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CONTRACTUALISATION (consensus oriented approach)

AND

JUDICIAL PROCESS

IN EUROPE[1]

(Situation in 2009)

By

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[1] Readers wishing to obtain information on contractualisation practice in some member states are invited to consult the complementary documents available on the CEPEJ's website: www.coe.int/cepej, area "quality of justice".

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INTRODUCTION

What is contractualisation? – *"Contractualisation"* is a complex concept that needs some clarification. As used in this study the term should be construed in a specific sense.

In ordinary legal parlance a contract is an agreement between two or more parties giving rise to obligations that mutually bind them. A defaulting party may be held liable for failing to comply with the contract. However, as used here, "*contractualisation of justice*" does not necessarily mean that obligations arise between the parties concerned or that sanctions may be sought.

Here, the term "*contractualisation*" must be understood more metaphorically. It refers to a consensus-oriented approach.

In this study the term contractualisation must be construed in the metaphorical sense.

The starting point for this study is a simple observation: until only recently, judicial activity was traditionally based on subordination to *authority*. Judicial procedure was imposed on the users of the justice system, who were subject to procedures which had been chosen for them, over which they had no influence and which - in criminal matters - more often than not led to the imposition of penalties on the perpetrators of offences.

To a large extent that is still the case at present.

Contractualisation refers to a new type of relations based on dialogue and consensus rather than an authoritarian approach.

And yet things have changed. Nowadays, judicial activity is no longer based solely on the exercise of authority. New elements are gradually being added to the vertical model involving the imposition of rules. A horizontal model, relying on mutual assent, is steadily gaining ground in the different parts of the judicial system. In many European countries, procedure and practice reflect the existence of procedural elements that now involve interaction and exchanges between different players.

In contrast with the authoritarian approach, a "*contract*" would seem to offer a more consensus-based, less unilateral means of regulating the functioning of society. In this study, "*contractualisation*" therefore refers to the emergence of new judicial relations seeking to establish a balance.

The metaphor consists in the fact that contractualisation refers less to a specific legal situation in civil law (an agreement) than to a new type of relations based on dialogue and consensus, rather than authority.

In this study, contractualisation must be understood as a discussion process, a process for exchanging viewpoints with the aim of achieving common objectives. It hardly matters whether the parties incur a liability on the basis of this discussion: the term contract is not to be construed in the civil law sense. All that counts is the negotiation process. The contractualisation arises from the initial exchange of viewpoints, from the stakeholders' mutual intent, rather than from the resulting legal effects.

The study's purpose – Judicial activity would therefore seem to have evolved, becoming "contractualised" - but to what extent and which proportions? To find out, this study seeks to make the broadest possible assessment of the links between contractualisation and judicial process, addressing both the *efficiency* and the *quality* of justice.

Has the *efficiency of justice* become contractualised? Do those running and managing the courts on a daily basis apply a top-down approach founded solely on hierarchical relationships and authority or, conversely, do they seek to discuss matters, to strike a balance and to build a consensus in the interests of good administration of justice?

Has the *quality of justice* become contractualised? In fulfilling their role - which is to hear and determine cases - do the courts now have procedural instruments that enable them also to hear and take into account

the views of court users, thereby making their decisions better informed and more readily acceptable by all concerned?

The study seeks to answer these questions at the European level (Council of Europe), while drawing attention to the existence of contractualisation, the issues it raises, the risks it poses and the benefits it offers. It attempts to determine whether contractualisation is a potential means of improving justice and whether it can constitute a criterion for measuring the quality of justice.

The research methodology and the questionnaire are set out at the end of this document.

The study's layout – With regard to judicial process, contractualisation fulfils two functions: *ensuring that courts are better managed* and *giving court users a more active role*. These two themes accordingly form the backbone of the study:

PART ONE: ENHANCING THE EFFICENCY OF THE COURTS: TARGET-BASED CONTRACTS AND PARTNERSHIPS

PART TWO: ENHANCING THE QUALITY OF DECISIONS: CONTRACTUALISATION BETWEEN STAKEHOLDERS TO THE PROCEEDINGS

The various aspects of contractualisation are analysed in detail under each theme.

It is particularly important to draw a clear distinction between the two parts of the study. Although, as already mentioned, contractualisation must be construed throughout this study as the introduction of a discussion process, an attempt to achieve a balance, to some extent tempering the traditional authoritarian approach of judicial process, it covers very different concepts in the two parts of the study.

In the first part:

The primary focus will be on the agreements that can be reached between different entities - or different administrative bodies - acting in the public interest.

A first section is devoted to *"target-based contracts"*, which may be "target-based contracts" in the strict sense of the term (infrequent and voluntary in nature) or *management contracts* (periodic and mandatory). These contracts, which again are contracts only in name, are in fact based on an agreement concluded by the judicial authorities with a provider of financial and/or human resources. This section raises the question whether contractualisation of judicial process allows more rational management of resources.

A second section goes on to discuss *partnerships*, that is to say *service contracts* and *accreditation agreements ("conventionnements")*, both forms of agreement concluded by a court with a view to ensuring the good administration of justice. The objectives, the procedures for awarding the contracts, their evaluation and the benefits of formalising the arrangements are addressed. This section raises the question whether contractualisation of judicial process offers means of better co-ordinating the management of resources.

In the second part:

The primary focus will be on the framework governing any procedural arrangements which, under the judge's authority, afford parties a means of greater individualisation of the judicial process.

A first section is devoted to contractualisation mechanisms that allow judges, while they are still pondering a case, to obtain information relevant to taking a good decision. Particular attention should be paid here to elements of contractualisation present in the *examination of cases*, in *changes in judicial doctrine* and in *obtaining expert opinions*. This section raises the question whether contractualisation of judicial process offers procedural instruments allowing judges to inform their decision-making.

Lastly, a second section discusses the contractualisation mechanisms that enable judges to hear and decide cases while seeking to promote users' understanding and acceptance of their decisions. Elements of contractualisation present in the *conduct of proceedings*, in the *choice of criminal procedure* and in the *choice and enforcement of sentences* are relevant here. This section raises the question whether contractualisation of judicial process offers procedural instruments allowing judges to foster greater acceptance of their decisions.

I. ENHANCING THE EFFICIENCY OF THE COURTS: TARGET-BASED CONTRACTS AND PARTNERSHIPS

The first part of this study concerns the emergence in Europe of contractualisation models as a means of managing judicial services. It mainly deals with agreements concluded between different entities, or different administrative bodies, acting in the public interest.

Contractualisation could prove to be a persuasive criterion for assessing the quality of justice in that it permits, inter alia, more rational, better co-ordinated management of the resources allocated to the judicial system.

A. More rational management?

"Target-based contracts" and management contracts – An administrative body can sometimes conclude an agreement with the authorities responsible for its funding, aimed at obtaining resources in exchange for a commitment to achieve certain objectives. This is known as an "*target-based contract*" or "*convention of services*" and is an opportunity for two institutions to take stock of a situation and reach agreement on the efforts to be made by both sides so as to improve the performance levels they offer users, expressed as clearly quantifiable objectives.

Here a target-based contract can be seen to be a flexible, pragmatic solution, intended to reinforce all or part of the services of an administrative body confronted with a one-off management or activity-related problem. It is in a way an exceptional response to an exceptional situation.

In practice two systems co-exist in Europe: conclusion of target-based contracts may be mandatory (management contracts) or it may be optional and voluntary.

However, some states take things further, in that they adopt a formal process whereby agreements are reviewed at regular intervals, here too taking into account the institution's management and operation in practice. In this case the agreements are no longer exceptional in nature and become an opportunity for determining, on a regular basis, the amount of the budget to be allocated to the institution for the coming year (for example). This type of periodic target-based contract is known as a "management contract".

These two approaches can be transposed to the judicial sphere, where a court (to be construed here as the bench or the prosecutor's office, or both) can undertake to attain certain performance objectives in the short or medium term in exchange for the requisite financial and human resources.

The term "target-based contract", which has a broader sense than "management contract", lends itself to a general theoretical and practical discussion of this issue. The considerations set out herein with regard to "target-based contracts" also apply to management contracts, unless stated otherwise.

1. Models of target-based contracts

Classification – Taking the contracting parties as the reference criterion, it is possible to propose a classification of target-based contracts in two categories: *semi-autonomous* / *autonomous* and *centralised* / *decentralised*.

1.1. Semi-autonomous / Autonomous

Definitions – A target-based contract follows an "autonomous" model where the judicial authorities can discuss the overall justice budget directly with the authority responsible for voting it (the legislative authority). If that is not the case, the target-based contract can be qualified as "semi-autonomous" where the judicial

authorities can discuss the matter only indirectly with the authority responsible for voting the budget since they must go through an intermediary (executive authority - the minister or ministry of justice).

Under the fully autonomous model, the judicial authorities can freely utilise the sums allocated to cover their operating expenditure (for example to meet material and human resources needs). The legislative and executive authorities do not scrutinise the use made of the funds.

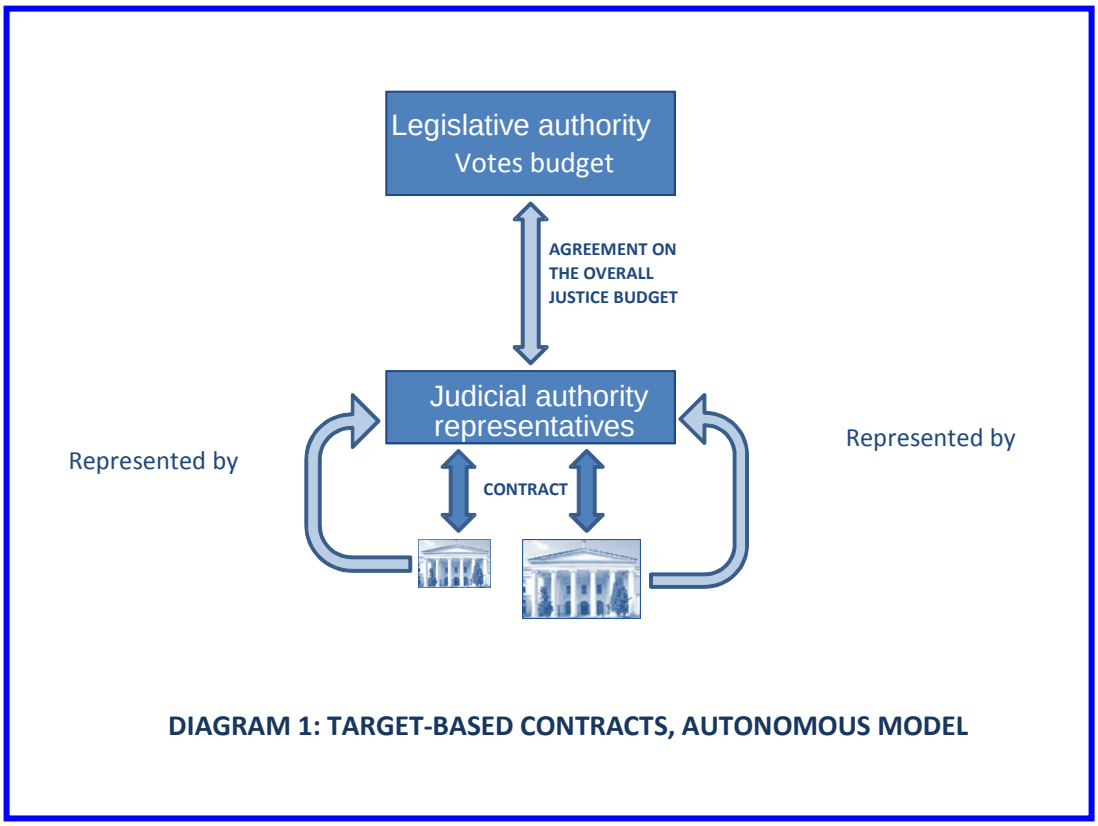


DIAGRAM 1: TARGET-BASED CONTRACTS, AUTONOMOUS MODEL

Under a semi-autonomous model, there are often greater tensions between the judicial authorities and the executive authority, as the latter often considers itself to be accountable for the resources it has to allocate.

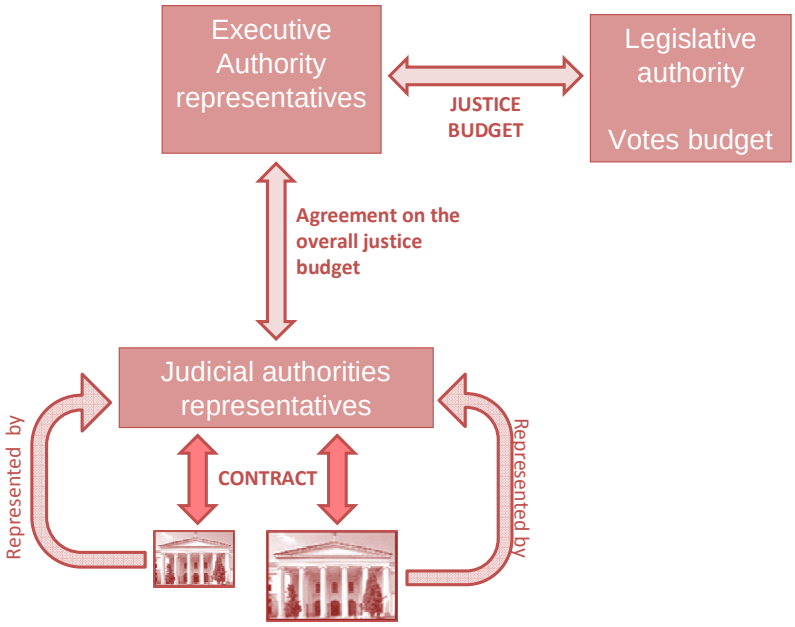


DIAGRAM 2 : TARGET-BASED CONTRACTS, SEMI-AUTONOMOUS MODEL

1.2. Centralised / Decentralised

Definitions – A target-based contract may be "*centralised*", where it is concluded between a court and a central authority, or "*decentralised*", in which case it is concluded between two courts, more often than not where one belongs to the other's judicial district.

Within the same state, the two categories are not mutually exclusive, since, although the first category can quite easily be implemented where the second does not exist, the second must nonetheless be considered to constitute an optional extension of the first.

1.2.1. Target-based contracts concluded between a court and a central authority ("centralised" model)

"Centralised" model – In practice, where a target-based contract is drawn up with the public authorities, the court's point of contact is frequently a national or federal body, such as a ministry - more often than not the ministry of justice. However, in some countries the court's point of contact may be an authority representing a federated state or an independent authority (a judicial council; a board composed of judicial or prosecutorial representatives) where the latter is competent for allocating the required resources. In some states which have to rely on international financial aid, this role may even be assigned to a foreign funds provider. At all events, this form of contractualisation in a way becomes a communication channel between a court and a central authority.

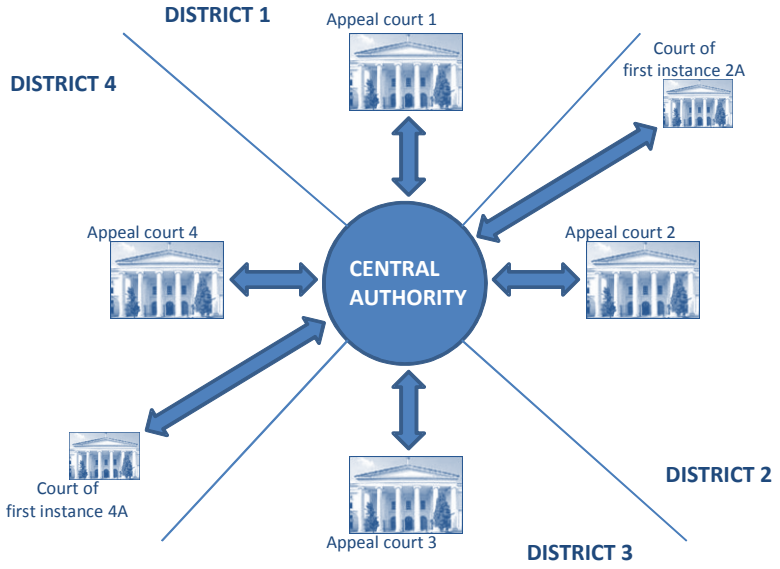


DIAGRAM 3: TARGET-BASED CONTRACTS, CENTRALISED MODEL

Advantages – This first model – a target-based contract concluded directly with a central authority - offers the advantage of facilitating co-ordination of performance policies at national level, which is necessary, and even essential, to guarantee equality of access for all justice system users. It also helps to offset unavoidable local disparities, an example being that, where a policy aiming to crack down on a specific type of offence is implemented in a given district, the outcome may be a rapid, lasting increase in the backlog of cases pending before its courts (mass offences).

A target-based contract concluded with a central authority, albeit complex to set up and in much demand by the courts, facilitates the co-ordination of court performance policies and helps offset local disparities.

Weaknesses – This model's weakness lies in the fact that it is cumbersome to implement. Whether target-based contracts are available to appeal courts alone or to both courts of first instance and courts of appeal changes nothing: the process is often protracted. The identification of problems and the consideration of solutions may be delayed as a result of the extent of an appeal court's jurisdiction (complexity) or the number of courts of first instance also wishing to conclude such contracts (multiplicity).

1.2.2. Target-based contracts concluded between two courts ("decentralised" model)

"Decentralised" model – If target-based contracts are to be concluded between two courts - typically a court of first instance and a court of appeal - decision-making concerning the management and administration of judicial resources must be highly decentralised. Although some European states have adopted it, this second model is doubtless harder to implement, since it is more likely to clash with established traditions. In fact, before it can be implemented, considerable autonomy must be granted to heads of courts, who, at appeal court level, must be able to act as commitments officers with delegated responsibility for authorising expenditure and allocating resources.

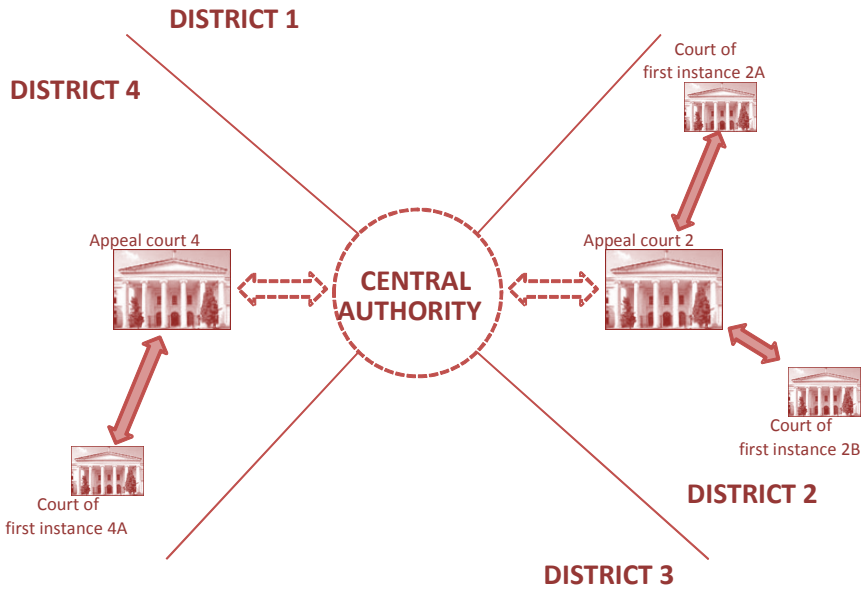


DIAGRAM 4: TARGET-BASED CONTRACTS, DECENTRALISED MODEL

Advantages – The key strength of this second model is that it permits the administrative decentralisation of management decisions at the level closest to realities on the ground while ensuring the critical size (financial strength, staffing) necessary to effective application of state policies at local level. For example, it makes it easier to respond to the needs of those courts within a district that are short of staff (judges, clerks, etc.). Since they are less cumbersome to implement than a national procedure, these "local" contracts can undergo adaptations several times per year.

A target-based contract between courts permits the administrative decentralisation of management decisions at the level closes to realities on the ground while ensuring the critical size necessary for applying state policies at local level. This system however requires that heads of courts be given management responsibilities, often entailing changes in work organisation.

Weaknesses – One weakness of this second model lies in its optional nature where the central authority can conclude target-based contracts directly with courts of first instance. However, the main weakness is that, setting aside the constraints of tradition, even where it is accepted decentralising decision-making regarding the management and administration of judicial resources is not enough: the head of the court must also display consummate managerial skills and be aware of and responsive to problems arising within his or her remit. He or she must be capable of building a consensus on the basis of an appropriate diagnosis, focusing on clearly defined objectives, combined with specific targets. This often means that heads of court have to change their working methods and organisation, adopting attitudes consistent with a performance culture, a situation which does not always find favour among them.

2. Practical aspects of target-based contracts

2.1. Duration and frequency

A combination of factors – The period for which a target-based contract is concluded varies, firstly, according to the type of contract under consideration - a target-based contract in the strict sense (exceptional and voluntary in nature) or a management contract (periodic and obligatory). It also varies depending on the

ease of implementation of the chosen model (centralised/decentralised; autonomous/semi-autonomous)). However, these variances are primarily attributable to the combination of objectives being pursued: sustainability, formalisation of supervision, responsiveness to users' needs.

Sustainability, formalisation of supervision and responsiveness to users' needs – Where the aim is to make an action sustainable there is naturally a tendency to provide for the implementation of target-based contracts over relatively lengthy periods. However, prolonging a contract's duration often goes hand in hand with limited possibilities of renewing it.

A target-based contract in the strict sense, which is intended to constitute a voluntary response to an exceptional problem, is by nature only rarely renewable. To ensure that the problem is nonetheless satisfactorily dealt with, this type of contract often has a multi-annual duration (three years at most). It is almost never renewed, except where there are compelling reasons for doing so.

Management contracts obey an entirely different logic and follow a very different frequency. Since they are by nature intended to be recurring, they more often than not stipulate a duration of one year, or at any rate a period sufficiently long to make the preliminary statistical and economic analysis meaningful but not so long that the resulting projections become irrelevant.

In states that apply the decentralised model of target-based contracts (between courts), concern to guarantee responsiveness leads the court of appeal to allocate human and material resources to the court of first instance several times a year, in line with the requirements noted. Contracts concluded on this basis are therefore often fairly short-lasting (a few months).

Example – France offers an interesting example, since the country has target-based contracts in the strict sense, management contracts and contracts between courts. There are currently 4 target-based contracts in progress (strictly speaking). Their initial duration is two years, with a possibility of prolonging this period up to five years, a rare occurrence (only two out of fourteen contracts have been extended in this way over the years). The management contracts (referred to as "management dialogues") have been concluded on an annual basis since 2006 (they were introduced under the institutional reform of the budget known as the LOLF "Loi organique relative aux lois de finances"). They number 42. Local contracts between courts are themselves too numerous to quantify. Their duration varies from one to six months.

Other states also have management contracts, such as the Netherlands (since the organisational reform of 2002 which set up the Council for the Judiciary), perhaps soon to be joined by Belgium (which has set out plans to reorganise the judicial system in a memorandum summarising the main lines of the proposed reform).

Diagrams 5 to 8: National models of target-based contracts: England and Wales, Belgium, France, the Netherlands

NB: In diagrams 5 to 8 the coloured double-headed arrows correspond to a contractualisation approach.

The diagram showing the English and Welsh model does not take account of the reform planned for April 2011, whereby the courts and tribunals management services are to be merged into a single entity.

The diagram showing the Belgian model is based on the proposed reform of judicial organisation that was at one time being considered (document on the main lines of the reform dated 21 April 2010).

DIAGRAM 5 : ENGLISH & WELSH MODEL

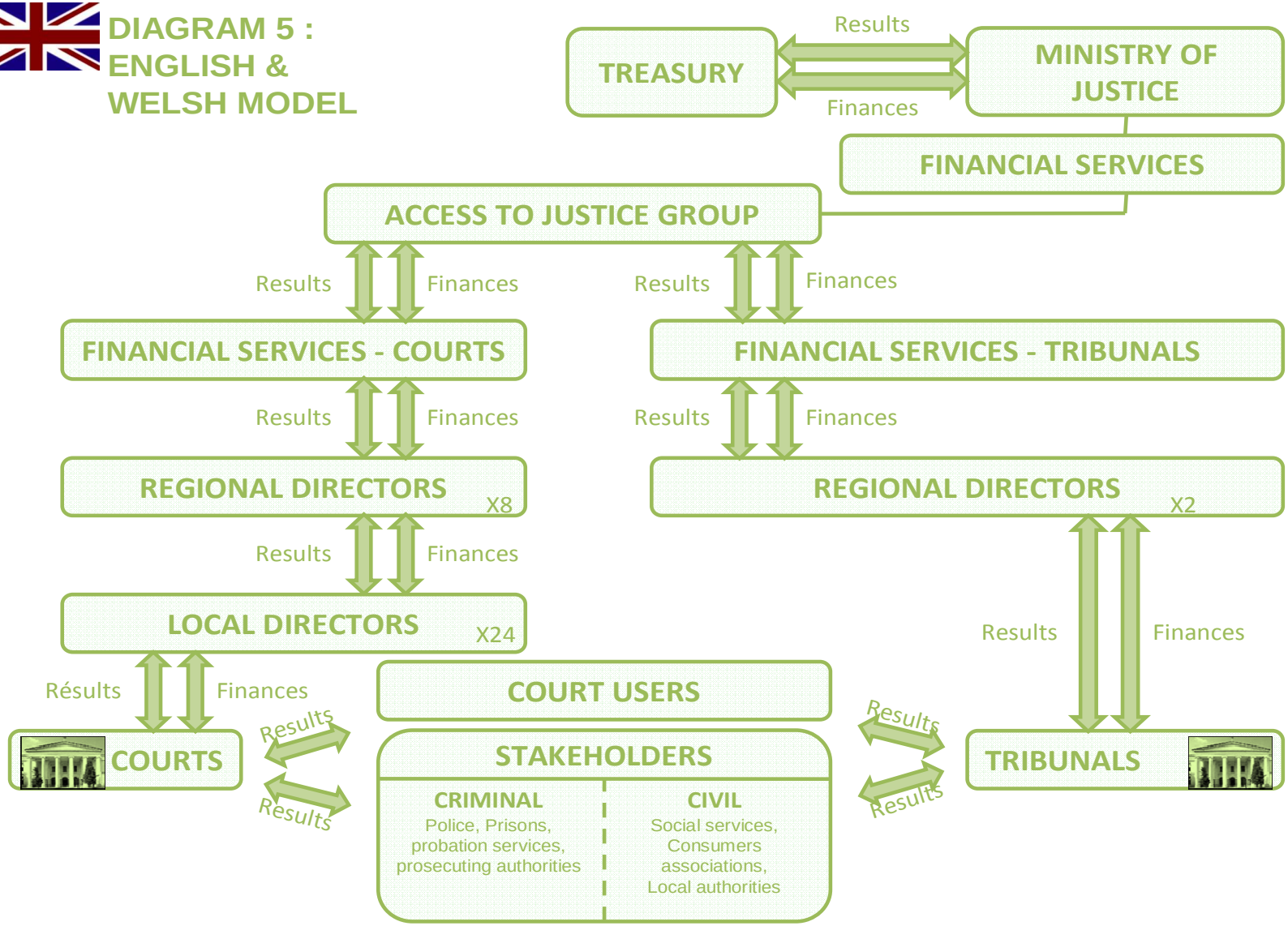


DIAGRAM 6 : BELGIAN MODEL

Proposed judicial reorganisation

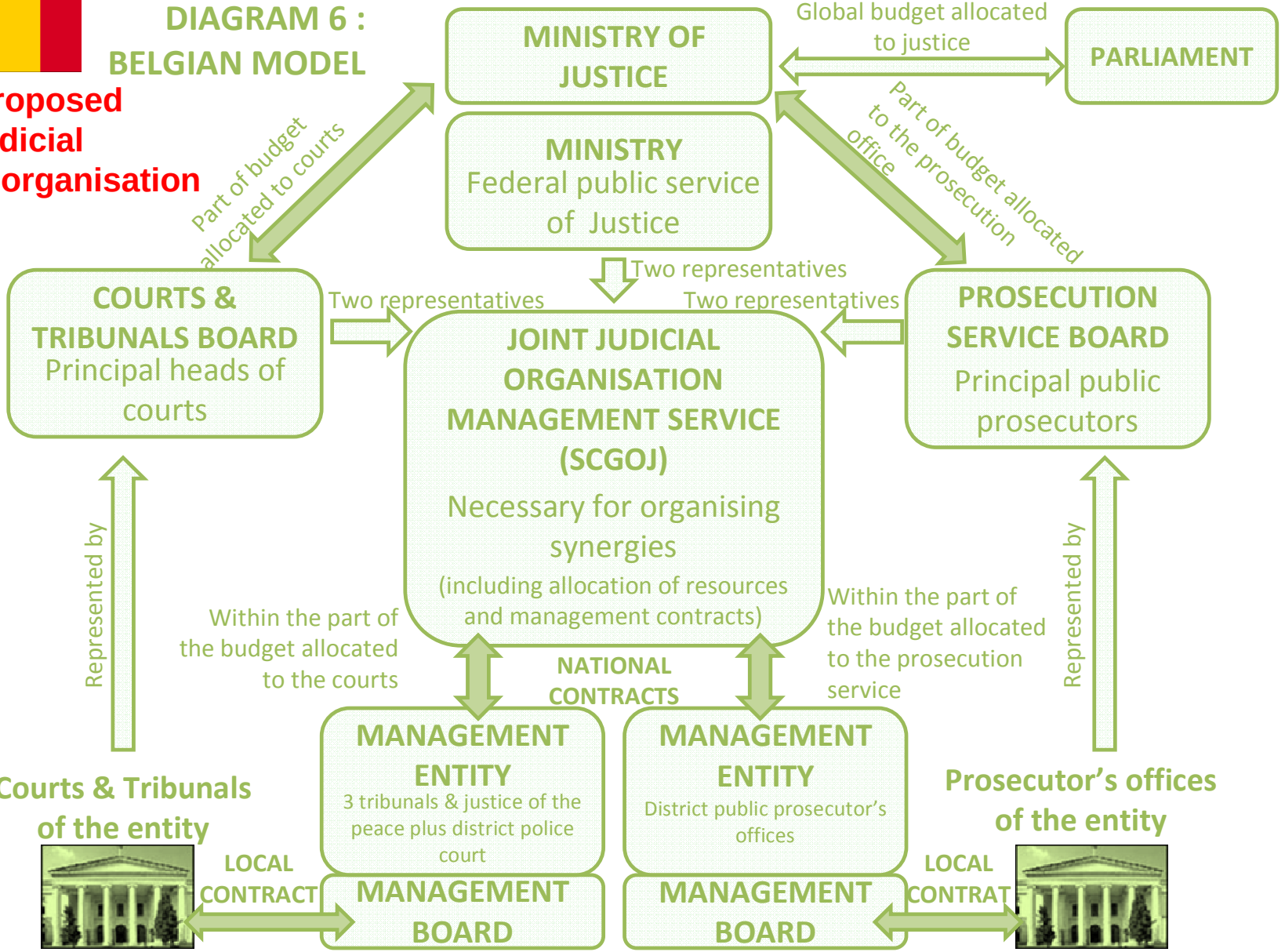


DIAGRAM 7: FRENCH MODEL

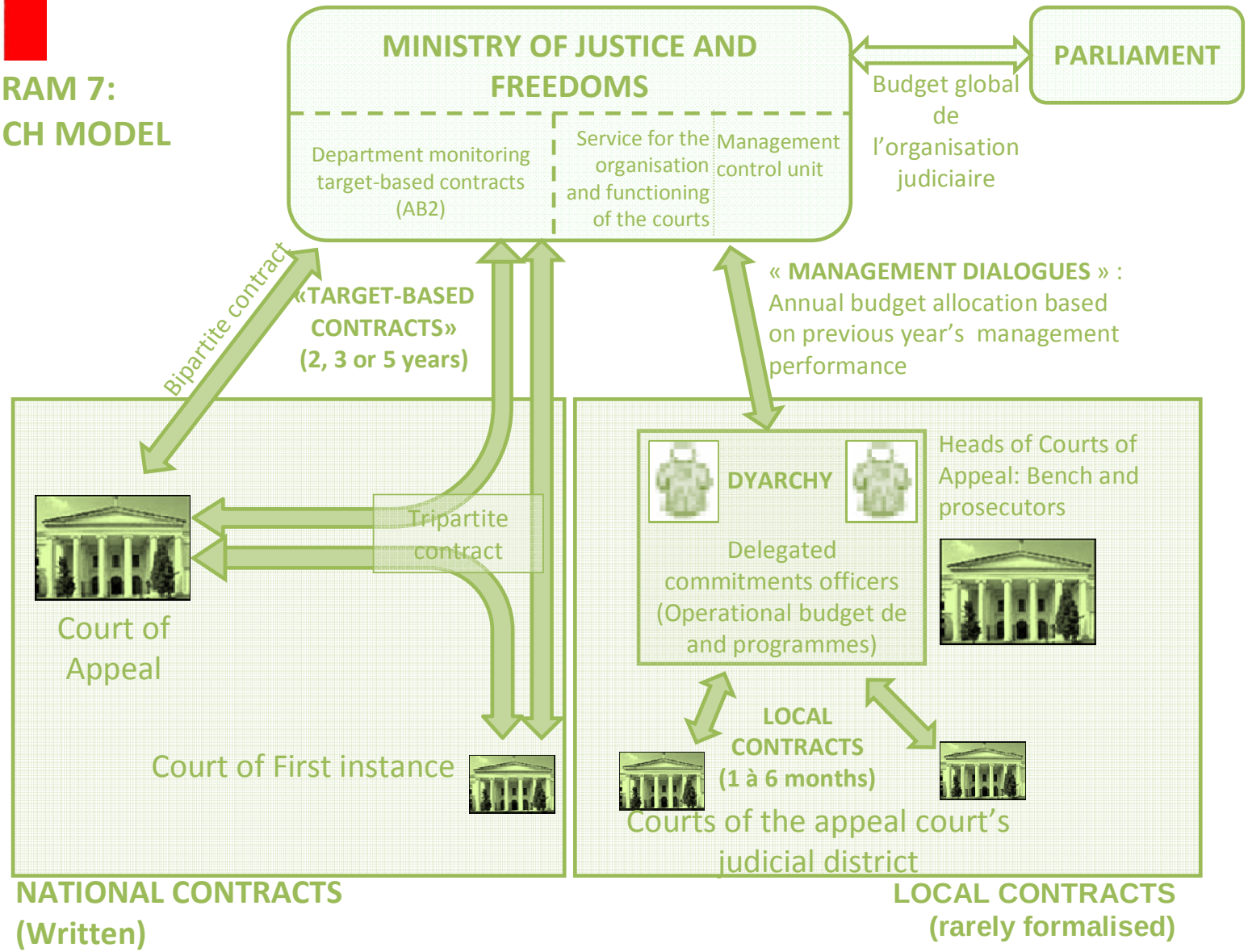
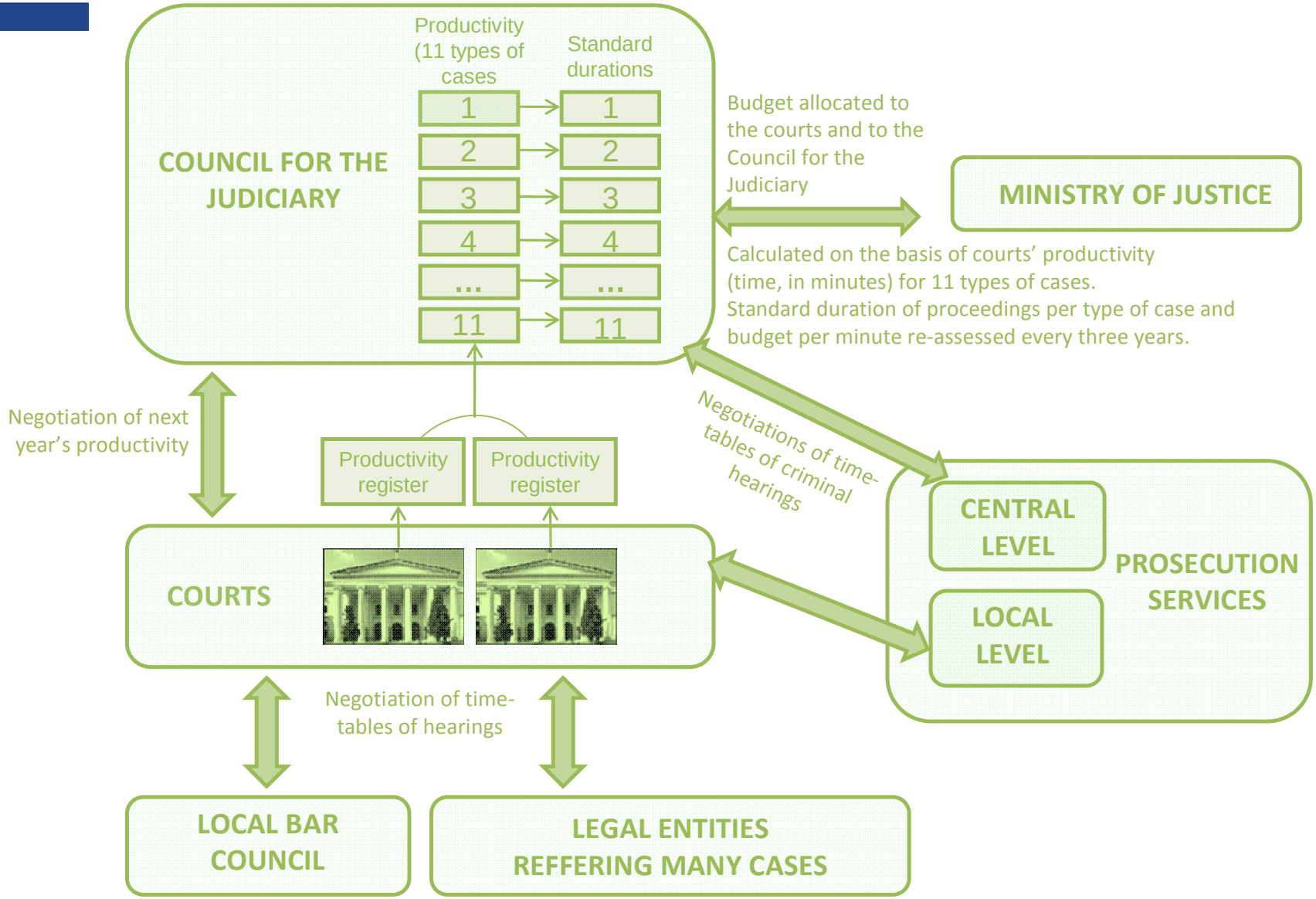


DIAGRAM 8 : NETHERLANDS MODEL



2.2. Targets of target-based contracts

Regardless of whether the agreement reached is a management contract or a target-based contract in the strict sense, the targets are of two kinds: firstly, quality standards the courts are required to meet and, secondly, methods to be used by the courts to attain these standards, where the contract's signature depends on the adoption of these methods.

Efficiency standards constituting targets of target-based contracts – In concrete terms, the contracts concluded are aimed at attaining certain efficiency standards required of the courts, or at ensuring the sustainability of standards that have already been met.

The most frequent objective is to reduce the length of proceedings or a backlog of cases. An example is the creation, for a given period, of new divisions set up especially to process and eliminate the oldest case-files. Statistical and ergonomic studies may be performed before taking specific action to reduce referral rates or set the number of cases to be managed by judges in chambers.

The most frequent objectives in terms of quality are: reduction of the length of proceedings or of a backlog of cases, modernisation of court facilities and equipment or of processes, diversification of the means of responding to cases and training of judges.

Having this in mind, the SATURN Centre Guidelines for judicial time management advise member states that the “central bodies responsible for the administration of justice have the duty to ensure means and conditions for appropriate time management, and take action where appropriate”. (CEPEJ(2008)8Rev, point I.E.3). In order to achieve this, such authorities “have to cooperate in the process of setting standards and targets” (point III.A.2). In addition, “there should be specific targets at the level of individual courts. The court managers should have sufficient authorities and autonomy to actively set or participate in setting of these targets”. (point IV.C.1). The conditions related to such targets are as follows:

- “The targets should clearly define the objectives and be achievable. They should be published and subject to periodical re-evaluation.” (point IV.C.2)
- “The targets may be used in the evaluation of the court performance. If they are not achieved, the concrete steps and actions have to be taken to remedy the situation.” (point IV.C.3)
- “In the situations where there is a significant departure from the targets set at the court level, there should be specific means to rapidly and adequately address the cause of the problem.” (point IV.D.1)

Apart from the reduction of case processing times, the contracts concluded often relate to the modernisation of court facilities and equipment (information and communication technologies) or of processes (dematerialisation of procedures).

They are also frequently used to raise the number of criminal cases in which the courts take action through a diversification of the means of prosecuting offences.

They also make it possible to free up time for the training of judges: lay judges can be invited to attend appeal court hearings or regular discussion sessions with the district's professional judges so as to benefit from the latter's experience; professional judges can find time to undergo training in various techniques (for example, new information technologies, communication techniques, conflict management and negotiation techniques) which they have not previously been able to master.

Methods provided for in target-based contracts – Contracts may stipulate specific methods for utilising the resources allocated.

The first is known as the "***proportioning***" method. This consists in adjusting the resources allocated in proportion to each court's foreseeable objectives. The court's organisation is in principle unchanged. This

method of *management* of judicial funding is particularly utilised in states where target-based contracts are mandatory for the courts (examples being France and the Netherlands).

The second is known as the "***reorganising***" method. Contracts may provide for the internal reorganisation of a judicial district or a given court with a view to reinforcing its activities as a whole. They may also provide that internal reorganisation shall be confined to reinforcing one or more services at district or court level (an example here is France).

The third is known as the "***supplementing***" method. This concerns contracts providing for the creation of new bodies, added on to one or more services so as to respond to certain pre-identified problems within a district or a court or to allow the introduction of new arrangements provided for by law (France). It may also concern the supply of additional temporary personnel to cope with staff shortages (absences for reasons of illness or childbirth or unfilled vacancies).

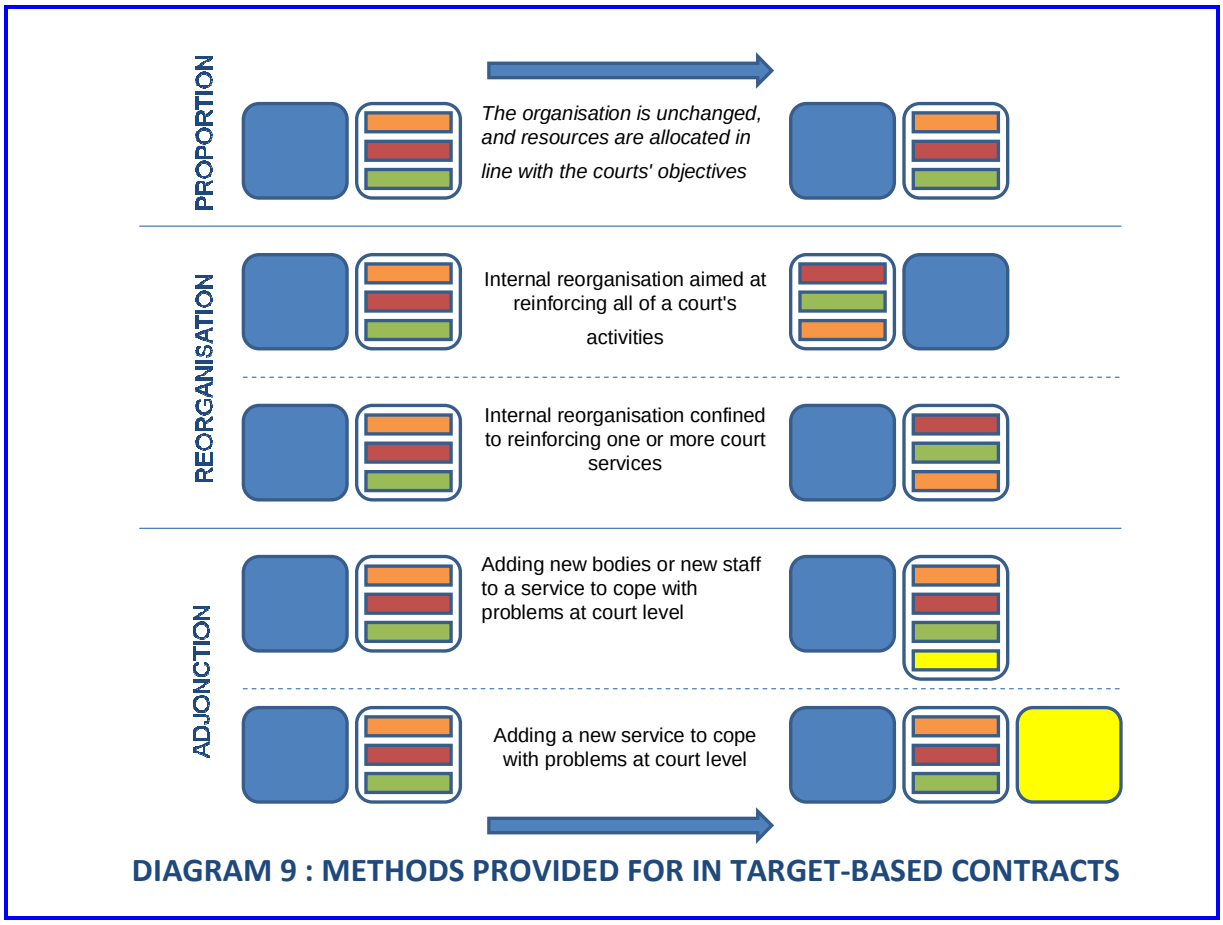


DIAGRAM 9 : METHODS PROVIDED FOR IN TARGET-BASED CONTRACTS

2.3. Procedure for concluding target-based contracts

Issues – Although target-based contracts provide for the allocation of resources to the courts, they also require them to achieve certain predetermined results. It is accordingly important to know who can instigate such contracts and to what extent these procedures are monitored and scrutinised.

Instigation of the target-based contract – Since target-based contracts are concluded in part by a court's representatives, it would seem only logical that service deficiencies should be detected at the level of the court itself through feedback from staff, qualitative user satisfaction surveys or quantitative statistical surveys, making it possible to compare the service performance of courts of the same size.

In the case of management contracts (periodic and obligatory), the practice is clearly becoming institutionalised. In the Netherlands, since 2002, first-instance and appeal courts have been obliged to enter into a commitment vis-à-vis the Council for the Judiciary concerning the number of cases they undertake to deal with for a given budget and staffing level, determined on an annual basis for the next twelve months. Although the judges of a court are not officially empowered to make proposals, it can be seen that in practice heads of court consult the representatives of the judges and the clerks of court. In France, following the adoption of the LOLF (budget reform act) in 2006, the ministry now sends the heads of each appeal court (the dual authority constituted by the President of the Court of Appeal and the Principal State Prosecutor at the Court of Appeal) an initial analysis on which they are asked to comment, following which an updated analysis is prepared and sent to them and they are invited to a meeting (in person or via videoconference) to discuss the resources to be allocated to the appeal court's judicial district. As delegated commitments officers, they are jointly responsible for making good use of the resources allocated to the judicial district with a view to managing its judicial services needs.

Management contracts are based on an obligation for the courts to commit themselves regularly to attaining objectives in exchange for the budgets allocated.

Target-based contracts in the strict sense (exceptional and voluntary in nature) continue to be instigated by the courts themselves.

In the case of target-based contracts in the strict sense (exceptional and voluntary), it is more often than not the heads of court who have authority to instigate the conclusion of the contract. Depending on the country concerned, the head of a court may be a member of the judiciary (a judge or a prosecutor) or not (a chief clerk or a manager) and decisions may be taken by a court head alone, by a dual authority (such as the judge/prosecutor diarchy in France) or collegially (as in the Netherlands). The heads of court are then parties to the negotiation of the contract and thus play a role in determining the objectives. They submit a request to their contact point (a department within the Ministry of Justice, a competent regional authority or the court of appeal for their judicial district), which, if accepted, may in some states (e.g. Bosnia and Herzegovina) necessitate the judicial council's validation.

Whether a target-based contract is mandatory or optional, it is therefore not normally a collective initiative of the judges or the clerks of a court. They are not usually collectively involved in the decision-making stage, but their representatives are consulted and involved in the discussions (as is the case in France, the Netherlands and the United Kingdom). This observation must nonetheless be qualified: firstly, in some states the heads of court are members of the judiciary (e.g. in France) but it is as managers that they are involved in the decision-making stage; secondly in practice it can be seen that judges' and prosecutors' views are increasingly being taken into account (e.g. in the Netherlands and the United Kingdom); and, lastly, in states where the judicial council has to approve the contract once it has been concluded a number of judges/prosecutors are again called upon to participate in the decision-making process (an example is the Netherlands, where two of the four members of the Council for the Judiciary come from the judiciary).

The initiative does not normally come collectively from a court's judges and clerks. They are not involved in decision-making except via their hierarchical representatives.

Consultations are, however, frequently organised to allow court staff to make their views known.

The judges and clerks of a court are usually informed after the contract has been signed. In some states it is even obligatory to inform them (an example being France, where the annual general assembly of the court's judges, prosecutors and clerks must be informed of a contract's signature and of the results attained during its execution).

Legal regulation of target-based contracts – In some instances there is no predefined procedure for the conclusion of a target-based contract and, for lack of a basis in law, the budgetary procedure is scarcely regulated (this is the case in Germany). However, in most of the countries having recourse to this contractualisation technique, target-based contracts are covered directly by a law (in Bosnia and Herzegovina by section 48 of the Law on the High Judicial and Prosecutorial Council; in France by the Judicial Services Planning and Programming Act (Loi d'orientation et de programmation pour la justice) of 9 September 2002, and subsequently the LOLF and the related circular of 27 February 2004; in "the former Yugoslav Republic of Macedonia" by the Law on Public Procurement).

The conclusion of target-based contracts is not always based on strictly defined criteria (for instance in Germany, or the Netherlands where they are mandatory). Nonetheless, in states where target-based contracts have a specific basis in law, that is to say in the majority of the states concerned, the criteria are more transparent. Where both the court and the relevant authority have noted a significant deterioration in one or more sectors of judicial activity, they can even reach agreement on very precise conditions. For instance, in France, in the case of target-based contracts in the strict sense (voluntary in nature), the court must not simply call for the allocation of financial or human resources but must submit a quantified recovery plan, proposing the reorganisation of the service(s) concerned and judicial process modernisation measures, the sole means of guaranteeing the sustainability of the results being aimed for.

2.4. Evaluation of target-based contracts

Evaluation approach – Following the conclusion of a target-based contract, the results attained are evaluated with a view to verifying that the terms of the contract have been respected within the timeframe laid down.

This evaluation may be informal (as in Germany, where the ministry monitors the results without exercising any form of scrutiny in the true sense).

However, in most states, this evaluation gives rise to a specific monitoring process implemented by the authorities allocating the resources. This takes the form of an annual, half-yearly or quarterly reporting system, whereby the head of court reports progress achieved. In some states the report must be backed by statistical evidence obtained from computer systems existing at national level. For example, in France, in connection with the "management dialogues", the Statistics and Performance Management Unit of the Ministry of Justice uses a system called PHAROS, which allows the auditing of and comparisons between courts according to their size or in the light of national averages.

Evaluation can also be based on other data showing trends in activity processes, in particular when assessing the effects of a target-based contract in the strict sense (exceptional and voluntary in nature). In this case use is made of protocols concluded with external partners, minutes of thematic discussions on the harmonisation of practices or service organisation, and so on.

Consequences of evaluation: target-based contracts (in the strict sense) – Depending on the fulfilment of the commitments entered into, target-based contracts in the strict sense (exceptional and voluntary) do not go hand in hand with any advantages or restrictions.

The concept of a "reward" or "sanction" is irrelevant in a judicial system where the authority that concludes a contract with a court must in any case continue to deal with that court in future. Even if the court fails to achieve the objectives set, the authority that concluded the contract with it will still have a future obligation to help improve its efficiency.

The fulfilment of the commitments entered into under a target-based contract (exceptional and voluntary in nature) does not involve a system of rewards and sanctions.

In the end, if a target-based contract (in the strict sense) is successfully implemented, the court will gain in terms of efficiency and the heads of court will find that there is more flexibility in the organisation of the day-to-day administration of justice.

Conversely, if the target-based contract is not properly implemented, the underlying problem will subsist, and the funding authority will in future be more cautious about the reform projects and guarantees proposed by courts confronted with the same type of problem.

Consequences of evaluation: management contracts – The consequences are not the same in the case of management contracts (periodic and mandatory), which sometimes involve reward/penalty ("bonus-malus") systems.

If implementation of a management contract permits savings, the sums economised will more often than not have to be returned to the funding authority so they can be reallocated to other courts under a fungibility system (this is the case, for example, in France and the Netherlands). However, the Netherlands is a specific case, since, although the bulk of the funding has to be returned by the court, it may keep a small percentage of any savings made (approximately 3%).

Fulfilment of the commitments entered into under a management contract (periodic and mandatory) can sometimes be linked to a system of rewards and sanctions.

If a management contract is unsuccessful in that the court does not achieve the objectives set for the period under consideration in keeping with its commitments and the resources allocated to permit their fulfilment, the court will be asked to explain this discrepancy. If it is unable to account for the poor performance, it will be deemed not to have fulfilled its objectives and the resources allocated to it the following year will be reduced.

3. Misgivings concerning target-based contracts

3.1. Real or alleged risks

Alleged risks – A number of potential risks may be raised when this type of contract is being envisaged in the judicial field.

The most widespread fear is that judicial independence may be interfered with as a result of the scrutiny exercised over a court's detailed accounts by a non-judicial authority, so as to ascertain the use made of the resources allocated. This question is relevant, but it disregards the following considerations: it is in principle not abnormal for a body responsible for financing the administration of justice to concern itself with the actual use made of funds allocated; the manner in which specific cases are dealt with does not fall within the scope of either target-based contracts or management contracts; from the court's standpoint the contract is entered into by the head of the court, who is generally a judicial authority and who, in any case, is already responsible for the day-to-day running of the court; some states make the conclusion of such contracts subject to the judicial council's oversight. This misgiving is typically encountered in countries where it is not possible to conclude target-based contracts or in states that utilise such contracts but conduct no studies to determine whether the hypothetical risks actually arise. States using this type of contractualisation but submitting it to stringent oversight nonetheless brush aside these criticisms, pointing out that there are no known cases of established or alleged interference with the independence of the judiciary.

A second potential risk concerns the possibility of endless extension of a target-based contract where the court persistently presents the symptoms that led to the initial allocation of resources. This misgiving above all concerns target-based contracts in the strict sense, which are meant to be exceptional in nature. The theory however does not stand up, since target-based contracts are concluded for a fixed term and only a

limited number of renewals are possible. Nor can this criticism be levelled at management contracts, as, although they are periodically renewed, their renewal is based solely on an updated analysis of the situation.

A third potential risk is increased corruption. In a way, what is feared here is not that oversight will be too stringent, but that it will be lax or too lenient. Corruption, the implications of which go far beyond the issue of contractualising judicial procedure, can be combated through the rigorous application of strict rules.

The most widespread fears raised in states that have misgivings about target-based contracts are not borne out in practice. The introduction of a penalty/reward system does involve risks. This makes it highly desirable to provide members of the judiciary with adequate training in management of the courts.

One last risk that could arise is the creation of a climate of wilful negligence: the assumption here is that judges, prosecutors and clerks might bring about - or at least deliberately abstain from making any effort to prevent - an exceptional decline in judicial service standards necessitating the allocation of additional resources. This possibility is however not borne out in practice: on the contrary, the possibility of concluding target-based contracts in the strict sense seems to have fostered a greater collective awareness and to have enabled faster adaptation in terms of the deployment of judicial and support staff (France).

Real risks – In the end the true risk would seem to lie more in the possibility that the introduction of a penalty-reward system could have unwanted side-effects. In the Netherlands, where all courts of first instance and of appeal are obliged to sign target-based contracts with the Council for the Judiciary, a court that fulfils its objectives and records financial gains can keep a portion of those gains. A court that fails to fulfil its objectives is however likely to see its grants cut. This means that it is solely the sense of ethics of the judge in charge that will prevent productivity being given priority over quality, combined with economising of necessary expenditure. The pressure is all the greater in that an efficiency ranking of the courts is drawn up each year.

The new challenge confronting the judicial system is to strike a balance between quality and efficiency: in this context attention must be drawn to the importance of training, something that many states have grasped since they propose specific initial and in-service training for judges in court management techniques.

3.2. An approach absent from a number of states

Between disinterest and distrust – A number of European countries do not apply the target-based contracts approach. There may be a number of reasons for this.

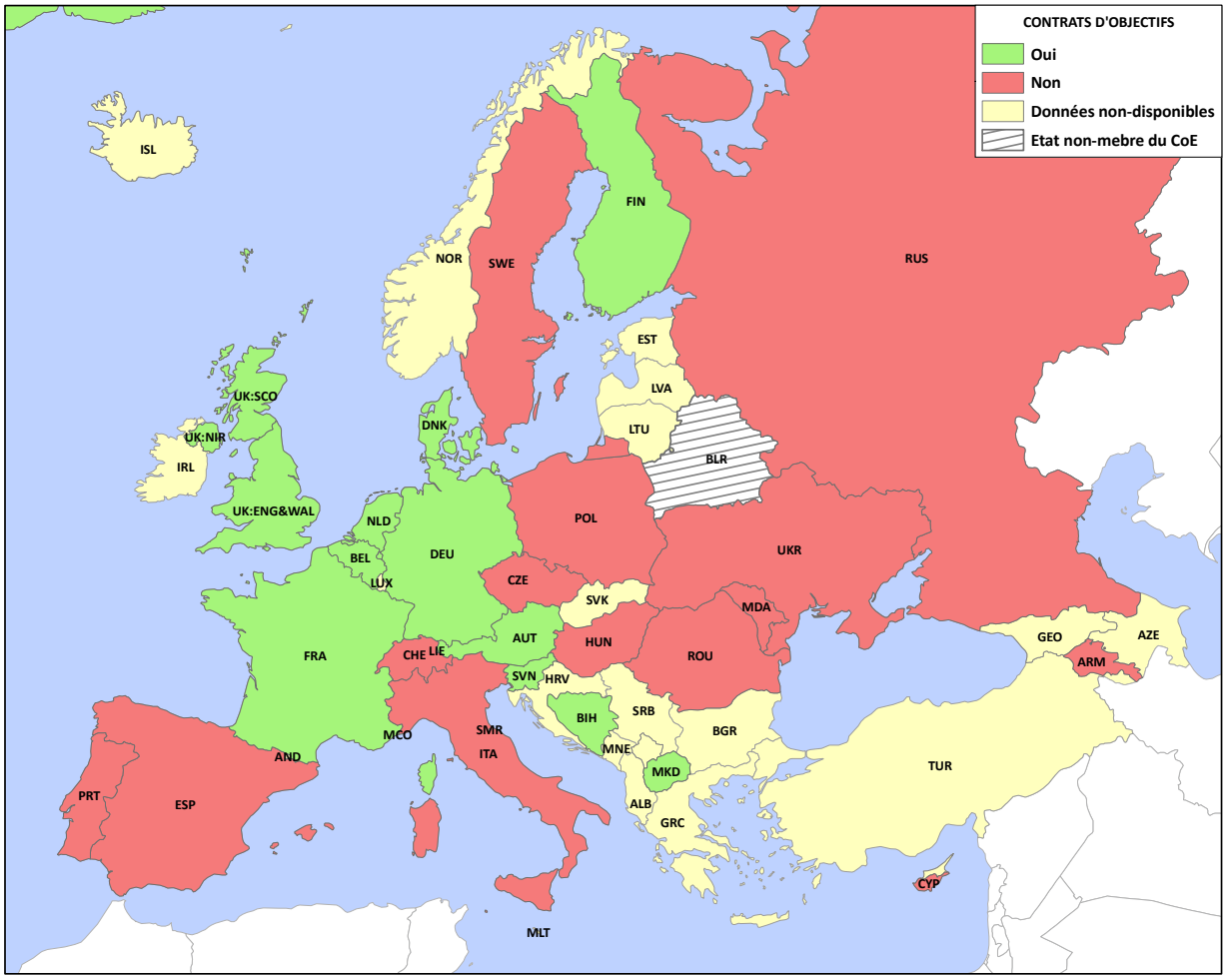
Some states are against the principle for fear that such contracts will detract from the independence of the judiciary (Cyprus). Others argue that their judicial culture is too remote from that of the countries that adopt this approach, which they perceive as being inspired by Anglo-Saxon concepts (Czech Republic). Some consider that they lack reliable indicators within their system that would make it worth introducing such mechanisms (Poland). Some deem that their courts already have sufficient human and financial resources (Switzerland). Lastly, in some countries the issue has simply never been raised (Monaco, Sweden).

The trend in these states – Within states that do not apply the approach, opinions seem very mixed as to whether its introduction is justifiable or appropriate. No clear general tendency can be discerned in these countries.

Some states which already apply certain aspects of contractualisation seem to wish to develop it further. For instance, Belgium - which already has target-based contracts in the strict sense - has future plans to entrust a number of management tasks partly to a central body, acting autonomously, and partly to individual entities at the level of the courts and the public prosecution service. The Belgian model currently under discussion

expressly provides for the introduction of "management contracts"; it sets out the main lines of a management plan that is both operational and strategic in nature.

Map 1: Utilisation of target-based contracts (in the broad sense) in Council of Europe member states



Comments:
Switzerland: the answer provided by Switzerland describes the situation in a majority of Cantons. However, since the answers were given, at least three cantons (Soleure, Zurich and Bern) have implemented target-based contracts within the judicial organisation of the Canton.

4. Conclusion

Strong involvement of the courts in the management of their financial resources offers the advantage of making them parties to genuine court-level projects.

Where the judicial institution allows itself the time to build consensuses concerning the indicators enabling a court to commit itself to the objectives to be achieved, the outcome may be enhanced rationalisation of the judicial system's organisation and functioning.

However, these efforts require a significant transformation in the profile of the judicial profession so that judges become skilled managers.

B. Better co-ordinated management?

Co-ordination of justice system players – Judges, prosecutors, their national representatives, the executive (ministry) and the legislature (budget approval) are far from being the only parties involved in the judicial system. People in many other occupations, sometimes far removed from the legal professions, can have a significant role in the routine administration of justice. Through constructive dialogue, they can become full partners in genuine court-level projects.

This kind of co-ordination between justice system players is a fairly new concept. It can be seen to offer numerous advantages. Co-ordination of the action of all those coming into contact with justice system users allows a faster, less costly and more readily assessable response. Co-ordination of the various players also offers courts the possibility of increasing their range of competencies, rationalising operating expenditure, sharing certain costs and relieving themselves of certain peri-judicial tasks, over which they merely retain oversight, and so on.

A new balance among justice system players offers opportunities for contractualisation techniques to enhance co-ordination.

In the light of the necessary new equilibriums, contractualisation can be seen to offer a particularly interesting means of social regulation and functioning as it offers considerable possibilities for interaction and exchanges while situating the resulting dialogue within a formal legal framework. This sometimes leads the courts, or the authorities representing them, to conclude various forms of partnerships.

1. Partnership models

"Service contracts" and "accreditation agreements" – In the sphere of partnerships, two types of contractualisation should be considered: *service contracts* and *accreditation agreements ("conventionnements")*. A typology can be proposed based on the characteristic features of the co-contractor, who, under a partnership arrangement, is never part of the judicial authority. The distinction between the two forms of agreement depends on where the co-contractor's staff operate (*within* or *outside* court premises) and the nature of the tasks performed (ordinarily linked to the judicial activity or not).

1.1. Service contracts

An agreement on conditions of service provision – Service contracts are agreements aiming to ensure the good administration of justice, concluded by a court or an authority representing a court with a service provider whose staff usually work on the court's premises but do not come under the judicial authority and do not perform tasks ordinarily linked to the judicial activity.

These are therefore not contracts concerning staff reporting to the court hierarchy, whose working conditions are usually governed by their employment contract. These agreements are concluded with personnel having a contract with another employer but required to perform their duties within the court itself.

Issues – The objective of a service contract is accordingly not to conclude an employment contract but to take account of the specificities of the judicial system when agreeing on the conditions of performance of certain tasks, so as to ensure the good functioning of the court concerned.

Service contracts are aimed at adapting the conditions of performance of services to the specificities of the judicial system, with a view to ensuring the good administration of justice.

Examples – Service contracts are primarily concluded with private service providers entrusted with the performance of tasks linked to the routine running of the court (switchboard operation, courier services, security firms, caretaking, catering or cleaning services, etc.).

Some service providers are public-law entities, as is the case in Germany where the judicial authorities lease court buildings from state-owned property management companies.

One current tendency is to conclude information technology service contracts covering the supply of outside personnel to work on IT projects (development of computer systems for the courts and so on) or to fulfil routine IT service functions (running computer departments, line rentals, access to judicial data bases, publishing judicial information on the Internet, and so on).

1.2. Accreditation agreements

An agreement broadening the judicial services offer – Accreditation agreements are agreements aiming to ensure the good administration of justice, concluded by a court or an authority representing a court with a service provider whose staff perform tasks ordinarily linked to the judicial activity but do not come under the judicial authority (except where two courts reach an agreement whereby the staff of one court will perform tasks on behalf of the other); these may also be agreements concluded with entities willing to host services ordinarily provided on court premises and linked to the judicial activity.

Accreditation agreements offer a means of broadening the judicial services offer through agreements concluded on the basis of joint projects, authorisations or the hosting of judicial services access points in places not traditionally linked to the courts but where a demand for such services exists.

Issues – The objective here is to broaden the judicial services offer at reduced cost. This can take the form of agreements concluded with outside providers of skills not available among the staff of the court (on the basis of joint projects, authorisations, etc.) or the hosting of judicial services access points by entities not normally part of the justice system but frequently dealing with its users.

Examples of judicial services offers made via "skills agreements" (joint projects, authorisations, etc.) – Dematerialisation of procedures is a field offering a good illustration of the functioning of contractualisation, in general, and of accreditation agreements, in particular. Although paper is still the main medium used for procedural documents in Europe today, growing interest is being shown in the dematerialisation of judicial documents, since this approach could offer certain advantages: financial savings, time savings, simplification of cross-border legal proceedings, availability of supporting documents for videoconferences, and so on. In this context the use of contractualisation is almost inevitable where two preconditions are met: firstly, all the parties to the procedure must subscribe to a joint project aimed at reaching mutual agreement on the exact nature of the relations covered by the dematerialisation process; secondly, at all levels of a procedure, it must be possible to implement the co-operation arrangements between the various parties involved via compatible IT systems. In Europe, many agreements have been signed with the representatives of the different parties concerned: the police, lawyers, judicial enforcement officers and so on (examples exist in Belgium, Bosnia and Herzegovina, France, Germany, Italy, the Netherlands, Switzerland and the United Kingdom).

Another example of a contractualised judicial services offer can be found in the accreditation agreements concluded with scientific experts' representatives in the context of joint projects concerning the financial management of scientific investigations: in states where scientific experts' reports are commissioned by order of the courts, the question of the cost/benefit ratio can clearly be raised if the judge is also willing to assume the role of public funds manager. In some member states (such as France) agreements have been reached between the courts and lawyers' and experts' representatives with a view to bringing the cost of an expert's work more into line

Example of an accreditation agreement: Experts' fees must be commensurate with the work needed to ensure the truth is uncovered. Too low fees pose a problem of competence. Too high fees pose a problem of access to justice or efficiency of the courts.

with the importance of the matters at stake in judicial proceedings. These agreements offer a framework for a fully transparent discussion between the judge, the expert and the parties concerning the expert's fees, which must be guaranteed by clearly defined rules concerning their calculation and payment. These fees must be neither too small, nor too high: they should be commensurate with the work needed to ensure that the truth is brought to light. Paying experts insufficient fees detracts from the quality of justice, since it encourages the most competent experts whose services are in demand elsewhere to turn away from judicial work and to cease co-operating with the courts on a regular basis. Those experts who continue to work with the courts tend to seek to offset their low fees by taking on more cases, which can adversely affect the quality of their work. Where experts' fees are too high, the quality of justice also suffers. Whether experts are paid directly by the party commissioning their services or are appointed and paid by order of the courts, an imbalance between the cost of an expert report and the ensuing benefits poses problems. Where the expert's fees are too high in relation to the service provided, this has adverse implications for users' access to justice (if the users themselves pay the expert) or for the efficiency of the courts (squandering of public money where the expert is paid by the court). Contractualisation may constitute a useful means of striking a happy medium regarding fees levels. In states where judges are increasingly being entrusted with the role of court manager (such as France) the economic approach to judicial investigations has brought about a change of mindset: procuring expert services on a competitive, negotiated basis has now become a matter that concerns judges. Courts are called upon to optimise their methods of ensuring that they pay the fair price for experts' services and to expedite the payment process once an expert has submitted a report: to this end they will doubtless have to determine and standardise assessment criteria with the experts' representatives.

Accreditation agreements can also offer courts an opportunity for accrediting civil society representatives with a view to their greater involvement in the judicial services offer. This applies for instance to victim support associations that may be offered premises and Internet connections inside court buildings with a view to holding surgeries there. Other types of partnerships (training, etc.) also exist with other kinds of associations (such as those having anti-discrimination or employment related objectives) or certain professions (mediators for instance).

In some states a judicial entity in one district may exceptionally authorise an entity in another district to perform certain tasks on its behalf for reasons of urgency, distance, and so on. In France, for instance, in matters of juvenile justice a public prosecutor's office can authorise another prosecutor's office, which is not competent to deal with cases involving juveniles, to take emergency action at local level where the need arises.

Lastly, some public authorities or decision-makers may also have occasion to conclude accreditation agreements with a broad range of partners: prisons (transfer of prisoners), hospitals (psychiatric experts' reports), the police (monitoring of crime statistics), local elected representatives (pooling of crime prevention resources), social housing organisations, local communities and charitable organisations (emergency rehousing) and so on. For example, agreements have been concluded between Belgium and the Netherlands whereby, for reasons of prison overcrowding, certain offenders sentenced to prison by Belgian courts serve their sentences in prisons in the Netherlands located close to the border that have not yet reached saturation point (this arrangement exists in the Maastricht region).

Examples of judicial services offered through the hosting of competencies – Apart from joint projects and authorisations, accreditation agreements can also be utilised in cases where it is necessary not to bring the user closer to the justice system, but to take the justice system to the user. The opening of judicial services access points in locations not normally intended for this purpose, although they are often frequented by justice system users, offers many examples of this kind of approach. This is a means of making judicial competencies available outside court premises on a permanent basis.

The health care sector is a privileged partner for this type of approach. Under agreements concluded with hospitals co-financed medical and judicial services are opened within hospital premises with a view to receiving the most vulnerable justice system users (rape victims, juveniles - whether perpetrators, victims or

witnesses, and so on) under conditions allowing psychiatric assessments and permitting the taking of statements and the recording of interviews.

In partnership with local authorities other structures are set up in smaller towns, aimed at offering users facilitated access to justice despite the tendency throughout Europe to merge courts into single entities serving a larger area. In this instance accreditation agreements can be seen to offer one means of remedying the sense of neglect experienced by some users in more isolated areas.

2. Partnerships

2.1. Procedures for concluding partnerships

Preliminary discussions – Any agreement reached at local level must be based on preliminary discussions concerning various aspects of the partnership under consideration: identity, projects to be pursued, values, commitments, potential social usefulness, organisation and resources.

The lack of a specific procedure – Whether it is a matter of concluding a service contract or an accreditation agreement, the member states do not seem to require that any specific procedure be followed, regardless of the type of partnership envisaged. Partnerships have no basis in law since they merely reflect a joint interest in the good administration of justice (a few exceptions do exist within certain states, but the requirement that there be a legal basis is itself very rare).

There are usually no specific procedural requirements for concluding a partnership, but there is a growing tendency to encourage the conclusion of a formal agreement.

Encouragement to place the partnership on a formal footing – Although the general principle would indeed seem to be that partnerships can be concluded informally (as is the case in Germany, Monaco, Poland, Sweden, "the former Yugoslav Republic of Macedonia" and the United Kingdom) there is a growing tendency to encourage the conclusion of a formal agreement, which is nonetheless kept to a minimum, taking the form of a simple contract (France, Hungary, Switzerland).

To disseminate these practices and encourage greater recourse to formal arrangements, some partnerships are first concluded at national level in the form of framework agreements that can then be replicated and placed on a more precise footing at local level, again in written form. Model local agreements are made available to the courts to facilitate the process of adapting these arrangements to their needs (examples are France and the United Kingdom).

2.2. Evaluation

Approach to evaluating service contracts and accreditation agreements – Following the conclusion of a *service contract* the results attained are evaluated firstly by the contracting parties. In the majority of states it is they who are competent to verify the agreement's application. If it is not respected this contract - which, with a view to the good running of the court, aims to lay down the conditions of performance of certain tasks taking into account the justice system's own specificities - may serve as a legal basis for the application of contract law (as is the case in Germany).

Following the conclusion of an *accreditation agreement* the authority required to evaluate its results varies considerably from one state to the next, and often even between agreements concluded within the same state. It may be a funds provider, a representative of the judicial authorities, an independent body, the parties and so on. If the agreement is not respected, it will not be renewed and contract law will apply.

The advantages offered by a formal arrangement in terms of evaluation – Since it may constitute a useful basis for assessing the due execution of the partnership arrangements, a formal agreement should be encouraged, but not imposed so as to avoid hindering the development of this kind of approach.

From a good practice standpoint, an agreement must stipulate from the outset the conditions governing the partnership's existence. Where the partners recognise the need for a formal agreement, many uncertainties, omissions and vague assumptions can be avoided.

From a good practice standpoint it is preferable to formalise a partnership; the document must stipulate from the outset the conditions governing the partnership's existence.

An agreement of this kind should preferably cover at least the following matters:

a. the subject of the agreement,
b. the parties' commitments (including any confidentiality clauses),
c. the possible creation of a steering or monitoring committee,
d. the agreement's duration and scope,
e. financing of activities,
f. terms of renewal of the agreement,
g. possibilities of amendment,
h. winding up of activities,
i. termination and cancellation possibilities.

2.3. Misgivings

Real or alleged risks – Some member states (Armenia, Cyprus and Latvia) have misgivings about partnerships on account of the dangers of conflicts of interest or corruption, or simply the risk that these arrangements may be incompatible with existing legislation.

It must nonetheless be pointed out that states that utilise the partnership approach record a very high rate of satisfaction with this kind of arrangement. The number of people harbouring misgivings is far smaller in these states, and no specific problems have been reported.

In the final analysis, the main risk is that outsourcing will be taken to such extremes that it is no longer consistent with the good administration of justice in that it focuses on the system's efficiency (for example cost effectiveness considerations) to the detriment of its quality. The prisons sector offers an illustration of this risk. A state that wants to bring about a rapid increase in its prisons' capacities may decide to entrust private companies with the building and ownership of prisons under a service contract. However, is it not paradoxical for a state - which should normally and ideally be seeking to reduce crime - to enter into financial commitments vis-à-vis a private company that is speculating on the stabilisation of, or an increase in, the crime rate? Beyond the borders of the Council of Europe, in some states where the role of the companies holding these concessions extends to prison design or certain aspects of the prison regime, such as the organisation of rehabilitation activities, a wide-ranging debate is taking place on these matters: in 2007 the Supreme Court of the State of Israel ruled that transferring the organisation and running of a detention centre to a private company constituted a breach of the constitution and of fundamental rights.

2.4. Conclusion

Quality certification and sustainability – Partnerships must be encouraged in states that wish to apply them with a view to fostering the good administration of justice. Without making it compulsory to reach a formal agreement, it is important to draw attention to the benefits of placing agreements on a formal footing. Apart from evaluation, an agreement's formalisation, on the basis of predetermined criteria, brings with it at least two advantages:

- Quality certification: formal agreements give courts the possibility of consolidating good practices, enforcing compliance with them, harmonising them and extending them to other partners. The formal conclusion of an agreement confers on its content the status of a standard for achieving greater justice.

Formalisation of partnerships allows quality certification of partners and places the relationship on a sustainable footing.

- Sustainability: a formal agreement provides the parties with guarantees that help to place the services provided, and the objective being pursued, on a more permanent footing. It gives justice system partners a formal status and constitutes recognition of their social usefulness, which can sometimes be of assistance to them in their fundraising efforts.

II. ENHANCING THE QUALITY OF DECISIONS: CONTRACTUALISATION BETWEEN THE STAKEHOLDERS TO THE PROCEEDINGS

Like the first part of this study, the second deals with the links between contractualisation and judicial process, but from a radically different angle.

It still concerns a discussion process that gradually brings with it new relations tempering the authority-based approach in favour of one aiming for consensus. However, the context here is very different from that of the dialogue described in the first part of this document, where various bodies acting in the public interest agree on the judicial service's public management.

The second part of the document is more concerned with privatisation, from the standpoint of the way judicial process is influenced by agreements between the parties. This no longer relates to a means of managing the judicial process (as in the first part), but a means of individualising it (second part).

Do these procedural mechanisms, utilised under the judge's authority, allow the judge to take a more informed decision that will be better accepted by the parties?

A. Better informed decisions?

The quest for relevant information – Contractualisation offers the possibility not only of improving the management of justice, but also of enhancing the quality of decisions handed down by the courts.

European countries' practice shows that, within judicial processes, elements of contractualisation are sometimes utilised to allow judges, while still pondering a case, to obtain information relevant to taking a good decision.

Particular mention should be made of three fields: use of contractualisation in the examination of cases, concerning changes of judicial doctrine and in obtaining expert opinions.

1. Contractualisation in the context of examination of cases

Contractualisation *in limine litis* – This form of contractualisation consists in the practice whereby, before the hearing, judges present their understanding of the case to the lawyers so that the latter may draw attention to any possible difficulties. The judge's presentation of the case may take different forms: written report, oral presentation and so on. The difficulties raised by lawyers generally concern factual errors, oversights in submitting requests or raising points of law, barriers to execution, etc.

Issues – The point of this approach is to familiarise the judge as closely as possible with the case so that the proceedings immediately start on the right footing. The lawyers also thereby obtain assurance that no omission or misunderstanding will detract from the quality of the hearing. The judges' difficulty consists in addressing what they perceive to be the complexities of the case, including those inherent in the parties' arguments, without placing themselves in a position where they could be challenged on grounds of bias.

In many member states it is considered useful for judges to present their understanding of a case and the complexities they can see in it to the parties' lawyers, so as to obtain the lawyers' views.

Usefulness – This approach is deemed useful by those states that implement it (Bosnia and Herzegovina, France, Germany, Poland, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", for instance). It makes it possible to focus the proceedings on points that really pose a problem and assures the parties that the hearing will be meaningful from their standpoint. In addition, in cases where the hearing is preceded by this approach, often perceived as less formal by the parties, some judges have noted a resumption of dialogue between the parties and, hence, an increase in

the number of amicable settlements (in civil cases) or instances of repentance (in criminal cases). In some states this mechanism is provided for by law (examples being the German Code of Civil Procedure and the future Swiss Code of Criminal Procedure). Other states that have not introduced the practice nonetheless acknowledge its usefulness (Monaco).

Limits – The usefulness of this approach must however be qualified. Firstly, in no state is it applied systematically, although very frequent recourse may be had to it, as in "the former Yugoslav Republic of Macedonia" or certain German *Länder*. In most states its use is limited and the manner in which it is utilised varies depending on the type of proceedings (criminal or civil), the category of court concerned and of course judges' personal practice. Many judges can see some point to this approach only where the case is sensitive or complex. Secondly, this kind of approach may necessitate a change of attitude and of habits: the parties must be prepared to reveal their defence tactics at the pre-hearing stage, while judges must obligatorily have been able to acquaint themselves with the substance of the case beforehand, which is not always possible especially in civil matters (in France, for instance, it is still exceptional for documents to be submitted before the hearing).

The usefulness of a discussion of the case depends in particular on its complexity and the type of proceedings.

This approach often necessitates a change of habits and attitudes.

Real or alleged risks – Many states are unfamiliar with this type of approach (such as Armenia, Cyprus, Hungary and Latvia). The main risk raised is a violation of the equal treatment principle should judges fail to formulate their comments in the cautious, guarded manner their role requires. Another risk is that the parties may adapt their arguments in line with the judge's understanding of the case out of either self-interest or deference. The examination of the facts, the heed paid to the case-file and the caution exercised by the judge in commenting on the case are therefore of the utmost importance in a contractualisation context.

2. Contractualisation in the context of changes in judicial doctrine

Contractualisation in cases before supreme courts – Although in some states contractualisation may be used in courts of first instance and of appeal, does the same apply in cases brought before supreme courts? Is there scope in these courts for a contractualisation process aimed at ensuring that the judges are in possession of as much relevant information as possible when they wish to assess the consequences of a possible change in judicial doctrine?

These are thorny questions, especially as the supreme courts of the countries of Europe naturally function in very different ways, which it would be tedious to describe here. Whatever procedural rules are applicable at the stages of the exchange of documents, the hearing or the deliberations, it is perhaps worth asking what contribution contractualisation might make to these stages.

Issues – The issues here are ultimately the same whether one is considering states where a direct contact between the supreme court and the parties is exceptional in nature, or even impossible, except via the exchange of documents (France and Switzerland, for example) or states where, conversely, it is usual for the parties to be questioned directly at the hearing (Germany, for instance). As the supreme judicial body that may decide on a change in judicial doctrine, the court itself becomes a lawmaker. A lawyer who lodges an appeal on points of law seeking a change of judicial doctrine invites the court to weigh the consequences of such a change, but the court must be in a position to apply a procedure enabling it to address the issues raised in depth. Two procedural approaches may be adopted: opening a discussion with the parties or inviting stakeholders to submit their observations on the question.

Opening a discussion with the parties – Where a supreme court is asked to vary an established judicial doctrine, it may be helpful to hold a discussion with the parties so as to assess, and possibly mitigate, the consequences of this change.

This approach would nonetheless seem undesirable at the decision-making stage. As the deliberations draw nearer, requesting the parties to indicate the potential consequences of a change in judicial doctrine may be perceived as a pre-trial revealing the court's state of mind. The fact that the request in itself implies that no final decision has yet been reached makes no difference: a challenge could be based on the theory of appearances (European Court of Human Rights, Borgers v. Belgium, 30 October 1991, A-214A).

Opening a discussion with the parties is a possible means for a supreme court to initiate consideration of the consequences of a change in judicial doctrine.

It is therefore at an early stage in the proceedings that a discussion can possibly be opened with the parties, either when documents are exchanged, when the appellant's lawyer requests a change in doctrine or during the hearing itself in states where the parties are ordinarily present at the hearing. The situation differs according to whether a state has decided to follow a dogmatic or a pragmatic logic.

In Switzerland contacts with parties going beyond the exchange of documents are deemed likely to cast doubt on the impartiality of the supreme court (the Swiss Federal Tribunal). Such contacts are also precluded by law in Armenia, Cyprus and Poland.

In France, where the parties are almost never present at the hearing, the court has no procedural powers to bring about the necessary discussion. The provision of information as to the consequences of a change in doctrine accordingly depends on the professionalism of the parties' lawyers, who are specially authorised to plead cases before the supreme court (Cour de cassation).

The situation would seem to be easier in Germany, as the parties are more often present at hearings before the Federal Court, which affords judges an opportunity to question them directly about the consequences they foresee. Parties may also submit observations concerning the possible consequences even where the court has not requested them do so. However, there is no rule requiring a joint discussion. In practice, the consequences of a possible change in doctrine are the subject of an often much-appreciated discussion with the parties in many cases, but such discussions are not systematic.

Opening a discussion with stakeholders – Where as a consequence of their decisions supreme court judges themselves become lawmakers, it may be desirable to consult stakeholders concerned by a proposed decision. The court then opens itself up to a discussion in which the stakeholders are asked to give their opinions on a voluntary basis. This more in-depth dialogue can take different forms: *amicus curiae*, experts, *etc*.

Such practices seem to meet with little enthusiasm in continental European judicial systems. They are more frequent at the level of international courts and in Anglo-Saxon systems, especially those of North America (Canada, United States). An obstacle to their application in continental European systems is the supreme courts' desire to be, and show themselves to be, impartial. In Switzerland, for example, before pronouncing a decision the Federal Tribunal abstains from consulting bodies that could be assimilated with lobby groups, since this might convey the impression that it has allowed itself to be influenced by a school of thought adhered to by one of the parties to the proceedings, thereby preventing it from deciding the case with all necessary impartiality.

However, is there not scope for a contractualisation process at the level of the supreme courts? In the Czech Republic, judges alone decide the issues to be addressed at the supreme court's hearings, but a party to proceedings can suggest any lines of research it deems relevant, notably concerning a future decision's potential consequences for third parties. The judges are then authorised by law to take into consideration such parties' opinions. In Poland the presiding judge may seek the opinion of any entity or organisation that may be able to provide information of relevance to the settlement of a case.

The question that arises is the cost, in financial terms, of executing decisions that have an impact on legislation or on some other mechanism. Would it not be appropriate for judges to inform their decision-making by consulting the public authorities? In some countries, such as France, the ministries are now consulted by the public prosecution service concerning cases that involve ambiguously worded legislation or marginal situations. Would it really be a shocking breach of impartiality for the supreme courts to be able to discuss these matters with the originators of legislation, so as to obtain clarifications on the legislation's intent or on the economic impact of a proposed change of doctrine? Would this not be in the interests of parliament itself since it could then anticipate the legislative consequences of changes in doctrine and be well-prepared to adopt any necessary amendments?

The decisions delivered by supreme court judges sometimes confer a lawmaking role on them.

Opening a discussion with stakeholders is a means for them to assess the financial consequences before taking the proposed decision.

The supreme courts' lack of enthusiasm can in fact be summed up as follows: under the cloak of a degree of judicial realism, the public authorities might be tempted to seek to influence the supreme court's decisions, or be suspected of doing so, and this might damage the supreme court's image. However, in the final analysis there would seem to be no risk of pressure being brought to bear. Nor would the principle of separation of powers be violated in so far as the supreme courts merely rehear cases on points of law; they could therefore not be suspected of lacking independence or impartiality as a result of the consideration of factual elements which are solely a matter for the courts of first-instance and of appeal.

Switzerland prefers another solution, involving less institutional dialogue. Changes in legal doctrine are usually notified in advance by means of a judgment that the Federal Tribunal publishes in its official law reports (which contain only 5% of the judgments delivered). This judgment states, for example, that as a result of recent changes in circumstances the Federal Tribunal might be minded to change its practice. The judgment's publication and subject-matter come to the attention of the authors of the original doctrine, who are always on the lookout for such advance notifications and who readily publish their comments on the judgment's substance in specialised legal journals appearing either in print or online. The Federal Tribunal's legal documentation service compiles a press review of the articles published in these specialised journals, linking them to the relevant judgment in the Tribunal's in-house case-law data-base. As a result, when the Federal Tribunal again has to deal with a case of the same kind, it will be aware of the views expressed by the doctrine's authors and can pronounce itself on the opinions they have expressed in the legal reasons it gives for its decision.

3. Contractualisation in the context of obtaining expert opinions

Contractualisation relating to expert opinions, a means of guaranteeing the quality of justice – The quality of judicial decisions increasingly depends on the quality of the underlying expert opinions. The judicial system's very image may sometimes be shaped by expert opinion, in so far as the latter is instrumental to the quest for judicial truth. The quality of the work done by experts must accordingly be a key concern for the courts, and, where they can help to guarantee or improve it, contractualisation processes should be given due consideration.

Contractualisation in the context of obtaining expert opinions can indeed become a genuine instrument for promoting the quality of justice.

Contractualisation of experts' work – Contractualisation can have some influence on the work done by experts in at least two respects: the methodology utilised and the expert's degree of knowledge of the case.

The methodology to be followed can be discussed beforehand, outside the context of a specific case, at meetings bringing together judges, experts, and sometimes lawyers who plead cases in a given court. The objective here is to approve good practices, raise any problems and identify solutions that are satisfactory for

all concerned. Meetings of this kind are already held in many member states (examples are Bosnia and Herzegovina, France, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" and the United Kingdom), but not all the countries of Europe are in favour of the idea (Armenia, Cyprus, the Czech Republic, Germany, Hungary and Poland for instance). Such meetings may be held at national level between representatives of the courts and the experts (as is the case in the United Kingdom), at the local level (individual courts) or both (as is the case in France).

Under systems where experts are appointed by the courts and do not specifically represent any of the parties to proceedings, the expert's state of knowledge of a case depends on the court. In a complex or sensitive case it can be very helpful for the court, the expert and the parties to hold joint discussions (which are accordingly conducted in the presence of the parties and their representatives) to ensure that the expert has sufficient knowledge of the circumstances of the case and to discuss the scope of the expert opinion and the required degree of precision. Such discussions are commonplace in a number of states (including France, Germany, Sweden, Switzerland and "the former Yugoslav Republic of Macedonia"). In the event of particular difficulties, discussions may even be held on a very regular basis. In practice, discussions often take place through the exchange of written documents or emails, while still complying with the inter partes principle. Some states (such as Switzerland) nonetheless prefer an approach whereby the specificities of the expert's assignment are addressed at a preparatory hearing before the expert is formally appointed. Whatever form they take, such exchanges make it possible to explain the scope of the assignment, to prevent unnecessary expenditure and to respond to any difficulties raised by a party or by experts themselves. The outcome is that the expert's report is more precise and more informative.

The work done by an expert must be as helpful as possible: where experts are court-appointed, discussions concerning the methodology to be used, the scope of the assignment and the expert's knowledge of the case can prove useful.

Under systems where the expert specifically represents a party to proceedings, the expert's state of knowledge of the case does not depend on the court, which normally has no cause to discuss the scope of the assignment with the expert (this is the case in Bosnia and Herzegovina and the United Kingdom). However, even within these systems, a court may sometimes appoint an expert when hearing the case. The court's decision, pronounced in the parties' presence, stipulates the expert appointed, the nature of the assignment and its scope.

B. Better accepted decisions?

Acceptance of decisions, a criterion for measuring the quality of justice – Throughout criminal and civil proceedings judges have to make choices, deciding between the various viewpoints advanced so as to ultimately give a ruling and settle the case. In accordance with law, judges must strive to dispense justice and, as far as possible, to ensure that their decisions are understood and accepted by court users.

So long as they comply with law, judges' decisions are of a better quality where they are accepted by parties to proceedings and the public.

It can be seen from European courts' practices that elements of contractualisation are sometimes used in judicial process to enable judges to secure such acceptance.

Mention can be made in particular of three fields: contractualisation concerning the conduct of proceedings, contractualisation concerning the choice of criminal procedure and contractualisation concerning the choice and the enforcement of sentences.

1. Contractualisation concerning the conduct of proceedings

Procedures contracts – Modern courts have many technical aids for properly managing cases (Intranet sites; computerised monitoring of judicial timeframes, with automatic reminders of key deadlines; and so on). However, the measures taken will not be successful without a real desire for co-operation and dialogue between members of the judiciary and lawyers. In this connection, it can be very helpful for judges to conclude agreements with parties to proceedings, or with their lawyers, as to how proceedings are to be conducted.

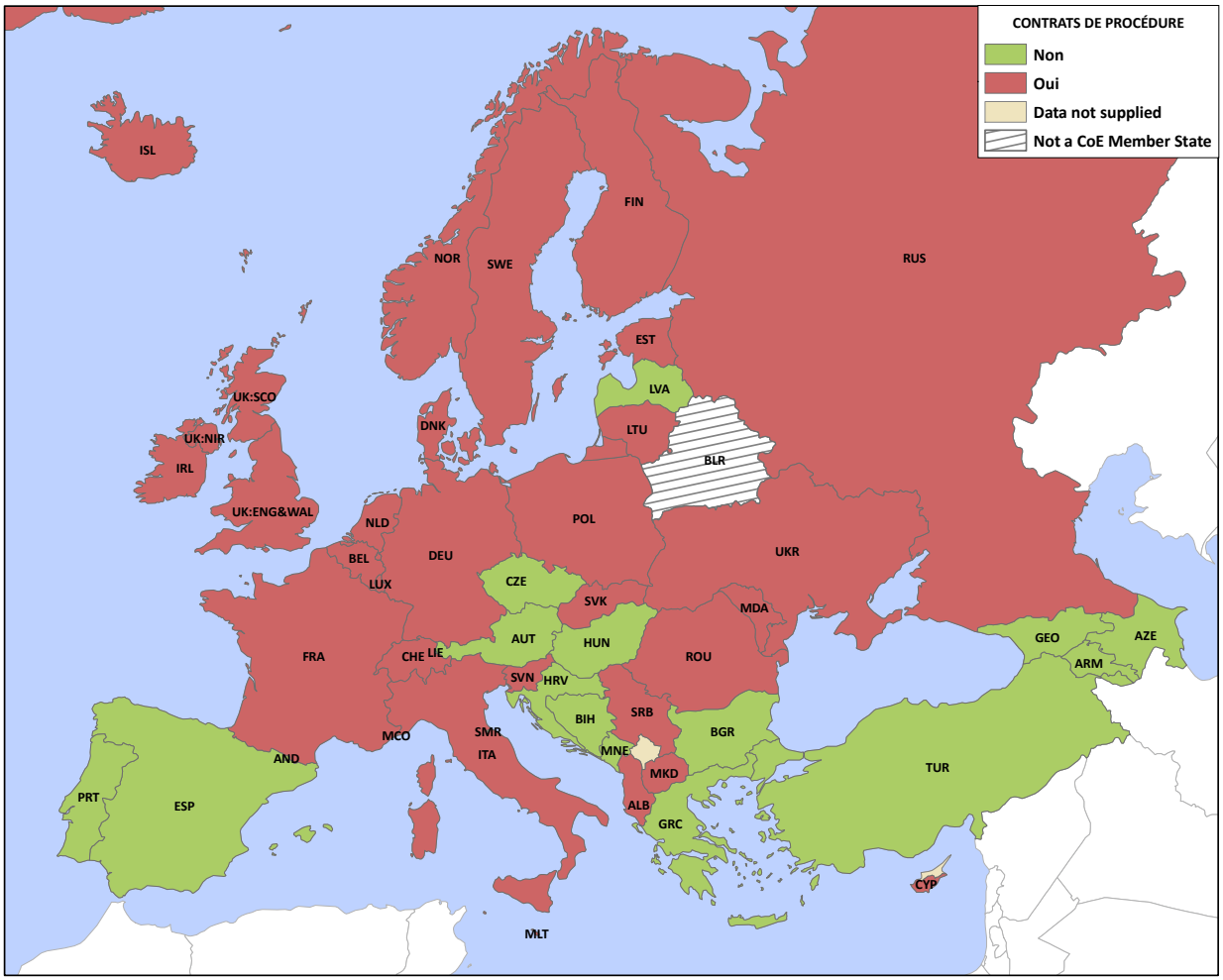
These agreements, which are sometimes referred to as "*procedures contracts"*, consist in judges entering into a formal or informal agreement with the parties - where necessary for the good management of the case - concerning the conduct of the proceedings (stipulating, for example, the time allowed for pleadings by counsel and the questioning of witnesses; a time-table for the production and discovery of documents; a time-table for the filing of submissions, and so on).

Procedures contracts provide judges with a procedural framework allowing them to reach agreement with the parties on the conduct of the proceedings, with a view to the good management of the case.

By limiting the length of oral procedure in favour of written procedure, judges and parties co-operate to arrive at a decision within a time acceptable for the parties.

Frequency of procedures contracts – The states utilising this approach are very diverse and are located in eastern Europe (such as the Russian Federation), central Europe (such as Poland), western Europe (such as France, Germany, the Netherlands, Switzerland and the United Kingdom) or Scandinavia (such as Sweden). However, the responses received from states in the Balkans and the Mediterranean Basin would seem to show a degree of reticence.

Map 2: Utilisation of procedures contracts in Council of Europe member states



The frequency of utilisation of this type of approach also varies considerably from one country to another: for example, France and the United Kingdom utilise it in over half of cases, whereas Switzerland only rarely has recourse to it (less than 10% of cases). The frequency also varies within a single state depending on the type of proceedings (civil or criminal).

In any event, procedures contracts should remain optional and be reserved for courts having a heavy, complex case-load.

It should nonetheless be noted that, as time goes by, the frequency of these agreements seems to be growing: the earlier a country began to utilise them, the stronger the hold this practice has gained there. Since people's attitudes change only gradually, a further increase in utilisation can be expected in many states that have only recently espoused these practices (for instance, in Sweden, where their use dates from November 2008).

It is important to point out that this type of approach is not compulsory in any country. In any event, these agreements, which have arisen through practice, would seem destined to remain optional and reserved for courts having both a heavy and a complex case-load, with a view to enhancing flexibility and effectiveness.

Targets – The objectives of procedures contracts are the same everywhere - giving users guarantees concerning the *foreseeable length of proceedings,* ensuring that the length of proceedings will be *reasonable* and, thereby, limiting *unnecessary expenditure*.

The agreement can provide for many means of achieving this, having their basis in practice and in the difficulties encountered locally. They include:

- a limitation of the number of exchanges of documents between the parties;
- an effort to be concise so as to make judicial debate more effective;
- compliance with mutually agreed deadlines;
- more interactive hearings, which entails that the trial should take place within a more concentrated timeframe so as to allow more argumentation between judges and lawyers;
- agreements on the production of evidence and on the order and substance of testimonies by witnesses and expert opinions (for example, a specific time allotted for the questioning of witnesses or waiver of the right to a second expert opinion);
- and so on.

The CEPEJ indeed supports, within the Saturn Centre Guidelines for judicial time management (document CEPEJ(2008)8Rev), that agreements may be concluded between judges and parties. It seems now essential for users of the justice system to be “involved in the time management of the judicial proceedings” (point I.A.1). This effort to cooperate should allow judges and parties to define “standards and targets” and require these be fully observed” (point III.A.2 and point V.C.1). For example, as mentioned above, this may result in an estimation of “the timing of all future procedural steps” (point I.C.2).

Initiation of procedures contracts – Depending on the state concerned, this kind of contract can be instigated by the court, the parties or each and any of them. There may be a legal instrument setting down clear rules on the subject, although this remains uncommon given the small number of countries that provide for procedures contracts in their legislation (examples being Bosnia and Herzegovina, France and the United Kingdom).

Form of procedures contracts – In practice, these agreements are formalised in the majority of countries, taking the form of a written document or electronic record setting out the commitments entered into. The agreement may be formalised directly by the judge and the parties (as is the case in Bosnia and Herzegovina and France) or indirectly in the form of a clear mention included in the records of the proceedings (as, for example, in Germany, Poland, Sweden and the United Kingdom). However, in some states (Switzerland, for example) the agreement is not formalised at all.

Legal validity of procedures contracts – Procedures contracts are legally binding in the majority of states where they are utilised (for example, Bosnia and Herzegovina, France, the Netherlands, "the former Yugoslav Republic of Macedonia" and the United Kingdom). A significant minority of states nonetheless consider that they are more a means of moralising relations between professionals and do not attach any legal value to them (examples are Poland, Sweden and Switzerland).

Where an agreement is not legally binding, there is a risk that parties who initially derived a practical benefit from complying with it may subsequently change their minds. In that case the entire process would become pointless. It is probably for this reason that most of the respondents whose countries utilise such agreements wish to see their legally binding nature duly recognised. However, in some countries (such as Germany) this issue would seem to be hotly debated within the judiciary, in particular as regards any sanctions that might be applicable.

In Europe, penalties for non-compliance are rare. Firstly, procedural sanctions would seem feasible only where provided for in the legislation of the country concerned. Secondly, the failure to comply would have to be extremely serious for a sanction to be imposed, if only so as not to adulterate the spirit of such agreements, which are voluntary in nature, have their basis in mutual respect and are underpinned by a desire to work together so as to improve the day-to-day administration of justice. Examples of sanctions can nonetheless be cited. More often than not, judges will take into account a party's failure to comply with the contractual terms when determining the allocation of expenses. More lasting penalties also exist: for instance, in France a case can be struck off where one of the parties is lacking in diligence, and in the United Kingdom the arguments advanced by a defaulting party may be disregarded.

Real or alleged risks – Do such agreements pose a danger for the quality of decisions? This can sometimes be the case, as these practices, like all instruments, can prove counter-productive where they are not properly implemented.

Judges proposing that the parties reach agreement on a procedures contract must ensure that their authority is not undermined and that they do not themselves enter into commitments that would subsequently prevent them from utilising procedures provided for by law. In Germany, in some cases, procedures contracts are apparently misused and have become a last resort for defence lawyers seeking to delay proceedings or to have specific requests taken into consideration.

Penalties for non-compliance with procedures contracts are rare.

Where it is not properly implemented this kind of contract jeopardises the judge's authority and can prove counter-productive in terms of time and costs.

Another example of an instance where such a contract can prove counter-productive is when it has the effect of increasing the cost of proceedings. It is true that a well-implemented procedures contract will help to bring down costs, but in some cases it merely transposes the problem. In civil matters where a lawyer has already encountered difficulties due to excessively strict deadlines imposed under procedures contracts, he or she may tempted to advise the client to forestall this kind of situation by doing some preparatory work even before the proceedings have commenced. This will simply inflate the costs. This would already seem to be occurring in a number of civil cases in England and Wales. It is necessary to establish safeguards so that this does not become a habit for lawyers. Recourse to this type of agreement must not be extended to all cases. Only those which are both numerous and complex should be concerned, and then only where necessary for the good management of the case.

Here also, the risks of corruption which can occur in such a framework must be underlined.

Although they are well aware of the risks, most states implementing these procedures contracts regard them as a major progress, taking into account the realities and constraints of the exercise of each of the professions concerned. Nowhere are there plans to end this practice. The Council of Europe even encourages states which have not yet done so to give serious consideration to this option (Guide to Good Practice accompanying the Committee of Ministers' Recommendation to member states on effective remedies for excessive length of proceedings).

Misgivings – In many states procedures contracts are neither prescribed by law, nor a customary practice in the judicial sphere (examples are Armenia, Cyprus, Hungary, Latvia and "the former Yugoslav Republic of Macedonia"). The main reservation expressed concerning such contracts, where they are not simply unheard of, is that current legislation does not vest courts with the requisite procedural authority to initiate this type of dialogue with parties to proceedings.

2. Contractualisation concerning the choice of criminal procedure

Simplified criminal procedure – In recent years simplification of criminal procedure has become increasingly common in Europe and the fields in which it is applied have gradually broadened. This means of attaining more effective justice, reducing costs and curtailing the length of proceedings is used in at least 37 member states. A number of these procedures, involving an admission of guilt, utilise elements of contractualisation concerning the choice of criminal procedure. Some examples are set out below.

Simplified criminal procedures are based on an admission of guilt.

They often involve elements of contractualisation surrounding the choice of criminal procedure.

"*Sentence orders"* allow the prosecution to propose a penalty (a fine or even a prison sentence depending on the country concerned), the suitability of which is weighed by

the judge. If the judge accepts this proposal, the defendant is informed of it and is free to accept or reject it. If the defendant does not reject the proposal, he or she will be deemed to have accepted the sentence order and it will become binding. If he or she objects, the case will go to trial. Many states implement a procedure of this kind (examples are France, Germany, Italy and Switzerland, where it exists in some cantons pending its application throughout the Confederation in 2011 following the entry into force of a new Code of Criminal Procedure).

In Italy the prosecution (acting under the judge's preventive supervision) or the defence may instigate a "summary trial" procedure, in which case summary - that is expedited - proceedings must be opened, which nonetheless follow the ordinary trial procedure unless the accused opts within fifteen days for another procedure (abridged procedure or *pattegiamento* - bargaining between prosecution and defence to agree on the penalty to be imposed).

In Portugal the prosecution is entitled to request "simplified proceedings" in cases where the maximum penalty that may be incurred is a five-year prison sentence, where there is "clear, simple evidence" of the defendant's guilt and where the offence was placed on record less than 90 days previously. Within ten days of notification of the charges the defendant may request that the investigation be conducted on an inter partes basis. Portugal also has "highly simplified proceedings", closely resembling the "sentence order" procedure, but whereby the judge can vary the nature or the severity of the penalty proposed in agreement with the prosecution.

Alternatives to prosecution – In recent years Europe has seen the emergence of many alternative means of disposing of criminal cases other than prosecution. Mediation is the most well-known (it exists in twenty member states of the Council of Europe, including Austria, Bosnia and Herzegovina, France, Hungary, Latvia, Portugal, Romania, the Russian Federation, Slovenia, Sweden, Turkey and the United Kingdom).

Participation in alternative means of dispute settlement, beginning with mediation in criminal matters, is voluntary in nature.

Both perpetrators and victims agree to restore some balance to their respective roles in the proceedings under a mediator's supervision.

In criminal matters, as in other spheres, a mediation process is in principle voluntary in nature. Mediation offers perpetrators an alternative procedure in which a new role is conferred on the victim - subject to his or acceptance. The perpetrator and the victim participate in the proceedings in a more balanced manner under a mediator's supervision.

3. Contractualisation concerning choice and enforcement of sentences

3.1. Negotiations concerning the choice of sentence involving an admission of guilt (plea bargaining)

"Plea bargaining" procedures in Europe – Since the late 1980s a growing number of European countries have been introducing the concept of plea bargaining into their legislation. The solutions adopted however vary considerably, and are too diverse to be described in full here. It can nonetheless be noted that there is a marked difference between the "Anglo-Saxon" countries, where the concept was first devised, and those that have more recently introduced this kind of procedure. This difference relates to the underlying philosophy - in Anglo-Saxon countries the aim of plea bargaining is to protect defendants from undue pressure by courts seeking to obtain an admission of guilt, whereas in continental Europe the objective is to make the procedure as transparent as possible.

In continental Europe plea bargaining aims for greater transparency. Negotiations concerning the severity of the penalty are possible.

A negotiated sentence validated by the court will be better accepted by the defendant.

"Anglo-Saxon" plea bargaining – In England and Wales (as in Canada and the United States) there are few formal legal provisions governing plea bargaining. It can be used in a wide variety of situations, involving all kinds of offences, as a result of which a vast majority of perpetrators opt for this solution in practice. The earlier the stage in the proceedings when the admission of guilt takes place, the greater will be the reduction of sentence. However, a reduction of sentence can be granted only if no pressure is brought to bear so as to secure an admission of guilt: a judge must therefore not indicate the terms of the sentence that could be imposed if the defendant pleaded guilty. In other words, there are no genuine negotiations on the severity of the sentence pronounced.

Plea bargaining in continental Europe – The first difference compared with England and Wales is that plea bargaining is strongly formalised in written law (examples are Bosnia and Herzegovina, France, Italy, the Netherlands, Poland, Portugal and Spain) subject to a few exceptions (such as Germany, where agreements on mitigation of sentences in exchange for a confession are permitted by case-law, subject to certain conditions).

Another difference is that there are more restrictions on the use of plea bargaining. The sentence incurred for the offences concerned must not exceed a maximum penalty clearly defined by law (for instance, three years in Italy, five years in France and Portugal, six years in Spain and ten years in Poland).

Lastly, in some continental European countries negotiations concerning the severity of the sentence to be pronounced are possible. In Spain the Code of Criminal Procedure provides that, on completion of proceedings, the court may pronounce a "*sentencia de conformidad*" imposing a penalty decided by mutual agreement between the prosecution and the defence, after verifying a number of conditions (the definition of the offence in the light of the facts of the case, the suitability of the penalty, the defendant's degree of understanding, the lack of pressure on the defendant). The same applies in Bosnia and Herzegovina, France (where the procedure is known as "*comparution sur reconnaissance préalable de culpabilité*"), Italy ("*pattegiamento"* or "bargaining") and Poland (where the agreement on the sentence reached by the prosecution and the defence must systematically be validated by the court).

3.2. Negotiations concerning the choice of sentence involving other procedures

Simplified criminal procedures – In agreeing on a simplified procedure (sentence order, summary proceedings, simplified proceedings, and so on) the prosecution and the defence do not simply opt for one criminal procedure rather than another. Their agreement opens up another phase of contractualisation allowing them to reach direct agreement on the choice of sentence.

Co-operative defendants – A growing number of countries (such as France, Italy and the Netherlands) are introducing systems whereby repentant defendants co-operate with the courts. The offenders concerned are usually members of criminal or terrorist organisations who agree to co-operate with the courts so as to facilitate the prevention of certain offences or the solving of certain cases. In exchange for co-operating they are given protection and the charges against them may be dropped or reduced, or their sentence may be mitigated.

Alternatives to prosecution – The dialogue established between a perpetrator and a victim who agree to participate in a criminal mediation process creates a form of "contractualisation of the penalty", since the agreement that may eventually result from the dialogue will constitute a restitution to the victim by the perpetrator.

Simplified criminal procedures, co-operation with the courts by repentant defendants, alternatives to prosecution, community service and electronic surveillance are all procedures based on an, at least tacit, consensus concerning the choice of sentence.

Community service – As a result of the ban on forced labour contained in Article 4 of the European Convention on Human Rights a judicial authority that is considering sentencing a defendant to community service must seek the defence's agreement beforehand.

This approach is followed in all Council of Europe member states applying this type of penalty (examples are Belgium, France, Germany Luxembourg, the Netherlands, Portugal, Switzerland and the United Kingdom).

Electronic surveillance – Electronic surveillance has undergone considerable growth in Europe over the last twenty years. Whether combined with home imprisonment of sentenced offenders or used to monitor pre-trial defendants granted liberty under bail or prisoners granted conditional release, it systematically entails obtaining the agreement of the person concerned. This, at least tacit, agreement is sought in all member states of the Council of Europe utilising this form of supervision (such as Austria, Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Portugal, Sweden, Switzerland and the United Kingdom).

3.3. Negotiations concerning the choice of sentence and standardisation of sentences

Individualised, structured or standardised sentencing – During negotiations over simplified criminal procedures or plea bargaining the prosecution sometimes has to submit a proposal to the court, in which case it must bear many factors in mind.

Some of these factors tend to lead to individualisation of the sentence, in conformity with the principles laid down by the European Court of Human Rights, whereby the sentence proposed must be in keeping with the circumstances of the case and the character of the defendant.

The prosecution takes account of different factors when proposing a sentence to be validated by the court.

Some factors leads to a more individualised sentence, whereas others insidiously lead to a degree of structured sentencing, or even standardisation of sentences.

Others insidiously lead to a degree of structured sentencing (imposition of a base or "model" penalty): for instance, the nature of the offence largely determines the choice of procedure particularly with so-called "mass offences" (an example being road traffic offences in France for which a form of plea bargaining - *comparution sur reconnaissance préalable de culpabilité* - is very often proposed).

Lastly, others result in some standardisation of sentences, whereby the prosecution proposes a penalty once the procedure has been chosen and agreed to by all concerned, taking into account the sentences usually pronounced for the type of offence. Prosecutors are well aware of the fact that the scrutiny exercised by judges to some extent guides the outcome they can propose to an offender. So as to be consistent with sentencing guidelines, the prosecutor's proposal is likely to be standardised to a certain degree.

3.4. Negotiations concerning the enforcement of sentences

An increasingly frequent occurrence – Although many member states consider that, for reasons linked to the concept of judicial authority, a sentence pronounced by a court that has become final should not give rise to subsequent negotiations, contractualisation concerning the enforcement of sentences is becoming an increasingly frequent occurrence that cannot be disregarded.

Contractualising the enforcement of sentences is not synonymous with "non-enforcement" of the sentence handed down, but is a means of enforcing it under dignified, meaningful conditions, taking account of material realities.

Issues – This concept has significant implications.

Contractualising certain elements of the enforcement of sentences permits states to adapt what is in principle an authoritative decision (sentencing) to the conditions under which it has to be enforced (prison overcrowding,

funds shortages, etc.). This is accordingly a matter not of non-enforcement of a sentence handed down, but of its enforcement under dignified, meaningful conditions.

Contractualising the enforcement of sentences also gives states more time to assess the defendant's character and personality, which is particularly desirable in the case of prison sentences (which can be lengthy and during which the defendant's personality can change considerably). Here too, the point of this approach is to make the penalty meaningful.

To make a sentence as meaningful as possible, it is worth considering the possibility of negotiating its enforcement. The best results in terms of rehabilitation and prevention of re-offending are obtained where negotiations are aimed at preserving the offender's current job or training him or her in a new occupation.

Negotiations on the enforcement of sentences that give the best results are aimed at preserving offenders' current employment or training them in a new occupation.

Examples – In Sweden the authority responsible for the enforcement of sentences is independent of both the government and the judicial system. If a judgment creates a financial liability between two persons following the commission of an offence, no further negotiation is possible with the authority enforcing the sentence since the debt will have become binding. Negotiations can only feasibly take place between the debtor and the creditor, provided the latter is willing: these two parties may reach a voluntary agreement on the execution of the sentence, in which case it will not be implemented by the enforcement authority. The creditor can then withdraw any application it has made to the authority seeking enforcement of the decision. The authority moreover sometimes applies certain provisions concerning the attachment of income, which leave the authority free to determine the sum involved, in which case the authority will negotiate the amount with the debtor taking into account his or her personal needs (health care, dependent children and so on).

In Switzerland due to prison overcrowding the authorities seek to determine the period of service of a prison sentence in agreement with the offender, provided the latter is a Swiss resident. In semi-open prisons it is also possible to adapt the timing of the sentence's execution to take account of employment or family constraints, for example.

In France a "*parcours d'exécution des peines"* ("sentence execution path") was introduced in 2000. Based on observation of prisoners' conduct by prison officers and health care, vocational training and other staff, it is implemented in all categories of prisons so as to ensure that each prisoner undergoes continuous monitoring. This process has a twofold objective: firstly, greater involvement of prisoners in managing their time in prison, with a view to preparing for release, and, secondly, providing the judge responsible for the enforcement of sentences with objective elements on which an assessment of the prisoner's behaviour can be based when dealing with requests for adaptation of the sentence (release on parole, day release, placement in an open or semi-open prison, use of electronic surveillance and so on). Legislation is currently under consideration that will enable an adaptation of the current arrangements so as to put in place a genuine strategy of preparation for release - known as the "*parcours de mobilisation".* This will be a voluntary process, which prisoners will agree to follow after having the underlying logic and the justifications for the approach explained to them, and which will take contractualised form, since a written document will be signed by the prisoner, the prison governor and the head of the rehabilitation and probation service. The agreement will be concluded for one year and will be renewable, taking into account changes in the prisoner's character and conduct while in prison, which are to be assessed on an annual basis. Any behaviours that need to be changed, or conversely aspects of behaviour that should be continued, will be determined in agreement with the prisoner concerned.

EXECUTIVE SUMMARY

This study of the relations between *contractualisation and judicial process* is based on the results of a questionnaire administered to justice system officials in the 47 Council of Europe member states.

"*Contractualisation"* is a complex concept that must here be interpreted in the metaphorical sense. It refers not to a specific legal situation in civil law (conclusion of an agreement) but rather to a new style of relations based on dialogue, trust and consensus, rather than authority.

Examining the links between "contractualisation" and "judicial process" therefore entails consideration of the emergence of a new type of relations within the judicial sector, based on the need to strike a balance.

This new balance can be broached from the standpoints of the efficiency of justice and the quality of justice: it is accordingly a matter for both justice system managers and the stakeholders in proceedings. Contractualisation can therefore be expected to improve the judicial process in two ways: by enhancing the efficiency of the courts and by enhancing the quality of decisions.

These are the objectives underlying the study.

The first part presents certain agreements that can be reached between different entities or different administrative bodies acting in the interests of justice.

Target-based contracts, which are in fact contracts only in name, are based on an agreement concluded by the judicial authorities with a provider of financial and/or human resources. Their aim is to enable the courts to meet certain efficiency standards, or ensure the sustainability of standards already met, by adapting the resources allocated to them. These contracts, which are increasingly prevalent in Europe, vary greatly as to their conditions of execution and sometimes meet with considerable criticism, notably for fear of a loss of judicial independence. However, in those states that implement these kinds of target-based contracts, involving the courts in the funds allocation process can be seen to constitute a genuine court-level project that is capable of rationalising a court's organisation and functioning where the indicators are chosen on the basis of a consensus.

A form of contractualisation can moreover clearly be perceived in the partnerships concluded by courts with a view to the good administration of justice. Whether these take the form of "service contracts" or "accreditation agreements", savings made through better co-ordinated management of resources serve some point only if they benefit court users. As justice is a sovereign matter, it would seem desirable to avoid outsourcing: the very purpose and meaning of the justice process must be preserved in its entirety. However, placing partnerships on a fairly formal footing and regularly assessing service outcomes can be a means of avoiding problems and highlighting good practices. A formal arrangement moreover makes it possible to guarantee the system's quality to some extent through the award of quality certification labels to the courts' partners, which facilitates their survival in the longer term.

The second part of the study addresses contractualisation of judicial process from a radically different standpoint.

While it still concerns a discussion process that gradually brings with it new relations tempering the authority-based approach in favour of one aiming for consensus, the focus here is on privatisation of justice and the way agreements between the parties influence the judicial process. This no longer concerns a means of managing the judicial process but a means of individualising it.

Contractualisation mechanisms enable judges, while still pondering a case, to obtain information relevant to taking a good decision. In many countries of Europe, while examining a case, judges frequently propose the holding of a preliminary meeting with the parties, before the hearing commences, so as to present their understanding of the salient issues raised by the case and the points which they consider should be

addressed in greater depth during the hearing: the result may be a hearing that is more relevant. So as to inform their decisions, the supreme courts of certain states may also invite parties and stakeholders to submit comments on the potential implications of any change in judicial doctrine under consideration, in particular from a financial standpoint. Lastly, the courts may seek better to inform their decision-making by contractualising the services of judicial experts, in particular with regard to the methodology applied by experts and their knowledge of a case.

Contractualisation mechanisms also enable judges to deliver judgments that they seek to make more understandable and acceptable by users. Fair dealing and dialogue between parties and the courts are essential to the quality of justice, and such co-operation is increasingly utilised at all stages in proceedings to determine the conduct of the proceedings, the choice of criminal procedure or the choice and enforcement of the sentence handed down.

In the final analysis the purpose of this study is not to promote contractualisation at all costs or to set it up as an ideal model that states would be well advised to follow. Nor is the aim to stigmatise these practices. In accordance with the CEPEJ's role, the study simply sets out to shed light on this phenomenon in the broadest possible manner, since the study's scope goes beyond anything written on the subject so far, and to promote good practices while warning against the dangers of over- or mis-using this approach. It thus provides states, justice system professionals and researchers with a scientific means of envisaging future reforms of the judicial system.

Readers wishing to obtain information on contractualisation practice in some member states are invited to consult the complementary documents available on the CEPEJ website: www.coe.int/cepej, area "quality of justice".

METHODOLOGY

This study is an initiative of the Working Group on Quality of Justice (CEPEJ-GT-QUAL)[2] of the European Commission for the Efficiency of Justice (CEPEJ, Council of Europe). Mr André POTOCKI (France) and Mr Johannes RIEDEL (Germany), who were then members of the Working Group, proposed the idea, which was adopted at the Working Group's 3rd meeting held in Strasbourg on 6 and 7 March 2008.

At its 4th meeting, held on 25 and 26 September 2008, the Working Group appointed Mr Julien LHUILLIER (France), scientific expert for the CEPEJ, to carry out the study and draw up a report on the subject.

Mr LHUILLIER devised a questionnaire containing 86 questions on different aspects of contractualisation. Through the intermediary of the CEPEJ's representatives in the member states of the Council of Europe, he entered into contact with judicial system professionals throughout Europe considered best able to complete the questionnaire. For each member state the following were contacted:

- A person in charge of the day-to-day management of a court
- A person in charge of the administration of justice at national level (for example within the Justice Ministry)
- A representative of the Bar
- A representative of the supreme court
- A representative of the prosecution service
- A judge dealing with civil cases
- A judge dealing with criminal cases
- A person belonging to an authority responsible for decisions concerning the enforcement of sentences (such as a judge dealing with these matters)
- A person familiar with relations between judges and court experts (for example a court expert).

The CEPEJ's network of pilot courts was also called on to contribute to the study on the occasion of its 3rd plenary meeting held in Catania (Italy) on 24 October 2008. This constituted an opportunity to increase the number of professionals involved in the study.

[2] The members of the Working Group on Quality of Justice are: Joao ARSENIO DE OLIVEIRA (Portugal), Fabio BARTOLOMEO (Italy), Andrei CHIRIAC (Moldova), Tatiana KOBOZEVA (Russian Federation), François PAYCHERE (Chair of the working group, Switzerland), Serge PETIT (France), John STACEY (United Kingdom), Yinka TEMPELMAN (Netherlands). The following also participate in the group: Jean-Paul JEAN (France), Philip LANGBROEK (Netherlands) and Julien LHUILLIER (France) as scientific experts.

Rather than being sent the full questionnaire, each professional concerned received the sections relevant to his or her own spheres of competence (see the table below).

	Part 1			Part 2							
	CO	CS	CP	General questions			Specificities of criminal law				Expert
Questions	1-13	14-24	25-35	36-49	50-56	57-62	63-66	67-70	71-74	75-78	79-85
Administration of justice – local level	X	X	X								
Administration of justice – national level	X										
The Bar			X	X			X				
Prosecutors			X	X	X		X	X		X	
Supreme Courts						X					
Civil law judges				X	X						X
Criminal law judges				X	X		X	X	X	X	X
Enforcement of decisions									X		
Judicial experts											X

CO : Target-based contracts
CS : Contractualisation between courts and their own services
CP : Contractualisation between courts and their partners

The responses to the questionnaire were collected in 2009 and fed into a data base. They were then resituated in a bibliographical research context (see the bibliography).
The study was submitted to the Working Group on Quality of Justice (CEPEJ-GT-QUAL) at its 9th meeting, held in Strasbourg on 23 and 24 September 2010.
It was submitted to the CEPEJ for final approval at its 17th plenary meeting, held in Strasbourg on 28 and 29 June 2011.

CONTRACTUALISATION OF JUDICIAL PROCESS

(Questionnaire)

- I - CONTRACTUALISATION AND MANAGEMENT OF THE JUDICIARY

A. "Target-based contracts" between
- the court
- central government, the regional authority or an independent authority

1. In your country, do the courts negotiate "target-based contracts" with central government, the regional authority or an independent authority whereby they undertake to obtain a specific result by an agreed date in exchange for extra resources for the purpose (financial appropriations, staff, premises, information technology, etc.)?

If efforts are made to enter into « target-based contracts »

2. How frequently are such "target-based contracts" concluded?

, Several times a year (please specify :)
, Once a year, on average
, Less than a year, on average
, Regularly, after a set time-limit (Please, specify)

3. In practice, what types of undertakings do courts give ?

NB This question concerns only contracts designed to improve the quality of the administration of justice (e.g. to reduce the length of proceedings, ensure that people may be received by appointment and that all telephone calls are followed up, etc.); it does not concern contracts designed only to make working conditions more comfortable (size of offices, etc.).

4. What procedure must be followed by a court that wishes to conclude an "target-based contract"? Is there a legal basis for such contracts? If so, does it involve a closely regulated budgetary procedure?

5. Are judges themselves able to propose "target-based contracts"? Are judges involved in decisions as to whether or not to issue "target-based contracts"?

6. What criteria are used to decide whether or not it is appropriate to conclude a "target-based contract" with a court that applies for one?

7. When a contract has been concluded, does an authority supervise its application? If so, which authority? How does it do so?

8. Depending on the results obtained, what advantages are granted and what restrictions apply?

9. In your opinion, what are the potential risks of this type of contract for the management of the judiciary? Have such risks already become apparent and, if so, what solutions do you recommend?

If no « target-based contracts » are sought

10. Give the reason(s) for which such contracts are not used (please give the main reason first).

11. Do you think "target-based contracts" would be useful in your judicial system?

12. Do the courts anticipate applying for them?

Conclusion

13. Comment(s) or testimony on “target-based contracts” and relations between courts and central government/the regional authority (particularly with respect to supervision and judicial independence):

B: Agreements concluded between courts and their own services

14. In your country, do the courts sometimes seek to improve the quality of justice by entering into an agreement with staff who work in the court but do not come under its authority?

If agreements are sought with some court services :

15. Which services are concerned and how often?

- , Several times a year (please specify :)
- , Once a year, on average
- , Less than a year, on average
- , Regularly, after a set time-limit (Please, specify)

16. What procedure must be followed by a court that wishes to conclude an agreement? Is there a legal basis for such agreements? If so, does it take the form of a formal procedure (such as a “target-based contract”) or an informal procedure (i.e. a simple verbal agreement)? Are the trade unions involved?

17. In practice, what are the most commonly sought quality objectives?

18. When an agreement has been concluded, does an authority supervise its application? If so, which authority? How does it do so?

19. Depending on the results obtained, what are the rewards and what penalties apply?

20. In your opinion, what are the potential risks of this type of agreement for the management of the judiciary? Have such risks already become apparent and, if so, what solutions do you recommend?

If no agreements are sought with court services:

21. Give the reason(s) for which such agreements are not used (please give the main reason first).

22. Do you think such agreements would be useful in your judicial system?

23. Do the courts anticipate using them?

Conclusion

24. Comment(s) or testimony on relations between courts and their services:

C. Contractualisation of relations between courts and their partners

The concept of “partners” should be understood broadly (prosecuting authorities, barristers, solicitors, bailiffs, experts, prison authorities, social landlords, public transport companies, hospitals, ambulances, trade unions, professional associations, religious communities, etc.).

25. In your country, do the courts negotiate with partners in order to involve them in joint projects?

If partnerships are sought :

26. What are the partners concerned (e.g. prosecuting authorities, solicitors) and how frequently are partnerships entered into?

, Several times a year (please specify :)
, Once a year, on average
, Less than a year, on average
, Regularly, after a set time-limit (Please, specify)

27. What procedure must be followed by a court that wishes to enter into a partnership? Is there a legal basis for doing so?

28. In practice, which areas are most concerned by partnerships? Please specify for each partner, if appropriate:

Examples of areas concerned: computerised exchange of procedural data, organisation of hearings, management of proceedings, reduction in the length of proceedings, transfer of prisoners, determination of reporting thresholds, etc.

29. Which of these areas can be the subject of informal partnerships?

, All of them
, Some of them (please specify :)
, None

30. When a partnership has been concluded, does an authority oversee it? If so, which authority? How does it do so?

31. In your opinion, what are the potential risks of this type of partnership for the management of the judiciary? Have such risks already become apparent and, if so, what solutions do you recommend?

If no partnerships are sought:

32. Give the reason(s) for which such partnerships are not sought (please give the main reason first).

33. Do you think such partnerships would be useful in your judicial system?

34. Do the courts anticipate using them?

Conclusion

35. Comment(s) or testimony on relations between courts and their partners:

- II - CONTRACTUALISATION AND MANAGEMENT OF JUDICIAL DECISION-MAKING

A. Contractualisation between judge and parties (civil and criminal proceedings)

a. Contractual agreements on the conduct of proceedings

36. In your country, does the regulatory framework require the judge to enter into an agreement with the parties on how proceedings will be conducted (for example, an agreement on the choice of timeframe for the proceedings, the foreseeable length of the case, the parties' waiving of the right to a second expert opinion, etc.)?

The question here is not about the conduct of the hearing but about the conduct of the proceedings as a whole.

37. In the absence of any such legal requirement, do the parties sometimes enter into an agreement with the judge on how the proceedings will be conducted (for example, an agreement on the choice of timeframe for the proceedings, the foreseeable length of the case, the parties' waiving of the right to a second expert opinion, etc.)?

The question here is not about the conduct of the hearing but about the conduct of the proceedings as a whole.

If such an agreement is possible :

38. How frequent are such contractual agreements? Are they reached in:

, + 90% of cases dealt by judges
, from 51 to 90% of cases dealt by judges
, from 11 to 50% of cases dealt by judges
, – 10% of cases dealt by judges

39. What are the scope and objectives of these contractual agreements?

- Examples of scope: agreements on the choice of timeframe for the proceedings, the foreseeable length of the case, the parties' waiving of the right to a second expert opinion, and so on.
- Examples of objectives: speed up proceedings, improve the image of the judiciary, and so on.

40. Who usually initiates such contractual agreements?

, generally the judge
, generally the parties
, the judge or the parties, equally

41. In practice, are such contractual agreements formalised by a written undertaking?

42. Are such contractual agreements legally binding?

43. In your opinion, is it preferable for them to be legally binding or not?

44. Depending on the results obtained, can a penalty be applied for failure to honour a contractual agreement? If so, in what form?

45. In your opinion, what are the potential risks of this type of contractual agreement? Have such risks already become apparent and, if so, what solutions do you recommend?

If such an agreement is not possible :

46. Give the reason(s) for which such contractual agreements are not used (please give the main reason first).

47. Do you think such agreements would be useful in your judicial system?

48. Do the courts anticipate using them?

Conclusion

49. Comment(s) or testimony on contractual agreements between judge and parties on the conduct of proceedings:

b. Practices involving the parties in the examination of cases

50. Is there a practice whereby judges present the case as they understand it to the lawyers before the hearing (written report submitted before the hearing, oral presentation at the hearing, etc.) so that the lawyers may draw attention to possible difficulties (for example, factual errors, omission of an application or point of law, impossibility of execution)?

If there is such a practice

51. Would you say that it improves the quality of the subsequent proceedings?

52. How frequently is the practice used?

, + 90% of cases dealt by judges
, from 51 to 90% of cases dealt by judges
, from 11 to 50% of cases dealt by judges
, – 10% of cases dealt by judges

53. In your opinion, what are the potential risks of this type of contractual agreement? Have such risks already become apparent and, if so, what solutions do you recommend?

If there is no such practice

54. Give the reason(s) for which such practices are not used (please give the main reason first).

55. Do you think such a practice would be useful in your judicial system?

56. Do the courts anticipate introducing such a practice?

c. Practices involving the parties in changes in judicial doctrine

57. Is there a practice whereby supreme court judges deliberately involve the parties in their work in order to assess the consequences of a possible change in judicial doctrine (debates on doctrine, amicus curiae, etc.)?

If there is such a practice

58. Would you say that the practice is useful?

59. In your opinion, what are the potential risks of this type of contractual agreement? Have such risks already become apparent and, if so, what solutions do you recommend?

If there is no such practice

60. Give the reason(s) for which such practices are not used (please give the main reason first).

61. Do you think such a practice would be useful in your judicial system?

62. Do the courts anticipate introducing such a practice?

B. Specific contractualisation between judges and parties in criminal proceedings

a. Contractualisation concerning the choice of procedure

63. In criminal cases, is there a practice whereby judges meet the victim and the perpetrator of the offence in order to find out what action each wishes to take on the case (for example, seek a friendly settlement)?

64. If so, please explain briefly:

65. Can the conduct of proceedings be influenced by the rights afforded to victims (for example, the possibility of objecting to the proceedings being discontinued)?

66. If so, please explain briefly:

b. Contractualisation concerning the choice of sentence

67. Can the sentence be negotiated with the parties?

68. If so, please explain briefly:

69. If the sentence can be negotiated, in your opinion does negotiation of sentences lead to standardisation of sentences?

70. If so, please explain briefly:

c. Contractualisation concerning the enforcement of sentences

71. Are there circumstances in which the enforcement of a sentence can be negotiated?

72. If so, please tick the obligation(s) that may be the subject of negotiation:

, Obligation to undergo treatment
, Obligation to reside in a particular place
, Obligation to work
, Obligation to compensate victims
, Other

73. If you replied “Other” to the previous question, please specify:

74. If the enforcement of a sentence can be negotiated, in your opinion what negotiations are likely to give the best outcomes with respect to rehabilitation and prevention of reoffending?

d. Other types of specific contractualisation to criminal procedure

75. Apart from any negotiations on the choice of procedure, choice of sentence or enforcement of a sentence, do your legal rules on criminal procedure include rules requiring a consensus between the judge and the parties?

76. If so, please explain briefly:

77. Are there criminal procedure situations in your country where, independently of any regulatory framework, a consensus is sought between the judge and the parties?

78. If so, please explain briefly:

C. Contractualisation between judges and experts (civil and criminal procedure)

This section concerns relations between judges and experts.

79. Are meetings between judges and court experts organised independently of specific cases to discuss working methods in order to improve efficiency?

80. In a sensitive case, is it possible for the judge to converse with an expert in the presence of the parties and their representatives in order to present the case and discuss the scope and degree of precision required of the expert appraisal?

If at least one of these practices is authorised :

81. What can you say about the usefulness of this (these) practice(s) for the quality of the subsequent expert opinion (for example, in relation to the choice of expert, the relevance and scope of the assignment, limiting unnecessary expense)?
(If both practices are possible, please distinguish clearly between your comments on each of them.)

82. In your opinion, what are the potential risks of this type of contractual agreement? Have such risks already become apparent and, if so, what solutions do you recommend?
(If both practices are possible, please distinguish clearly between your comments on each of them.)

If neither practice is authorised :

83. Give the reason(s) for which such practices are not used (please give the main reason first).

84. Do you think these practices would be useful in your judicial system?

85. Do the courts anticipate introducing them?

Conclusion

86. Comment(s) or testimony on contractual agreements between judges and parties concerning the management of judicial decision-making:

PERSONAL REFERENCES - PROFESSIONALS REQUESTED

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