts kept a register containing all data related to bankruptcy cases and exercised control on and enjoyed unlimited access to this register, while other actors, such as companies, lawyers and creditors, enjoyed limited access) to a distributed government. (The Belgian Bar Associations organize and administer the register, while the courts do not participate in this organization anymore.) In this context, commercial courts are becoming hubs in the bankruptcy data and information networks. Such an overhaul of court administration questions their autonomy and independence. Who has rights to this data? What are these rights? And how is the data managed and exploited? These questions are too important from a socio-economic point of view to be decided without any social debate.

Faced with these concerns, the Bar Associations have repeatedly called for order, as in the following press release:

> The recent criticism of certain senior magistrates is unfortunate: the Bar and the Judiciary are not adversaries here; they have no conflicting interests. Avocats.be and the OVB therefore call for a positive spirit to lead all the judicial actors to a new consultation. It is only through intense collaboration between the judiciary, the legal profession, the administration, the court clerks, the minister and his strategic unit that the necessary modernisation of justice can be achieved. All have the historic obligation to advance this modernisation and

68 Act amending the Judicial Code and the Bankruptcy Act of 8 August 1997 in order to introduce the Central Solvency Register. Available on https://etaamb.openjustice.be/fr/loi-du-01-decembre-2016_n2016009610.html (last accessed on 24 March 2022).

69 Manager's regulations for the use of the public section of the Central Solvency Register – February 2021. Available on www.regsol.be/Downloads/Terms_FR_February_2021.pdf (last accessed on 24 March 2022).

70 Vanderstichele 2017a.

71 *Ibidem*.

72 Manager's regulations for the use of the public section of the Central Solvency Register - February 2021. Available on www.regsol.be/Downloads/Terms_FR_February_2021.pdf (last accessed on 24 March 2022).

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> digitalisation, to improve the citizen's access to justice within the framework of a democracy concerned with offering an efficient and accessible judicial system to all. (Press release of 4 September 2018)[73]

Such calls emanating from the Bar Associations could not be heard by the magistrates and other court practitioners, as they did not recognize any legitimacy in the entrepreneurial role of the former. At this stage, we can see how the legitimacy of *RegSol* and that of the Joint Bar Associations intertwine[74]: as they were unable to legitimize the platform, they could not *mobilize* court practitioners in a common project.

6 Implementation reality: political promises versus practitioners' experiences

Let us go back to 2017, when the minister of justice announced a revolutionary tool for the insolvency and restructuring proceedings. He promised that *RegSol* would "make the procedure faster and cheaper overall".[75] However, the various obstacles identified in the design and development phases hindered, to a certain extent, the platform's potential to make justice more efficient and accessible. Indeed, everyday reality for court practitioners has not yet fully met its political promises. Its impact remains ambiguous: while simplifying tracking processes and centralizing information, it also entails new challenges.

6.1 Court practitioners' experience: fees, workload, impoverished labour and patience

In addition to the tensions already noted, certain principles are undermined by this platform, such as its user costs. If the use of *RegSol* is mandatory by law, it also requires the payment of a fee. It means that a service that was previously free for litigants becomes chargeable, which questions the public policy intentions to make justice "more accessible and cheaper".[76]

And what about ease of access to justice? Beyond the actual access to the tool, many actors, such as court clerks, registry staff members and judges, regret that the information available on *RegSol* is unintelligible and overly technical.

> The tool is not user-friendly, proof is that there are many handling errors, because it is not designed to respond to the procedure we have to follow. (Clerk, 17 February 2022, Court Delta)

73 https://jubel.be/fr/avocats-be-et-lo-v-b-continuent-de-soutenir-la-digitalisation-de-la-justice/.

74 Swanson & Ramiller 1997.

75 Avocats.be press release of 27 March 2017. Available on https://avocats.be/fr/actualites/regsol-la-plateforme-digitale-des-faillites-sera-lancee-le-1er-avril-2017 (last accessed on 24 March 2022).

76 *Ibidem*.

This is even more concerning as the bankruptcy and restructuring procedures are already complicated in nature. As previously mentioned, it relates to various actors located in several chambers and requires a variety of documents.

As a result, a lot of people fill in the boxes in an approximate way, causing difficulties for the registry and for further processing of the procedure. The poor quality of information requires it to be reviewed and updated by a court worker, slowing down the handling of the case, and weighing up the registry workload. This also changes the very nature of the work at the registry since their mission of helping and advising the litigant has been transformed in practices of "information control".

> Before 2017, when a request was filed by a litigant, it was signed and it was processed. With the electronical platform, if it is not filed in the right item, we have to send it back to the person saying 'you did not file it in the right item', with a comment. So even if *RegSol* is supposed to speed up the file process, there is a workload appearing from the use of the system itself. (Registry staff member, 24 February 2022, Court Delta)

Fluidity and continuity problems are also encountered by court practitioners, as the platform sometimes needs one minute to load a page. This problem is all the more serious when several pages need to be loaded to submit a single document. Furthermore, the handling of certain functionalities is not automated. For example, file access to the consular judges must be given manually and individually by the registry. If 200 files are processed during a hearing, it represents 400 access rights to be given, since there are two consular judges per hearing. This task requires a lot of patience and many manipulations, as it takes about one minute to grant a single access. Considering that there are several hearings a day, this type of assignment mobilizes one person during a whole day of work, considerably transforming and impoverishing the nature of some court clerk's work:

> Clicking on the same item all day every day is far from being intellectually stimulating. (Chief of clerk, 18 November 2021, Court Alpha)

And yet, the sending of documents and the file management is no longer subject to postal time frames:

> Before, you never got a response from the curators for 5 to 6 days, whereas now with regsol, in two seconds you can get [the] response if he is alert. He sees the notification on the phone and he answers right away. (Consular judge, 08 February 2022, Court Beta)

Strictly speaking, *RegSol* makes file management faster. But as these new difficulties take up some of the workers' worktime, the workload has not decreased, it simply became different. Hence, the goal to accelerate the procedure does not seem to be realized.

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6.2 Digitalization as facilitation: a false promise?

Regarding the promising efficiency *RegSol* was supposed to bring by replacing paperwork with an electronic and centralized procedure, there is still a lot to be done. At this time, the ambition to have a file that would only exist electronically into *RegSol* is not realistic, according to the registry employees. First, because certain documents, such as the citations, are not intended to be integrated into *RegSol* by the law and there is no item foreseen for that matter in the interface at the moment. This forces the Registry to keep these documents in their paper form.

> I believe that the legislator will have to evolve: there is a gap between the intentions they have in saying that the file will be fully electronic and the reality. They would really have to look at each section of the law and ask themselves what they need to do in order to make it full and only electronic. Because today the legislation doesn't allow it. (Chief of clerk, 17 February 2022, Court Delta)

A second reason is that *RegSol* was not intended to replace any of the tools that already existed.[77] *RegSol* was conceived additionally to all the many applications that were already used by the commercial courts, increasing their technological redundancy, and entailing parallel – electronic and paper – files.

> The proposed law does not in fact prevent the maintenance of a double bankruptcy file. In addition to a procedural file (opening and closing of the bankruptcy), there will in fact still be – simultaneously – a bankruptcy file at the court.[78]

A third reason is that the court is not sufficiently equipped to work with an electronic file alone.

> Before the pandemic, court clerks had to share computers. We had to wait two years to get laptops and finally allow some homeworking. So much to say that tablets or laptops for consular judges is unthinkable and the courtrooms are not equipped with computers anyway. So, we have to print the file so that everyone can have access to it. (Registry staff member, 07 January 2022, Court Alpha)

A fourth reason is that consulting a file is faster in the paper version than in its electronic version on *RegSol*. This observation is induced by the fluidity and continuity problems mentioned previously. This constraint is not negligible and was clearly visible in times of high caseloads. If the "big" courts did not operate with a paper version, this difficulty would paralyse proceedings. In a certain sense,

77 Mougenot & Vanderschuren 2017.

78 Draft legislation to amend the Bankruptcy Act of 8 August 1997 and to introduce the Central Solvency Register, report made on behalf of the Committee on Commercial and Economic Law, Parl. Doc., House, 2016-2017, doc. 54 1779/008, p. 16.

RegSol was not designed for courts dealing with large volumes of information and cases.

This observation must be qualified if one considers the point of view of some magistrates:

> With RegSol, it is the first time that we have an electronic file. We click for every operation. With this platform, we have finally managed to dematerialise the court file. It's imperfect, it only works for a specific procedure, but it also has its advantages in terms of mobility, because you no longer have to go and sign: you click; you no longer have to send repetitive and cumbersome letters by post, nor acknowledge receipt: you click; you no longer have to go and find the files, look for the right document and photocopy it: you click. (Judge, 12 July 2022, Court Alpha)

> Ultimately, RegSol is a handy tool for exchanging data between the curator, the commissioner and the court because you only have to press a button. (Judge, 07 March 2022, Court Beta)

This fairly positive opinion seems to be shared more by young magistrates (under 45) who have started working with *RegSol* and are quite satisfied with it. It also seems that older magistrates, who were familiar with the procedure before the tool was introduced, are the most critical of it.[79]

In any case, the electronic file did not replace the paper file, as expected and announced, but it has been added to it.[80] Yet, article 5/1 of the law of 8 August 1997 on bankruptcies stipulates that the *Register* is an "authentic source".[81] Thus, when the registry and the magistrates handle the paper file, "they give up their authentic source by working on duplicates", as mentioned by one of the Bar Associations' administrators.[82] The term "authentic source" might seem strange if one knows that the original signed judgments remain in the paper file at the court. Only unsigned copies are uploaded on *RegSol*.[83] The Data Protection Commission questioned the legitimacy of the *Register* as an authentic source since it duplicates the file kept in court.[84] *RegSol* is actually a combination of true certified copies of an original document kept in the paper file at the court (such as the decisions pronounced) and original electronic documents (such as the consular judges' orders). The *Register* can only serve as an authentic source for the latter. The former is included for information purposes only, to allow the person consulting the *Register* to have a complete view of all acts performed in insolvency cases. This

79 This nuance, which we bring here, is the subject of the second part of our ongoing research and will be the subject of a later article.
80 Mougenot & Vanderschuren 2017.
81 Art. 5/1. de la loi du 8 AOUT 1997 – CODE DE COMMERCE LIVRE III – Loi sur les faillites.
82 Extract from an interview with one of the Bar Associations' administrators, 16 December 2021.
83 Mougenot & Vanderschuren 2017.
84 Advisory opinion No. 66/2016 of 19 December 2016, p. 4, available on the Commission's website – www.privacycommission.be (last accessed on 24 March 2022).

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shows the importance of keeping the file in both paper and electronic formats: "There is a paper part and an electronic part. And some documents exist twice."[85] Currently, a dual and parallel working process exists, as files lead a double existence. It becomes clear that this dual process has duplicated the work of the registry, court clerks having to track the file in both forms simultaneously. The paper versions require a great deal of administrative support to be printed, scanned, classified and recorded manually.[86] And we have seen that the electronic versions require considerable check and handling backing. This constraint has led to some reorganizing processes, weighing on some – court – actors more than on others – i.e. lawyers and curators.

7 Conclusion

This article critically analyses the controversies raised by *RegSol*. It reports on the discourse of the actors involved, some of whom are enchanted (having taken an active role) while others are disenchanted about the tool (unable or unwilling to let their needs to be taken into account). Our study shows that the primary objective of the tool was to make justice more accessible and efficient in commercial courts. This goal, however, is undermined by various issues about data ownership, service continuity and courts' independence from third – and private – parties. These concerns have been gradually revealed by the obstacles encountered in the design, development and implementation process of the tool. These obstacles emerged through the genesis of the platform, and they complicate *RegSol*'s vocation to make justice more efficient and accessible. As such, *RegSol* plays a paradoxical role in insolvency jurisdictions: while giving a remote access to the file and centralizing information and actors, it increases the heterogeneity of non-integrated tools. It also brings new challenges mainly weighting on magistrates, court clerks and registry employees. While the court practitioners were already averse to *RegSol* before it was implemented, their aversion worsened later. *RegSol* is currently unable to meet the unspoken needs of court actors, who have to tinker with this new device – and the others. As a chief clerk remarked, "They are developing a tool that is very well done, but it is not adapted to what we do in the field".[87] This, in turn, sheds light on why *RegSol* cannot automatically increase the access to justice; or its transparency, efficiency and effectiveness; or restore societal trust in the judicial system.

However, as it appears, bankruptcy proceeding is both a long and a thick working process driven by various actors, procedures and tools, artisanal practices, discussions, deliberations and negotiations, making it difficult to automate. This complex working context also undermines the ability of any tool to meet the needs of each actor at each stage of the process and, in turn, could partly explain why different groups of actors have conflicting opinions about *RegSol*. Furthermore, it

85 Extract from an interview with a court registry staff member, 21 December 2021, Court Alpha.
86 Mougenot & Vanderschuren 2017.
87 Extract from an interview with a chief clerk, 17 February 2022, Court Delta.

may not be excluded that some implementation issues experienced by the court practitioners are just a consequence of technological insufficiencies.

Finally, this contribution shows the need to reflect on the role of digital tools on/in justice and on the rule of law it should guarantee.[88] It also demonstrates that the implementation of *RegSol* involved not only technological but also institutional, organizational and normative factors.[89] Therefore, it is necessary to study technological tools and access to justice as social constructions. Tools are produced in several stages (design, development, implementation) which all involve a variety of stakeholder groups that need to be *interested*, *enrolled* and *mobilized* beyond their categorical and short-term interests. While the Bar Associations have been successfully *mobilising* most lawyers to use *RegSol*, this tool has rather been contested within the commercial courts, particularly among magistrates and court clerks, who did not participate in its design and development. They opted for an *exit* strategy after *voicing* their discontent, but this did not influence the minister's logic of action. Both their *non-enrolment* and their choice to *exit* impacted on their working practices, as *RegSol* does not meet their specific needs and working context. All of this takes place in a dynamic technological and economic context, where digitalization constitutes both a normative discourse and an opportunity.[90] In this case, the opportunity reinforced the power of the Bar Associations. Together with their private partners, they became central and indispensable actors for the proper functioning of the courts, which are now dependent on *RegSol*. Without *interessing*, *enrolling* and *mobilizing* court practitioners in the design, development and implementation of the tool, and without a strategic shift to *loyalty* on their part, the capacity of *RegSol* to increase access to and transparency of justice will remain problematic and controversial. This questions the future of *RegSol*: what will future developments regarding the tool look like? Will it be increasingly used by more and more court practitioners? Will it be adapted to their needs?

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88 Vanderstichele 2017a.

89 Velicogna, Errera & Derlange 2013.

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