Opinion of the European Economic and Social Committee on 'Proposal for a Regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726'

(COM(2020) 712 final — 2020/0345 (COD))

(2021/C 286/15)

Rapporteur: **Ozlem YILDIRIM**

Consultation	European Commission, 24.2.2021
Legal basis	Article 81(2) and Article 82(1) of the Treaty on the Functioning of the European Union
Section responsible	Section for the Single Market, Production and Consumption
Adopted in section	31.3.2021
Adopted at plenary	27.4.2021
Plenary session No	560
Outcome of vote (for/against/abstentions)	247/0/3

1. **Conclusions and recommendations**

1.1. The EESC welcomes the proposed regulatory initiative, which needs to be supplemented by the European Parliament's proposals. e-CODEX will have an indirect positive impact as it simplifies and speeds up cross-border judicial procedures and cooperation, which will also contribute to improving the functioning of the single market.

1.2. It is worth noting that e-CODEX is not limited to e-justice. In anticipation of the future, the EESC recommends including a provision to open up the possibility of other uses by other public administrations, including for example the transfer of e-health records.

1.3. The EESC recommends that the Commission include the scalability aspect within the scope of the regulation. Until now, e-CODEX has been operating in a few Member States that are the initial sponsors of this project. However, the current e-CODEX project needs to be scaled up and to continue to function smoothly across all Member States, as this is the intention of the proposed regulation.

1.4. The digitalisation of society, the economy and administration is accelerating and together represent an ambitious aim; a clear connection with this reality is needed. The e-CODEX system is a key component of the 'Digital judicial cooperation package' and the e-Justice digital service infrastructure, among other initiatives. Because it deals with justice and fundamental rights, the EESC considers that it must be linked with the overarching digital strategy 'Shaping Europe's Digital Future' ([1]), a key aspect that is not explicit in the regulation.

1.5. Given that eu-LISA is not a regulatory agency, the EESC believes that chapter 2 of the proposed regulation needs to address the transparency of the decision-making process, the involvement of Member States and other relevant stakeholders, and the necessary independence of decisions taken by the bodies involved in its governance.

1.6. As e-CODEX consists of a package of software products, which can be used to set up an access point for secure communication, guaranteeing a high degree of security must be a key objective in the regulation, understood as the need to establish security measures that protect the unfettered exercise of individual rights.

([1]) COM(2020) 67 final.

1.7. One point which the EESC believes is deserving of greater attention is real and broad access to digital justice. The benefits of the e-CODEX system need to go beyond aspects related to improved management, operation and communication capabilities. The EESC believes that the development of digital justice must aim at ensuring that all citizens in the EU have secure, safe, reliable and easy access to justice.

1.8. The EESC points out the existing concerns raised by various stakeholders and Member States about whether the principle of independence of the judiciary will be sufficiently ensured in the permanent operation and further development of e-CODEX by eu-LISA.

2. **Background and gist of the Commission proposal**

2.1. The e-CODEX (e-Justice Communication via On-line Data Exchange) system was launched under the multiannual e-Justice action plan 2009-2013 ([2]), mainly to promote the digitalisation of cross-border judicial proceedings and to facilitate communication between Member States' judicial authorities.

2.2. e-CODEX is the main tool for establishing an interoperable and decentralised communication network between national IT systems in cross-border civil and criminal proceedings. It is a software package that enables connection between national systems, allowing users, such as judicial authorities, legal practitioners and members of the public, to send and receive documents, legal forms, evidence and other information in a swift and safe manner. The e-CODEX system consists of a package of software products which can be used to set up an access point for secure communication.

2.3. The e-CODEX system is one of the key components of the Commission's e-Justice policy to improve access to and the efficiency of justice in the Member States and is included in the Multi-annual European e-Justice action plan for 2019-2023 ([3]). It is also confirmed as the main tool for secure digital communication in cross-border judicial proceedings in the Commission's Communication *Digitalisation of justice in the European Union — A toolbox of opportunities* ([4]). In the context of a digital single market that aims to provide high-speed, secure and trustworthy infrastructure and services, solutions for promoting e-Justice were part of the 2016 eGovernment action plan ([5]).

2.4. e-CODEX was developed by 21 EU Member States with the participation of other third countries/territories and organisations ([6]) between 2010 and 2016.

2.5. Currently the e-CODEX system is managed by a consortium of Member States and other organisations, financed by an EU grant.

2.6. The e-CODEX system needs to be managed in a way that does not call into question the independence of national judiciaries.

2.7. The Commission is putting forward a proposal for a regulation to establish the e-CODEX system at EU level, and is entrusting the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) with the system's operational management. Stable governance for the e-CODEX system will make it possible to establish it as the default system for exchanging electronic messages for judicial cooperation at EU level. eu-LISA will not take over the management of the e-CODEX system before July 2023.

3. **General comments**

3.1. The EESC welcomes the proposed regulatory initiative, which needs to be supplemented by the European Parliament's proposals. e-Codex will have indirect positive impact as it simplifies and speeds up cross-border judicial procedures and cooperation, which will also contribute to improving the functioning of the single market.

([2]) OJ C 75, 31.3.2009, p. 1.
([3]) Regulation (EU) 2018/1726.
([4]) COM(2020) 710 final.
([5]) COM(2016) 179 final.
([6]) Jersey, Norway, Turkey, the Council of Bars and Law Societies of Europe (CCBE) and the Council of the Notariats of the European Union (CNUE).

3.2. Europe is a leading force in the digital transformation. e-CODEX is a catalyst for this transformation in Europe and in the Member States and, importantly, between them. It goes beyond functional IT needs, touching on key factors such as harmonisation, culture, human rights and other processes which need to be addressed by Member States in the digitalisation of society and the economy.

3.3. As this regulation allows citizens to benefit from improved cross-border access to justice, the EESC considers that it must also specifically address the necessary strengthening and harmonisation of Member States' capabilities in the field of judicial cooperation. This starts with the digital ecosystem underpinning e-CODEX, which must allow for an interoperable and interconnected environment. The EESC would like to point out that so far, uptake of IT on the part of the judiciary in Europe has been divergent. Hence the EESC calls for stronger cooperation among national justice departments and convergence across the EU at various levels, fully respecting the specific features of national systems including the roles and responsibilities of the various actors involved. On a technical level, it is necessary to guarantee that Member States have similar degrees of automation and the technical capacity to handle and store large electronic documents, as well as to interconnect service providers in a highly secure manner.

3.4. Enhancing trust in cross-border electronic interaction between citizens, businesses and public authorities is key. The impact of the regulation on electronic identification and trust services for electronic transactions in the European Single Market (eIDAS) on the e-CODEX infrastructure and functioning cannot be overlooked. As eIDAS regulates electronic signatures, electronic transactions, the bodies involved and their processes, the EESC observes that e-CODEX functions as an effective vehicle for communicating widely. Its infrastructure needs to operate in conformity with eIDAS requirements and to allow secure interoperability.

3.5. It is worth noting that e-CODEX is not limited to e-justice. In anticipation of the future, the EESC recommends including a provision to open up the possibility of other uses by other public administrations, including for example the transfer of e-health records. Using e-CODEX beyond e-justice will contribute to ensuring its long-term use and encourage Member States to make the necessary investment in their infrastructure. As this proposal regulates justice aspects only, in order to do so, different legislative proposals would be required.

3.6. The EESC supports the e-CODEX system as it enables secure electronic transmission of information and documents in cross-border civil and criminal proceedings. As the Commission notes, this regulation is needed for two main reasons: (1) to establish and provide for the long-term sustainability of the e-CODEX system; and (2) to entrust its management, further development and maintenance to the eu-LISA Agency. However, the EESC points out that effective governance of the digital judicial system requires both technical architecture that is sustainable and stable, as well as a robust governance infrastructure.

3.7. The EESC recommends that the Commission include the scalability aspect within the scope of the regulation. Until now, e-CODEX has been operating in a few Member States that are the initial sponsors of this project. However, the current e-CODEX project needs to be scaled up and to continue to function smoothly across all Member States, as this is the intention of the proposed regulation. The EESC highlights that it is the responsibility of each Member State to ensure that their national IT systems and infrastructure function well, are secure and that personal data and privacy are ensured.

3.8. The EESC calls upon the Commission to explore the possibility of helping entities operating outside the EU in particular in countries associated with the European Union to set up the e-CODEX system's package of software products. Broadening the scope of the project, which should be based on a clear model of co-funding, would bring benefits to all parties involved. The need to ensure the system's scalability and operationality should be taken into consideration.

4. **Specific comments**

4.1. *Alignment and consistency with core European strategies*

4.1.1. The digitalisation of society, the economy and administration is accelerating and together represent an ambitious aim; a clear connection with this reality is needed. The e-CODEX system is a key component of the 'Digital judicial cooperation package' and the e-Justice digital service infrastructure, among other initiatives. Because it deals with justice and fundamental rights, the EESC considers that it must be linked with the overarching digital strategy 'Shaping Europe's Digital Future' ([7]), a key aspect that is not explicit in the regulation.

4.1.2. In the view of the EESC, the forthcoming legislative initiative on Artificial Intelligence (AI), to be unveiled by the Commission in the spring of 2021 ([8]), needs to specifically address the role of AI-based solutions in enabling e-justice solutions and the risks associated with the use of AI-based solutions by judicial authorities. These possible uses include 'predictive justice' and its challenges, the use of online dispute resolution platforms, and the use of algorithms in criminal investigations.

4.1.3. The EESC acknowledges that e-CODEX does not entail the use of AI. However, AI is used more and more in judicial systems. Hence, due to the indirect relationship, the EESC recommends that the first review of the Coordinated Plan on AI ([9]), scheduled for the first quarter of 2021, address the connection between AI and digital justice and the e-CODEX system.

4.2. *Effective e-CODEX governance and operational aspects of e-CODEX*

4.2.1. Given that eu-LISA is not a regulatory agency, the EESC believes that chapter 2 of the proposed regulation needs to address the transparency of the decision-making process, the involvement of Member States and other relevant stakeholders, and the necessary independence of decisions taken by the bodies involved in its governance. For example, and because there will be a main potential user group of e-CODEX, the participation of lawyers could be included at both policy and implementation level to respond, for instance, to the need to ensure that e-CODEX supports an equal playing field in terms of accessibility for all *parties* and meets lawyers' requirements. Judicial legal professionals should therefore be structurally involved and not only consulted.

4.2.2. On an operational level, the EESC underlines that some clarification is needed regarding, for instance, the strict delimitation of home affairs issues and the question of the 'one-shop stop'. Formats for submitting and exchanging evidence between jurisdictions also need to be harmonised.

4.2.3. Concerning eu-LISA, the agency must be provided with both sufficient human and sufficient financial resources. To reinforce this point, the EESC reiterates its recommendation on the necessary training for eu-LISA staff ([10]), particularly IT personnel, which should include a proper understanding of how the management of the e-CODEX system must ensure the independence of the judiciary and the right to a fair trial. This can be further developed in Article 13 of the proposed regulation.

4.3. *High degree of security to protect rights and freedoms*

4.3.1. As e-CODEX consists of a package of software products which can be used to set up an access point for secure communication, guaranteeing a high degree of security must be a key objective in the regulation, understood as the need to establish security measures that protect the unfettered exercise of individual rights ([11]). The EESC also believes that the e-CODEX regulation must stress in Chapter 2 that there is a cooperation agreement in place between the eu-LISA Agency and the EU Agency for Cybersecurity (ENISA) ([12]).

([7]) COM(2020) 67 final.
([8]) https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20201208STO93329/coming-up-eu-spearheads-efforts-for-recovery-in-2021
([9]) COM(2018) 795 final https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52018DC0795
([10]) OJ C 283, 10.8.2018, p. 48.
([11]) Opinion EESC-2020-05923 adopted during the plenary session of April 2021 (see page 76 of this Official Journal).
([12]) https://www.enisa.europa.eu/publications/artificial-intelligence-cybersecurity-challenges

4.3.2. Digital solutions need to ensure a high level of privacy and data protection. A high degree of security also involves ensuring harmonised data protection at national level. The EESC reiterates the need for data controllers in the Member States to put in place appropriate technical and organisational measures, implement data protection principles in an effective manner and secure sufficient financial resources to enable this.

4.3.3. Security-related risks are increasingly unpredictable. The EESC recognises that risk assessment and risk mitigation lie at the core of eu-LISA's annual planning, default operations and reporting cycle. The EESC believes that in addition to risk mitigation strategies and the mapping of 'major risks', eu-LISA could reinforce its framework by mapping possible risks with unexpected outcomes. This will make it a more resilient and anticipatory agency.

5. **Compliance with fundamental rights**

5.1. *Access to digital justice for all, as a way to ensure equality and non-discrimination*

5.1.1. One point which the EESC believes is deserving of greater attention is real and broad access to digital justice. The benefits of the e-CODEX system need to go beyond aspects related to improved management, operation and communication capabilities. The EESC believes that the development of digital justice must aim at ensuring that all citizens in the EU have secure, safe, reliable and easy access to justice. Equality of access needs to be at the heart of the regulation, so as to avoid discrimination and inequalities. The EESC recommends that the e-CODEX regulation better highlight the fact that citizens must genuinely benefit from equal and effective legal protection and access to e-justice and related digital services.

5.1.2. The benefits of the e-CODEX system must reach out and serve a larger public. In a border dimension, judicial and cross-border authorities are not the only stakeholders. The environment in which e-CODEX exists needs to integrate not only judicial authorities and e-CODEX access points, but also a multiplicity of actors: citizens, courts, court staff, other administrative and ICT staff, law enforcement agencies, notaries, digital forensic experts, lawyers and third parties who directly or indirectly benefit from the system.

5.1.3. Moreover, given the importance of the e-CODEX system in ensuring effective access of citizens and businesses to justice, reference to the protection of procedural rights should be included too.

5.2. *Respect of the independence of the judiciary and the right to a fair trial*

5.2.1. The independence of the judiciary is a cornerstone of the principle of the separation of powers and one of the essential principles of the rule of law. The use of technology should not sacrifice the consistent delivery of justice. For this reason, the EESC calls on the Commission to conduct a proper assessment as to whether the system used to interconnect national e-justice systems is capable of complying with the principles of a fair trial and due process. Such safeguards apply, in particular, in the event of a handover of e-CODEX to eu-LISA.

5.2.2. The EESC points out the existing concerns raised by various stakeholders and Member States about whether the principle of independence of the judiciary will be sufficiently ensured in the permanent operation and further development of e-CODEX by eu-LISA. Current provisions of the proposal mentioning the independence of the judiciary are not satisfactory. Given the importance of that principle, stronger wording is required. Furthermore, the EESC asks for clarification as to how the proposed governance structure of e-CODEX will effectively ensure this principle in practice.

5.3. *Respect and reference to fundamental rights*

5.3.1. The EESC underlines the fact that this regulation must respect fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union and the Member States' constitutions. These include the right to security, the right to an effective remedy, and the principles of legality and proportionality. The EESC points out that protecting these rights also depends on the conditions under which these rights may be encroached upon, and who decides on this.

5.3.2. The use of digital technologies should not undermine the right to a fair trial and effective legal remedy. This is especially important as regards: equal opportunity for both parties to make their case (equality of arms); the right to have knowledge of/comment on all evidence and observations filed (adversarial proceedings); the right to a public hearing; in criminal proceedings, non-interference with the rights of the defence.

5.3.3. A specific reference to the applicability of Title VI: Justice of the Charter of Fundamental Rights of the EU, and to Article 47 thereof, must be included in the proposal.

Brussels, 27 April 2021.

The President
of the European Economic and Social Committee
Christa SCHWENG