Connecting the European e-Justice Community: Towards a New Governance Model for e-CODEX

Conectar a Comunidade de e-Justiça Europeia:
Para um Novo Modelo de Governação do e-CODEX

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ABSTRACT

The latest Multiannual European e-Justice Action Plan (2014-2018) embraced e-CODEX as the solution for achieving cross-border judicial cooperation by facilitating the digital exchange of case related data. Since the start of the project in December 2010, e-CODEX has transformed from a ambitious project to an operational Digital Service Infrastructure (DSI) in the judicial domain. Currently, the focus lies on the transition of the e-CODEX

project towards a long-term sustainable solution for the maintenance of e-CODEX. In this article, the authors present the challenge to establish a comprehensive governance model for e-CODEX. Five PRINCEII-inspired governance roles are introduced to set a framework for the interaction between the involved actors. Special attention is given to the unique position of the judiciary in this context.

Keywords: e-CODEX, governance model, e-Justice, European Union

RESUMO

O último plano de ação plurianual europeu de justiça eletrónica (2014-2018) adotou o e-CODEX como a solução para alcançar a cooperação judiciária transfronteiriça, facilitando o intercâmbio digital de dados relacionados com os casos. Desde o início do projeto, em dezembro de 2010, o e-CODEX passou de um projeto ambicioso para uma Infraestrutura de Serviço Digital (DSI) operacional no domínio judicial. Atualmente, o foco está na transição do projeto e-CODEX para uma solução sustentável de longo prazo para a manutenção do e-CODEX. Neste artigo, os autores apresentam o desafio de estabelecer um modelo abrangente de governação para o e-CODEX. São introduzidas cinco funções de governação inspiradas no PRINCEII para estabelecer uma estrutura para a interação entre os atores envolvidos. É dada especial atenção à posição única do poder judicial nesse contexto.

Palavras-chave: e-CODEX, modelo de governação, e-justiça, União Europeia

1. Introduction

The continuous flow of goods, services, capital, and labor in the European Union, as part of the European Single Market, has resulted in increased attention towards cross-border legal procedures. Within this new context, the protection of citizens' rights and economic activities requires better cross-border access to justice and justice service provision (Hess and Kramer, 2017; Ontanu, 2017; Velicogna, Lupo and Ontanu, 2017). In order to respond to this increased demand, cross-border justice must become faster, more efficient, and more accessible to European citizens and businesses.

As legal instruments deployed by the EU are proving insufficient support to satisfy this demand (Hess and Kramer, 2017; Ontanu, 2017), e-Justice initiatives have been undertaken to tackle the existing deficit (Pangalos, Salmatzidis and Pagkalos, 2014). Within this context, the e-CODEX project (e-CODEX, n.d.) aimed to improve the cross-border access of citizens and businesses to legal justice in Europe as well as to improve the interoperability between legal authorities within the European Union (Borsari et al., 2012), developing and piloting an e-Justice services interoperability infrastructure. The European e-Justice Strategy, with e-CODEX as one of the main cross-border e-Justice achievements, has laid the foundation for the interoperability in the domain of European Justice (Steigenga and Velicogna, 2017).

The e-CODEX project ended on 31 May 2016. Currently, the e-CODEX infrastructure is still governed through a typical project structure, with an Executive Board and a General Assembly. It is, however, foreseen that in the future, the activities for e-CODEX maintenance are transferred to an existing EU agency. In order to ensure the sustainability of the e-CODEX infrastructure beyond its current project-based funding model, it is important to focus on the associated governance challenges lying ahead.

In this article, the authors present the challenge to establish a comprehensive governance model for e-CODEX. On the one hand, the challenge is profound as e-CODEX has to deal with being a 'supplier' of a core service platform within the definition of the Connecting Europe Facility (CEF)[1], whose governance model has to be adhered to. Moreover, because in the near future e-CODEX will be maintained by an existing EU agency, its governance will also need to fit within the existing governance structure of that EU agency. Finally, some Member States use PRINCEII-inspired governance roles to achieve clear competences of the actors and the communication channels between them.

On the other hand, the 'demand' for e-CODEX support requires governance too. For example, prioritization between cross-border legal procedures to be supported by e-CODEX has to be catered for. Similarly, the communication and explanation to stimulate demand and the management of user communities will need to be steered. Furthermore, e-CODEX should respect the core values of the EU, including the independence of the judiciary. Respecting judicial independence offers the e-CODEX community an additional complexity amidst the already described diverging governance context.

The rest of the article is structured as follows: section two provides an introduction to the main elements characterizing the digital transformation of justice in the European Union, and positions the e-CODEX project and e-CODEX infrastructure within it. Section three investigates the current e-CODEX governance, its limits and future challenges applying PRINCEII project management concepts and method. Section four analyzes the e-CODEX governance by considering one of its key challenges, which is ensuring the independence of the judiciary. Finally, section five provides some discussion and concluding remarks on the challenges to be faced by the EU e-Justice community.

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1. The Connecting Europe Facility (CEF) supports trans-European networks and digital service infrastructures (DSIs) in order to facilitate cross-border interaction between public administrations, businesses and citizens. For more information about CEF, visit the official CEF website: <https://ec.europa.eu/inea/en/connecting-europe-facility>.

2. Background

In this section, a short introduction is provided on the digital transformation of justice in the EU. Against this background, the different elements of the e-CODEX solution are exemplified and further explained.

2.1 The digital transformation of justice in the European Union

Europe is already experiencing the effects of the fourth industrial revolution. A growing competitive European market, throughout which individual companies are scaling up, calls for a concurrent digital transformation of the national public sectors. Public services should become digital, open and cross-border by design. E-Justice is one of the cornerstones of the efficient functioning of justice in the Member States and at the European level. It is an essential instrument to provide legal protection to citizens and companies in the digital era. As such, it is one of the key areas addressed by the Digital Single Market Strategy, in which "citizens and businesses have the necessary skills and can benefit from interlinked and multi-lingual e-services, from e-government, e-justice, e-health, e-energy or e-transport" (Carullo, 2016, p. 1).

Each of these areas has developed their own strategies in the Digital Single Market as well as in associated multiannual Action Plans. Nevertheless, they all rely (and are dependent) on the e-Government strategy and associated Action Plan.

In addition, the eGovernment Action Plan (2016-2020), being inclusive of several government sectors, focuses in particular on e-Justice actions with a multisector impact. An example is the IT platform for exchange of electronic evidences between judicial authorities (DG JUST, n.d.). This action aims to effectively combat cybercrime. Furthermore, there is a need to improve the possibilities for judicial authorities in different Member States to exchange electronic evidence between them. In the context of its work on e-Justice, the Commission will develop a secure online platform for requests and responses between judicial authorities of the EU Member States concerning e-evidence. This will be completed by the end of 2019. Member States that currently lack such capacity will be able to install the portal in their national context.

E-Justice aims to facilitate access to justice and the functioning of judicial systems, including cross-border cases, for citizens, legal practitioners, and (judicial) authorities, taking into account judicial independence and separation of powers. The Strategy on European e-Justice 2014-2018 defined the general principles and objectives of European e-Justice and set out a general framework for the multiannual European Action Plan 2014-2018 on e-Justice. The latter builds on what has

already been achieved and has prioritized those actions to be supported by European financial instruments based on Member States' priorities as defined by the Working Party on e-Law (e-Justice).

Briefly, there are three main groups of e-Justice services to be supported:

1. Access to information in the field of justice, to be pursued through the maintenance and further development of the e-Justice Portal and the interconnection of national registers, and to be accessed through the e-Justice portal;

2. Access to courts and extrajudicial procedures in cross-border situations through the availability of communication by electronic means between courts and parties to proceedings, as well as witnesses, experts and other participants, i.e. through the use of video conferencing, teleconferencing or other appropriate means of long-distance communication for oral hearings;

3. Communication between judicial authorities of the Member States, more specifically in the framework of instruments adopted in the European judicial area in the field of civil, criminal and administrative law, with the e-Justice Portal to be developed as an efficient tool by providing a platform and individual functionalities for effective and secure exchange of information, including via the e-CODEX network.

2.2 From the e-CODEX project to an operational digital service infrastructure

E-CODEX is the primary instrument of the third main group of e-Justice services. The e-CODEX project started in December 2010 as one of the Large Scale Pilots (LSPs) in the Competitiveness and Innovation Program (CIP), which is now merged into the CEF. CIP aimed to build on initiatives in Member States or associated countries to ensure the EU-wide interoperability of ICT-based solutions. "The e-CODEX system was developed in the context of the Digital Single Market by a group of Member States with the help of EU grants" (European Commission, 2017), reusing, whenever possible, building blocks developed in previous LSPs.[2]

The pilot phase of the project started in 2013. The technical solutions developed by e-CODEX were used in real life scenarios within the civil and criminal justice field. Several civil and criminal law procedures were selected as use cases

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2. Some of the e-CODEX technical solutions comes from 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>.

(Justizministerium, n.d.). These use cases are currently being deployed by an increasing number of Member States.[3]

Today, e-CODEX is a Digital Service Infrastructure (DSI), which makes use of DSI building blocks (maintained by CEF), through which it supports the interconnection of national e-Justice systems. It allows the exchange of legal documents, forms, evidence or other judicial information, in a secure manner (European Commission, 2017). More parties and users are now relying on the proper operation and maintenance of this infrastructure. Within the e-Justice domain, the CEF is the financial instrument providing the funding to DSIs, such as e-CODEX.

E-CODEX is designed as a decentralized system based on a distributed architecture. It enables communication between national and European ICT systems through a network of decentralized access points. This is done without the use of a centralized system (Velicogna et al., 2016). In addition to the exchange of messages between national access points, e-CODEX supports the adaptations required to allow meaningful communication between national and European level ICT systems (i.e. semantic interoperability) (Velicogna and Steigenga, 2016). Also, a trust mechanism is installed which allows legally valid communication through messages generated with national instruments across national borders (Velicogna, 2018).

The key non-technical component of e-CODEX service provision, which supports the legally valid communication, is an agreement called the Circle of Trust. This agreement is signed by all e-CODEX partners participating in the piloting of the services (Velicogna et al., 2016). The extension of the agreement beyond the end of the project and the piloting phase is part of the long-term effort to provide a sustainable solution for e-CODEX. An important technical feature enabled by the Circle of Trust is the recognition of e-Identification and e-Signature, through national systems across national borders. To achieve this recognition, a Trust-OK token was created. The objective of the Trust-OK Token is to provide the possibility for the receiving party to 'trust' the legal documents from the sending party, based upon a verification of the signature by the competent authority of the sending access point. The Circle of Trust stems from before the eIDAS regulation.[4] It is foreseen that eIDAS has delivered the legal base to trust electronic identities from other Member States. At the moment governance of eIDAS instruments follows CEF governance.

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3. The Access to e-CODEX project, funded under CEF, aims to support more Member States to join the cross border e-Justice community.

4. eIDAS is the abbreviation for electronic identification, authentication and trust services. The eIDAS regulation is an EU regulation which provides a set of standards for electronic identification and trust services for the Digital Single Market.

The e-CODEX project ended on 31 May 2016. However, its continuous functioning and sustainability is a top priority for the European Commission and the Member States. The European Commission is supporting the functioning of e-CODEX in the interim period until a long-term sustainable solution for the maintenance of e-CODEX is found. The maintenance of the Justice domain components of e-CODEX infrastructure is the competence of the Me-CODEX project, while its extension has been delegated to a number of loosely aligned EU co-funded projects such as Pro-CODEX (extended until July 2018), e-SENS (ended in April 2017), API for Justice (ended in June 2017). The EU Commission is currently working on several topics such as the e-Justice portal e-CODEX European Payment Order procedure functionality for citizens and the e-Evidence initiative, and the Permanent Expert Group on e-CODEX related issues (PEG) established by the Working Party on e-Law (e-Justice) of the Council of the European Union.

Ongoing discussions will most likely lead to the conclusion that the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) will be a suitable hosting organization for e-CODEX. eu-LISA is a newly established EU agency that is already managing Eurodac, the second-generation Schengen Information System (SIS II) and the Visa Information System (VIS).[5] The future handover to eu-LISA means that there are some governance challenges e-CODEX needs to consider. This is partly due to the fact that eu-LISA is currently not focused upon justice systems. Also, the current governance structure of eu-LISA does not specifically aim to facilitate e-CODEX. However, in the EU context, eu-LISA is still the most viable candidate to host e-CODEX.

Due to the foreseen handover of e-CODEX maintenance activities to eu-LISA, it is important to identify the key governance roles and responsibilities for the future context of e-CODEX. In the next section, five PRINCEII-inspired basic governance roles are introduced. Based on these roles, the governance challenges of e-CODEX, resulting from the foreseen handover to eu-LISA, will be discussed.

3. Towards the identification of governance roles

PRINCEII (Project In Controlled Environments), is a prescriptive method of project management. PRINCEII is process-driven and, as such, offers a structured approach to project management. It is the standard used by the English government, but in the last two decades it has become widely recognized as a standard for project management which can be used in any type of project, scale, culture, and organization (Matos and Lopes, 2013). One of the main advantages of applying

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5. For more information, visit: <www.eulisa.europa.eu>.

a methodology like PRINCEII is that it provides a common language across all parties involved in a certain project (Matos and Lopes, 2013).

Within PRINCEII, responsibilities are not defined on the basis of individual jobs, but in terms of roles (Bradley, 2002). In this article, the focus lies on five PRINCEII-inspired governance roles: the owner, the contractor, the supplier, the customer, and the user. Based on these governance roles, a reference model is created by the Dutch ministry of Justice and Security (Nordhausen et al., 2016). This reference model partly diverges from the sole project focus of PRINCEII (i.e. effectively managing a project), and instead focuses on "the positioning of the different governance roles for delivering the common IV [information provision]/ICT services" (i.e. effectively managing a common IV/ICT service, such as e-CODEX) (Nordhausen et al., 2016, p. 5). The clear separation between the five governance roles in the reference model is also inspired by the recommendation of the Dutch Elias Committee[6] that stresses the need for transparency and the clear division of responsibilities in the context of larges-cale ICT projects.

Table 1 briefly introduces these governance roles. Figure 1 presents a simplified graphical representation representing the governance roles in the reference model.

TABLE 1. Governance roles

SUPPLY SIDE	DEMAND SIDE
Owner The owner is responsible for the vision and long-term strategy of the service.	**Customer** The customer is responsible for correctly articulating the user requirements – on behalf of the users – to the owner.
Contractor The contractor monitors whether the service delivery is in line with earlier made agreements.	**User** The user is the actual beneficiary of the service delivered by the contractor.
Supplier The supplier is responsible for the delivery of the (technical) building blocks to the contractor.	

Source: Nordhausen, S., Boersma, R. Van Oldenbeek, N., Lousberg, J., & Appelboom, D. (2016). *Reference model for governing common IV/ICT services within the Dutch Ministry of Justice and Safety.* Ministry of Justice and Safety: The Hague.

6. Parlementair onderzoek naar ICT-projecten bij de overheid [Parliamentary research into government ICT projects]. Final report of the Dutch Elias Committee. Kamerstuk 33 326 Nr. 5 (2014-2015).
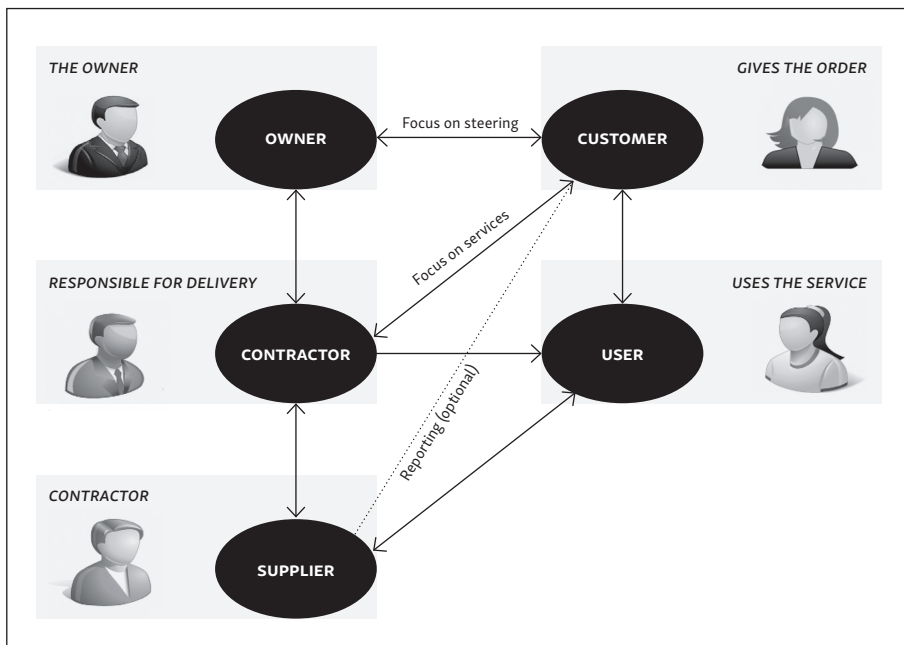
FIGURE 1. The reference model

In order to create a clear and workable governance structure for e-CODEX, it is of crucial importance to clearly assign the above roles to different parties within the given context. Although this seems to be a rather simple exercise, the contrary is true as many complicating factors need to be taken into account. In this section, firstly, the current project governance structure of e-CODEX will be introduced. Secondly, the scope of the e-CODEX governance will be presented. Thirdly, the future governance of e-CODEX will be discussed on the basis of the five governance roles. Finally, an overview of governance challenges related to these governance rules is presented.

4. The current project governance structure of e-CODEX

Currently, e-CODEX is still governed through a typical project governance structure. The Executive Board and the General Assembly share the decision-making capacity at the executive and strategic level. Because not all Member States participate in e-CODEX and its sequel projects, the decisions and directions taken need to reflect a broad consensus among all Member States, leaving room for future participants. Hence, the European Commission and Member States have estab-

lished the PEG, within the Working Party e-Law (e-Justice) (Council Presidency, 2015). The PEG consists of representatives of the Member States, the e-Justice unit of the European Commission and of observers (the Netherlands Delegation, 2018). Observers are mostly representatives of the European organizations of legal professionals.[7] PEG meets approximately six times a year in addition to the meetings of the Working Party e-Law (e-Justice). The mandate for the expert group lists as tasks:

◈ Engage with the future hosting organization;

◈ Develop a governance structure;

◈ Perform an impact analysis;

◈ Set up a business case;

◈ Engage stakeholders;

◈ Maintain relations with (e-CODEX) related projects; and

◈ Carry out a technical examination of the e-IDAS Regulation with a view to identifying its possible use cases in the context of e-Justice.

The presence in PEG of representatives of Member States that do not participate in Me-CODEX is important because of several issues. First, all European institutions[8] acknowledge the importance of e-CODEX for cross-border cooperation in the domain of Justice. Therefore, all Member States must be enabled to be involved in deliberation on that topic. Second, sharing knowledge and presenting progress reports on e-CODEX minimizes chances of divergence of ideas and products aiming for digital cross-border exchange of case related data. In principle, the cross-border exchange of case related data in civil law does not differ from that in criminal or family law. Third, in the exploration of electronic possibilities for advancing information exchange on the existence and content of wills (Council of the European Union, 2017) between EU Member States, the expertise stemming from e-CODEX experiences proved illustrative for the opportunities and approach. Similarly, such availability of expertise is valuable as well for the development and maintenance of other cross-border procedures.

Moreover, the presence of the European Commission in PEG is essential to go beyond communication on project administration and finances, as is the case in Me-CODEX, and also exchange ideas on e-CODEX related policies and the cross-border exchange of case related data. Such discussion is of increasing importance, especially since, in the near future, e-CODEX will also be accessible

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7. CCBE, CNUE, CEHJ and UIHJ.

8. E-CODEX delegates have met with several MEPs on the topic of e-CODEX.

from the European e-Justice portal, and given the result of the (inception) impact assessment of e-CODEX indicating the possibility for e-CODEX regulation (European Commission, 2017).

The participation of representatives of the legal professions ensures that the practical reality is not forgotten within the PEG discussions. E-CODEX offers professionals, businesses as well as citizens, easy access to cross-border justice (Me-CODEX, 2017, p. 7): in practice, these groups or individuals are often assisted by legal practitioners. The combined experiences, expertise, and expectations of the legal professions in dealing with cross border justice are therefore essential to ensure e-CODEX delivers that which is demanded. Their presence in PEG enriches the discussions with examples from real life, and with ideas to take full profit of both the technical possibilities of e-CODEX and their potential impact for cross border Justice.

5. The scope of e-CODEX governance

The figure below presents the scope of e-CODEX governance graphically. E-CODEX reuses CEF DSI building blocks (e.g., e-Delivery), but the governance of these building blocks lies outside the direct scope of the (future) e-CODEX governance. Still, e-CODEX shares a common future with CEF (or the post-CEF reality which starts after the ending of the CEF program in 2020). Close collaboration with CEF
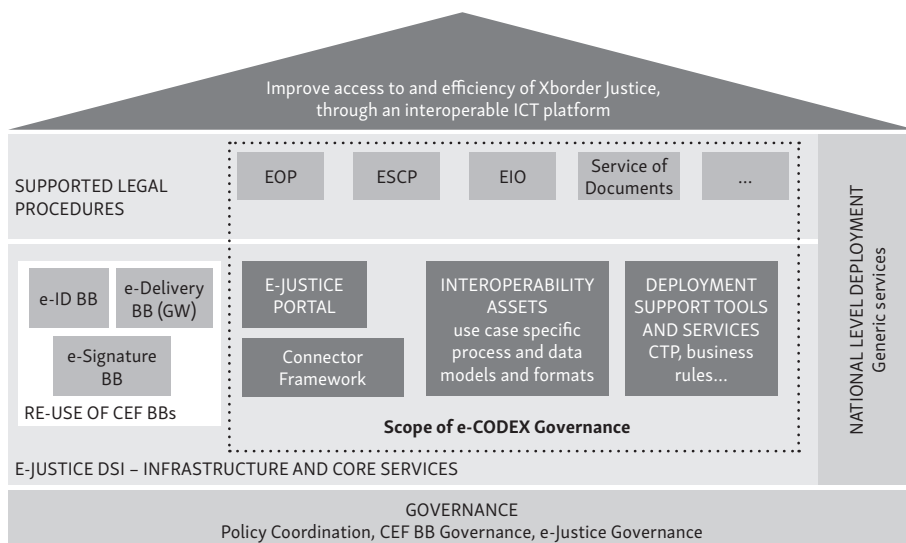

FIGURE 2. The scope of e-CODEX governance

should ensure that "all the necessary technical components used within e-CO-DEX are maintained and enhanced where possible" (Velicogna and Steigenga, 2016, p. 21). In fact, e-CODEX Plus, representing deployment efforts beyond piloting, is supported by CEF, while more cross-border e-Justice initiatives are foreseen in the CEF 2018 Work Programme. Hence, for better understanding of the future e-CODEX governance, it is important to take the current and post CEF reality into account as well.

6. The foreseen governance roles

Owner and contractor

Within the EU, eu-LISA is the most viable candidate for hosting e-CODEX. The formal governance structure of eu-LISA, whose owner is DG HOME, currently consists of a management board, an executive director and three advisory groups.[9] From a governance perspective, selecting the hosting organization (i.e. the contractor) is, however, only step one of creating clear and workable governance structure for e-CODEX.

Supplier

CEF provides reusable DSI building blocks, making it the supplier delivering the DSI building blocks to the contractor (i.e. eu-LISA). Within the CEF governance structure, a distinction is made between the e-Justice DSI owners and the e-Justice DSI solution providers. The e-Justice DSI owners are both the Member States and the European Commission, according to their area of responsibility (e.g., DG DIGIT, DG JUSTICE). They are accountable for the policy side of the DSI, through the EU level e-Justice policy bodies, and the functional side of the DSI. The e-Justice DSI solution providers are accountable for the delivery of the DSI building blocks, including the design and implementation of solutions in the form of specifications, software, and services.

Customer

The Permanent Expert Group (PEG) is the customer of e-CODEX. On the political level, the Justice and Home Affairs (JHA) Council can be referred to as the customer as well. When eu-LISA becomes the hosting organization of e-CODEX (with DG HOME as its owner), is it likely that the PEG and the JHA Council will stick to their shared role of customer.

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9. VIS, EURODAC and SIS II. See: <https://www.eulisa.europa.eu/Organisation/Documents/eu-LISA%20Organisational%20Chart.pdf>.

User

Within the given context, there is not just one type of user. E-CODEX supports a wide range of judicial procedures (e.g., European Investigation Order, European Payment Order). In the future it is likely that this range of procedures becomes even wider (e.g., European Account Preservation Order, Service of Documents). As a consequence, different user communities are involved. Next to the variety of user communities, it is important that the unique position of the judiciary is taken into account. This is one of the foreseen governance challenges which will be further explored later in this article.

7. The foreseen governance challenges

When focusing on the responsibilities associated with the different governance roles, it becomes clear that there are several governance challenges to overcome. In this section, four governance challenges will be discussed briefly.

A first challenge refers to a broad and divergent user community of e-CODEX, and the addition of new legal procedures. During the project, e-CODEX started to support cross-border legal procedures in civil and criminal law. Although the methodology to support these procedures has been identical, the approach to the user communities involved in each of the supported procedures has been different. The e-CODEX community has had to get used to different cultures, modes of operations, and requirements towards digital support for processing data in cross border legal procedures. One has to presume that the diversity of user communities will only increase with a growing number of procedures supported by e-CODEX.

The 'value chain', as the Business Modeling Canvas approach describes that process, has to be accommodated from e-CODEX and e-CODEX governance. In particular, this part might be the biggest challenge for the e-CODEX community. A working group for each supported procedure might be a proper solution for the time that the amount of procedures is limited enough to assure coordination between the groups. However, one can easily foresee that once the amount of supported procedures has passed 25 or 30, even the coordination will require coordination, let alone proper influence by all user communities into the further development of e-CODEX. This is where ideas on governance or user influence from commercial software vendors or other providers of other types of services becomes interesting. E-CODEX might look at mechanisms used by Google, Apple, Airbnb or eBay. The idea of distributed responsibility and its governance might be the way for e-CODEX to learn of useful models for governance on the demand side of e-CODEX.

A second challenge refers to the mutual ratio between eu-LISA and CEF. eu-LISA is the contractor of e-CODEX with CEF as the supplier of the building blocks. Discussions about the future sustainability of the building blocks lies within the realm of CEF, but it also has an effect on the task responsibilities of eu-LISA. The governance structure of CEF is a given, which makes it a challenge for eu-LISA to deal with this set reality.

A third challenge refers to the ending of the CEF program in 2020. It is still unclear how the post-CEF reality after 2020 will exactly look like; and how it will affect e-CODEX.

A fourth challenge refers to the unique position of the judiciary as one of the users of e-CODEX. This challenge will be reviewed in more detail in the next section.

7.1 Independence of the judiciary

As has already been mentioned several times in this article, e-CODEX has many different user communities, all of which need to be accommodated in the governance in their own way. One of the most unique challenges, however, lies in a core value of the EU and its Member States, and a fundamental principle for the existence of the rule of law: judicial independence.

The judiciary as a user community brings along many opportunities and dilemmas that reach to the very core of the judiciary as a branch of government and its versatile activities. This is not limited to the different (possibly future) use cases, but also touches upon the fundamental principle of judicial independence. E-CODEX will only be of added value to the judiciary in its use cases if it is able to respect this value. An important opportunity for countering possible concerns regarding this dilemma lies in the future governance of e-CODEX, which needs to sufficiently ensure the involvement of the judiciary in the decision-making process, and guard other potential independence issues, such as encryption and the protection of case related data.

While, at first, this may seem as a rather straightforward problem with an equally straightforward solution, in reality, it is a particularly challenging topic, as there are many different interpretations of what independence means, and many Member States have different applications of the concept, all of which, to a certain extent, need to be reflected in the governance of e-CODEX.

Defining Independence

The first step towards safeguarding judicial independence in e-CODEX would then be to provide a basic definition of what it means. Judicial independence is

inherent in the rule of law, a building block of both national and EU democratic principles (Article 2, TEU). It means that Courts do not only review the decisions of other governmental bodies, but they ought to be independent when doing so (Jacobs, 2007).

Basically, judicial independence means that there is no unwarranted pressure or influence of external parties on the decision-making by Courts (Vanberg, 2008). The concept seems vague, and interpretations vary wildly based on national or cultural contexts. Defining judicial independence is also a *moral* discussion on the operationalization of the role of the judiciary within the *trias politica* and the rule of law (Vanberg, 2008). The manner in which it is defined determines the way in which it is operationalized in national law and institutional structures. Without a clear definition and corresponding benchmarks and criteria, proposed measures to preserve judicial independence will not be able to fulfill their objective. Therefore, this section will propose two different understandings of judicial independence, *decisional* and *institutional* independence.

Firstly, *decisional* independence regards the ability of an individual judge to act as an autonomous moral agent, without influence of ideological or corruptible considerations (Scirica, 2015; Vanberg, 2008). Because judges are only humans, certain institutionalized guarantees to prevent individual damages to judges or possible bribes for decision-making should be in place (Ferejohn, 1998). Contentious issues in this regard may be the renewability of terms and what this depends upon, or salary provisions (Jackson, 2007; Power, 2012).

Secondly, *institutional* independence refers to the structural autonomy of judiciary as a branch of government from the other branches (Scirica, 2015). Complete independence from the other branches is unworkable as well as undesirable (Scirica, 2015), as interference is not *per se* "bad", but could also provide otherwise unavailable expertise. However, interference cannot be legitimatized if it unjustifiably limits the power of the judiciary or inclines judges to act partially (Ferejohn, 1998). Although the aim of interference may not be aimed at limiting judicial power, it may be its effect. Controversial issues could be the allocation of budget, provision of real estate, or the establishment of technical infrastructure, aimed to increase efficiency (Van Opijnen, 2014). Outsourcing such measures to other branches could, without safeguards, limit the ability of the judiciary to perform their tasks properly and independently, be it intentional or not. To prevent such a situation, a careful system of checks and balances with sufficient institutional safeguards should be in place (Reiling, 2009i).

National differences in interpreting independence mean that it is operationalized differently in the governmental frameworks of Member States. Whereas the judiciary in some MS manages its own IT and budget, in others it has little input

on managerial and financial affairs; this is not necessarily problematic (Reiling, 2009ii).

The discussion on judicial independence is not limited to abstract arguments on the structure of the national or European governmental system. It is a highly relevant discussion in the light of IT innovations, which are mostly aimed at increasing the efficiency and decreasing the workload of the judiciary. However, these innovations could decrease the institutional independence of the judiciary. A similar problem may arise with e-CODEX, if its servers would be governed by a non-judiciary body, that may have undue insight into and control over how the system would be used.

This is not necessarily a problem in itself. From the inception of the project, the question of ensuring judicial independence has been carefully assessed. As a result, important steps have already been taken, e.g., the encryption of messages (Appelboom, 2017; Ferrand, 2018). Moreover, e-CODEX merely connects the systems and transfers the messages, with no role in their content. This also implies that the responsibility for judicial independence lies primarily with the national guarantees of the participating MS. Thus, e-CODEX is an independent instrument in itself, because it respects national diversity with regard to the operationalization of independence, thereby enabling national safeguards for independence, no matter who governs the servers and the system (Groustra, 2018).

However, this does not absolve e-CODEX from all responsibility with regard to independence. A principle of mutual trust at the EU level is no sufficient guarantee. Potential safeguards must go beyond encryption and track and trace, but must also be sought in future governance, such as in the eu-LISA scenario (Groustra, 2018).

The formal governance structure of eu-LISA currently consists of a Management Board (MB) where Member States' representatives from Home Affairs and an alternate, results in a situation where national Home Affairs departments take the decisions regarding e-CODEX. Even though an expert advisory group prepares these decisions, the ultimate decision-making power lies with a body without any representation from the judiciary. Consequently, there would be no safeguards in place for the judiciary to ensure that there is no improper influence from the MB (Groustra, 2018). Solutions could be found, however, in providing that the alternate in the MB comes from the judicial field, or the involvement of the European Network of Councils of the Judiciary (ENCJ). Nevertheless, the first option does not solve the problem of the ultimate decision-making power lying with representatives from Home Affairs, and the second one poses the problem of where their involvement would be appropriate, and that they do not represent the

judiciaries of all the EU MS. Furthermore, one can also suggest the representation of the ENCJ in the e-CODEX consortium (Groustra, 2018).

These options and dilemmas are not limited to the specific governance structure of eu-LISA, but also may present themselves as possible safeguards in alternative governance proposals. Without careful consideration of these potential issues, e-CODEX risks unwittingly harming judicial independence within its use cases.

8. Discussion and concluding remarks

The paper tried to describe the sheer complexity that has to be faced in the development of a governance mechanism capable of governing a *core service platform* in a specific domain like Justice using newly developed instruments or methodologies and existing generic instruments. The friction between global governance constructions of generic instruments and the nuanced governance of domain specific instruments easily leads to a labyrinth of governance constructions. Such a labyrinth would bypass the initial goal of clear distribution of competences and effective lines of communications between all partners. In the ongoing process the e-CODEX community will need to look for examples in other domains or for other types of solutions. One might think of how the governance of building a plane is dealt with. A plane also consists of generic instruments coming from multiple sources and customer specific demands that need to be catered for.

The assignment for the Me-CODEX project is to find ways to reduce complexity in the governance and at the same time respect the existing governance models. Inevitably with complexity reduction will come a perceived, or real, loss of competence of some or all of the actors. Such a loss will need to be compensated for either by trust or by good services, preferably both.

The article has provided an insight into ongoing discussions and lines of reasoning inside the Me-CODEX project on the topic of future governance of e-CODEX. Whereas the effective differentiation between governance roles helps to realize a sustainable solution for e-CODEX governance, the actual implementation of such as structure remains a challenge.

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