

## **“Criminal Law Practice and e-Justice”**

by Fernando Piernavieja Niembro, Member of CCBE e-Justice steering committee.  
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The tremendous development in Information and Communication Technology in recent years has made the World Wide Web Internet an indispensable, necessary and vital communication tool all over the globe, for everybody. We Criminal Lawyers, as any other professional, use and need our computers as an essential part of our work, and, especially in cross-border cases, they have become the main link between us, without which we effectively could not work, or at least it would be much more difficult, slow and expensive to do so.

Information Technology is in fact part of our everyday life. Governments consider it strategically of outstanding importance in all fields and, in relation to Justice, it is our working field. It is acquiring day by day a key importance. Accordingly, the European Union and its institutions, Council, Commission and Parliament for many years has been developing documents, rules and mechanisms towards a wider and better use of the new technology.

At this stage of the game, EU has several actions already in the pipe-line and several projects on the way, based on a **European e-Justice Strategy**. This has also created a sub-group on e-Justice within the **Justice Forum**. Accordingly **CCBE** (Council of European Bars and Law Societies) has set up its own strategy on e-Justice.

In the document "**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**", the heading entitled **Towards a European e-Justice Strategy** states what is understood as **E-Justice**: ....

“The e-Justice approach uses ICT to improve citizens' access to justice and to make legal action more effective, the latter being understood as any type of activity involving the resolution of a dispute or the punishment of criminal behaviour. If judicial systems are to be modernised, the further development of e-Justice is crucial.

European work on **e-Signature** and **e-Identity** is particularly relevant in the legal field, where the authentication of acts is essential.

**For the Commission, e-Justice's primary objective is to help justice to be administered more effectively throughout Europe, for the benefit of citizens.** The first hallmark of priority projects should be that they **help legal professionals work more effectively and citizens obtain justice more easily.** They must also contribute to the implementation of existing European instruments in the field of justice and, potentially, involve all or a large majority of Member States.

In the Commission's view, these projects should be encouraged and successful experiments publicised and repeated. In this respect, the creation of the Justice Forum offers interesting possibilities. An "e-Justice" sub-group will be created within the Forum to serve as a catalyst for the exchange of best practices among national judicial systems and among legal professionals. In the Commission's view, these projects should be encouraged and successful”

Following with the Commission e-Justice strategy these are the **PRIORITIES FOR ACTION (2008-2013):**

**“A European e-Justice portal facilitating access by citizens and enterprises to justice in Europe**

The portal will have at least three functions.

a) Access to information

The portal will have to provide European citizens, in their language, with data on judicial systems and procedures. Ignorance of the rules in force in other Member States is one of the major factors preventing citizens from asserting their rights outside their home country.

In particular, the **portal** will contain:

- **European and national information on victims' rights in criminal cases and their rights to compensation;**
- **the fundamental rights enjoyed by citizens in each Member State (rights of persons charged in criminal proceedings);**
- **fundamental principles relating to citizens' ability to initiate proceedings before a court in another Member State, or to their defence when summoned to appear before such a court.”**

b) Referral

The portal must also refer visitors to existing sites (Eur-lex, Pre-lex, SCADPlus, Eurovoc and IATE), to European legal institutions and to the various existing legal networks and their tools.

Moreover, the portal will direct visitors to certain registers interconnected at European level via links to the bodies that manage these projects<sup>16</sup>.

c) Direct access to certain European procedures

In the long term, fully electronic European procedures could be created. Legal bases already do exist, such as for example the "small claims" regulation<sup>17</sup> and the "payment procedure" regulation

*Continuing the interconnection of criminal records*

Interconnection of criminal records is the area in which e-Justice efforts have progressed the most, illustrating how a project begun by a small number of Member States can gradually take on a genuine European dimension.<sup>1</sup> In 2008, €15 million will be devoted to criminal-record programmes

*Creating a network of secure exchanges for sharing information among judicial authorities* Judicial authorities should be able to exchange confidential data in complete confidence. With regard to criminal matters<sup>22</sup>, this is provided for in several European instruments.

*Facilitating use of videoconferencing*

Several instruments adopted at European level provide for the use of videoconferencing during judicial proceedings. For cultural, linguistic or technical reasons, however, these possibilities remain underused. A recent study by the Council showed that laws in the majority of the Member States authorise videoconferencing. Even so, it is rare that actors in different countries use it to communicate with one another. The benefits of increased videoconferencing are, however, clear: savings of time, money and travel; increased flexibility; etc.

*Aid for translation*

- Development of automated translation Tools

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<sup>1</sup> In 2008, €15 million will be devoted to criminal-record programmes

- Database of legal translators and interpreters
- Online forms for automated translations”<sup>2</sup>

These are the priorities of the e-Justice strategy of the European Commission, and, accordingly, **CCBE**, has settled its own e-Justice strategy in the document “**FIRST IMPLEMENTATION PAPER FOR CCBE E-JUSTICE STRATEGY**”<sup>3</sup>, stating its main objectives, basically as follows:

“**a data base** would offer a structure through which European lawyers can be found and contacted via the e-Justice portal. Without it, there will be no Europe-wide ability to access a lawyer across borders through electronic means, and lawyers will both lose out on the benefit of the initiative and be seen as not part of the electronic age. It is obvious that the database’s structure, despite the divergences of the legal profession’s organization in every EU member state, should be user-friendly. This means that there should be ideally a unique approach to navigate the system without requiring any knowledge of the specific national organization of the legal profession, on the basis of similar lay-out and information options, and offering also a certain language choice. It is proposed that national experts from the CCBE membership who are dealing with data bases at national level should be gathered in the special working group. There should also be experts who would be familiar with the technology of such data bases. One of the first exercises of this group could be a survey on the data bases on lawyers and their structure being in place at national/local/regional level. The special working group would be in constant interaction with the CCBE Steering Committee on e-Justice.”

“implement **a CCBE platform for the validation of electronic signatures**. The idea of a CCBE platform for the validation of electronic signatures is based on the necessity to provide identity management for European lawyers so they are enabled to participate in e-Justice structures. This will be done with the vehicle of an electronic ID card which helps to identify a lawyer and authenticate his/her communications.”

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<sup>2</sup> Brussels, 30.5.2008, COM(2008)329 final, *COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE*

<sup>3</sup> [www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_First\\_ImplementatI\\_1231836210.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_First_ImplementatI_1231836210.pdf)

“The important Pilot project “PenalNet”, is already looking into creating a secure platform for criminal lawyers all over Europe. The CCBE will be involved into this project through a person who follows the project process and is in constant interaction with the special working group and the CCBE steering committee on e-Justice in order to evaluate the opportunities of this pilot project for a CCBE platform. The special working group on the CCBE platform will consist of technical and legal experts from the CCBE membership, and will meet on a regular basis as deemed necessary.”

“Close work with the European Institutions, the Council of Europe, national governments (particularly ministries of justice) The CCBE Steering Committee will also be a first point of contact for working relationships with European and national institutions in order to build up a technically, legally and financially sound implementation of the CCBE e-Justice strategy.”

I must say that a main issue for CCBE has been the **Opening of the European Judicial Network to the legal professions**<sup>4</sup>. “Following an evaluation of the EJM conducted in 2005, the European Commission presented in 2006 a report<sup>5</sup> on the functioning of the EJM and its future perspective with a clear message for a gradual opening of the network to the legal professions.

The support was subsequently conveyed in the Commission’s proposal for a decision amending Council decision 2001/470/EC establishing the EJM<sup>6</sup> submitted in June 2008. In December 2008 the proposed amendment was adopted by the European Parliament at first reading under the co-decision procedure.

The last stage, formal adoption by the Council, is foreseen under the Czech Presidency of the European Union for April 2009. Once adopted, the decision will be published in the Official Journal of the European Union.

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<sup>4</sup> CCBE Note on European Judicial Network (EJM)

<sup>6</sup> For the proposal of the European Commission <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0380:FIN:EN:PDF>

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The *vacatio legis* is agreed by the Member States to be a year and a half. The first activity of the EJM under the new law might be then expected to take place not earlier than December 2010 – a Plenary meeting with the new composition. The long *vacatio legis* is intended to give sufficient time for nomination and designation of the new members.”

**CCBE president, Anne Birgitte Gammeljord** in her appearance before the Council of Ministers "e-Justice" Working Party on 31 March 2009, concentrated on two areas where we have particular concerns, the first relates to the e-Justice portal, and the second outlines our concerns about human rights aspects of e-Justice, and said:

**1. e-Justice portal.** “The CCBE welcomes the development of the e-Justice portal. We have two principal wishes as lawyers for uses of the portal:

1. From the perspective of the citizen

It would be extremely useful for citizens to have a single access point for finding a lawyer in Europe. At present, most – if not all – bars have their own electronic directories, but the aim is to bring these within a single search system. The CCBE does not want to create a new lawyers’ directory, but rather to make a system that links to the existing directories in each country. Since these directories are currently in different languages, with different navigation systems and probably differently presented information, there will be future work in trying to work towards convergence of their structures. It is important that the necessary means are allocated to this;

2. From the perspective of lawyers

A specific use for lawyers would be e-identity management through the portal, to enable lawyers to undertake cross-order transactions with official registries in the member states on e.g. recorded insolvencies, company registrations, land registrations etc., and secure communication with judicial authorities in other Member States. The CCBE has already developed an e-identity card which is being adopted by more and more bars with guidelines

for interoperability. At the same time, we are participating in the PenalNet project, led by the Spanish Bar (CGAE), which is introducing the use of the CCBE identity card for secure electronic communications between 300 criminal lawyers in 5<sup>7</sup> Member States, in a trial funded by the European Commission. There will be need to be a close co-operation in the future between the CCBE and the e-Justice portal contractor, Unisys, as the CCBE would suggest to build on existing structures and to ensure that lawyers will be able to use the e-Justice portal for various electronic transactions.”

**2. Human rights concerns.** In our opinion, we also need to discuss the human rights aspects of some of the innovations which e-Justice will bring. I shall touch on two aspects, while reminding those present that they are in no way the only ones: video-conferencing, and the linking of criminal databases:

#### Video-conferencing

Of course, the CCBE understands that the use of video-conferencing systems provides a number of advantages. But we would like to have a discussion of the possible drawbacks, and in particular the human rights concerns, before there is a headlong rush to adopt video-conferencing cross-border. Our main concerns are as follows:

- If there is a trend towards using video-conferencing for cost reasons, this could eventually result in it being the main or only form of access to a suspect held in custody in cross-border cases. This is not acceptable;
- Some practitioners may be reluctant to rely on the confidentiality of communication with clients through video conferencing because of interception or surveillance risks. It is very important that, if there is video conferencing, the necessary safeguards to protect confidentiality can be assured. Any breach of confidentiality, be it by a third party or agency, should be a criminal offence, and such information should not be able to be relied upon in the proceedings. The necessary safeguards across all the Member States which use video-conferencing should therefore be harmonised;

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<sup>7</sup> France, Hungary, Italy, Romania and Spain

- It is essential that clients have ready access in person to their lawyers to build up the relationship of trust and confidence. This will be more difficult in cross-border cases using video-conferencing, also due to the frequent need for interpreters;
- In cross-border criminal cases, particularly where the defendant might not be a native speaker and will be subject to different cultural influences, the judge might not be able to examine so easily the nuances of the defendant's appearance and responses through a video-link. Actually, it is very difficult.

### Linking of criminal databases

The CCBE is concerned about a number of issues related to the link-up. For instance:

- what is a crime in a particular jurisdiction? - what may be a crime in one country might not be a crime in another country;
- what about the age of criminal responsibility? It varies across Europe;
- who would have access to the database?;
- what purpose can the information be used for?;
- the accuracy, access, use and understanding of the information stored must be clarified. How can any errors or misunderstandings be rectified, and how can one appeal against misinformation on the criminal record database?
- there is an issue as to delay in putting information onto the database, and also the removal of information which has been successfully appealed”

The CCBE stands ready to assist the institutions insofar as possible to ensure the successful implementation of the e-Justice initiative for the benefit of the rule of law and the citizens of the European Union.”<sup>8</sup>

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<sup>8</sup> *“The view of European Lawyers on the European e-Justice initiative”*



We Criminal lawyers are the first to push ahead any instrument that may help us enhance our practice on behalf of the suspects and defendants whom we represent. Two projects, strictly applied to criminal practitioners, are now on the way, one is the joint venture between CCBE and ECBA to study European Cross Border Legal Aid, just recently granted by the European Commission, and the other is the introduction of Penal Net.

As Magistrates, Prosecutors and Police have their own information and communications electronic portals, which allow them to work with fast and secure tools in order to prevent crime, under the bases of the equality of arms principle, we criminal lawyers need the same sort of instruments for something as important to the rule of law as the procedural rights of European citizens.

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Málaga, 16/4/09