

Strasbourg, 9 November 2011

CCJE(2011)2 Final

CONSULTATIVE COUNCIL OF EUROPEAN JUDGES

(CCJE)

Opinion No.(2011)14 of the CCJE

“Justice and information technologies (IT)”

Adopted by the CCJE at its 12th plenary meeting

(Strasbourg, 7-9 November 2011)

A. Introduction

1. In 2011, the Consultative Council of European Judges was given the task of adopting an Opinion for the attention of the Committee of Ministers on non-materialisation of the judicial process. In its discussions, the CCJE concluded that the title “Justice and Information Technologies” reflects the intended subject of this opinion in a more comprehensive and readily recognisable way than the previous title. Therefore, this new title has been chosen for this Opinion.
2. The Opinion was prepared on the basis of previous CCJE Opinions and of the Magna Carta of judges, as well as replies by member States to a questionnaire prepared by the CCJE on the non-materialization of the judicial process and on a preliminary report prepared by an expert, Ms Dory Reiling (Netherlands).
3. In preparing this Opinion, the CCJE also considered relevant Council of Europe instruments, in particular the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data as well as the Report “European Judicial Systems” (Edition 2010) by the European Commission for the Efficiency of Justice (CEPEJ) (specifically, Chapter 5.3 on Information and Communication Technologies in the courts). It also took into account other international legal instruments such as the European Union’s European Justice Strategy and the European Union’s Data Protection Directive, Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

B. Scope of the Opinion and general principles

4. This Opinion deals with the application of modern information and communication technology (IT) in courts. It focuses on the opportunities that IT offers in relation to, and its impact on, the judiciary and the judicial process. In particular, it addresses questions such as access to justice, the rule of law, the independence of judges and the judiciary, the functioning of courts and the parties’ rights and duties. It does not concern itself primarily with the technical aspects of IT.
5. IT should be a tool or means to improve the administration of justice, to facilitate the user’s access to the courts and to reinforce the safeguards laid down in Article 6 ECHR: access to justice, impartiality, independence of the judge, fairness and reasonable duration of proceedings.
6. The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice¹. If justice is perceived by the users as purely technical, without its real and fundamental function, it risks being dehumanised. Justice is and should remain humane as it primarily deals with people and their disputes. This is best seen when evaluating the

demeanour of litigants and their witnesses, which is an exercise performed in a court of law by the judge trying the case.

7. The Magna Carta of Judges entrusts judges with co-responsibility for access to swift, efficient and affordable dispute resolution. Judges must identify the advantages and disadvantages of IT and identify and eliminate any risks to the proper administration of justice. IT must not diminish parties' procedural rights. Judges must be mindful of such risks as they are responsible for ensuring that parties' rights are protected.

8. Judges need to be involved in assessing the impact of IT, especially when it may be required or decided that documentary matters and/or proceedings may be conducted by electronic means. IT must not prevent judges from applying the law in an independent manner and with impartiality.

9. Not all individuals have access to IT. At present, more traditional means of access to information should not be abolished. Help desks and other forms of assistance within courts should not be removed because of an erroneous argument that IT has made justice "accessible for all". This is a particularly pressing concern as regards the protection of vulnerable persons.

10. The use of IT should not diminish procedural safeguards for those who do not have access to new technologies. States must ensure that parties without such access are provided specific assistance in this field.

11. Having regard to the important role that IT technology plays today in the administration of justice, it is particularly important to ensure that difficulties in the functioning of IT do not prevent the court system, even for short periods, from taking decisions and ordering appropriate procedural steps. Appropriate alternatives should always be available whenever the IT system is under maintenance, or when technical incidents occur, in order to avoid any adverse impact on court activity.

12. Particular care should be taken to evaluate proposed legislation in advance with reference to its implications for the appropriate IT treatment of cases arising under it. The CCJE recommends that such legislation comes into force only after the IT systems have been adjusted to the new requirements, and court personnel are properly trained.

13. IT assisted treatment of judicial proceedings is especially important in the area of international and European judicial co-operation. IT facilities may be particularly relevant in areas such as the transmission of rogatory commissions and other requests for judicial co-operation, in the service and notification of judicial documents in member States as well as for cross-border taking of evidence (e.g. by way of video-conferencing). The CCJE recommends that member States develop methods of mutual access to each national IT systems, as well as making such systems compatible with one another. This will ensure that IT enhances co-operation of judges in different countries, and do not constitute an obstacle.

14. The CCJE welcomes the solutions envisaged by some states in the application of EU regulations, allowing the electronic initiation of civil claims in one country by residents in another country, as well as video-conferencing in the context of international cooperation.

15. The use of IT improves access to justice, as well as increases its effectiveness and transparency. On the other hand, it requires major financial investments. The CCJE's recommendation that access to justice should be enhanced by using IT therefore, necessarily means that States must make adequate financial allocations to the judicial system for this purpose.

16. Data and information, such as those contained in case registers, individual case files, preparatory notes and drafts, judicial decisions and statistical data on the evaluation of judicial processes and court management, need to be managed with appropriate levels of data

security. Within the courts, access to information should be limited to those who need it in order to accomplish their work.

17. Having regard to the nature of the disputes brought before courts, the online availability of certain judicial decisions could place privacy rights of individuals at risk and jeopardize the interests of companies. Therefore courts and judiciaries should ensure that appropriate measures are taken for safeguarding data in conformity with the appropriate laws.

18. The CCJE encourages the development of IT as a tool to improve communication between the courts to the media, for example, by giving the media easier access to judicial decisions as well as notice of forthcoming hearings.

C. IT and access to justice

19. Full, accurate and up to date information about procedure is a fundamental aspect of the guarantee of access to justice identified in Article 6 of the Convention (ECHR). Judges must therefore ensure that accurate information is available to any person engaged in court proceedings. Such information should generally include details or requirements necessary to invoke jurisdiction. Such measures are necessary to ensure the necessary equality of arms.

20. In any case, Justice cannot be disconnected from its users, and the IT development should not be used to justify courts being dispensed with.

21. IT creates new opportunities to provide court users with general information on the judicial system, its activities, case-law, the costs of proceedings, ADR etc. The CCJE recommends that full use be made by the judicial system of the internet and other new technologies to provide the general public with those elements which, in its Opinion N° 6 (paragraphs 12 and following) the CCJE has already concluded should be widely publicised.

22. IT is a valuable tool to support the role of courts. IT can also improve the ways in which courts can provide the concerned persons with detailed information on procedures in general. Therefore, the CCJE recommends that Courts introduce user-friendly electronic information services.

23. IT enables court users to initiate court proceedings electronically (e-filing). The CCJE encourages further development of this practice².

24. The CCJE considers that the judiciary should make case law, or at least landmark decisions, available on the internet i) free of charge, ii) in an easily accessible form, and iii) taking account of personal data protection. The CCJE welcomes initiatives to introduce international case-law identifiers (like the European Union case-law identifier ECLI³) which will improve access to foreign case-law.

D. IT in court procedure

25. IT offers opportunities for more efficient, clear and certain case processing.

26. Computerisation assists courts in rationalising file management as well as in registering and keeping track of cases. In this way, a series of files or connected cases can be managed under more secure conditions ; templates may be designed to support the formulation of judicial decisions or orders and multi-criteria statistics for each type of litigation, which can be made publicly available.

27. Computerisation can also improve the quality of the judge's work, for example through databases with links to judicial decisions, legislation , studies of identical questions of law, legal commentaries on previous decisions delivered by a court, and other forms of knowledge-sharing between judges. The most advanced and complete methods of this kind existing on the market should be made available free of charge to judges, who need to be able to verify all

sources of legal information available to other actors in the judicial process (defence lawyers, experts, etc.). The aids to judicial decision must be designed and seen as an ancillary aid to judicial decision-making, and to facilitate the judge's work, not as a constraint.

28. The use of IT should not, however, diminish the procedural safeguards (or affect the composition of the tribunal) and should in no event deprive the user of his/her rights to an adversarial hearing before a judge, the production of original evidence, to have witnesses or experts heard and to present any material or submission that he/she considers useful. Moreover, the use of IT should not prejudice mandatory hearings and the completion of other essential formalities prescribed by law. The judge must also retain, at all times, the power to order the appearance of the parties, to require the production of documents in their original form and the hearing of witnesses. Security requirements must not be an obstacle to these possibilities.

29. Resort to IT simplifies exchanges of documents. The parties and their representatives can access information about the cases in which they are involved before the court. In this way, they can follow the progress of their case by accessing the computerised case history.

30. Video-conferencing may facilitate hearings in conditions of improved security or the hearing remotely of witnesses or experts. It could, however, have the disadvantage of providing a less direct or accurate perception by the judge of the words and reactions of a party, a witness or an expert. Special care should be taken so that video-conferencing and adducing evidence by such means should never impair the guarantees of the defence.

31. The role of IT should remain confined to substituting and simplifying procedural steps leading to an individualised decision of a case on the merits. IT cannot replace the judge's role in hearing and weighing the factual evidence in the case, determining the law applicable and taking a decision with no restrictions other than those prescribed by law.

E. IT governance

32. IT should be used to enhance the independence of judges in every stage of the procedure and not to jeopardize it. Since judges play an important role in safeguarding both their individual and institutional independence and their impartiality, they need to be involved in decisions that have consequences in those areas.

33. IT access to information can contribute to a greater autonomy of judges in performing their tasks.

34. Over dependence on technology and on those who control it can pose a risk to justice. Technology must be suitable for the judicial process, and for all aspects of a judge's work. Judges should not be subject, for reasons solely of efficiency, to the imperatives of technology and those who control it. Technology also needs to be adapted to the type and level of complexity of cases.

35. The CCJE considers that instructions, templates or other suggestions as to form or content of decisions should not be addressed to judges by whatever other authority on the basis of needs reflecting the architecture of IT systems to be employed in the judicial process; rather, this architecture should be flexible, and ready to adjust to judicial case-law or practices.

36. Dialogue is absolutely necessary between those developing technology and those responsible for the judicial process. IT governance should be within the competence of the Council for the judiciary or other equivalent independent body. Regardless of which body is in charge of IT governance, there is the need to ensure that judges are actively involved in decision making on IT in a broad sense.

37. Judges should have flexibility when it comes to deciding how to manage cases and deal with back office work. The case management system should not limit this flexibility.

38. Judges and court staff have both a right and a duty to initial and on-going IT training so they can make full and appropriate use of IT systems.

39. IT can be an important tool for strengthening transparency, and objectivity in distributing cases and fostering case management. It can play a role in relation to the evaluation of judges and courts. However, data collected from IT systems should not be the sole basis for analysis of the work of an individual judge. Statistical data should be examined by the Council for the Judiciary or another equivalent independent body⁴.

40. Managing and developing IT presents a challenge for any organisation. For judiciaries, it presents a new and demanding challenge for their governance structures. Information-based management is an opportunity for developing institutional independence.

41. Funding for IT should be based on its contribution to improve court performance, the quality of justice and the level of service to the citizens.

F. Conclusions - Recommendations

- i. The CCJE welcomes IT as a mean to improve the administration of justice;
- ii. IT can contribute to the improvement of access to justice, case-management and the evaluation of the justice system;
- iii. IT plays a central role in the provision of information to judges, lawyers and other stakeholders in the justice system as well as to the public and the media;
- iv. IT has to be adapted to the needs of judges and other users, it should never infringe guarantees and procedural rights such as that of a fair hearing before a judge;
- v. Judges should be involved in all decisions concerning the setting up and development of IT in the judicial system;
- vi. Consideration must be given to the needs of those individuals who are not able to use IT facilities;
- vii. The judge must retain, at all times, the power to order the appearance of the parties, to require the production of documents in their original form and the hearing of witnesses;
- viii. The CCJE encourages the use of all aspects of IT to promote the important role of the judiciary in guaranteeing the rule of law (/the supremacy of law) in a democratic state;
- ix. IT should not interfere with the powers of the judge and jeopardise the fundamental principles enshrined in the Convention.

¹ On the relationships between symbolism and justice and the risks in the de-ritualisation of the judicial process which is a trend of modern democracies, see A. Garapon, "*Bien juger – Essai sur le rituel judiciaire*" (Odile Jacob, Paris, 2001), also offering an extensive bibliography in an appendix.

² See for example Regulation (EC) No 1896/2006 of 12.12.2006 (on European Payment Order) and Regulation (EC) No 805/2004 of 21.4.2004 (on European Enforcement Order for uncontested claims).

³ See OJ C127, 29.4.2011, p.1 : Council conclusions inviting the introduction of the European Case Law Identifier (ECLI) and a minimum set of uniform metadata for case law.

⁴ See also Opinions of the CCJE No.1(2001) para 9, No.10(2007) and No. 11(2008).