



ACADEMIC ARTICLES

Video-Hearings in Europe Before, During and After the COVID-19 Pandemic

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While they were possible before in many countries, the COVID-19 crisis accelerated the use of remote- or video-hearings in courts in many European countries. It is unlikely that video-hearings will disappear with the end of the pandemic. Looking forward to the best possible use of remote hearings for the future, and to a new understanding how justice is done outside a physical courtroom, collecting and comparing the different legal frameworks and experiences in as many countries as possible can provide invaluable resources. This paper presents information on legal approaches and experiences provided by active and former members of the Council of Europe's Consultative Council of European Judges (CCJE) from Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Finland, France, Germany, Ireland, Italy, Lithuania, Norway, Poland, Romania, Russia, San Marino, Spain, Sweden, Switzerland, Ukraine and the United Kingdom who generously replied to a questionnaire sent out by the CCJE secretariat in December 2020 on my behalf. The paper addresses the legal framework, the technical side of video-hearings and different experiences and challenges.

Key words: Court Administration; remote courts; video-hearings

1. Introduction

While they were possible before in many countries, the COVID-19 crisis accelerated the use of remote-hearings in courts. In many countries, courts had to close for a while. Video-hearings or remote-hearings helped to provide access to justice and kept the justice system working through an indefinite and fluctuating crisis.¹ During the crisis, not only was the technology improved, but also judges' familiarity with it and confidence in it grew, even if only grudgingly at times. Therefore, it is unlikely that video-hearings will disappear with the end of the pandemic. In a survey among the attendees of the online E-justice Conference organised by the German Federal Ministry of Justice on December 8th 2020, on the occasion of the German presidency of the Council of the European Union, I took the opportunity to ask the audience what they thought about the future. 70% replied that three years from now, video-hearings would be normal all over Europe.

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¹ See e.g., CCJE (2020)2, para 14.

To make the best possible use of remote-hearings in the future, a number of challenges must be addressed: Legal frameworks are needed which secure fair trial rights and provide appropriate access to the public and the media. Technical solutions are needed which are both user-friendly and protect sensitive data. Moreover, when traditional hearings are possible again, decisions must be made as to which hearings are suitable for video-hearings and which conflicts might be solved more effectively with parties and judges present in one courtroom.

However, the challenges go even deeper. Solving technical problems requires new interactions. The case of a hearing in the 394th US District Court in Texas, where one lawyer who was using the laptop of an assistant found himself with a cat face filter provides a peculiar but telling example.² The way judges, parties and advocates interact in hearings needs to be adjusted to these new circumstances. While the set-up and design of courtrooms assigns the different parts in a hearing and establishes an atmosphere of seriousness, the same is not necessarily the case in a video-hearing. In our culture, justice was designed to be exercised at a specific place, the courthouse.³ With remote hearings, it might be asked if justice still “knows its place”.

Collecting and comparing different legal frameworks and experiences in as many countries as possible can provide important resources for the discussions needed to answer these questions.⁴ This paper aims at making a modest contributing to this endeavor. After this introduction (1), the paper addresses the legal framework (2) and the technical side of remote hearings (3). Different experiences and challenges are then addressed (4) before a conclusion with some observations for the future (5). Neither the scope of this paper nor the information on which it is based allows the author to provide information in as much detail as the important issues deserve. Much more work needs to be done. While the paper focusses on making experiences from different judiciaries available to the reader, it offers some tentative observations in relation to the questions posed above.

The data used for this article was mainly provided by former and active members of the Council of Europe's Consultative Council of European Judges (CCJE)⁵ from Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Finland, France, Germany, Ireland, Italy, Lithuania, Norway, Poland, Romania, Russia, San Marino, Spain, Sweden and Ukraine who generously replied to a questionnaire sent out by the CCJE secretariat in December 2020 on my behalf. In the questionnaire, I asked about the regulation of video-hearings before the pandemic, experiences during the pandemic, whether the consent of both parties was necessary and about the technical systems used. Because I made a mistake in the drafting of the questionnaire, only a smaller number of members who expressed interest in the project were asked in a follow-up question if and how the public gains access to video-hearings. Since not all participants referred to legal regulation or other sources, the depth of the information provided varies. I also discuss Switzerland and the UK on the basis of publicly available information. Experiences from countries outside Europe, for example from the US state of Michigan, are only taken into account as a contrast to European discussions, or to provide a more complete picture, for example when it comes to technical solutions used. The views expressed in this paper are my own and do not necessarily coincide with the view of the CCJE and its

² <https://edition.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html>, <https://youtu.be/IGOfzZOyl8> (last visited 11.2.2021).

³ See Susskind, 2019, Chapter 5.

⁴ One important initiative for exchange is <https://remotecourts.org> (last visited 07.02.2021).

⁵ <https://www.coe.int/en/web/ccje> (last visited 18.02.2021).

delegates. However, maybe in the future, the CCJE will address these important issues in an Opinion.

The term remote-hearing in this article refers to a court hearing where one, several or all participants including witnesses, experts, parties, advocates and judges are not present in one courtroom, but connected via telephone or video-conference systems. The term video-hearings will be used interchangeably with the term remote-hearing in cases where all or some participants are connected through a video-conference system which allows participants to see each other using a camera.

2. Regulation of remote hearings

2.1 Before the pandemic

Video-hearings did not start with the pandemic. Important experiences were already made in Australia,⁶ Singapore, and the United States. However, this article focusses on Europe. In 2009, as part of the European e-justice program, a booklet on cross-border video-hearings was prepared.⁷ In Council of Europe countries such as Albania,⁸ Austria,⁹ Belgium,¹⁰ Croatia,¹¹ the Czech Republic,¹² Finland,¹³ France,¹⁴ Germany,¹⁵ Ireland,¹⁶ Italy,¹⁷ Lithuania,¹⁸ Norway,¹⁹ Poland,²⁰ Romania,²¹ Russia,²² Spain,²³ Sweden²⁴ and Ukraine,²⁵ legal regulation for video-hearings was also in place before the pandemic, even if they were not used very often. In some cases, legislation had been introduced in the 1990s or early 2000s to modernize civil procedure or to make criminal trials safer. In recent years another wave towards e-justice brought not only initiatives for e-filing, but also improvements in older legislation or introduction of legislation for video-hearings.²⁶ Such laws usually allowed the court to hear witnesses in criminal and civil trials and the accused in criminal trials via video-conference technology, while other participants such as judges, lawyers, parties, were present in the courtroom. However, from the beginning, questions such as fair trial rights and access to the right technology were raised.

⁶ See only: Wallace 2008; Wallace, Roach Anleu, Mack 2018.

⁷ Downloadable at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiQ-ndjK4IbuAhUDAmMBHcWzAsYQFjAAegQIARAC&url=https%3A%2F%2Fjustice.europa.eu%2FfileDownload.do%3Fid%3Df26030b3-ae25-4d08-825f-05152d7bb772&usg=AOvVaw2xvEMT9Rq64_pStjunsXJf (last accessed 15.02.2021); see also the 2013 guide at <https://www.consilium.europa.eu/media/30606/qc3012963enc.pdf> (last accessed 15.02.2021).

⁸ Information kindly provided by the Albanian CCJE member.

⁹ Information kindly provided by the Austrian CCJE member.

¹⁰ Information kindly provided by the Belgian CCJE member.

¹¹ Information kindly provided by the Croatian CCJE member.

¹² Information kindly provided by the Czech CCJE member.

¹³ Information kindly provided by the Finnish CCJE member.

¹⁴ Information kindly provided by the French CCJE member.

¹⁵ § 128a ZPO, § 185 (1a) GVG; § 32 (3) FamFG § 91a FGO; § 102a VwGO; § 110a SGG; §§ 58b, 247a (2) StPO.

¹⁶ Information kindly provided by the Irish CCJE member, Oireachtas Library & Research Service, 2020.

¹⁷ Information kindly provided by the Italian CCJE member.

¹⁸ Information kindly provided by the Lithuanian CCJE member.

¹⁹ Information kindly provided by the Norwegian CCJE member.

²⁰ Information kindly provided by the Polish CCJE member.

²¹ Art. 204 (7) Criminal Procedure Code; Art. 235, Art. 364 (1) (4); Law 254/2013 on Enforcement of Sanctions, Nr. 271/11 April 2016, Article 29 Regulation on the application of law 254/2013.

²² Information kindly provided by the International Cooperation Department of the Supreme Court of the Russian Federation on behalf of the Russian CCJE member.

²³ Information kindly provided by the Spanish CCJE member.

²⁴ Information kindly provided by the Swedish CCJE member.

²⁵ Information kindly provided by the Ukrainian CCJE member.

²⁶ See for Ireland: Oireachtas Library & Research Service, 2020, L&RS *Note: Remote Court Hearings*, 4–5.

2.1.1 Austria and Germany

In the early 2000s, video-hearings were introduced in Austria and Germany. In 2004 and 2005, the legal basis to hear parties, experts and witnesses in civil procedures and the accused and witnesses in criminal procedures via video was established in Austria.²⁷ In Germany, video-hearings in courts were introduced in 1998 for the protection of witnesses in criminal procedures. A first attempt to introduce video-hearings of experts, witnesses and advocates in civil proceedings was made in 2002. In § 128a of the Civil Procedure Act, a legal basis was established, similar regulations were introduced in Administrative and Family Procedural Codes.²⁸ However, in criminal proceedings, only witnesses may be heard remotely, an approach quite different from the rules in other European countries.

In both Austria and Germany, the reform triggered a discussion of the principles of oral proceedings under the terms *Unmittelbarkeit* (immediacy) and *Mündlichkeit* (orality).²⁹ The German legislature saw video-hearings as part of a customer-oriented judiciary and argued that possible restrictions to the immediacy of proceedings were more than balanced by possibly faster, safer proceedings.³⁰

Even though the legal basis was there, video-hearings were not used much before the pandemic in Austria and Germany.³¹ However, in Germany, there were some experiences with video-hearings at tax courts³² between parties and courts using Cisco Video Communication Server (VCS). The tax authorities regularly appearing as parties installed the necessary technical equipment. Law firms representing taxpayers either purchased the equipment as well or used the facilities of the tax authorities.³³ Such an approach might be taken in the future to allow parties access to video-hearings who lack the funds to purchase the right equipment.

2.1.2 Belgium

In Belgium,³⁴ the 2002 the criminal proceedings Act³⁵ has allowed the use of video-conference technology for the hearings of witnesses and experts in criminal matters under certain conditions. The Civil Procedure Code does not mention the possibility to hear witnesses via video-conference. However, it is not forbidden, and article 10.4 of “*Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*” might be seen as sufficient legal basis.

A first attempt to introduce video-hearings in courts on a larger scale was unsuccessful. A law of 29 January 2016 “*relative à l’utilisation de la vidéoconférence pour la comparution d’inculpés en détention préventive*” allowed the tribunal to order the appearance of an accused awaiting trial in detention in a pre-trial hearings concerning the detention or at the end of the investigation. The law did not concern the actual trial and did not require the consent of the accused. The law was quashed by the Constitutional Court on 21 June 2018.³⁶ The court

²⁷ Information kindly provided by the Austrian CCJE member.

²⁸ Irskens, 2020, p. 10–11.

²⁹ See for the discussion in Germany with further references: Sauerwein, 2002, p. 155; Fritsche, 2020, para 1,9.

³⁰ BT-Drucks 17/1224 p. 10–12.

³¹ Austria: Information kindly provided by the Austrian CCJE-member. See for Germany: Grab, 2020, p. 520; Schmidt, Saam 2020, p. 216.

³² Herbert 2019.

³³ Information kindly provided by a German tax court judge in a personal conversation.

³⁴ Information kindly provided by the Belgian CCJE member.

³⁵ Articles 112, 158bis and 298 of the Criminal proceedings Act.

³⁶ Judgment n° 76/2018, available on <https://www.const-court.be/public/f/2018/2018-076f.pdf> (last visited 20.12.2020).

held that the law violated the Belgian constitution read in conjunction with article 7.1 of the European Convention on Human Rights and with article 15.1 of the International Covenant on Civil and Political Rights because it did not establish any preconditions under which the tribunal could order a video-hearing. Moreover, the law left the organisation of such hearings to royal decree, thereby violating the principle of due process.

2.1.3 Finland, Sweden

In Finland,³⁷ it has been possible since 2003 to hear witnesses and also parties for probative purposes in video-hearings. Since the beginning of 2019, parties in criminal and civil cases can participate in the main hearing through video-conference. This legislation was mainly intended to enable the hearing of witnesses who could not travel or to prevent the transportation of an accused or defendants in custody.³⁸

In Sweden,³⁹ there was also a legal basis for a party to attend a court hearing via video-conference before the pandemic. However, just as in other countries, before the pandemic it was uncommon for all parties to attend a hearing via video-conference. While all parties should attend a hearing in person in principle, the court could decide, for example, if an especially costly journey became necessary, or for safety reasons, that a party should or could attend a court hearing via video-conference. A thorough evaluation considering matters such as a person's wish to attend and the nature of the case, has always been part of the court's decision-making.⁴⁰

2.1.4 Italy

In Italy, the dangers of the Mafia-trials of the 1990s had a significant influence on the development and use of video-hearings in courts. Different legal provisions allowing video-hearings have been used in the Italian judiciary for more than 20 years. Specific, secure audio-visual systems are provided by the Italian Ministry of Justice.⁴¹

Since 1992, the Italian Code of Criminal Procedure⁴² provided that "collaboratori di giustizia", undercover agents and other persons likely to be subjected to the risk of pressure or danger for their safety, can testify via video-conference technology. In this case, the judge decides after hearing the parties, but may order a video-hearing without their consent. In the place where the witness is located, there is a clerk present to ensure the regularity of the cross-examination. The Constitutional Court, called to rule on the legitimacy of this method of (remote) cross-examination, considered that the law was in accordance with the Constitution and the principles of due process.⁴³

The fight against organised crime in the Mafia-trials of the 1990s showed not only the need to protect witnesses but also the advantages of not transferring dangerous criminals from secure prisons to courtrooms. In a courtroom or on the way to it, dangerous criminals could (re)establish contact with other defendants and try to escape. Moreover, the need to transfer detainees to different courts to attend different proceedings could cause serious delays. Therefore, since 1998, Italian criminal procedural law provided that in trials concerning organised crimes or terrorism, defendants held in prison participate

³⁷ Information kindly provided by the Finish CCJE member.

³⁸ Information kindly provided by the Finish CCJE member.

³⁹ Information kindly provided by the Swedish CCJE member.

⁴⁰ Information kindly provided by the Swedish CCJE member.

⁴¹ Information kindly provided by the Italian CCJE representative.

⁴² Article 147-bis implementing provisions - disposizioni di attuazione del codice di procedura penale.

⁴³ Judgement no. 342-22/7/1999.

by video-conference.⁴⁴ The video-conference is implemented by activating a television link between the place of detention of the accused and the courtroom. Moreover, an accused detained abroad who cannot be transferred to Italy, may also attend a criminal hearing via video-conference.⁴⁵

2.1.5 France

In France, video-hearings were introduced into criminal procedural for similar reasons as in Italy. The articles 706-71 and 706-71-1 of the code de procedure pénale provide for the use of video-hearings with the consent of the accused. This possibility has been widely used for several years now, especially in order to avoid the transfer of detainees to the courts where the trials are held. Though the quality of the transmission varies, there seems to be support among public authorities for the judiciary to make use of video-hearings as much as possible.⁴⁶

2.1.6 Lithuania

In Lithuania,⁴⁷ extensive legislation was introduced to allow the use of video-conferences to hear parties and witnesses in civil proceedings in 2011 (Article 175 of the Code of Civil Procedure).⁴⁸ In the area of criminal procedure, legislation followed suit in the years 2013–2016: participation via video- and audio-link was allowed for interpreters,⁴⁹ for detainees in hearings concerning the duration of their detention or other pre-trial measures,⁵⁰ for the questioning of suspects or accused in detention,⁵¹ for the sentenced person in an oral hearing on appeal⁵² and the hearing of experts⁵³ and witnesses who cannot participate in person⁵⁴ or need to stay anonymous in the interest of their safety.⁵⁵

In 2017, administrative procedural law followed suit and allowed the participation of participants in the proceedings, witnesses, experts and interpreters, in part 7 of Article 13 of the Law on Administrative Proceedings.⁵⁶ In 2014, the Council of Judges established a description of the procedure for video-conference equipment.⁵⁷

2.1.7 Russia

On behalf of the Russian CCJE member, the International Cooperation Department of the Supreme Court of the Russian Federation informed me that video-hearings have been used in Russian courts for more than 20 years now; well over a million hearings have

⁴⁴ Article 146-bis criminal procedure code, introduced by law 11/1998 and subsequent amendments; art.134-bis criminal procedure code, introduced by law 4/2011.

⁴⁵ Article 205-ter implementing provisions of the criminal procedure code.

⁴⁶ Information kindly provided by the French CCJE representative.

⁴⁷ Information kindly provided by the Lithuanian CCJE representative.

⁴⁸ Article added to the Code in 2011: No. XI-1480, 21/06/2011, Official Gazette, 2011, No. 85-4126 (2011-07-13).

⁴⁹ Article 43 of the CCP; No. XII-2194, 17/12/2015, published in TAR 2015-12-30, i. k. 2015-20993.

⁵⁰ Part 6, Art. 127, CCP, No. XII-2556, 30/06/2016, published in the TAR on 13/07/2016, i.k. 2016-20293, Part 5, Article 233, CCP (No. XII-2556, 30/06/2016, published in the TAR on 13/07/2016, i.k. 2016-20293), Part 1, Art. 130, CCP, No. XII-2556, 30/06/2016, published in the TAR on 13/07/2016, i.k. 2016-20293.

⁵¹ Part 6, Article 189, CCP, No. XII-1848, 23/06/2015, published in TAR 2015-07-09, i. k. 2015-11213); Part 1, Art. 246, CCP; No. XII-1848, 23/06/2015, published in TAR 2015-07-09, i. k. 2015-11213.

⁵² Part 4, Article 375, CCP; No. XII-2556, 30/06/2016, published in TAR 2016-07-13, i. k. 2016-20293.

⁵³ Article 285, CCP; No. XII-498, 2013-07-02, Žin., 2013, Nr. 75-3769 (2013-07-13); Part 5, Art. 286 CCP.

⁵⁴ Part 6, Article 279, CCP; No. XII-498, 2013-07-02, Žin., 2013, Nr. 75-3769 (2013-07-13).

⁵⁵ Article 282, CCP; No. XII-498, 2013-07-02, Žin., 2013, Nr. 75-3769 (2013-07-13).

⁵⁶ No. XIII-609, 2017-07-04, published in TAR 2017-07-19, i. k. 2017-12430.

⁵⁷ Resolution of November 28, 2014 No. 13P-156- (7.1.2).

been conducted with the use of video technologies at this point. This use of video-hearings is enabled by the equipping of all courts and many prisons and pre-trial detentions centres with video-conference technology; a special high-security system is used for these video connections.

The corresponding provisions have existed in procedural legislation before the pandemic.

In civil litigation, the consent of the parties is required for video technologies to be used; in criminal cases, the accused is normally heard in person in the court of first instance and by video-conference on appeal. However, in special cases established in legislation, e.g., terrorism, the court, upon the motion of a party, may decide to hold a video-hearing during a first-instance trial in order to ensure the safety of the trial participants.

2.2 Legal Changes during the pandemic

With the pandemic, courts and legislators had to switch completely to remote hearings without any participant, or only the judge, present in the courtroom. This happened in many countries including Albania, Austria, Croatia, Finland, France, Germany, Hungary,⁵⁸ Ireland, Lithuania, Poland,⁵⁹ Portugal, San Marino, Serbia,⁶⁰ Sweden, Switzerland, Ukraine and the UK. In Greece, the regulatory framework only permitted deliberations to be held remotely; trials were postponed.⁶¹ Preexisting legislation was applied more often, or new legislation introduced video-hearings for the first time. In some countries, preexisting legislation was adapted by emergency legislation or executive regulations. The judiciary took an active role in the process, both helping in the implementation as well as evaluating new legal rules in light of fair trial principles.

2.2.1 New legislation or regulation

In some countries, a legal basis for remote-hearings was introduced with emergency-legislation for the first time. Examples are Andorra,⁶² San Marino,⁶³ Switzerland,⁶⁴ and the UK. In Switzerland, video-hearings in civil proceedings were introduced on the 16th of April 2020 by means of a federal regulation in Article 2–6 COVID- 19-Verordnung Justiz und Verfahrensrecht.⁶⁵ However, these rules do not apply to public deliberations at the Supreme Federal Court. In the UK, there was no legislation concerning remote-hearings. A draft law prepared in 2017 to accompany a pilot project on video-hearings was introduced as part of the Coronavirus Act 2020 in order to provide a legal basis to hold pure video-hearings.⁶⁶

In Belgium,⁶⁷ during the pandemic, a “special powers Royal decree” of 9 April 2020 ordered that all *civil* cases put on the agenda to be pleaded from April 11th until June 17th were automatically taken under advisement on the basis of the written submissions, without pleadings.

⁵⁸ ODHIR, 2020, 22.

⁵⁹ ODHIR, 2020, 22.

⁶⁰ ODHIR, 2020, 22.

⁶¹ ODHIR, 2020, 22.

⁶² Information kindly provided by the CCJE representative from Andorra: loi 5/2020 de nouvelles mesures exceptionnelles et urgents par la pandémie SARS-CoV-2, 18.04.2020.

⁶³ Information kindly provided by the CCJE representative for San Marino: art. 1 Decreto Legge 30/04/2020 n. 66, art. 8 Decreto Legge 27/05/2020 n. 93, and art. 17 Decreto Legge 26/11/2020 n. 206.

⁶⁴ Article 2-6 COVID- 19-Verordnung Justiz und Verfahrensrecht Kettiger, Jusletter 04.05.2020; see also Kettiger/Lienhard in this special issue.

⁶⁵ See for a discussion of the constitutional basis for this regulation: Kettiger, Jusletter 04.05.2020, para 5–8.

⁶⁶ For a detailed analysis of the development see: Sorabji forthcoming.

⁶⁷ Information kindly provided by the Belgian CCJE representative.

However, pursuant to that decree,⁶⁸ parties or the judge had the right to disagree with the written procedure, and, in these cases, the decree allowed the judge to decide that the hearing would be held by video-conference.

In criminal proceedings in Belgium, legislative reform on video-hearings has not been successful so far. After the abovementioned law of 29 January 2016, that was quashed by the Constitutional Court, there was a new attempt to introduce video-hearings with a draft bill of 27th May 2020 that proposed to authorize the investigating court or the trial judge to order a hearing by video-conference for a detained person without his consent in case of a risk to public health or public order, or for the safety of other parties to the trial, and, in other cases, with his consent. However, several stakeholders strongly opposed this draft, and the Minister of Justice in office then decided to abandon it.⁶⁹

The recently appointed Minister of Justice took up the project again and declared in his General policy note of 4th November 2020 his intention to create the legal frameworks necessary to organize hearings by video-conference.⁷⁰ A draft text, submitted to stakeholders in November 2020, included temporary provisions on the standards to be met in the Covid-context (valid until 31st March 2021) for remote hearings in civil and criminal proceedings. While the draft act seemed to provide that remote hearings could be held in some categories of civil proceedings apparently without the consent of the parties, remote procedures in criminal trials and before investigative courts could only be allowed if the accused was in detention and agreed with his lawyer to the hearing by video-conference. However, after a negative assessment by the Conseil d'État⁷¹ of the provisions concerning criminal procedures, all provisions concerning remote hearings were removed from the draft act.⁷² The Conseil d'État in its opinion stressed unsolved problems of data protection when a US-software is used, the possibility to record the hearing without permission and the lack of access of the public to such remote hearings. The latter is of course a valid point, which will come up again in this article (3.1).

In some countries, the legal basis for holding remote hearings was unclear, as in Bulgaria, where judges acted on the basis of a governmental recommendation and in Serbia, where a letter by the minister of justice had to be clarified first by the President and Prime Minister and then by the High Judicial Council.⁷³

2.2.2 Adaptation

In countries where a legal basis for video-hearings had been introduced before the pandemic, legislation was expanded during the pandemic, as for example in Austria, France,⁷⁴ Ireland, Italy, Norway and Poland.

In Austria, legislation⁷⁵ allows, for a limited time, hearings to be held remotely with the consent of the parties in civil procedures. The law also allows to hold hearings remotely in

⁶⁸ Royal decree n° 2 of 9 April 2020, art. 2, § 2, al. 5. This decree was issued pursuant to the special powers law of 27 March 2020 empowering the government to take measures in the fields of judicial procedures and the management of courts.

⁶⁹ <https://www.lachambre.be/FLWB/PDF/55/1295/55K1295001.pdf> (last visited 30.12.2020).

⁷⁰ <https://www.lachambre.be/FLWB/PDF/55/1580/55K1580016.pdf> (last visited 27.12.2020).

⁷¹ <https://www.lesoir.be/340904/article/2020-12-01/coronavirus-le-conseil-detat-recalle-la-justice-par-visioconferance>; <https://www.lachambre.be/flwb/pdf/55/1668/55K1668001.pdf> p. 88 (last visited 27.12.2020).

⁷² <https://www.lachambre.be/flwb/pdf/55/1668/55K1668001.pdf> (last visited 27.12.2020).

⁷³ ODHIR 2020, 21.

⁷⁴ Ordonnance n° 2020-303 du 25 mars 2020 portant adaptation de règles de procédure pénale sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 <https://www.legi-france.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755529&categorieLien=id> (last visited 27.12.2020).

⁷⁵ 2. Covid-19-Gesetz (BGBl I 16/2020, Artikel 21 Bundesgesetz betreffend Begleitmaßnahmen zu COVID-19 in der Justiz.

criminal cases, especially concerning the detention of suspects or accused. However, jury trials can only be held remotely under special circumstances. In administrative procedures, the law only provided that parties “could” be heard remotely. However, in a decision of October 8th 2020,⁷⁶ the Constitutional Court stressed the importance of hearing parties – even if only remotely- to protect their rights to a fair procedure.

In Ireland, video-hearings had been allowed to hear witnesses but not to hold fully remote hearings. A specific statutory basis to allow fully remote hearings in civil and criminal cases was provided in the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 signed into law in August 2020.⁷⁷

In Italy, the procedural rules adopted following the Covid-19 health emergency have expanded the possibility of using video-hearings in criminal trials. In particular, the law n. 27/2020 established that from 9 March 2020 to 30 June 2020 (a term subsequently extended to 31/7/2020), criminal hearings that do not require the hearing of witnesses other than judicial police officers can be held via remote connections identified by the Ministry of Justice. These provisions do not apply, without the consent of the accused person, to the final hearings (prosecutor’s and attorney’s closing statements) and to those during which witnesses, parties, consultants and experts must be examined. During the second wave of the pandemic, similar rules were adopted at the end of October 2020. They are in force until 31. 1. 2021. If necessary, these rules may be further extended. At the Corte Suprema di Cassazione (Supreme Court of Cassation) most chamber hearings, civil and criminal, are now held remotely. Civil cases are still heard behind closed doors, but Criminal public hearings are usually held remotely on the basis of the appeals filed and the written conclusions of the Public Prosecutor, unless the Attorney General or the defense request a face-to-face hearing.

In Norway, legal changes allowed the extended use of web-based solutions to make remote hearings possible and the streaming of court hearings to ensure open justice.⁷⁸

In Poland, the *“Act on special arrangements related to the prevention, prevention and eradication of COVID-19, other communicable diseases and the crisis situations caused by them of 02.03.2020”*⁷⁹ made provision for remote hearings in civil,⁸⁰ criminal⁸¹ and administrative proceedings.⁸²

2.2.2 The role of the judiciary

In the implementation process, the judiciary took an active role in many countries, especially by providing guidelines on how to conduct fully remote hearings or how to ensure openness to the public, such as the Spanish “Consejo General del Poder Judicial” (CGPJ).⁸³

In Albania, the normative acts 9 and 21 by the Council of Ministers regulated the participation in video-pre-trial hearings and hearings of all parties who had given their consent.

⁷⁶ E 1873/2020-2 https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=fbd0c0f8-4efe-4b5a-b26d-3c0c44c7e600&Position=1&SkipToDocumentPage=True&Abfrage=Vfgh&Entscheidungsart=Undefined&Samm lungnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=True&GZ=E 1873/2020&VonDatum=& BisDatum=10.12.2020&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPag eSize=100&Suchworte=&Dokumentnummer=JFT_20201008_20E01873_00 (last visited 28.12.2020).

⁷⁷ <https://data.oireachtas.ie/ie/oireachtas/act/2020/13/eng/enacted/a1320.pdf> (last visited 27.12.2020).

⁷⁸ Information kindly provided by the CCJE representative from Norway.

⁷⁹ Journal of Laws of 2020, item 11. 1842.

⁸⁰ Article 15zs.

⁸¹ Article 96a; Article 250; Article 374.

⁸² Article 15zs.

⁸³ information kindly provided by the Spanish CJJE representative.

Building on this regulation, the Albanian High Judicial Council issued guidelines on April 27th to implement measures for the organization and administration of courts through alternative communication measures, including a recommendation to use Microsoft Teams.⁸⁴

In Italy, the presidents of tribunals, the courts of appeal and of the Supreme Court of Cassation can decide by means of regulations that some judicial activities are carried out by video-conference. Such regulations are adopted on the basis of agreements with representative bodies of lawyers.⁸⁵

In Lithuania, the Council of Judges took on an active role in the pandemic as well, issuing recommendations promoting remote communication to ensure the safe administration of and the use of video-hearings for continuous and safe court proceedings. These recommendations included advice on how to organize video-hearings including the use of the centralized video-conference equipment.⁸⁶

In the UK, the legal basis provided in Act 2020 left a number of questions open. The judiciary stepped in and issued a number of guidelines⁸⁷ and a good practices guide.⁸⁸ These guidelines made recommendations on a number of organizational issues, including how to evaluate the perspective of the parties, and on how many hearings could be scheduled during one day, given that video-conferences proved more exhausting than traditional hearings. This reliance on such judiciary-made soft-law is particularly interesting with respect to the criminal justice system.⁸⁹

In Bosnia and Herzegovina, the judiciary acted as best as they could without a legal framework for video-hearings. There is no legal basis allowing video-hearings, but in practice, witnesses are heard via video-conference if they are abroad or serious obstacles hinder their presence, just as in procedures at the International Criminal Tribunal for the former Yugoslavia. Since the law was not changed during the pandemic, judges continued their practice, hearing witnesses from other cities via video-conference with the other parties present in the courtroom.⁹⁰

The contribution of the judiciary helped to implement video-hearings and helped to remedy shortcomings of emergency legislation and regulation. The lessons learnt in this process will be important to improve the legal framework in the future.

2.2.3 Consent or no consent

Whether a remote hearing requires the consent of the parties in civil proceedings or of the accused in criminal proceedings is an interesting question that was answered differently by the legislature in different countries. In some cases, for example in France, this gave rise to proceedings in the highest court.

⁸⁴ Information kindly provided by the Albanian CCJE representative.

⁸⁵ Information kindly provided by the Italian CCJE representative.

⁸⁶ Information kindly provided by the Lithuanian CCJE representative.

⁸⁷ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/> (last visited 26.12.2020). https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1-1-1.pdf (last visited 26.12.2020). <https://www.judiciary.uk/wp-content/uploads/2020/08/Message-to-CJJ-and-DJJ-9-April-2020.pdf> (last visited 26.12.2020).

⁸⁸ <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf> (last visited 29.12.2020).

⁸⁹ Sorabji/Vaughan forthcoming.

⁹⁰ Information kindly provided by the CCJE member for Bosnia and Herzegovina.

In Albania, Andorra, Austria, Romania,⁹¹ Russia, Ukraine consent of the parties is necessary. In these countries, video-hearings without the parties' consent are seen as a violation of fair trial rights. In Austria, the law requires consent by the parties and the accused in civil and criminal proceedings. The new Covid-19 Covid-19-Gesetz of 21.03.2020⁹² did not require the same consent explicitly in administrative proceedings. However, there is agreement that consent is necessary to protect the parties' rights under article 6 ECHR and article 47 CFR. Lithuania stressed that consent was required because of basic principles of court proceedings.⁹³

In the Czech Republic, Germany, Ireland, San Marino, and Spain consent is not legally required. However, there are often special rules for criminal proceedings and the wishes of the parties are taken into consideration. In Germany, the legislature previously tried to make video-hearings more attractive in 2013 by removing the need for the consent of both parties in civil, social, tax and administrative proceedings. The court can decide to hold a remote hearing either according to an application of one party or even *ex officio*.⁹⁴ However, in practice, a video-hearing is not conducted against the parties' wishes. In criminal proceeding, remote hearings are limited to hearing witnesses.⁹⁵

In Spain, the consent of the parties is not required, but it has been established that criminal trials, in which the penalty is severe – more than five years imprisonment – must be held in person. In Ireland, consent of the parties is not necessary. However, in Ireland criminal trials have to be dealt face to face still. In Sweden,⁹⁶ Norway and San Marino, consent is not necessary, although the parties' opinions and wishes should always be considered. In the Czech Republic, the consent of parties is not necessary, but the court has a duty to instruct all parties about special conditions of this proceeding.

The example of France shows how controversial the introduction of video-hearings against the wishes of the accused can be. In pre-pandemic times, video-hearings had required the consent of the accused. In pre-pandemic times, however, article 5 of Regulation of March 25th allowed it without consent. The Cour de Cassation held that this did not violate article 6 ECHR because of the singular circumstances of the pandemic.⁹⁷ However, the criminal chamber of the Cour de Cassation brought a constitutional question (question prioritaire de constitutionnalité, QPC) to the Conseil Constitutionnelle on October 13th 2020 to clarify the constitutionality of this provision.⁹⁸ In a decision of the Conseil Constitutionnelle of January 15th 2021, the court declared the provision unconstitutional.⁹⁹ Even before that, a new regulation of November 18th 2020¹⁰⁰ had adapted the rules concerning criminal proceedings further. The regulation was put under the urgent scrutiny of the Conseil d'État upon the application of the defendant in the proceedings concerning the attacks against Charlie Hebdo, who, despite having tested positive, insisted on appearing in person. The Conseil d'État suspended the rules allowing the use of video-hearings for the final submissions in

⁹¹ A new draft law, however, would allow it without the consent of the accused if the court is of the opinion, that the rights or the rights of the accused or other parties are not violated. Information kindly provided by the CCJE representative of Romania.

⁹² BGBl. I 16/2020.

⁹³ Information kindly provided by the CCJE member for Lithuania.

⁹⁴ Irskens, 2020, p. 10–11.

⁹⁵ §§ 58b, 247a (2) Criminal Procedural Code.

⁹⁶ Information kindly provided by the Swedish CCJE member.

⁹⁷ Crim., 22 juillet 2020, pourvoi n° 20-82.213, publié.

⁹⁸ Crim., 13 octobre 2020, QPC n° 20-84.360.

⁹⁹ <https://www.conseil-constitutionnel.fr/decision/2021/2020872QPC.htm> (last visited 07.02.2021).

¹⁰⁰ Ordonnance n° 2020-1401 du 18 novembre 2020, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042532778?r=hgsxnGjiOv>.

criminal trials, stressing the importance of oral arguments in serious criminal proceedings.¹⁰¹ However, the Conseil d'État upheld the use of video-hearings in proceedings concerning the detention of the accused.

This variety in approaches shows that consent is a key issue in need for discussion in the future. The right to be heard and speak in court is fundamental, especially in criminal cases. The fact that so many countries demand consent of the parties and or provide special rules at least for criminal procedures shows that video-hearings are not (yet) considered of equal value; oral argument in the presence of all parties is still seen as the "gold standard". With the improvement of technology, this might change in the future.

3. The technical side

3.1. From internal video-systems to the internet

As discussed above, many countries such as Croatia, Finland, France, Italy, Lithuania, Poland, Russia, Sweden and Ukraine have highly developed systems for video-systems in place. However, these systems were used to communicate between prisons and courts, or between courts, but not necessarily between courts and parties. But even these systems could be useful to make socially distanced hearings possible during the pandemic. In Croatia for example, existing internal video-systems in the courts were used for distanced hearings with the parties in one room and the panel of judges in another room.

During the pandemic, video-hearings via the internet became common in many countries. Moreover, because of the more frequent use, judges demanded more user-friendly systems. Thus, the use of privately owned systems, such as Zoom, Skype and Microsoft became more common and were combined with systems provided by the state.

In Italy, law n. 27/2020 and the follow up legislation adopted at the end of October 2020 provided that not only the specific secure tools provided by the Ministry of Justice could be used during the pandemic, but also the Microsoft Teams or Skype for Business applications.¹⁰²

In the Czech Republic, Polycom is used in every court. However, since many judges require professional assistance using it, some judges try Skype for Business on an experimental basis with the consent of the parties.¹⁰³

The Swedish response explained that Swedish courts have their own video-hearing system which is usually used between courts in different locations and other parties with access to a video-conference system. Since the beginning of the pandemic, the new and more easily accessible system WebRTC has been used to enable parties to attend a video-hearing from home on their own mobile devices.¹⁰⁴

Ukrainian courts, in general, use the internal special software for video-hearings, developed by a special state company, which is the administrator of the unified judicial information and telecommunication system in Ukraine. But there are no restrictions on courts holding video-hearings with other available software that meets the requirements of the legislation.¹⁰⁵

¹⁰¹ <https://www.conseil-etat.fr/actualites/actualites/le-juge-des-referes-suspend-la-possibilite-d-utiliser-la-visio-conference-lors-des-audiences-devant-les-cours-d-assises-et-les-cours-criminelles> (last visited 28.12.2020).

¹⁰² Information kindly provided by the Italian CCJE member. (MVC0 (piattaforma AVAYA-Equinox con codec Life-size), MVC1 (piattaforma AVAYA-Equinox), MVC2 (piattaforma Microsoft Teams), MVC3 (piattaforma Microsoft Skype for Business)).

¹⁰³ Information kindly provided by the CCJE member from the Czech Republic.

¹⁰⁴ Information kindly provided by the Swedish CCJE member.

¹⁰⁵ Information kindly provided by the Ukrainian CCJE member; see also ODHIR 2020, 22.

Private system**In-house system**

- **Skype for Business:** Italy,¹⁰⁶ Switzerland (canton of Bern),¹⁰⁷ Germany, Finland, UK, Czech Rep. on an experimental basis¹⁰⁸
- **Zoom:** Andorra,¹⁰⁹ Austria,¹¹⁰ Lithuania,¹¹¹ US state of Michigan, Spain (Madrid courts),¹¹² UK, Poland rarely, Switzerland (commercial court of Zurich),¹¹³ Singapore,¹¹⁴ Supreme Court of Victoria,¹¹⁵ New Zealand¹¹⁶
- **CISCO Webex:** Germany, San Marino, Sweden, Switzerland (cantons Basel Landschaft and Zurich),¹¹⁷ Spain,¹¹⁸ Belgium, Poland rarely, UK Supreme Court,¹¹⁹ Brazil¹²⁰
- **Microsoft Teams:** Albania¹²¹, Croatia, Italy, Poland, UK, Federal Courts and some State Courts in Australia,¹²² Malaysia,¹²³ Kazakhstan¹²⁴
- **PEXIP VMS:** Ireland¹²⁵
- **WebRTC:** Sweden¹²⁶
- **Polycom:** Czech Rep,¹²⁷ Romania, Qatar¹²⁸
- **Jitsi:** Poland, Switzerland
- **TrueConf:** Kazakhstan¹²⁹
- Norway (Athea Meetanywhere, compatible to all private platforms)
- Finland
- France
- Italy
- Poland (SCOPIA)
- Ukraine,
- Russia (Justitia)
- Other bespoke platforms: China,¹³⁰ South Korea¹³¹

The following illustration shows the different systems used in the countries discussed in this paper, complemented by information on other legal systems.

The Standing International Forum of Commercial Courts have produced a memorandum in May 2020 to assist courts with the choice and use of technical platforms.¹³²

¹⁰⁶ Information kindly provided by the Italian CCJE representative.

¹⁰⁷ Information kindly provided by Daniel Kettiger.

¹⁰⁸ Information kindly provided by the Czech CCJE representative.

¹⁰⁹ Information kindly provided by the CCJE representative from Andorra.

¹¹⁰ Information kindly provided by the Austrian CCJE representative.

¹¹¹ Information kindly provided by the Lithuanian CCJE representative.

¹¹² Information kindly provided by the Spanish CCJE representative.

¹¹³ Information kindly provided by Daniel Kettiger.

¹¹⁴ SIFOCC (2020) p. 5.

¹¹⁵ SIFOCC (2020) p. 5.

¹¹⁶ SIFOCC (2020) p. 5.

¹¹⁷ Information kindly provided by Daniel Kettiger.

¹¹⁸ Information kindly provided by the Spanish CCJE representative.

¹¹⁹ SIFOCC (2020) p. 5.

¹²⁰ SIFOCC (2020) p. 5.

¹²¹ High Judicial Council, by decision no. 145, dated 27.04.202.

¹²² SIFOCC (2020) p. 5; <https://www.supremecourt.vic.gov.au/law-and-practice/virtual-hearings>.

¹²³ SIFOCC (2020) p. 5.

¹²⁴ SIFOCC (2020) p. 5.

¹²⁵ Oireachtas Library & Research Service, 2020, p. 8.

¹²⁶ Information kindly provided by the Swedish CCJE member.

¹²⁷ Information kindly provided by the Czech CCJE representative.

¹²⁸ SIFOCC (2020) p. 5.

¹²⁹ SIFOCC (2020) p. 5.

¹³⁰ SIFOCC (2020) p. 5.

¹³¹ SIFOCC (2020) p. 5.

¹³² SIFOCC (2020) p. 5.

In choosing a platform for video-hearings, data-security is of special importance. Therefore, in Europe, Zoom,¹³³ and other private owned systems are regarded with mistrust because of data protection reasons, despite their stability and user-friendliness. In Austria, Sweden, Germany¹³⁴ and Switzerland,¹³⁵ such systems are used on the courts own servers (on premises). In other countries, for example in the US, this is seen as less problematic. According to the Chief Justice of the Supreme Court of Michigan, in Michigan, judges were equipped with Zoom licenses before the pandemic. During the crisis, courts went completely remote to keep the judiciary up and running, so that until September, nearly 1000 judges and other courtroom officers had presided over 800,000 hours of remote hearings via Zoom. Zoom's programmers were described as eager to meet the wishes of the judiciary quickly, for example, by creating a tool for a pilot study which guaranteed that jurors appeared at the same place on the screen all the time in the same order.¹³⁶

The responses to my survey showed that user-friendliness is a key issue for choosing a platform. Neither parties nor judges can be expected to consult a technical expert before every hearing. Once the emergency situation of the pandemic is over, the incentive to do so, will be even lower. However, it must also be clear that the judiciary's data must be kept safe. In the future, judiciaries will have to strike the right balance between user-friendliness and easy accessibility on the one hand and data-security and data-protection on the other hand.

3.2 Public Access to Remote Courts

Article 6 ECHR protects the right to a fair and public hearing. According to the case law of the ECtHR, a video-hearing does not necessarily violate fair trial rights.¹³⁷ Access to hearings in important for both citizens and the media to inform and hold the judiciary accountable. But what does a "public hearing" mean for video-hearings? This is another question, one that demonstrates how the judiciary, which has seen itself as doing its work in a physical place, a courtroom, needs to find a new place and a new concept of access to it.

In Germany, courts have adhered to a traditional understanding of "public hearings" in relation to video-hearings: Judges may conduct video-hearings only from their courtrooms, which must be open to the public.¹³⁸ However, while in proceedings with high media attention, problems of capacity need to be solved, in traditional physical hearings, interest is often not very high. In a pandemic, inviting people to visit a physical courtroom raises even more problems. Moreover, it seems strange to connect a remote-hearing to a physical place this way.

Technically, it is easy to stream hearings live and thereby allow a large number of interested citizens to watch. Such an approach to "open justice" was taken by the US state Michigan. Here, all video-hearings are streamed live using YouTube. The court's YouTube channel has more than 25.000 subscribers, and several thousand watch each hearing.¹³⁹ However, this is not a step taken in Europe.

¹³³ The use of Zoom ist fobidden for example in Finish and German courts.

¹³⁴ Irskens, 2020, p. 12.

¹³⁵ Art 4c COVID 19 Verordnung Justiz und Verfahrensrecht, Kettiger, Jusletter 4.5.2020, 16; Hearings have to be recorded and the recording take to the files: Art 4b COVID 19 Verordnung Justiz und Verfahrensrecht, Kettiger, Jusletter 4.5.2020, 15–16.

¹³⁶ Information provided by Chief Justice Bridget McCormack in her presentation at the online conference of the EGPA permanent study group on justice and court administration on 3.9.2020.

¹³⁷ ECtHR *Marcello Viola v. Italy* - 5 October 2006 -app nr. 45106/04.

¹³⁸ Grab, 2020, p. 522.

¹³⁹ Information provided by Chief Justice Bridget McCormack in her presentation at the online conference of the EGPA permanent study group on justice and court administration on 3.9.2020.

In some countries such as Germany and Switzerland, filming court sessions is forbidden.¹⁴⁰ In Germany, section 169 GVG aims at protecting the personality rights of the parties and at securing fair trial rights. The legislator feared that filming might affect the behavior of parties and judges. In 1996, the Federal Constitutional Court declared that the law did not violate the constitution.¹⁴¹ While a prohibition of filming does not necessarily prevent streaming,¹⁴² unauthorized recordings and filming is difficult to prevent, even if it is forbidden. However, during a pandemic, this might be the only way to guarantee access of the public.¹⁴³

In other countries like the UK¹⁴⁴ and Norway,¹⁴⁵ there is live streaming for cases of particular public interest. From other European countries, especially those where filming hearings is forbidden, there are reservations about streaming hearings.¹⁴⁶ In personal conversations, German judges expressed their fear that streaming hearings would lead to attacks on judges via social media. If streaming hearings, or at least all hearings, is not an option, public access must be secured in other ways. In Spain, the “Consejo General del Poder Judicial” (CGPJ) has made recommendations about public access to remote hearings. In case of remote trials, the date and subject is announced. Interested citizens are informed with an access key and informed that recording is not permitted. In case of special interest, for example by the media, the court may record the trial within the limits of data protection laws. In Switzerland,¹⁴⁷ Ireland,¹⁴⁸ Poland, UK and Norway,¹⁴⁹ interested persons, especially journalists, can also ask for the links to join the meeting.¹⁵⁰ In the UK, journalists did report positive experiences and mentioned that they could attend more remote hearings than physical hearings.¹⁵¹ However, access were not as easy for other parts of the public e.g., NGOs and there were differences between first instance courts and senior courts.¹⁵²

In respect of access of the public and the media to remote hearings, there is still a need for thorough discussion. In a justice system with remote-hearings, the term ‘public hearing’ requires rethinking. Positions like the one held in Germany will probably be abandoned in the future following the example of countries like the UK and Norway.

4. Experiences

Considering the way forward, the experiences made during the last months are an invaluable resource for future developments.¹⁵³ This part will first present the experience of selected countries in some detail before a comparative overview discusses experiences and obstacles.

¹⁴⁰ Switzerland: Kettiger, 2020, p. 11–12.

¹⁴¹ BVerfG, 11.01.1996 – 1 BvR 2623/95 – Neue Juristische Wochenschrift 1996, 581.

¹⁴² Kettiger, 2020, p. 11–12.

¹⁴³ CCJE(2020)2 para 16.

¹⁴⁴ See for example for the Supreme Court <https://www.supremecourt.uk/live/court-01.html> and the Court of Appeal: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/the-court-of-appeal-civil-division-live-streaming-of-court-hearings/> (last visited 30.12.2020).

¹⁴⁵ Information kindly provided by the Norwegian CCJE representative.

¹⁴⁶ Kettiger, Jusletter 4.5.2020, 12.

¹⁴⁷ Art. 2 Abs. 3 COVID-19-Verordnung Justiz und Verfahrensrecht.

¹⁴⁸ Oireachtas Library & Research Service, 2020, 11.

¹⁴⁹ Information kindly provided by the Norwegian CCJE member.

¹⁵⁰ This is also the case in many Australian courts running virtual hearings in COVID eg. <https://www.supremecourt.vic.gov.au/news/accessing-virtual-hearings>.

¹⁵¹ Civil Justice Council Report 2020, para 1.24; 7.5–7.9.

¹⁵² Civil Justice Council Report 2020, para 1.25–1.26.

¹⁵³ See also ODIHR, 2020, 20–28.

4.1 Country reports

4.1.1 UK

The change from physical hearings to having almost none conducted face-to-face was made in impressive speed by the judiciary of England and Wales.¹⁵⁴ Moreover, the judiciary took the opportunity to conduct a survey in May 2020 about the challenges and experiences of civil court users in video-hearings, to make use of the “biggest pilot project”¹⁵⁵ ever conducted – even if unwillingly – in the judiciary. A remarkable 1077 people, mostly legal professionals, participated between May 1st and May 15th, and reported their experiences.¹⁵⁶ 71,5% reported positive experiences,¹⁵⁷ even though roughly 50% experienced technical problems.¹⁵⁸ However, compared with face-to-face hearings, participants considered remote hearings less effective and more tiring.¹⁵⁹ Experiences were less positive at lower courts and for in-person litigants. Only very few in-person litigants participated and some who reported feeling that the judge had not listened to them and that the hearing had not been fair.¹⁶⁰ The report expressed concern that these problems might be amplified by the participation of particularly vulnerable litigants-in-person once more low value cases were heard remotely.¹⁶¹ The report thus concluded tentatively that experiences were quite positive for legal professionals at highest courts, especially for short, non-contested hearings where both parties were represented, but that there were more problems in contested hearings.¹⁶² Moreover, there was a need for further research about litigants-in-person, especially in first instance courts,¹⁶³ and also into the question whether remote hearings affected the outcome of hearings.¹⁶⁴ A rapid review of the available studies by Dr. Byrom indicated a number of risks especially for vulnerable parties in remote hearings, especially that the seriousness of the occasion might be underestimated.¹⁶⁵

4.1.2 Austria

The response from Austria reported positive experiences. The use of the new technology depended on the willingness of judges and the situation at the individual court. The size of the courtrooms – in large rooms, socially distanced hearings remained possible – and the technical equipment available. Courts where judges were already working with electronic files often had better technical equipment. According to estimations, 10% of hearings were held remotely. Those judges who used the technical and legal opportunities for remote hearings were grateful for the opportunity to hear the parties personally without masks during the pandemic.

4.1.3 Germany

A judge from the first instance court (Landgericht) Hannover in Germany reported that while she had conducted more than 50 video-hearings between 2017 and 2019, there were between 10 and 20 video-hearings at her court every week during the pandemic.¹⁶⁶ However,

¹⁵⁴ See Sorabji, forthcoming.

¹⁵⁵ Lord Burnett CJ, Evidence to House of Lords' Constitution Select Committee, 13 May 2020, p. 8.

¹⁵⁶ Civil Justice Council Report 2020, para 1.5.

¹⁵⁷ Civil Justice Council Report 2020, para 1.19.

¹⁵⁸ Civil Justice Council Report 2020, para 1.17.

¹⁵⁹ Civil Justice Council Report 2020, para 1.20, 5.85.

¹⁶⁰ Civil Justice Council Report 2020, para 6.2–6.3

¹⁶¹ Civil Justice Council Report 2020, para 1.23,

¹⁶² Civil Justice Council Report 2020, para 1.19.

¹⁶³ Civil Justice Council Report 2020, para 9.10–9.12.

¹⁶⁴ Civil Justice Council Report 2020, para 9.10–9.15; Byrom, 2020.

¹⁶⁵ Byrom, 2020.

¹⁶⁶ Irskens, 2020, p. 13.

other German courts are not necessarily as active. Some judges with whom I had contact in my capacity as a part-time judge, expressed reluctance to be the first to try out new technology and rather hope that they can return to the physical hearings they are used to. In personal conversation, they insisted that a remote hearing could never be as efficient, especially when it came to discussing the settlement of a controversial issue. Moreover, the necessary technical support is not available everywhere.

4.1.4. Norway

Norway reported positive experiences as well. Working groups led by judges identified the need for new legislation and regulation, and a partnership of the National Court Administration and the Ministry of Justice ensured that identified needs were communicated and responded to. According to the information received from the Norwegian CCJE representative, remote hearings are quite usual in Norway now, but often as a combination of traditional court hearings and remote hearings. There were also hybrid solutions where counsels are sitting in their offices and judges at home/in courtrooms with witnesses/parties on video link. At least in some courts, there were virtual courtrooms enabling the judges to do a lot without physical meetings.¹⁶⁷

4.1.5 Poland

In Poland, according to a report of the Ministry of Justice of 19 November 2020, about 3,5% cases were heard via video-conference, most of them at the level of the courts of appeal (3rd tier) – from 0 to 20% – and on the regional (“circuit”) courts level (2nd tier) – from 1,5 to 25% – depending on the court circuit. In the 1st tier (district courts), the figures are lower. The notable differences between different courts and instances were explained by technical deficiencies. Not all courtrooms are equipped with the necessary tools, especially at first instance and not everywhere is the necessary technical support for judges available.

Moreover, many courts have reported as the greatest problem a lack of the necessary hardware and slow Internet connections among parties and advocates, rather than the courts themselves. Low-quality Internet connections resulting in bad sound was a particularly significant problem.¹⁶⁸ Such problems are reported from Germany as well, where a judge said she sometimes spoke to parties on telephone during hearings to ensure that she understood everything.¹⁶⁹

4.1.6 Sweden

The Swedish response stressed that video-hearings had proved very useful and allowed the courts to continue their business without any larger disruptions. Though there were some shorter interruptions due to technical problems, those were mostly due to parties and the court being unaccustomed to the format or due to a lack of necessary technical means.¹⁷⁰

4.2. Experiences and potential obstacles

So far, positive experiences have been reported from different countries, especially Austria, Finland, Ireland, Norway, Sweden, the UK. All agree that remote hearings have increased significantly because of the pandemic, though no statistical data was provided.

There is also widespread agreement that the availability of the right technical equipment and good internet connections is an important factor determining the success of remote

¹⁶⁷ Information kindly provided by the CCJE representative from Norway.

¹⁶⁸ Information kindly provided by the Polish CCJE member.

¹⁶⁹ Irskens, 2020, p. 11–12.

¹⁷⁰ Information kindly provided by the Swedish CCJE member.

hearings. An interesting conclusion by some was that rather than saving time, at least for now, remote hearings are not more efficient than face-to-face hearings.¹⁷¹ Therefore, the hope that remote-hearings alone will suffice to reduce backlogs might be disappointed.

Though the information gathered for this report only allows a limited insight, it is not surprising that there are differences between the member states not only when it comes to the technical equipment of both courts and parties. San Marino reported for example that experiences had not been entirely satisfactory because of slow internet-connections.¹⁷² A lack of the right equipment by parties rather than courts was reported from Poland. Together with the assumption expressed in the UK and the concern shared in Ireland,¹⁷³ that unrepresented parties might have a hard time in remote hearings and might not take such hearings seriously enough, this information should be reason for caution among court administrations, judges and politicians. Technical problems, fair trial rights and the needs of vulnerable litigants in person must be taken into account on the way forward. While younger people can be expected to be familiar with remote communication and might feel quite confident expressing their views this way, this is not necessarily the case among older people, especially where a meager income from a pension or social security does not provide the means to purchase the necessary equipment.

Apart from technical problems, potential threats to the quality of hearings and possible risks to fair trial rights, especially those of the defence are discussed.¹⁷⁴ Insufficient regulation was mentioned as a problem in the response from Croatia. A hearing should provide a space the controlled by the judge so that evidence can be gathered and evaluated appropriately. In remote hearings, judges had less control over nonverbal communication between the parties and witnesses.¹⁷⁵ The decisions by the Conseil d'État reported from Belgium and France show the importance of data protection. The risk of illegal recordings is discussed in Germany,¹⁷⁶ and in the report from Spain.¹⁷⁷

In the responses to my survey, but also confirmed in other reports and private conversations, is the view that judges consider remote hearings necessary during the pandemic but not preferable to face-to-face hearings.¹⁷⁸ This mirrors the conclusion drawn in the UK report that in the future, fully remote hearings might be used for uncontested applications, interlocutory matters and case management¹⁷⁹ rather than the hearing of witnesses and jury-trials. The view that remote hearings are most suitable for cases on appeal or without witnesses was expressed by the Irish sources as well.¹⁸⁰

5. Conclusions for the future

This paper provided a modest insight into how different judiciaries adopted video-hearings to keep the justice system working during the pandemic. But are video-hearings here to stay? In some countries, e.g., Norway¹⁸¹ and the UK, video-hearings are seen as an important tool for the judiciary not only in the pandemic but also in the future.¹⁸² On the way forward, much research and discussion is needed to develop the rules and technical support to develop video-hearings

¹⁷¹ UK: Civil Justice Council Report 2020, para 1.20, 5.85. Information kindly provided by the CCJE representatives from Albania and Croatia; Oireachtas Library & Research Service, 2020, 10.

¹⁷² Information kindly provided by the CCJE representatives from San Marino.

¹⁷³ Oireachtas Library & Research Service, 2020, 11, 15–17.

¹⁷⁴ ODHIR, 2020, 23–28; CCJE(2020)2 para 15.

¹⁷⁵ Point raised in the information kindly provided by the CCJE representative from Croatia.

¹⁷⁶ Irskens, 2020, p. 13.

¹⁷⁷ Information kindly provided by the Spanish CCJE representative.

¹⁷⁸ Albania, Croatia, see also Oireachtas Library & Research Service, 2020, 10–11.

¹⁷⁹ Civil Justice Council Report 2020, para 1.19.

¹⁸⁰ Oireachtas Library & Research Service, 2020, 7, Information kindly provided by the Irish CCJE representative.

¹⁸¹ View expressed in a recently published White Paper on future courts (The Third Power of the State – the Courts in Transition).

¹⁸² See for a perspective for the future: Susskind, 2019.

into a place – even though not a physical one - where justice can be done. The reports from the Council of Europe member states depicted in this article allow some tentative observations.

5.1 Legislation

In many countries, despite preexisting legislation, adaptations were necessary to make completely remote hearings possible. In some countries, courts are working on the basis of emergency legislation. If video-hearings are here to stay, clear legislative bases are needed. In this process, the experiences made during the pandemic must be taken as an invaluable resource.

5.2 Rights of the parties and the public

Legislation needs to secure the rights of the parties, especially in criminal cases. As long as video-hearings are seen as inadequate compared with physical hearings, the wishes of the parties should be taken into account before a video-hearing is planned. However, if video-hearings become more and more common, a refusal to appear in a video-hearing will be accepted less and less even outside the emergency situation of the pandemic. Before this state of a “new normal” can be reached, however, issues like the adequate inclusion of natural litigants and vulnerable parties must be addressed.

Access by the public and the media is essential for a transparent, accountable judiciary, even though it is unlikely that unauthorized recordings can be prevented technically. This can either be achieved through streaming or – in less important cases – by providing links. Countries like England and Wales and Norway can provide guidance in this respect.

While all this involves risks, it should be kept in mind that the status quo is neither perfect for unrepresented and vulnerable parties, nor for ensuring data protection since illegal recordings cannot be completely prevented in a courtroom either.¹⁸³

5.3 Technical challenges

The responses showed that technical problems are an issue in all countries. Without adequate technical equipment and software that is both stable, user-friendly and secure, video-hearings cannot meet their full potential and neither judges nor parties will be confident to use them. Not only do courts need adequate technical support, but parties need it too, at least they need access to places, e.g., in town halls, police-stations or courts, where they can attend court video-hearings with a stable Internet connection and without the need to buy the necessary equipment.

5.4 Limits of video-hearings

Taking a moderately optimistic perspective in relation to video-hearings also requires taking a realistic view on its limits. At least for the near future, before the problems discussed have been adequately solved, video-hearings outside-emergency situations should be used for uncontested hearings with represented parties, maybe also appeals. In the future, highly contested cases with witnesses and highly emotional parties, as for example in family law, might still be heard more efficiently and effectively face-to-face.

5.5. Final words

Lawyers are understood to be conservative, but during the pandemic, judges were ready to adapt to new circumstances and use technology because they had to. Only time will tell if innovations will stick.¹⁸⁴ Some judges express the hope in personal conversation that courts can go back to physical hearings as soon as possible. However, reports and surveys also

¹⁸³ Irskens, 2020, p. 13.

¹⁸⁴ See for an analysis using innovation research the paper “Courts in Victoria during COVID: Will digital innovation stick?” by Anne Wallace and Kathy Lester in this special issue.

showed engagement and positive experiences with video hearings. The CCJE representative from Romania expressed such a positive attitude suggesting that disadvantages could be overcome, and it was the responsibility of judges to find the modalities for remote hearings to give justice a humane and timely face. I would like to join this positive perspective. While the pandemic makes physical hearings too risky now, the climate crisis may discourage travelling in the future and require the use of remote hearings. Moreover, in sparsely populated countries such as Norway,¹⁸⁵ video-hearings offer great opportunities. It is vital that we use all the experiences made during the pandemic to design the best way forward for judiciaries all over Europe.

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Competing Interests

Even though I do not see it as a conflict of interest, I would like to disclose that I work regularly as an expert for the Council of Europe and am currently acting as expert on the preparation of Opinion No. 24 (2021). Before that, I have acted as an expert for CCJE Opinions No. 17(2014), No. 18 (2015), and No. 22 (2019).

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¹⁸⁵ See for an Australian perspective Wallace, 2008.

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