AN OVERVIEW OF THE POSSIBILITY OF IMPLEMENTING REMOTE HEARINGS IN MONTENEGRO

2022 February

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The study was created within the 'Online Trials – The Pathway to Efficient Judiciary' project, implemented by the Centre for Monitoring and Research (CeMI) and financially supported by the Balkan Trust for Democracy, a project of the German Marshall Fund of the United States and the United States Agency for International Development (USAID).

CONTENT

INTRODUCTION

As a candidate country for membership of the European Union, Montenegro opened Chapter 23 – Judiciary and Fundamental Rights on 18 December 2013. Nine years later, Montenegro is still only 'moderately prepared' to implement the EU acquis. According to the latest report of the European Commission, issued in 2021, Montenegro had made no progress in the area of the judiciary from the previous year. The implementation of key reforms is stagnating, which is largely the result of the political crisis and an inability to secure the necessary majority in the Parliament to adopt reform laws and unblock key institutions. This has had a domino effect on other aspects of the judiciary, including shortcomings in efforts to resolve some of the key problems affecting the efficiency of the judicial apparatus.

This study deals precisely with the problem of judicial efficiency, not from the political aspect, but from the aspect of the digitalization of justice and the introduction of innovative methods of conducting judicial proceedings, and it is inspired by the effects of the COVID-19 pandemic on the functioning of judicial systems around the world. During the pandemic, judicial systems were faced with a dilemma between the complete closure of the courts, which would have had inconceivable consequences for the system protecting human rights, and innovative solutions such as remote hearings (online trials). The prevailing view was to ensure the smooth conduct of court proceedings through an online service, thus avoiding the exposure of any participant in the proceedings to the risk of infection. Many EU countries implemented such solutions in their own national legal systems, and this helped to reduce the consequences of the pandemic on the functioning of the judiciary to a minimum.

This study was created as a result of qualitative research within the 'Online Trial – The Pathway to Efficient Judiciary' project that was implemented by CeMI with the financial support of the Balkan Trust for Democracy, a project of the German Marshall Fund of the United States and the United States Agency for International Development (USAID). The project aims to contribute to the creation of the environment necessary for the implementation of remote hearings in Montenegro, in order to solve long-standing problems of judicial efficiency which were exacerbated by the COVID-19 pandemic.

The study is intended primarily for legal practitioners and holders of judicial office, but it may also benefit the general public, bearing in mind that the citizens are participants in court proceedings. The study presents the concept of remote hearings and its advantages and disadvantages, as well as the most important international standards for fair trial in the context of remote hearings and the practice of the European Court for Human Rights in Strasbourg. The study also provides a comparative overview of the state of the judiciary in the EU countries during the pandemic, the way in which remote hearings were implemented, and the effects of remote hearings in these countries. The study describes the efforts of the Montenegrin judiciary to improve its digitalization. The study ends with the conclusions and recommendations reached by CeMI during the research.

The goal of this study is to provide the stakeholders with a set of recommendations for legislative changes, such as recommendations aimed at achieving the other

preconditions necessary for the implementation of online trials in Montenegro. With this study, CeMI aims to present, to the representatives of the judiciary and the general public, the benefits of this type of hearing as one of the elements of the digitalization of the judiciary, and at the same time to familiarize them with the potential problems in the implementation of a new and innovative system for conducting court proceedings in Montenegro.

I. CONCEPT AND DEVELOPMENT OF REMOTE HEARINGS

The digital transformation of society, which began in the 1970s when, in the opinion of some philosophers and historians, the so-called 'information age' started, is characterized by a growing reliance on technological innovations. The technology that has evolved in the last 50 years has become an indispensable part of our lives, and an irreplaceable tool for daily information and communication. However, it is an indisputable fact that technology is evolving at a speed that is not always possible to follow, and certain segments of society do not always keep up with the times. However, 'necessity is the mother of invention', as was demonstrated two years ago when the global pandemic changed our way of life. The changes resulting from the pandemic have been reflected in both the private and the professional sphere. In more or less every country in the world, prevention (that is, the slowing down of the spread of the pandemic) meant having to adopt measures for physical (social) distancing, the closure of facilities and the restriction of the right of movement. These measures required us to change some old habits and to adopt new ones. The consequences were also felt in the functioning of all three branches of government, but although the legislative and the executive branches did not require major changes and efforts to ensure their smooth functioning, the functioning of the judiciary was temporarily paralysed in many countries, and the need to continue administering justice was soon recognized as imperative. Although some hearings could be postponed, no one could say with certainty how long the measures that were adopted would be in force (that is, whether the temporarily adopted measures would be extended and, if so, for how long), and it quickly became clear that the pandemic must not be allowed to endanger the ability of citizens to exercise some of their most fundamental rights.

The transition for the employees of a large number of companies, state bodies and institutions from a physical presence in the office to working from home, and from holding meetings in conference rooms to holding meetings via the Internet, gave the impetus to the concept that had already existed in the legislation of some countries but was mostly not used before the pandemic of so-called remote hearings (also known as online hearings or hybrid hearings).

The term remote hearings in this study refers to oral hearings that are conducted in such a way that one or more, or all, of the participants in the proceedings is not physically present in the courtroom. Instead, the participants attend the hearing via the Internet, using a videoconferencing system. The potential and the need for this type of judging was quickly recognized by international organizations and institutions, which is best illustrated by the good practice in this area that has been developed over a relatively short time.[1]

Opinions about remote hearings and assessments of the positive and negative aspects of this form of the administration of justice crystallized very quickly. Although it is still early to talk about all the advantages and disadvantages of remote hearings, primarily because of the limited practice in this area but also because of the diversity of judicial systems and the different scope and form of the implementation of remote hearings in legal systems where remote hearings are held, it is possible to point to some common advantages and disadvantages that will be recognized by most countries that have decided to introduce this method for proceedings.

1 The European Commission for the Efficiency of Justice (CEPEJ) has adopted a special document "Guidelines on videoconferencing in judicial proceedings". In November 2021, the CEPEJ Working Group on Cyberjustice and Artificial Intelligence published a complementary document containing data on good practice for the use of videoconferencing in court proceedings developed in several countries. In August 2021, the Central and Eastern European Law Initiative (CEELI Institute) published a document entitled "Practical Guidelines for Remote Judging in Central and Eastern Europe". The Vienna International Arbitral Centre has published "The Vienna Protocol – A Practical Checklist for Remote Hearings" etc.

1.1. Advantages of remote hearings

Primarily, the use of information and communication technologies (including remote hearings) proved to be useful because it allowed courts throughout Europe and the rest of the world to continue working during the COVID-19 pandemic.[2] However, the positive aspects of remote hearings are not limited to the mitigation of the consequences of the pandemic for the judicial system. Rather, remote hearings should be viewed in a broader context – as a way to contribute to the solution of long-standing problems in the judiciary, and as a tool that will find a permanent place in the judicial system.

There are numerous ways in which remote hearings can have a positive effect on the work of courts, with better access to justice being among the most noteworthy. In a study carried out for the European Commission for the Efficiency of Justice (CEPEJ), it is stated that efficiency in the access to justice is imperative, with costs and benefits being identified as two key components of this efficiency.[3] With that in mind, the way in which remote hearings can contribute to cost reduction is fairly obvious. A remote hearing allows those participants in the proceedings who do not reside in the location of the court to participate in the court proceedings regardless of their geographical location. This also results in lower costs for these participants, because they do not have to endure unnecessary travel costs and possibly accommodation costs, both personal as well as costs related to the potential hiring of an attorney who resides elsewhere. It is also possible to reduce the costs of the court, and thus the state, because the hearing can be conducted without some of the court officials who must be present in certain proceedings (e.g. security staff), particularly in cases in which people who are in detention or serving a prison sentence are being tried remotely. Whether the cost savings are justified, and to what extent, is a matter that the court has to assess in each case.

In the context of remote hearings, when we look at the benefit that they provide in terms of the efficiency of access to justice for society as a whole, the primary benefits can be seen at the court level and are reflected in the expansion of the capacity of courts to conduct hearings that cannot be conducted remotely. This may be of a particular importance for certain courts in Montenegro, which will be discussed in more detail in Chapter IV. The benefits are also seen in the faster resolution of some court cases, since a remote hearing can contribute to a trial being held within a reasonable time. In addition, remote hearings allow people who are currently outside the country to participate in the proceedings.

Since the physical capacities of the court are not a limiting factor in a remote hearing, because the participants in the proceedings access the hearing from another location via the Internet, we can also mention that the transparency of court proceedings can be improved by increasing the publicity given to them, which can have a positive effect on court credibility. Online hearings can provide all interested citizens, media representatives, organizations that monitor the judiciary, non-governmental organizations and the academic community with access to public hearings and the ability to observe the course of a trial via the Internet. This possibility is limited only by the technical capacities of the court (the number of possible connections depends on the Internet quality and may be limited to avoid network congestion and the loss of picture and sound quality due to limited bandwidth) and the technical capacities of the interested persons.

2 European Commission for the Efficiency of Justice, European judicial systems CEPEJ Evaluation Report, Part 1, Tables, graphs and analyses, 2020 Evaluation cycle (2018 data), p. 103, available at: https://rm.coe.int/evaluation-report-part-1-english/16809fc058
3 Julien Lhullier and Daria Lhullier-Solenik, Access to Justice in Europe, CEPEJ, 2007, p. 21, available at: https://rm.coe.int/168074827e

1.2. Disadvantages of remote hearings

As previously stated, there are also some negative aspects of remote hearings. Primarily, this type of hearing is not appropriate for every court case, so insisting on a remote hearing in some cases could jeopardize the right to a fair trial and increase the risk that other rights of participants in the proceedings are violated. Gathering and processing of evidence that requires physical access and the examination of evidence by the court and court experts cannot be conducted via the Internet, by its very nature. This can only be done in a 'classic' courtroom trial.

The participants' ability to participate effectively in remote court proceedings depends, to a large extent, on the technical conditions for holding hearings via videoconferencing. This is of particular importance in criminal proceedings, considering the rights of the defendant. If there are technical problems, the communication of the defendant with his/her defence counsel can be hindered,[4] and thus his/her right to be defended may be jeopardized. Apart from communication between the defendant and the defence counsel, which is part of the right to be defended, there may be a problem with the right to safe and secret communication with the defendant's counsel. In the opinion of the Hamburg Commissioner for Data Protection and Freedom of Information, the videoconferencing application Zoom, popularized during the pandemic and often used in Montenegro, is incompatible with the EU›s General Data Protection Regulation (GDPR).[5]

When criminal proceedings are conducted remotely, the court's ability to assess the credibility of witness testimony may be reduced. Another possible problem is that defendants and witnesses may not fully appreciate the serious nature of court proceedings conducted remotely.[6] When it comes to hearings of disputes from which the public is excluded, such as family proceedings, criminal proceedings against minors or proceedings involving minors and children, there is a risk that such hearings could be recorded without the knowledge of the court and other participants in the proceedings. The question then arises as to whether in these particular cases it is advisable to conduct such procedures remotely.

We also cannot ignore potential problems when it comes to people with disabilities. Even though technology can have a positive effect on the empowerment of people with disabilities, much depends on the type of disability. For people with some types of disability (e.g. those with certain types of mental disorders), a remote hearing could be an additional obstacle.[7]

4 Eric T. Bellone, Videoconferencing in the courts: An exploratory study of videoconferencing impact on the attorney–client relationship in Massachusetts, 2015, Dissertation, p. 159, available at: https://repository.library.northeastern.edu/files/neu:349724/fulltext.pdf

5 The Hamburg Commissioner for Data Protection and Freedom of Information, available at: https://datenschutz--hamburg-de.translate.goog/pressemitteilungen/2021/08/2021-08-16-senatskanzlei-zoom?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=sr

6 Camille Gourdet et al., Court appearances in criminal proceedings through telepresence: Identifying research and practice needs to preserve fairness while leveraging new technology, 2020, Rand Corporation, available at: https://www.rand.org/pubs/research_reports/RR3222.html

7 Equality and Human Rights Commission, Inclusive justice: A system designed for all, 2020, available at: https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

II. INTERNATIONAL STANDARDS

Hearings conducted via the Internet are a departure from the norm that court proceedings are conducted in a courtroom. Often this form of hearing is not explicitly permitted by domestic procedural laws. Justifiably, this raises the question of whether this form of hearing is in accordance with the standards for a fair trial contained in the most important international standards and conventions, especially bearing in mind the wide range of procedural rights that people in court proceedings enjoy.

Fair trial guarantees are contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention),[8] Article 14 of the International Covenant on Civil and Political Rights,[9] and Article 47 of the Charter of Fundamental Rights of the European Union.[10]

For the topic of this study, the most relevant of these is the European Convention, and more precisely its guarantees of the right to access to justice as an element of the right to a fair trial, and the relevant case law of the European Court of Human Rights (ECtHR). Although the text of Article 6 of the European Convention does not explicitly guarantee the right of access to the courts, the ECtHR derived this right in its judgment in the case of ***Golder v. The United Kingdom.***[11] This right contains several guarantees that have crystallized through the case law of the ECtHR[12]: the right to initiate court proceedings, seek compensation for damages and obtain a court decision, procedural obstacles and restrictions (deadlines, court fees, jurisdiction, etc.), practical obstacles (absence of legal aid) and the immunity of defendants in a civil case.

When it comes to remote judging, the guarantee of the right of access to court that is in question is the right to participate effectively in the proceedings, which in this context refers to the right to be physically present in a courtroom.

In the case ***Colozza v. Italy***[13] the ECtHR pointed out that, *the object and purpose of the Article taken as a whole show that a person «charged with a criminal offence» is entitled to take part in the hearing, and that the Article 6 guarantees to "everyone charged with a criminal offence» the right «to defend himself in person», «to examine or have examined witnesses» and «to have the free assistance of an interpreter if he cannot understand or speak the language used in court», and* ***it is difficult to see how he could exercise these rights without being present.***[14]

This poses a question of whether it is possible to conduct a remote trial without violating Article 6 of the European Convention, that is, without violating the right to effective participation in the proceedings, and how this can be done. Through the democratic necessity test, the ECtHR assesses whether the right of access to court has been violated, considering the level at which the restrictions imposed diminish the

8 Available at: https://www.echr.coe.int/documents/convention_bos.pdf
9 Available at: https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf
10 Official Journal of the European Union C 301/1 of 14.12.2007.
11 *Golder v. The United Kingdom*, no. 4451/70, ECHR 1975
12 Dovydas Vitkauskas and Grigory Dikov, Protecting the right to a fair trial under the European Convention on Human Rights, 2012, Council of Europe, Strasbourg, p. 26
13 *Colozza v. Italy,* no. 9024/80, ECHR, § 27, ECHR 1985
14 Ibid, § 27

essence of the given right. Restrictions must have a legitimate aim and there must be proportionality between the restriction of the right and the aim sought thereby.

In its practice so far, the ECtHR has allowed remote hearings under certain conditions, but this possibility is interpreted differently in criminal and civil cases, and different criteria are applied to decide on the possibility of holding remote trials. In criminal proceedings, the ECtHR interprets personal presence very restrictively as physical presence. On the other hand, when it comes to remote trials in civil proceedings, neither Article 6 nor the case law contain the presumption that oral hearings in civil proceedings are necessary. That will depend on the circumstances of the case.

2.1. Remote hearings in criminal proceedings

The most important case in which the ECtHR confirmed the possibility of holding a remote trial by videoconferencing in criminal proceedings, and in which it found that there was no violation of the right to a fair trial, is Marcello v. Italy.[15] In this case, the question was raised as to whether Article 6 of the Convention had been violated when the proceedings were conducted by videoconferencing without the consent of the defendant, who was in prison at the time. An important circumstance of this case was that the remote hearing was conducted in appeal proceedings.

In its judgment, the Court found that *in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.*[16] The Court cited the aforementioned parts from the ***Colozza v. Italy*** judgment, which support the view that criminal proceedings without the presence of the accused are difficult to imagine, but, further in the judgment, the Court referred to the judgment in ***Kamasinski v. Austria,*** which states that ***the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing.***[17] According to the ECtHR, the application of Article 6 to proceedings before an appellate court depends on the specific nature of the proceedings. The overall procedure in the domestic legal system and the role of the court of appeal must be taken into account. Appellate proceedings and proceedings dealing only with legal inquiries, as opposed to factual ones, can meet the requirements of Article 6 even if the applicant was not given the opportunity to be heard in person by the appellate court or court of cassation, provided that the trial in the first instance was public.[18]

In the ***Marcello v. Italy*** case, the court also considered the ratio legis of the Italian legal provision which allows trials by videoconferencing, and the role of this provision in contributing to the reduction of delays related to the transferring of detainees, thus simplifying and accelerating criminal proceedings. The ECtHR considered the nature of the proceedings (the fact that this case was about a member of the mafia), and that the defendant›s participation in the appellate proceedings by videoconferencing served the legitimate aims of the Convention, namely preserving public safety, preventing crime, protecting witnesses and victims of criminal offences regarding their rights to life, liberty and security, and respecting the principle of a 'reasonable time' in court proceedings.

It is possible to waive most of the rights guaranteed by Article 6. Accordingly, criminal proceedings conducted remotely in the first instance may be in accordance with the requirements of Article 6 if the defendant waives his/her right to be physically present at the hearing, that is, if he/she agrees to attend via videoconference. However, the waiver must be irrevocable and unequivocal. The defendant must understand all the consequences of his/her waiver. He must not in any way be forced to waive his/her rights,[19] and the waiver must not be contrary to

15 Marcello v Italy, no. 45106/04, ECHR 2006
16 Ibid, § 50
17 *Kamasinski v. Austria.* 9783/82, § 106, ECHR 1989
18 Ibid
19 *Deweer v. Belgium,* no. 6903/75, ECHR 1980

any important public interest.[20]

In the case of ***Sakhnovskiy v. Russia***[21] the question of using videoconferencing as a substitute for physical presence was raised again. In this case, the applicant claimed that his/her rights stemming from Article 6, paragraphs 1 and 3 of the European Convention were violated in the criminal proceedings conducted against him because he was not provided with effective legal aid in the appellate proceedings and because he communicated with the court via video link, so that he was not able to defend himself effectively. The ECtHR in this case applied the principle from the case of Marcello v. Italy and pointed out that this form of participation in the proceedings was not contrary to the right to a fair and public hearing, but also that the defendant must be able to follow the proceedings and to be heard without technical issues, and must be provided with an effective and confidential communication with his/her defence counsel. The court reiterated the position established in the ***Marcello v. Italy*** case, that a person *charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance trial hearing.* ***However, the attendance of the defendant in person does not necessarily take on the same significance for the appeal hearing.***[22]

2.2. Remote judging in civil proceedings

When it comes to civil cases, as stated, the ECtHR does not consider that an oral hearing is a necessary condition for the Article 6 requirements to be fulfilled. Elementary logic dictates that, if an oral hearing is not always a necessary condition for civil proceedings to be in accordance with the right to a fair trial, then the presence in person of the participants before the court in those cases cannot be a necessary condition.

As an example, in this section we can mention the case of ***Yevdokimov and others v. Russia.***[23] The applicants in this case claimed that their rights under Article 6 of the European Convention had been violated because, as parties in civil litigation, they had not been allowed to appear in person before the court. The applicants were in prison at the time, and they had complained about the conditions, claiming that these were inhumane. For this reason, one of the applicants brought a claim for compensation. The domestic courts prevented the applicants from attending the hearing in person, on the basis that there was no domestic legal provision for bringing detainees to court. The applicants appealed against the decision, while some of them requested, in separate claims, to appear before the Court of Appeal. The Court of Appeal rejected their arguments and concluded that their absence was in accordance with national regulations and not contrary to the principle of a fair trial.

ECtHR in this case held that ***Article 6 of the Convention does not guarantee the right to personal presence before a civil court but enshrines a more general right to present one's case effectively before the court*** *and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants these rights. Further in the judgment, the Court clarified that as regards the form of proceedings, the right to a "public hearing" under Article 6 § 1 has been interpreted in the Court's established case-law to include entitlement to an "oral hearing". Nevertheless,* ***the obligation under this Article to hold a hearing is not an absolute one.*** *An oral hearing may not be necessary due to the exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case file and the parties' written observations.*

20 *Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006
21 *Sakhnovskiy v. Russia* [GC], no. 21272/03, ECHR 2010
22 Ibid, § 96
23 *Yevdokimov and others v. Russia, no.* 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, ECHR, 2016

III. REMOTE HEARINGS – BEST PRACTICE IN EU COUNTRIES

In this chapter, we will take a look at the possibility of remote hearings in some countries of the European Union, as well as how and to what extent the courts of different European Union countries applied this mechanism during the pandemic. We opted for the following three countries of the European Union: Austria, because it was the first country in Europe to develop an electronic system for the functioning of its courts, Estonia, as the country with the highest level of digitalization, and Italy, because, on the one hand, it has been struggling for many years with problems in the efficiency of its judiciary, and, on the other hand, because of its efforts to solve some of these problems through the digitalization of the judicial system.

3.1. Austria

Austria is the leading country in Europe when it comes to the development and implementation of electronic judicial systems. By introducing the ERV system *(Elektronischer Rechtsverkehr)* in 1990, Austria became the first country to introduce electronic communications in the justice system.[24] The use of the ERV is considered an essential characteristic of the Austrian judicial system. It enables communication between the court and the participants in court proceedings. It is used for the exchange and submission of documents and evidence, and the transfer of other information and data relevant to ongoing proceedings. In practice, this means that the participants in court proceedings are not obliged to submit documents to the court physically (in person or by mail). They can submit them electronically, including via a mobile phone application, 'ID Austria'.[25] It is said that this system enables the 'remote' functioning of the judicial system.

Austria reacted relatively fast after the first COVID-19 infection was recorded in the country. The first case of infection was recorded on February 25, 2020.[26] By March 16 the ad hoc Federal Law on Accompanying Measures for COVID-19 in the Judicial System had already been adopted.[27] This lex *specialis* was initially supposed to be in force until December 2020, but because of the pandemic it is still in force, with several amendments having been made. The law provided a basis for the greater use of the videoconferencing system in court proceedings beyond what is already established in the Austrian Code of Civil Procedure (CCP), by establishing a different work regime in the courts, in an effort to enable the functioning of the judicial apparatus in civil cases during the pandemic. This was done by limiting access to court buildings, postponing and cancelling some hearings, excluding the public from hearings, and reducing the use of oral hearings in civil matters in exchange for the wider use of videoconferencing systems.[28]

24 Federal Ministry of Constitutional Affairs, IT applications in the Austrian justice system, Vienna, 2018, p. 10
25 See https://www.buergerkarte.at/en/ for more detail
26 Austria: First cases of COVID-19 confirmed February 25 /update 2, 25 Feb 2020, available at: https://www.garda.com/crisis24/news-alerts/317331/austria-first-cases-of-covid-19-confirmed-february-25-update-2
27 Federal law on accompanying measures for COVID-19 in the judiciary (1st COVID-19 Judicial Accompanying Act - 1st COVID-19 JuBG), StF: Federal Law Gazette I No. 16/2020 (NR: GP XXVII IA 397/A AB 112 p. 19. BR: AB 10288 p. 904.), available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011087
28 Rouzbeh Moradi, International Bar Association, available at: https://www.ibanet.org/article/60DFF95C-FAE5-4CA9-84E7-0EC8150946AE

The possibility of having a remote hearing in a civil matter therefore existed in Austria even before the pandemic, but this possibility was limited. Article 277 of the Austrian CCP prescribes that *the court may, if technically possible, present evidence using technical means for transmitting words and images, unless personal presentation of evidence in court is more appropriate or necessary for special reasons, taking into account the principle of economy of the proceedings.*[29] A similar provision is contained in the Criminal Procedure Code (CPC), in Article 165, paragraph 1: *cross-examination, as well as audio and video recording of such examination of the defendant or witness is permitted if there is a fear that the examination at the main hearing will not be possible for factual or legal reasons.*[30]

The novelty of the aforementioned 2020 law was to enable the conduct of hearings in civil proceedings without the physical presence of the parties or their representatives, as well as the presentation of evidence during or outside the oral hearing, and the possibility of experts, witnesses, interpreters etc. attending the hearing by videoconferencing, regardless of whether the conditions of Article 277 of the CCP were met. However, certain preconditions should be met, such as the provision of adequate communication equipment, the consent of all parties to the use of this equipment (consent is considered to exist if the parties do not object before a certain deadline), and confirmation by the parties that there is an increased health risk, both for them and for the individuals with whom they are in necessary private or professional contact.[31]

In addition to the implementation of electronic communication, Austria's Supreme Court was the first in the world to adopt a decision on the legality of remote hearings in arbitration during the 2020 COVID-19 pandemic,[32] despite an objection by one of the parties in the arbitration. The Supreme Court of Austria stated in its decision that the decision of the Arbitration Court to conduct the hearing using videoconferencing did not violate the basic principle that both parties must be treated fairly and have a right to be heard, and stated that videoconferencing, as a recognized standard procedural conduct in court proceedings before other courts, also has an impact on arbitration. The court pointed out that the use of videoconferencing technology during the COVID-19 pandemic was explicitly promoted by the Austrian legislators in order to ensure that court proceedings could be conducted.[33] The Supreme Court, in its decision, also referred to the ECtHR judgment in the case of ***Sakhnovskiy v. Russia,*** stating that *the use of videoconferencing does not violate Article 6 of the European Convention, even if one party does not agree to such way of judging...Conducting the proceedings by videoconferencing can save time and money, which promotes the administration of justice while retaining the right to a hearing. In case of an impending delay in the administration of justice during the pandemic, videoconference technology offers the option of harmoniously combining the request for effective administration of justice with the right to a hearing.*[34]

The use of videoconference systems in Austria largely depends on the size of the courtroom. In larger courtrooms it was possible to hold hearings while respecting the prescribed physical distance. It is estimated that in 2020 about 10% of hearings were held remotely, and the overall experience of judges who used this possibility was positive.[35] The manner in which Austria dealt with the challenges caused by the pandemic gave good results. The European Commission›s report on the rule of law in Austria for 2021 states that the judicial system has continued to function efficiently.[36]

29 Article 277 of the Austrian Code of Civil Procedure, available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699

30 Article 165, paragraph 1 of the Criminal Procedure Code of Austria, available at: https://www.jusline.at/gesetz/stpo/paragraf/165

31 Article 3, paragraph 1 of the Federal Law on Accompanying Measures for COVID-19 in the Austrian judicial system

32 Decision of the Supreme Court of Austria, Case No. 18 ONc 3/20s, available at: https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20200723_OGH0002_018ONC00003_20S0000_000/JJT_20200723_OGH0002_018ONC00003_20S0000_000.pdf

33 Ibid

34 Ibid, para. 11.2.4

35 Anne Sanders, Video-hearings in Europe before, during and after the COVID-19 pandemic, International Journal for Court Administration 12(2), 2021, available at: https://www.iacajournal.org/articles/10.36745/ijca.379/

36 European Commission, Commission staff working document, 2021 rule of law report, country chapter on the rule of law situation in Austria, p. 8

3.2. Estonia

Estonia is considered one of the most developed countries in the world when it comes to the scope of digitalization, and this played a major role in the way Estonia dealt with the consequences of the pandemic on the functioning of the judicial system. The first case of the COVID-19 infection in Estonia was recorded on February 27, 2020.[37] The government soon declared a state of emergency, which lasted from March 12 to May 1,[38] but this declaration did not define new ways for the courts to function, despite the need for this, bearing in mind the introduction of measures which restricted public gatherings and introduced mandatory physical distancing. There was therefore a collision between the measures that were in force and the scheduled oral hearings. This was quickly demonstrated in practice, as evidenced by the fact that, because of the need to ensure the functioning of the judiciary, on March 16 the Council for the Administration of Courts adopted its Recommendations for the administration of justice in emergency situations.[39]

Among the adopted recommendations were recommendations on remote working and cooperation with the Ministry of Justice to ensure the availability and functioning of technical solutions that enabled remote working and supported the electronic administration of court proceedings. Also, one of the recommendations was that, whenever possible, cases should be resolved in written form, using the court information system and digital court files. Also, under these recommendations, urgent hearings that could not be postponed (such as hearings in cases involving persons in detention, the separation of a child from a family or the establishment of adult guardianship) were to be held using technical means of communication. In cases that did not constitute an emergency, the court was recommended to hold remote hearings. Although the court was to decide in each particular case, if a remote hearing was not possible it was recommended that the hearing be postponed, provided that the court ensured that the hearing was held as soon as possible after the state of emergency had ended. The recommendations further provided that prosecutors should access the hearings by videoconferencing. When it came to the parties, a room in the court building would, if possible, be arranged so that they could be present at the hearing by videoconferencing.

Hearings conducted by videoconferencing became the norm in Estonia relatively quickly during the pandemic. In the period between March 23 and May 15, 2020, 42% of the scheduled total number of 3,418 hearings were held, and 869 (60.5%) of these were held by videoconferencing.[40] This was despite the fact that there was no obligation to attend a remote hearing, given that the possibility of a remote hearing was not previously regulated by law.

The sheer speed of Estonia's adaptation to the new circumstances is confirmed by the fact that in 2020 Estonia developed the so-called virtual courtroom to allow judges, prosecutors, and lawyers to participate in remote hearings. This tool allows users to log in without installing special software and allows the hearing to be transmitted and recorded. The virtual courtroom was accompanied by the development of a user guide, and the Supreme Court of Estonia developed additional educational materials to improve knowledge in this area.[41] The importance of remote hearings in Estonia is perhaps best illustrated by the recommendation of the President of the Supreme Court of Estonia that remote hearings should be regulated by law for all court proceedings.[42]

37 Mait Ots and Urmet Kook, Eesti Rahvusringhääling, https://www.err.ee/1057192/eestis-leiti-esimene-koroonaviirusesse-nakatunu

38 Declaration of state of emergency in the territory of the Republic of Estonia, available at: https://www.riigiteataja.ee/en/eli/517032020002/consolide

39 Recommendations for administration of justice in emergency situations, available at: https://www.riigikohus.ee/sites/default/files/elfinder/KHN%20soovitused%20kohtutele%20eriolukorra%20ajaks.pdf

40 Külli Luha, Summary of the Procedural Statistics of the County, Administrative and Circuit Courts in 2020: about Resolved Matters (incl. Paperless Procedure) and the Average Workload of a Judge, The Supreme Court of Estonia, available at: https://aastaraamat.riigikohus.ee/en/summary-of-the-procedural-statistics-of-the-county-administrative-and-circuit-courts-in-2020-about-resolved-matters-incl-paperless-procedure-and-the-average-workload-of-a-judge/

41 European Commission, Commission staff working document, 2021 rule of law report, country chapter on the rule of law situation in Austria, p. 5

42 Villu Kõve, Review concerning courts administration, administration of justice and the uniform application of law during the emergency situation, The Supreme Court of Estonia, available at: https://www.riigikohus.ee/en/news-archive/review-concerning-courts-administration-administration-justice-and-uniform-application

Although the Estonian government did not initially envisage the way in which courts would function during the state of emergency caused by the global pandemic, we must emphasize that in Estonia, unlike Austria or Italy, it was not necessary to change procedural laws or to adopt ad hoc laws to allow the functioning of the justice system. This was accomplished with a set of recommendations. Although the pandemic paralysed the judicial systems of some countries, the judiciary in Estonia continued to function at a more or less similar pace as in previous years, with an increase in proceedings that were resolved digitally (by the submission of digital documents) without oral hearings being held.[43] Estonia owes its effective response to the consequences of the pandemic mainly to the high degree of digitalization of the judiciary, which mitigated some of the negative consequences and enabled a quick adaptation to the new situation.

3.3. Italy

Although it is not at a comparable level of digitalization to Austria and Estonia, Italy has a relatively advanced e-justice system, developed by the Italian Ministry of Justice as part of a judicial digitalization plan called the Processo civile telematico (hereinafter: PCT), which translates as 'online civil proceedings'.[44] The implementation of this plan began in 2003, but the process has been relatively slow, as with other efforts to implement judicial reform. Italy's strategy to improve the efficiency of its judicial system relies on the adoption of a set of laws. The changes Italy needs to adopt in order to overcome its efficiency problems include, among other things: a greater emphasis on alternative dispute resolution and arbitration, a greater focus on the preparatory phase of proceedings, simplification of appellate proceedings and the reorganization of the Chamber of Judges. Unlike in Montenegro, which will be discussed in more detail in the next chapter, one of the ways that was envisaged to increase efficiency was to work on digitalization through the introduction of remote hearings.[45]

In order to increase the use of the PCT system, Italy adopted Law no. 179[46] on October 18, 2012, which obliges people to use the PCT system: this law introduced the mandatory electronic transmission of all communications between the courts, lawyers and parties in the courts of the first and second instance. From February 2016 the same obligation applied to proceedings before the Supreme Court. The law also obliges all petitions to be submitted to the court electronically. In this way, the PCT system is not a mere computer representation of the procedural laws, but a 'living process' that simplifies civil proceedings.[47]

Like Austria, in an effort to overcome some of the problems in the functioning of the judiciary caused by the global pandemic, Italy relied on the adoption of special laws. On March 17, 2020, the Italian government adopted Law no. 18/2020,[48] the so-called Cura Italia. The full name is 'Measures to strengthen the national health service and economic support for families, workers and businesses connected to the epidemiological emergency from COVID-19'. Articles 83 and 84 of this law contained provisions on temporary amendments of procedural laws. The law stipulated that all court proceedings were suspended from March 9 to April 15[49], except for certain procedures in the areas of family and criminal law, as well as some administrative procedures. The courts could only act in urgent proceedings, in cases of the separation of minors from their family, domestic violence, obligations arising from family relations, cases when a delay could cause serious damage, and generally in those proceedings where the protection of fundamental human rights was urgent and could not be postponed. It was also possible to act in some urgent criminal

43 Ibid

44 Italian Ministry of Justice, IT Sector, E-Justice in Italy: The 'on-line civil trial', available at: https://pst.giustizia.it/PST/resources/cms/documents/eJustice_in_Italy_rev_May_2016.pdf

45 European Commission, Commission staff working document, 2021 rule of law report, country chapter on the rule of law situation in Italy, p. 8

46 Decreto-Legge 18 ottobre 2012, n. 179, available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2012-10-18;179!vig=

47 Supra, note 42.

48 Gazetta Ufficiale Della Repubblica Italiana, Legge 17 marzo 2020, n. 18, 'Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19. (20G00034)', available at: https://www.agenziaentrateriscossione.gov.it/export/.files/it/news/GU_DL_18_2020.pdf

49 This deadline was extended through amendments first until June 30 and later until October 31

proceedings, mainly in proceedings for the deprivation of liberty, or while collecting evidence that could not be postponed. The courts were also entrusted with special discretionary powers under this law. Among other things, under certain conditions they were allowed to hold remote hearings in litigation using videoconferencing, as well being able to order the parties to submit to the court a short written defence instead of giving oral testimony at a hearing.

Like Montenegro, Italy has been in the process of judicial reform for many years and is working to address similar problems when it comes to efficiency. However, Italy has recognized the potential of remote hearings, and concrete steps have been taken to implement these. Italy recognized this potential years before the pandemic, if we consider the aforementioned case of ***Marcello v. Italy,*** which arose from a period when videoconferencing technology was at a much earlier stage of development than it is today. Nevertheless, some lawyers in Italy still see remote hearings as a potential threat to effective oral hearings in criminal proceedings, whereas other lawyers are of the opinion that in some circumstances remote hearings could be a useful tool in the future, and that the introduction of new digital tools may be an opportunity for faster and more efficient access to justice.[50]

Based on the very limited experience so far, a preliminary conclusion could be drawn that scepticism about the use of remote hearings is much lower in those countries where the level of digitalization is higher. There is a logical reason for this, if we view it from the perspective of the problem of efficiency in the judiciary. Countries where the digitalization of the judiciary is at a high level also have a higher degree of efficiency. This allows them to accept innovative solutions with far less scepticism, and gives them enough room to experiment with new ideas because, even if the implementation of a new idea does not provide the expected results, it is unlikely that it will lead to serious problems in the functioning of the system. It is to be expected that new ideas will be approached with greater reservations in countries such as Italy, which is struggling with serious problems in the work of judiciary, bearing in mind that each new solution potentially brings new complications. It is, therefore, particularly commendable that Italy has recognized the potential of remote hearings.

50 Niccolò D'Andrea, Remote justice before Italian civil courts during Covid-19, available at: https://www.ibanet.org/article/DE193DF8-776C-451C-B48E-4A56C4A32761

IV. POSSIBILITY OF IMPLEMENTING REMOTE HEARINGS IN MONTENEGRO

Bearing in mind that remote hearings are a relatively new phenomenon, there is no detailed analysis of the long-term effects of this manner of the administration of justice in countries where this practice has been adopted over the past two years. However, the fact that this form of trial is already being used in EU Member States and that some countries have accepted remote hearings as part of their national strategy to address problems of efficiency in the judiciary leads us to consider the possibility of the gradual implementation of remote hearings in Montenegro. However, the need and possibilities for the implementation of this concept depend, to a large extent, on the current state of the judiciary, that is, on the efficiency of the judicial system and the degree of digitalization. Of course, this form of trial must also have an adequate normative basis.

4.1. The efficiency of the Montenegrin judiciary

In its efforts to implement the reform processes necessary for the closure of Chapter 23 'Judiciary and Fundamental Rights', the government of Montenegro has adopted a number of strategic documents, of which the Strategy for the Reform of the Judiciary 2019-2022[51] and the Judicial Information and Communication Technology Development Programme 2021-2023 (hereinafter: the ICT Programme)[52] should be emphasized.

The Strategy for the Reform of the Judiciary 2019-2022 (hereinafter: the Strategy) is based on strategic goals created in accordance with the assessment of the fulfilment of the goals set out in the previous strategy. One of the goals of the Strategy is to strengthen the efficiency of the judiciary. This strategic goal was part of the previous Strategy for the Reform of the Judiciary 2014-2018, and includes streamlining the judicial network, improving criminal and civil legislation, reducing case backlogs, improving judicial management and administration, improving alternative dispute resolution and developing a judicial information system.

The European Commission report for Montenegro for 2021 points out that there were no tangible results from the implementation of the new Strategy, and that efforts in this regard should be intensified.[53] The report states that there was a slight decrease in the number of resolved cases older than three years, as well as a slight increase in the duration of proceedings compared to 2019. Given the fact that the problems recorded in 2021 are identical to those recorded in 2019, we can also point to the results of research conducted by CeMI's legal team during trial monitoring in 2018 and 2019, which indicated problems in the efficiency of the judiciary, primarily in relation to trials being held within a reasonable time, as well as on the lack of space in the courts. Inadequate space was also one of the reasons why a large number of hearings were postponed.[54] CeMI also conducted a public opinion poll in March 2020[55] (just

51 Available at: https://wapi.gov.me/download/b228029e-9d4d-4c91-95fe-f34468f6df57?version=1.0
52 Available at: https://wapi.gov.me/download/3ab0d094-2b75-4c84-b40d-c71d7b8c7d6f?version=1.0
53 European Commission, Commission staff working document, Montenegro Report for 2021, Strasbourg, 2021, p. 20
54 Centre for Monitoring and Research (CeMI), Second annual report on monitoring judicial proceedings in Montenegro, 2020, p. 16
55 Available at: https://cemi.org.me/me/post/istrazivanje-javnog-mnjenja-o-percepciji-nezavisnosti-i-integriteta-pravosuda-u-crnoj-gori-801

before the COVID-19 pandemic, which soon caused new problems in the functioning of the judiciary), which showed that 46% of citizens were dissatisfied with the work of the courts, and more than two thirds (69%) believed that court proceedings lasted unnecessarily long because the courts were not efficient enough. When asked what were the biggest problems in the work of the courts, the respondents gave first place to political bias (34%) with the costs of proceedings and the duration of proceedings sharing second place (23%).

The new Strategy lists the main challenges that continue to affect the efficiency of the judicial system: a backlog of cases, the length of court proceedings, the insufficient use of alternative dispute resolution and an inadequate judicial network. The CEPEJ indicators point to the need to rationalize the judicial network. Namely, Montenegro is significantly above the European average in terms of the number of courts and their distribution per 100,000 citizens, as well as in terms of the number of employees in the courts and the prosecutors' offices. The budget is also distributed in such a way that over 80% of the court budget goes on the salaries of the employees.[56] According to the latest CEPEJ data, in Montenegro the number of judges per 100,000 citizens is 50, which is much higher than the European average of 21.4, and the number of prosecutors is 17, compared to the EU average of 11.[57]

In order to reach EU standards, the Ministry of Justice has adopted the Analysis for the Needs of Rationalization of the Judicial Network.[58] As part of the solution, the Analysis suggests merging courts, reducing staff, improving alternative dispute resolution, simplifying procedural laws, and also improving ICT in the courts and prosecutors' offices and the Directorate for the Execution of Criminal Sanctions. In other words, the Analysis envisages an increase in the degree of digitalization of the judiciary.

4.1.1. Degree of digitalization of Montenegrin judiciary

The Montenegrin judiciary is not yet at an enviable level of digitalization. The CEPEJ score for Montenegro in this segment is lower than the EU average of 5.78, at 4.87 out of 10.[59] The goals set in the ICT Strategy for Judiciary 2016-2020 were generally not met in the planned period, so their implementation was postponed, with the main cause of stagnation being insufficient funds.[60]

Among the problems that cause the lack of efficiency in the judicial ICT system, and that stand out in the context of the possibility of introducing remote hearings, are the outdated IT equipment in judicial institutions, the unreliability of the system, the poorly developed network infrastructure, and the lack of harmony in the legal framework.[61] There is still a problem with IT equipment that is more than 10 years old being used. When it comes to the network infrastructure, the main problems are the speed and stability of connections to courts outside Podgorica. This was also confirmed by a significant number of the respondents and judges who answered the CeMI questionnaire. The most common problems that they cited were the speed of the Internet, which did not meet their needs, and the lack of technical equipment necessary for conducting remote hearings. One of the problems that they pointed to were power outages, which can last for several hours.

Although digitalization is not at an adequate level, and is being implemented at a slower pace than planned, some progress has been made. Procuring subsystems for courts and an electronic data exchange are among the goals that have been realized. Also, computer equipment worth 250,000.00 EUR has been procured for the courts, the Ministry of Justice, Human and Minority Rights and the Directorate for the Execution of Criminal Sanctions. The installation of equipment and a videoconferencing system and the development of a new web portal for justice have also been completed.[62]

56 Supra, note 2
57 Supra, note 2, p. 48
58 Available at: https://www.gov.me/dokumenta/273215a3-10ab-409b-991c-8dfa652ddbb1
59 CEPEJ, ICT in judiciary v2020.1.0 EN, available at: https://public.tableau.com/app/profile/cepej/viz/ICTinjudiciaryv2020_1_0EN/ICTDevlopmentDashboard
60 Ministry of Justice, Judiciary Information and Communication Development Programme 2021-2023, p. 14
61 Ibid, p. 23
62 Ibid, pp. 17-18

One of the most important activities planned for the future is the migration from an old to a new IT system. The existing judicial information system (PRIS) was never fully implemented, as it did not cover misdemeanour courts. This system will be replaced by the new unified judicial information system (ISJ). The aim of the ISJ is *to optimize time resources, rationalize financial and human resources, automate procedures and neutralize the impact of human factors on efficiency as much as possible, as well as to avoid paper documentation to the greatest possible extent (the concept of "paperless judiciary"), to enable electronic exchange of data and documents among judicial institutions and other state and international institutions.*[63]

Unlike the PRIS, the ISJ will contain subsystems that will cover all relevant institutions: the Ministry of Justice, Human and Minority Rights, all the courts in Montenegro (including misdemeanour courts) and the Judicial Council, all the state prosecutors' offices, the Special State Prosecutor's Office and the Prosecutorial Council, as well as the Directorate for the Execution of Criminal Sanctions.[64] In addition to the basic subsystems, the ISJ will contain several important electronic services for citizens, lawyers, legal entities and international institutions, as follows: 1) access to cases stored in the court subsystem, 2) a searchable web directory of judicial institutions, court experts, court interpreters and lawyers, 3) a court fee calculator and 4) the possibility of initiating cases before the courts and delivering court decisions electronically.[65] With the implementation of the ISJ and all its envisaged subsystems, the Montenegrin digital justice system should be closer to the European standard.

As rare examples of compliance with the technical requirements that remote hearings would require, we can mention the Basic Court in Podgorica and the High Court in Podgorica. The Basic Court in Podgorica is equipped with multimedia equipment that enables the recording of proceedings, the presentation of digital evidence and videoconferencing calls, and hearings in cases where the parties belong to vulnerable groups when there is a need for the party to be heard without them being physically present (e.g. victims of sexual violence, minors, victims of trafficking and other vulnerable groups).[66] However, this system has not yet come to life. Moreover, during the COVID-19 pandemic in 2020, due to the lack of space and the need to ensure the prescribed physical distance, the Basic Court in Podgorica conducted proceedings in the premises of the Law Faculty at the University of Montenegro, as well as in the halls of the Judicial Training Centre,[67] while at the Basic Court in Niksic, in case **K.no.169/2020,** the court had to postpone the hearing because of the limited space and the consequent inability to ensure that measures of mandatory physical distancing among those present could be respected.[68]

However, this problem should be viewed outside the framework of the consequences of the pandemic. The lack of space, as already stated, has existed for many years, and it affects access to justice, the ability to publicize justice and the effectiveness of the judicial process as a whole, regardless of the epidemiological situation.

63 Ministry of Justice of Montenegro, Judiciary Information and Communication Technologies (ICT) Strategy 2016-2020, p. 8
64 Ibid, p. 15
65 Some of the functionalities that the ISJ needs to provide have already proved necessary because of the COVID-19 pandemic. For example, the Basic Court in Herceg Novi, as a result of infections among judges on November 8, 2020, adopted a decision on a special working regime for the period of November 9-23. Some of the measures consisted of suspending the reception of parties in the court building. The court received letters exclusively through the Post Office of Montenegro and by e-mail, and the delivery of court decisions and other letters was done electronically (Decision of the Basic Court in Herceg Novi V Su. no. 325 / 2020).
66 Judicial Council, Annual Report on the Work of the Judicial Council and the State of Judiciary for 2020, p. 22
67 Source: https://pravosudje.me/ospg/sadrzaj/QWAG
68 Source: https://sudovi.me/osnk/sadrzaj/W92O

4.1.2. Remote hearings as an element of the digitalization of the judiciary

As a positive step forward and a sign that remote hearings have a future in Montenegro, we can mention that, in 2020, the High Court in Podgorica organized 24 hearings that were held simultaneously in two courtrooms. Audio and video signals from the courtroom in which the hearing took place were transferred to another courtroom where the parties were present, in order to comply with the health measures and the prescribed physical distancing.[69] Although this is not a remote hearing in the true sense, the use of videoconferencing in this way is an indication that some judicial officials are willing to accept innovative methods that require a greater use of this technology. Also, some of the respondents to the opinion poll expressed optimism and interest about the idea of the implementation of remote hearings, but often with some reservations, due to the previously mentioned technical shortcomings in the courts, as well as shortcomings in the normative framework, especially when it comes to criminal proceedings. The respondents were much more open to the idea of implementing remote hearings in civil proceedings.

It should also be mentioned that the Judicial Reform Strategy 2016-2020 recognizes the following as the benefits of a videoconferencing system: saving time that would otherwise be spent on witnesses travelling to court as well as travelling to other meetings, reduced costs related to transportation, accommodation, food, per diems, etc., increased productivity due to the possibility of organizing more meetings, and better communication and group work on joint projects.

However, the recognized benefits are limited to the existing legislation. In other words, the Strategy does not envisage the introduction of remote hearings, but only the ability to conduct procedural actions in a way that is already prescribed in the Code of Criminal Procedure.

4.2. Normative aspects of remote hearings in Montenegro

We have mentioned at the beginning of this chapter that a normative basis is also needed for the implementation of remote hearings. For now, this should be limited to criminal and civil proceedings, which have been at the centre of the consideration of the comparative practice in the last two years, as well as in the practice of the ECtHR.

Remote hearings in criminal proceedings are treated as an exception. According to the case law of the ECtHR, trials can be conducted in this way only in certain second instance proceedings, and the consent of the defendant is necessary for a remote hearing in the first instance. Also, in criminal cases it is necessary to ensure in every trial that sufficient time is provided to the accused and his/her attorney to prepare his/her defence, as well as to ensure the secrecy of their communication.

When it comes to Montenegrin legislation, it should be emphasized that remote hearings in criminal proceedings would not be possible without amendments to the Code of Criminal Procedure of Montenegro (hereinafter: the CPC), given that the possibility of holding remote hearings is not provided for in the CPC. Namely, Article 306 of the CPC stipulates that the place of the main hearing is the seat of the court and the court building, and even in a situation where the court building is unsuitable for holding the main hearing, the CPC stipulates that the president of the court may order that the hearing be held in another building.[70] Also, from the provisions which prescribe the summons, content and delivery of the summons (Article 164) and the order for bringing the accused to court (Article 165), it can be concluded that the physical presence of the accused at the hearing is obligatory. As we saw in the second chapter, in order for a remote hearing to

69 Supra, note 64.
70 Official Gazette of Montenegro, no. 57/2009, 49/2010, 47/2014 – CC decision, 2/2015 – CC decision, 35/2015, 58/2015 – other law, 28/2018 – CC decision and 116/2020 – CC decision

comply with Article 6 of the European Convention, such a possibility must be prescribed by the national law. Furthermore, Article 320, which prescribes the preservation of the reputation of the court and participants in the proceedings, stipulates that audio and audiovisual means may not be brought into the courtroom unless this is approved by the president of the supreme court for a particular main hearing. If the recording at the main hearing is approved, the council may, for justified reasons, decide that certain parts of the main hearing are not to be recorded.

On the other hand, there are some exceptions to the obligation for a physical presence that apply to witnesses. Article 112 of the CPC provides for the possibility of hearing witnesses through technical devices for the transmission of image or sound, so that the parties may ask them questions even though they are not present in the same premises as the witness. The CPC also envisages the possibility of witnesses being examined in a preliminary investigation in such a way that the hearing is recorded with an audio or audiovisual recording device, on the basis of which a record can be made which can be used as evidence in criminal proceedings (Article 262).[71]

Potential changes to the CPC that would provide for the possibility of remote hearings would have to take into account the case law of the ECtHR. In other words, the amendments could not provide that the court can decide unilaterally on holding a remote hearing in the first instance, because the defendant cannot be denied the right of access to court, which, in criminal matters, is interpreted restrictively as the right to a physical presence in the courtroom. However, as this is a right that the defendant can waive, the possibility of the court proposing to the defendant that the trial be held remotely may be considered, if other circumstances of the case allow it (e.g. if the case is about a less serious criminal offence, there is only one accused, the accused wants to confess, there is no need for direct insight into the evidence, etc.).

On the other hand, when it comes to civil proceedings, unlike the CPC, the Law on Civil Procedure[72] (hereinafter: the LCP) allows for the possibility of holding a hearing using a videoconferencing system. First of all, Article 111 prescribes that a hearing will, as a rule, be held in the court building, but that the court can decide to hold the hearing outside the court building when it determines that this is necessary or will save time or costs. In the case of the LCP, the legislators went a step further, prescribing in Article 111a the explicit possibility that a party may conduct the litigation from outside the place where the hearing is held, if electronic communication is provided between the place of the hearing and the place of litigation, via audio and visual transmission, but only with the prior consent of the opposing party. The court may decide that evidence and the examination of parties, witnesses and experts can also be presented in this way. However, the LPC stipulates that no appeal will be allowed against a decision of the court on this manner of conducting the hearing and presenting evidence. According to the CEPEJ recommendations,[73] the parties should be given the opportunity to consult with the court on whether a hearing should or can be held in the case. If the parties do not agree with the decision to conduct the hearing by videoconferencing, and their objections are justified (e.g. they do not have the necessary technical equipment or knowledge of how to use it, and the court is unable to provide the necessary technical support, or the parties consider that certain actions in the proceedings cannot be conducted remotely), the court must take those objections into account. However, it should be left to the court to assess and to make the final decision on whether the hearing or other procedure will be organized in the court or remotely, depending on the testimony of the parties and the collection of other relevant information, including the nature of the civil proceedings. In that case, the CEPEJ recommends that there is a possibility of appealing against such a decision before the competent authority in accordance with the law.

However, remote hearings should not be the rule, nor is it the goal of introducing this type of hearing to move the courtroom to an online space. According to Opinion no. 14 (2011) of

71 The Montenegrin public had the opportunity to see how this works during the trial in the 'Coup d›état' case, when people from other countries were examined as witnesses through a videoconferencing system.
72 Official Gazette of Montenegro, no. 22/2004, 28/2005 – US Decision and 76/2006 and Official Gazette of Montenegro, no. 47/2015 – other law, 48/2015, 51/2017, 75/2017 – US Decision, 62/2018 – US Decision, 34/2019, 42/2019 - corr. and 76/2020
73 European Commission for the Efficiency of Justice (CEPEJ), Guidelines on videoconferencing in judicial proceedings, 2021, p. 11, available at: https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4

the Consultative Council of European Judges (CCJE),[74] *IT should be a tool or means to improve the administration of justice, to facilitate the user's access to the courts and to reinforce the safeguards laid down in Article 6 ECHR…The introduction of IT in courts in Europe should not compromise the human and symbolic faces of justice. If justice is perceived by the users as purely technical, without its real and fundamental function, it risks being dehumanized. Justice is and should remain humane as it primarily deals with people and their disputes.*

According to the respondents to the survey, there were situations in which people who were to participate in court proceedings had asked the court if they needed to come to the court. This circumstance is of great importance, because it shows that citizens are potentially willing to participate in remote trials, meaning that if a remote hearing becomes one of the options available to them, some citizens could opt to use this option.

A remote hearing, however, should be an exception that is used precisely in those cases when such a method can achieve positive effects. The primary goal of remote hearings is to contribute to a more efficient justice system, but efficiency cannot take priority over justice.

74 Consultative Council of European Judges (CCEJ), Opinion no. 14 (2011), "Judiciary and Information Technologies (IT)», p. 1

V. CONCLUSIONS AND RECOMMENDATIONS

Remote hearings are one of the new methods of conducting court proceedings. Given the dynamics of technological progress, especially when it comes to today's judicial systems, it is to be expected that in the future there will be an increased use of this method of organizing court proceedings. Remote trials contribute to solving some of the problems we have previously pointed out, which concern the efficiency of the work of the courts. However, the introduction of remote hearings cannot be viewed only from the aspect of practicality; it should be preceded by numerous analyses that will demonstrate all the advantages and disadvantages of this concept. The scepticism of some jurists about the idea of the introduction of remote trials is completely understandable. However, the positive experiences of a large number of judges and legal practitioners in relation to the organization of online trials during the COVID-19 pandemic give reason for optimism about the serious consideration of the idea of introducing remote trials in the Montenegrin judicial system. Apart from the consequences of the pandemic and the positive experiences of other countries, this idea is also based on the real needs of the Montenegrin judiciary for a greater degree of digitalization and efficiency.

The issue of the implementation of a system for remote hearings is a question of a systemic nature, which will be answered by the goals of judicial reforms for the future. As stated in the study, remote hearings must be based on the legal framework governing the procedural rights of the parties to the proceedings, and it should be noted that at this time there are no special legal restrictions when it comes to conducting remote trials in civil proceedings in Montenegro. It seems that, at the moment, remote trials predominantly depend on the degree of digitalization of the courts, prosecutors' offices, Directorate for the Execution of Criminal Sanctions, etc., and on the technical equipment and human resources of all relevant entities needing to use the equipment for remote trials, including the Bar Association and, finally, all citizens of Montenegro. It should be noted that technical equipment for the courts does not mean only the possession of the computer equipment necessary for participation in remote trials, but also a certain quality of equipment, which must take into account the specific nature of the trial, the interest and needs of the participants and personal data protection. As this is a relatively new idea, its implementation should be preceded by training of all relevant stakeholders, raising awareness of the benefits of remote hearings, including promoting the idea of remote hearings to the general public.

RECOMMENDATIONS

- The Ministry of Justice should conduct a detailed analysis of the situation regarding the readiness of judicial institutions to implement the concept of online trials. This analysis would answer the question of what normative and technical preconditions need to be met if the concept of online trials is to become an integral part of the judicial system of Montenegro and in what period it would be realistic to expect some courts to be ready to offer citizens the concept of online trials.

- As a result of the analysis conducted here, the updated Judicial Reform Strategy should contain concrete measures and activities aimed at establishing a system of online trials in all the courts in Montenegro. The Ministry of Justice should provide sufficient financial resources for the implementation of this system, which in its initial phase should be tested at the level of several pilot courts in all three regions of Montenegro. It seems that the Basic Court in Podgorica and the High Court in Podgorica (civil department), because of their technical equipment and annual inflow of cases, would be suitable for testing an online trial system in a certain group of cases (civil cases), together with the Basic Court in Bijelo Polje and the Basic Court in Kotor, because these cover several municipalities. Of course, there would need to be prior investment in the necessary technical equipment, and the judges would need to be trained.

- It is necessary to intensify the efforts being made in the further digitalization of the judicial system, and to work continuously on harmonization with the standards of the European Union in order to improve the efficiency of the judiciary. Accordingly, the ICT Judiciary Working Group should consider amending the procedural laws in a way that would explicitly allow for online trials in all types of cases. Special focus should be placed on amendments to the CPC and the Law on Misdemeanours, as well as on the harmonization of the LCP with the CEPEJ recommendations in this area.

- It is necessary to ensure that budget funds for the digitalization of the judiciary are available on time and continuously, in order to avoid situations in which it is not possible to implement the activities envisaged by the ICT Programme. Through the implementation of ICT programmes, as well as through projects financed by the European Union and other international organizations, it is necessary to equip all courts and state prosecutors' offices with videoconferencing systems and to conduct training for their use.

- In order to create the technical preconditions for conducting online trials in all the courts in Montenegro, it is necessary to ensure that there is a sufficiently fast and stable Internet connection and electricity supply in all judicial institutions in Montenegro, in order to enable the uninterrupted use of videoconferencing systems.

- In the period of preparation of the normative and technical preconditions for the implementation of an online trial system in Montenegro, it is necessary to work actively on improving citizens' awareness of the introduction of the concept of online trials in Montenegro, so that the public is better informed and so that online trials are recognized by the general public as an effective way of organizing court proceedings. The parties responsible for this activity should be the Ministry of Justice, the Supreme Court, the Bar Association and non-governmental organizations that actively participate in monitoring the reform of the judiciary in Montenegro.

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