



Strasbourg, 19 April 2012

CCJE-GT(2012)3

**WORKING PARTY
OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES
(CCJE-GT)**

**Report of the 22nd meeting
Strasbourg
26-28 March 2012**

Secretariat document prepared by the
Directorate General of Human Rights and Legal Affairs

I. Introduction

1. The Working Party of the Consultative Council of European Judges (CCJE-GT) held its 22nd meeting in Strasbourg from 26 to 28 March 2012. Mr Paul MAFFEI (Belgium) chaired the meeting.
2. The agenda and the list of participants are appended to this report (Appendices I and II respectively).

II. Communication by the Chair of the CCJE, the Chair of the CCJE-GT and the Secretariat

3. The Chair of the CCJE, the other Bureau members and the Secretariat provided the members of the Working Party with particulars of the meetings which they had attended in order to represent the CCJE (for details, see the report of the 22nd meeting of the CCJE Bureau, document CCJE-BU(2012)1). Special mention was made of the traditional exchange of views between the Committee of Ministers and the Chairs of the CCJE and the CCPE held on 18 January 2012. The former Chair of the CCJE, Mr Orlando AFONSO (Portugal), who had taken part, said that the CCJE's work had been very well received and that numerous questions had been asked about the report concerning the specific assistance activities and the infringement on judges in Europe, and it had been considered very useful.

III. Preparation of draft Opinion No. 15 on the specialisation of judges

4. The Working Party examined the draft report on specialisation of judges (Document CCJE-GT(2012)1), drawn up by Ms Maria Giuliana CIVININI, scientific expert, on the basis of the replies made by 26 member states to the questionnaire on the same theme. The CCJE-GT regretted the expert's absence for medical reasons, wished her a speedy recovery, and conveyed to her its sincere thanks for the high quality of her report, which thus gave the Working Party a sound basis for reflection in formulating the structure of the opinion.

5. Having also examined a document prepared by the Chair of the Working Party containing his suggestions for the preparation of the Opinion (see document CCJE-GT(2012)2), the CCJE-GT agreed to devise a structure as detailed as possible at the present stage, in order to cover all aspects of the theme handled and give the drafters some useful indications. The structure as decided at the current meeting looked like this (see Appendix III to this document):

- 1st part: Presentation of the reasons why the CCJE was working on the subject of "specialisation";
- 2nd part: Specialisation and the protection of Article 6 ECHR, especially the judge's independence and impartiality;
- 3rd part: The advantages and drawbacks of specialisation;
- 4th part: The different types of specialisation;
- 5th part: Specialisation vis-à-vis the judge's status;
- 6th part: Specialisation of the other services (registries, administrative services, etc.);
- Conclusions and recommendations.

6. In conclusion to the meeting, and in order to be sure of having a well-written text, the CCJE-GT decided to change the drafting methods used in previous years. Two drafting groups were accordingly appointed:

- one French-language, composed of Mr Paul Mafféi (Belgium) and Mr Bernard Corboz (Switzerland), instructed to draft chapters A, B and C;
- the other English-language, composed of Mr Richard Aikens (United Kingdom) and Mr Johannes Riedel (Germany), instructed to draft chapters D, E and F.

7. In addition, the following schedule of work was settled:

- from 28 March to 7 May, production of the preliminary draft by the two drafting groups;
- from 7 to 21 May, circulation of the preliminary draft between the two groups to verify its substantive coherence;
- 21 May, dispatch of the consolidated text by the Secretariat for translation;

- 4 June, forwarding of the text in both languages to the members of the CCJE-GT for any comments ahead of the discussion at the 23rd meeting of the CCJE-GT to be held from 18 to 20 June 2012.

8. It was agreed at that stage to advise the CCJE members, when invited to examine the finalised draft Opinion, that only comments made in writing and sent in advance to the Secretariat would be considered at the plenary meeting (5-7 November 2012).

IV. Preparation of draft Opinion No. 16 on relations between judges and lawyers

9. The Secretariat informed the Working Party that the next plenary meeting of the CCJE would foreseeably be organised in Paris and immediately followed by a one-day international Conference on relations between judges and lawyers, which would be organised in co-operation with the Paris Bar Association with a view to the preparation of CCJE Opinion No. 16 (to be adopted in 2013).

10. During an exchange of views, the CCJE-GT discussed the following aspects with regard to the theme of relations between judges and lawyers in a state governed by the Rule of law:

- The need to give each justice professional's responsibility, including the lawyers, due prominence in the operation of the judicial system;
- The importance of emphasising the lawyer's role when representing victims, while making it clear that this is only one procedural aspect;
- The lawyer's role in the development of alternative dispute resolution methods;
- The problems attending equality of arms and relations with prosecutors;
- The common interests and goals of judges/lawyers;
- The possibility of joint training;
- The relationship with the media and the lawyer's role in this context;
- The need to propose practical solutions for resolving the conflicts likely to arise between judges and lawyers during proceedings.

11. It was agreed to continue this exchange of views at the next meeting of the CCJE-GT.

V. Appointment of the Gender Equality Rapporteur

12. The Secretariat informed the CCJE-GT that in accordance with its new terms of reference the CCJE, like all the other Council of Europe intergovernmental committees, was to appoint a gender equality rapporteur. The Committee of Ministers' decision to include this rapporteur in each committee followed on the Declaration of the Committee of Ministers adopted in Madrid on 6 May 2009 and entitled "Making gender equality a reality" (see document CM(2009)68final).

13. After hearing Ms Anne-Marie FARADJI, in charge of the gender equality question in the Council of Europe, concerning the tasks to be carried out in this context, Mr Bart Van Lierop (Netherlands) volunteered and was appointed CCJE Gender Equality Rapporteur.

VI. Other business

14. The next meeting of the CCJE-GT will be held in Strasbourg from 18 June (2 pm) to 20 June (5 pm) 2012.

APPENDIX I

AGENDA

- 1. Opening of the meeting**
- 2. Adoption of the agenda**
- 3. Communication by the President, members of the Bureau and the Secretariat**
- 4. Preparation of the CCJE Opinion No. 15 on the specialisation of judges and courts**
- 5. Discussion of the overall working programme for 2012**
- 6. Appointment of the Gender Equality Rapporteur**
- 7. Any other business / *Divers***

APPENDIX II**LIST OF PARTICIPANTS****Members of CCJE-GT / Membres du CCJE-GT****CROATIA/CROATIE :**

Mr Duro SESSA, Judge, Supreme Court, 310 000 ZAGREB

GERMANY/ALLEMAGNE : (deputy member/membre suppléant):

Mr Johannes RIEDEL, President of the Court of Appeal, KÖLN, Vice President of the Constitutional Court of North Rhine-Westphalia

Tel: + 49 (0)2 2177 11 - 300, E-mail: johannes.riedel@olg-koeln.nrw.de

LUXEMBOURG :

M. Jean-Claude WIWINIUS, Président de Chambre, Cour Supérieure de Justice, LUXEMBOURG

NORWAY/NORVEGE :

Mr Nils A. ENGSTAD, Judge, Halogaland Court of Appeal, TROMSØ

PORTUGAL :

M. Orlando AFONSO, Juge à la Cour Suprême, LISBONNE

SLOVENIA/SLOVENIE :

Ms. Nina BETETTO, Supreme Court of the Republic of Slovenia, LJUBLJANA

SPAIN/ESPAGNE :

M. José Francisco COBO SÀENZ, Magistrato, Presidente de la Secc. 2a, Provincial de Navarra, PAMPLONA

SWITZERLAND / SUISSE :

M. Bernard CORBOZ, Juge fédéral, Tribunal fédéral, LAUSANNE

“THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”/“L’EX-REPUBLIQUE YUGOSLAVE DE MACEDOINE” :

Mrs Aneta ARNAUDOVSKA, Juge, Director of the Academy for training of judges and prosecutors, SKOPJE

UNITED KINGDOM/ ROYAUME-UNI :

Lord Justice Richard AIKENS, Royal Courts of Justice, Strand, LONDON

Members of the CCJE-BU / Membres du the CCJE-BU

AUSTRIA/AUTRICHE : (President of the CCJE/ Président du CCJE)

Mr Gerhard REISSNER, President, District Court of Floridsdorf, Vice-President of the Austrian Judges Association, VIENNA

BELGIUM/BELGIQUE : (President of the CCJE-GT/Président du CCJE-GT)

M. Paul MAFFEI, Conseiller à la Cour de Cassation, BRUXELLES

ITALY/ITALIE :

M. Raffaele SABATO, Conseiller à la Cour de Cassation, ROME

NETHERLANDS/PAYS BAS :

Mr Bart Van LIEROP, Justice, Court of Appeal for Trade and Industry, THE HAGUE

SCIENTIFIC EXPERT / EXPERT CONSULTANT

Maria Giuliana CIVININI, Presidente di Sezione del Tribunale di Livorno, Italy

**COUNCIL OF EUROPE'S SECRETARIAT /
SECRETARIAT DU CONSEIL DE L'EUROPE**

**Directorate General of Human Rights and Legal Affairs/
Direction générale des droits de l'Homme et des affaires juridiques**

**Division for the Independence and Efficiency of Justice / Division pour l'indépendance
de la justice**

E-mail: ccje@coe.int
Fax: + 33 (0) 88 41 37 43

Muriel DECOT, Secretary of the CCJE / *Secrétaire du CCJE*, Tel: + 33 (0)3 90 21 44 55 ; e-mail: muriel.decot@coe.int

Ms Maria ORESHKINA, Co-Secretary of the CCJE / *Co-Secrétaire du CCJE*; Tel: + 33 (0)3 90 21 40 26; e-mail: maria.oreshkina@coe.int

Mr Hasan HENDEK, Special advisor / *Conseiller spécial*; Tel: + 33 (0)3 90 21 58 74; e-mail: hasan.hendek@coe.int

Jean-Pierre GEILLER, Documentation, Tel: + 33 (0)3 88 41 22 27; e-mail: jean-pierre.geiller@coe.int

Annette SATTEL, Communication, Tel: + 33 (0)3 88 41 39 04; e-mail: annette.sattel@coe.int

Emily WALKER, Assistant/*Assistant*; Tel: + 33 (0)3 90 21 48 39, e-mail: emily.walker@coe.int

Valérie GUILLEMIN, Trainee, *Stagiaire*; e-mail : valerie.guillemine@coe.int

INTERPRETERS / INTERPRÈTES

Grégoire DEVICTOR
Corinne McGEORGE
Chloé CHENETIER

APPENDIX III

Pre-draft structure of CCJE Opinion (2012) on specialisation of judges

A. Why is the CCJE looking at the subject of “specialisation”? Formulating the problem

- Specialisation is a reality. There is an almost universal trend in Europe towards specialisation
- The main reason for specialisation is the increasing specialisation of the law and the growing complexity of topics
- What is the origin of this trend? Is it internal or external (the demand of society that requires that judges demonstrate a better expert knowledge and efficiency)? Specialisation of judges is also rendered necessary by the specialisation of lawyers and prosecutors
- The need for the CCJE to take a position on the general trend of specialisation:
 - as a rule, the “generalist” judge is already a specialist in analysing the facts and the law in all areas of law (“the art of adjudicating”): it is him/her who applies the Law (“specialist” of art), and his/her role should not be underestimated (see para. 41 of the Civinini Report):
 - the judge should be able to apply the law, whatever it is
 - any facts of a technical nature can be explained by experts
 - however, there is a tendency for judges to rely on experts to assess the facts correctly (e.g. in matters related to medicine)
 - if the need for specialisation is recognised, it should involve an experienced generalist judge
 - if the system works well with generalist judges, why change it? The need is simply to have good judges, able to deal with technical subject matters
 - nevertheless, the reality of the development of the law means that we cannot avoid specialisation
 - the general trend towards specialisation must be regulated
 - it is imperative that judicial specialisation be compatible with the fundamental principles inherent in the art of the judge; compatibility with the obligations of Article 6 of the ECHR
- there is no ideal solution or single model: it is necessary to take into account the needs of the judge’s task: the size of courts; the needs of the judiciary; the impossibility for a judge of mastering all areas of law; the cost of specialisation
- the specialisation of judges required by the complexity of the law has nothing to do with the creation of ad hoc or extraordinary courts (*tribunaux d’exception*) due to specific

circumstances. The CCJE is not in favour of the creation of such tribunals that are outside the ordinary judicial system and may be in breach of the principles of Article 6

B. Specialisation must not violate the provisions of Article 6 of the ECHR, and in particular the independence and impartiality of the judge

- Courts should organise their specialisation in a manner which guarantees the fundamental principles inherent in the art of judging
- The judicial body must remain unified, with specialised and non-specialised judges enjoying the same status
- Specialisation and procedure:
 - general procedure and specific procedure for specialist cases? (e.g. competition law). Certain specialist procedures are acceptable where they are justified by the nature of the subject matter (e.g. family law procedures where children are to appear before the court). However, the tendency to create a new specialist procedure every time a specialist court is established should not be encouraged as it carries certain risks (making the procedure too complicated, reducing access to justice). A common procedure should remain the rule and specialist procedure an exception
 - risk of giving priority to specific types of cases (case management and available budget): all cases, specialist or general, should be progressed in the same manner (with the exception of cases implying a detention)

C. Advantages and disadvantages of specialisation

1. Advantages of specialisation

- recognises its necessity as a result of the complexity of cases
- greater ability to understand the reality inherent to subject matters
- permits demonstration of the importance of solving certain problems (e.g. corruption, terrorism) (as long as it does not imply giving priority to these cases in terms of case management or establishment of special courts)
- more efficient case management
- better knowledge of judges which has an impact on the quality and predictability of decisions

2. Limits and dangers of specialisation

- risks for the independence and impartiality of the judge (risk of too close a relationship therefore of connivance with parties or their lawyers)
- risk of exposure to interference by the executive and the administration (particularly when the principle of unity of the judiciary is at risk of violation, as is the case with the establishment of special courts)

- risk for the unity of the judiciary (specialised judges considered as specialist and technical entities)
- in some courts, it is impossible to have a specialist in every subject matter
- due to the complexity and to the development of the law, a specialised judge needs to have knowledge of different areas because they are often interlinked
- risk of compartmentalisation of the judge's activity and knowledge and of the law
- risk of loss of flexibility in the development of case-law if judgements are always delivered by the same limited number of persons
- individual specialisation may limit the judiciary generally to specialise

3. Ways of compensating for the disadvantages:

- encouraging the rotation of specialised judges (to avoid a "routine" for cases and for judges)
- finding a balance between the simplicity of procedure and legal certainty

D. Different types of specialisation

The results of the questionnaire demonstrate that there are significant differences between member States.

1. Specialisation of judges

a. Non-jurist judges (i.e. non-lawyers):

- risks and advantages. This trend is not to be encouraged because there are other solutions
- if the member of the tribunal is an expert (non-jurist), there is a risk that his/her own technical knowledge of the subject in question will be decisive of the decision to be made; it is necessary to ensure that the principles of a fair trial are respected, namely impartiality, the judge's freedom to assess evidence or the principle of the ability of parties to respond to propositions put forward by expert judges that can be included in the final decision or influence it; in such a case it is better to call upon experts whose findings and conclusions can be subject to debate by the parties.

[3 types of participation by non-jurists:

(i) for reasons relating to the subject matter (e.g. cases concerning medical issues), a non-jurist judge can be appointed to a court;

(ii) in some highly technical areas (e.g. patent law) an expert can assist the judge in understanding the circumstances of a case, and the arguments of an expert can be included in the decision at judge's request;

(iii) "échevins" representing each of the two sides and sitting together with the judge in cases of certain types (traditionally letting cases, labour cases)]

- b. how does a judge become a specialist: by virtue of experience (from which moment on can one speak of a “specialist judge”?) or by virtue of a specialist training. In the latter case, should such training be a precondition for adjudicating on certain matters?
- c. specialisation for the assessment of facts and of law
- d. multidisciplinary, specialisation in different legal or non-legal matters, e.g. economics etc.
- e. specialisation of judges at all levels of courts?

It is necessary to ensure that specialisation at the higher court level permits a certain versatility of the judges and flexibility in processing cases, which is indispensable for these jurisdictions if they are to fulfil their legal and constitutional objectives (namely to ensure uniformation of the law and case-law).

2. Specialisation of certain courts and/or chambers of courts

For example, “commercial courts” which exist in numerous countries; also, EU instruments recommending specialist courts or sections thereof (e.g. on the law of industrial property). Much depends on the size of the specialist court and/or chamber.

3. Regional distribution of specialised judges:

- specialist judges throughout the whole territory or creation of a single specialist court in the country (regional or national concentration of specialisation)
- it is necessary to take account of the fact that in some highly specialised areas, the judges have very few cases, so there is a need to concentrate them in order to have a balanced caseload per judge. But there is the risk of increasing the distance between the judge and the court user.

E. Specialisation and the status of the judge
--

1. Status of the specialist judge

- a. constitutional guarantees: a specialist judge should have the same status as the generalist judge
- b. remuneration or other types of compensation:
 - a specialist judge must not receive additional remuneration or compensation simply by virtue of his/her specialisation or of the complexity of cases he/she adjudicates. Principle of equal remuneration applies to both generalist and specialist judges. Specialisation in itself does not justify additional remuneration
 - certain emoluments can be awarded to compensate for specific additional tasks (night duty etc.)
 - for certain types of specialisation an additional emolument may represent an incentive (e.g. to attract specialised lawyers into the judiciary), notably when judges specialised in a very specific area are difficult to find (e.g. patent law) **(valid for certain countries only)**

c. ethics

d. discipline

2. Evaluation and promotion

a. evaluation

Taking the judge's specialisation into account for evaluation:

- a generalist judge can be of equal ability as a specialist judge
- flexibility of some judges who agree to deal with cases involving different specialisation, as well as the ability of some judges to process highly complicated cases in an expedient manner, should be taken into account in the evaluation of their performance
- the average number of cases to be decided by a judge as an evaluation criterion can be adapted according to their complexity

b. promotion

- specialisation alone must not be used to justify promotion

3. Training

- specialist training should be accessible to all but adapted to the needs of courts
- issues related to the organisation of continuous specialist training for generalist judges and its cost-efficiency
- the right of the judge to decide whether or not he/she wishes to specialise
- specialist training should be provided in the same manner as general training (independence, quality) – see Opinion no. 4

4. Specialisation and participation in judges' associations

5. Role of the High Council for the Judiciary

See Opinions nos. 10 and 4.

6. Cost

- the cost of specialisation should be proportional to its benefits
- cost is not the only element to be taken into account when deciding on the need for specialisation

F. Specialisation of the judge and other departments (court clerks, administrative department etc.)

- specialist judges and courts cannot fulfil their role properly without adequate human resources and technology

- evolution of technology may allow some specialised courts to merge their resources

G. Conclusions and recommendations