Editorial

Consolidation of TEDIS Results: Methods and Technique Dependency

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This issue of *The EDI Law Review* provides a forum for the publication of the TEDIS-II consolidation report. The report is the result of the EDICON project. Eleven TEDIS publications are subject to combined analyses from three perspectives: legal, organisational and technical. As a first result, highlights of the eleven reports are summarised in an effort of consolidation. Secondly, from the eleven reports persistent problems hampering the development of EDI have been identified. These problems have been analysed and discussed by the project team and in brainstorm sessions with international experts. The results have been digested into recommendations to the Community (EC).

In my opinion one of the interesting aspects of the EDICON project has been the co-operation of different disciplines. Of this co-operation, the report shows the results, not the intricacies. Since it has proven to be difficult to combine different methods, and interdisciplinary experience is scarcely reported, I will use this editorial to give vent to a few thoughts.

An additional (and related) aspect of the EDICON project has been that the elapsed time between work and publication allows for new technical contexts to emerge. Consequently, an important aspect is technique-independence of project findings and thereon I will spend a few words too.

1. Methods

The first method used is qualification by the legal professional. It may be summarised in three questions: (i) what are the facts, (ii) what is the relevant statute-law, (iii) what is the relevant case-law. In this perspective, the incident or situation has structuring potential. If statute- and case-law are not available, an ad hoc solution based on principles has to be decided. The more case-law available in an area of dispute, the more predictable the outcome of legal dispute resolution. When there is no case-law available the outcome may be unpredictable. The method of the legal professional is inductive and

incremental and thus leaves a lot to be wished by the entrepreneur entering an area of business that makes use of the opportunities offered by new technology. The entrepreneur needs security, while it nonetheless remains important to have some free room for decision making (discretionary power) for the legal professional in order to mould existing law in a form accommodating changes in society. Especially so in a society that is to a large extent propelled economically by technical novelties. Moreover, in real life the method of the legal professional remains restricted to situations that are brought to the fore of the legal courts, even if technical novelties are available for some time now. Thus, in practice, legal qualifications are only due in situations where the commercial relations are such, that litigation is considered profitable for at least one of the interested parties. Consequently, large patches of the territory remain uncovered, unless perusal of legal test cases is made a strategy.

However, the legal method may to a large extent be applied to hypothetical cases and thus provide tentative insight in how things stand. This approach has often been used in the EDICON project and has been particularly helpful for the scenario analyses.

The second method of research used in the EDICON project is the empirical one, appropriate for the gain of scientific knowledge. Again, the method can be crudely summarised in questions: (i) what is observed, (ii) how are the observations best explained, (iii) what can be predicted using the explanation, (iv) do the predictions come true on further observation, (v) does this test rule out the explanation and (vi) does the amount of knowledge gained thus far sustain the practical use of the explanation or should we start all over again. These questions describe a popular methodological framework as used in the sciences. It results in knowledge of the observable world and its behaviour. When used to observe physical matter it is the method of physics, when used to observe human behaviour it is the method of psychology. When used to observe the behaviour of legal systems, it becomes either politics or legal theory. Politics will see the legal system and its behaviour as an instrument, while legal theory may look at legal systems and their behaviour in order to find ethical foundations.

Empirical methods have been very important in the EDICON project, for instance in providing frameworks for analysis related to trade procedures and for the identification of success scenarios, amendable problems and of hard problems.

Legal and empirical methods are not independent. Establishing the facts is an empirical task. Decisions on explanations and their reliability, as well as decisions on relevance of predictions are often normative. It is from this intertwinement that the call for guidelines for regulation often is related to the specification of domains for research: sometimes it is too early to regulate

– especially when the explanations about the behaviour of the future solution cannot yet be considered reliable enough.

Besides legal qualification and the acquisition of empirical knowledge there is a third method involved in the EDICON project, as in almost any epistemic context. The method applies to tasks of composition, of design. Whether we want to create contractual solutions, to technically build an open EDI-system, to constrain organisational security hazards, to summarise the results of TEDIS projects or to provide guidelines for harmonisation – all these activities involve design, and much of the EDICON project has been dependent on it. We found no generally accepted design method available. So the most important parts of our results are related to the individual qualities of the project team members and the experts consulted. Some parts of the project results thus have intuitive, apodictic flavour. This can be seen in the EDICON-report presentation and identification of persistent issues, for instance.

2. Technique Independent Results

The most recent of the eleven reports under consideration dates back to December 1995. The others are up to three years earlier. As a matter of fact, all reports under consideration in the EDICON project have been written before the Internet had become a serious option for EDI and electronic commerce. The main work of the EDICON project has been performed in the period 1994–1995. Consequently, the emergence of 'Internet' and 'Electronic Commerce' as key concepts in EDI have not been considered explicitly. At the time, 'open EDI' covered part of the issue.

This is not merely a terminological development. The emergence of Internet as a cost effective and widely available communication infrastructure has propelled the legal subject matter of the TEDIS programme further to the front of administrative and political recognition. In December '96 the preliminary version of a Master Plan 1997–1998 for the Electronic Commerce Working Groups in the G7 project "Global marketplace for SME's" was presented. The working groups 2–5 address issues also addressed in the EDICON report. In April 1997 the EC launched "A European initiative in Electronic commerce" [COM(97) 157]. Again, infrastructures and interoperability of services as well as the establishment of a favourable regulatory framework are key issues. To my mind the findings of the EDICON project remain fully applicable to these developments. The analysis has been at a functional level, rather than at the level of individual techniques – and consequently, changes in technique do not *per se* affect the results. Particularly the points made on timing and orchestrating standardisation efforts and legislative efforts seem to be valid. The current

output of the plethora of sectoral, regional, national and/or international competencies and the unravelling of their spaghetti-like interrelationships need huge monitoring efforts and will pose real problems to the development of EDI/Electronic Commerce. To mention a few of the acronyms involved in a random fashion: UN/ECE, UNCITRAL, WP4, UN/EDIFACT, ISO, ICC, UCC-sale, CEN/CENELEC, G7, WTO, WIPO, OECD, EC, CE, EP, EC-directorates and ISPO. It will be interesting to observe how international legislation will comply with national legislations that have been implemented by now in South Korea, Utah, Norway, Sweden, Germany, . . .

The explosive growth of Internet does present new questions, but these are not of a technical nature. A most formidable question is how reliable commercial use can be made to co-exist peacefully with freedom of expression and freedom of communication. This question is not considered in the EDICON project, but it is being discussed all over the world now. Applying one of the regulatory heuristics promoted by the EDICON project team I hope that legislative efforts will keep pace with the knowledge available. It would be a shame if legislators will anticipate and start formulating legal rules before actual experience with legal and empirical methods has yielded enough insight to elevate the rule-making process above the level of mere speculation and experiment.

During the project, in one of the meetings with international experts, one of the points that was made rather vehemently addresses the poor availability of TEDIS project results. I am happy that *The EDI Law Review* has taken the opportunity to at least partially remedy this by publishing the EDICON report.