

CCBE Position paper on the proposal for a Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726 (the “e-CODEX proposal”)

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

On 2 December 2020, the European Commission published a [proposal](#) for a Regulation on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system) and amending Regulation (EU) 2018/1726 (hereafter the “e-CODEX proposal”). The same day, the Commission presented a [communication](#) “*Digitalisation of Justice in the European Union – A toolbox of opportunities*” and on the [Inception Impact assessment](#) on the Digitalisation of cross-border judicial cooperation.

The CCBE welcomes that the Commission considered various aspects which the CCBE suggested during the preceding consultation process. The CCBE previously issues [comments](#) regarding the Roadmap on the digitalization of Justice in the EU and published an [Open letter](#) from the CCBE President on the future of e-CODEX and the involvement of the CCBE.

With this paper, the CCBE wishes to further develop its position in relation to several aspects of the e-CODEX proposal.

1. General considerations

The CCBE welcomes EU initiatives to support the digitalisation of judicial procedures, to foster interoperability of different national systems, and to support the uptake of new technologies in the day-to-day functioning of justice systems. **The CCBE recalls that in order to uphold fair trial rights, such endeavours must always be coupled with sufficient safeguards and due process procedures, including the protection of professional secrecy and legal professional privilege.**

Furthermore, the CCBE stresses that the digitalisation of justice systems (hereinafter referred to as “e-justice systems”) should be sufficiently coherent with other e-government tools and remain flexible to address frequently changing requirements as well as the variety of IT systems among different countries.

Regarding the e-CODEX system, the CCBE strongly welcomes the proposal for a Regulation which establishes the e-CODEX system and entrusts its operational management to the European Union Agency for the operational management of large-scale IT systems within the area of freedom, security and justice (eu-LISA). In its [comments](#) regarding the Roadmap on the digitalisation of Justice

in the EU, the CCBE recalled the necessity to establish the e-CODEX infrastructure as the standard mechanism ensuring interoperability of national e-justice systems and enabling cross-border electronic communications and transmission of information between judicial authorities.

2. Access points and digital procedural standards

As provided for in the Article 4 (1) of the proposal, the e-CODEX system should be composed of an e-CODEX access point and digital procedural standards. The access point is defined as “*a software installed on a hardware infrastructure, able to transmit and receive information to and from other e-CODEX access points in a trusted manner*” (Article 3 (a)). According to Article 4 (3), “*a digital procedural standard shall consist of the business process models and the templates defining the electronic format of the documents used in the context of the procedures laid down by legal acts listed in Annex I of the proposal*”.

It is the duty of the Member States and the Commission to maintain a list of authorised e-CODEX access points operated within their territory or by the Union institutions, bodies and agencies, and communicate them to eu-LISA in order to enable the interaction between them in the context of the relevant procedures. Only access points which have been notified to eu-LISA and which are operating a digital procedural standard will be considered as “authorised” according to the provision of Article 3 (b).

- **Entities operating access points**

The CCBE notes that an entity operating an authorised e-CODEX access point “*means a Union institution, body or agency, a national public authority or legal person which is operating an authorised e-CODEX access point*” (Article 3 (c)). The CCBE also notes that according to Recital 6 such entities might be “*public authorities, organisations representing legal practitioners or private companies*”.

The CCBE welcomes to possibility for public authorities and organisations representing legal practitioners, such as Bars and Law societies, to be entities operating access points. Legal practitioners, such as Lawyers, have been involved in the development of e-CODEX since its creation. Moreover, they offer sufficient safeguards in order to maintain the integrity of the e-CODEX system. However, clarification should be made regarding how to maintain the integrity of the system when entities operating access points are private companies.

The CCBE stresses that the proposal does not contain clear and concrete provisions regarding the operating conditions of access points. Also, it does not provide for the financing conditions of entities operating an e-CODEX access point. The Commission could be responsible for establishing, by means of an implementing act in accordance with Article 7 of the proposal, financing conditions and guarantees to maintain the integrity of the e-CODEX system which would apply to entities operating an e-CODEX access point. In any case, safeguards must be provided to ensure the right to a fair trial, the independence of the judiciary, and to secure an electronic equality of arms and access to justice.

- **Digital procedural standards**

The e-Codex system should also “*include digital procedural standards consisting of the business process models and templates defining the electronic format of the documents used in the context of those procedures to support the use of e-CODEX access points for legal procedures provided for by legal acts adopted in the area of judicial cooperation and to enable the exchange of information between the*

access points” (Recital 15). As mentioned above, such digital procedural standards are defined in Article 4 (3).

The CCBE notes that eu-LISA shall be responsible for the operational management of the components of the e- CODEX system. According to the **Article 6(2) (g) and (j)** of the proposal, this operational management shall consist, in particular, of the preparation, maintenance and distribution to the authorised e-CODEX access points of the business process models and of the templates defining the electronic format of documents referred to in Article 4(3).

The CCBE also notes that *“the Commission **may** adopt implementing acts establishing detailed technical specifications on the digital procedural standards defines in article 4(3)” (Article 5(2))*.

The CCBE welcomes the fact that, in its operational management, eu-LISA will have to maintain or update the digital templates for the different procedures where e-CODEX will be used to respond to legal or organisational changes and create new ones for those instruments within the scope of the e-CODEX regulation.

Moreover, the CCBE stresses that it is necessary for the digital documents that will be used in the context of Article 4(3) to comply with already existing standards or for the European Commission to request drafting standards from European standardisation organisations. Therefore, the Article 5(2) could be modified to ensure that the Commission shall adopt implementing acts establishing detailed technical specifications on the digital procedural standards defines in article 4(3).

Furthermore, in order to ensure that the above-mentioned digital documents are up to date, a proper monitoring should take into account the view of legal practitioners using the e-CODEX system. This requires their involvement in the operational management of the system.

3. The legal professions and stakeholder’s involvement in the governance and management of the e-CODEX system

Since the CCBE is the representative organisation of a main potential user group of e-CODEX – i.e. more than 1 million lawyers – its continued involvement in the future management of e-CODEX is essential. In particular, the CCBE has relevant input to provide both at policy and implementation level regarding, for example, the need to ensure that e-CODEX supports an equal playing field and accessibility for all parties, the requirements and obligations lawyers have in terms of deontology, data protection, professional liability, rules of evidence, etc. For these reasons, it is very important that lawyers, through the CCBE, are fully involved in the future development of e-CODEX.

Regarding this necessary involvement, the proposal contains satisfactory provisions. Indeed, Recital (9) of the proposal explains the importance *“to involve the legal professions and other stakeholders in the governance of the e-CODEX system through the Programme Management Board”*.

On this basis, **Article 11(4)** requires that *the e-CODEX Advisory Group shall involve in its work the professional organisations and other stakeholders, which participated in the management of the e-CODEX system at the time of its handover*.

Moreover, **Article 12 (5) (d)** provides that the Programme Management Board of e-CODEX shall include in its rule of procedure rules on *“the admission of experts to the meetings, including professional organisations and other stakeholders, participating in the management of the e-CODEX system at the moment of its handover”*.

The CCBE welcomes the recognition of the involvement of the legal professions and other stakeholders in the governance of the e-CODEX system, within the work of the Advisory group and the Programme Management Board. However, clarifications might be needed regarding the conditions and the effectiveness of such involvement. For instance, guarantees could be set up regarding the participation of professional organisations and other stakeholders in the work of the advisory group. A provision could also be adopted in order to ensure that the voice of the above-mentioned stakeholders would be listened to and effectively considered. These observations are also relevant for the work of the Programme Management Board. The latter has the responsibility to draft its own rule of procedure which shall involve the admission of experts from the legal profession (see Article 12 (5)(d)). Safeguards should be provided for ensuring an effective involvement of stakeholders and that their views are properly taken into account.

The CCBE is also concerned and would like to express its opposition to Article 15(3) insofar as it provides that at the time of the first evaluation of the e-CODEX, three years after the handover to eu-LISA, the Commission shall reexamine the role of the Programme Management Board and its continuation. Such provision threatens, on an arbitrary basis, the continuity of the e-CODEX specific governance, which aims to ensure the independence of the national judiciaries and the participation of the legal professions.

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

The CCBE stresses that any perceived need to increase efficiency through the use of technology should not sacrifice the consistent delivery of justice. For this reason, the CCBE has persistently called for a proper assessment as to whether the system used to interconnect national e-justice systems can adhere to the principles of a fair trial and due process, which include the independence of the judiciary.

Such safeguards apply in case of a handover of e-CODEX to the eu-LISA. 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. As such, it needs to be respected at all levels of the operation of the justice system. **Therefore, the governance model of eu-LISA must be adapted to ensure the principle of separation of powers.** Moreover, any doubts about the extent to which the independence of the judiciary is guaranteed in the future management of e-CODEX may have a negative impact on the willingness of European citizens, businesses, and legal professionals to use the system, thus undermining cross-border access to justice.

The CCBE welcomes that the proposal considers the need for a specific governance for e-CODEX to respect the independence of the judiciary. According to **Recital (7)**, an appropriate entity for the operational management of the e-CODEX system should be designated to ensure the long-term sustainability of the system and its governance while taking into account the independence of the national judiciaries. **Recital (8)** concludes that eu-LISA should be entrusted with the operational management of the e-CODEX system and that it is necessary to adjust its existing governance structure by adapting the responsibilities of its Management Board and by establishing an e-CODEX Advisory Group and a specific Programme Management Board. Moreover, **Recital (9)** refers to [eu-LISA Regulation](#), and its article 19 (oo), which provides that the role of the Management Board of eu-LISA is to ensure that all decisions and actions of the Agency respect the principle of the independence of the judiciary.

Following this motivation, the proposal provides for the creation of an **e-CODEX Advisory Group** and a **Programme Management Board for e-CODEX** (Article 12). On one side, the Advisory group will assist

with the work on the e-CODEX system by providing eu-LISA with necessary expertise related to the e-CODEX system and following up on the state of implementation in the Member States, among other issues. On the other side, the Programme Management Board will assist eu-LISA Management Board to ensure the adequate management of the e-CODEX system. It will act as an intermediary body between the Advisory Groups and eu-LISA's Management Board. The PMB will ensure appropriate prioritisation of the work on the e-CODEX system and mediate in relation to potential contentious issues.

The CCBE welcomes the creation of a specific governance of e-CODEX while considering the independence of the national judiciaries and the participation of the legal professions.

However, the current provisions of the proposal mentioning the independence of the judiciary are not satisfactory. Giving the importance of that principle, a stronger wording is required.

- **In Recital (7)** *"Since it is necessary to ensure the long-term sustainability of the e-CODEX system and its governance while ~~taking into account~~ ensuring the independence of the national judiciaries, an appropriate entity for the operational management of the system should be designated."*

Furthermore, the CCBE asks for clarifications on how the proposed governance structure of e-CODEX will effectively ensure the independence of the judiciary in practice. Indeed, the regulation might need stronger requirements to ensure this principle, even in appearance (following the case law of the ECHR), such as a clear separation of services and personnel, data and administration inside eu-LISA between the justice side and the Home Affairs/Law enforcement side. Such separation should also appear at the governance level. Even if the creation of a specific Programme management board could be welcomed by the CCBE, clarifications should be made about, for example:

- **the decision-making process of eu-LISA and the effective participation of stakeholders regarding the e-CODEX system:** even if the proposal recalls the importance to involve the legal professions and other stakeholders in the governance of the e-CODEX system through the Programme Management Board, the form and conditions of such participation is still unclear. Such provisions could be reinforced.
 - For instance, it is upon the Programme Management Board to establish its rule of procedure which shall involve *the admission of experts to the meetings, including professional organisations and other stakeholders, participating in the management of the e-CODEX system at the moment of its handover* (Article 12(5)(d)). **The conditions of involvement are not provided for in the proposal and should be more detailed.**
 - Also, the Programme Management Board shall have no decision-making power nor any mandate to represent the members of the Management Board according to Article 12(4) of the proposal. **Therefore, it should be clarified how the eu-LISA Management Board and its decision-making process regarding e-CODEX effectively ensure the independence of the judiciary and the right to a fair trial. Such clarifications could concern the composition of the eu-LISA Management Board (Article 20 eu-LISA Regulation), the organisation of its meetings (Article 23 eu-LISA Regulation). In this regard, the CCBE noticed that Europol can play a**

role in the Management Board as an observer. Such participation needs to be carefully considered in the justice domain.

- **the conditions of appointment of the members of the Programme Management Board,** as the proposal only requires the Management Board of eu-LISA to ensure that they have *“the necessary experience and expertise regarding the e-CODEX system”* (Article 12 (2)).

5. Respect of Fundamental rights

The CCBE estimates that endeavours on e-justice must respect and ensure fundamental rights and principles, as they are recognised by the EU Charter of Fundamental Rights and the European Convention on Human rights. The CCBE stresses that e-justice systems need to be secure and support an "electronic equality of arms" and "access to justice". In other words, digital procedures should facilitate all parties in a trial and not only one party to the possible disadvantage of the other party. Also, they should enable the parties to use at least the full procedural rights that they previously had under paper-based systems. Moreover, e-justice systems need to consider lawyers' deontological and statutory duties. For example, lawyers must be capable of acquiring evidence for their acts done within the electronic system, namely, the possibility of filing and archiving electronic documents and related metadata in a reliable manner, even after a court might have deleted the original file.

Within the impact assessment for fundamental rights of the e-CODEX proposal, the European Commission refers to Article 47 of the European Charter of Fundamental rights, explaining that the e-CODEX system would make it easier for people to exercise their right to an effective judicial remedy, 'Right to an effective remedy and to a fair trial', since electronic communication and document transmission facilitates and speeds up the court proceedings. As mentioned above, the Commission pointed out the comments made by stakeholders on the need for the future e-CODEX governance, coordination and related activities need to respect the right to an impartial and independent tribunal.

The Commission refers to the decentralised system of e-CODEX to explain that *“there will be no data storage or data processing by the entity entrusted with the operational management of the system components beyond what is necessary to maintain contacts with the entities operating e-CODEX access points. These entities have the responsibility for setting up and operating the different e-CODEX networks, and thus they will be the only ones responsible for the personal data transmitted via the respective access points”*. Listed operators will have to respect either Regulation (EU) 2018/1725 31 or the General Data Protection Regulation or Directive (EU) 2016/680. It is also mentioned that eu-LISA must comply with Regulation (EU) 2018/1725 when processing personal data. It includes ensuring that any improvements or new versions of the software components entrusted to eu-LISA respect security and data protection requirements by design and by default. Article 10 of the proposal makes eu-LISA responsible for carrying out this task, and for data security overall.

Even if the provisions ensuring data protection and a high level of security of the e-CODEX system are to be welcomed, the provisions of the proposal are not adequate when it comes to the protection of fundamental rights. A specific reference to the applicability of TITLE VI Justice of the Charter of fundamental rights of the EU must be included in the proposal and its recitals. Also, a specific reference to the applicability of article 47 of the Charter must be included. This reference could be made, for instance in Recital 6:

- *(6) Given the importance of the e-CODEX system for cross-border exchanges in the justice area in the Union, there should be a sustainable Union legal framework establishing the e-*

*CODEX system and providing rules regarding its functioning and development. **Such legal framework should effectively ensure the protection of fundamental rights as they are guaranteed in the Title VI of the Charter of fundamental rights of the European Union, in particular Article 47 on the right to an effective remedy and to a fair trial.***

Moreover, given the importance of the e-CODEX system to ensure an effective access of citizens and businesses to justice and facilitating judicial cooperation between the Member States, a reference to the protection of procedural rights should be made in the proposal, guaranteeing that any of its provision shall not undermine the procedural rights established by the EU Charter, other EU instruments, and the European Convention on Human Rights. For instance, the proposal could mention the Directive 2016/343 on the right to be presumed innocent and to be present at trial; the Directive 2013/48 on the right of access to a lawyer, the Directive 2012/13 on the right to information and the Directive 2010/64 on the right to interpretation and translation.