Electronic Data Exchange Within European Justice: e-CODEX Challenges, Threats and Opportunities[1]

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Abstract:
This paper analyses one of the most debated and controversial issues regarding the changes which are taking place in the Justice domain: the complexity of developing and implementing ITC systems that 'actually work', and doing so with a reasonable budget and in a reasonable time. While the number of studies on National experiences is slowly growing (see for example Fabri & Contini 2001, Fabri 2007, Contini & Lanzara 2009, Reiling 2012), filling an often-mentioned gap in justice sector literature, building on the European project e-CODEX case study, the authors point the attention to a somewhat new and unexplored phenomenon, the concrete attempt to build cross-border electronic data exchange within the European justice field.

e-CODEX (e-Justice Communication via Online Data Exchange) is the first European Large Scale Pilot in the domain of e-Justice. The project is carried out by 19 partners either being or representing their national ministries of justice of 15 European countries, plus the Council of Bars and Law Societies of Europe (CCBE), the Conseil des Notariats de l'Union Européenne (CNUE) and the National Research Council of Italy (through two of its institutes - IRSIG-CNR and ITTIG-CNR). To provide a better grasp of the project scale, its overall budget is over 14 M euro and about 14 hundred person-months are committed to it.

The project aims at improving cross-border access of citizens and businesses to legal means in Europe, as well as to improve the interoperability between legal authorities of different Member States. With a case based approach, e-CODEX is developing and will be soon implementing an interoperability layer to connect existing National Systems in order to provide cross border e-justice services. The project commitment includes running a live pilot in a 'production environment' for a duration of twelve months. The electronic services that have been so far selected are: European Payment Order (EPO), European Small Claim procedure, European Arrest Warrant (EAW), and the Secure cross-border exchange of sensitive data.

The paper provides a description of the on-going project, showing the additional layers of complexity which affect the design and innovation of ICT when the scope of the system being created crosses not only organizational and institutional boundaries, but also national borders. When implementing their National Systems, many European countries have experienced difficulties ranging from delays to never ending design or piloting stages to more or less openly declared failures. According to the authors' main hypothesis, and in line with a growing number of empirical studies, this complexity is caused by several factors such as technological, organisational, normative, and their intertwining. Furthermore, it provides the opportunity to begin investigating the changes deriving from such a project in terms of governance and public value of the services delivered.

1. Introduction

In a Europe without borders, cooperation among judicial authorities of different countries is crucial to enable and stimulate the mobility of citizens and businesses.[2] In an increasingly digital society, such judicial cooperation relies on e-Justice to facilitate the interaction between different national and European judicial actors. A European system of e-Justice should be accessible to citizens, businesses, legal practitioners and the judicial authorities, which will make use of existing modern technologies.

[1] This work has been carried out within the e-CODEX Work Package 2 (Communication) activities. While involved in the e-CODEX project, the authors have attempted to keep an independent stance while collecting and analysing the data. This work has also benefited from the results of several research projects in the area of e-justice coordinated by the Research Institute on Judicial Systems of the Italian National Research Council (IRSIG-CNR) with financial support from the European Commission and from the Italian Ministry of Universities and Research. The opinions expressed in this article are those of the authors and do not necessarily reflect the positions of e-CODEX or of the aforementioned institutions.

[2] In particular, in the EU jargon, the concept of *judicial cooperation* refers to "Cooperation between the judicial bodies of different States, which may take the form of mutual assistance or the recognition and enforcement of judgments (http://eurovoc.europa.eu/drupal/?q=request&view=pt&termuri=http://eurovoc.europa.eu/209988&language=en last visited 19/11/2012).

In June 2007 the Justice Home Affairs Council of Ministers decided that it was time to develop, at European level, the use of information and communication technologies in the field of justice.[3] In November 2008 the European e-Justice Action Plan was launched. This plan basically states that the European e-Justice system must be designed while respecting the principle of the independence of the judiciary. From a technical viewpoint, e-Justice must take into account the more general framework of e-Government, especially on issues like secure infrastructure and the authentication, e-Signature and e-Identity. The European e-Justice Action Plan outlines numerous areas of activity for the support of the European judicial area at the service of European citizens. Examples are access to information in this field, dematerialization of proceedings and communication between judicial authorities. The realization of these goals calls for common solutions to potential digital barriers between countries. At a time when the physical barriers between countries in the European Union have been removed, the digital era poses new cross-border challenges though. Challenges relate to different standards, different protocols, the cross-border recognition of identities, mandates, electronic signatures, and so forth.

Within this framework the E-codex project has been drafted. It aims to improve the cross-border access of citizens and businesses to legal means in Europe as well as to improve the interoperability between legal authorities within the EU. The use of ICT will make judicial procedures more transparent, efficient and economic. At the same time, it will help citizens, companies, administrations, and legal practitioners to get an easier access to justice. This means not only smoother access to information but also the ability to process cross-border cases efficiently.

The paper provides a description of the on-going e-codex project, showing the additional layers of complexity which affect the design and innovation of ICT when the scope of the system being created crosses not only organizational and institutional boundaries, but also national borders.

It proceeds as follows. First, we propose a conceptual framework to evaluate ICT-enabled governance projects at a pan-European level. The approach is based on both the academic literature and practitioner experience. Then we apply it to a case study at cross-border in Europe. E-codex project well suits the main paper's objective that is to outline the various challenges that interoperability initiatives at EU level pose. Conclusions discuss threats and opportunities related to electronic data exchange within European Justice field.

2. Theoretical Framework

Our analytical framework is based on previous works within the public administration literature. We mainly refer to the recent findings related to the explanatory research[4] on emerging ICT-enabled governance models in EU cities carried out by Misuraca et al. (2011).

Following Misuraca et al. work, we started from the idea of a multilevel framework concerning three key dimensions: governance, interoperability and public values. Then we develop the three concepts through indicators and we apply it to a pan European project.

3. Governance/ e-Governance

The concept of governance has come to be widely used, yet it is not always clear what it means (Al-Habil, 2011). The complexity of governance has been studied from different perspectives and in different disciplines with evolving definitions and variations of interpretations. In our research, we define[5] it as the process of autonomous, self-organizing networks of organizations exchanging information, negotiating, reaching agreements and taking decisions (Toikka, 2011; Velicogna and Contini, 2009). In other words, governance is related to self-organizing, inter-organizational networks that are charged with policy-making (Rhodes 1996). In fact, the multiple dimensions of governance - the structures, roles and relationships governing how society functions – refer to complex policy-making situations, involving multiple organizations, from the government as well as from the outside.

[3] For a description of which technologies were available at the time in the European justice domain, see Velicogna (2008, 2007).

[4] The research was conducted by the Information Society Unit of the Institute for prospective technological studies (IPTS)of the European Commission 's Joint Research Centre.

[5] We mainly refer to the definition developed by the UN, which sees governance as "a multifaceted compound situation of institutions, systems, structures, processes, procedures, practices, relationships, and leadership behavior in the exercise of social, political, economic, and managerial/administrative authority in the running of public or private affairs". It is a situation of multiple inter-linkages and relationships in which a variety of public and private actors collaborate - sometimes mutually conflicting and sometimes mutually reinforcing and complementary - in order to produce and define policy. In this sense, governance involves the management of administration at European, national and local level, including inter-administrative and inter-sectorial linkages with various partners and stakeholders.

To this respect governance can be described by the characteristics of governance models (macro perspective) and of governance network (micro perspective). The first dimension refers to the institutional level where stable formal and informal rules, boundaries, procedures, regime values and alike are found, this level is associated with the policy studies approach and it addresses the problematic changing context of administration. The second level is organizational or managerial. Where the bureaus, departments, executive branches and such reside along with the lateral nongovernmental contractual entities linked to government. At this level the issues of incentives, administrative discretion, performance measures and civil service functioning become crucial (Frederickson, 1999).

ICTs are important tools to support the transformation of governance processes through e-Governance. e-Governance can therefore be considered as a broad framework to capture the co-evolution of ICTs' various stakeholders with the political institutions, at local, national and global level. e-Governance can also be regarded as a multidimensional construct that encompasses ICT research, at the intersections with social, economic, political, and organizational science research, and addresses the investigation of the missions of government in relation to the interests of society (Misuraca 2011a). *E-Governance* is not simply the process of moving existing government functions to an electronic platform. It is also about 'democratic processes' and 'public policies'. E-Governance reflects the capacity and ability of government to reform and improve to better serve its citizens. It also means engaging with the stakeholders to share the risks, opportunities and benefits of collaboration in steering the Nation's and community affairs.

To fulfill its mission, however, e-Governance has to reflect the principles and objectives of 'Good Governance', which include government efficiency, transparency, openness, accountability, and inclusiveness (United Nations, 2006). e-Governance is, or should be citizens or people centred. Efficiency and quality services, however, are too fundamental to e-Governance. The core idea of 'public service' or 'public value' is therefore central to delivering successful e-Governance.

4. Public Values

In recent years, public administration research has paid greater attention to the study of public values (e.g., Beck Jørgensen & Andersen, 2010; Beck Jørgensen & Bozeman, 2007; de Graaf & Van der Wal, 2010; Meynhardt, 2009). After a rather one-sided focus on efficiency, a key aspect of this new interest is the acknowledgement of the multidimensionality of the value universe[6].

Public value refers to the value created by government through services, law regulations and other actions (Moore 1995). In the public value idea, public intervention should be directed towards meeting citizens' needs in a fair, effective and accountable way. Hence, the public value concept acknowledges the necessity to involve citizens and civil society actors to build a democratic governance system.

The close relationship between the concept of public value and e-Government was first noted by Kearns (2004). From this perspective, the use of ICTs to improve government and governance is also a means to improve the production of public value.

A number of value classifications have been developed over time (Hood, 1991; Lundquist, 2001; Pollitt 2003, Beck Jørgensen and Bozeman 2007). To this regard Misuraca et al. (2011c p. 5) identified three main value drivers that constitute the basis of a theoretical framework for ICT-enabled governance, and which include various dimensions:

a) Performance: effectiveness, efficiency (and also, indirectly, responsiveness (serving all citizens in a consistent and predictable way).
b) Openness: access to information as a proxy for participation (enabling the empowerment of citizens so that they can legally control service delivery) and transparency (bringing visibility to citizens of the service workflow by means of automated service delivery); and accountability (creating standards against which the individuals providing a service and the service delivery can be held accountable)
c) Inclusion: equity and inclusiveness (referring to citizens receiving a service on an equal basis and providing services to disadvantaged and minority groups), which involve respect for the rule of law.

[6] Even the OECD – with its traditional emphasis on efficiency – has paid increased attention to the variety of public values (OECD, 1996, 2000, 2008).

5. Interoperability

According to the European eGovernance policy, the implementation of trans-border public services will require that member states' public administrations and nation-based technical and legal systems be made interoperable, that is, able to communicate and exchange data, documents and information with one another (Contini, Lanzara 2012). The European Interoperability Framework defines the main principles and guidelines which member states should attend when they develop their National or Government Interoperability Frameworks (NIF or GIF). The EIF recommendations should be taken into account in order to deliver trans-border services for the European citizens, enterprises, and public agencies and administrations. Within the vision of the European Commission the EIF does not replace the NIFs, but complements them according to the principle of subsidiarity, one of the leading principles of European integration. This means, for example in the case of e-services in civil justice, that national courts and Ministries of Justice are responsible for delivering services across European borders when they receive trans-border claims. In order to be able to do that, they should adapt or update their technology, language, legal rules and procedures, and institutional and organizational structures according to the EIF guidelines (Contini, Lanzara 2012). It means that the national frameworks must become interoperable by means of the European Interoperability Framework.

The EIF v.2 identifies four types of interoperability: technological, legal, semantic, and organizational/institutional[7].

a) Technological interoperability

This includes both hardware and software issues. The former mainly concerns connectivity and protocols (e.g., TCP/IP), while the latter concerns a common syntax (e.g. XML) for data, and also standards for messaging (e.g. SOAP and WSDL). A technological interoperability platform allows two organizations to reliably exchange messages, but the actual understanding of message content remains outside its scope (Misuraca 2011c).

b) Semantic interoperability

Ojo et al. (2009) define the concept of "semantic interoperability" as the capability of organizations in public, private, voluntary and other sectors, and their information systems to:

- discover required information;
- explicitly describe the meanings of the data they wish to share with other organizations;
- process received information in a manner consistent with intended purpose of such information.

This implies that, despite divergences in the structure, organization and content of the exchanged data, the intended meaning is correctly conveyed, the information is correctly acquired and the expected actions are understood and undertaken.

c) Legal Interoperability

It has been defined (Onsrud, 2010) as: … "a functional environment in which:

– differing use conditions imposed on datasets drawn from multiple disparate sources are readily determinable, typically through automated means, with confidence;

– use conditions imposed on datasets do not disallow creation of derivative products that incorporate data carrying different use conditions;

– users may legally access and use the data of others without seeking permission on a case-by-case basis."

Onsrud and Rushton (1995, in Onsrud, 2010: 7) define the complexities in data sharing as needing to deal with "both the technical and institutional aspects of collecting, structuring, analysing, presenting, disseminating, integrating and maintaining spatial data". More recent trends in spatial data use have further compounded the already complex privacy and intellectual property challenges. These trends include ubiquitous location-based devices and services and the collection and use of personal information; the call for more open access to data and the variety of licensing regimes; and the crowd-sourcing movement borne of Web 2.0.

d) Organizational interoperability

For an effective and far-reaching cooperation between two (or more) organizations, organizational interoperability also needs to be addressed. The latter means that the two (or more) cooperating organizations are able to effectively perform a cooperative task, exchanging information and services. Furthermore, this strand also includes the progressive adoption of best practices, necessary to ease an effective interoperability. Organizational interoperability is generally supported by adopting an appropriate framework, such as ebXML, TOGAF, or e-GIF (Misuraca 2011b).

[7] Lanzara and Contini (2012) use the expression institutional interoperability rather than organizational, as it underlines the institutional features of public administrations.

The multilevel analysis for evaluation of ICT-enabled governance projects at EU level results from the conceptual combination of three variables/dimensions:
Multilevel governance: characteristics of governance models (cultural and administrative tradition – typology of judicial systems) and of governance network (actors involved at local – national – European level).
Multifaceted interoperability : legal – organisational – semantic – technical
Multi public values: openness – inclusion – performance

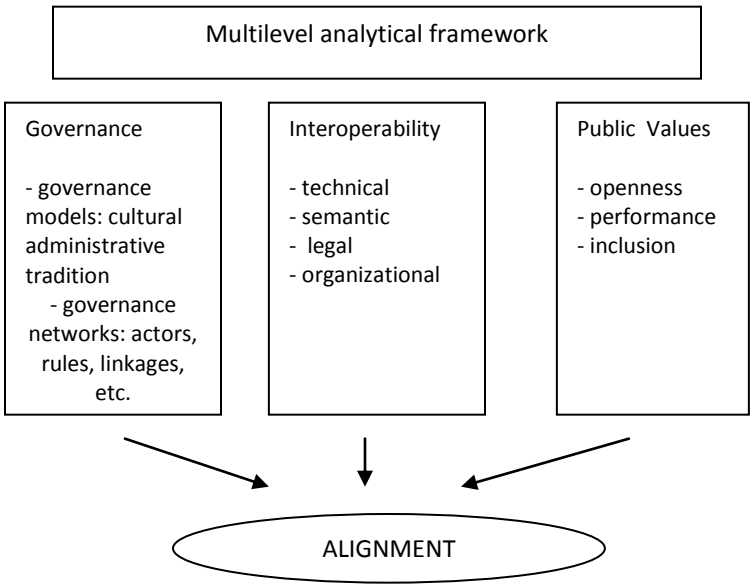

Figure 1 – The case study analysis: the e-Justice Communication via Online Data Exchange (e-Codex) project

6. e-CODEX Case study

An Overview

The e-Justice Communication via Online Data Exchange (e-CODEX) [8] project is the first European Large Scale Pilot of the Information and Communication Technologies Policy Support Programme (ICT PSP) in the domain of e-Justice. Within the Competitiveness and Innovation Framework Programme (CIP), the ICT PSP is part of the European Union effort to exploit the potential of the new information and communication technologies.

Coordinated by the Justizministerium des Landes Nordrhein-Westfalen (Jm Nrw), the e-CODEX project is carried out by 19 partners either being or representing their national ministries of justice of 15 European countries, plus the Council of Bars and Law Societies of Europe (CCBE), the Conseil des Notariats de l'Union Européenne (CNUE) and the National Research Council of Italy (through two of its institutes - IRSIG-CNR and ITTIG-CNR).[9] The project started in December 2010 and will end in December of 2013. To provide a better grasp of the project scale, its overall budget is over 14 M euro and about 14 hundred person-months are committed to it.

[8] http://www.e-codex.eu/ e-CODEX is an EU co-funded project (Ref. CIP-ICT PSP 2010 no 270968).

[9] In addition to the Justizministerium des Landes Nordrhein-Westfalen (JM NRW) GERMANY, the project sees the participation of: Bundesministerium für Justiz Österreich (BMJ Austria) AUSTRIA; Federal Public Service Justice (MoJ Belgium) BELGIUM; Fedict Belgium (Fedict Belgium) BELGIUM; Ministry of Justice of the Czech Republic (MoJ Czech Republic) CZECH REPUBLIC; Ministry of Justice (MoJ Estonia) ESTONIA; Ministry of Justice France (MoJ France) FRANCE; Aristotelio Panepistimio Thessalonikis (AUTH Greece) GREECE; Italian Ministry of Justice - Directorate General for IT (MoJ Italy) ITALY; Malta Information Technology Agency (MJHA/MITA Malta) MALTA; Ministerie van Justitie (MoJ Netherlands) NETHERLANDS; Instituto das Tecnologias de Informação na Justiça (MJ - ITIJ Portugal) Portugal; Ministry of Communications and Information Society (MCSI Romania) ROMANIA; Spanish Ministry of Justice - Directorate General for Modernization of Justice Administration (MJU Spain) SPAIN; Ministry of Public Administration and Justice (KIM Hungary) HUNGARY; IT Department of the Ministry of Justice of Turkey (MoJ Turkey) TURKEY; Council of Bars and Law Societies of Europe (CCBE) BELGIUM; Conseil des Notariats de l'Union Européenne (CNUE) BELGIUM; the National Research Council of Italy (CNR) ITALY.

The project aims at improving cross-border access of citizens and businesses to legal means in Europe, as well as to improve the interoperability between legal authorities of different Member States. With a case based approach, e-CODEX is developing and will be soon implementing an interoperability layer to connect existing National Systems in order to provide cross border e-justice services. The project commitment includes running a live pilot in a 'production environment' for a duration of twelve months. The electronic services that have been so far selected are: European Payment Order (EPO), European Small Claim (ESC) procedure, European Arrest Warrant (EAW), and the Secure cross-border exchange of sensitive data.

The case study focuses on two of the four electronic services that have been so far selected for piloting e-CODEX, the European Payment Order (EPO), and the European Small Claim (ESC) procedure. This is done for two reasons. Firstly, they are the ones that are in the most advanced phase of development, and secondly, they involve the general public and potentially a much larger number of users. Second, both procedures are based on Regulations where "for the first time the European Union legislator, not only regulated certain aspects related to civil proceedings in cross-border cases (e.g. the jurisdiction, the serving of documents, the gathering of evidences etc.), but also tried to propose an autonomous model of rules governing civil proceedings".[10] Some reference to the criminal justice pilots, the European Arrest Warrant (EAW), and the Secure cross-border exchange of sensitive data will be made when needed to highlight additional relevant elements. It should be noted that the project is still in the phases of developing the technological components of the e-CODEX infrastructure and that the pilots are not running yet, even though, as we will see, the action of development is itself generating effects and pointing out at future consequences.

A description of the off-line procedures from the user perspective highlighting its critical elements is followed from a description of the high level technological and organizational infrastructure that e-CODEX is building to support them.

7. The European Payment Order

The European Payment Order procedure is based on the Council Regulation 1896/2006 of 12 December 2006, which is applicable since the 12th of December 2008. Its purpose was is "to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure; and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement".[11] In other words, the procedure should allow EU citizens to autonomously file a cross-border case without having to resort to legal assistance or at least reducing its need.[12] The procedure does not require presence of the parties before the court and the communication exchange between the actors of the procedure (parties and seized Court) is supported through structured forms provided by the Regulation, which are available in all official languages of the EU. Furthermore, the e-justice portal provides a step-by-step guide of the procedure, on-line forms to be filled and automatic translation of the 'static' component of the form. A relevant problem is that "these forms are not very clear in most parts and often both citizens and Courts do not know exactly how to deal with them". [13]

In order to begin the procedure, the claimant has to submit an application to the competent Court[14]. The regulation provides a preformatted form (A) to be filled for this purpose. Filling and submitting the claim rises at least four main problems: understanding which is the competent Court, filling the claim in one of the languages accepted by the seized court, paying the court fees (if applicable), submitting the claim.

Understanding which is the court jurisdictionally competent - In principle, if the claim is against a consumer and relates to a consumer contract, the application must be lodged with the competent court of the Member State in which the defendant is domiciled. In the other cases, jurisdiction is determined in accordance with the rules of international jurisdiction provided by Regulation (EC) No 44/2001. The system set up by Regulation No. 44/2001 "is not so easy to apply: it is sometimes based on quite complicated criteria of connection, whose interpretation can often differ according to the Court seized … Moreover, this system of jurisdiction is not very well known by the Courts of the Member States. Finally, except as for

[10] Mellone, M. (2012), p. 1
http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EuropeanSmallClaim_Mellone.pdf
[11] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p.3
[12] The European order for payment procedure applies between all Member States of the European Union with the exception of Denmark.
[13] Mellone, M. (2012), p. 1
http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EuropeanSmallClaim_Mellone.pdf
[14] It should be noted that the "European order for payment is issued by courts with the exception of Hungary, where order for payment procedure falls under the competence of notaries" https://e-justice.europa.eu/content_european_payment_order_forms-156-en.do

rules on exclusive *fora*, there are no duties for the Court seized to check automatically ("ex officio") its competence to deal with the case. In other words, if parties do not raise any exception of jurisdiction, the Court seized can declare its competence to deal with the case, although it is not actually competent to do it". [15] Furthermore, the claimant must also specify the grounds for the court's jurisdiction choosing from 14 options, one of which is open and needs to be specified.

Filling the claim in one of the languages accepted by the seized court – Given the nature of the procedure, typically, the languages accepted by the seized court are not those of the claimant. While the static content of the form is available in the EU official languages and part of the structured data that need to be entered do not need translation (i.e. names. Surnames, telephone numbers etc.), some open fields need to be filled with unstructured text such as descriptions, statements and additional information which need to be translated. Further complexity to the need of translation is added by the fact that each Member State "juridical language is a technical language and it deeply depends on the national law. Therefore, it can not be easily or automatically translated into a different language". [16]

Paying the court fees – in order to file a claim, fees and charges need to be paid to the seized court. The problem here concerns not only the amount to be paid, which is fixed in accordance with national law, but also the modalities through which the payment is allowed. Not all countries accept credit card or collect the fees from the bank account. Consulting the website of the European Judicial Network in civil and commercial matters may provide some help, but understanding how to proceed may require contacting the court concerned.

Submitting the claim – Once completed, the form needs to be printed, dated and signed and submitted. Submission can be done in paper form or by any other means of communication, such as fax and electronic, that is accepted by the Member State of the seized court and available to the seized court. In several countries though only paper submission is allowed while in others, electronic submission requires the possession of special software or of a digital signature valid in the Member State of the seized court.

Once the seized court receives the application, it examines if the form is correctly filled out. If the application needs to be completed and/or rectified the seized court should send a request to the claimant (Form B). If the court considers that the necessary requirements are met for only a part of the claim, it can propose a modification to the application (Form C). Failure for the claimant to reply within the limit set out by the court results in the rejection of the application. The court also rejects the application if the requirements set out by the European Payment Order Regulation are not met, or if the claim is clearly unfounded. Decision to reject the application is communicated to the claimant through form D. If the requirements are met, the court should issue the European Payment Order within 30 days (Form F). The order is therefore issued solely on the basis of the information provided by the claimant, which is not verified by the court.

According to the e-justice portal, "the European Payment Order must then be served on the defendant by the court". [17] At the same time, "Regulation No. 1896/2006 does not clearly state whether the Court or the claimant shall serve the European order for payment". [18] It only mentions that the court should "ensure that the order is served on the defendant in accordance with national law by a method that shall meet the minimum standards laid down in Articles 13, 14 and 15". [19] So, while in some countries the courts take care of the service of the European order for payment together with the creditor's claim, in others this task is left to the claimant.

Once the claimant receives the documents, she/he can decide to pay to the claimant the amount indicated in the order, or oppose the order by lodging a statement of opposition with the court that issued this order within 30 days from the day following that on which the order is served. The order becomes enforceable unless a statement of opposition is lodged with the court within the time limit indicated. The eventual enforcement of the order is a separate procedure, which "takes place in accordance with the national rules and procedures of the Member State where the European Payment Order is being enforced".[20] If a statement of opposition is lodged, the proceedings continue before the competent courts of the

[15] Mellone, M. (2012), p. 4
http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EuropeanSmallClaim_Mellone.pdf
[16] Mellone, M. (2012), p. 17
http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EuropeanSmallClaim_Mellone.pdf
[17] https://e-justice.europa.eu/content_european_payment_order-41-eu-en.do
[18] Mellone, M. (2012), p. 11
http://www.irsig.cnr.it/BIEPCO/documents/case_studies/EuropeanSmallClaim_Mellone.pdf
[19] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p.3
[20] https://e-justice.europa.eu/content_european_payment_order-41-eu-en.do

Member State where the order was issued in accordance with the rules of ordinary civil procedure, unless the claimant has explicitly requested that the proceedings be terminated in that event.[21]

8. The European Small Claim Procedure

The European Small Claims Procedure has been introduced to simplify, reduce costs and speed up cross-border civil and commercial claims of up to €2000 (excluding all interest, expenses and disbursements).[22] The European Small Claims Procedure is available to litigants as an alternative to the procedures existing under the laws of the European Union Member States. [23]

The procedure is defined by the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.[24] This Regulation also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure.[25] In other words, "a judgment given in the European Small Claims Procedure is recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition".[26]

Similarly to the European Payment Order procedure, the European Small Claims Procedure is designed with the objective to allow a common person to file a claim or to defend himself without the need of a lawyer. For this reason, it is supported through structured forms for the communication exchange between the parties and the seized court provided as annexes to the Regulation. Also in this case the forms are available in all official languages of the EU and the e-justice portal provides a step-by-step guide of the procedure, on-line forms to be filled and automatic translation of the "static" component of the form. Once again, the problem of clarity of the forms for non-expert users is present.

In order to begin the procedure, the claimant has to submit an application to the competent Court filling a standard claim form (A) in a fashion similar to -and with the same problems of- the form A of the European Payment Order procedure.[27] An additional complexity is added by the fact that relevant supporting documents, such as receipts, and invoices must be attached to the form. Furthermore, translation of such documents may be requested.[28]

Once the seized court receives the application, it examines if the form is correctly filled out. If the claim is outside the scope of the Regulation, the court should notify it to the claimant and if the claim is not withdrawn, the court should proceed in accordance with the relevant applicable procedural law of the Member State. If the application is within the scope of the regulation but some information is missing or is incorrect, the seized court sends a request to the claimant (Form B) to provide it. If the claimant fails to provide the relevant information in the time specified, the claim is rejected. The claim is rejected also if it is found manifestly unfounded or inadmissible.

If the form provides the needed information or if and the application is not manifestly unfounded or inadmissible, "copy of the claim form, and, where applicable, of the supporting documents, together with the answer form should be served on

[21] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p.3

[22] Art. 2. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

[23] Art. 1. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

[24] The European Small Claims Procedure Regulation applies from 1 January 2009 in all EU Member States with the exception of Denmark

[25] Art. 1. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

[26] https://e-justice.europa.eu/content_small_claims-42-EU-en.do

[27] European Small Claims form A provides details on the parties, on the claim, on the grounds on which the court has been seized and an eventual request for an oral hearing. Filling, signing, and submitting the claim rises the same problems discussed for the European Payment Order procedure: understand which is the competent Court, filling the claim in one of the languages accepted by the seized court, paying the court fees (if applicable), submitting the claim.

[28] "If any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment" Art. 6. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Furthermore, a party can refuse to accept a document because it is not in either one of the official languages of the place where service is to be effected, or to where the document is to be dispatched or a language which the addressee understands. In this case, the other party must provide a translation of the document (ibidem).

the defendant … within 14 days of receiving the properly filled in claim". [29] While according to the e-justice portal "the court should serve a copy of it, along with the Answer Form, on the defendant",[30] the Regulation does not specify it and in some cases it has been interpreted otherwise by Member States (i.e. Italy).

The defendant has 30 days from the service of the claim form and answer form to reply, by filling a part of the answer form and returning it (accompanied, where appropriate, by relevant supporting documents), to the court or tribunal. The court should then send a copy of the reply and any relevant supporting documents to the claimant within 14 days. A counterclaim is also possible. [31]

Within 30 days of receiving the defendant's answer (or of the claimant in case of a counterclaim) the court must give a judgment on the small claim or demand further details from the parties (within a maximum of 30 days), taking evidence,[32] or summon the parties to an oral hearing.[33] The court should then give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment.[34]

Enforcement is governed by the national rules and procedures of the Member State where the judgment is enforced. "The party seeking enforcement produces an original copy of the judgment, and of the certificate (Form D) translated by a qualified person into the language, or one of the languages, of the Member State of enforcement".[35] The only reason that enforcement in another Member State can be refused is if it is "irreconcilable with an earlier judgment given in any Member State or in a third country". [36]

9. e-CODEX Technological and Organizational Infrastructure[37]

Let's now focus our attention on the technological and organizational infrastructure, which is now being built to support them. The main focus of e-CODEX is on the cross-border electronic data and documents exchange. As we will see, one of the consequences of the switch from paper to digital changes some key properties of the techno-legal objects supporting the data and document exchange. So for example, the content of a paper form sent by the claimant to the court maintains its structure and format once the envelope is opened at the court. This is not necessarily true for an electronic document, which visualization may depend on the application used to open it. The typical example is the opening of a word document with Microsoft Word and with OpenOffice Writer, or an html or xml document by two different browsers. Furthermore, while by postal service the "original" of a paper supporting document can be submitted, the digital version of such document is necessarily a copy. It is important to remember that in the justice domain, not only the content of a document is of importance. Also the form, including the presentation of the content and the way in which the information is packaged, can be relevant for it to perform its purpose. To face these challenges e-CODEX has to find viable techno-legal solutions.

For example, the European Payment Order and the European Small Claims procedures Regulation requires the claimant to sign the claim form. In the electronic version, an advanced electronic signature, as defined by Directive 1999/93/EC of

[29] Art. 5.2. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

[30] https://e-justice.europa.eu/content_small_claims-42-EU-en.do

[31] If the counterclaim does not exceed the value, it should be submitted using the Form A and follows a procedure analogue to that of the claim. If the counterclaim exceeds the limit, the claim and counterclaim do not proceed in the European Small Claims Procedure but must "be dealt with in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted" Art. 5.7. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

[32] According to Article 9, Taking of evidence, "1. The court or tribunal shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence. The court or tribunal may admit the taking of evidence through written statements of witnesses, experts or parties. It may also admit the taking of evidence through video conference or other communication technology if the technical means are available. 2. The court or tribunal may take expert evidence or oral testimony only if it is necessary for giving the judgment. In making its decision, the court or tribunal shall take costs into account. 3. The court or tribunal shall use the simplest and least burdensome method of taking evidence".

[33] If there is an oral hearing, the parties do not need to be represented by a lawyer.

[34] Art. 7.2. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

[35] http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l16028_en.htm

[36] Art. 22. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, and in particular "(a) the earlier judgment involved the same cause of action and was between the same parties; (b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and (c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given" (ibidem).

[37] This section builds on e-CODEX D7.3 "High Level Architecture Definition" v0.2, v0.4 and v1.0.

the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (which guarantees the integrity of the text, as well as the authentication) is needed. While a paper signature can be easily done by any claimant and it is also assumed that can be verified by any reader (although the validity of this assumption could be easily questioned), this is not so in the case of an advanced electronic signature. In case of advanced electronic signature, both signature and signature verification require the litigant to have access to specific and typically not interoperable technologies. So for example an Italian claimant may be able to electronically sign a document in a way that is adequate and can be verified by an Italian court, but if the document is sent to a court of another EU Member State, this court cannot verify it even if it has an e-filing infrastructure. This is because the various judiciaries have developed solutions that are not interoperable.

For this reason, e-CODEX infrastructure is being built taking into account not just the specific procedures it will support, but also that Member States have already established ICT solutions in the justice domain, solutions that respond to specific requirements of national legal systems, and which implied considerable investments in terms of financial and human resources. Recognising that "these national solutions … cannot simply be replaced in favour of new, centralised approaches",[38] e-CODEX aims to create an interoperability layer for the electronic exchange of data and documents between the existing European national information systems and infrastructures. Accordingly, "e-CODEX … should not be a new centralised approach or duplication of any national solution at the European level". [39]

Furthermore, given the size, complexity, cost and independent evolution of such national systems, feasibility and evolvability reasons suggested to avoid, wherever possible, attempting their modification in order to fit e-CODEX needs.[40] What e-CODEX wants to create, therefore, is an e-Delivery platform based on a multilateral solution in which all parties agree to common e-CODEX interoperability standards.[41] The choice of a multilateral solution avoids the need to implement bilateral arrangements as this would "create the need for the maintenance of a multitude of solutions and agreements" [42] and increase complexity. In practice, the e-Delivery platform exchanges data and documents that are translated from sending national format to e-CODEX format and then again to receiving national format.

One of the key concepts adopted by E-CODEX to achieve such simplification is the creation of a 'circle of trust' between the judicial authorities involved. This circle of trust should provide the basis for the Judicial authorities to trust the information provided through e-CODEX. In other words, E-CODEX works on each Member State's trust of other Member States on issues such as confidentiality, e-Identification,[43] e-Signature, e-Documents, e-Payment and transport. [44] So, for example, "through the use of the 'circle of trust' the responsibility of verifying the signature lies with the sending country. The process does not have to be repeated in the receiving country".[45] As e-CODEX analysis has shown, without such a circle of trust, the complexity of the task would be too high to be managed in order to produce a working solution.

The creation and maintenance of the circle of trust is not only a technological and organizational issue. It also requires a formal agreement between the States and in some cases the introduction of national norms in order to make it performative in the national justice domains.

In line with its exchange nature, the e-CODEX system is not designed for the storage of data and documents, but only for the transport of messages. As a consequence, after a successful message transmission, the message is deleted and only the log information is stored for statistical and security purposes. [46]

[38] e-CODEX Technical Annex V.1.1, p.11.

[39] e-CODEX Deliverable 4.2 Concept for Implementation of WP4 (Pilots authentication and signature specifications), p.13.

[40] e-CODEX Deliverable 7.1 Governance and Guidelines Definition, p.10.

[41] e-CODEX Standards and Architectural Guidelines are based on the European Interoperability Framework for European public services (EIF version 16.12.2010 COM(2010) 744 final) and the Architecture Guidelines for Trans-European Telematics Networks for Administrations (IDABC Version 7.1) (e-CODEX Deliverable 7.1 Governance and Guidelines Definition p.10).

[42] e-CODEX Deliverable 7.1 Governance and Guidelines Definition, p.30.

[43] Typically, e-service users need to identify and authenticate themselves in order to be recognized by the system and use the services i.e. signing in to an email account through user name and password.

[44] e-CODEX Deliverable 7.1 Governance and Guidelines Definition, p.10.

[45] e-CODEX D7.3 High Level Architecture Definition V0.2, p.20.

[46] e-CODEX D7.3 High Level Architecture Definition V0.2, p.16.

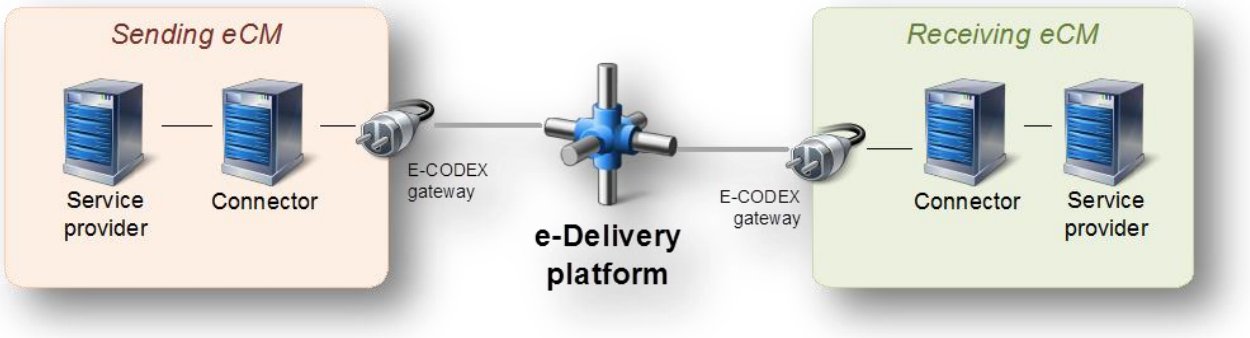

Figure 2 – e-CODEX Components Source: e-CODEX D7.3 v1.0

The above picture provides a representation of e-CODEX's main technological components and their interconnection from the sending e-CODEX Member State (sending eCM) to the Receiving e-CODEX Member State (Receiving eCM). The e-CODEX includes four main technological building blocks: the e-CODEX Service Provider, the e-CODEX Connector, the e-CODEX Gateway and the e-Delivery platform.

E-CODEX infrastructure allows an e-CODEX user to submit files, data and documents. The e-CODEX users for civil cases are typically the claimant, the defendant, their lawyers and the seized court. In the criminal cases, not discussed in this paper, users can be judges, public prosecutors, lawyers or even members of the police forces.

The figure below provides a simplified representation of the e-CODEX high level infrastructure in civil cases. It should be considered that typically, in European Payment Order and the European Small Claims procedures, claimant and seized court are located in different Member States and that the defendant may or may not be in the same Member State of the seized court. Furthermore, each Member State may be the place from which any of the actors send or receive a document. The figure includes an additional actor, the e-Justice portal, which in theory will also provide an alternative access to the e-CODEX communication infrastructure to parties that are not able to connect through their Member State infrastructure component.

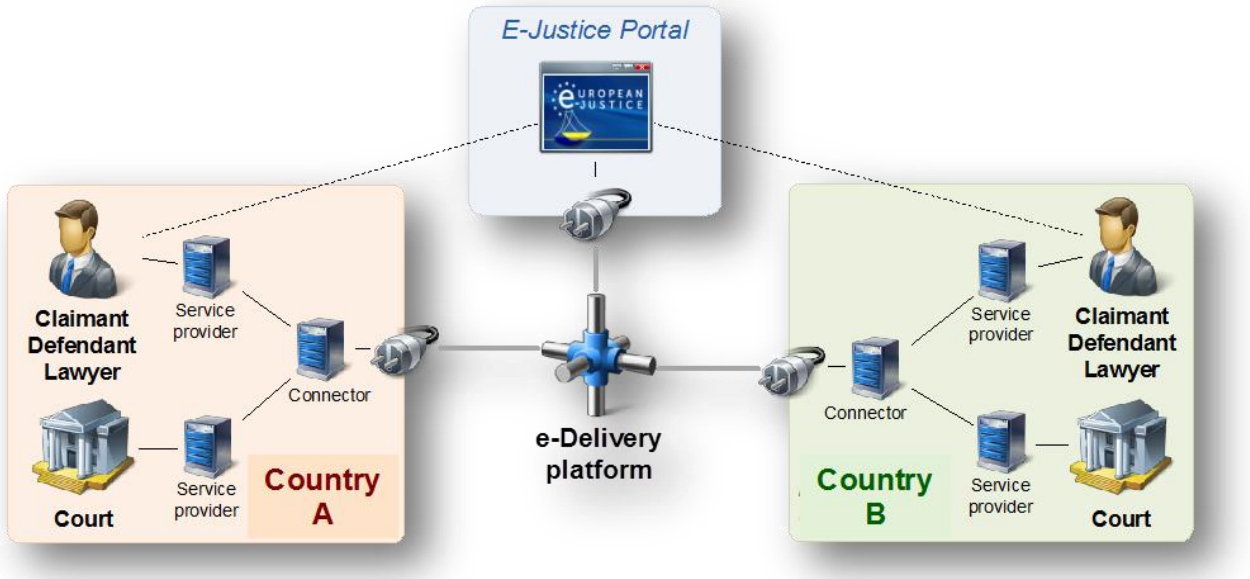

Figure 3 - e-CODEX building blocks from EU Member State perspective Source: e-CODEX D7.3 v1.0

Let's now look more in detail to the e-CODEX infrastructure in action. An e-CODEX user creates, submits and receives his/her files through his/her national system (i.e. the national solution which allows e-filing of national cases which has been adapted to satisfy e-CODEX requirements or an ad-hoc solution) or through the e-Justice portal. Such systems, for the purpose of e-CODEX, act as **e-CODEX Service Providers**. In order to be an e-CODEX service provider the system must be able to deliver a service in conformity with e-CODEX standards (i.e. security standards, privacy) in the field of e-justice and be connected to an e-CODEX gateway through an e-CODEX Connector of an e-CODEX member. An

e-CODEX Service Provider may be a governmental solution or a private solution. In other words, depending on the use case, or on the role of the user, the e-CODEX service provider can be a national application maintained by the participating country's government, the e-Justice portal or another application used by legal professionals.[47]

The **e-CODEX Connector** performs two main functions: 1) it transforms the outgoing documents received from the e-CODEX Service Provider from the national standard to the e-CODEX standard and adds a trust-ok token to the documents. The trust-ok token provides the results of electronic signature verification or a statement guaranteeing that the document was issued by an *advanced electronic system*[48] that is capable of identifying the user and that ensures that the document is uniquely linked to the user and is created using means that the user can maintain under his control and any subsequent change of the data is detectable. According to the principle of the circle of trust, the responsibility for the implementation and the control of those characteristics lies with the Member State whose party to a procedure uses the system.[49] The receiving country can then trust the documents and is not required to validate them again.[50] 2) It transforms the incoming documents received by the e-CODEX gateway from the e-CODEX standard to the national standard, it verifies the trust-ok token and that no data has been changed.

The e-CODEX Connector might also perform protocol and semantic translations. Member States' are free to decide at what stage in their infrastructure they will perform these actions if they are necessary at all.

The **e-CODEX gateways** (national or provided by the e-Justice portal) are "channels" or systems for data transmission between two communication partners. e-CODEX gateways are under the responsibility of e-CODEX members. The gateways are required to fulfill specific security requirements within their operation, but also for the communication with others. These gateways act as interfaces between national systems (or the e-Justice portal) and the e-Delivery platform. Accordingly, they perform different functionalities, such as establishing a connection to other gateways and connectors, format the content of a message to be sent to the e-CODEX standard (eBMS3.0) and extract the contents of a received e-CODEX message,[51] providing a transport signature and providing a timestamp for outgoing messages and checking of the transport signature, providing of a timestamp and sending of an acknowledgment of receipt for incoming messages.

The **e-Delivery platform** is responsible for the secure and reliable transport of data and files from one e-CODEX gateway to another. It has been decided to adopt a decentralized architecture. If a technical need will emerge in the future, a central hub will then be considered. To allow access to all potential users, the system will use the Internet with encryption to ensure a secure connection. In principle, the e-CODEX e-Delivery platform will be "content agnostic, however it remains to be discussed if delivery evidences are business documents and therefore part of the content (the payload) or if they are rather an integral part of the transport infrastructure".[52]

As **payment** of court or other fees can be required by the procedure, e-CODEX addresses the issue. While apparently simple, this aspect is also a source of complexity as the various Member States have different ways to handle e-payment. To cope with this complexity, pilot solutions will "vary from direct debit handling outside the e-CODEX process to online payment done with a national system parallel to the e-CODEX process and handing over the payment receipt to the e-CODEX process". [53]

A representation of the electronic cross border judicial communication exchange process supported by e-CODEX is provided in the swim lane diagram below (*Figure 4*):

[47] D3.3 Documented System Requirements and Specifications, 11.05.12 p. 13.
[48] An advanced electronic system is an electronic system which meets the following requirements: the created document is uniquely linked to the user; the system is capable of identifying the user; the document is created using means that the user can maintain under his control; any subsequent change of the data of a created document is detectable.
[49] D3.3 Documented System Requirements and Specifications , 11.05.12 p. 16.
[50] e-CODEX Deliverable 5.3 Concept of Implementation v0.9.
[51] D4.2: Concept for Implementation of WP4, 30.05.2012.
[52] D5.2 Reusable Assets 02.12.2011, p. 25.
53 e-CODEX Deliverable 5.3 Concept of Implementation, v0.9 p.14.

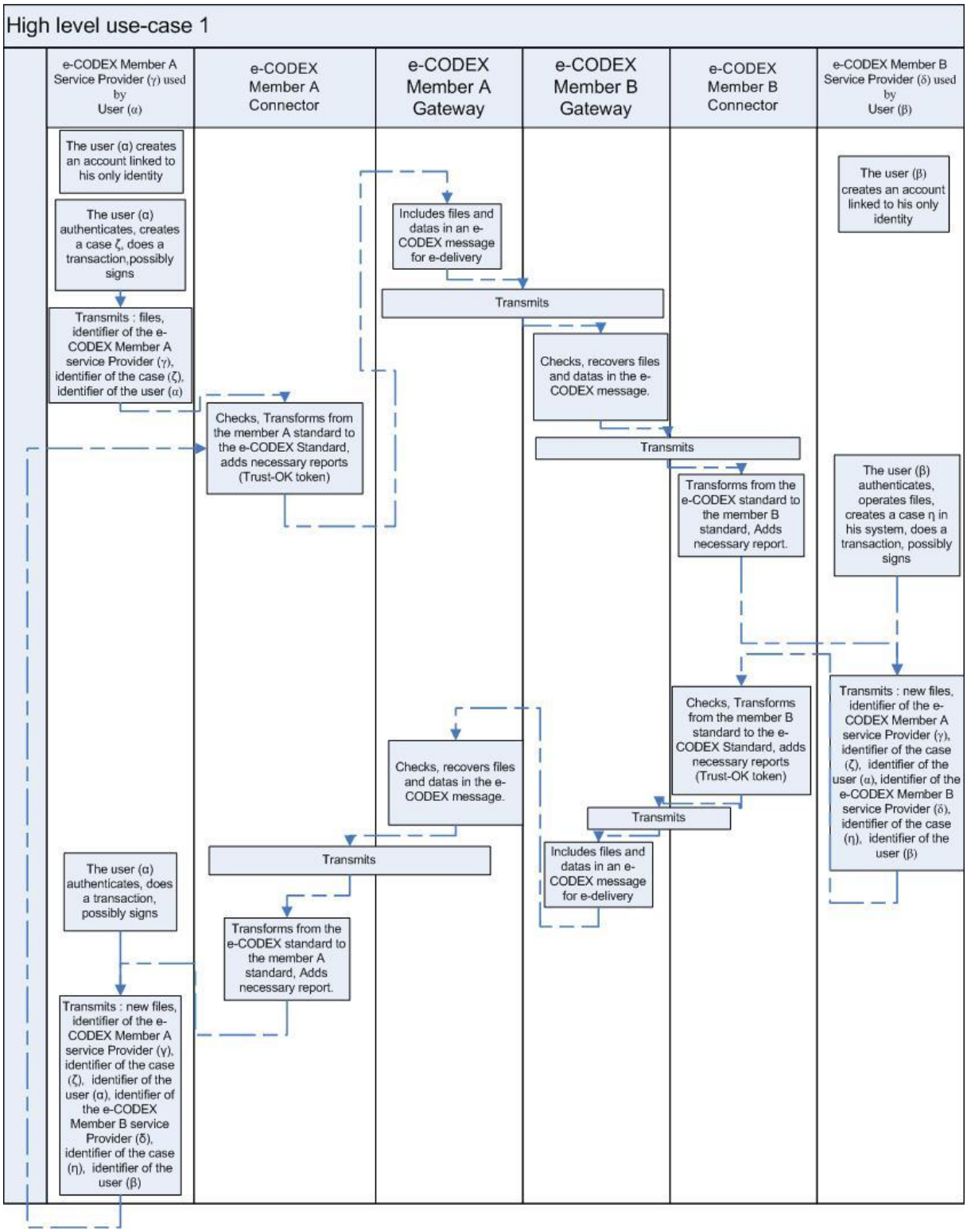

Figure 4 – High level use cases scenario Source: e-CODEX D7.3 v1.0

10. Analysis and Concluding Remarks

As previously mentioned, e-CODEX goal is to improve cross-border access of citizens and businesses to legal remedies in Europe, and to improve the interoperability between legal authorities of different Member States. The previous paragraphs have provided two examples of procedures that will be supported by e-CODEX and have described the infrastructure that is being assembled in order to provide such support. In line with the objectives of this paper, it is now time to analyse how the assemblage of this infrastructure interacts with the three key dimensions of governance, interoperability and public values.

From a **governance** perspective, e-CODEX introduces a number of new actors to the ones already playing an active or potentially active role in the European Payment Order and the European Small Claims off-line service provision. To the main actors such as claimants, defendants, lawyers, judges and court personnel, and service and information providers such as postal services, e-justice portal, the e-CODEX infrastructure adds as a minimum the national points of contact where national Gateway and Connector are managed, typically under the responsibility of the Member State Ministry of justice, the public and private organizations which develop and maintain the e-CODEX Service Providers, the advanced electronic signature infrastructures, the networks, etc.

On the one hand this change increases the rigidity of the system, as it will make it more cumbersome to introduce some changes in the supported procedures. To provide a trivial example, at present changes in the forms provided by the European Payment Order and the European Small Claims Regulations require 'just' a change in the regulation and in the XML and PDF schemes available on the e-Justice portal. Once such schemes are integrated in the e-CODEX Service Providers and Connectors, these components will also need to change and the private and public actors maintaining and evolving them will need to be involved.

On the other hand, the analysis carried out on the European Payment Order and the European Small Claims off-line empirical procedures in order to develop the pilots, are resulting in a better understanding of the concrete and multiple problems that until now have been tackled only at individual party and court level, providing to them a broader perspective. It is the case, for example, of the problems related to the payment of the court fees in Italy,[54] which, once recognized as a problem not of the single court, the Italian Ministry of Justice e-CODEX coordinator is now addressing from a National perspective. So the new, broader network of actors involved in the governance of the system is providing also new opportunities to improve the service (not only on-line one but also off-line).

On the level of **interoperability**, the introduction of e-CODEX infrastructure is indeed increasing the complexity of the system. Technological interoperability solutions are constrained not only by the Member States technological installed bases but also by Member States and EU regulations on the feature that the electronic data and documents exchange have to be performative in the seized court justice domain. Furthermore, evolvability issues need to be taken into account. National Member States ICT systems, which are becoming components of e-CODEX, are only temporarily stable and e-CODEX infrastructure needs to be able to cope with their change in order to keep running.

From a semantic perspective, e-CODEX is not directly addressing the issue of translation problems that the parties are facing when dealing with the preparation of a claim or of a counterclaim. It is focused on the semantic issues related to the structure and structured data of the documents, which can be used for example for feeding automatically court case management systems. At the same time, once again, given the level of action, which is that of the Member State and not the court, some more systematic actions are being taken to improve the information available to parties of other Member States. For example, some of the Member States that did not do it before, are attempting to provide information on payment of court fees not just in the official language(s) of the seized court but also in other ones (i.e. English).

While one of the organizational implications of e-CODEX is the increase in the number of organizational actors involved in the procedure (at least on-line), another interesting result is the increase in coordination and standardization that seems to be taking place (but which will need further investigation and analysis) as the technological infrastructure is being developed and its organizational counterpart is being designed. Much of this will be visible only in the future, such as for example that the role of the national points of contact play once established.

The project is attempting to avoid the need of normative changes in the various Member States in order to allow interoperability, as it can be quite time consuming and require the involvement of legislative bodies. This reduces the governance complexity. Furthermore, the EU Regulations provide some common grounds, which ease the legal complexity. At the same time, the elements which still depend, especially for the on-line procedure, on the national legal domains make achieving interoperability still a dauntless task.

Finally, considering the **public values** dimensions suggested, in relation *to Performance,* it could be argued that while the system may improve effectiveness and efficiency of European Payment Order and the European Small Claims procedures, given the complexity of the infrastructure required, if the number of cases does not rise consistently, it is not probable that it will result in a gain for the tax payers in a service delivery perspective; at the same time, it seems that there are good indications from a responsiveness perspective (serving all citizens in a consistent and predictable way). Furthermore, it should be remembered that the European Payment Order and the European Small Claims pilots are just a

[54] For an interesting presentation of the problems faced by a claimant see Ng G.Y. (2012).

first step in the attempt to create an information infrastructure which should enable support of all cross-border services in the justice domain (both civil and criminal).

At the present state of the project, an attempt to assess in more detail present and future costs and benefits of these e-services is difficult. On the one hand, while budget and budget expenditure data are available, costs can not be easily defined in monetary terms (such as front-end, maintenance and evolution costs, return on investment etc.) as many of the resources are not clearly allocated and many of the costs are not clearly visible or predictable (i.e. personnel of courts cooperating with the project piloting are outside the project budget' or using the system once it is fully operational; service providers adapting National software applications to cope with the e-CODEX infrastructure - or with European Payment Order and the European Small Claims on-line procedures- within their contract for the provision of maintenance and evolution of national applications; etc.). On the other hand, it is only through the use that ICT infrastructures show most of their potential benefits. Empirical research has shown how initial goals, visions, plans, and models are subject to drifts and derives which leads to the actual outcomes which are often quite distant from what was originally intended (Ciborra et al. 2000, Contini and Lanzara 2009).

It is in the opinion of the author that the collection of further data in the next phases of the project will allow to better assess the results of the project as *Performance* is concerned. This will include quantitative data on costs associated to development and maintenance of the technology and organizational infrastructure that allows the service provision, data on the system usage etc. But it will include also more qualitative data through interviews and focus groups with the various categories of users.

Considering *Openness,* the on-line automated service delivery should become more transparent and, given the increased organizational coordination which seems to be emerging and the statistical data collection which should be supported, also accountability should improve. As *Inclusion* is concerned, providing an additional way to proceed which can be chosen by the parties, e-CODEX should be able to improve it. Furthermore, many of the changes which are being generated as an effect of e-CODEX pilots implementation, such as in the case of payment of court fees, also go in the direction of improving inclusion.

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