

## From drafting common rules to implementing electronic European Civil Procedures: the rise of e-CODEX

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**Summary:** This paper explores the e-CODEX project in its effort to develop a techno-legal system to pilot ‘live’ (involving real cases and real people) cross-border judicial procedures and ensure its long-term sustainability. It is the understanding of the authors that this experience goes far beyond that of developing a technological tool to support judicial procedures. This is because creating such a tool in the judicial domain requires a reflection on key elements that ensure that procedures are juridically effective in the off-line world, and how such elements need to be transposed in the digital domain. As there is not a perfect fit between the two domains and different judicial domains have different requirements, the developing process involves legal (and political) decision-making. Furthermore, as a result of the understanding of the procedures and of their problems generated by developing such tools, and linked to the need to have the tools adopted by the users, actions are taken to influence not only the procedures themselves, but also their drafting approach. This is done for example addressing procedural off-line barriers both at implementation level, both influencing the EU legal instruments drafting/revision to reduce and supporting more semantic coherence. Finally, in its long-term sustainability effort, e-CODEX is becoming part of the EU political agenda and discourse at the highest levels.

### 1. INTRODUCTION

<sup>1</sup>In recent years considerable effort has been made for the harmonisation of cross border judicial procedures in the EU with the aim of furthering judicial cooperation in civil and criminal matters. In particular, a number of directives, regulations and other legal instruments have been adopted to facilitate “the coordination between national rules (e.g. in the area of international jurisdiction, recognition and enforcement,<sup>2</sup> cross-border service of documents,<sup>3</sup> and the taking of evidence),<sup>4</sup> to harmonised procedures that provide an automatic recognition and enforcement of the judgment

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<sup>2</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1–32.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.04.2004 p. 15–39).

<sup>3</sup> Council regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, in OJ L 324, 0.12.2007, p. 79–120.

<sup>4</sup> Council 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, in OJ L 174, 27.6.2001, p. 1–24.

issued for certain types of civil and commercial matters (e.g. the European Order for Payment (EOP),<sup>5</sup> the European Small Claims Procedure (ESCP)<sup>6</sup> and the European Account Preservation Order (EAPO)<sup>7,8</sup> and in criminal matters to support between others, mutual legal assistance between judicial and police authorities,<sup>9</sup> mutual recognition of judicial decisions, extradition (EAW).<sup>10</sup> Recently, the focus of the EU discourse has shifted from minimum standards and harmonized rules to the actual implementation, application, and operationalization of such rules. Within this shift, e-Justice has risen to the attention of EU policy makers as a tool (or set of tools), which can be instrumental for the successful implementation of cross-border judicial procedures. Long-term European e-Justice strategies started to be drafted<sup>11</sup> to place “information and communication technologies (ICT) at the service of judicial systems [...to improve] their functioning and contributing to a streamlining of procedures and reduction in costs”<sup>12</sup>, and with the practical intent to “create synergies of the initiatives at the European and national level”.<sup>13</sup> As a concrete outcome of this effort, the EU Commission and a group of EU Ministries of Justice begun to develop an infrastructure to support the communication and the exchange of legal information in EU cross-border judicial procedures. This initiative took the form of an EU-Co-funded project called “e-Justice Communication via Online Data Exchange” (e-CODEX).

The focus of the present paper is on the experience of e-CODEX project in the development of the techno-legal system, which has allowed to pilot ‘live’ cross-border civil procedures. It is the understanding of the authors that this experience goes far beyond that of developing a technological tool to support judicial procedures. This is because, on the one hand, creating such a tool in the judicial domain requires a reflection on key elements that ensure that procedures are juridically effective in the off-line world, and how such elements need to be transposed in the digital domain. As there is not a perfect fit between the two domains and different judicial domains have different requirements, the developing process involves legal (and political) decision-making. And on the other hand, because as a result of the understanding of the procedures and of their problems generated by developing such tools and linked to the need of not only implementing them but having them adopted by the users, actions are taken to influence not only the procedures themselves (e.g. addressing procedural off-line barriers both at implementation level, both influencing the EU legal instruments drafting/revision), but also their drafting approach (e.g. in a more semantically coherent direction).

In the attempt to provide a comprehensive picture of this emerging phenomenon, three topics are addressed by the paper: 1) the procedural tools created by the EU legislator and implemented by the EU Member States justice systems, 2) the development of e-CODEX solution, and 3) the far reaching effects that have been generated by such development process and by the drive to make the e-

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<sup>5</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1-32.

<sup>6</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1-22.

<sup>7</sup> Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in OJ L 189, 27.6.2014, p. 59–92.

<sup>8</sup> M. Velicogna et al., “Simplifying access to justice in cross-border litigation, the national practices and the limits of the EU procedures. The service of documents example”, EGPA Conference (26-28 August 2015), Toulouse, France.

<sup>9</sup> Convention on Mutual Assistance in Criminal Matters.

<sup>10</sup> Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA).

<sup>11</sup> European Commission, Towards a European e-Justice Strategy, COM (2008), 329 final; European Commission, Strategy on European e-Justice (2014-2018), Official Journal 2013, C376/06, 21 December 2013; European Council, Multiannual European e-Justice Action Plan 2014-2018, Official Journal 2014, C182/2, 14 June 2014.

<sup>12</sup> European Commission, Towards a European e-Justice Strategy, COM (2008), 329 final.

<sup>13</sup> X.E. Kramer, “A European Perspective on E-Justice and New Procedural Models: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU”, Available at SSRN 2696978 (2015).

CODEX solution sustainable in the long term.

## 2. RESEARCH METHODOLOGY

The procedural tools created by the EU legislator and implemented by the EU Member States justice systems have been analysed through several methodologies and data sources, including: 1) analysis of the relevant legislation and legal literature discussing it; 2) access to and analysis of the data collected during the Building Interoperability for European Civil Proceedings Online (BIECPO) project, coordinated by IRSIG-CNR, which investigated the legal Interoperability topic with a specific focus on the European Payment Order and on the European Small Claims Procedures both from a legal and organizational perspective and through the use of simulations with the cooperation of a real court; 3) access to and analysis of the data collected within the e-CODEX project on the EU cross-border judicial procedures related topics which emerged as problematic during the project piloting preparation and implementation phases.<sup>14</sup>

The experience of the e-CODEX project is investigated through a case study approach. The case study approach has shown to be the most effective way to study the large scale ICT phenomena in the broad area of justice.<sup>15</sup> In general, in-depth case studies are the preferred strategy when “how”, “who” or “in which way” questions are being dealt with, when the researcher/author has little control over events, and when the focus is on a contemporary phenomenon within some real-life context.<sup>16</sup> These elements characterize the investigation of large scale ICT innovation. Furthermore, the in-depth case study methodology allows the use of an interdisciplinary approach, which is particularly relevant in an area where multiple factors (such as legal, institutional, technological and practical) are deeply intertwined.<sup>17</sup> For what regards the analysis of the e-CODEX case-study, data have been collected through an analysis of the relevant documentation developed by the project (project Deliverables, reports, meeting minutes), both through the longitudinal and participant observation of the project development. The participant observation methodology here utilized reflects the principles of the interpretive ethnography approach. This method largely explores phenomena within a particular cultural and contextual setting from the perspective of the informants.<sup>18</sup> The ethnographic research involves lengthy and extended fieldwork among informants and therefore allows the researcher to get a privileged view of the action.<sup>19</sup> Several recent ICT-related studies clearly utilized an ethnographic orientation,<sup>20</sup> also in the e-justice field.<sup>21</sup> In the case of e-CODEX analysis, our approach is clearly ethnographic due to our involvement as researchers of a research institute partner (IRSIG-CNR<sup>22</sup>) in the e-CODEX project. Being involved in the project, we

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<sup>14</sup> As an example, a questionnaire was circulated between e-CODEX project partners to investigate the service of documents in national ordinary, simplified and European civil procedures, which collected replies on 14 EU justice systems from their Ministry of Justice or their representatives within the project.

<sup>15</sup> R.J. Teixeira, et al. “Risk factors in e-justice information systems”, *Government Information Quarterly* (2013) 30(3), 241-256.

M. Velicogna, “Justice Systems and ICT-What Can Be Learned from Europe”, *Utrecht L. Rev.* (2007) 3, 129.

<sup>16</sup> R.K. Yin, *Case study research, design and methods*, Sage publications, 2013.

<sup>17</sup> M. Velicogna et al. “e-Justice in France: the e-Barreau experience”, *Utrecht Law Review* (2011) 7(1), 163-187.

<sup>18</sup> M. Myers, “Investigating information systems with ethnographic research”, *Communications of the AIS* (1999) 2(4es), 1.

<sup>19</sup> J. Van Maanen, *Tales of the field: On writing ethnography*, University of Chicago Press, (2011).

R. Shankar et al., A collaborative framework to minimise knowledge loss in new product development, *International Journal of Production Research* (2013) 51(7), 2049-2059.

<sup>20</sup> N. Rangaswamy and S. Nair, “The mobile phone store ecology in a Mumbai slum community: Hybrid networks for enterprise”, *Information technologies & international development* (2010) 6(3), pp-51.

<sup>21</sup> G. Lupo (2014) “Law, Technology and System Architectures: Critical Design Factors for Money Claim and Possession Claim Online in England and Wales”, in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014, 83-107.

G. Lupo and J. Bailey, “Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples”, *Laws* (2014) 3(2), 353-387.

<sup>22</sup> Research Institute on Justice Systems of the Italian National Research Council.

could easily gather data for the research not only through the analysis of documentation but also through face-to-face contact, participant observation and informal interviews.

### 3. EUROPEAN CIVIL PROCEDURES

As mentioned in the introduction, the European Union has introduced a number of laws to help individuals and businesses to deal with the topic of cross-border litigation. This section focuses on the two procedural tools which have been designed to simplifying cross-border debt recovery, the European Order for Payment (Regulation 1896/2006, applicable since December 2008) and the European Small Claims Procedure (Regulation 861/2007, applicable since January 2009). They are the first examples in which the EU legislator “tried to propose an autonomous model of rules governing civil proceedings”<sup>23</sup> which applies to all Member States of the European Union,<sup>24</sup> as before, only specific aspects of cross-border civil proceedings such as jurisdiction, service of documents, gathering of evidences had been addressed.<sup>25</sup>

The European Payment Order applies to uncontested pecuniary claims, while the European Small Claims Procedure applies to cross-border claims of up to €2000 (excluding interests). They are intended as tools to provide to individuals “and businesses across EU the means for quicker, more efficient resolution of cross-border cases, by making it easier to enforce a claim against a defendant in another Member State”.<sup>26</sup> What follows is a short description of the two procedures based on the letter of the regulations, on the descriptions provided by the EU justice portal and on the practice guides, that allows to evince the key simplification steps compared to alternative cross-border procedures.

**European Order for Payment** covers cross-border uncontested monetary claims. It is designed as a written procedure, and uses seven standard forms which are set out in the Annex to the Regulation and which are available in all EU languages. It can be initiated by the claimant filling-in the application form, signing it and sending it by post to the competent court. The claimant must give the name and address of the parties, explain the case, show the cross-border nature of the claim and describe the evidence that supports the claim. Relevant documentation supporting the claim can be attached (receipts, invoices etc.). The procedure continues for as long as the defendant does not oppose the application. If the application is opposed, it becomes a contested case and it can be heard under the normal national civil procedure rules of the seized court’s Member State. Once the court receives the application form it can ask the claimant, also through the use of forms, to complete, rectify or modify the application. The court then decides if rejecting the application or issuing a European Order for Payment (using a specific form). If the EOP is issued, depending on the seized court rules, the court or the claimant must then serve a copy of it. The defendant can pay the amount indicated in the EOP or oppose the order by lodging a statement of opposition (form) to the seized court within 30 days. If the order is not opposed, the court can declare the order enforceable (through a standard form).

Similarly to the EOP procedure, the **European Small Claims Procedure** operates on the basis of four standard forms set out in the Annex to the Regulation and which are available in all EU languages. It is a written procedure unless an oral hearing is considered necessary by the court and it is initiated by the claimant filling-in a claim form, signing it and sending it (accompanied by relevant supporting documents) to the competent court. If the court considers the claim form to be inadequate,

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<sup>23</sup> M. Mellone, “Legal Interoperability in Europe: The Cases of the European Payment Order and the European Small Claims Procedure”, in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014, 83-107.

<sup>24</sup> With the exception of Denmark.

<sup>25</sup> Mellone, supra n. 23.

<sup>26</sup> [http://ec.europa.eu/civiljustice/publications/docs/guide\\_litiges\\_civils\\_transfrontaliers\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/guide_litiges_civils_transfrontaliers_en.pdf) (last visited 03/02/2016)

insufficiently clear or not properly filled in, it can ask the claimant to complete or rectify it. If the claim is not dismissed because the claim is clearly unfounded, the application inadmissible or the claimant has not integrated or rectified the claim, the court issue an answer form filled for the part of competence of the court. Depending on the seized court rules, the court or the claimant must then serve the answer form, a copy of the claim form, and eventual supporting documents to the defendant. The defendant can then submit the response within 30 days of service, by completing the filling of standard answer Form, adding eventual supporting documents. Counterclaim is also possible using a claim form, and follows the same procedure. Before giving the judgment, the court can then request further details concerning the claim from the parties, take evidence in accordance with the applicable rules, or summon the parties to an oral hearing. After the judgment is given, one of the parties can ask the court to issue a certificate concerning the judgment using standard Form. With such certificate and a copy of the judgment, the judgment is enforceable in the other Member States of the European Union.

The procedures are clearly an attempt to simplify, speed up and reduce costs of litigation in cross-border cases and improve accessibility also for self-represented claimant<sup>27</sup> and their wide and effective application from a legal perspective has been broadly recognized.<sup>28</sup> Several **simplification and standardization** elements must be underlined. The procedures are conceived as **written procedures**, and apart from exceptional cases for the ESCP, do not require the presence of the parties or their representatives before the court. A great effort has been made in order to standardize communication through the use of **standard forms**, which in theory should cover all communication requirements. The forms limit as much as possible **free text** in order to reduce possible communication problems and ease translation. Support **translation** through the availability of the form in all EU languages also reduce translation complexity. The identification of the parties and expression of will is based on **written signature** with no additional requirement. Failure to respond from one of the parties does not block the procedure. Both regulations have specific provisions to reduce the complexity of the enforceability in EU Member States other than the one in which the judgement is given.

At the same time, the empirical research and the debate among European scholars and practitioners on the implementation of these two regulations has unveiled many **blocking elements** where procedural steps are deferred to the national interpretations and rules;<sup>29</sup> resulting in non-uniform

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<sup>27</sup> Mellone, supra n. 23. Kramer, supra n. 13.

<sup>28</sup> M.L. DE TEJADA and L. d'Avout, "Les non-dits de la procédure européenne d'injonction de payer: (Règlement (CE) n° 1896/2006 du 12 décembre 2006)(1)", *Revue critique de droit International* (2007) 96(4), 717-748.

A. Fiorini, "Facilitating Cross-Border Debt Recovery – The European Payment Order and Small Claims Regulations", *International Civil Law Quarterly*, 57(2008)2, p. 456.

X.E. Kramer, "Enhancing Enforcement in the European Union. The European Order for Payment Procedure and its Implementation in the Member States, Particularly in Germany, the Netherlands, and England", in C.H. van Rhee, (Remco) and A. Uzelac (eds.), *Enforcement and Enforceability: Tradition and Reform*, Intersentia (2010), p. 25.

M. Mellone and A. Pancaldi, "Il nuovo regolamento comunitario sulle controversie di modesta entità", *Diritto dell'Unione Europea* (2008) 2, 281-317.

Mellone, supra n. 23.

<sup>29</sup> X.E. Kramer, supra n. 28.

G.Y. Ng, "Experimenting with European Payment Order and of European Small Claims Procedure", in F. Contini and G.F. Lanzara (eds.), *Building Interoperability for European Civil Proceedings Online*, Bologna: Cooperativa Libreria Universitaria Editrice Bologna, 2013.

M. Mellone, "Legal Interoperability: The Case of European Payment Order and of European Small Claims Procedure", in F. Contini and G.F. Lanzara (eds.), *Building Interoperability for European Civil Proceedings Online*, Bologna: Cooperativa Libreria Universitaria Editrice Bologna, 2013.

G.Y. Ng, "European Payment Order and European Small Claims Procedure in Practice: Findings from a Simulation Experiment", in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014.

M. Mellone, "Legal Interoperability in Europe: The Cases of the European Payment Order and the European Small Claims Procedure", in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures*

cross-border procedures.<sup>30</sup> In particular, interesting information has been collected on the practical application through simulations carried out by scholars<sup>31</sup> and by researchers and practitioners working on the implementation of e-CODEX project.

Ng (2014)<sup>32</sup> and Kramer (2015)<sup>33</sup> describe a number of issues the claimant (especially if not a “repetitive player”) is confronted with when attempting to file a claim. The first challenge is to understand if one of the two regulations applies to the case. While a Wizard is now provided on the dynamic forms section of the e-Justice Portal, the non-expert user requires time and effort to locate the tool<sup>34</sup> which then may result quite annoying with its long tree of chained closed Y/N questions it uses (e.g. “Do you have a legal case which could be decided by a court in a Member State other than your own or that of the other party?”) to guide and to suggest the possibility to use one of the two procedures or to suggest that the procedures do not apply to the case.

Once the user has determined the procedure he/she wants to use, the filling of the form itself provides a number of difficulties. These range from questions of international jurisdiction (in accordance with the rules of Council Regulation (EC) No 44/2001), providing the required information on the defendant (which may vary depending on the competent court Member State rules), calculating interests, identifying attackable assets in the EOP case, describing the claim, the documents the claimant has in support of the claim and additional information in a language accepted by the competent court (and eventually translate it in the language of the defendant).

Another difficulty regards the lack of information available on the methods of payment of the **court fees**, which must be done in order to properly file a claim. On the basis of what stated in the regulation, claimant should utilize the methods of fees payment available in the Member State in which the addressed court resides. These pose several problems ranging from the calculation of the fees to the specific methods available, which in some cases require to physically go to the court. In addition, depending on the Member State, more than one fee has to be paid at different steps of the procedure (Italy for example includes “standard court fee” *contributo unificato*, “Costs of service” *spese di notifica* and “rights of copy” *diritti di copia*). What must be paid, when and how, and what happens in case of mistake is not always clear.

Furthermore, once the form is sent to the competent court, **what happens next** is not clear. The expectation is that the court will take care of the procedure and inform the parties, but this is not always the case. As an example, according to the Italian procedure the service of documents is typically carried out by the bailiff (*ufficiale giudiziario*) upon the party’s request. So in the EOP procedure the claimant, and not the court, has to notify the EOP. In the simplest case, when the defendant is domiciled in Italy, the claimant has to request a true copy (in Italian “*copia conforme*”) of the EOP to the court and to request the service through the bailiff (“*ufficiale giudiziario*”) within the deadline of 30 days. These activities normally entail the physical presence of the creditor or of a person acting on his/her behalf and the payment of further fees.

The absence of clear information on the methods of judicial documents’ service in each Member State and the presumption made in the EU Justice portal that the task is carried out by the court, increase the complexity as the claimant is often unaware of the difficulties that he or she may encounter after the claim is filed.

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for *European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014. G. Lupo and J. Bailey, supra n. 21.

Velicogna et al., supra n. 8. Kramer, supra n. 23.

<sup>30</sup> Velicogna et al., supra n. 8.

<sup>31</sup> G.Y. Ng (2013), supra n. 29. G.Y. Ng (2014), supra n. 29.

Kramer, supra n. 23.

<sup>32</sup> G.Y. Ng (2014), supra n. 29.

<sup>33</sup> Kramer, supra n. 23.

<sup>34</sup> Kramer, supra n. 23.

Furthermore, additional **actions not explicitly mentioned** in the regulations may also be required from the parties. As an example, here is a list of the communications identified by the Italian Team during the analysis of the practical application of the EOP in Italy carried out for the preparation of the e-CODEX EOP Use case and for the Italian pilot (adapted from Velicogna, 2015).<sup>35</sup>

1. Communication from the Court to the claimant informing the latter that the claim has been received and has been registered under a specific number of protocol.
2. Communication from the Court to the claimant informing the claimant on the need for the payment of Court fees and the possible modalities to do it.
3. Communication from the claimant to the Court informing the Court on the payment of Court fees.
4. Communication from the Court to the claimant informing the latter that the order for payment has been issued and that a certified copy of the order can be issued on the basis of a request of the claimant and the payment of a specific Court fee.
5. Communication from the claimant to the Court in which the former asks to the latter for a certified copy of the order.
6. Communication from the Court to the claimant in which the former informs the latter that a certified copy of the order is ready, under the condition of the payment of a specific Court fee (the claimant is supposed to pay the Court fee, is supposed to take the certified copy and is supposed to serve it upon the debtor through a bailiff).
7. Communication from the claimant to the Court asking for the issue of the Declaration of enforceability.
8. Communication from the Court to the claimant that the Declaration of enforceability is ready.
9. Communication from the claimant to the Court informing that, after the service of the order, debtor has paid the debt, in order to avoid that a registration tax is applied over the order.

As a result of these blocking elements, these procedures are seldom used. To counteract this situation, and in line with the idea that ICT is a tool to increase the efficiency of procedures and therefore to make them more appealing to the potential users, several actions have been carried out and sustained in particular by the EU Commission. These actions include constant work to improve on-line access to procedural information and the dynamic forms provided through the e-Justice portal, and the indication to have these two procedures selected for piloting in the e-CODEX project.

## **4. E-CODEX**

### **4.1. An introduction to the project**

e-CODEX was launched under the multiannual European e-Justice Action Plan 2009-2013, to work on the realisation of some of the functions of European e-Justice as described in this Action Plan,<sup>36</sup> especially the dematerialisation of cross-border judicial proceedings and communication between judicial authorities.

e-CODEX project started as a 36 months project involving 19 partners and 15 European States, mainly through their Ministries of Justice or their representatives, but also three other institutions: the Council of Bars and Law Societies of Europe, the Council of the Notaries of the European Union, and the National Research Council of Italy. From its beginning, in December 2010, the project has been extended twice up to 66 months, and its budget has risen from €15m to €24m (EU contribution: €12m). The number of participants has also increased to 25 and the number of States actively

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<sup>35</sup> M. Velicogna, "e-CODEX and the Italian Piloting Experience", IRSIG-CNR Working Paper V. 1.0, 2015.

<sup>36</sup> <http://data.consilium.europa.eu/doc/document/ST-14208-2015-INIT/en/pdf>

involved to 20. The explicit aim of the e-CODEX project is to improve the cross-border access of citizens and businesses to legal means in Europe as well as to improve the interoperability between legal authorities within the EU.<sup>37</sup>

For descriptive purposes, the story of the project can be divided in two parts. The first part of the project, approximately the first four years, was directed to determine the technological and normative requirements and to develop the **technological solution** to provide an interoperability layer for the cross-border exchange of judicial data and to allow access to cross-border e-Justice services. By the end of this period, the main elements of the solution were implemented, a **legal solution** was drafted to cover voids in the existing normative framework, and the **pilot** of the first use case had started. In the second part of the project, the focus shifted to the question of long-term sustainability of the solution and to the implication of the lesson learned through the project for the EU justice domain. These can be linked to at least three factors: the achievement of the immediate objectives of the project, the approaching of the end of the project and the increased interaction with the “external environment” including EU institutions, an increasing relevance of the e-Delivery convergence initiative and similar activities.

## 4.2. Determining the technological and normative requirements

Part of the requirement analysis process was the identification of key components and principles that needed to be considered for building the actual solution. These requirements are a combination of technological, legal and political constraints coming from national and EU level. One of the first decisions was to design the architecture with the aim of exploiting the existing legal, technological and organizational *installed base*,<sup>38</sup> by allowing the connection of the already existing national systems developed in the member states and taking the maximum possible advantage of already existing EU components such as the EU judicial procedures and the EU e-Justice portal. While investigating the requirements it was recognized that the complexity of building an omni-comprehensive solution could not be managed<sup>39</sup> and a case centric, iterative approach was adopted. It was therefore decided to proceed “starting from the analysis of the requirements the system had to satisfy to support the use cases that were initially identified (in particular EPO, EU Small Claims Procedure and European Arrest Warrant) and then progressively extended to cover additional requirements”.<sup>40</sup>

### 4.2.1. Key legal requirements

The focus of e-CODEX is on the transmission of data and documents in the legal domain. The objective therefore is not limited to ensure secure transmission of data and documents, but is directed to support “juridically effective cross border acts and the transmission of juridically effective

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<sup>37</sup> M. Velicogna et al., “D7.6 Architectural Hands on Material (Update of D7.4)”, *e-CODEX Deliverable*, 2016.

<sup>38</sup> With installed base we refer here to the set of existing technological, legal and organizational components and their “capabilities [, ...] their users, operations and design communities”. O. Hanseth and K. Lyytinen, “Design theory for dynamic complexity in information infrastructures: the case of building internet”, *Journal of Information Technology* (2010) 25(1), p.4; G.F. Lanzara, “The Circulation of Agency in Judicial Proceedings: Designing for Interoperability and Complexity”, in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014, 14.

<sup>39</sup> The complexity of developing an omni-comprehensive approach depended on several factor including, between others, the scope (cross border civil, criminal and administrative judicial proceedings), the legal multilevel requirements (national, EU, technical, procedural etc.), geography (15+ States), number of organizations involved in the service provision (Ministries of Justice, software providers, Courts, Public Prosecution offices etc.), number of potential users.

<sup>40</sup> M. Velicogna and G. Lupo, “Developing e-Justice technology for use: the e-CODEX experience”, EGPA Conference (26-28 August 2015), Toulouse, France.



documents”.<sup>41</sup> This implies that the system must not just enable the communication, but support the identification and expression of will needed for the performance of juridically effective acts in cross border judicial proceedings.<sup>42</sup> Identity and expression of will are essential elements in any interaction that a natural person or a legal entity has with the other participants in legal proceedings (e.g. in the filing of a civil case from a claimant to the court, the identity of the claimant and its will to file are key for the beginning of the procedure). In the “physical world”, identity and expression of will are often shown through written signatures, identity documents and/or written mandates, which authorise persons or institutions to act on behalf of the party entitled to take part in the procedure.<sup>43</sup> Moving to the digital world, electronic identities, electronic signatures and electronic mandates all exist in some form in different e-CODEX Member States. Recognizing these identities and expressions of will, and being able to use them in cross-border cases, though, is a complex matter. Supporting e-Identification and e-Signatures was therefore recognized as a key requirement of the e-CODEX system. At the same time, as e-CODEX was being developed, the Regulation (EU) N°910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) was still under discussion. Given the missing legal framework, supporting e-Identification and e-Signatures was not just a technological problem, but a legal one. The solution had to be compatible with the legal systems of the Member States, and if the system was to be used, user friendly”.<sup>44</sup> The Project partners decided that these requirements had to be satisfied “regardless of the state of advancement of the new signature directive”.<sup>45</sup>

#### 4.2.2. Key technological requirements

From a technical perspective the questions that needed to be addressed included: “Which techno-institutional components does e-CODEX reuse? What needs to be done at National level and what by e-CODEX? Who build what (i.e. gateways, XML etc...)?”.<sup>46</sup> The Ministries of Justices participating in e-CODEX had a clear idea about the existence, in several cases, of “e-Services and infrastructure that Member States [... had] already established cover specific requirements of national legal systems”.<sup>47</sup> As “these national solutions [... were] the result of considerable investments [... , they could not] be replaced through new centralized approaches.”<sup>48</sup> At the same time, the decision was not based just on an economic or opportunity reasoning, but also on a political one, as “The technical solutions envisaged within this context must respect both the principle of independence of the judiciary and of subsidiary”.<sup>49</sup> The decision was therefore to adopt a decentralized architecture.<sup>50</sup>

Another requirement of “political origin” was to re-use wherever possible, solutions already developed and implemented by previous EU projects such as EPSOS, STORK, PEPOL and SPOCS. The presence of these solutions has been on the one hand an opportunity, on the other the dependency from other LSPs implied potential risks and imposed coordination efforts given “the maturity and availability of their technical developments and [...] the complexity in finding a solution that is simple

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<sup>41</sup> M. Velicogna, “The ‘e-’ experience in courts around Europe: insights from the practice”, presentation at the European Informatics Data Exchange Framework for Courts and Evidence - Market Size Workshop (11 December 2015), Rome, Italy.

<sup>42</sup> M. Velicogna, supra n. 41.

<sup>43</sup> F. Contini and R. Mohr “How the Law Can Make It Simple: Easing the Circulation of Agency in e-Justice, in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014, 53-79.

R. Mohr and F. Contini, “Reassembling the Legal: ‘The Wonders of Modern Science’ in Court-Related Proceedings”, *Griffith Law Review* (2011) 20(4), 994-1019.

<sup>44</sup> G. Borsari et al., D7.3 High Level Architecture Definition, e-CODEX deliverable (2012) p.8.

<sup>45</sup> Borsari et al., supra n. 44, p.8

<sup>46</sup> Borsari et al., supra n. 44, p.1

<sup>47</sup> Borsari et al., supra n. 44, p.7

<sup>48</sup> Borsari et al., supra n. 44, p.7

<sup>49</sup> Borsari et al., supra n. 44, p.7

<sup>50</sup> Borsari et al., supra n. 44, p.13

enough from a user perspective to be adopted”.<sup>51</sup> This resulted in the participation of an “e-Delivery convergence effort and pursue the effort to re-use and adapt solutions from other co-funded projects”.<sup>52</sup>

A requirement deriving from the legal layer was to support identification and expression of will. Combined to the decision to adopt a decentralized architecture and the impossibility for e-CODEX to provide fore-ID and e-Signature to its potential users, this resulted in the requirement to provide interoperability for e-ID and e-Signature infrastructures designed to operate at national level.

#### 4.2.3. Additional requirements

In addition to the key legal and technological requirements, one additional key requirement was to enable communication of **semantic information** between national systems that use different semantic structures. In other words, through semantic mapping and semantic transformation schemas, it must be ensured the mutual interpretation of data exchanged between national electronic systems in cross border legal procedures.<sup>53</sup>

### 4.3. The e-codex solution

As a result, e-CODEX project developed an e-delivery solution that uses building blocks from previous EU Large Scale Projects<sup>54</sup> (LSP) and national projects, to allow data and documents exchange, and the validation and cross-border recognition of e-identities and e-signatures,<sup>55</sup> which, as previously mentioned, is a key requirement to have juridically effective legal communication. On the basis of the requirements, a gateway-based architecture was selected. “The function of the gateways is to separate national and EU portal solutions from e-CODEX allowing them to exist independently. It converts messages from the national or EU portal format to a format supported by e-CODEX and *vice versa*”.<sup>56</sup> In practice, the e-CODEX e-delivery solution receives and hands over (route and forward) data, documents and evidences of the main process steps asynchronously. The solution is content agnostic, in the sense that the transport of data is independent from the format of the files being exchanged and from the business processes being supported. Finally, it is multilateral, in the sense that common standards are agreed by the partners to develop common solutions, instead of implementing bilateral arrangements, which create the need for the maintenance of a higher number of solutions and agreements.<sup>57</sup> It uses building blocks from previous EU Large Scale Projects to support cross-border e-Justice services.<sup>58</sup> The function of e-CODEX is not limited to the transportation of data and documents. To enable meaningful exchange of information between national systems, it also supports semantic interoperability. Every Member State participating in the pilots has national solutions for procedures in civil and criminal law (either existing or developed in

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<sup>51</sup> Borsari et al., supra n. 44, p.8

<sup>52</sup> Borsari et al., supra n. 44, p.8

<sup>53</sup> M. Velicogna, et al. “D7.4 Architectural Hands on Material”, *e-CODEX Deliverable*, 2014.

<sup>54</sup> PEPPOL: e-procurement, epSOS: e-health, STORK: e-identity and SPOCS: e-business services. More information can be found here: [http://ec.europa.eu/information\\_society/newsroom/cf/document.cfm?action=display&doc\\_id=1250](http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=1250)

<sup>55</sup> M. Velicogna, “The Making of Pan-European Infrastructure: From the Schengen Information System to the European Arrest Warrant”, in F. Contini and G.F. Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings*, Dordrecht: Springer, 2014.

M. Velicogna, supra n. 35.

<sup>56</sup> G. Borsari et al., supra n. 44, p.9

<sup>57</sup> G. Borsari et al, “D7.1 Governance and Guidelines Definition”, *e-CODEX Deliverable* (2011), Available online: [http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam\\_frontend\\_push&docID=143](http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam_frontend_push&docID=143) (accessed on 22 July 2015).

<sup>58</sup> At the same time, this e-delivery infrastructure may be adapted for more generalised use in the government sector within the EU Large Scale Project called electronic Simplified European Networked services (e-SENS), aiming to deliver reusable and tested technical components (building blocks) to the Connecting Europe Facility (CEF).

the context of e-CODEX). Such solutions are typically based on domestic semantic structures. To support the exchange of semantic information, e-CODEX uses common document standards and semantics. Specific coding schemas used by national systems need to be transformed in order to be interpreted by other systems using different schemas. This transformation is better known as mapping. To this end, “e-CODEX has to and will provide the means to connect rightfully and meaningfully that data that is presented in a different format and may carry different interpretations within the Member States”.<sup>59</sup> Following a use-case centric modelling approach, for each use-case, with the support of national experts, e-CODEX has developed specifications which ensure mutually equal interpretation of data exchanged between national electronic systems in cross border legal procedures. In practice, for being processed through e-CODEX, the national solutions need to be converted into basic “European” semantic concepts. Member States are responsible for *when*, *if* and *how* the messages are transformed from European to national level and vice versa. The result is that the data being exchanged “is clearly and uniformly understood when exchanged through the e-CODEX infrastructure”.<sup>60</sup>

In addition to fulfil e-Delivery and semantic functions, an e-ID and expression of will solution was developed. Dealing with such topics, and in line with its subsidiary stance, e-CODEX project decided to support secure electronic communication and information exchange between the existing national systems. Identity management systems, systems supporting the indication of intention by identified users and signature verification solutions already in place in the different Member States are made interoperable cross-border through a mechanism of validation of the signature/identification that works at the level of the sender’s e-CODEX components and which creates a certification signed by the sending connector authority (i.e. the Ministry of Justice of the sending MS), the so called Trust-Ok-Token (e-CODEX, 2015). When electronic communication crosses national borders, mutual trust and acceptance of the national systems that manage such communication is needed. To support this, the e-CODEX project has drafted an agreement called the Circle of Trust, signed by all piloting partners. This established a legal basis to recognise exchanged electronic information. The Circle of Trust also establishes the minimum level of operational and technical requirements the partners need to satisfy to be connected to the e-CODEX system and provide services through it. One of the key concepts supported by the Circle of Trust is that if the information is trusted by the state where it originates from, then it may also be trusted by the receiving state/s, subject to certain conditions. A Circle of Trust is understood as the mutual recognition between Member States of electronic data, documents and signatures within the existing legal framework.<sup>61</sup>

In addition to the technological components and the Circle of trust agreement, e-CODEX is also composed of organisations, rules and agreements that allow the actual provision of cross border judicial services. Being the legal domain, first of all, procedural rules (laws) are required. e-CODEX services follow cross-border judicial procedures based on EU Regulations and Decisions (e.g. European Payment Order, European Small Claim etc.). While these EU norms provide a certain level of standardisation, their functioning relies on national organisations (e.g. courts, bailiffs, tax agencies), procedures (e.g. notification, payment of fees).

#### **4.4. From developing to piloting**

From the fourth year of the project, the effort shifted toward moving ‘testing’ Member States to the production environment (live cases), increase the number of working pilots and the long-term sustainability of the solutions developed by the project and of the provided services. As of May 2016, the project has five working pilots, the European order for Payment – EOP, live since August 2013

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<sup>59</sup> E. Francesconi et al. “D6.3 Concept for Implementation of WP6”, Available online: [http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam\\_frontend\\_push&docID=143](http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam_frontend_push&docID=143), 2011, (accessed on 22 July 2015).

<sup>60</sup> Francesconi et al., supra n. 59.

<sup>61</sup> M. Velicogna, et al. (2014), supra n. 53.

and providing services in 7 Member States,<sup>62</sup> the EU Small Claims, live since June 2015 and providing services in four Member States,<sup>63</sup> the Synchronous Communication applied to Business Registers, live since September 2015 and providing services in three Member States,<sup>64</sup> and Secure Exchange of Sensitive Data (which includes Mutual Legal Assistance for criminal law, and civil justice/ Taking of Evidence, EURegio and the Mutual Recognition of Custodial Sentences), live since November 2015 and providing services in three States,<sup>65</sup> and finally, the Financial Penalties, live since May 2016 and providing services in two Member States.<sup>66</sup> Overall, 13 Member States are involved in the piloting.<sup>67</sup>

The piloting stage of the e-CODEX project is carried on in waves. In the EOP case for example, the first use cases being piloted, the first wave saw the involvement of four e-CODEX partners going live in August 2013 (Austria, Germany, Estonia, and Italy), the second wave with one partner going live in March 2014 (Greece), the third wave with one partner going live in June 2015 and the fourth wave with one partner going live in May 2016 (Malta).<sup>68</sup>

The piloting countries begin the piloting stage by configuring and implementing the e-CODEX solution components that are managed nationally. Aside the nationally implementation of e-CODEX solution, piloting countries must connect an already existing service provider or develop a new one<sup>69</sup> (a stand-alone version of the e-CODEX national component has been introduced since November 2014 as a default implementation of the connector framework for all piloting Member States which do not have any national system in place to be connected to e-Codex,<sup>70</sup> but does not provide an end-user interface). The service provider allows the access to the service and to the Forms available in the procedure, both to the external users (citizens and/or lawyers) and to judges and court staff. On the one hand, national lawyers and/or citizens may access to the national service to fill out the EPO form, for filing a claim or an opposition (in case of a defendant). On the other hand the service provider is accessed by judges and court staff to manage the incoming forms (in the EOP case, for example, the Form A sent by a claimant in order to file a request for a European possession order) and to fill out and send the forms prepared by the Court to the parties. At the moment, only the national e-filing system of each piloting country function as a service provider through which documents can be transmitted into the e-CODEX system (e.g., the filing of a possession order). For instance in the Italian case, the Italian Trial Online (in Italian, *Processo Civile Telematico*)<sup>71</sup> has been connected to the e-CODEX system enabling the piloting Court of Milan to pilot “live cases”. Moreover in the Austrian case, the ERV (*Elektronischer Rechtsverkehr*)<sup>72</sup> has been connected as service provider in the e-CODEX pilot for the EPO providing access to the Austrian lawyers trough their ERV applications which

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<sup>62</sup> Austria, Germany, Estonia, Greece, Italy, Malta and Poland, while France and the EU Commission are in the testing phase.

<sup>63</sup> Austria, Czech Republic, Malta and Poland, while France and the EU Commission are in the testing phase.

<sup>64</sup> Austria, Ireland, Italy.

<sup>65</sup> Germany, Spain and Netherland, while Greece is in the testing phase.

<sup>66</sup> France and Netherland, while Germany and Hungary are in the in the testing phase.

<sup>67</sup> D.B. Hvillum, et al., D3.8 WP3 Final Report, e-CODEX Deliverable, 2016, pp.17-26.

<sup>68</sup> D.B. Hvillum et al., supra n. 67.

N. Carboni and M. Velicogna, “Electronic data exchange within European Justice: a good opportunity?”, *International Journal for Court Administration* (2012) 4(3), 104-120.

G. Lupo and J. Bailey, supra n. 21.

<sup>69</sup> G. Borsari et al., supra n. 57.

<sup>70</sup> F. Rödlich and M. González, D5.13 WP5 Final Report, e-CODEX deliverable, (2016).

<sup>71</sup> D. Carnevali, “L’Italia nel tunnel dell’e-justice”, in D. Carnevali and F. Contini (eds.), *Tecnologie per la Giustizia. I Successi e le False Promesse Dell’e-Justice*, Milano, Giuffrè Editore, 2006, pp. 83–132.

D. Carnevali, *Soggetti smarriti. Perché innovazione e giustizia non si incontrano (quasi) mai*, Milano, Franco Angeli, 2010.

D. Carnevali, and A. Resca, “The Civil Trial On-Line in Italy”, in F. Contini and G.F. Lanzara (eds.), *Building Interoperability for European Civil Proceedings Online*, Bologna: Cooperativa Libreria Universitaria Editrice Bologna, 2013, pp. 273–316.

G. Borsari and A. Baratta, “L’interoperabilità e gli strumenti per i soggetti esterni”, in E. Zan (ed.), *Tecnologia, Organizzazione e Giustizia. L’evoluzione del Processo Civile Telematico*, Bologna, Il Mulino, 2004, pp. 227–39.

<sup>72</sup> S. Koch and E. Bernoier, “Aligning ICT and legal framework in Austria’s e-bureaucracy, from mainframe to the internet”, in F. Contini and G.F. Lanzara (eds.), *ICT and innovation in the public sector: European studies in the making of e-government*, Basingstoke, Palgrave Macmillan, 2009.

have been adapted to manage the EOP forms and communication. In the Greek case, a national EPO Case Management System was specifically developed.<sup>73</sup>

Successively to the implementation of the e-CODEX solution at national level, and the adaptation and connection of the service provider to it, the piloting countries begin the testing phase. The tests follow a timeline agreed with the other testing partners and coordinated by the e-CODEX working package responsible for piloting.<sup>74</sup> Testing includes: a) sending of the document from the national service provider to the e-CODEX national solution; b) validation of signature; c) capability to create a message; d) capability to send and receive messages from and to other e-CODEX national solution; and e) other capabilities such as the forwarding of evidences generated by the message transmission and the correctness of the message.<sup>75</sup> All the exchanges are tested by all the piloting countries utilizing mock cases in a test environment.<sup>76</sup>

The successful conclusion of the test phase is followed by the going live of the pilot. At this stage, real users (citizens, lawyers, court staff and judges) are involved in utilizing the system with real cases. Piloting countries activated the “go-live” pilot phase in different ways. As an example, in the EOP case, in Austria, the national e-filing systems has been connected to e-CODEX permitting sending EOP claims. Greece has activated a court which deals with about 50% of incoming EOPs and is working on the development of a system to allow lawyers to file cases. In Germany, a single national court (the Wedding District Court) also processes all EOP cases incoming from European citizens, but Germany can only receive EOP cases through e-CODEX. The system is not available for German citizens or lawyers who want to send an EPO claim to a court in another piloting country.<sup>77</sup> Estonia developed an interface connected to e-CODEX, which allows citizens to file EOP claims to piloting countries’ courts based on the use of an already developed system of electronic signature. In Italy, only the First Instance Court of general jurisdiction of Milan is connected to the e-CODEX system through TOL’s infrastructure for judges and court staff. Unlike Germany, the Court of Milan can only process incoming claims over which the first instance court of general jurisdiction of Milan is competent. It should be noted that the modifications introduced in the Italian court ICT system could be activated in all first instance courts, but the Ministry of Justice has decided to carry on the pilot in a limited environment to better understand the potential legal performativity problems before making the service available nationwide.

In addition to the national solutions, at present, the European e-Justice Portal is being modified to become a central European Service Provider, allowing access to the e-CODEX system to both professional and non-professional users. The idea of providing such functionalities is three fold. First, it is in line with the intended scope of the European e-Justice Portal to be an electronic one-stop-shop in the area of justice. Second, it overcomes the problem of piloting countries that do not have a national e-Justice infrastructure that would allow access to e-CODEX services to the general public. Third, it allows access to e-CODEX services also to potential users outside the piloting countries.

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<sup>73</sup> G. Pangalos, et al., “Using IT to Provide Easier Access to Cross-Border Legal Procedures for Citizens and Legal Professionals-Implementation of a European Payment Order e-CODEX pilot”, *International Journal for Court Administration* (2016) 6(2).

<sup>74</sup> *Supra* n. 73.

<sup>75</sup> D.B. Hvillum et al., “Documented System Requirements and Specifications”, e-CODEX project deliverable, Available online: [http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam\\_frontend\\_push&docID=143](http://www.e-codex.eu/news-and-media/media/deliverables.html?eID=dam_frontend_push&docID=143) (accessed on 22 July 2015), 2013.

<sup>76</sup> G. Borsari et al., *supra* n. 57.

A tool simulating a complete e-CODEX infrastructure and to provide a full e-CODEX test environment for sending and receiving test messages for existing e-CODEX pilots was introduced after recognizing the complexity of testing after the first experiences. One of the main difficulties was to setup such a tool very quickly after recognising its importance. The Greek team volunteered not only to implement the tool (called a Central Testing Platform) but also to host it and provide access to all piloting partners. The CTP started with the EOP use case and then extended to include Small Claims, Mutual Legal Assistance and Business registers: M. Velicogna et al., *supra* n. 37; F. Rödlich and M. González, *supra* n. 70.

<sup>77</sup> N. Carboni and M. Velicogna, *supra* n. 68. G. Lupo and J. Bailey, *supra* n. 21.

The different implementation of the technological innovation fostered different conditions between users in the different piloting countries. This brought also different results in terms of number of cases that have been filed through the e-CODEX system. On the case of Austria and Germany, for instance, geographical proximity, shared language, similar national procedural rules resulted in a much higher number of cases than Estonia, Greece and Italy. This result acknowledges the clear existence of important commercial relations between the two countries and the obvious absence of semantic barriers (in both countries the official language is German). Moreover, even before e-CODEX the Austrian and German system was already used to exchange and send trans-border payment orders. On the other hand, as an example, the cases sent through the Austrian service provider to the Italian system are very few (only four by the end of 2015). It is probable that with the implementation of the e-Justice portal as an e-CODEX service provider, accessible by all the European citizens through the web, the number of EPO cases filed in e-CODEX will raise. However, it is worth saying that an improved accessibility of the e-CODEX technology to European citizens may not positively affect the diffusion of the procedure as several of the favourable elements to the use of the procedure are not affected by the technology. Indeed most of the issue previously mentioned regard the different national application of the European Regulation on European Order for Payments and the lack of information for potential users. While information provision needs began to be addressed in cooperation with the e-Justice portal as soon as recognized, the other factors were considered at least initially as unmovable cornerstones around which the system could be built as they would have required amendment of the European Regulations.

## **5. GOING BEYOND**

While the e-CODEX ended up with a successful test bed and a proof of concept on how juridically effective acts and documents could be electronically transmitted in cross-border judicial proceedings, it produced much more than a tool to support the service provision experimented in a small number of live cases.

Creating e-CODEX system meant putting together the efforts of more than 150 people directly involved in its various activities for over five years. While much of the effort of these people was directed toward investigating, developing and making interoperable technological components, much effort was also directed toward understanding the functioning of EU cross-border procedures.

### **5.1. Knowledge creation on cross-border procedures**

The work carried out within e-CODEX generated a reflection on key elements that ensure that national and EU cross-border procedures are juridically effective in the off-line world, and how such elements can be transposed in the digital domain. At the same time, it generated quite a bit of research and knowledge on why the procedures that needed to be *supported* did not work properly. In many cases the result was that the problem could not be addressed through technological means. It is the case of the service of documents, which emerged as one of the critical issues determining the low level of EOP and EU Small Claim procedures. In this instance, project team carried out a throughout investigation of the procedure resulting in a report on the service of document procedures in national and cross-border EU procedures in 14 Member States judicial systems. Other topics were also explored quite extensively, such as the national procedures for the payment of court fees. One of the results of this exploration was an update of the information available on the EU e-Justice portal and the draft of guidelines to the use of e-CODEX describing also these issues, in cooperation with the EU Commission.

## 5.2. Policy making and Political dimensions

As there is not a perfect fit between the two domains and different judicial domains have different requirements, the developing process needs legal (and political) decision-making. In this perspective, the circle of Trust (and the decision to adopt it) can be seen not just as a legal object, but as the result of a political decision driven by multiple needs. At the same time, the political dimension of e-CODEX seems to stem less from the development phase itself, and more from the attempt to make the e-CODEX solution sustainable in the long term.

While a test bed does not need a critical mass of users, a large-scale system that needs to be sustainable in the long term does. As a result of the understanding of the procedures and of their problems, linked to the need of having them used through e-CODEX, initiatives have begun to be taken to influence not only the procedures themselves (e.g. addressing procedural off-line barriers both at implementation level, both influencing the EU legal instruments drafting/revision), but also their drafting approach (e.g. in a more semantically coherent direction).

Furthermore, the dialogue has extended from within the e-CODEX project boundaries to a much broader set of arenas. From the very beginning e-CODEX has been in close contact to existing standardisation bodies in order to provide a solution based on widely accepted standards. In particular, it tried to involve representatives and professionals of different standardisation organisations such as ETSI and OASIS into the specification phase in order to make the right decisions and use the standards accordingly. Also, as previously mentioned, the experience with standards coming from previous LSP projects has been taken into account.<sup>78</sup>

Furthermore, e-CODEX has been in close contact with the latest large-scale project e-SENS (Electronic Simple European Networked Services), which started in 2013 aiming at consolidating the building blocks developed by all previous large-scale projects (e.g. e-Signature, e-Identity, e-Delivery and e-Documents which are relevant in the legal area). e-SENS and especially its e-Justice domain team are building upon the results of e-CODEX to “identify more specific demands of potential users of electronically available legal procedures”<sup>79</sup> and are working on extending the piloting activities to additional judicial areas (e.g. family law, administrative law etc.). Besides this, e-SENS is taking into account the e-CODEX sustainability action plan<sup>80</sup> and will consider the requirements and actions which need to be met or carried out to ensure the maintenance and sustainability of the e-CODEX technical components. The work on sustainability will therefore continue in the e-SENS project extension phase during the course of 2016 and early 2017.<sup>81</sup> Furthermore, in the final piloting conference call of e-CODEX it was announced that the piloting of e-CODEX in the criminal area was going to continue within the e-SENS umbrella,<sup>82</sup> while piloting in the civil area is going to take place within the “CEF-TC-2016-2: European e-Justice Portal” call for proposals, which, between its priorities has “Access to e-CODEX” and specifically refers to European Order for Payment and European Small Claims procedures.<sup>83</sup>

At a higher EU political level, the discourse generated by the need to ensure the long-term sustainability of e-CODEX has much increased its institutional visibility and therefore its potential impact on fields that are outside its sphere of influence as a simple *tool* to support cross-border

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<sup>78</sup> F. Rödlich and M. González, supra n. 70.

<sup>79</sup> e-SENS, Technical Annex, WP5.3: e-Justice Piloting S. 102.

<sup>80</sup> In A. Buhr et al., D3.3 Report on the integrated view of the LSP strategies, e-SENS deliverable (2014), and A. Alcaide et al., D3.4 Preliminary proposal for a governance body, e-SENS deliverable v.2 (2014), the e-CODEX sustainability action plan was used as sources. Furthermore, in the process of drafting such documents, e-CODEX sustainability experts were contacted.

<sup>81</sup> N. Nickel et al., e-CODEX Deliverable D1.16 Final sustainability report and recommendations (Update of D1.12 Sustainability Plan), 2016.

<sup>82</sup> e-CODEX WP3, Piloting Call Minutes, June 31st 2016.

<sup>83</sup> INEA CEF-TC-2016-2: European e-Justice Portal, Call for Proposals Concerning Projects of Common Interest Under the Connecting Europe Facility in The Field of Trans-European Telecommunication Networks, CEF TELECOM CALLS 2016.

communication. As part of this dialogue, e-CODEX sustainability has emerged as a relevant component to achieve the Digital Agenda for Europe objectives. This has resulted in the explicit mention of e-CODEX “in the Strategy on European e-Justice 2014–2018<sup>84</sup> and the associated Action Plan<sup>85</sup>, both of which have been endorsed by the Council of Ministers of the European Union and the European Parliament”.<sup>86</sup>

Furthermore, the Council of the European Union (Justice and Home Affairs), in its meeting on 4 December 2014, identified and underlined the need to establish a sustainable framework for the technical solutions developed in the context of the e-CODEX project. In particular, Council (Justice and Home Affairs) “invited the Commission to finalise its internal reflections and submit to the Council solutions for the sustainability of the e-CODEX project in the short and longer terms, on the aspects concerning the future governance of e-Justice at EU level, including the possibility of using an existing EU agency”.<sup>87</sup> The topic of e-CODEX sustainability was addressed again at the informal Justice and Home Affairs ministerial meeting on 30 January 2015. As a result of this high level EU political discourse, the “Council (Justice and Home Affairs) established the expert group on e-CODEX related issues on 15 June 2015”.<sup>88</sup>

Since then the expert group has worked in cooperation with the e-CODEX Management Board and the Commission to find a viable solution for the e-CODEX sustainability “taking into account the principles of voluntary action, decentralisation, interoperability and independence of the judiciary, and the need to take into account the interests of those Member States not currently participating in the e-CODEX project”.<sup>89</sup> While the medium-term sustainability of the technical generic components could be ensured by the “Connecting Europe Facility” (CEF), the e-CODEX system was seen as more than just the sum of the technical parts. In particular, three solutions for the long term were discussed:<sup>90</sup>

1. Firstly, the Commission could be invited to assume responsibility for the continued maintenance of the e-CODEX solutions. However, the Commission may not be optimally equipped for such a form of operational management.
2. A second option could be to assign these responsibilities to one or more Member States. Comparable experiences have, however, shown that this can create structural, organisational and technical difficulties (e.g. the Schengen Information System). Therefore such an approach might not be a viable solution.
3. A third option would be to entrust an existing agency with these tasks. For this purpose, three agencies were identified as possible candidates, eu-LISA, ENISA and INEA.

The expert group on e-CODEX related issues and the e-CODEX Management Board have worked to identify criteria for involving an existing European agency for the purpose of sustaining and maintaining e-CODEX components. As it has already emerged, the entrusting of the e-CODEX solution maintenance and long-term sustainability has implications which go beyond those one would expect if the object was simply a support tool. In addition to technical capabilities, it is important that the governance of the agency respected and ensured the independence of the judiciary. Accordingly, the “Management Board of e-CODEX has approached eu-LISA, ENISA and INEA to check their respective interest, willingness and approach towards acting as a partner for the sustainability of e-CODEX”.<sup>91</sup> At the same time, it was also recognised that “if an EU agency is made responsible for the full lifecycle

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<sup>84</sup> See 17006/13.

<sup>85</sup> See 9714/14.

<sup>86</sup> <http://data.consilium.europa.eu/doc/document/ST-14208-2015-INIT/en/pdf>

<sup>87</sup> Supra n. 86.

<sup>88</sup> Supra n. 86.

<sup>89</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015774%202014%20INIT> p.6

<sup>90</sup> <http://data.consilium.europa.eu/doc/document/ST-14208-2015-INIT/en/pdf> pp. 7-8

<sup>91</sup> Supra n. 90, p.8



of development and operational management of the e-CODEX solutions in the short term and, after due consideration, for the full lifecycle of development and operational management of the interoperability of decentralised IT systems in the area of e-Justice in general in the long term, a specific legislative instrument to be submitted by the Commission will be necessary”.<sup>92</sup>

As a result of this process, the expert group on e-CODEX recommended that the “Management Board of e-CODEX starts contact with eu-LISA, in full cooperation with the Commission, with a view to it taking care of the maintenance of e-CODEX at a date to be agreed between all parties, though preferably no later than 1 August 2018”.<sup>93</sup> It further stressed that “between the end of the e-CODEX project and the uptake by a European agency the maintenance of the e-CODEX assets have to be ensured”,<sup>94</sup> and it underlined that “A first step in this direction was taken by the Commission in its latest call for proposals for an Action Grant on e-Justice”.<sup>95</sup> In its meeting on 3-4 December 2015, the Council of the European Union (Justice and Home Affairs), adopted the roadmap on the sustainability of e-CODEX and “confirmed the importance of a new co-financed project covering the maintenance of the e-CODEX assets”.<sup>96</sup>

Following this lead, a group of e-CODEX leading Member States used the e-Justice call to apply for funding with a proposal for a new project called Me-CODEX (Maintenance of e-CODEX) covering the maintenance of the e-CODEX assets specifically related to the e-Justice service provision. The overall goal of Me-CODEX is to ensure a swift and sustainable transition of the e-CODEX project towards long-term sustainability. It is intended as a bridge between the closure of e-CODEX and the handover to a potential agency that will take responsibility for the daily maintenance of the solutions, on-going development and support to EU Member States and associated countries.<sup>97</sup> The expected result of Me-CODEX is therefore to outline the necessary requirements to an agency that will be charged of ensuring the long-term sustainability of the e-Justice solutions that have been developed by e-CODEX. To ensure the approach undertaken by Me-CODEX to maintain e-CODEX is viable, the consortium will work in collaboration with a number of on-going initiatives. In particular, close collaboration with the Connecting Europe Facility (CEF) should ensure that all the necessary technical components used within e-CODEX are maintained and enhanced where possible. Furthermore, Me-CODEX plan to benefit from its current links with the CEF team of DIGIT and DG CONNECT to position the sustainability needs of Me-CODEX and take part in discussions regarding the future sustainability of all digital service infrastructures and building blocks. This alignment will be key in ensuring a viable and sustainable long-term solution for the maintenance of all e-CODEX solutions and beyond.<sup>98</sup> Furthermore, due to the e-Justice Portal role in providing an entry point for the citizens of “most of the MS”,<sup>99</sup> the involvement of DG JUSTICE in the activities related to e-CODEX solutions maintenance and evolution seems also to be needed.

While the area of influence of e-CODEX has extended, a constellation of activities in the e-justice domain have spurred on from the e-CODEX achievements. To cite three initiatives that started at the beginning of 2016:

1. The CCBE, within a EU co-funded project, is planning to connect Find a Lawyer 2 (a tool that allows lawyers to verify e-ID in cross border procedures) to e-CODEX. “Within the framework of e-CODEX, FAL 2 will provide the necessary solution to ensure that the person claiming to be a lawyer is indeed a qualified lawyer in his/her home jurisdiction and is, thus, able to fill in

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<sup>92</sup> Supra n. 89, p.5

<sup>93</sup> Supra n. 90, p.9

<sup>94</sup> Supra n. 90, p.9.

<sup>95</sup> Supra n.90, p.9

<sup>96</sup> <http://www.statewatch.org/news/2015/dec/eu-jha-council-3-4-dec-prel.pdf> p.13

<sup>97</sup> Exact geographic scope to be defined in the future legal act.

<sup>98</sup> N. Nickel et al., supra n. 81.

<sup>99</sup> F. Rödlich, M. González, supra n. 70.

claims on behalf of the client through e-Justice procedures available, for instance, under e-CODEX”.<sup>100</sup> More concretely, a use case on Lawyer-2-Court communication consisting in testing the participation of lawyers in EPO via the European e-Justice Portal using the outcome of the projects FAL2 and FAL3 has been initiated and will be finalised in the context of the expected Me-CODEX project.<sup>101</sup>

2. Pro-CODEX (Connecting legal practitioners national applications with e-CODEX infrastructure), a EU co-funded project, that has begun to investigate the possibilities and create conditions to make e-CODEX and the applications used by legal professionals (lawyers and notaries) at national level interoperable. e-CODEX has been designed to provide general solutions and is well tailored on meeting national courts’ needs, while the e-Justice Portal should provide a solution for non-repetitive players. At the same time, with exceptions, these solutions are not integrated with the applications that legal practitioners use to manage their business in different member states. At present, private companies providing these systems do not seem interested in developing e-CODEX interfaces due to the limited number of users. In this perspective, Pro-CODEX will provide the means to extend the user bases of e-CODEX investigating the issues related to the connection of legal professionals applications to e-CODEX infrastructure and develop running pilots in a limited number of countries.
3. The “API for Justice” EU co-funded project, coordinated by the Dutch Ministry of Justice aims to open up the infrastructure for cross border legal services provided by e-CODEX and the European e-Justice portal, by means of an API (Application Programming Interface). This would make it possible for third parties to build applications which use the e-CODEX services.

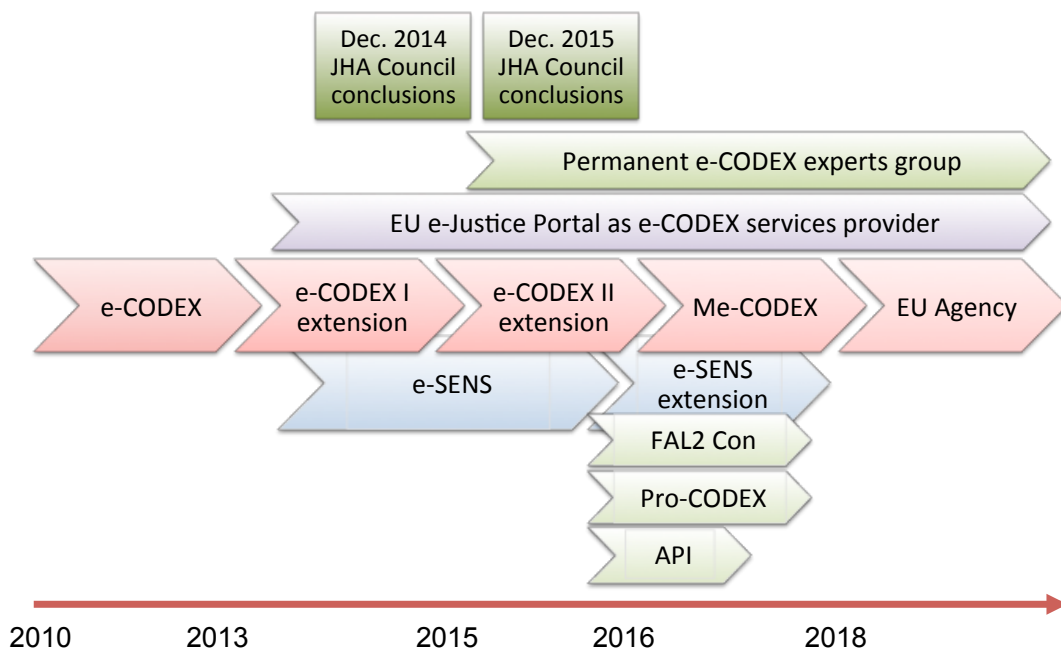


Figure 1 e-CODEX and related initiatives (adapted from Velicogna 2015<sup>102</sup>)

<sup>100</sup> [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/FAL2\\_page\\_EN\\_webpdf1\\_1366020243.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/FAL2_page_EN_webpdf1_1366020243.pdf)

<sup>101</sup> As the work to link FAL2 with e-CODEX will take more time than first expected, the work on FAL3 needs to be postponed. This means that the testing of the Lawyer2Court use case will be done after the end of e-CODEX. Source: e-CODEX Deliverable D3.13 Update of D3.4 Test Findings of Tests.

<sup>102</sup> M. Velicogna, “The ‘e-’ experience in courts around Europe: insights from the practice”, presentation at the European Informatics Data Exchange Framework for Courts and Evidence - Market Size Workshop, Rome, Italy, 11 December 2015.

## 6. CONCLUDING REMARKS

This paper showed some of the key strengths and weaknesses of the legal tools introduced to enable cross border judicial procedures, and in particular the EOP and the EU Small claim procedure. It also discussed how many of the complexities related to such procedures are not solved by the availability of a technological *tool* supporting it. At the same time, it has shown how the effort to develop, implement and make sustainable such tool in the long run has resulted in far reaching consequences, which goes well behind the limits of technology. e-CODEX generated knowledge on the legal procedures, but also on the process of drafting such procedures and on the limits engrained in the present situation. At the same time, its process of institutionalization has resulted in an increasing capability to influence *its external environment*. As this process is just at the beginning, this process will need to be studied, as it provides a new perspective on the dynamics influencing the evolution of EU cross-border procedures, and of the EU legislative process itself.