



Cross-border dispute resolution in Europe: looking for a new “normal”

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Abstract

We live in an increasingly digitally mediated, platform-based environment characterised by remote working, schooling, shopping, and socialising, where national borders blur and geographical location importance decreases. One of the main effects of this transformation is the growing relevance of cross-border (actual and potential) disputes and, therefore, the need for adequate means to address and resolve them. Geographically bounded forms of dispute resolution based on national justice systems, courts, and independent judges have shown their limits to face the new challenge. Building on Canguilhem’s work on the norm, normal and pathological concepts, the paper explores the European Union’s attempt to provide adequate cross-border dispute resolution mechanisms through traditional justice means, showing achieved results and limits. The paper then explores the increasing role of dispute resolution mechanisms integrated into platforms, such as Amazon, eBay and Booking, that bring together service-and-goods providers and buyers/users. These platforms 1) act as third parties in the adjudication of controversies and 2) deploy crowd-based adjudication and enforcement instruments.

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Key words

Cross-border dispute resolution; alternative dispute resolution; online alternative dispute resolution; e-Justice; e-CODEX; platformisation; crowd justice; click farms; Canguilhem

Resumen

Vivimos en un entorno cada vez más mediatizado digitalmente y basado en plataformas, caracterizado por el trabajo, la escolarización, las compras y la socialización a distancia, donde las fronteras nacionales se difuminan y la importancia de la ubicación geográfica disminuye. Uno de los principales efectos de esta transformación es la creciente relevancia de los litigios transfronterizos (reales y potenciales) y, por tanto, la necesidad de contar con medios adecuados para abordarlos y resolverlos. Las formas de resolución de litigios delimitadas geográficamente y basadas en los sistemas de justicia nacionales, los tribunales y los jueces independientes han demostrado sus límites para afrontar el nuevo reto. Basándose en el trabajo de Canguilhem sobre los conceptos de norma, normalidad y patología, el documento explora el intento de la Unión Europea de proporcionar mecanismos adecuados de resolución de conflictos transfronterizos a través de los medios de justicia tradicionales, mostrando los resultados obtenidos y sus límites. A continuación, el documento explora el papel cada vez más importante de los mecanismos de resolución de conflictos integrados en plataformas, como Amazon, eBay y Booking, que ponen en contacto a los proveedores de servicios y bienes con los compradores/usuarios. Estas plataformas 1) actúan como terceros en la adjudicación de controversias y 2) despliegan instrumentos de adjudicación y ejecución basados en la multitud.

Palabras clave

Resolución de conflictos transfronterizos; resolución de conflictos alternativa; resolución de conflictos alternativa online; e-Justice; e-CODEX; plataformización; justicia popular; granjas de clics; Canguilhem

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1. Introduction

The sociotechnical environment in which we live our lives has radically changed in the last few years. In a way, the COVID-19 emergency has exacerbated some tendencies, such as remote working, schooling, shopping and socialising.

However, within the European Union, the social and legal equilibrium based on Member States' well-established institutions, norms, and practices has been subject to altering forces for a much more extended time. This change has been driven by factors such as 1) the free movement of goods, capital, services, and labour within the EU; 2) the growing role of e-commerce;¹ and 3) the new forms of organisation and interaction taking place in the digital world (in particular platformisation). One of the main effects of the transformation which is taking place is the increasing relevance of cross-border (actual and potential) disputes and, therefore, the need for adequate means capable of addressing and resolving them. It should not surprise that traditional (geographically bounded) forms of justice service provision have problems providing an adequate response. Cross-border access to courts increases problems such as limited knowledge of own rights; language barriers; finding adequate information about legal provisions, including the complexity of finding the competent court; the need to deal with formalistic and expensive legal procedures which are different from the domestic "normal" one in the litigant's home country; finding adequate legal representation; problems related to service and enforcement (Velicogna and Ontanu 2019).

In the attempt to address these issues, and based on the principle of subsidiarity, EU institutions deployed several legal instruments (such as directives and regulations) to facilitate the coordination between national rules in areas such as international jurisdiction, cross-border service of documents, recognition and enforcement, and taking of evidence. Harmonised procedures have also been introduced for certain types of civil and commercial matters. To support the use of these instruments, which have failed to achieve the expected results, the European Commission has developed a portal to provide information and services to potential court users. Furthermore, a cross border e-justice services infrastructure (called e-CODEX) has been developed starting in 2010 and tested by EU Member States with real cases since 2013. Once again, in light of the minimal number of cases managed through the system in almost a decade from its "going live", the response seems insufficient to establish the new "normal" needed to cope with the radical changes which are taking place.

As a result, more and more people seem to rely on alternative means to resolve or avoid disputes, based on tools provided by the platforms (e.g. Amazon, Booking etc.) they use to interact. Considering this trend, it may have come the time to re-discuss what is to be valued, considered acceptable, or aimed for in the cross-border justice service provision, as adaptive evolution changes seem to fail, and more radical actions seem to be required.

From this perspective, Canguilhem's work on *The Normal and the Pathological* (1991) provides a sound theoretical framework to describe and analyse the change that is taking

¹ According to Eurostat, 72% of internet users living in the EU had bought goods or services online in the 12 months prior to the 2020 survey and 30% of the online shoppers ordered goods or services from sellers based in the other Member States in the prior 3 months (Eurostat 2021).

place, the measures which are being implemented to adapt the justice service provision to the “new” cross-border requirements, and the rise of new forms of equilibrium.

2. Theoretical framework: some reflections on norm, physiology and pathology

Canguilhem reflection on the concepts of the *norm*, *normal* and *pathological* in medicine and biology, and his reflections on their application to the social domain, provides an interesting framework through which to interpret the changes affecting cross-border disputes resolution. As the “normal” way of doing business is changing, the question of what can be defined as normal and how to qualify the change (is it adaptation, evolution or aberration?) becomes increasingly relevant.

The concepts of *normality* and the *norm*, and how medicine establishes norms of human function are at the heart of Canguilhem’s work (Horton 1995, p. 317). Building on Claude Bernard’s concepts of disease, health, illness, and pathology and his idea of the identity of the normal and the pathological, which differ only for a quantitative variation² Canguilhem radically reformulates them (Spicker 1987).

Canguilhem suggests that, as a result of the “scientifically guaranteed dogma” (Canguilhem 1991, p. 43), which affirmed itself in the nineteenth century through authors such as François- Joseph-Victor Broussais, Auguste Comte, and Claude Bernard, medicine came to identify the normal state of the human body as a set of quantitative values that “one wants to reestablish.” (Canguilhem 1991, p. 126). Due to this quantitative drive, “[n]ormality is usually defined from limits derived from population data: e.g., ‘normal’ laboratory values. This statistical definition of normality implies that abnormality -pathology or disease- is simply an excess or deficit of a particular variable”. (Horton 1995, p. 317). While Canguilhem’s discourse focuses here on the history of the medical field and the emergence of the study of pathology, it is interesting to note the parallel development of quantitative studies and values in the justice field over the last thirty years. Courts and judges are increasingly evaluated based on quantitative indicators, and concepts such as caseload, timeliness, time limits, clearance rate, disposition time, cost per case and comparative analyses based on such quantitative data provide an indication of “normal” or “abnormal” functioning of courts.

Canguilhem explores the limits of this reductionist approach based on quantities compared to a more holistic and qualitative one. His analysis highlights that “what is statistically frequent is not necessarily normal; what is statistically infrequent is not necessarily abnormal and surely not pathological” (Spicker 1987, p. 400). He suggests that there is a need to “distinguish between the normal state and health” (Canguilhem 1991, p. 203), as an *anomaly* may not be related to a *pathological* state (Canguilhem 1991, p. 181), such as in the case of a mutation which is the point of origin for a new species (Canguilhem 1991, p. 144). As a consequence, “a statistically obtained average does not allow us to decide whether the individual before us is normal or not” (Canguilhem 1991, p. 181). Canguilhem, therefore, objects to the possibility to define a normal which is

² “[E]xaggeration, disproportion, discordance of normal phenomena constitute the diseased state” (Bernard 1947, p. 391).

“objective and absolute, starting from which every deviation beyond certain limits would logically be assessed as pathological” (Canguilhem 1991, p. 145).

Similar reflections have recently emerged also in the field of justice administration studies, as a call for a more comprehensive understanding of the concept of “quality of Justice” has emerged, taking stock both of the experience of “normal” quantitative statuses which hid or even generated pathological conditions (e.g. judges dealing with easy cases to provide good clearance rate and disposition times, resulting in a break down only after a long period of apparent normality), and of the need of the justice service to provide more than that which can be quantifiable with numbers (Contini and Mohr 2008, Contini 2017).

Canguilhem sustains that “health and disease are evaluative terms that signal qualitative distinctness, not quantitative degrees of difference” (Spicker 1987, p. 403). While it may be possible to identify norms of life, which are superior to others as they include them, “in different situations there are different norms, which, insofar as they are different, are all equal, and so they are all normal” (Canguilhem 1991, p. 182). The difference between the physiological and “the pathological is not a physicochemical objective reality but a biological value” (Canguilhem 1991, p. 220). In other words, “no fact can be established as pathological by objective means alone. This is because (...) abnormalities are not pathological absolutely—by themselves—but always in relation to their environment” (Margree 2002, p. 308). Consequently, what is normal in a given situation “can become pathological in another situation if it continues identical to itself” (Canguilhem 1991, p. 182). Furthermore, the pathological state can be identified as an alteration of the normal state only at the level of the organism as a whole, when its functions are changed and not just from isolated symptoms (Canguilhem 1991, pp. 87–88).

Therefore, it can be argued that a norm does not have a value in itself. “A norm draws its meaning, function and value from the fact of the existence, outside itself, of what does not meet the requirement it serves. The normal is not a static or peaceful, but a dynamic and polemical concept” (Canguilhem 1991, p. 239). More, “The concept of normalisation excludes that of immutability, includes the anticipation of a possible flexibility” (Canguilhem 1991, p. 247). The result is that if “the normal is defined in terms of the most frequent, a considerable obstacle is created to understanding the biological significance of those anomalies which geneticists have given the name of mutations. Indeed, to the extent to which a mutation in the plant or animal world can be the origin of a new species, we can see one norm arise from a divergence from another norm” (Canguilhem 1991, p. 263).

An interesting feature of the state of health of an organism is its being “a state of unawareness where the subject and his body are one. Conversely, the awareness of the body consists in a feeling of limits, threats, obstacles to health” (Canguilhem 1991, p. 91). Similarly, as the paper will show, attention to the justice service provision in the cross-border domain seems to focus on the limits of the traditional mechanisms while there is limited or no awareness for new and emerging mechanisms for dispute resolution that allow the new cross-border socio- economical environment to function properly.

At the same time, Canguilhem also reflects on the difference between *social norms* and those that regulate living organisms. An important distinction is that “while in a living organism the rules for adjusting the parts among themselves are immanent, presented

without being represented, acting with neither deliberation nor calculation" (Canguilhem 1991, p. 250), in the social order "[r]ules must be represented, learned, remembered, applied" (Canguilhem 1991, p. 250). As a result of this difference, there can be divergence, distance and delay between what the rules prescribe and their implementation in the social order. In the justice domain, the rules inscribed in the law are subject to interpretation by the judges, but also by the people in their everyday life, and practices diverge as local interpretation occurs.

Furthermore, "the difference between the social machinery for receiving and elaborating information, on the one hand, and the living organ on the other, still persists in that the perfecting of both in the course of human history and the evolution of life, takes place according to inverse modes" (Canguilhem 1991, p. 254). As a result of this inversion, "[i]n society the solution to each new problem of information and regulation is sought in, if not obtained by, the creation of organisms or institutions "parallel" to those whose inadequacy, because of sclerosis and routine, shows up at a given moment" (Canguilhem 1991, pp. 254–255).

Finally, Canguilhem points out a critical *ethical* distinction between social and living organism from the perspective of the "therapist". This distinction makes it much more problematic to talk about physiological and pathological in the social domain: "As far as health and disease are concerned, and consequently as far as setting accidents right, correcting disorders (...) the therapist of their ills, in the case of the organism, knows in advance and without hesitation, what normal state to establish, while in the case of society, he does not know" (Canguilhem 1991, p. 257). In the social domain, what is considered normal in a particular social and legal context may be seen as pathological in another (e.g. slavery). From this perspective, it becomes more problematic to define the physiological state that needs to be achieved, as it depends on the ethical values adopted by the "therapist" and by the social organism.

An interesting concept on which Canguilhem also reflects is that of *adaptation*, for which he discusses two forms: "There is one form of adaptation which is specialisation for a given task in a stable environment, but which is threatened by any accident which modifies this environment. And there is another form of adaptation which signifies independence from the constraints of a stable environment and consequently the ability to overcome the difficulties of living which result from a change in the environment" (Canguilhem 1991, p. 262). From this, the question about how much specialised traditional justice systems are to their "traditional" environment, and how much this constrains their capability to adapt to the new, emerging environment. Also, as the divergence driven by the platformisation of interactions and the emergence of new "normal" means of dealing with dispute resolution increases, how will this impact more traditional areas?

In a way, this paper explores the tension (and contradiction) between three definitions of "normal" that emerged from the reflection on Canguilhem's work and its implications for the justice domain. The first definition of "normal" refers to a *traditional* understanding of justice and dispute resolution, bound to national justice systems developed to guarantee judicial independence, the respect of human rights, and fair trial. Part of the traditional justice process is the places where justice takes place, the courts and their courtrooms, and other aspects such as the right to appeal or the expectations

for consistency, coherence, equality of judicial decisions. The second definition of normal refers to a *well-functioning* justice system, which must not only provide sound judgments based on a traditionally “normal” judiciary but do so using the available resources efficiently to provide simple, speedy, and low-cost access to judicial remedies. The third definition of “normal” refers to the mechanisms for resolving disputes that are *in common use*. While in the tradition of modern states, justice systems corresponded to this normal, this paper shows how new platform-based mechanisms are replacing them as the standard solution in the increasingly cross-border and digitally mediated environment which characterise our life.

3. Courts and cross-border dispute resolution in Europe

The increasing movement of people, capital goods and services and the growing role of e-commerce result in an increasing number of disputes among individuals and/or businesses, which reside or are based in different countries. The normality of social and economic life based on local interactions is being disrupted, and a new normality is emerging. At the same time, the normal means of resolving disputes among businesses and/or individuals residing or based in different countries, transnational litigation based on national “normal” laws, does not seem to provide an adequate answer to the growing number of potential cases. It does not respond adequately to the new, emerging environment.

While transnational litigation is a matter of national law, over time, it has “been the subject of bilateral and multilateral conventions.” (Kramer 2014). Key issues of transnational litigation, which can be considered as deviations from the normal national proceedings, concern areas such as jurisdiction, differing national service practices, taking of evidence, trial requirements, translations and the recognition and enforcement of court decisions.

3.1. Looking for a new normal: a legal approach to improving cross-border judicial litigation

Within the European Union, cross border litigation was initially governed by international conventions, such as the Hague Convention on the service of documents, the Hague Convention on the taking of evidence, and the Brussels Convention on jurisdiction, recognition and enforcement. However, these arrangements were deemed not sufficient for the needs of the growing European Union internal market. As a result, as part of the effort of maintaining and developing the European Union as an area of freedom, security and justice, and to address the obstacles deriving from incompatibilities between Member States legal systems and adapt them to the new “environment”, European “judicial cooperation in civil matters was included in the Maastricht Treaty as a “matter of common interest”, and subsequently in the Treaty of Amsterdam (1997), which places judicial cooperation in civil matters at Community level by associating it with the free movement of persons”.³ At present, based on the Treaty on the Functioning of the European Union, the EU legislator is charged with the task of addressing these factors and supporting access to justice. The Treaty on the Functioning

³ E-justice, cooperation in civil matters: https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do

of the European Union (TFEU) clearly states that “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States” (TFEU Article 67, par 1.) and that it “shall facilitate access to justice” (TFEU Article 67, par 4).

Concerning the judicial cooperation in civil matters, the European Union is developing provisions to address matters “having cross-border implications, [and] based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States” (TFEU Article 81 par 1).

In line with the treaty provision, the EU legislator tried to address these factors by introducing several legal instruments to simplify, speed up, and reduce litigation costs. The legal instruments developed have been seeking to “distribute jurisdiction among the Member States’ courts and determine the applicable law, contributing to the legal certainty and foreseeability of the outcome of legal disputes for EU citizens” (Kramer 2014). These instruments play a fundamental role because, in the absence of harmonised rules, it is up to the national rules to determine if a national court has jurisdiction and which law applies to each case. Consequently, without “normal” cross-border procedures, it is up to the party to explore the maze of national rules and practices, and discover which ones are applicable, typically in settings different from those a party knows, resulting in a lack of familiarity. The fact that these procedures are not “normal” also results in high costs and duration that “can easily reach disproportionate levels” (Ontanu 2017, p. 12). Therefore, the EU legislator effort can be seen as an attempt to normalise cross-border litigation within the European Union borders, thus creating “normal” procedures and practices that can address the problems national divergences generate. The technology of normalisation here is the legal “norm”.

As a result, over time, several legal instruments have been introduced in the area of judicial cooperation in civil matters, dealing with specific procedural law issues such as service of documents and the taking of evidence, harmonising international jurisdiction, the applicable law, and recognition and enforcement (Kramer 2016, Ontanu 2017). The European Enforcement Order provides a perfect example of the attempt to “normalise” an anomaly, the decision taken in a foreign justice system, to the one in which the decision needs to be enforced (Art. 20(1) EEO Regulation).

In addition to instruments harmonising specific procedural issues, the EU legislator has begun to adopt uniform procedures such as the European Order for Payment, the European Small Claim, the European Account Preservation Order – seeking to offer procedural alternatives to national procedures. These are meant to be standard procedures applicable for all Member States, in order to simplify, speed up “and reduc[e] the costs of litigation, as well as securing the free circulation of judicial decisions issued according to these instruments” (Ontanu 2019a).

In line with the idea of being simple, these procedures allow self-representation by the parties. While this component is in line with some Member States’ normal practices, it is utterly foreign to others (e.g. Italian courts of general jurisdiction).

An essential element of normalisation provided by the uniform procedures is standard forms available in all European Union languages that can be used for the communication

exchange within the procedure. While the importance of these instruments from a legal perspective has been broadly recognised, field research has also shown several limits to this effort of normalisation (Mellone 2014, Ng 2014, Kramer 2014, Gascón *et al.* 2017, Ontanu 2017). These limits are the consequence of several factors, including that the uniform procedures delegate part of the procedural steps to national rules, and even uniform parts are interpreted and implemented according to national rules and local practices (Velicogna and Steigenga 2016). The “divergence, distance, delay between what the rules prescribe and their implementation” (Canguilhem 1991, p. 250), which Canguilhem mentions concerning the social norms, seems to apply here, working as a mechanism to bring uniform procedures back to the “local” normal. Even the standardisation provided by the forms is limited: an analysis of the communication requirements for carrying out a European Payment Order in Italy, for example, evidenced that, due to national specificities, nine additional forms to the seven provided by the EU regulation would be required (Velicogna 2015).

Quoting Canguilhem, from the European perspective, these national specificities may be seen as sclerosis and routines which result in an inadequacy of the local normative and institutional setting. This points to the intersection (or contradiction) between two senses of normal, as traditional and as well-functioning.

An attempt to “normalise” practices in a “well-functioning” direction can also be seen in the effort to introduce training on the topic. Unfortunately, given the limited quantitative relevance of these procedures compared to the national ones, training has typically achieved only limited results.

Overall, therefore, from a practical cross-border judicial cases perspective, the normalisation achieved appears to be quite limited. In a research on the issues legal practitioners are confronted with in cross-border litigation within the European Union carried out by the EU co-financed Pro-CODEX project between July 2016 and January 2017 in four countries, Italy, Austria, Netherlands, and Greece, several problematics were identified (Velicogna *et al.* 2017) including finding practical information on how to carry out the procedure, complexity for first-timers and non-repetitive users, differences between EU judicial procedures (e.g. different structure of the forms, diverging definitions, etc.), correctly identify the competent court, language barriers.

- Service of documents.
- Communication problems with the competent court, lack of uniformity in opposition proceedings (Velicogna *et al.* 2017).

3.2. Looking for a new normal: a technological approach to improve cross-border judicial litigation

Confronted with the limited achievements of the normalisation approaches based on legal technologies, the European Union Institutions and Member States have looked for a “technological” one. The “e-Justice & e-Law: New IT-Solutions for Courts, Administration of Justice and Legal Information Systems” conference organised in Vienna between May 31st and June 2nd 2006 under the Austrian presidency of the European Union can be seen as the beginning of the dialogue between EU Member States for the exchange of information and experiences on National solutions. In the following

“18 Month Programme of the German, Portuguese And Slovenian Presidencies” reference was made to the crucial importance of “promoting electronic communication on legal matters (“E-Justice”)” (EU Council 2006, p. 58), while the German Presidency program stated that “Germany will drive forward the E-Justice Project in order to improve the application of this information technology in cross-border judicial proceedings in Europe and to structure the work on European standards” (German Federal Government 2006, p. 20). The latter can be seen as the pivotal point in the political discussion, moving from national experiences to the possibility of developing a European e-Justice.

In June 2007, the Justice and Home Affairs Council, following a report of the Working Party on Legal Data Processing (e-Justice) on the possibility of beginning to work in the area of e-Justice at the European Union level and the outcomes of the second EU Member States e-Justice Conference held in Bremen in May 2007 concluded “that work should be carried out with a view to developing at European level the use of information and communication technologies in the field of justice, particularly by creating a European portal to facilitate access to justice in cross-border situations” (EU Council 2013, p. 7). Based on these conclusions, the “Commission has financed the development, operation and translations of the European e-Justice Portal and provided funding opportunities for e-Justice projects through a number of means, including DG Justice, the Connecting Europe Facility, the Interoperability Solutions for European public administrations, and the Competitiveness and Innovation Framework programs” (Velicogna 2018).

The EU e-Justice Portal, in particular, was developed to provide better access to information in the field of justice in the European Union, including EU and its Member States' law and judicial procedures, access to information resources and services that already existed at the EU and national level, and facilitate the work of European networks operating in the justice area (EU Council 2009, 2013). The portal was opened to the public in 2010, as a “one-stop cyber shop for justice information” (EU Council 2013) for EU citizens, businesses and lawyers. More than just information, it was intended to be a tool to provide citizens with legal information and advice. The portal can be seen as an attempt to normalise cross-border proceedings, reducing the “abnormal” difficulties faced by the cross-border justice users in front of the “normal” ones faced in national proceedings. The portal also provides guides to the uniform procedures. Interestingly enough, the first versions of these guides provided a “uniform” interpretation of the procedures, which had been loosened up in the follow-up editions to open up to the national deviations in implementing the regulations. In several cases, such as the service of documents – which according to a first interpretation, had to be carried out by the seized court – resulted in critical failures when the claimant suddenly discovered (often too late) national deviations. While improved, these guides still fail to convey the practical knowledge needed to deal with concrete cases, which require indications on national and local practices and interpretations that applies to them and not generic references and alerts.

The portal itself, and not just the information provided, evolved over time in this effort of normalisation of EU cross-border judicial procedures. Nowadays, in addition to information and guidelines, it includes several services such as a search engine called “finding a competent courts”, which is designed to help users to identify the competent

court for a specific EU legal instruments, providing contact details such as the telephone numbers, address, and other contact information.⁴ Unfortunately, the tool does not answer the question “is this court the actually competent one for my case?” but it just provides the list of a number of courts that have jurisdiction for a given geographical area and leaves the problem to the user. It is important to note that while in some countries (e.g. Austria), if the wrong national court is seized, this court will redirect the claim to the competent one, in other countries (e.g. Italy), the court will reject the claim on the ground of not being competent. If the claim is rejected, the claimant will typically lose the court fees, incur delays and possibly miss the time limits applicable to the case. Another search engine provided by the portal is Find-A-Lawyer,⁵ which can be used to find lawyers according to the cross-border case requirements (i.e. country, practice area, language). However, the tool does not provide information that nowadays end-users expect from e-services, such as on the lawyers’ capability, the satisfaction of their users, their success rate and an estimation of the costs that will be incurred.

The portal also offers an online multilingual dynamic version of the forms provided by the European Order for Payment and European Small Claim procedures and other regulations. Such forms can be filled online, saved in XML format and, once completed, printed and sent to the competent court. In Canguilhem’s terms, this dramatically reduces the “abnormality” of the language to be used from the claimant’s perspective, which is typically the one of the seized court, and not his or her own or at least a standard one such as English.

A wizard has also been developed to help the user to decide which, between the European payment order or the European small claims procedure, is more suited to its case, following a questions tree. As the wizard’s use requires the potential claimant to know already the answers to the questions, its usefulness seems quite limited (on this topic see also Kramer 2014, Velicogna 2018).

In addition to using ICT tools to provide better access to information, the Commission has co-founded a series of initiatives aimed at providing online tools to carry out cross-border judicial procedures. This effort’s origin can be seen in an EU project called e-CODEX, implemented by a consortium of EU Ministries of Justice (or their representatives) and representative of justice European professional bodies (e.g. CCBE for lawyers, CNUE for notaries). The project began in December 2010 and, after being extended twice, ended in May 2016. The project developed a technical solution to interconnect existing national e-justice solutions within the existing legal framework. This architectural choice was based on the idea of the need to respect the principles of subsidiarity and the judiciaries’ independence (Velicogna 2019). The solution “is designed as a decentralised system based on a distributed architecture, enabling communication between national and European ICT systems through a network of [National] access points” (Amato and Velicogna 2020). To ensure electronic communications’ legal effectiveness, the infrastructure provides a tool for the validation and cross-border recognition of national e-identities and e-signatures. Using existing

⁴ See for example the search tool interface for the European Payment Order available at https://e-justice.europa.eu/353/EN/european_payment_order [Accessed on 7 April 2022].

⁵ https://e-justice.europa.eu/content_find_a_lawyer-334-en.do [Accessed on 3 October 2020].

national “systems for the authentication of users adds reliability to electronic legal proceedings and helps avoid malicious use of e-Justice services.”⁶

The e-CODEX solution can be seen as an attempt not to build a “normal” EU solution, but a solution that does not impact national solutions in their “normal” independence from one another. It is a system that, incidentally, should be “normal” also from the users’ perspective, as it works through their “normal” applications and interfaces and not through new ones that would require exploration and learning.

At the same time, the norm regulating the physiological development and functioning of technical solutions, which consist in the identification (through business process modelling) of rules and procedures, and their inscription in the technological artefact, freezing them, clashed with the indeterminateness of their practical implementation. This indeterminateness is generated by the interplay between uniform European judicial procedures, national laws and local practices, which is resolved only through their (diversified) implementation in actual cases. The e-CODEX partners developed an iterative methodology for exploring cross-border procedures and identifying business and technical requirements to address this issue. This methodology allowed creating a prototype to be tested and adapted as new requirements were discovered through the prototype use.

Starting from August 2013 the technical solution was tested progressively by piloting countries through “live” use cases (based on five cross-border judicial procedures) (Hvillum *et al.* 2016). The experimentation demonstrated that the system was “capable of supporting real cases, involving real people, real judges and real judicial decisions” (Velicogna 2019, p. 30).

The project’s end brought about the need to move e-CODEX infrastructure and services from an experimental phase to normality. In this process of normalisation, the transportation infrastructure’s multi-domain components were handed over, for maintenance and development, to the Connecting Europe Facility (CEF, a key EU funding instrument to promote growth, jobs and competitiveness through targeted infrastructure investment at European level.), while things got more complicated for the justice domain ones. The justice domain components, have continued to be financed through a multitude of follow-up projects co-funded by the EU: 1) to maintain the domain-specific components (i.e. Me-CODEX, Me-CODEX2, Me-CODEX3); 2) to extend the system to additional procedures and Member States (i.e. EXEC, EXECII, IRI, e-CODEX Plus, CEF e-Justice DSI); 3) to develop new functionalities (i.e. CCDB); and 4) to open it to legal professions and third-party service providers (i.e. Pro-CODEX, API for Justice).⁷

A strong push in the process of normalisation resulted from the decision to use e-CODEX for the secure transmission of data in the exchange of electronic evidence, in the criminal law field, between Member States competent authorities. Member States can connect their national e-Evidence Digital Exchange System (eEDES) or install a reference solution developed by DG-Justice and made available to Member States in April 2020 (Palamioti 2017) “to secure and obtain e-evidence more quickly and effectively by streamlining the

⁶ <https://www.e-codex.eu/technical-solutions> [Accessed on 07/04/2022]

⁷ Ibid.

use of MLA proceedings and where applicable, mutual recognition” (JHA Council 2016, p. 4).

Furthermore, steps are being taken to ensure the long term maintenance and evolution of e-CODEX justice domain generic component and services. In its 8 October 2020 Conclusions, the Council of the European Union recognised e-CODEX as “the main tool for secured communication in both civil and criminal cross-border proceedings” (EU Council 2020, p.8) and invited the European Commission to present a legislative proposal “ensuring the sustainability of e-CODEX” (EU Council 2020, p. 9). This was followed, two months later, by the European 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, which entrusted the operational management of the e-CODEX system to European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) (European Commission 2020, p. 16).

3.3. Some conclusions on cross-border judicial litigation normalisation process

Despite all the efforts to normalise cross-border judicial procedures done through legal and ICT technologies, cross-border judicial litigation remains the exception both from the potential court users perspective, as a means to solve disputes, and from the justice systems perspective, as a source of disruptions from the “normality” of national cases. Only a few countries have developed specialised courts with national jurisdiction for the European Order for Payment, (e.g. Austria and Germany), while in most countries and for the other procedures, they are spread out as if they were “normal” cases. Which they are not. The user is then left with the need of exploring the local rules and practices.

As we have seen, the development of a technological solution has not – so far at least – changed the situation. At the same time, it has been an occasion to gain a more holistic perspective and to highlight the divergences between national rules which hamper the litigants’ efforts but which are invisible to the seized court, as these divergences from the European standard are part of the court “normalising” a foreign procedure (the cross-border one).

The results of field research focusing on quantitative data evidence a general lack of official statistics on cross-border judicial procedures as their data are often collected together with national ones. Available information shows that only a limited number of procedures are carried out (e.g. Ontanu 2017, von Hein and Kruger 2021). These findings are in line with the European Commission evaluations on the use and application of the European Order for Payment (European Commission 2015) and the European Small Claims Procedure (European Commission 2013), and it is expected that the on-going evaluation of the European Enforcement Order will also show the same. To provide a reference, data collected by the European Commission for the most used procedure, the European Order for Payment, show that “[a]ccording to the available information, between 12,000 and 13,000 applications for European orders for payment are received by the courts of Member States per year” (European Commission 2015, p. 3). Furthermore, the “use of the procedure is (...) mostly concentrated in only two Member States i.e. Germany and Austria, which account for over 4,000 applications annually each

(over two thirds of the total). Belgium, the Czech Republic, France, Hungary, the Netherlands, Portugal and Finland display more modest figures (between 300 to 700 applications annually), and the remaining Member States only make very limited use of the procedure” (Reynolds 2015, p. 11).

3.4. Looking for a new normal: an alternative solution to cross-border judicial litigation

While the attempts to develop a physiological, well-functioning, cross-border judicial litigation have produced limited results, the EU institutions have made a parallel attempt to develop alternative mechanisms capable of resolving potential cross-border disputes. In recent years, the legitimisation of mechanisms alternative to public courts and justice has risen in the public and academic debate (see Cadiet *et al.* 2019). The rise of alternative dispute resolution (ADR) has been linked to the ideas fostered by the privatisation movement of the 1980s, calling for a shift from public to private, as in the ideas of the proponents, services could be better organised and more cheaply provided by the market than by public bureaucracies (Hess 2019, p. 17).

Within the EU institution discourse, the work on ADR can be seen as a way to legitimise out-of-court mechanisms as a cheap and quick way to solve disputes, “normalising” them based on the “normal” values inspiring court justice service provision. The possibility for consumers to settle disputes through out-of-court procedures efficiently and appropriately was stated initially in the conclusions approved by the Consumer Affairs Council of November 25th 1996. ADR is seen as a means to boost consumer confidence in the functioning of the internal market. At the same time, the European Parliament resolution of November 14th 1996 stressed the need for ADR bodies to meet minimum criteria concerning impartiality and the efficiency, transparency, and publicity of their procedures.

The European Commission Recommendations 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes provided the clarification and consolidation of key principles for ADR bodies and procedures in EU Member States. The development of ADR is seen here as a mechanism to respond to the court dispute resolution limits to the changing context: the “development of new forms of commercial practices involving consumers such as electronic commerce, and the expected increase in cross-border transactions, require that particular attention be paid to generating the confidence of consumers, in particular by ensuring easy access to practical, effective and inexpensive means of redress, including access by electronic means” ((2) Rec. 2001/310/EC). From a practical perspective, the research carried out by Alleweldt *et al.* for the Directorate-General for Health and Consumers of the EU Commission identified already in 2009 “750 ADR schemes relevant for business-to-consumer disputes in Member States” (Alleweldt *et al.* 2009, p. 8), 46% of which established by public law, while 29% were private schemes (Alleweldt *et al.* 2009, p. 33). ADR procedures emerge as highly diversified, both across and within EU Member States. They provide a cheap and quick mechanism for consumers to settle their disputes with businesses through mediation, non-binding or binding decision. “The vast majority of the ADR procedures are free of charge for the consumer, or of moderate costs below

50 Euro. A majority of ADR cases are decided within a period of 90 days” (Alleweldt *et al.* 2009, p. 13).

The current framework for ADR in EU is provided by Directive No 2013/11/EU of the European Parliament and of the Council of May 21st 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive No 2009/22/EC (Directive on consumer ADR), with the objective of granting “access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts” (Directive 2013/11/EU) ADR is perceived as “particularly important when consumers shop across borders” (*ibidem*). The Directive is not aimed at changing the self-regulatory approaches of EU Member States but provides for a set of minimum standards for consumer ADR procedures and establishes accreditations procedures for consumer ADR bodies (Hess 2019, p. 32). “The Directive allows only consumers to act as complainants against traders as they are considered the weaker parties. The complaints are to be handled by certified entities offering independent, impartial, transparent, effective, fast, and fair alternative dispute resolution procedures in order to guarantee a high level of consumer protection” (Ontanu 2019b, p. 64).

Furthermore, on the basis of Regulation (EU) No 524/2013 of the European Parliament and of the Council of May 21st 2013 on online dispute resolution (ODR) for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive No 2009/22/EC (Regulation on consumer ODR), an online platform has been set up by the European Commission to allow electronic access to the ADR entities listed following Directive 2013/11/EU.

The ADR entities to which a complaint is transmitted through the ODR platform apply their own procedural rules, including cost rules. However, the regulation establishes some common rules, and in particular that the procedures may “not require the physical presence of the parties or their representatives before the ADR entity, unless its procedural rules provide for that possibility and the parties agree” (Regulation (EU) No 524/2013).

An important element for the normalisation of this tool as a means of solution of disputes resulting from electronic transactions is the provision of Art. 14 according to which “Traders established within the Union engaging in online sales or service contracts, and online marketplaces established within the Union, shall provide on their websites an electronic link to the ODR platform” (Art 14(1) Regulation (EU) No 524/2013). Furthermore, if traders are “committed or obliged to use one or more ADR entities to resolve disputes with consumers, [they] shall inform consumers about the existence of the ODR platform and the possibility of using the ODR platform for resolving their disputes” (Art 14(2) Regulation (EU) No 524/2013). Data on the ODR platform shows a much higher number of cases than those emerging from the EU cross-border judicial uniform proceedings. In its second year of activities, between February 2017 and February 2018, the ODR platform received an average of 360,000 unique visitors per month, while the complaints lodged were above 36,000 (European Commission 2018).

As of April 2022, data shows that from the establishment of the system, over 165,000 complaints lodged, of which 53,4% were National while 46,6% Cross-Border.⁸

Interestingly enough, only 2% of the complaints reached an ADR body. A Survey carried out by the Commission to investigate the reason for this result pointed out the system's functioning as an incentive for traders to cooperate on an amicable solution before reaching the ADR body (European Commission 2018).

While dealing with much larger number of disputes than cross-border judicial litigation mechanisms, also the EU and Member States supported ADR and ODR solutions do not seem to provide an adequate answer to the dispute resolution needs of the new cross-border environment, although they seem to be particularly suited for specific areas such as airlines related disputes, which amount to more than 15% of complaints lodged on the EU ODR platform since the introduction of the system.⁹

The questions thus remain: why is our increasingly cross-border society prospering, becoming the new "normal"? Why economic transactions take place in a physiological way when all the dispute resolution mechanisms so far analysed do not seem to be sufficient? The next section will attempt to identify a possible answer.

4. The new normal: platform-enabled markets and the platformisation of dispute resolution

While most of the attention of policymakers and scholars was directed toward the functioning of judicial cross-border dispute resolution and the possibility of ADR and ODR bodies mimicking courts' features and mechanisms to solve disputes between parties in a growingly cross-border context, something else happened. The previous paragraphs pointed out the inability of such mechanisms to address the new environment's dispute resolution demands. Nevertheless, online exchanges of goods, services and data do not seem to be hampered and proceed in a state of unawareness of this missing element. This raises the question of "why" is that? What is at the basis of this "abnormal" normality?

This paragraph looks for a possible answer exploring the distinctive elements which characterise the new environment. These elements result from the possibilities provided by the internet, but in particular from the rise of software-based *platform-enabled markets*.

Software-based platform-enabled markets are part of the broader e-commerce revolution, giving consumers access to a much broader range of goods and goods' providers, reducing information asymmetry, allowing faster products and prices comparison, reducing search costs and allowing shopping from home or any other location where internet connection is available, reducing constraints related to geographical and time barriers. Moreover, e-Commerce in general, and platform-enabled markets in particular, foster competition between services and goods providers and "gives voice to the individual consumer through the possibility of public customer reviews and social media sharing, and as an online purchase is a computer mediated transaction it improves its traceability and makes more efficient contracts possible"

⁸ Statistics, number of complaints by country: <https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show> [Accessed on 7 April 2022].

⁹ Ibid.

(Valarezo *et al.* 2018, p. 464). However, these new forms of commerce introduce new challenges which did not exist or were less relevant in the off-line world. This is especially true when transactions take place across national borders. These issues include the familiarity and trust in the vendor and the goods delivery cost-efficiency, problems related to non-delivery, delivery of a defective or damaged or wrong product, language barriers, security of the payment system, data privacy, applicable laws in case of disagreements. Online direct business-to-consumer retail poses also challenges to policymakers in charge, at least within their national boundaries, of the regulatory environment in which e-Commerce operates. In recent years the EU has introduced several initiatives to address existing barriers, such as eliminating geo-blocking, making prices and conditions for parcel delivery more transparent, harmonising consumer protection regulations across the EU Member States and simplifying rules for cross-border trade within the EU (*ibidem* p. 466).

Software-based platform-enabled markets created by large e-commerce companies have emerged as a potential solution to many of the challenges cross-border online commerce poses, creating multisided markets which boost trust and predictability. While multisided markets, with third parties “which get two or more sides on board and enable interactions between them” (Hagiu and Wright 2015, p. 162), have existed at least since medieval times, the rise of software-based platforms has revolutionised this concept, operating on an unprecedented scale, but also providing new opportunities and challenges (Tiwana 2014). Airbnb, Amazon, eBay, Booking, Uber, Twitter, Google Playstore, and Apple App Store are examples of platforms that enable the interaction between service and product providers with their consumers. “The common denominator of all platforms is that they facilitate interactions between two [or more] *distinct* groups (...) that want to interact with and need each other (Evans and Schmalensee, 2007, p. 38)” (Tiwana 2014, pp. 7–9). Furthermore, the platform’s value for the user does not depend only on the platform functionalities and capabilities, but also, and even more importantly, “on the number of adopters on the other side” (Tiwana 2014, p. 9). We move, therefore, from the broad definition of platform used in everyday language, where is intended as “an application or website that serves as a base from which a service is provided” (Merriam-Webster dictionary), to a narrower one, developed in the Information Systems research domain, which sees digital platforms as a “subtype of digital infrastructure with specific control arrangements (Hanseth and Lyytinen 2010)” (De Reuver *et al.* 2018, p. 127) that enable a multisided market (Tiwana 2014, Parker *et al.* 2016).

A key component of trading platforms such as Amazon, eBay and Booking, which focus on matching buyers and sellers of goods and services, is the element of trust. In this perspective, platforms act as third-party trust providers. To this end, they have typically implemented tools to gather users’ feedbacks in order to assess the reliability of services and products they provide while at the same time gathering information on the consumers’ behaviours. While these functionalities support the potential consumers in their choices, they can also be seen as a means to implement a crowd justice service provision and enforcement. In this perspective, they function as aggregators of micro judgements that produce their effects shaping potential consumers’ choices. The consumers’ comments and evaluation of goods and service providers have an effect of punishment of misbehaviour, but also a restorative justice component, providing a

possibility to the “victim” to present their experience and for the “offender” to react to it in front of the wider community of potential users. A key difference between these platform-based crowd justice mechanisms and “normal” means of dispute resolution is that these systems do not just punish misbehaviours but also prize good behaviour. Also, parties become a core part of the justice service provision. At the same time, the phenomenon of fake online reviews and in particular of click farms, driven by goods and seller providers incentive to artificially improve their positioning, are increasingly challenging existing ranking mechanisms (Martens and Maalej 2019, Wu *et al.* 2020, Golrezaei *et al.* 2021, Jiang *et al.* 2021). While solutions are being devised to address the difficulty in distinguishing between real and fake users (e.g. through the use of technologies ranging from simple classifiers to learning algorithms and artificial intelligence), and to disincentivise fraudulent behaviours (with the imposition of sanctions such as the exclusion from the platform), the path to a stable arrangement seems still long (see for example the conclusions in He *et al.* 2022, pp. 20–21).

Another tool that platforms have introduced to resolve disputes is the integration in their procedures of online ADR tools (ODR). “For example, eBay, Amazon, and PayPal, all have ODR systems that are widely acknowledged as increasing the overall trust of the online buying, selling, and payment environment” (Shackelford and Raymond 2014, p. 624). In contrast with more traditional ADR and ODR mechanisms discussed in section 3.4., the platform-based ones are not developed to provide an alternative to judicial litigation but to support the confidence in the exchanges and transactions enabled by the platform. They are typically designed to provide a seamless experience to the user, which is not required to look for a solution to solve an emerging dispute but is guided to it by the platform she/he is already using. Access to such procedures is highly simplified, as most of the data on the parties and the transaction is already available to the system, while the platform acts as a third between the parties in the dispute.

Amazon, for example, provides a tool to dispute transactions between buyers and third-party merchants, which is designed as an escalation mechanism. In certain situations (e.g. the failure in the delivery of a good), it is the system itself that suggests starting the procedure, while in other cases (e.g. the delivery of a damaged, defective, or a materially different item from the one depicted in the third-party merchant’s description) the initiative is left to the buyer.¹⁰ The first step consists of putting directly in contact the buyer with the third-party merchant so that they can clarify the situation and try to find a solution. The system structures and supports such interaction. For example, it provides communications means and trees of possibilities while setting some rules, such as requiring the merchants to respond to email correspondence concerning complaints against them within specific timeframes. If the parties cannot resolve the issue, the Amazon Payments Buyer Dispute Program provides a mechanism to address it. The buyer can then track the progress of the claim through their Amazon account. The system includes potential sanctions for both parties. Amazon can restrict or terminate the account access privileges of customers who abuse the Buyer Dispute Program, while merchants that fail to cooperate to resolve buyers’ complaints may have their account privileges restricted or terminated. Amazon Payments may also place a hold on funds in

¹⁰ Amazon Pay A-to-Z Guarantee for Customers: <https://pay.amazon.com/help/201751470>

a merchant's account if the merchant does not respond timely to a dispute or does not honour a commitment made to resolve a dispute within a reasonable amount of time.¹¹

An interesting element of these kinds of systems, which further differentiate them from the "normal" civil justice proceedings, is the ability of the decision system to consider the history of the parties and their previous behaviour, allowing a more holistic approach that is not limited to the facts related to the specific case. Also, the consequences may not affect just the parties but the broader community.

Several scholars have pointed out that ODR systems provided by platforms are exposed to the risk of "conflict of interest, especially given the difficulty of checking programmers' code" (Shackelford and Raymond 2014, p. 644). Things get even more complicated when the platform providing the ODR mechanism is not a third party, as in addition to facilitate interactions, it also takes part in them (e.g. selling goods or services as third party merchants).

Nevertheless, given the advantages platforms' ODR systems provide in terms of efficiency and effectiveness in restoring the "normal" physiological as opposed to the pathological dispute state, they are generally accepted by the platform users. They act as an invisible component of the platforms' function, operating in the background and emerging only in case of need.

In a way, these mechanisms disrupt the whole idea of dispute resolution that builds on a traditional understanding of justice and justice values, bringing up new ways to address disputes which is, on the one hand, more participative, holistic and visible, and on the other hand more opaque.

5. Some preliminary conclusions

Canguilhem's work provided a robust framework to explore the growing tensions and contradictions between 1) traditional disputes mechanisms based on national justice systems, national courts and independent judges, 2) the changing expectations of society, which increasingly require public bodies to deliver their services efficiently, in a reasonable time and be accountable for their managerial decisions and results, and 3) the increasingly cross-border and digital mediated nature of people's everyday lives, with a growing role of digital-platform mediated markets.

As economic transactions take place in a physiological way in a new environment where traditional means of dispute resolution, even if evolved, are not sufficient to address pathologies, the question arises as to how order is maintained. The answer I suggest in this paper, after discussing the attempts carried out in the European Union, including the development of legal instruments for cross-border judicial cooperation, of an e-justice cross-border digital services infrastructure (e-CODEX), and a legal framework to support and regulate ADR and ODR bodies mimicking courts' features and mechanisms to solve disputes between parties, is that the changed environment brought about new ways of dealing with disputes. The exploration of the new "normal" – increasingly digitally mediated – life environment, characterised by platforms that bring together service-and-goods providers and buyers/users, revealed an increasing role of the

¹¹ Amazon Buyer Dispute Program: <https://pay.amazon.com/help/201751580>

platforms underlying dispute resolution mechanisms. These mechanisms are based on 1) the role of platforms as third parties and 2) crowd-based adjudication and enforcement mechanisms. This exploration also showed how these new mechanisms are silently challenging the traditional discourse on justice and the values the justice systems must uphold. The EU is based on the Rule of Law and its Member States judiciaries must be independent and impartial, guaranteeing access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners. The fact that the new platform-based model of dispute resolution respects or not the traditional values of justice service provision does not seem to be relevant for those who use it, as they do not see a possible answer to their needs in the “normal” justice approach, but find a practical solution in the new mechanisms. As a consequence, while not as visible as the “failing” traditional (or traditional inspired) justice approaches, these mechanisms are acquiring an increasing relevance and legitimation with their capability of maintaining the health of the new “normal” cross-border commerce environment .

What are the implications of this for the European Union and its Member States, but also worldwide? Will regulation by law of these mechanisms take place in order to reconcile them with the old “normal” understanding of a healthy justice? Or will the effectiveness of these mechanisms bring about a radical change in the concept we have of justice?

These are important and challenging question that the future will have to answer. What we know, in Canguilhem words, is that the new state of health that will emerge will not be the same as the old one as “life does not recognise reversibility” (Canguilhem 1991, p. 196).

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