Computerised system for communication in cross-border judicial proceedings (e-CODEX)

OVERVIEW

The e-CODEX system is the technological backbone of the digitalisation of EU judicial cooperation in both civil and criminal matters. It comprises a package of software products that allow for secure digital communication between courts, and between citizens and the courts, in particular enabling the secure exchange of judicial documents. The project, launched in 2010 with EU funding, has until now been managed by a consortium of Member States and other organisations, and coordinated by the Ministry of Justice of the German Land of North Rhine-Westphalia. However, it has so far lacked an explicit legal basis in EU law. To remedy this situation, in 2020 the Commission put forward a proposal for a regulation laying down the legal framework for e-CODEX and entrusting its management to eu-LISA (the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) seated in Tallinn, Estonia. The final text of the regulation, agreed by the co-legislators in April 2022, introduces new provisions safeguarding the rule of law, in particular judicial independence and separation of powers, and fundamental rights, in particular the right to a fair trial, the right to data protection, and the right to privacy.

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

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<th>Committee responsible:</th>
<th>Civil Liberties, Justice and Home Affairs (LIBE) and Legal Affairs (JURI) (jointly under Rule 58)</th>
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<td>Rapporteurs:</td>
<td>Nuno Melo (EPP, Portugal); Emil Radev (EPP, Bulgaria)</td>
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<td>Shadow rapporteurs:</td>
<td>Franco Roberti, Isabel Santos (S&amp;D); Ramona Strugariu, Adrián Vázquez Lázara (Renew); Gwendoline Delbos-Corfield, Sergey Lagodinsky (Greens/EFA); Angel Dzhambazki, Cristian Terheş (ECR); Clare Daly, Emmanuel Maurel (The Left)</td>
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| Procedure completed:   | Regulation (EU) 2022/850  
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Introduction

The e-CODEX system is the digital backbone of EU judicial cooperation in civil and criminal matters. e-CODEX comprises a package of software products that allow a network of access points for secure inter-court digital communication to be set up. e-CODEX enables judicial authorities to communicate with other judicial authorities via a set of common protocols. The main purpose of the e-CODEX system is to enable the digitalisation of judicial communication, including communication between courts, as well as between citizens and courts, including the secure exchange of judicial documents. e-CODEX was developed as from 2010: it is currently used by 21 Member States, managed by a consortium of Member States and other organisations, and financed by an EU grant. However, until now, it has lacked a clear and uniform legal basis for the whole EU.

To remedy this situation, on 2 December 2020 the European Commission put forward a proposal for an e-CODEX regulation as the proposed legal instrument to establish the e-CODEX system formally at EU level. The proposed regulation entrusts 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 operational management of e-CODEX. To this effect, the proposed regulation would amend Regulation (EU) 2018/1726 on eu-LISA, to guarantee the uniform application of the rules on e-CODEX across the EU, and their simultaneous entry into force in all 27 Member States, thus preventing legal fragmentation. By establishing the e-CODEX system, the proposed regulation would contribute to its uptake by all of the Member States for procedures in which the system is already in use, as well as for future ones. The handover of e-CODEX to eu-LISA would take place no earlier than in July 2023. By that time, eu-LISA is expected to have gained the necessary financial and personnel capacities to start managing this central tool of digital judicial cooperation in Europe.

Context

Commission communication on digitalisation of judicial cooperation

In the letter of intent accompanying her State of the Union speech of 16 September 2020, European Commission President Ursula von der Leyen announced a new legislative proposal for 2021 regarding the digitalisation of cross-border judicial cooperation. On 2 December 2020, the Commission adopted its communication on digitalisation of judicial cooperation, as well as the above-mentioned proposal for an e-CODEX regulation. In the communication, the Commission noted that ‘the COVID-19 pandemic has highlighted the need for the EU to accelerate national reforms to digitalise judicial institutions’ handling of cases, parties’ and lawyers’ exchange of information and documents, and continued easy access to justice for all’. However, the communication noted the ‘persisting use of paper files, which continues to dominate national and cross-border judicial proceedings’. The current EU legislation does not require digital transfers of data in cross-border cooperation, and as a result, ‘most communication remains paper-based, thus generating inefficiencies in cross-border exchanges (mainly with regard to speed, reliability, traceability and cost), complicating individuals’ and businesses’ access to information, and slowing down exchanges between Member State authorities’.

To remedy these problems, the communication announces a number of legislative initiatives that will appear in the course of 2021:

- making digital judicial cooperation the default option – a legislative proposal is planned for the end of 2021;
- creating a joint investigation teams collaboration platform for criminal matters;
- updating the legal framework of the Eurojust case management system.

Apart from legislative proposals, the Commission envisages the following initiatives as part of the digitalisation of judicial cooperation:
financial support to Member States, including through the new cohesion policy instruments, the new 'Justice' and 'Digital Europe' programmes, as well as the Recovery and Resilience Facility;

development of new IT tools, which can be built upon in the short to medium term and used in all Member States;

making old and new IT tools interoperable by default, accessible for persons with disabilities, user-centred, fast, secure, reliable, resilient and data-driven, and ensuring their privacy, data protection and transparency;

promotion of national coordination and monitoring instruments that would allow regular monitoring, coordination, evaluation and exchange of experiences and best practices.

Strengthening digital communication in the recast regulations on taking of evidence and service of documents

In the meantime, the co-legislators adopted two important legal instruments on the digitalisation of judicial cooperation in the European area of justice, namely recast Regulation (EU) 2020/1783 on taking of evidence in civil cases, and recast Regulation (EU) 2020/1784 on service of documents in such cases. Both these recast regulations are focused on a broader use of electronic communication between national courts in the EU. As regards the recast Regulation on Taking of Evidence, it requires that all communication and exchange of documents should be carried out through a secure and reliable decentralised IT system comprising national IT systems that are interconnected and technically interoperable, for example based on e-CODEX. It also provides that such communication and exchanges are to be carried out with due respect for fundamental rights and freedoms. Traditional means of communication (such as letters sent by post) should only be used in cases of disruption of the IT system or other exceptional circumstances. To simplify and accelerate the taking of evidence, videoconferencing or other distance communications technologies should be used more widely for direct taking of evidence by courts.

Similarly, under the recast Regulation on Service of Documents, all communication and exchange of documents should be carried out through a secure and reliable decentralised IT system comprising national IT systems that are interconnected and technically interoperable, for example based on e-CODEX. By contrast, traditional means of communication should only be used in cases of disruption of the IT system or other exceptional circumstances. Furthermore, the mechanisms of direct cross-border service should be strengthened, by allowing electronic service between Member States, while securing procedural safeguards for the parties.

Existing situation

e-CODEX was developed between 2010 and 2016 by 21 EU Member States with the participation of Turkey, Jersey, the Council of Bar Societies of Europe, and the Council of the Notaries of the European Union. According to the Commission, ‘several’ Member States have installed and are actually using the system. The total costs of establishing e-CODEX – estimated at €24 million – were half financed by EU grants from the competitiveness and innovation framework programme of the European Commission’s Directorate-General for Communications Networks, Content and Technology (DG CONNECT), and through an action grant administered by the Commission's Directorate-General for Justice and Consumers (DG JUST) under the Justice programme, and half by the Member States that participated in the project. An additional €2 million was awarded for maintaining e-CODEX between 2016 and 2018 by the Me-CODEX project (financed through the Justice programme), and €3 million for the period until mid-2021 through the currently ongoing Me-CODEX II project (financed under the Connecting Europe Facility).

At present, e-CODEX is used to support electronic communication between citizens and courts, and between Member States’ competent authorities in civil cross-border proceedings. However,
whether e-CODEX can be used depends on the applicable national law. The Commission notes that 12 Member States do not allow for the digital transmission of European payment orders, and 15 do not allow for the filing of small claims digitally. e-CODEX can only be used for this purpose if the applicable national law so allows. In addition, the Commission notes that back in 2018, it proposed legislation to provide for a mandatory digital channel for the purpose of service of documents and taking of evidence in civil and commercial matters.

From a technological perspective, it is important to stress that e-CODEX is a decentralised network of access points established with every e-CODEX participant. Thus, e-CODEX does not replace existing ‘back-end’ systems in the Member States, but rather, it interlinks national and European IT systems in the area of justice. Therefore, each e-CODEX participant has to set up its own access point to participate in the communication.

At present, the e-CODEX platform is used for communicating within the scope of four EU legal instruments: 1) European order for payment procedure; 2) European small claims procedure; 3) mutual recognition of financial penalties procedure; and 4) mutual legal assistance in criminal matters and European investigation order. The products that are part of the e-CODEX system are available free of charge, and the underlying software (Domibus and Domibus Gateway) is offered under the EU public licence – EUPL v1.2, which means it is open source. The project management is based at the Ministry of Justice of North Rhine-Westphalia, Germany, which acts as consortium leader and project coordinator. In this context, the North Rhine-Westphalian justice administration is the single entity that handles the administrative tasks for the project (including with regard to its funding) as well as its technical and legal coordination.

Parliament's starting position

Parliament has had the opportunity to express its views on e-CODEX in the context of the revision of the Regulations on Taking of Evidence and Service of Documents (see Section on ‘Context’ above). In its legislative resolution on the Taking of Evidence Regulation of 13 February 2019, Parliament explicitly opted to refer to e-CODEX as the decentralised IT system for cross-border communication of evidence. Likewise, in its legislative resolution on the Service of Documents Regulation, adopted on the same day, Parliament also proposed a similar amendment, clearly indicating e-CODEX as the system for digitalised judicial cooperation in the European area of justice.

Council starting position

While Parliament supported e-CODEX in the context of the revision of the Regulations on Taking of Evidence and Service of Documents mentioned above, the Council had more doubts. Indeed, in conjunction with the revision of those two regulations, the Council considered the question of digitalisation as one of the most sensitive, and debated the following four aspects in particular: 1) mandatory vs non-mandatory use of an IT system; 2) whether a centralised or a decentralised IT system is preferable; 3) whether to use an existing IT solution or establish a new one; and 4) the costs associated with the establishment and use of an IT system. With regard to mandatory vs non-mandatory availability and use of an IT system, the delegations held divergent opinions. Regarding the use of a centralised or a decentralised IT system, the majority of delegations preferred the decentralised approach. On creating a new IT solution or using an existing one, delegations again had different views. Some also pointed out that e-CODEX had not yet been implemented, and was not being used by all the Member States; concerns were also voiced about the possible costs involved.

Preparation of the proposal

The preparation of the proposal involved stakeholder consultations and an impact assessment. The Commission consulted all major legal professions, with feedback sought by the Italian and Dutch Presidencies from the Council of Bar Societies of Europe, the Council of the Notaries of the
European Union, the European Chamber of Bailiffs, and the European Law Institute. Moreover, the e-CODEX consortium evaluated the work by sending out questionnaires to stakeholders including pilot courts, consumer organisations and legal professionals. The inception impact assessment was published on 17 July 2018, following which 11 respondents submitted comments (see section on 'Stakeholder views', below). Jointly with the tabling of the proposal, the Commission published an extensive impact assessment (IA). The Ex-Ante Impact Assessment Unit of the European Parliamentary Research Service (EPRS) made an initial analysis of the impact assessment's strengths and weaknesses, concluding that it establishes a clear set of objectives that match the problems, and makes a genuine attempt to identify the costs and benefits of the preferred option and to describe it. The EPRS analysis also pointed to a number of important shortcomings that significantly reduce the IA's overall quality, in particular with regard to its clear preference for e-CODEX from the outset. The EPRS analysis also noted that the requirement for a 12-week open public consultation – which, according to the Better Regulation Guidelines, is mandatory for all initiatives supported by an IA – was not undertaken for e-CODEX. Nevertheless, the IA did not provide any reason as to why it did not meet this requirement. The EPRS analysis concluded that the evidence used in the IA was rather limited and quite outdated, while the assumptions and limitations of the analysis it carried out were not systematically acknowledged.

The changes the proposal would bring

The main aim of the proposed regulation is to establish a proper legal basis for the e-CODEX system, and to make it the default tool for digital cooperation between the Member States' judiciaries. To this end, article 1 of the proposal defines e-CODEX as a ’a decentralised IT system for cross-border communication for the purpose of facilitating electronic exchange of documents, requests, legal forms, evidence or other information in a secure and reliable manner in cross-border civil and criminal proceedings’. Article 2 indicates the scope, by referring to a list of legal acts enumerated in annex I to the proposal, for which e-CODEX will become the tool for electronic transmission of information. The list of legal acts in annex I covers 23 instruments in civil matters and 20 in criminal matters; it can be described as comprehensive, in the sense that it covers all existing instruments for cross-border judicial cooperation.

Article 3 of the proposed regulation contains a number of legal definitions, including for the following concepts: 1) the 'e-CODEX access point' (access point software installed on a hardware infrastructure, able to transmit and receive information to and from other e-CODEX access points in a trusted manner); 2) the 'authorised e-CODEX access point' (e-CODEX access point that has been notified to eu-LISA); 3) the 'entity operating an authorised e-CODEX access point' (an EU institution, body or agency; or national public authority or legal person that is operating an authorised e-CODEX access point); and 5) the 'connected system' (IT system that is connected to an e-CODEX access point for the purpose of communicating with other e-CODEX access points), and others.

Article 4 outlines the composition of the e-CODEX system, which will be composed of an e-CODEX access point and digital procedural standards. An e-CODEX access point will be composed of a gateway (software, based on a common set of protocols, enabling the secure exchange of information over a telecommunications network with other gateways using the same common set of protocols) and a connector (making it possible to link connected systems to the gateway and consisting of software, based on a common set of open protocols, enabling the structuring, logging and linking of messages, the verification of their integrity and authenticity, and the creation of time-linked evidence of the receipt of the exchanged messages).

Article 5 describes the responsibilities of the Commission. By the end of 2022, the Commission will be tasked with establishing, by means of implementing acts, the minimum technical specifications and standards, including on security, underpinning the components of the e-CODEX system, the service-level requirements for the activities to be carried out by eu-LISA, and the specific arrangements of the handover/takeover process of the e-CODEX system by eu-LISA. For the
implementing acts in question, the **examination procedure** (giving a qualified majority of Member States the possibility to block a draft measure) applies.

Article 6 lays down the obligations of eu-LISA, which will include the **operational management of the e-CODEX system’s components**, and, more specifically, 1) the development, maintenance, bug fixing and distribution of the e-CODEX software; 2) its documentation and configuration files; and 3) the work on updating it. eu-LISA will also publish a list of the authorised e-CODEX access points on its website. Finally, its task will be to respond to requests for technical advice and support from the Commission, and to organise and facilitate workshops with e-CODEX correspondents.

Article 7 defines the **responsibilities of the Member States**, which must maintain a list mentioning the **authorised e-CODEX access points** operated within their territory, the cross-border civil and criminal procedures, and the forms that each access point is authorised to apply, as well as designate **up to five e-CODEX correspondents** that will be entitled to request and receive eu-LISA technical support.

Article 8 defines the **responsibilities of entities operating authorised e-CODEX access points**. They will be responsible for the system’s secure set-up and operation. Importantly, the responsibility for any **damage** resulting from the operation of an authorised e-CODEX access point and any connected systems will be borne by the entity operating that authorised e-CODEX access point.

Article 9 regulates the handover (and respectively the takeover) of e-CODEX from its current operators to eu-LISA. The deadline is set for 31 December 2022 at the latest. Article 10 regulates questions of security, which, following the takeover, will become the duty of eu-LISA. Article 10(3) provides that the entity operating an authorised e-CODEX access point must have the **exclusive responsibility for the security of that access point**, including the security of data transmitted through it. Article 11 sets up the **e-CODEX advisory group**, which will start operating from 1 January 2023. The group will provide eu-LISA with the necessary expertise related to the e-CODEX system, in particular in the context of the preparation of its annual work programme and annual activity report. Article 12 sets up an **e-CODEX programme management board**, which will be established by the eu-LISA Management Board. It will be composed of 10 members: eight members appointed by the Management Board, one member being the chair of the e-CODEX advisory group, and one member appointed by the Commission. The programme management board will meet at least once every three months or more often, when necessary, and will ensure the **adequate management of the e-CODEX system**.

**Advisory committees**

The advisory committees have not adopted opinions on the proposal, and are not subject to mandatory consultation.

**National parliaments**

National parliaments in 11 Member States **analysed** the proposal, raising no subsidiarity concerns by the deadline of 11 March 2021.

**Stakeholder views**

Commission consultation outcome

In its impact assessment, the Commission presents the views of the stakeholders it has consulted. The **Council of Bars and Law Societies of Europe** supported the initiative to seek a sustainable solution for the operational management and further development of e-CODEX, stressing that it would like to see the e-CODEX model being used in all projects focusing on digitally interconnecting the Member States’ judicial systems, to avoid different models being developed. The **European Chamber of Bailiffs** also welcomed the initiative, considering e-CODEX of utmost importance for
an efficient justice system. The chamber has aligned its e-justice strategy with e-CODEX and is developing its own e-justice project around the e-CODEX solution, convinced that e-CODEX is the only way forward in creating a strong European justice system. The International Union of Judicial Officers welcomed the initiative, considering the possibilities created within e-CODEX to be of utmost importance for strengthening cross-border judicial cooperation. In the view of the European Law Institute, the e-CODEX system offers practical benefits and has substantial potential to improve cross-border judicial cooperation, not to mention the lives of ordinary individuals and enterprises. The institute further points out that e-CODEX addresses important aspects of several European legal instruments, and that a stable synergetic platform is the best way to guarantee continuity and realise the system's untapped potential. The institute is keen to be involved in finding the best solution. The Hague Conference on Private International Law welcomed the initiative, considering it of paramount importance that e-CODEX be maintained. The European Network of Councils for the Judiciary stated that the proposal is in full compliance with Article 47 of the Charter of Fundamental Rights, i.e. the right to an effective remedy and to a fair trial, adding that the possibilities created by e-CODEX would have a positive impact on everybody's ability to exercise their right to an effective remedy.

Involvement of the European Law Institute

In June 2016, representatives of the e-CODEX group and of the ELI met to discuss the project. The European Law Institute became an associate partner in the second phase of the project, the Me CODEX. The topic of digital access to justice was discussed at the 2016 European Law Institute annual conference with participants from the e-CODEX coordination team (from the Ministry of Justice of North Rhine-Westphalia) and from the European Commission.

Scholars' views

Marco Velicogna and Giampiero Lupo (Research Institute on Judicial Systems, National Research Council of Italy) consider e-CODEX a project aimed at developing a 'techno-legal system to pilot [a] "live" … cross-border judicial procedure'. They argue that creating such a tool requires a reflection on the inter-relation between online and offline justice, and on how these components will fit together. Since they do not fit together harmoniously, there is need for political decision-making on how to adjust them to each other. The two researchers point out that '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'. In a different paper, the same authors explored the functioning of the e-CODEX system in practice, based on the Italian experience in launching e-CODEX. They highlighted the difficulties that IT designers face in grasping and addressing the complexities of cross-border e-justice development. Professor David Hodson (International Family Law Group) praised the Commission's digital justice agenda, and specifically the proposed e-CODEX regulation. However, he pointed to the costs of implementing such systems at Member State level, which could be problematic for the less wealthy ones.

Council of Bars and Law Societies of Europe position paper

In March 2021, the Council of Bars and Law Societies of Europe published its position paper on the Commission proposal. The council welcomed the proposal, as it would provide for a proper legal basis for the e-CODEX system, but at the same time invited the co-legislators to include in it mechanisms to safeguard judicial independence, separation of powers, and fundamental rights, in particular the right to a fair trial, including the principle of equality of arms in trial. It also called for including guarantees regarding the involvement of professional organisations and other stakeholders in the work of the e-CODEX advisory group and possibly also its management board.
Legislative process

European Parliament

Within the European Parliament, the Civil Liberties, Justice and Home Affairs (LIBE) and Legal Affairs (JURI) committees were jointly in charge of the legislative file on the e-CODEX proposal, under Rule 58. Co-rapporteurs – Nuno Mela (EPP, Portugal) and Emil Radev (EPP, Bulgaria) – were appointed on 10 May 2021. On 14 June 2021, the co-rapporteurs tabled their draft report in the joint committee, proposing a number of amendments. In July 2021, amendments were tabled to the draft report. On 14 October 2021, the committee report was adopted and submitted to the plenary. The new provisions added to the Commission’s original proposal include a statement that nothing in the proposed regulation can be understood as limiting, expanding or otherwise changing the legal or administrative definitions, concepts or competences of the EU or the Member States. The scope of the regulation was limited to civil and criminal matters within EU competence. e-CODEX access points can be authorised under national law or EU law. A new rule on fundamental rights was inserted, whereby the fundamental rights and freedoms of all concerned by the exchange of information via the e-CODEX system must be fully observed and respected in accordance with EU law; this concerns in particular the right to effective access to justice, the right to a fair trial, the principle of non-discrimination, the right to protection of personal data, and the right to privacy. Moreover, a new rule on the legal effect of electronic documents was added, whereby a document may not be refused on the sole ground that it is in such form, rather than on paper. The Commission would receive the empowerment to issue implementing acts laying down detailed aspects of the functioning of e-CODEX. The term in office of the programme management board is set at four years and made renewable. Furthermore, a new rule provides that all entities acting under the e-CODEX system must respect the principle of the separation of powers, and ensure that their decisions and actions respect the principle of the independence of the judiciary.

Council

The Portuguese Presidency of the Council included this file among its legislative priorities. An ad hoc working party was set up to manage matters related to the e-CODEX regulation. It started working in February 2021, and by May 2021, it was close to a compromise text. The compromise text, published by the presidency on 28 May 2021, includes the following main changes:

- introduction of guarantees for the independence of the judiciary as regards the functioning of the e-CODEX system, by expressly providing for oversight of the system by the programme management board, which should ensure that all measures taken by eu-LISA regarding the e-CODEX system, either technical or organisational, guarantee, in particular, the independence of the judiciary;
- clarification that stakeholders and experts, including members of the judiciary, legal practitioners and professional organisations that are affected by, use or participate in the e-CODEX system, are to be involved in eu-LISA’s work;
- additional details on the governance of the e-CODEX system, detailing the duties of the various bodies involved, notably the advisory group and programme management board;
- clarification that the minimum technical specifications and standards, to be established by means of implementing acts, should set the security operating standards, namely in what concerns the connector.

Final text of the regulation

Interinstitutional negotiations and their conclusions

The committee decision to enter into interinstitutional negotiations was announced in plenary (Rule 71) on 18 October 2021, and confirmed the same week. The Council Presidency and the
European Parliament reached a provisional agreement on 8 December 2021. The Permanent Representatives Committee (Coreper) approved the text on 6 April 2022, following which it was adopted by the Council on 12 April 2022 (all votes in favour, no votes against and no abstentions). On 30 May 2022, the final act was signed by the Presidents of the Parliament and the Council, and then published in the Official Journal of the EU on 1 June 2022.

Changes concerning scope, definitions, fundamental rights and rule of law

Purpose and scope of the regulation

The text adopted as the outcome of interinstitutional negotiations makes it explicit that the regulation provides the legal framework for e-CODEX, rather than establishing it, as provided in the original Commission proposal (Article 1(1)). This is indeed exact, given that e-CODEX already exists but has lacked, until now, both a distinct legal basis under EU law and a specific legal framework. The importance of the security of e-CODEX is highlighted additionally through a new provision stating that the regulation ‘lays down … the legal framework for the security’ of the system (Article 1(2)(d)). The Commission's original proposal, which provided for a numerus clausus of legal acts in the area of judicial cooperation in civil and criminal matters (listed in an annex), is replaced by an open-ended formula (Article 2); this means that the regulation will not need to be adapted each time a new act on judicial cooperation is adopted, which would otherwise have been the case.

The preamble states that the e-CODEX system should not, in principle, be used to transmit classified information as defined in the agreement between Member States regarding the protection of classified information exchanged in the interests of the EU. This would only be possible if the ‘relevant conditions provided for in that agreement, in other Union legal acts and in national law are fulfilled’ (Recital 32).

The preamble also clearly states that the e-CODEX system is the ‘preferred solution for an interoperable, secure and decentralised network between national IT systems’ in the area of judicial cooperation (Recital 8); it nonetheless emphasises that the use of e-CODEX is not mandatory for the Member States (Recital 10).

Legal definitions

The definition of e-CODEX, originally found in article 1 of the Commission proposal, is moved to Article 3(1) (definitions), and new elements are added to it, namely the interoperability of the system and the swiftness of its functioning. The requirement of authorisation by the Commission or a Member State has been included in the definition of an authorised e-CODEX access point (Article 3(3)). Similarly, the definition of an entity operating an authorised e-CODEX access point has been supplemented by the requirement that such an entity be authorised under national law or by an EU institution, body, office or agency (Article 3(4)). A new definition of e-CODEX correspondent has been added (which was missing from the original proposal), to be understood as a ‘natural person, designated by a Member State or the Commission, who can request and receive technical support … from eu-LISA concerning all the components of the e-CODEX system’ (Article 3(5)). Furthermore, the notion of digital procedural standard has been included, understood as the ‘technical specifications for business process model and data schemas which set out the electronic structure of the data exchanged through the e-CODEX system based on the EU e-Justice Core Vocabulary’ (Article 3(9)). This notion was initially defined in article 4(3) of the proposal as ‘the business process models and the templates defining the electronic format of documents …’.
Fundamental rights, non-discrimination and rule of law

An entirely new article devoted to non-discrimination and respect for fundamental rights (Article 4) has been added, which makes it explicit that the ‘fundamental rights and freedoms of all persons affected’ by the use of e-CODEX must ‘be fully respected in accordance with Union law’. The article specifically mentions the right to effective access to justice, the right to a fair trial, the principle of non-discrimination, the right to protection of personal data, and the right to privacy. A new Article 14 is devoted explicitly to judicial independence. It requires that all entities carrying out tasks under the regulation must ‘respect the principle of independence of the judiciary, having regard to the principle of separation of powers’ (Article 14(1)). To this end, representatives of the judiciary are to be involved in the management of the e-CODEX system (Article 14(2)).

Several modifications were made to the preamble, including emphasis placed on the need to increase citizens’ trust in the EU and the mutual trust between Member States’ judicial and other competent authorities (Recital 3). The rule of law aspect of digitalisation of judicial proceedings was highlighted, as was the need to strengthen the protection of fundamental rights (Recital 4), with particular reference to the right to an effective remedy and a fair trial, as enshrined in Article 47 of the Charter of Fundamental Rights (Recital 12), and to judicial independence (Recital 14).

Changes concerning composition, functions, and responsibilities

The principle that the Commission should use implementing acts to establish technical specifications and standards, and service level requirements and specific arrangements for the handover and takeover of e-CODEX by eu-LISA, has not been modified (Article 6). The number of e-CODEX correspondents, initially limited to five (article 5(5) of the Commission proposal) has been left open (‘a number of’) and it is to be ‘in proportion to the number of e-CODEX access points’ authorised by the Commission (Article 6(5) of the regulation). Concerning the responsibilities of eu-LISA, the final text has essentially taken over the original proposal, with the exception of making it explicit that eu-LISA will not be responsible for the gateway (Article 7(1)). Additional tasks have been added, however, including development, maintenance and updating of the EU e-Justice Core Vocabulary (Article 7(1)(k)); development of security operating standards; and provision of training on the technical use of e-CODEX (Article 7(1)(k)-(m)).

Member States’ responsibilities

The rules on the responsibilities of the Member States have been amended to make it explicit that they may authorise e-CODEX access points ‘in accordance with applicable national and Union law’ (Article 8(1)); the original proposal simply spoke of a list of authorised e-CODEX access points (not mentioning the need for a legal basis for authorisation). Furthermore, Member States will be required to supervise the authorised access points, in particular to ensure that ‘the conditions under which authorisation was granted are continuously met’. Importantly, it is prohibited explicitly to operate access points in third countries (Article 8(1), fourth sentence). The number of e-CODEX correspondents is no longer limited to five per Member State, but is to be ‘in proportion to the number of e-CODEX number points which [the Member State] has authorised and to the number of digital procedural standards which those … access points apply’ (Article 8(2)).

Handover and takeover of e-CODEX and its security

The rules on handover and takeover of e-CODEX (Article 10) are essentially the same as those in the original proposal, with the exception that the Commission is required to update the Parliament and Council on the handover and takeover process by 31 July 2023 (Article 10(3)). The Commission may only declare the process complete after consulting with the entity managing e-CODEX and eu-LISA. A new rule (Article 11(5)) provides explicitly that if eu-LISA detects any vulnerabilities or security incidents or receives notification of such incidents, it must analyse the incident and inform
both the entities operating authorised e-CODEX access points impacted by it, and the e-CODEX advisory group.

e-CODEX bodies: Advisory group and programme management board

The rule on the e-CODEX advisory group has been expanded to include monitoring the state of implementation of e-CODEX in the Member States, evaluating the need for new digital procedural standards, promoting knowledge sharing, and monitoring eu-LISA’s compliance with the service legal requirements (Article 12(2)). While the original proposal provided only for obligatory meetings of the group during the handover and takeover process, the final text requires that such meetings also take place at least every six months, even after the process is completed (Article 12(3)). Membership in the group is explicitly open to members of the judiciary and legal practitioners (Article 12(5)).

The final text explicitly sets out the tasks of the e-CODEX programme management board. These comprise advising the eu-LISA management board, ensuring the adequate management of e-CODEX, and monitoring respect for judicial independence, including taking ‘prompt preventive or corrective action, where necessary’ (Article 13(1)(a)-(c)). It is explicitly stated that the programme management board will be permanent (Article 13(1), first sentence), and its term in office is set at four years, with a possibility of renewal (Article 13(3)). The preamble highlights that appointments to the e-CODEX programme management board should ensure representation of all Member States over time (Recital 37).

Seat of e-CODEX and eu-LISA

The preamble states that the seat of e-CODEX is established in Tallinn, the capital of Estonia, where eu-LISA also has its seat (Recital 50).

Cooperation with international organisations and third countries

Article 17 of the final text provides for the possibility of eu-LISA’s cooperation with international organisations, their subordinate bodies governed by public international law, or other relevant entities or bodies set upon the basis of an agreement between two or more countries. The preamble also states that the e-CODEX system would be not only open to EU Member States, but also to international organisations and their subordinate bodies governed by public international law, as well as other entities or bodies set up by agreement between two or more counties (Recital 45). Moreover, the Commission is invited to study the feasibility of allowing third countries to take part in e-CODEX, and, if necessary, to make a legislative proposal to that end (Recital 47).

Analysis

An important element resulting from interinstitutional negotiations, which follows the concerns voiced by the European Parliament, is the strong emphasis on judicial independence and fundamental rights visible in the final compromise text; it aims to prevent the use of the e-CODEX system for aims incompatible with the founding values of the EU common to the Member States (Article 2, Treaty on European Union). This element, which was missing from the original proposal, is not only present in a declaratory manner within the preamble, but also takes a concrete form in Article 4 prohibiting discrimination and fundamental rights; Article 14 explicitly mandating respect for judicial independence and separation of powers; and in the involvement of representatives of national judiciaries in the e-CODEX advisory group (Article 12). The regulation’s rule of law dimension is also strengthened by the explicit requirement for a legal basis for authorising e-CODEX contact points, and Member States’ duty to monitor whether the conditions for authorisation are continuously met (Article 8). Lastly, the e-CODEX programme management board is mandated to take prompt preventive or corrective action to safeguard judicial independence, whenever it is necessary.
EUROPEAN PARLIAMENT SUPPORTING ANALYSIS


OTHER SOURCES

Computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), European Parliament, Legislative Observatory (OEIL).

ENDNOTES

2 ibid., p. 5.
3 Source: e-CODEX FAQ.
4 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under ‘European Parliament supporting analysis’.
5 Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, OJ C 202, 8.7.2011, pp. 13–23.

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eprs@ep.europa.eu (contact)
www.eprs.ep.parl.union.eu (intranet)
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