

III

(Preparatory acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

456TH PLENARY SESSION HELD ON 30 SEPTEMBER AND 1 OCTOBER 2009

Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Towards a European e-Justice Strategy’

COM(2008) 329 final

(2009/C 318/13)

Rapporteur: **Mr PEGADO LIZ**

On 30 May 2008, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

‘Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Towards a European e-Justice Strategy’

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 9 September 2009. The rapporteur was Mr PEGADO LIZ.

At its 456th plenary session, held on 30 September and 1 October 2009 (meeting of 30 September), the European Economic and Social Committee unanimously adopted the following opinion.

1. Conclusions and recommendations

1.1 The EESC welcomes this Commission communication entitled *Towards a European e-Justice Strategy* because of its timeliness and because of the structured, well-informed way in which it has been drafted and presented, which has justified the EESC’s decision to deliver an opinion on the matter, despite not having initially been asked to do so.

1.2 The agreement that has since been concluded between the EP, the Council and the Commission and taken into account in the Council of Justice and Home Affairs Ministers resolution of 28 November 2008 on the Action Plan to be implemented in this field up to 2013, together with the recommendations on the initiative’s scope and its future development are key factors to be taken into consideration.

1.3 Against this backdrop, the EESC takes good note of the guidelines for the measures to be adopted, subject to certain conditions and reservations regarding the development and implementation of these measures.

1.4 The Committee wishes to draw attention, first of all, to the need for the specific scope of e-justice itself to be properly defined, taking into account other applications of new information technologies, where they are applied to different aspects of citizenship and public administration in general.

1.5 The EESC also wishes to point out the ultimate aims of providing justice – so-called ‘Fair Justice’ - in such a way as to ensure that a) praiseworthy initiatives to streamline and standardise laws and procedures on access to justice genuinely serve the interests of the public in general and economic and social operators in particular and b) these initiatives are both accepted and wanted by justice professionals.

1.6 The Committee wishes to express its concern about the possibility that any initiative in this field might infringe the basic rights of Europe’s citizens, especially the right to data protection; it strongly recommends that any measure adopted be carried out in full respect of the underlying principles of international conventions and national civil procedural law common to all of Europe’s Member States.

1.7 The EESC calls on the Commission to take due account of the specific characteristics of the different national legislations concerned, which reflect cultural standards and national values that should be preserved, in line with the subsidiarity principle and also with a cost/benefit assessment for each new initiative, in keeping with the proportionality principle.

1.8 The Committee therefore recommends that, when developing the different initiatives it has planned, the Commission always bear in mind the general public's view of the application of justice, to ensure that it is the information and communication technologies which serve justice and not the other way around.

1.9 The EESC suggests, in particular, taking special precautions and extra care when introducing mechanisms for dematerialising judicial procedures, so as to meet procedural requirements and requirements for a durable medium, guaranteeing legal certainty and security.

1.10 Lastly, the Committee calls on the European Parliament and the Council to closely follow how the various measures develop, monitoring their implementation in the light of the values and standards set out in their respective resolutions, which the EESC also endorses.

2. Introduction and explanatory statement

2.1 The issue of electronic justice was first addressed systematically during Italy's presidency of the EU in 2003, at a conference held jointly with the Council of Europe, which concluded that *'above all, the discussions concerning the benefits, opportunities and dangers of the Internet, ultimately revert back to our concern for values and rights which are enshrined, in particular, in the Council of Europe's Conventions on Human Rights and Data Protection'* (1).

2.2 Since then, a number of Member States have developed their own electronic justice systems, some of which have a well-developed theoretical side and focus on ensuring a smooth practical application (2), but lack coordination.

(1) Conference entitled 'Internet Strategies and e-Justice in Europe', Rome, 13-14 November 2003.

(2) It is worth citing the example of Belgium, whose commission responsible for developing the e-justice project comprises some of the most eminent legal academics and practitioners in this field, such as Professor George de Leval, on methods of instituting proceedings and the means of communication between members of the judiciary, and Professor Yves Pouillet, on the law on evidence. The second example is Portugal, where an in-depth study was carried out on use of the new technologies at the different moments and stages in judicial proceedings. This study arose specifically out of an in-depth report entitled 'Para um novo judiciário: qualidade e eficiência na gestão dos processos cíveis' [Towards a new judiciary: quality and efficiency in the management of civil proceedings], by the Permanent Observatory for Portuguese Justice, headed by Professor Boaventura de Sousa Santos and coordinated by Professor Conceição Gomes.

2.3 At the Community level, the issue has begun to be seen as coming under the umbrella of e-governance, particularly in the wake of *eEuropa 2002* and *eEuropa 2005* documents, adopted at the Feira (2000) and Seville (2002) European Councils respectively and in the i2010 strategy paper (3).

2.3.1 The e-Justice project was actually launched under the 6th Framework Programme, as one of the first 'integrated projects', but its aims were still extremely limited and experimental. It was only at the informal meeting of Ministers of Justice held in Dresden in January 2007, however, that the issue was addressed in its own right, and subsequently developed at the conference entitled 'Work on e-Justice', held in Bremen in May 2007 (4).

2.4 It was really under the Portuguese presidency (5) that the issue received further impetus: firstly at the informal meeting of Ministers of Justice and Home Affairs on 1-2 October 2007, where the key issues for future options were defined; then at the Justice and Home Affairs Council on 6-7 December 2007, which assessed the work carried out hitherto and set the end of June 2008 as the project's deadline; and, finally, in the conclusions of the Council of Ministers' meeting on 14 December 2007, which welcomed the achievements so far in the field of e-justice and called for the work to continue.

2.5 Following this, the Commission drew up the communication now under consideration, which was forwarded to the Council, the European Parliament and the *European Economic and Social Committee*, although not referred to the Committee for an opinion. This being the case, the EESC decided to take the initiative and state its views on the communication.

2.6 In the meantime, both the European Parliament (6) and the Council (7) have in fact had the opportunity to adopt a

(3) COM(2005) 229 final of 1.6.2005. Cf: EESC opinion OJ C 110, 8.5.2006, rapporteur: Mr Lagerholm.

(4) It is significant that 'The Hague Programme: ten priorities for the next five years', COM(2005) 184 final of 10 May 2005, makes no reference to use of the new technologies in the field of justice. The lack of ambition in that programme was in fact highlighted in the EESC opinion drawn up by Mr Pariza Castaños, OJ C 65, 17.3.2006. See the recent Commission report on Implementation of the Hague Programme for 2007 (COM(2008) 373 final of 2 July 2008), which considers that 'The general overall assessment is rather unsatisfactory'.

(5) In this regard it is worth referring to Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing the Specific Programme 'Civil Justice' for the period 2007-2013 as part of the General Programme on 'Fundamental Rights and Justice' (OJ L 257, 3.10.2007).

(6) Cf. European Parliament resolution of 18 December 2008, which contains recommendations to the Commission in the field of e-Justice (Rapporteur: Diana Wallis - 2008/2125(INI) - T6-0637/2008) and the Opinion of the Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Luca Romagnoli) of 5 November 2008.

(7) Cf. the press release for the 2908th session of the Justice and Home Affairs Council, held on 27-28 November 2008 (16325/08), and for reference: Doc. 15315/08 of 7 November 2008 from the Presidency to Coreper/Council (JURINFO 71, JAI 612, JUSTCIV 239, COPEN 216).

stance on this communication, in particular on the Action Plan appended thereto. Bearing in mind this is a programme of measures to be developed over a five-year period, the comments and recommendations below should not be dismissed as insignificant – being as they are a contribution from representatives of civil society, who would be particularly interested and concerned by future initiatives in this domain – and could be taken into account during implementation of the different measures envisaged ⁽¹⁾.

3. Gist of the Commission communication ⁽²⁾

4. General comments

4.1 The EESC broadly supports the Commission initiative, which has now been supplemented by the European Parliament's proposals and Council guidelines.

4.1.1 Its support comes however, with a number of provisos, being subject to certain conditions and reservations.

4.2 Firstly, it is crucial that the scope of e-justice be properly defined. Whilst it could be incorporated into broader concepts such as 'e-democracy' or 'e-governance', of which it is a key component, and although closely related to 'e-law', which should facilitate electronic access a) to legal texts and their real-time production, be this substantive or procedural law, 'hard law' or 'soft law', b) to the case-law of the courts and c) to administrative decisions, e-justice should be confined to the judicial aspects of dispensing justice in the fields of civil, commercial and perhaps administrative law – in other words, court practices and procedures, including arbitration proceedings ⁽³⁾.

4.3 Furthermore, it should be borne in mind that in any programme for the dispensation of justice, the ultimate aim is not to make justice swift, efficient, cost-effective or straightforward, but to ensure FAIR JUSTICE ⁽⁴⁾ which fully respects fundamental rights, in particular the protection of people's personal data.

4.3.1 The Committee thus wishes to warn against any excessive attempts to achieve simplification, efficiency, financial savings or speed, which might jeopardise the fundamental value of providing justice and which, instead of facilitating access to justice, might make it more difficult or complicated.

⁽¹⁾ In fact, this emerged clearly from the statements and discussions at the Inter-Parliamentary Forum on Judicial Cooperation in Civil Matters, held under the French presidency on 2 December 2008 at the European Parliament in Brussels, in particular the second session, on 'E-Justice: a tool for citizens, practitioners and business'.

⁽²⁾ Due to the limits imposed on the length of opinions, the summary, which was to outline the Commission communication, is not included. The reader is referred to that document and to the related EP and Council resolutions.

⁽³⁾ Whilst excluding alternative dispute resolution mechanisms, however, which – although intended to settle disputes – do not fall within the scope of justice; these are simply voluntary and extrajudicial processes aimed at balancing the interests of the parties concerned.

⁽⁴⁾ As summarised perfectly in the Latin saying: 'Justitia est constans et perpetua voluntas jus suum cuique tribuendi' [Justice is the constant and perpetual desire to render each his due].

4.4 It will be equally important to ensure that the desired dematerialisation or simplification of procedural steps and the standardisation of working methods and processes does not blur the distinction between aspects that are inevitably different, and does not throw out the baby with the bathwater either, doing away with features that are essential and do not have to, and perhaps must not, be identical, together with aspects that are unnecessary and unintended.

4.4.1 It is crucially important to ensure that any programme implementing information technologies actually meets the needs of the European public in general and economic and social operators in particular, as well as legal professionals. Nor must any such programme work against the interests of these professionals.

4.4.2 There is also a need to ensure that any system that is introduced or developed does not allow for interference from third parties, whether malicious or simply negligent, likely to jeopardise the security and reliability of the system's use or the possibility that its files and their contents might be changed, fully or in part.

4.5 Another aspect that should always be borne in mind concerns different procedural aspects which might appear excessive and unnecessary to lay people but which make an essential contribution to the public's regard for judges and the act of handing down rulings, and which provide guarantees for the respect of fundamental rights in the process of dispensing justice ⁽⁵⁾.

4.6 It should be added that, because procedural law, as such, is subsidiary to substantive law and because the latter is a consequence of the cultural differences between the Member States and also because it would not be possible nor desirable or appropriate to standardise such laws, basic and consequently diverse aspects of secondary judicial procedures should not and cannot be standardised. Otherwise, they risk clashing with the substantive law that they are supposed to protect and uphold.

4.7 Because law and in particular procedural law forms a set of technical legal instruments designed to dispense justice, to be used by legal experts who have specialist training and appropriate professional experience, it is logical that technical language specific to these professionals be used when defining and applying the law.

⁽⁵⁾ The author is thinking in particular here of the 'underlying principles' of procedural law, the most important of which are the 'guarantees of a fair trial', and include the court's impartiality, the principle of the equality of the parties, the dispositive principle and the principle of discretion and the guarantee of the adversarial procedure, the right to be tried in public, the right to evidence, the continuity of proceedings and the guarantee that the accused is properly notified or informed of all procedural steps (cf., for all of the above, Miguel Teixeira de Sousa, 'Estudos sobre o Novo Processo Civil' [Studies on the New Civil Proceedings], published by LEX Lisbon, 1997).

4.7.1 An excessive desire to make the law 'simple' and 'accessible to everyone' could lead to it becoming less rigorous and losing its specific technical meaning, which in turn is not and should not necessarily be the same in all national legislations.

4.7.2 Here too, what is needed rather than standardisation is an 'equivalency table' or a 'common frame of reference' for the different judicial instruments.

4.8 The EESC considers, lastly, that the successful implementation of any system for applying new technologies to justice requires that it meets the needs and aims of the organisation in question, that it is compatible with existing computer systems, that a prior audit of current proceedings is conducted and that the system can be adapted, swiftly and inexpensively, to new circumstances and new goals.

4.8.1 Greater weighting should be given to the general cost/benefit ratio of the initiative as a whole and at every stage of its implementation, given that the Commission's impact assessment (apparently only available in one official language) does not quantify the matter. Instead, it specifically acknowledges that 'the costs incurred are correct but cannot be assessed ...' and can only be determined on a 'case-by-case' basis whilst, with regard to the benefits, 'broadly speaking, the economic impact is hard to quantify but not in doubt'. This is a highly subjective position, which is not really acceptable in a project of this scale ⁽¹⁾.

5. Specific comments

5.1 Because a trial consists of a set of (procedural) steps which must be documented, for reasons of legal security and certainty and to guarantee the rights of the parties involved, the issue of a durable medium covering the entire trial places constraints on the principle of oral proceedings and on dematerialisation under the rule of law.

5.1.1 Against this backdrop, certain aspects of the measures envisaged in the current 'overall strategy' should be analysed and considered.

5.2 With regard to the *e-justice portal*, the EESC considers that before this is established, everyone involved in the judiciary (judges, public prosecutors, court officials, administrative authorities, government officials and all legal professionals) should receive rigorous training to ensure that this is a useful, workable instrument for everyone concerned.

5.2.1 The EESC feels that the portal could act as a forum for judicial information and services and as a useful contact point between the public, businesses and members of the judiciary to help settle legal questions.

5.2.2 In the Committee's view, the portal could be a beneficial, viable tool for daily use by the entire judiciary. For this to happen, however, the reliability and authenticity of the information the portal contains must be guaranteed and the portal should ideally have different levels of access and access rights, in line with the type of information in question, as a means of protecting the individuals concerned.

5.2.3 It should also serve as a point of access to Community and national legislation, along the lines of the European Judicial Network in civil and commercial matters ⁽²⁾. It will have to be accessible to the public and allow better general legal advice and assistance with legal problems.

5.3 With regard to *videoconferencing*, the EESC considers that all Member State courts should be rigorously audited ⁽³⁾ to establish whether or not they have audiovisual equipment that could encourage its widespread use, since it is currently unclear as to whether all Member States have provided their courts with the equipment needed for videoconferencing or whether any equipment that does exist is compatible or even works as it should ⁽⁴⁾.

5.3.1 Furthermore, and where the aim is to gather evidence from witnesses or to communicate judicial steps or decisions, the EESC considers that there is a need for genuine legislative harmonisation between the different Member States as regards making statements and videoconferencing, to ensure that legislation on the same matter is not interpreted and applied differently, because without the necessary legislative coordination, the use of videoconferencing will come up against legal and even cultural barriers in the different Member States.

5.3.2 The EESC considers that if videoconferencing is adopted in the forms proposed, the courts concerned should always request that this facility be used, and here the EESC agrees that the portal could assist with videoconferencing between courts, as it contains all the features this process requires ⁽⁵⁾.

⁽¹⁾ See Impact Assessment (SEC(2008) 1947, of 30 May 2008) points 5.3.2. and 5.3.3., pp. 30 and 31.

⁽²⁾ Especially given the fact that the recent proposal for a Commission decision amending Decision 2001/470/EC has confined its use solely to legal professionals (Cf. OJ C 175, 28.7.2009, p. 84, rapporteur: Ms Sánchez Miguel).

⁽³⁾ The Czech Council presidency has in the meantime asked Member States to provide all the information they have on the audiovisual equipment available in their courts and has published all the responses in a document entitled '*Summary of the replies of the EU Member States to the request of the Czech Minister of Justice for information on national videoconferencing equipment in the judiciary*'.

⁽⁴⁾ The issue of system interoperability has in fact recently been highlighted by the Commission in document (COM(2008) 583 final) which is the subject of the EESC OJ C 218, 11.9.2009, p. 36 (rapporteur: Mr Pezzini); to which, together with the select list of various other EESC opinions in this field, the reader is referred.

⁽⁵⁾ Worth noting is the work already carried out by the Council Working Party on Legal Data Processing (e-Justice), specifically the progress report of 15 May 2009 on legal data processing (DOC 9362/09), the strategy paper on videoconferencing (DOC 9365/09), the users' guide (DOC 9863/09) and the public information booklet (DOC 9862/09), all of 15 May 2009, which accurately reflect concerns identical to those set out in this opinion.

5.4 With regard to *cooperation between authorities*, in particular on interconnecting criminal records, the EESC takes the view that, given the sensitive nature of the material concerned, such cooperation must meet the most stringent security and data protection requirements in order to safeguard the privacy of the individuals involved ⁽¹⁾.

5.4.1 The Committee does, however feel that a prior study should also be carried out of national legislation and the prevailing situations in each Member State, to ensure that, for such sensitive material, the exchange of information on criminal matters is not subject to differing implementation and treatment.

5.5 As regards *translation*, the EESC wishes to draw attention to the fact that the e-justice portal must be multilingual and provide information in all EU languages. An automated translation system should, in order to be useful, enable the translation and simultaneous interpretation of the web page, to ensure that it is accessible to all EU citizens.

5.5.1 As a means of assisting legal professionals, the e-justice portal could contain a database of legal translators and interpreters and also all the necessary forms, which would have to

be correctly translated into the language used in each Member State's legal system.

5.5.2 The enormous costs that an effective system of automatic, simultaneous translation into all Community languages is likely to entail should be given careful consideration in terms of feasibility and proportionality in relation to the achievable results and their practical use.

5.6 Initiatives that warrant special reservations and caution include, in particular, the complete dematerialisation of the European payment procedure ⁽²⁾, the European small claims procedure ⁽³⁾ and also the creation of other 'fully electronic European procedures', summonses or notifications of judicial steps by exclusively electronic means, the online payment of legal costs or the electronic authentication of documents.

5.6.1 The EESC recommends the utmost caution when introducing any of the developments referred to above, a careful consideration of the cost/benefit ratio, and extensive trial periods before they are universally adopted; it also calls for absolute guarantees to be provided to ensure compliance with the rules of procedural law common to all States observing the rule of law.

Brussels, 30 September 2009.

The President
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Mario SEPI

⁽¹⁾ See the Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee entitled Towards a European e-Justice Strategy (2009/C 128/02), OJ C 128, 6.6.2009, p. 13.

⁽²⁾ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, p. 1).

⁽³⁾ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007, p. 1).