

## CCBE concerns and propositions regarding the current phase of reactivation of the justice system in the light of the COVID-19 crisis

24/06/2020

The Council of Bars and Law Societies of Europe (the CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The COVID-19 crisis has had a significant impact on the legal profession and the judiciary in general. The CCBE has already issued several statements in this regard, the latest being adopted on the reactivation of justice<sup>1</sup>, the systemic risks of the pandemic for the rule of law<sup>2</sup> as well as regarding contact tracing apps.<sup>3</sup>

The CCBE recently circulated to its members a questionnaire on the implications of the COVID-19 crisis on the legal profession<sup>4</sup>. An evaluation of the feedback received to date highlights a number of urgent matters that still need to be addressed for European lawyers and their clients.

As the legal profession is a key pillar for maintaining and defending the rule of law, the CCBE raises some urgent issues which should be of particular concern in the current phase of reactivation of justice system:

- **Diversity of measures as a threat to fundamental rights**

First, though lockdown measures are being progressively removed everywhere in Europe, the situations seem to, differ remarkably between countries as to the reactivation of the justice system/ court proceedings. It should be noted that significant differences existed already during the lockdowns regarding the access to courts.

What is extremely problematic is that the applicable measures regarding the reactivation of justice system are not only different from country to country but also within the same country, for example, depending on the region concerned. These concerns may become more acute if, for instance, regional lockdown measures are reintroduced to deal with any future outbreaks.

**By highlighting this issue, the CCBE wants to raise awareness among national authorities of different countries on how problematic and unacceptable such diversity of measures is from a fundamental rights perspective, in particular when it comes to equality/ equal treatment of citizens.** It is, therefore, essential to ensure that the measures related to the reactivation of justice system are taken and applied in a coherent and consistent way.

<sup>1</sup> [CCBE Statement on the reactivation of justice in Europe](#), 15/5/2020.

<sup>2</sup> [CCBE Statement about systemic risks for the Rule of Law in times of the pandemic](#), 15/5/2020.

<sup>3</sup> [CCBE Statement on Covid-19 contact tracing apps](#), 15/5/2020.

<sup>4</sup> [Replies to the questionnaire on the implications of the COVID-19 crisis on the legal profession](#), 18/06/2020.

- **Need to ensure the safety of all court users, including parties, witnesses, and lawyers**

Due to the independence of the legal profession in general, lawyers are responsible for taking the necessary safety measures themselves. However, when they are acting in the surroundings of the judiciary, the judiciary bears the responsibility to ensure their safety.

In this regard, it follows that the same level of protection must be guaranteed by the competent national authorities – by providing masks or other protection tools – to all justice professionals and court users, including parties, witnesses, and lawyers. The same principle obviously applies to other public premises, such as prisons and detention/pre-detention premises.

Only premises that offer sufficient space in terms of social distancing should be used and efforts also are required, for instance, to install plexiglass barriers in court rooms etc to prevent aerosols from spreading. Furthermore, national authorities should consider providing, to the maximum possible extent, other (non-judicial) premises where hearings could temporarily take place with sufficient space for the necessary social distancing. This could also help to mitigate the backlogs created by the lockdowns (the other possible ways to mitigate them are discussed below) as all hearings need space, and while certain current premises might no longer be suitable for the new situation.

- **Backlogs and possible ways to mitigate them**

The responses to the recent CCBE questionnaire on the implications of COVID-19 on the legal profession show that in most countries which responded to the questionnaire, the workload in the judiciary is expected to increase as a consequence of COVID-19 and the lockdown although the severity of the situation depends, of course, on the country.

In order to mitigate backlogs as much as possible and enhance access to justice, the following issues are raised:

1. The question of **judicial holidays** for this year (normally taking place during the months of July and August) could be examined in the countries where such holidays exist.

In this context, two different practices of judicial holidays can, however, be distinguished: 1) the practice in place in certain countries where courts are completely closed during a certain period of time but where deadlines are still running, and 2) the other practice where courts are closed but deadlines are also suspended. In both practices, one option could be to consider shortening the closing period of the courts. Regarding the second practice, it could be considered to additionally revoke the suspension of deadlines in a way that deadlines would not run for the same closing period of the courts; taking account the severity of the backlogs in the country in question.

2. As to the **prioritisation of cases** (criminal and civil cases etc.), it can be noted that there was a disparity in prioritisations of cases during the pandemic across Europe.<sup>5</sup> When considering if such prioritisation is still needed, the principle of proportionality should be properly taken into account. If this is the case, lawyers should be involved in and consulted in this regard (without any prejudice to the independence of judges).

Moreover, establishing clear and objective indicators/criteria for the prioritisation of cases would be extremely important from a future perspective in case a second wave or a similar pandemic would occur.

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<sup>5</sup> This was also identified from [a CCBE survey](#) undertaken in May 2020 that provided feedback in relation to restrictions on court working across Europe.

3. In an attempt to keep justice functioning during the COVID-19 pandemic, **technological means** have been used to enable **remote hearings** to be held. As the answers to the questionnaire disclose, there is a great diversity of solutions adopted in different jurisdictions or even different courts in the same jurisdiction. Some jurisdictions have not adopted technological solutions at all. Although the use of differing technologies may not, per se, be important, what is critical is that all technologies used should be equally capable of delivering a fair trial. Any perceived need to reduce backlogs should not sacrifice the consistent delivery of justice at least as well as that delivered by traditional means.
4. When it comes to new technologies at the different stages of judicial process, some governments will consider keeping some online tools and remote hearings also in a post-crisis future. The question to be asked is what, in the longer term, the next steps are, considering the particularities of different cases (criminal and civil cases; cases involving vulnerable adults etc.). This would require some further analysis. However, the countries which are not well-equipped already should urgently develop the infrastructure for the use of online tools and remote hearings for all justice professionals. As a general remark, it is important that all users are also aware of the risks related to the use of online tools and remote hearings and, therefore, particular attention should be paid on the respect of data protection rules as well as human rights and other ethical principles.
5. Moreover, the opportunities and challenges of using **written pleadings** as a substitute for oral hearings to mitigate backlogs should be assessed. The right balance between traditional hearings and written pleadings should be found by each country. In order to achieve this objective, in-depth discussion between all relevant justice professionals is needed.

- **Problems related to legal aid**

On the basis of the responses to the recent CCBE questionnaire, it can also be concluded that lawyers in some countries have encountered serious problems with payments when providing legal aid (although the answers differ significantly between countries and sometimes problems seem to have existed before the COVID-19 crisis).

With legal aid being an essential tool in ensuring the fundamental right of access to justice, it is crucial to ensure that lawyers are remunerated for legal aid services promptly, as already highlighted in several previous CCBE statements. In addition, the possibility of **advance payments** could also be considered as a solution to some of these issues in the current crisis.

- **Urgent measures to be taken to be better prepared in case of negative developments**

In general, the legal profession – as with many other professions – has been heavily impacted by the COVID-19 crisis around Europe – and the reactivation of justice system has also raised some serious concerns as explained above.

Considering the possibility of a second wave or the fact that a similar crisis might occur in future, it is very important to urgently prepare for such a situation immediately.

Not only should the legal profession be better prepared, for instance, by changing certain working habits by making greater use of different online tools etc., but more coherent approaches are needed at national and EU level. For example, lawyers, considering their central role in the administration of justice, should be recognised as key workers during (any future) crisis/emergency situations, exempting them from travel restrictions where travel is required for them to carry out their duties and providing them with access to adequate testing.

The whole judicial system must adapt in response to the problems raised by COVID-19 crisis – lawyers included. When discussing how this should be done, both dialogue and cooperation among all the justice professionals are needed.