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**ECODEX 2
EJUSTICE 7
JUSTCIV 13
JAI 83
COPEN 46
DROIPEN 13
IXIM 33
DATAPROTECT 23
CSC 30**

NOTE

From: General Secretariat of the Council
To: Delegations

Subject: 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
- formal comments of the EDPS on the proposal for an e-CODEX
Regulation

Delegations will find in the annex the formal comments drafted by the European Data Protection Supervisor on the e-CODEX Regulation proposal, as sent they were sent to the Commission.



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS Formal comments on the Commission 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

1. Introduction

1.1. Context of the Proposal

The Commission's 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)¹ aims at establishing a stable governance solution for the system, with a transparent decision-making process ensuring the involvement of Member States and other relevant stakeholders². To that end, it aims at extending the mandate of eu-LISA to include e-CODEX among its competencies³ to provide for the system's operational management.

Stable governance for the e-CODEX system would make it possible to establish it as the default system for exchanging electronic messages for judicial cooperation at EU level. eu-LISA would not take over the e-CODEX system before July 2023. Once eu-LISA takes over responsibility for the system, at the earliest on 1 July 2023, it would have to ensure, on the basis of technical and service-level requirements set out in implementing acts, that the existing software remains functional in a changing technical environment and is adapted to evolving user needs. Moreover, eu-LISA would have to maintain or update the digital templates for the different procedures where e-CODEX would be used to respond to legal or organisational changes and create new ones for those instruments within the scope of the regulation in which e-CODEX is introduced. The Commission would then ensure that these templates are laid down in an implementing act establishing detailed specifications on the use of e-CODEX for such procedures⁴.

The proposal would amend Regulation (EU) 2018/1726⁵, which established the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-Lisa).

This proposal is to be completed by another proposal on the further digitalisation of judicial cooperation procedures in civil, commercial and criminal matters to be issued by the Commission in Q4 2021. Such a proposal could:

- "Require Member States by default to use digital channels for cross-border communication and data exchanges between competent national authorities;

¹ COM(2020)712 final

² Page 3 of the explanatory memorandum of the proposal.

³ Page 5 of the explanatory memorandum of the proposal.

⁴ Page 5 of the explanatory memorandum of the proposal.

⁵ Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011, OJ L 295, 21.11.2018, p. 99.

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- Require Member States to accept electronic communication for cross border procedures involving citizens and businesses, without ruling out the use of paper;
- Guarantee that the solutions and principles set out in the eIDAS Regulation are referenced and used, in particular:
 - the principle that electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form;
 - electronic identification and signatures/seals should become acceptable for the digital transmission of judicial documents and their appropriate assurance levels agreed.
- **Provide a basis for the processing of personal data, within the meaning of the General Data Protection Regulation and applicable Union rules on data protection and determine the responsibilities of different controllers and processors;**
- Ensure that any electronic access points established for use by the general public cater for persons with disabilities ;
- In order to ensure that national IT systems are interoperable and able to communicate with each other, lay down the broad architecture of the underlying IT system for digital communication.⁶

The explanatory memorandum indicates that since the e-CODEX system is a decentralised system, there would 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.⁷ These entities have the responsibility for setting up and operating the different e-CODEX networks, and thus they would be the only ones responsible for the personal data transmitted via the respective access points. Depending on whether an access point is operated by an EU institution, body or agency or at national level, and depending on which national authorities are processing personal data and for what purposes, either Regulation (EU) 2018/1725 or the General Data Protection Regulation⁸ ('GDPR') or Directive (EU) 2016/680 would apply.

The explanatory memorandum also indicates that eu-LISA, as is already the case, is required to comply with Regulation (EU) 2018/1725 when processing personal data. As regards, in particular, the task of making further technical developments to the system, this 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 overall⁹.

1.2. Scope of the comments

The EDPS comments below concern the main data protection impact of the Commission Proposal. They are issued pursuant to Article 42(1) Regulation (EU) 2018/1725¹⁰ ('the

⁶ See section 3.2. ("Making the digital channel the default option in EU cross-border judicial cooperation") of Commission Communication "Digitalisation of justice in the European Union A toolbox of opportunities" (COM/2020/710 final)

⁷ Page 10 of the explanatory memorandum of the proposal.

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

⁹ Page 11 of the explanatory memorandum of the proposal.

¹⁰ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

Regulation (EU) 2018/1725'), following a request for consultation from the European Commission, Secretariat General, dated 3 December 2020. In this regard, the EDPS welcomes the reference to this consultation in Recital 27 of the proposal.

2. The EDPS Comments

The EDPS welcomes the proposal and that it contains specific reference to the applicability of the General Data Protection Regulation, Directive (EU) 2016/680 and the Regulation (EU) 2018/1725 to the processing of personal data involved (Recitals 17, 22, 23). He recommends also referring to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the e-privacy Directive)¹¹.

It is the understanding of the EDPS that relevant data protection provisions in relation to the processing activities within the remit of this proposal, in particular clarification on the data protection responsibilities of the different entities in this context, would be provided for by the upcoming proposal on the further digitalisation of judicial cooperation procedures in civil, commercial and criminal matters. The EDPS expects therefore to be consulted on this upcoming proposal for a comprehensive assessment. The EDPS takes this opportunity to recall that, in accordance with Recital 60 of Regulation (EU) 2018/1725, the Commission should endeavour to consult him when preparing proposals.

Brussels, 26 January 2021

Wojciech Rafał WIEWIÓROWSKI
(*e-signed*)

¹¹ OJL 201, 31.7.2002, p. 37.