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## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

### OPINION (2012) NO. 15 OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES ON THE SPECIALISATION OF JUDGES adopted at the 13<sup>th</sup> plenary meeting of the CCJE (Paris, 5-6 November 2012)

#### Introduction

#### Introduction

1. In accordance with the Terms of Reference given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has decided to prepare in 2012 an Opinion on the specialisation of judges.
2. The Opinion was prepared on the basis of previous CCJE Opinions, the Magna Carta of Judges, the member States' replies to a questionnaire on the specialisation of judges prepared by the CCJE, and the preliminary report by the expert of the CCJE, Ms Maria Giuliana Civinini (Italy).
3. In preparing this Opinion, the CCJE has also relied on the *acquis* of the Council of Europe, in particular the European Charter on the Statute for Judges, Recommendation Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, and the report on "European Judicial Systems" (2010 edition) by the European Commission for the Efficiency of Justice (CEPEJ)<sup>[1]</sup>.
4. The replies of member States to the questionnaire and the report by the expert show that specialist judges and/or specialist courts are common in member States. Such specialisation is a reality, and it takes a wide variety of forms, involving either setting up specialist chambers within existing courts or creating separate specialist courts. This trend has spread throughout Europe<sup>[2]</sup>.
5. In the context of the present Opinion, the "specialist judge" is a judge who deals with limited areas of the law (e.g. criminal law, tax law, family law, economic and financial law, intellectual property law, competition law) or who deals with cases concerning particular factual situations in specific areas (e.g. those relating to social, economic or family law).
6. Jurors who take part in criminal cases<sup>[3]</sup> have not been included within the definition of "specialist judges" mentioned above. Jurors do not sit in all criminal cases. They are not subject to the same codes and rules as judges who are part of the regular corpus of judges; nor are they part of the judicial hierarchy or subject to its disciplinary and ethical rules.
7. The purpose of this Opinion is to examine the main problems relating to specialisation, given the overriding need to secure the protection of fundamental rights and the quality of justice as well as the status of judges.

#### A. Possible advantages and disadvantages of specialisation

##### a. Possible advantages of specialisation

8. Specialisation often stems from the need to adapt to changes in the law rather than from any deliberate choice. The constant adoption of new legislation, whether at the international, European or domestic level, and changing case-law and doctrine are making legal science increasingly vast and complex. It is difficult for the judge to master all these fields, while at the same time society and litigants demand more and more professionalism and efficiency from the courts. Specialisation of

judges can ensure that they have the requisite knowledge and experience in their field of jurisdiction.

9. An in-depth knowledge of the legal field in question can improve the quality of the decisions taken by a judge. Specialist judges can acquire greater expertise in their specific fields, which can thereby enhance their courts' authority.

10. Concentrating case-files in the hands of a select group of specialist judges can be conducive to consistency in judicial decisions and consequently can promote legal certainty.

11. Specialisation can help judges, by repeatedly dealing with similar cases, to gain a better understanding of the realities concerning the cases submitted to them, whether at the technical, social or economic levels, and therefore to identify solutions better suited to those realities.

12. Specialist judges who provide knowledge of a science other than law can foster a multidisciplinary approach to the problems under discussion.

13. Specialisation through greater expertise in a certain legal field may help improve the court's efficiency and case management, taking into account the ever growing number of cases.

#### **b. Possible limits and dangers of specialisation**

14. Whilst judicial specialisation is desirable for a number of reasons, there are several dangers in it. The main risk in judicial specialisation is to be found in the possible separation of specialist judges from the general body of judges.

15. Judges who, for reasons of specialisation, have previously had to decide on the same issues might tend to reproduce these previous decisions, which can hamper the evolution of case-law in line with society's needs. This danger also arises where decisions in a specific field are always taken by the same select group of judges.

16. Specialist legal professionals tend to develop concepts which are specific to their field and are (often) unknown to other lawyers. This can lead to compartmentalisation of the law and procedure, cutting specialist judges off from legal realities in other fields, and potentially isolating them from general principles and fundamental rights. This compartmentalisation could undermine the principle of legal certainty.

17. Society may expect to have specialist judges where this is, in practice, not possible. Specialisation is only possible when courts reach a sufficient size. Smaller courts may find it impossible to set up specialist chambers, or an adequate number of such chambers. This forces judges to be versatile, and thus to have the ability to address a range of specialist matters. Excessive individual specialisation of judges would hamper this necessary versatility.

18. In some cases specialisation of judges may be detrimental to the unity of the judiciary. It can give judges the impression that their expertise in their specialist field places them in an elite group of judges who are different from the others. It may also give the general public an impression that some judges are "super-judges" or, on the contrary, that a court is an exclusively technical body separate from the actual judiciary. This may result in a lack of public confidence in courts that are not thought to be specialist enough.

19. Setting up a highly specialist court may have the purpose or the effect of separating judges from the rest of the judiciary and exposing them to pressure from the parties, interest groups or other State powers.

20. In a select field of law, the danger of an impression of excessive proximity between judges, lawyers and prosecutors during joint training courses, conferences or meetings is real. This could not only tarnish the image of judicial independence and impartiality, but could also expose judges to a real risk of secret influence and therefore orientation of their decisions.

21. Since courts require an adequate workload, setting up a court specialising in a very restricted field can have the effect of concentrating that specialisation within a single court for the whole country or for one national region. This may hamper access to courts or create too great a distance between the judge and the litigant.

22. There is a danger that a specialist judge who is part of a bench and who is responsible for providing particular technical or expert advice may express a personal opinion or account of the facts directly to his or her colleagues without such matters being presented to the parties for their submissions<sup>[4]</sup>.

23. Setting up specialist courts in response to public concerns (e.g. anti-terrorist courts)<sup>[5]</sup> can result in the public authorities granting them material and human resources unavailable to other courts.

#### **B. General principles – respect for fundamental rights and principles: position of the CCJE**

24. The CCJE stresses, above all, the fact that all judges, whether generalist or specialist, must be expert in the art of

judging. Judges have the know-how to analyse and appraise the facts and the law and to take decisions in a wide range of fields. To do this they must have a broad knowledge of legal institutions and principles.

25. The member States' replies and the expert's report demonstrate that most cases submitted to courts are dealt with by generalist judges, highlighting the predominant role played by such judges.

26. In principle, judges should be capable of deciding cases in all fields. Their general knowledge of the law and its underlying principles, their common sense and knowledge of the realities of life give them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary<sup>[6]</sup>. The role of the "generalist judge" can never be underestimated.

27. In any given court, generalist judges are usually assigned to various specialist sectors, changing assignments several times in the course of their careers. This gives them broad experience of a variety of legal fields, thus enabling them to adapt to new assignments and meet litigants' needs. This is why it is vital, from the outset, for judges to have general training in order to acquire the requisite flexibility and versatility to cope with the needs of a general court, which has to deal with an enormous variety of matters, including those requiring a certain degree of specialisation.

28. Nevertheless, the law has become so complex or specific in some fields that a proper consideration of cases in these fields demands a higher degree of specialisation. The provision of appropriately qualified judges who are responsible for specific fields is therefore recommended.

29. Specialist judges, like all judges, must meet the requirements of independence and impartiality set out in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Specialist courts and judges must also meet all the other conditions set out in this provision of the Convention: access to the court, due process, right to a fair hearing and right to be heard within a reasonable time. It is incumbent on the courts to organise their specialist chambers in such a way as to respect these requirements.

30. The CCJE considers that the creation of specialist chambers or courts must be strictly regulated. Such bodies should not undermine the remit of the generalist judge, and must in all cases provide the same safeguards and quality. At the same time, regard must be had to all the criteria governing a judge's work: court size, service requirements, the fact that it is increasingly difficult for judges to master all legal areas and the cost of specialisation.

31. Specialisation must never stand in the way of the quality requirements which every judge must meet. The CCJE notes that these requirements were listed in its Opinion No. 11 (2008) on the quality of judicial decisions, and that the requirements are applicable to all judges and therefore also to specialist judges. Everything necessary must be done to guarantee the optimum conditions for the administration of justice in specialist courts.

32. In principle, general procedural rules must also apply in specialist courts. Introducing specific procedures for each specialist court is liable to lead to a proliferation of such procedures, creating risks vis-à-vis access to justice and certainty of the law. Specific procedural rules are only permissible if they respond to one of the needs which led to the setting up of the specialist court (e.g. proceedings relating to family law, where examination of children is subject to specific rules geared to safeguarding their interests).

33. It is always vital to ensure that the principles of a fair trial are respected, namely impartiality of the tribunal as a whole and the judge's freedom to assess evidence. It is also vital that where the system of an assessor or expert who sits as part of the judicial tribunal exists, the parties retain the ability to respond to advice given to the legally trained judge by this assessor or expert. Otherwise an expert view could be included in a judgment without the parties having had the opportunity to test or challenge it. The CCJE would regard as preferable a system where the judge appoints an expert or the parties can themselves call experts as witnesses whose findings and conclusions can be challenged and debated between the parties before the judge.

34. All cases, whether before a specialist or generalist court, must be examined with the same diligence. There are no grounds for prioritising cases dealt with by specialist courts. The only permissible priorities are those based on objective need, e.g. proceedings involving deprivation of liberty or urgent measures in matters of custody of children, protection of property or persons, environment, public health, public order or security.

35. While specialist courts must benefit from adequate human, administrative and material resources necessary to perform their work, this must not be to the detriment of other courts which should enjoy the same conditions in terms of

resources.

36. The CCJE considers that greater mobility and flexibility on the part of judges might help remedy the above-mentioned disadvantages of specialisation. Judges should be entitled to change court or specialisation in the course of their career, or even move from specialist to generalist duties or vice-versa. Mobility and flexibility not only provide judges with more varied and diversified career opportunities but also allow them to take stock and move into other legal disciplines, which necessarily fosters the development of case-law and law in general. However, such mobility and flexibility should not endanger the principle of independence and irremovability of judges<sup>[7]</sup>.

37. Providing specialist judges to meet the complexity or particular requirements in specific legal fields is a separate matter from setting up special, *ad hoc* or extraordinary courts as dictated by individual or specific circumstances. There is a potential danger of these latter courts failing to provide all the safeguards enshrined in Article 6 of the Convention. The CCJE has already expressed its objections to the establishment of such courts, and refers here to the content of its Opinion No. 8 (2006) on the role of judges in protecting the rule of law and human rights in the context of terrorism. In any event, the CCJE stresses that where such courts do exist, they must fulfil all the safeguards incumbent on ordinary courts.

38. In sum, the CCJE believes that specialisation can only be justified if it promotes the administration of justice, i.e. if it proves preferable in order to ensure the quality of both the proceedings and the judicial decisions.

## **C. Certain aspects of specialisation**

### **1. Specialisation of judges**

39. In the view of the CCJE the principles of this Opinion are applicable to the types of specialist courts considered below.

40. The replies to the questionnaire demonstrate that there are significant differences between member States concerning the types of judge used in "specialist" courts and tribunals.

41. Specialisation can be brought about by different means. Depending upon what the legal framework of the relevant state permits, there can be either specialist courts that are separate and distinct from the general organisation of the judiciary as a whole or specialist courts or chambers that are part of the general judicial system. The jurisdiction of specialist courts or chambers will often differ from that of general courts; there are frequently far fewer of them, and they are sometimes only found in a country's capital. Specialist courts and chambers may include lay judges.

42. The most widespread means of achieving specialisation is by the creation of specialist chambers or departments. This can be achieved often by means of internal court rules. The main sectors of specialisation are: family and juvenile law; intellectual property law; commercial law; insolvency law; serious crimes; the investigation of crimes and the enforcement of criminal sanctions.

#### **i. "Non-jurist judges"**

43. In many Member States there are specialist courts or tribunals which consist of one or more judges with a legal training and one or more members of the court or the tribunal who are non-lawyers. There is a large variety of such "non-jurist judges", and it is impossible to give a comprehensive analysis of them here. Frequently these "non-jurist judges" either represent one or other group of interests (e.g. employers or employees; landlords and tenants, *échevins*), or have a specific expertise appropriate to the specialist court or tribunal concerned.

#### **ii. Professional judges**

44. Professional judges may become specialist judges by several means. It may be by means of experience gained either as a specialist lawyer before appointment as a judge or as a result of experience in specialist work following the appointment as a judge. Alternatively, the specialist judge may have received specific training in a specialist area of the law or in a non-legal area and then been appointed to a specialist court or deal with specialist cases in a general court.

45. Specialisation of judges at the higher levels of a court structure where it exists should still permit a certain degree of versatility in the judges so that there can be flexibility in dealing with all types of cases at the higher level. This flexibility is necessary to ensure that appellate courts fulfil their legal and constitutional mission, i.e. to guarantee consistency in the interpretation and application of legislation and of case-law. Also, this flexibility will ensure that a specialised area is not dealt with, at an appellate level, by too narrow a group of judges, who might then be in the position to impose their view in a certain

field and thus to prevent developments of the law in that area.

## **2. Specialisation of certain courts or courts within a larger group**

46. In some jurisdictions there are specialist courts which exist apart from the generalist courts<sup>[8]</sup>. In some cases these separate specialist courts have been created as a result of EU instruments providing for the establishment of specialist courts or sections of courts with a larger jurisdiction<sup>[9]</sup>. In other cases the specialist court may be a part of a larger court grouping<sup>[10]</sup>. In each case the court itself is specialist as are the judges who sit in it. The structure adopted in each country is partly a result of history and partly a result of the demand for a particular type of specialist court or judge in that jurisdiction.

## **3. Regional distribution of specialist judges**

47. It is necessary to take account of the fact that in some highly specialised areas the number of cases brought before courts is very low. In that case it may be necessary to concentrate the specialist judges in one court so as to ensure that they have a balanced caseload per judge and so that they can take on other, non-specialist work as well. However, if this concentration is carried too far there is the risk that the specialist court may become remote from the court users; a problem which in the view of the CCJE should be avoided.

## **4. Human, material and financial resources**

48. It is essential that specialist judges and courts are provided with adequate human and material resources, especially information technology.

49. Where the expected caseload for specialist courts is small in comparison to other courts, consideration should be given to developing and using resources and technologies which can be used collectively by several specialist courts or better still by all courts. Merging human and material resources can be a means to avoid problems connected with organising specialisation. Creating large "justice centres" with generalist and specialist courts and panels could, however, with increasing distance between court locations, impede easy access to courts.

50. The requirements and costs of specialist courts and judges may be greater than those of generalist courts and judges, e.g. because special precautions are required, because files are voluminous, or because trials and judgements are lengthy.

51. When such additional cost items can be identified in a given field of specialisation, there is justification for charging a specific group of litigants with higher fees, in order to cover the whole or part of those extra costs. This may apply, for example, to commercial or industrial construction cases, or to patent or competition cases, but not, for example, to specialisations in child custody cases, child maintenance cases, or other types of family cases. Higher costs for specialised cases should not exceed the additional work undertaken by the courts and should be proportionate to the work entailed for the courts and to the benefits of specialisation, both for litigants and for the courts. Nor does the introduction of specialist courts simply with the aim of obtaining more revenue seem either sensible or justifiable.

## **D. Specialisation and status of the judge**

### **1. Status of the specialised judge**

52. In all the types of specialisation described above, it is important that the role of the judge as a member of the judiciary remains unaltered. The specialisation of judges cannot justify or demand any deviation from the principle of the independence of the judiciary in any of its aspects (i.e. the independence of both courts and individual judges, see CCJE Opinion No. 1 (2001)).

53. The guiding principle should be to treat specialist judges, with respect to their status, in no way differently from generalist judges. Laws and rules governing appointment, tenure, promotion, irremovability and discipline should therefore be the same for specialist as for generalist judges.

54. This can best be achieved by the existence of one constituent body of both generalist and specialist judges. A single corpus of judges will guarantee that all judges respect fundamental rights and principles which must be universally applicable. Accordingly, the CCJE is not in favour of the creation of different judicial bodies or systems according to particular specialisations, which could result in different judges being subject to different rules in different organisations.

55. The CCJE is aware that in many European countries there are, traditionally, several distinct judicial hierarchies (e.g. in ordinary and administrative courts). They may also be linked to differences in the status of judges. The CCJE considers

that such separate hierarchies may complicate the administration of and access to justice.

56. In the CCJE's view, it should be ensured that:

- jurisdictional disputes do not restrict access to justice or cause delays contrary to Article 6 of the Convention;
- appropriate access to other judicial hierarchies, specialist courts, bodies and functions is available to all judges;
- all judges of the same seniority receive the same remuneration, with the exception of any specific additional remuneration for special duties (see the following paragraph).

57. The principle of equal status for generalist and specialist judges should also apply to remuneration. Recommendation No. Rec(2010)12 of the Committee of Ministers provides in Article 54 that remuneration of judges should be "commensurate with their profession and responsibilities", in order, inter alia, to "shield them from inducements aimed at influencing their decisions"<sup>[11]</sup>. Taking this into account, any additional salary or any other emolument granted by virtue solely of a judge's specialisation does not seem justified, because the specifics of the profession and the burden of responsibilities, as a rule, are of equal weight for the generalist and the specialist judge. Additional salary, other emoluments or certain remuneration (e.g. in case of night duty) may be justified where specific grounds can be identified which permit the conclusion that either the specifics of the profession of the specialist judge or the burden of his/her responsibilities (including a personal burden that may come with an assignment in a specialist function) demand such compensation.

58. The rules of ethics and of criminal, civil and disciplinary liability of judges must not differ between generalist and specialised judges. Standards of judicial conduct as set out in CCJE Opinion No. 3 (2002) must apply equally to specialist and non-specialist judges. Sufficient grounds for any different treatment have not been identified.

59. If a specialist judge is likely to be dealing with only a small and specialist group of lawyers, or even litigants, he/she may need to take caution in his own conduct to ensure his/her impartiality and independence.

## **2. Evaluation and promotion**

60. As regards evaluation of a judge's work performance, the criteria are manifold and well known (see CCJE Opinions Nos. 3 and 10 (2007)). Specialisation in itself does not justify granting a higher value to the specialist judge's work. Flexibility shown in accepting one or more fields of specialisation may be a relevant factor for evaluation of a judge's work performance.

61. The council for the judiciary or other independent body responsible for evaluating the performance of judges should, therefore, be very careful in determining whether and to what extent the performance of an individual specialist judge is comparable to that of a generalist judge. This exercise requires particular diligence and consideration, as it is generally easier to obtain a clear picture of a generalist's performance than that of a specialist who may be a member of a small group and whose work may not be as transparent or known for the evaluator.

62. With regard to promotion, similar considerations apply<sup>[12]</sup>. In the CCJE's view to grant earlier promotions to specialist judges just because of their specialisation is not justifiable.

## **3. Availability of training and specialisation**

63. The principles set out in the CCJE Opinion No. 4 (2003) for general training apply equally to specialist training. It follows from the fact that, in principle, the status of specialist judges does not differ from that of generalist judges that all the requirements as to safeguarding judges' independence and as to providing the best possible quality of training apply both to the generalist judges' and the specialist judges' fields. Generally, training courses should be open to all judges.

64. In principle, a judge's wish to specialise should be respected. In this regard the CCJE refers to its Opinion No. 10, and in particular to the provisions dealing with the selection of judges. Equally, sufficient training<sup>[13]</sup> should be available within a reasonable time once such a wish is known. Such training should be offered prior to the judge's assignment in the specialist field and it should be completed before starting the new functions.

65. There must be a balance between training requirements and their usefulness and, on the other hand, the resources available. Therefore, specialist training cannot, for example, be expected where resources for such training cannot be provided or could only be provided at the expense of more important training needs. Assignment in a specialist field cannot be demanded if, for example, the expected caseload in the respective field is too small to justify specialist courts or panels. The size of the court, of the court district, of the region, even of the state, may warrant different solutions as to specialisation and with respect to training in special fields. Where appropriate, however, co-operation in continuous training across national borders could be helpful.

#### **4. Role of the Council for the Judiciary**

66. The powers and responsibilities of a high council for the judiciary, where such a body exists, or an equivalent body, have to be applied in the same manner to generalist and specialist judges. Specialists should be represented or have the opportunity to present their problems in the same way as generalists. Any preferential treatment of one group or another should be avoided, in the public interest.

#### **5. Specialisation and participation in judges' associations**

67. Specialist judges must have the same right as all other judges to become and remain members of judges' associations. In the interests of the cohesion of the judicial body as a whole, separate associations for specialist judges are not desirable. Their specific subject-orientated interests as specialist judges, such as professional exchanges, conferences, meetings etc. should be provided for; however, their status-related interests can and should be safeguarded within a general association of judges.

#### **Conclusions**

- i. The CCJE stresses, above all, the fact that all judges, whether generalist or specialist, must be expert in the art of judging.**
- ii. In principle, the predominant role in judicial adjudication should be undertaken by "generalist" judges.**
- iii. Specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice.**
- iv. Specialist judges and courts should always remain a part of a single judicial body as a whole.**
- v. Specialist judges, like "generalist" judges, must meet the requirements of independence and impartiality in accordance with Article 6 of the European Convention on Human Rights.**
- vi. In principle, generalist and specialist judges should be of equal status. The rules of ethics and liability of judges must be the same for all.**
- vii. Specialisation must not dilute the quality of justice, either in "generalist" courts or in specialist courts.**
- viii. Mobility and flexibility on the part of judges will often be sufficient to meet the needs for specialisation. In principle, the opportunity to specialise and to undertake training as such should be available to all judges. Specialist training should be organised by public judicial training institutions.**
- ix. Rather than having specialist, non-jurist assessors sitting in specialist panels of judges, it is preferable that experts be appointed by the court or the parties and their opinions be subject to challenges and submissions by the parties.**
- x. The powers and responsibilities of a council of the judiciary or similar body should apply equally to generalist and specialist judges.**

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[1] Although these reference documents do not deal specifically with the specialisation of judges, they cover specialist judges where the principles which they set out are applicable to all judges.

[2] In the CCJE's questionnaire, the following specialisations were identified as examples common in many European countries: Family courts, Juvenile courts, Administrative courts/councils of state, Immigration/Asylum Courts, Courts of public finances, Military Courts, Tax Courts, Labour/social courts, Courts for agricultural contracts, Consumers' claims courts, Small claims courts, Courts for wills and inheritances, Patent/copyrights/trademark courts, Commercial courts, Bankruptcy courts, Courts for land disputes, *Cours d'arbitrage*, Serious crimes courts/courts of assize, Courts for the supervision of criminal investigations (e.g. authorising arrest, wire-tapping etc.), Courts for the supervision of criminal enforcement and custody in penitentiaries.

European Union law stipulates the creation of specialist chambers or courts in specific legal fields such as Community trademarks (Community Trade Mark Courts, Art. 90 of the Regulation (EC) No. 40/94 of the Council of 20 December 1993 on Community trade marks) and Community designs (Community Design Court, Art. 80 of Regulation (EC) No. 6/2002 of the Council of 12 December 2001 on Community designs).

[3] For example, at Assize Courts in several member States “jurors” are defined as persons who are chosen at random to be part of a jury, as opposed to persons who sit as non-legally trained members of a court; see also paragraph 43 below. Such jurors may in criminal cases decide upon the sentence as well as decide the guilt of a defendant, and in civil cases they may decide upon damages.

[4] An example here is a patent court with non-jurist judges having specific technical knowledge.

[5] “Specialist courts” must be distinguished from “ad hoc” or extraordinary courts – see also paragraph 37 below.

[6] As, for example, in the areas of health, industrial accidents, fire, building, technological affairs etc.

[7] See Opinion No. 1 (2001) of the CCJE, paragraphs 57, 59 and 60.

[8] Examples might be the *tribunaux de commerce* in France, labour tribunals in Belgium, Employment Tribunals in the UK.

[9] See examples listed in footnote 2.

[10] In England and Wales the Patent Court is a part of the Chancery Division which deals mostly with property and tax disputes. The Commercial Court is a part of the Queen’s Bench Division, which deals with contract and delict disputes and administrative law issues.

[11] See also CCJE Opinion No. 1, paragraph 61.

[12] See CCJE Opinion No. 1, paragraph 29.

[13] See CCJE Opinion No. 4, paragraph 30.