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**EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE
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**Structural measures adopted by some Council of Europe member states
to improve the functioning of civil and administrative justice**

In addition to the effective domestic remedies required by Article 13 of the ECHR

Good practice guide

As adopted at the 28th plenary meeting of the CEPEJ on 7 December 2016

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In addition to the effective domestic remedies required by Article 13 of the ECHR

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Document prepared by the CEPEJ-GT-QUAL

Based on the preparatory work of Francesco DE SANTIS, scientific expert (Italy)

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Introduction

1. Improving the efficiency and quality of the public service delivered by judicial systems in relation to the expectations of legal practitioners and litigants is the core mission of the European Commission for the Efficiency of Justice (CEPEJ). In conformity with one of the underlying goals of the CEPEJ, which is to reduce the increasing backlog of the European Court of Human Rights (ECtHR), and following consultation with the Registry of the ECtHR and the Department for the Execution of Judgements of the ECtHR within the Council of Europe (CoE), the Working Group on quality of justice (CEPEJ-GT-QUAL) has begun reflection on the scope of the right to an effective remedy set forth in Article 13 of the European Convention on Human Rights (ECHR) and its relationship with art. 6 ECHR. This reflection focused in particular, on the implications that the implementation of effective remedies has on judicial systems and the quality of justice. An exploratory study on this issue¹ addressing *inter alia* the implementation of effective remedies in selected Council of Europe (CoE) member states and putting forward critical points and recommendations has been discussed with the Group. While valuing the contents and the conclusions of such a study, the CEPEJ-GT-QUAL members have decided to choose a different approach and to put emphasis on possible actions needed to address the sources of existing structural problems in this area, which are the main cause of dysfunction in the judicial activity. Hence, this document focuses on structural measures which need to be taken ahead of the introduction of effective remedies ex. Article 13 of the ECHR to improve the functioning of justice and unload judicial systems.
2. The purpose of this document is to provide a reference framework. It illustrates initiatives adopted by some Council of Europe (CoE) member states which can be considered as a useful source of inspiration for policy makers and justice system professionals in their search for solutions able to guarantee an improved functioning of judicial systems, while respecting the requirement to provide to the users a public service of quality.
3. As a rule, when evaluating the administration of justice in a given country or as part of a multi-country comparative analysis, one can use three criteria corresponding respectively to three key aspects of justice: a) fairness of the proceedings and the decision; b) length of proceedings; and c) cost to the parties and to the public purse². The smooth functioning of the justice system depends essentially on proper balancing of these three key aspects by policy makers. In the light of the task assigned by CEPEJ-GT-QUAL, the application of the above evaluation criteria needs to be remodelled. More specifically, we need to focus on actions which, while remaining affordable for the public purse, are able to reduce the overload of the courts and the length of proceedings without at the same time creating undue obstacles for the right of access to a court or prejudicing the fairness of proceedings. In other words, these actions must be taken within the framework of respect for the guarantees arising from art. 6 ECHR and, more generally, of the relevant elements of international and European law on human rights, always pursuing the goal of quality of justice.
4. CEPEJ-GT-QUAL also wanted the description of these measures to be based mainly on the action plans, action reports and other information documents submitted to the Committee of Ministers by the governments of CoE member states as part of the execution process of judgments of the European Court of Human Rights ("ECtHR") finding a violation of the reasonable time requirement under Article 6 § 1 ECHR³. This, incidentally, is a methodology which was extensively adopted in the report "Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights", written by Françoise Calvez in 2006 and updated by Nicolas Régis in 2012, which was adopted by CEPEJ at its 20th plenary meeting.
5. However, the use of this methodology raises some critical points and risks producing incomplete or erroneous results.
6. First, the documents submitted by CoE member states in the execution process of judgments of the ECtHR finding a violation of the reasonable time requirement under Article 6 § 1 ECHR do not always report

¹ CEPEJ-GT-QUAL(2015) 6

² In this connection, see Adrian Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure", published in "Civil Justice in Crisis. Comparative Perspective of Civil Procedure", edited by Adrian Zuckerman, Oxford University Press, 1999, page 3 ff.

³ A list of these documents is given in the appendix (Bibliography). Detailed information on laws or other national sources that have implemented actions referred to here is omitted when this is already mentioned in the said documents submitted by the Governments of the CoE member countries to the Committee of Ministers. This information is also omitted in the cases where national sources were not directly available to the expert and were not mentioned in secondary sources (doctrine and other information) consulted by him.

general measures adopted or envisaged in the country concerned. In fact, a violation of the reasonable time requirement found by the ECtHR in a given case does not necessarily disclose a more general problem in the functioning of the judicial system⁴. Consequently, if we were to rely exclusively on the documents submitted as part of the execution process of ECtHR judgments, we would end up focusing exclusively on the countries where structural problems in the functioning of the judicial system have come to light in the proceedings before the ECtHR and, on the contrary, neglecting the – probably effective – measures taken by countries which do not show similar problems. This risk has been remedied through the use of other (primary and secondary) sources, insofar as the expert had access to them.

7. Secondly, the documents submitted by CoE member states as part of the execution process of ECtHR judgments do not always provide enough details for a proper understanding of the measures adopted, and of the context prior to and following the reform in question. Therefore only some measures are presented in detail in this document.

8. Thirdly, when supervising the execution of judgments finding a violation of the reasonable time requirement, the Committee of Ministers proceeds less to an analytical assessment of the impact of each of the measures concerned than to an overall assessment of the effectiveness of the latter. For the purposes of an analytical assessment, it would be desirable also to conduct a detailed multidisciplinary investigation, including interviews with various protagonists and users of the justice system.

9. Fourthly and lastly, it needs to bear in mind that, in the context of its supervision of the execution of judgments finding a violation of the reasonable time requirement, the Committee of Ministers is not called on to evaluate the effects of actions taken by the country concerned under other aspects of the right to a fair hearing in Article 6 § 1 ECHR and, more generally, the quality of justice. Indeed, even if, in some cases, the actions of the country “under supervision” make it possible to say that it has met its obligations under Article 46 ECHR and, hence, to end consideration of the group of cases in question, those actions are approved mainly because they have, on the whole, relieved the overload of the judicial system concerned and reduced the average length of proceedings. However, CEPEJ-GT-QUAL is interested in highlighting “good practices”, i.e. actions which, while remaining affordable for the public purse, are able to reduce the overload of the courts and the length of proceedings *without at the same time creating undue obstacles for the right of access to a court or prejudicing the fairness of proceedings*. In this document, therefore, the description of the various actions taken or envisaged by the countries concerned is accompanied by some comments aimed at bringing out the potentially negative effects of those measures with regard to the right of action and the guarantees of a fair hearing. It is less a question of drawing definitive conclusions or making clear-cut assessments than of encouraging reflection and caution in such a sensitive area.

10. After this account of the potential risks arising from the suggested methodology and the means employed to remedy them, some further details need to be given regarding the subject of the analysis and the structure adopted.

11. As regards its subject, the analysis focuses mainly, but not exclusively, on a period which is not fully covered by the above-mentioned Calvez-Régis Report, namely 2011 to the present day⁵. This analysis considers the administration of justice (and the measures taken) in the civil and administrative fields, without examining the criminal field⁶.

⁴ See, for example, the communication from the authorities on the group of cases *Moreno Carmona v. Spain*, submitted on 30/05/2013 for the meeting CM-DH 1179 of 24-26 September 2013: in the light of statistical information concerning the average length of civil proceedings in Spain, the Government “considers that the execution of the *Moreno Carmona* judgment does not require the adoption of general measures”.

⁵ Updated data until December 2015, except for more recent specific cases.

⁶ This choice is justified for several reasons:

A) The purpose and subject-matter of criminal proceedings differ considerably from those of civil and administrative proceedings. In democratic states, criminal procedure serves essentially to offer the accused a safeguard against the state’s punitive claims. Civil procedure, however, is designed to settle disputes under private law between two parties who are on an equal footing; administrative procedure (in those countries where it is distinct from civil procedure) is designed to settle disputes between private individuals and the public authorities originating from defects in administrative decisions. Consequently, the problems arising in the administration of justice are quite different in the criminal-law field as compared with the other two fields.

B) The efficiency and quality of justice in criminal law need to be assessed from the point of view of both the accused and the prosecuting authorities, and the interests of the victim and the civil parties cannot be overlooked either. However, the interests at stake in civil and administrative proceedings are centred, in principle, on two parties.

C) The workload of the criminal courts is heavily influenced by the State’s criminal policy, as regards both the acts established as offences under the law and, where applicable, the crimes on which the work of the prosecuting authorities is focused. Once again, these are factors which are of no relevance to civil and administrative proceedings.

12. As regards the structure of the analysis, the various measures identified are grouped together by theme: some concern the organisation of the judicial system and, more specifically, the courts in the exercise of their function (paragraphs 1 – 3); others have to do with rules of procedure and, in particular, the role of the judge in preparing cases for trial and managing procedural timeframes (paragraphs 4 and 5); the last theme covers the various conceivable measures for reducing or managing more effectively the “demand for justice”, including conciliation and mediation (paragraph 6). Lastly, it was deemed appropriate to restate the point that the success of any reform also depends on how it is designed and put in place (paragraph 7).

1. The judicial map and the division of cases among the different courts

13. The overload of some courts may be due to the size of the judicial district in terms of both geographical area and population. Several countries have therefore attempted to rationalise the court network, in particular by creating new courts (or new divisions of existing courts) and/or abolishing existing courts (or divisions) across their national territory. We are also seeing changes in the criteria for territorial jurisdiction, transfers of jurisdiction from one court to another and the setting up of specialised courts⁷.

1.1 Increase in the number of courts

14. To respond more effectively to the needs for justice, several countries have increased the number of courts in their territory (e.g. Slovakia and Turkey) or the number of divisions of some courts (e.g. in Turkey, the divisions of regional administrative courts).

1.2 Setting up of specialised courts or divisions

15. Most countries have set up specialised courts or divisions, to meet the needs for justice in some areas of the law.

16. For example, Turkey has created specialised courts to deal with litigation relating to social security and pensions, and France is considering taking a similar step⁸. Belgium has created a family and youth court. In Greece, divisions specialising in tax litigation have been set up in courts with more than 3 divisions. Italy has set up companies courts, which are divisions specialising in competition law, company law, industrial property, public procurement and other commercial disputes, at courts and courts of appeal based in the regional capitals. In Romania, a specialist unit has been set up at the High Court of Cassation and Justice to hear appeals in the interests of the law.

17. In Switzerland, there is since 2012 a "Federal Patent Court" jurisdiction for all disputes relating to patent inventions (art. 26, Patent Court Act⁹). The decisions of this court may be challenged only directly before the Federal Court. Furthermore, stock exchange litigations in the field of intellectual property, unfair competition and cartel must directly be brought before the cantonal courts of appeal (art. 5 CPC). The cantons may endow a cantonal court stating at first and last instance on all in disputes between persons included in the Commercial Register (art. 6 CPC), the appeal before the Federal Court remaining possible in any case.

18. In a number of other countries, such as Bulgaria and Albania, specialist courts or divisions have been set up to deal with administrative proceedings.

19. In Austria, the reform of administrative proceedings in force since 1 January 2014 resulted in the abolition of the system of appeals to higher administrative authorities and a streamlining of the remedies available: an administrative decision may now only be challenged before a federal or regional administrative court, whose judgment may be appealed at second (and last) instance before the Administrative High Court (for a breach of the law) or the Constitutional Court (for a breach of the Constitution). The new administrative courts (11 at regional and 2 at federal level) replace, among others, the old independent administrative panels (“*unabhängiger Verwaltungssenat*”) and the court for asylum, thus performing tasks that were previously assigned to 120 quasi-judicial bodies.

⁷ The Guidelines on the creation of judicial maps to support access to justice within a quality judicial system (CEPEJ-QUAL) should be borne in mind in this connection.

⁸ See the amendments to the Social Security Code contained in draft law no. 35 approved on 5 November 2015, on class actions and the organisation of the courts.

⁹ Law on the Federal Patent Court of 20 March 2009.

20. As a rule, specialisation of judges, enabling them to gain greater experience of certain areas of the law and the litigation typically associated with them, can contribute to both the quality and speed of justice. However, in the absence of any arrangements for rotation or alternation, a judge's permanent assignment to the same court or division could lead him or her over time to develop an undue familiarity with a limited circle of lawyers and experts, which is not necessarily conducive to efficient conduct of proceedings and, more generally, to the appearance of impartiality of the court in question. This issue was raised frequently in the case of commercial courts established in the Swiss cantons and on which sit assessors Judges also assuming certain mandates in favor of banks or insurance companies. It happens that the persons concerned do not spontaneously draw all the consequences of their business relations, or they hide the existence in the parties¹⁰.

21. Furthermore, specialist courts often deal with the areas of litigation that are most sensitive for the government and/or state finances. While it would be wrong to *a priori* doubt the equality of the parties to proceedings before these courts, one should not rule out the risk that their interpretation and application of the law might appear to be influenced by considerations of political expediency and/or budgetary affordability. These courts and their members should therefore offer the same guarantees of independence as judicial judges; for this reason, the creation of specialist divisions in ordinary courts would be preferable to the creation of independent courts with a different status.

1.3 Change in the boundaries of judicial districts, leading possibly to the closing down of some courts or their attachment to others

22. Some countries have reformed their judicial map by enlarging judicial districts. In Belgium, for example, the reform of 2013¹¹ reduced the 27 existing districts to 12.

23. Measures of this type often result in the smallest courts being attached administratively to other existing courts. They may then either be absorbed by those courts or kept on as outlying divisions acting as local courts.

24. In Romania, 12 courts of first instance have been abolished and their human and material resources redeployed. In Italy, the redrawing of the judicial map regarded around 1 400 first instance courts, resulting in the elimination of 750 small judicial seats and their attachment to bigger bordering seats. In Portugal, the creation of larger judicial districts led to a redistribution of jurisdiction at first instance level, in particular between the central institution (where all the specialist divisions are based) and the local branches (exercising general and local jurisdiction). In the Netherlands in the late 1990s, a dozen local courts (*kantongerechten*) were closed down, while over 50 of these courts were turned into outlying divisions of the district courts (*rechtbanken*) and came to act as local courts.

25. The reform of the judicial map ongoing in France since 2007¹² has resulted in courts being closed down or attached to other existing courts. This reform has decreased the number of regional courts from 186 to 163, the number of district courts from 473 to 302, the number of employment courts from 271 to 210, and the number of commercial courts from 1190 to 863. The activity criterion (minimum caseload for each type of existing court) also taking into account the demographic trends and the opinions expressed by the heads of the courts concerned has been applied in order to redraw the judicial map. . Moreover, at least one regional court was retained in each department; similarly the elimination of district courts in towns where the regional court was closed down or which are over an hour away from any other district court of attachment was avoided.

26. As the last example shows, measures of this type can contribute to a more rational nationwide distribution of available resources and, in particular, give each court the number of judges needed to

¹⁰ See the Federal Court judgment of 18 April 2011, File No. 4F_8 / 2010, available on www.bger.ch, according to which there is a suspect of partiality of a lawyer sitting as deputy judge not only when he represents or has recently represented one of the parties in another trial, but also when he is or has been, in another case, in a ratio of representation with the opponent of one of the parties (in this case, the existence of mandates had come to the knowledge of the plaintiff's lawyer during a telephone conversation, a long time after the commercial Court of Zurich and the Federal Court had dismissed the application recusal); see also Federal Court judgment of 27 August 2013, published in ATF 139 III 433 and available www.bger.ch: one of the judges of the Federal Patent Court who had to decide in a case with significant media coverage was, moreover, the Counsel in the field of intellectual property of one of the parties' branch.

¹¹ See Law of 1 December 2013 reforming the judicial jurisdictions and modifying the judicial code in view of an improved mobility of the members of the Judicial Order.

¹² Introduced by the Ministry of Justice at the time, Rachida Dati, this reform has been implemented, especially by the decrees of 15 February 2008 of 29 May 2008 and 30 July 1999.

discharge their responsibilities (e.g. hearing cases as a bench) and pursue their specialisation. Besides, certain factors such as geography and accessibility must also be taken into account to offset the risks to which the reorganisation of the judicial map and the closing down of certain courts might give rise in terms of access to a court (see in this connection the Guidelines on the creation of judicial maps to support access to justice within a quality judicial system, op. cit., para. 2). Furthermore, care must be taken to ensure that court mergers do not lead to the creation of oversized courts burdened with heavy caseloads. Lastly, any reform of the judicial map must be carried out in a manner that respects the jurisdiction assigned to the various institutions under the Constitution (see, for example, the difficulties encountered by Poland in the reform process undertaken in 2012 owing to the conflicts of jurisdiction between the Minister of Justice and the Judicial Service Commission).

1.4 Changes of jurisdiction

27. A more efficient and effective division of cases within the judiciary may be secured through changes to the jurisdiction of certain courts¹³.

28. This can be achieved, firstly, by increasing the jurisdiction at first instance of local courts to the detriment of the central court. This is the case in Portugal, as regards the extended jurisdiction of justices of the peace (from EUR 5 000 to EUR 15 000), and in Greece, where an increase in the financial limit on the jurisdiction of justices of the peace (from EUR 12 000 to EUR 20 000) was coupled with the assignment to these courts of several non-contentious matters (guardianship, notice of wills, etc.).

29. In Italy, the jurisdiction of justices of the peace (*giudice di pace*) in terms of the amount in dispute was raised from EUR 2 500 to around EUR 5 000 for disputes relating to goods, and from EUR 15 000 to around EUR 20 000 for disputes relating to damages caused by traffic accidents. In addition, Law No. 57 of 28 April 2016, which delegated the Government to broadly reform the status of non-professional judges, envisages the subsequent increase of the threshold of competence of the justices of the peace (EUR 30 000 as far as disputes on tangible property are concerned, and EUR 50 000 as regards disputes over damages caused by traffic accidents) as well as the allocation to them of out-of-court procedures on joint ownerships, out-of-court procedures in matters of inheritance and less complex community property and, under the supervision of a professional judge chosen by the court president, some expropriation procedures of the movables of the debtor, which can eventually be with a third party.

30. Secondly, what may be involved is a simplification of the criteria for assigning jurisdiction. In Romania, for example, courts of first instance (*judectorie*) used to have jurisdiction, in commercial matters, up to a limit of RON 100 000 (about EUR 20 000) and in civil matters, up to a limit of RON 500 000 (about EUR 100 000). With the entry into force of the new Code of Civil Procedure in 2013, these local courts acquired jurisdiction in respect of disputes up to a value of RON 200 000 (around EUR 40 000), regardless of the subject matter.

31. Insofar as local courts are not composed of professional judges, the extension of their jurisdiction to cases of considerable importance with large amounts in dispute should be accompanied by the provision of appropriate guarantees, which should gradually be brought closer to those attaching to the status of professional judge, in order to ensure their independence and impartiality.

32. Lastly, some countries have abolished the exclusive jurisdiction of the Council of State for certain categories of disputes. This is the case in the Netherlands, where, in the course of the 1990s, jurisdiction to hear cases involving review of administrative decisions was conferred on specialist divisions of the district courts, with the Council of State becoming the appellate court in these matters. This is also the case in Greece, where cases involving the setting aside of an administrative decision were assigned at first instance administrative courts and appellate administrative courts, and in Turkey as regards cases relating to administrative decisions which are not applicable throughout Turkish territory.

2. Collegiate or single judge decision-making

33. For several years, there has been a growing trend towards less collegiate decision-making in courts of first instance in the CoE member states because the assignment of cases to a single judge makes it possible to take maximum advantage of the human resources available, whereas collegiate decision-making

¹³ See in this sense item V of Recommendation R (86) 12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts, adopted on 16 September 1986.

presents objective difficulties in terms of the organisation of judges' work and complicates the conduct of proceedings.

34. In this area, the example of Greece is highly emblematic: since 2011, the financial limit on the jurisdiction of single-judge courts has risen from EUR 80 000 to EUR 120 000, and finally to EUR 250 000, to the detriment of courts where cases are heard by a bench of judges. Single-judge courts have also been entrusted with a wide range of family matters (judicial separation, divorce, etc.). Similarly, the financial limit on the administrative court sitting in a single-judge formation has risen from EUR 5 000 to EUR 60 000.

35. Similar measures were taken recently in Turkey, where the financial limit on the jurisdiction of first-instance administrative courts sitting in a single-judge formation has risen from EUR 3 500 to EUR 10 600. These measures also entail a reduction in the jurisdiction of the Council of State at second instance because it is now the regional administrative court which hears appeals lodged against the decisions of first-instance administrative courts sitting in a single-judge formation.

36. The system adopted in Germany (cf. § 348 *Zivilprozessordnung*, hereafter: « ZPO »), for dividing jurisdiction between single-judge and collegiate formations of the regional courts (*Landgericht*) is worthy of note in view of its rationality and flexibility. Since 2002 these courts have, as a rule, heard cases in a single-judge formation, unless the judge in charge of the case has less than one year's experience, a bench of three judges has jurisdiction *ratione materiae* (e.g. in intellectual property cases) or the single judge him/herself relinquishes jurisdiction in favour of a bench of judges owing to the difficulty or importance of the case. Conversely, a bench may relinquish jurisdiction in favour of a single judge if the case is straightforward or lacking in importance.

37. Several countries have opted for decision-making by a single judge even at second instance. In Italy, for example, single-judge courts hear appeals against decisions given by justices of the peace. The same approach was recently adopted in Greece, where single-judge courts of appeal were assigned jurisdiction in respect of appeals against judgments delivered by single-judge courts.

38. It is also possible in Germany that a one judge ruling occurs in appeal if the first-instance judgment was given by a single judge. This also depends on the complexity and importance of the case (§526 ZPO).

39. While the use of single judges has been encouraged by the CoE¹⁴, especially at first instance, the fact remains that the collegiate nature of decision-making (if not of the preparation of cases for trial) constitutes an additional means of ensuring the impartiality of judges. In the absence of collegiate decision-making, impartiality is mainly ensured by the guarantees attaching to the judge's status; consequently, when a potentially very important case is decided by a single lay judge, a remedy should be available before a professional judge.

3. Allocation and management of resources: organisation of the courts and rationalisation of working methods

40. The provision of suitable premises for judicial activity is a precondition for the proper functioning of a judicial system: some countries (e.g. Bulgaria, Slovakia, Slovenia and Turkey) have therefore made significant efforts to refurbish existing premises or build new courthouses¹⁵.

41. Also worthy of note is the – again substantial – increase in the number of judges and/or court clerks (e.g. in Bulgaria, Greece, Italy, Romania and Slovakia).

42. Given the importance of the responsibilities involved, an increase in staff numbers must not mean less strict selection criteria or lower standards of initial and continuous training.

3.1 Transfers of human resources between courts

43. To meet the needs of understaffed courts and deal, where necessary, with temporary congestion, several countries have endeavoured to achieve a better distribution of available human resources. In addition to closing down existing courts and redeploying the staff assigned to them, this involves either

¹⁴ See, in this sense, item V of Recommendation R (86) 12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts, adopted on 16 September 1986.

¹⁵ See in this connection the Guidelines on the organisation and accessibility of court premises (CEPEJ(2014)15).

changing the system for allocating staff or putting in place quicker and more rational transfer and replacement mechanisms.

44. In Belgium, the reform of judicial districts implemented in 2013 also increased the mobility of members of the judiciary: judges and prosecutors can move more easily between the different territorial divisions of a larger judicial district and unforeseen situations (such as the congestion of a court) can be dealt with more quickly (with the help of judges working at other courts in the same district).

45. In Slovenia, the courts of first instance have become, administratively, sections of the district court of appeal. This means that, every year, depending on the caseload of the different sections, the president of the court of appeal may decide that the judge of a local section will also work for another section in the same district.

46. While, in Portugal, a pool of auxiliary judges has been formed to meet courts' *ad hoc* needs, in Hungary, the law on the courts provides that every judge may be seconded to another court without his or her consent for one year in every three. The new profile of "seconded judge" has also been created: the notice advertising the position may stipulate that the judge may be seconded to another court without his or her consent for a given period.

47. Insofar as the posting and transfer systems described above result in a high turnover rate and a lack of job continuity, they may cause seconded staff to feel less committed to the service and less motivated. In addition, it is important to ensure that the prospect of being transferred, especially if this can be done without the consent of the person concerned, does not become a means of pressure on judges, thus jeopardising their independence.

3.2 Resort to law clerks and new professional categories

48. To help judges in the performance of their duties or lighten their workload, several judicial systems increasingly have recourse to legal professionals employed on the staff of courts on the model of the French *référéndaire* and the German/Austrian *Rechtspfleger*. These professionals benefit from a guarantee of independence in a few member states.

49. According to the first model, the non-judge staff assists the judge at the hearing and helps draft judicial decisions and making research on the case law. In France, clerks of court services are defined by the new statutory Decree of 15 October 2015, as technicians of the procedure, assisting and authenticating judicial acts of magistrates, but also exercising enhanced support functions to magistrates in the framework of the rehabilitation files and in the framework of legal researches; they write draft decisions and indictments or they can be entrusted with motivating decisions. They may also be responsible for the reception and general information for the public to inform, guide and support users in fulfilling legal formalities or procedures.

50. According to the second model, the *Rechtspfleger* is defined as an independent judicial body anchored in the law or in the Constitution, which performs duties delegated to him by the law, which are of jurisdictional character, following a transfer of tasks of judges. More particularly, the *Rechtspfleger* does not assist the judge. He is present at his side and may be entrusted by law with different tasks, for example in the area of family law and custody law, inheritance law or the law of the land and business registers. He may also be empowered to take independent decisions on the fields of allocation of nationality, payment orders, enforcement of judgments, forced sales of property, criminal cases, enforcement of criminal cases (publication of arrest warrants or tracking), implementation of alternative sentences to prison or performing community service, prosecution before the district court, legal aid, etc.

51. To make a few examples, 2013 saw the creation of the new position of "judge's assistant" in Estonia, and the appointment of new "research assistants" to the Court of Cassation in Italy. In the latter country, a hybrid body (*ufficio del processo*) composed of trainees, court clerks and honorary judges is also being set up in courts to support judges in research activities, preparation of hearings, statistical surveys, etc.

52. In 2016 France decided the introduction - within ordinary courts¹⁶ as well as within administrative courts¹⁷ - of legal assistants, i.e. persons having acquired solid legal expertise (through their academic

¹⁶ See the plan to fight against terrorism launched in May 2016, as well as the recent draft law on the modernisation of the 21st century justice.

¹⁷ See article L227-1 of the Code of administrative justice as amended in April 2016.

and/or professional experience) and, who therefore, can significantly free up time for professional judges. The recruitment of legal assistants in ordinary and administrative courts takes place on the basis of temporary contracts of two or three years, renewable once or twice, respectively. Furthermore, it is not without interest that under certain conditions, legal assistants to the judicial courts may be directly appointed legal specialists and thus be integrated into the judiciary.

53. In the countries where legal secretaries were already a reality, they have been given wider responsibilities: this is the case in Poland, where, since 2009, the *referendarze* have been able to issue European enforcement orders, order the rectification of formal defects in procedural steps taken by the parties to proceedings, examine requests for the placing under guardianship of persons of unknown origin, etc. Likewise, following the organic law of 19 December 2003, the Spanish *secretarios judiciales* have judicial responsibilities in the field of enforcement and voluntary jurisdiction in particular.

54. For other examples and more details, reference can be made to the CEPEJ reports on European judicial systems, which contain an ad hoc Chapter on non-judge staff¹⁸.

55. The use of support staff can contribute to the productivity of judges and the quality of justice provided these staff receive appropriate theoretical and practical training. Furthermore, if quasi-judicial or judicial functions are assigned to these professionals, guarantees of independence and effective supervisory mechanisms need to be put in place. Internships within courts contribute to the cultural enrichment and the practical training of participants, who can also provide an *ad hoc* support for the work of these courts.

3.3 Computerisation of case registration and management, and digitisation of case files and communications

56. The setting up of computerised systems for registering and keeping track of cases is essential for ensuring proper management of each court's caseload because the tasks of allocating cases, managing human resources and supervising the conduct of proceedings can be performed more quickly and more economically.

57. For example, over the last few years, Estonia has introduced a new computerised system which, as well as being used for case management in the courts, gives users access to information on the state of proceedings and registry communications¹⁹. Portugal is working on the same lines whereas in Slovenia, since 2012, a new system of judicial data collection and processing allows to create dashboards which enable court president and court managers to have access to reliable and analytical information to assess the performance and improve working organisation²⁰. In Belgium, since February 2015, under the first phase of the E-Deposit project, lawyers have for the first time been able to send submissions and other documents in civil cases by email to the Court of Appeal and Labour Court of Antwerp, which enables lawyers, litigants and the courts themselves to save time. If successful, this project will be extended to all other courts.

58. In Italy, full digitisation of procedural documents and registry communications (*Processo telematico*) went hand in hand with the setting up of a system for online consultation of the state of proceedings and their main stages (*Polisweb*). Likewise, in Spain the digitalised communication between different stakeholders of the judicial system has become a general phenomenon, which has allowed to lower costs and delays while ensuring the authenticity and the integrity of the communicated documents²¹.

59. As some of these examples show, computerised case management systems in courts are also a key tool enabling staff and users to have rapid and economical electronic access to information on the state of proceedings and to conduct the necessary correspondence in the course of proceedings. In this regard, the Austrian example deserves to be mentioned: since 2005 any judicial communication is available on a web portal (*Edict File*); the list of mediators, experts, interpreters and other judge's auxiliaries is also accessible on the web²².

¹⁸ Regarding the report "European judicial systems – Efficiency and quality of justice" 2016 Edition (2014 data), see chapter 3.3.

¹⁹ See the project "a centralised judicial database", which was awarded a special distinction within the framework of the Crystal Scale of Justice 2014 of the CEPEJ.

²⁰ See the project "Judicial database and performance dashboards" which was awarded a special distinction within the framework of the Crystal Scale of Justice 2012 of the CEPEJ.

²¹ See the project "Lexnet" which was awarded a special distinction within the framework of the Crystal Scale of Justice 2012 of the CEPEJ.

²² See the project "Court Pub", which was awarded a special distinction within the framework of the Crystal Scale of Justice 2015 of the CEPEJ.

60. In Poland, the Code of Civil Procedure was recently amended to allow pleadings and other documents to be filed electronically. Furthermore, where property registration is concerned, it has become obligatory for certain bodies (notaries, bailiffs and directors of tax offices) to initiate the proceedings electronically. This means that the information contained in the application is stored in digital form in an electronic property register and notifications are recorded automatically in the property registers after a notarial instrument has been drawn up.

61. In Romania, the “Little Reform” Law of 2010 allows judges to notify parties also by telephonic or telegraphic communication, by fax or by email.

62. Since 2009, Turkey has put in place the UYAP computer system at national level²³ to manage cases and communications to users. For example, lawyers may be informed of the dates of hearings by SMS.

63. While the use of computer systems for the administration of justice has obvious advantages, this same technology may, however, hinder access to justice. Computer bugs or system failures can be an obstacle to the performance of procedural acts in the proper form and within the prescribed time. At the same time, the correct use of computer facilities may present major difficulties for those who are unfamiliar with information technology in general. It is for this reason that in Slovakia, it is still possible to apply to judges in writing.

64. Information technology also offers ways of speeding up certain judicial activities which traditionally involve the physical drafting of a document. This applies, firstly, to the records of hearings, which can be prepared more effectively and more comprehensively through the use of computers. In Poland, for example, since the amendment of the Code of Civil Procedure in 2010, electronic records of hearings have been introduced, enabling the parties to have access to video and audio recordings of the case. In Albania too, transcripts of the audio recordings of hearings are used to draft the record. In Slovenia, since 1 October 2010, the drafting of written records has been replaced by audio recordings of hearings and consideration is also being given to the possibility of making the audio recordings of hearings available to the parties on a website with secure access. The hearings’ recording is also a very effective and appreciated tool in Latvia²⁴.

65. This also applies to the reasons for judgments when, as in Poland since 2014, the hearing is recorded in audio and video format and the judge gives his reasons verbally.

66. More generally, it is obvious that good use of computer facilities makes it possible to save on the human resources required for some activities and, hence, to redeploy them to good effect. In Slovenia, the issuing of enforcement orders based on certain documents proving the existence of debt (bills of exchange, cheques, etc.) has been fully digitised: up to 2008 this work was done by 350 employees based in 44 local courts and involved a waiting period of several months, but it is now completed within 48 hours by the Central Department for Enforcement on the basis of authentic documents (CoVL system) at the court in Ljubljana, which has 4 judges and 62 other employees²⁵.

67. Once the registration and management of cases have been computerised, the possibility may be envisaged of creating masks in which certain standard items of information and forms of words are generated automatically by the system using standardised decision templates: this helps to give decisions a consistent and coherent structure, saving drafting time and cutting down on clerical errors. This would be even more useful if the casefile (including, for example, the record of the hearing and the parties’ submissions) were also digitised: other material which the judge would otherwise have to copy manually could therefore be incorporated automatically into the text of the decision. This working method, which is routinely used in the Registry of the European Court of Human Rights, has been tested in the general prosecution service of the Land of Brandenburg (Germany)²⁶.

68. It should also be remembered that CEPEJ-GT-QUAL is in the process of drawing up Guidelines on driving change towards e-justice, which analyses the impact of information technologies on judicial work and the functioning of judicial systems. This document will describe the challenges, risks and opportunities arising in this area in terms of both the efficiency and quality of justice.

²³ Special distinction within the framework of the Crystal Scale of Justice 2008 of the CEPEJ.

²⁴ See the project “Recording of hearings before the court through specific techniques,” which was awarded a special distinction within the framework of the Crystal Scale of Justice 2015 of the CEPEJ.

²⁵ See the project “Automatic system of validation of authentic documents” which was awarded a special distinction within the framework of the Crystal Scale of Justice 2015 of the CEPEJ

²⁶ See the “SAS” project which received a CEPEJ “Crystal Scales of Justice” award in 2009.

3.4 Monitoring of the courts' activity

69. Over the last few years, some countries have stepped up measures to ensure timeliness and to encourage better performance in the judicial work.

70. In 2008, the Austrian basic law was amended to extend the sphere of competence of the Ombudsman (*Volksanwaltschaft*) to the operation of the justice system: he may now request the setting of a deadline in a particular case and suggest the adoption of supervisory measures²⁷. We should also note the setting up of *Justiz-Ombudsstellen*, which are supervisory bodies composed of judges working part-time.

71. In Belgium, the law amending the Judicial Code in order to reduce judicial backlogs introduced better supervision of the time taken by judges to give their decisions. If the statutory deliberation period is exceeded, judges must report to their hierarchical authorities (court presidents) in order to work out joint solutions and remedy these delays; in the event of repeated delays, the judge concerned must be given a hearing. Furthermore, all information arising out of this process may be used in disciplinary proceedings, in the judge's periodic appraisal or in any appointment procedure concerning him.

72. In Estonia, the president of each court has a power of supervision and intervention to ensure compliance with the reasonable time requirement; each president must also refer cases lasting more than 3 years to the Minister of Justice.

73. Since 2002, the system for financing courts in the Netherlands has been based on the number of cases decided, a standard timeframe being set for each type of case.

74. Measures of this kind raise some major issues with regard to the independence of judges and the promotion of the quality of justice. In this connection, we need merely refer to Opinion no. 17 of the Consultative Council of European Judges (CCJE) on the evaluation of judges' work, the quality of justice and respect for judicial independence²⁸ and, in particular, Recommendation no. 6: "Evaluation must be based on objective criteria. Such criteria should principally consist of qualitative indicators but, in addition, may consist of quantitative indicators. In every case, the indicators used must enable those evaluating to consider all aspects that constitute good judicial performance. Evaluation should not be based on quantitative criteria alone [...]". This recommendation on the one hand expresses a concern that, in the absence of objective rules and structured procedures, evaluation might be affected by political influence or by favouritism, conservatism and sectional interests; on the other, it seeks to restate the point that the quality of justice must not be regarded as synonymous with the mere "productivity" of the judicial system²⁹.

75. With regard to the individualisation of performance indicators, it might be useful to reiterate the criticisms that have been raised in connection with Article 352-bis of the Belgian Judicial Code, which, since 2011, empowers the King to issue a decree to determine the manner of recording and evaluating workload: "The first difficulty is related to the diversity of measurement methods, the second to the disparity of the content of workload measurement (does it include an indication of the time needed to deliver a judgment, an assessment of quality, an assessment of each judge's productivity, the degree of difficulty, etc.?). The last obstacle has to do with suspicion as to the official or potential aims pursued (aid to decision-making for resource sharing purposes, management, staff supervision, comparison of judges, identification of cases of underperformance with a view to possible disciplinary sanctions, optimisation of resources, etc.)"³⁰.

76. The issues raised are inherent in the "traditional" view of monitoring as being aimed essentially at identifying (and sanctioning) individual problem cases or, on the contrary, advancing judges' careers. However, another approach may be adopted, namely monitoring the overall performance of a particular court. In this context, the independence of judges goes hand in hand with their accountability in relation to the expectations of litigants and democratic societies³¹. It is essential, therefore, for judges to be involved in

²⁷ See para. 148 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, "B-VG").

²⁸ This text gives a detailed description of current practices for evaluating judges in the Council of Europe member states and makes recommendations.

²⁹ For further details, see the analysis in paragraphs 31-35 of the Opinion.

³⁰ See Alexandre Piraux, "Plan Thémis de modernisation de l'Ordre judiciaire, projet Phenix d'informatisation, mesure de la charge de travail : les difficultés du management judiciaire", *Pyramides* [online], 12 | 2006, put online on 14 September 2011, consulted on 1 February 2016. URL: <http://pyramides.revues.org/287>.

³¹ See François Paychère, "How to measure court performance while safeguarding the fundamental principles of justice? A debate between 'independence' and 'accountability'", contribution to the 14th plenary session of CEPEJ, consulted on 1 February 2016. URL:

the design, development and application of the system of indicators so that performance assessment is mainly carried out as part of a collective process in which the parties concerned are involved, and which is aimed less at the identification of individual responsibilities than at collective management of the operation of the court and dissemination of the most effective working methods³².

3.5 Decentralising the management of judicial organisation

77. A special mention should be made of the ambitious plan for the decentralisation of court management implemented in Belgium by the law of 18 February 2014 on the introduction of self-management in the organisation of the courts.

78. Under this law, which instituted the Board of Courts and the Board of State Prosecutors, the Minister of Justice signs a management contract with each of the two boards. Associated with this management contract is a commitment to achieve specific results, and staff and resources are allocated on that basis. The management bodies negotiate the requested resources with the minister and are required to justify the manner in which they are used.

79. It is then for the management bodies themselves, in consultation with the local entities, to determine, within the limits of the budget allocated, how the resources are to be apportioned among the different divisions within the legal system. This is done on the basis of a management plan which the local entities are required to draw up and submit to the boards. The local entities are run by a steering committee.

80. Lastly, cases are allocated on the basis of local regulations drawn up by the head of each court (after consulting the prosecution service, the court registry and the bar association) and approved by the King.

81. On the basis of the management plans drawn up by the local entities, the responsible board will determine whether the objectives are met and whether the resources allocated need to be adapted. Every year, both the boards and the local entities are required to submit an operating report. Finally, the allocation of an overall budget to justice can also allow for a better allocation of resources.

3.6 Action plans to eliminate backlogs

82. To tackle the backlogs which hamper the work of the courts and are the main source of the repeated findings of violations of the reasonable time requirement under Article 6 § 1 ECHR, two countries have launched special action plans.

83. Following the judgment of the ECtHR of 6 October 2005 in the *Lukenda* case, Slovenia adopted the "*Lukenda project*", a series of phased measures requiring the co-operation of several institutional players and based on various action protocols. The aim of the project was to eliminate the backlog by 31/12/2010. This deadline was extended to 31/12/2012.

84. The *Lukenda project* had three main thrusts:

- providing the courts with adequate premises;
- increasing the number of judges and clerks;
- introducing productivity rewards for success in eliminating the backlog (the judges entrusted with this task would therefore process more cases).

85. In addition to these main thrusts, there were several accompanying measures which have already been mentioned and will be mentioned again in the appropriate contexts. Here, it should be mentioned that:

- the law on the courts specifies a reference timeframe for the completion of proceedings according to the type of case and the court concerned. These timeframes have been reduced considerably since 2006. Cases which were not decided within the expected time are recorded separately in statistics;
- the implementation of backlog reduction programmes went hand in hand with the introduction of a system of statistical monitoring;
- productivity rewards for success in eliminating the backlog were also foreseen.

http://www.coe.int/t/dghl/cooperation/cepej/thematiques/Measuring_perf/Study_session_14th_plenary_contrib_paychere_fr.asp

³² In this connection, see François Paychère, op. cit.

86. Italy initially made it mandatory for court presidents to adopt plans for assessing the backlog, coupled with productivity rewards for registry staff.

87. Subsequently, starting in autumn 2014, a *Special survey of civil justice* was conducted by the Ministry of Justice. Briefly, this involved a more detailed statistical analysis of cases based on the length of proceedings (year when proceedings were initiated), the type of proceedings (e.g. contentious/non-contentious), the court concerned, its location and its size. The aims of this analysis were to:

- Identify, within the number of pending cases, those which have already exceeded a reasonable duration;
- determine the real productivity of judges, taking into account the complexity of the cases decided;
- give court presidents increased responsibility.

88. The *Special survey of civil justice* formed the basis for the “Strasbourg 2 Programme” launched by the Ministry of Justice and endorsed by the Judicial Service Commission, whose aims are to:

- encourage the presidents of courts of first instance and courts of appeal to give absolute priority to identifying the longest-standing cases: first those brought before 2000, then those brought before 2005 ;
- adopt the good practices listed in the Turin court’s Strasbourg Programme³³ (which broadly match the Saturn guidelines of CEPEJ) or other good practices identified by the Judicial Service Commission.

89. The main risk involved in special projects for the elimination or reduction of backlogs is that of promoting a one-sided, exclusively productivity-oriented view of judicial activity. However, while especially those cases which have exceeded reasonable timeframes need to be brought to the swiftest possible conclusion, this must always be done in a way that respects the other guarantees of a fair trial and preserves the quality of the decision.

4. Case management, concentration of proceedings and time-limits

90. The rules that lay down the principal stages of civil proceedings on the merits of a case vary between the CoE countries with regard to time-limits, the judge’s role in determining the subject of the dispute and the facts in dispute, the judge’s investigating powers and the role of the hearing.

91. Nonetheless, a trend seems to be emerging towards the involvement of judges in managing procedural timeframes in order to ensure, in co-operation with the parties and their lawyers, the efficient handling of a case in the context of the caseload pending before the judge and the court to which he or she belongs. The scheduling of a preparatory hearing and the dissemination of the practice of “procedural timetables” also reflect this trend: the aim is to establish the subsequent activities that are necessary in the light of the requirements of each case and, accordingly, to set foreseeable time-limits that apply to everyone involved in the procedural mechanism. In this context, postponements of hearings are strictly limited.

92. In Germany, under the 1976 and 2002 reforms of the Code of Criminal Procedure (*ZPO*), judges must ensure the smooth conduct of proceedings and the parties must co-operate in this regard. The judges set the dates of the necessary hearings and the time-limits to be observed. They must also let the parties know what aspects they consider potentially critical for reaching the decision and have considerable powers to conduct investigations on the basis of the facts alleged by the parties (see §§ 139, 142 and 144 *ZPO*). The hearing is not a compulsory step in proceedings before the court of first instance (*Amtsgericht*) and for summary or simplified proceedings that are not brought to a close by a judgment.

93. A similar approach can be found in Switzerland, where the Code of Civil Procedure provides that the judge must “take necessary instructional decisions for a preparation and a rapid conduct of the procedure” (art. 124 al. 1 CPC). Furthermore, and unless a legal disposition determines otherwise, the holding of a hearing is not necessary in cases to which summary procedure applies, the judge having the capacity to give it up by its own authority (art 256 al 1 CPC); with respect to the ordinary procedure, the withdrawal of a hearing is however subject to the agreement of the parties (art. 233 CPC). The parties may not, in principle, bring new elements at the hearing of judgment unless they occurred after the written exchange at the last preparatory hearing, or if they could not have been found previously (art. 229 al. 1 CPC). Nevertheless, an

³³ Special distinction within the framework of the Crystal Scale of Justice 2006 of the CEPEJ

exception is made when the judge immediately passes to the preliminary hearing after the filing of the response, without ordering a new exchange of observations or a preparatory hearing (art. 229 al. 2 CPC).

94. In England, where management of the timeframe for civil proceedings and the preparation of a case used to be entirely in the hands of the parties' lawyers, a fundamental reform of civil procedure was carried out with the introduction of the Civil Procedural Rules in 1999. The overriding objective of this reform was to enable the courts to "(deal) with a case justly and at proportionate cost"³⁴. It is based on three approaches: a) the establishment of three different types of procedure (small claims track, fast track and multi-track, according to monetary jurisdiction, the complexity of the case, etc.), which depend in particular on the different ways of preparing a case, the admissible evidence (for example, expert evidence is not admissible for small track claims and may only be "joint evidence" in fast track cases), etc.; b) the judge's involvement in the management of the case, since he or she allocates the case to the most appropriate track, sets (as far as fast-track and multi-track claims are concerned) a timetable for examining the case, possesses certain powers with regard to identifying key aspects of the dispute and the evidence required and may impose penalties in the event of the parties failing to comply with the rules, etc.; c) the parties' co-operation with the judge in the proceedings in order to pursue the overriding objective, which is "encouraged" through various types of penalty (for example, an order to pay costs).

95. In Belgium, the 2007 Law amending the Judicial Code in order to reduce the backlog of cases seeks to make judges and parties more responsible, in particular by speeding up the exchange of submissions between the parties and ensuring that, from the outset, the judge sets a timetable covering the main steps in the proceedings.

96. In Bulgaria, the new Code of Civil Procedure in force since 2008 sets time-limits restricting the scope for judges to require the production of evidence at the first hearing (in the subsequent proceedings, they may only call for evidence to be produced if the parties have been unable to do so before). At the beginning of the proceedings, the reporting judge must report on the case, identifying the legal classification of the claim, the facts not in dispute, the facts that must be proved and the allocation of the burden of proof between the parties.

97. In France, the need to adapt the proceedings to the requirements of the case in question and the judge's active role in indicating its main stages are now established principles, even before the Regional Court (*tribunal de grande instance*) and the Court of Appeal. An important step is the meeting held by the president of the chamber (see art. 759 CPC), in the course of which, on the basis of the alleged facts and the documents already provided by the parties, the decision is taken on whether the case is ready for judgment ("short track" – art. 760 CPC) or whether, in order to prepare the proceedings, there is a need for a subsequent hearing to supplement the submissions and provide documents ("medium track" – art. 761 CPC). The case may not be ready for decision and it may be necessary to conduct further investigatory hearings, which will then be held under the direction of the pre-trial judge (or adviser) ("long track" – art. 779 and following CPC). The deadlines are fixed by the pre-trial judge according to the complexity and urgency of the case. In more recent years, setting the timetable for preparing the proceedings has been based on an agreement "negotiated" between the various cogs in the procedural wheel ("procedural contract"). The judge also has the power to order *proprio motu* all legally permissible investigatory measures.

98. In Greece, the most striking change in the new Code of Civil Procedure is the fact that, in the first stage of the partially oral process, the so-called "ordinary" proceedings have been replaced by proceedings that in principle take place in writing and in fewer stages. In practice, witnesses only appear in exceptional circumstances to testify before a court, and their testimony is now provided in advance in writing. All documents, evidence, statements by the parties to the dispute, etc., must be submitted before the hearing and within 100 days of the lodging of the request.

99. In Italy, extinctive time-limits are set for making claims and producing documents and other items of evidence, based on the following stages: initial submissions by the claimant and the defendant, the first hearing and, usually, three further sets of submissions. The examination of the case will take place at subsequent hearings in accordance with a procedural timetable drawn up by the judge and indicating, in particular, the dates of those hearings and the procedural operations to take place in each one. However, if

³⁴ This objective is detailed as follows in Rule 1.1(2) of the Civil Procedural Rules: "Dealing with a case justly and at proportionate cost includes, so far as is practicable (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party. (d) ensuring that (the case) is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

the case is not complex, the judge can decide at the first hearing that it be prepared for trial according to a summary procedure (*procedimento sommario*).

100. In “the former Yugoslav Republic of Macedonia”, after the initial exchange of submissions between the parties, the core of the proceedings is the preparatory hearing, the aim of which is to establish the facts and necessary items of evidence and set a date for the main hearing, to be held within 8 and 90 following days. After that hearing, the parties may not allege other facts or introduce additional evidence. Furthermore, the judge may not order expert evidence *proprio motu*.

101. The principle of the concentration of proceedings and the active participation of the judge in preparing the case has been affirmed in Poland, where the principle of setting extinctive time-limits has been abandoned in favour of the judge’s power to admit late submissions and items of evidence.

102. In the Netherlands, the 2002 reform of the Code of Civil Procedure is based on the principles of setting extinctive time-limits and concentrating proceedings, with the hearing constituting a fundamental step in the proceedings and the judge playing a very active role. In their initial submissions, the parties must fully detail their legal grounds and their evidence. They must then attend the hearing in person, unless the judge decides otherwise in view of the nature of the case. At the hearing, the judge must explore the possibility of reaching an agreement or refer the case to a mediator. Otherwise, he or she will decide on the subsequent course of the proceedings (for example, he or she will determine the necessary evidence or order the parties to produce certain documents) and schedule the following hearings, in which, however, the lawyers may not put forward additional arguments or submissions. However, the judge does have the power to deliver his or her decision after the first hearing.

103. In order to avoid postponing the first hearing because of the need to remedy formal defects in the application to bring the case to court, Romania has introduced a form of prior administrative review: an *ad hoc* judge checks that the application has no formal defects and asks the parties to correct them if it does. This preliminary examination of procedural acts of the parties exists in several countries, as for example in Switzerland (art. 132 CPC) and in Turkey (see below). It should also be pointed out that the parties can decide to have the evidence dealt with by their lawyers: after having decided what evidence is required, the judge will give the lawyers six months to file the documents for the final decision. However, it would seem that this option is little used.

104. In Slovakia, the most recent procedural reforms introduced a preliminary hearing in which the judge must establish the main facts to be proven by the parties and the parties then have to submit their evidence. There is also provision for a written procedure, without a hearing, for straightforward legal cases. With regard to simplifying and speeding up proceedings, it should be noted that the judge can appoint a joint counsel for several parties in cases involving more than twenty claimants or defendants.

105. In Slovenia, proceedings have been speeded up by setting stricter time-limits for making claims and indicating the evidence on which they are based, as well as by limiting the possibility of postponing a hearing. Any decision to postpone a hearing must be appropriately justified.

106. In Turkey, civil procedure has recently been improved with the introduction of a so-called “preliminary examination” stage after the action has been brought and the defendant has replied, the aim being to eliminate errors and defects in the parties’ documents from the outset (art. 137 to 142 CPC). This supplementary step of the trial involves the holding of a preparatory hearing (art. 139-140 CPC), in principle unique (art. 140 al. 4 CPC) at which the judge will hear the parties on the possible exceptions of procedure they would have argued and challenges on the admissibility of the case (art. 140 al. 1 CPC), then identifies the points on which the parties agree and the extent of their divergence (art. 140 al. 2 CPC), before attempting conciliation on remaining issues of dispute (art. 140 al. 3 CPC). After the hearing, the judge makes a judgment on issues of respect of timeframes to bring cases in justice (art. 142 CPC) and fixes to the parties a period of two weeks to produce the documents to which they are referring in their originating documents (art. 140 al. 5 CPC). Passed the preliminary examination hearing, the parties may not change the subject of the dispute (art. 141 al. 1 CPC), except to use the “reform” of the trial (art. 176-182 CPC), approach involving the payment of costs incurred by the other parties to the proceedings (art. 178 al. 1 CPC). New evidence can be presented, provided that the submitting party proves that no fault is attributable to him/her (art. 145 CPC).

107. It is hard for a judge to play a really active role in ensuring the smooth conduct of proceedings without the establishment of the other organisational measures mentioned above and if he or she has to cope with an excessive workload. Furthermore, once the judge has been provided with the means necessary to plan and manage the caseload efficiently, case management also becomes a means of giving him or her

increased responsibility for meeting the reasonable time requirement. In this connection, it should be noted that, according to the CCJE³⁵, “individual cases need to be conducted ‘proportionately’, meaning both in a manner that enables the parties thereto to obtain justice at a cost commensurate with the issues involved and the amounts at stake, and in a manner that enables other litigants to obtain their fair share of the court’s time for their disputes. In short, parties are entitled to an appropriate share of the court’s time and attention, but in deciding what is appropriate, it is the judge’s duty to take into account the burden on and needs of others, including the state which is itself funding the court system and other parties who wish to use it.”

108. Systems in which deadlines, the number of hearings and extinctive time-limits are laid down by law are likely to result in a standardised processing of all cases and, therefore, limit the possibility of adapting the proceedings to the specific needs of the case concerned. Besides, a certain level of flexibility in the sense of the use of judicial resources commensurate with the requirements of each case concerned may be ensured by providing various types of proceedings (or different "circuits") depending on the nature, the value and complexity of the case.

109. Holding a preparatory hearing in principle represents a means to simplify the case file preparation and avoid any slowing down of the procedure and is useful whenever defects in originating documents, the need for third-party intervention or any other procedural issues prevent the judge from ruling immediately on the merits of a case. Furthermore, the absence of any preliminary discussion between the parties and the judge with the aim of identifying the subject-matter of the dispute and determining the facts to be proved may complicate the process of preparing the case for hearing.

110. As regards speeding up the preparation of the case, considerable importance attaches to the observance of deadlines for the completion of expert reports. In addition to supervision by the judge, which may include the power to revoke the expert’s assignment or other sanctions, other preventive measures are conceivable³⁶.

111. Turkey, for example, has reformed the rules governing the register of experts in order to improve the process of sharing out expert witness work among them. In Italy, all judges must let the court president know what expert witness testimony they have ordered and what fees have been paid to the experts. On the basis of this information and with the help of computerised registers, the court president ensures that no expert can obtain more than 10% of the court’s expert witness assignments and ensures the optimum allocation of work among the experts on the register. In Belgium, two initiatives are worth mentioning: firstly, the project launched with the first instance court of Liège in the field of construction law³⁷, focusing on the updating of the list of experts, the implementation of a standard expert’s mission and an increased surveillance of the respect of delays by the judge and the chief chancellor; secondly, the creation of a special department in charge of following expertises up within the first instance court of Anvers, which, thanks to a dedicated software, allows for a better communication between judges and experts³⁸.

112. Finally, mention should be made of the courts’ power to directly access databases needed to complete certain stages of the proceedings or prepare the case.

113. In Romania, for example, the courts now have direct access to the databases of public institutions in order to obtain the data and information necessary for the procedure of notifying the parties. Similarly, judges in Bulgaria have direct access to the registers of the public records offices.

5. Other measures with regard to procedural rules, in particular concerning legal remedies and summary proceedings

114. In addition to the rules pertaining to case preparation, extinctive time-limits and the role of the judge, it is necessary to consider other measures taken in the area of procedural rules, namely the various mechanisms for presenting new facts and arguments in appeal proceedings, extending summary proceedings, reducing the number of public hearings and ensuring compliance with the obligation to state reasons.

5.1 Reduction in the number of grounds for appeal/cassation

³⁵ Opinion No. 6(2004) on fair trial within a reasonable time, paras. 104-105.

³⁶ See in this connection CEPEJ(2014)14, *Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe’s Member States*.

³⁷ Special distinction within the framework of the Crystal Scale of Justice 2005 of the CEPEJ

³⁸ Crystal Scale Award 2012 of CEPEJ.

115. In Germany, the possibility of presenting new arguments on appeal has been limited since 2001. The submission of new facts is admissible either if the facts are linked to a point overlooked by the challenged judgment or if the trial court's first judgment is vitiated by a procedural error. By contrast, it is not admissible in the case of negligence by the parties at first instance (para 531 ZPO). New evidence may be submitted if there is reason to doubt that the facts of the case were established correctly and completely at first instance, notably when the evidence exposed on appeal gives grounds to doubts as regards their truthfulness (§ 529 para. 1 c. 1 ZPO). The aim of the appeal is thus to eliminate errors committed by the first-instance judge. Although the upper limits on the value of a claim for lodging an appeal have either been reduced (EUR 600 for an ordinary appeal) or abolished (in the case of a final appeal on points of law [*Revision*] or a 2nd appeal), permission to lodge a final appeal on points of law must be given by the court that has delivered the challenged decision (§ 543 al. 1 ch. 1 ZPO) ; the refusal to grant such permission can be challenged before the Supreme Court (§ 543 al. 1 ch. 2 ZPO) - "leave to appeal" system.

116. According to the new Bulgarian Code of Civil Procedure, appeal judgments may only be challenged by way of a cassation appeal for three reasons: if they fail to comply with the case law of the Court of Cassation, if they conflict with the judgments of the first-instance and appeal courts with regard to the establishment of the facts and if they raise important questions for the development of case law or the proper interpretation of the law. Similar criteria can be found in Germany, not only as regards an application for « Review » (§ 543 al. 2 ZPO), but also as regards the appeal (§ 522 al. 2 ch. 2 and 3 ZPO). The appeal procedure is not subject to any authorization, but the appeal court has nevertheless the power to end the proceedings before a hearing if the appeal is not necessary for the development of the case law or if the case does not have any fundamental importance.

117. In Greece, an ordinary or cassation appeal in administrative proceedings is now only permissible if the judgment is contrary to the case law of the Council of State or another higher court or in the absence of relevant case law of the Council of State or another higher court.

118. In Italy too, new evidence may no longer be adduced on appeal. Moreover, the number of possibilities of lodging an appeal to the Court of Cassation for failure to state reasons has been reduced.

119. In Romania, with the new Code of Civil Procedure, a cassation appeal has become an extraordinary remedy that may be lodged for limited legal reasons and may only be filed by a lawyer or legal counsel. The "Little Reform" Law had previously eliminated appeals in some disputes concerning debt claims amounting to a maximum of RON 2 000 (about EUR 440) and it then fell to the courts of first instance to give a first and final ruling.

5.2 Introduction of appeal filtering mechanisms, perhaps combined with summary decision proceedings

120. Such a mechanism has been introduced in Greece, where a three-member panel decides on the immediate rejection of manifestly inadmissible or ill-founded cassation appeals following a proposal from the reporting judge. The same procedure applies also to all claims addressed to administrative courts.

121. Swiss law goes very far in that direction, considering that both, the cantonal courts (art. 312 para. 1 and 322 para. 1 CPC) and the Federal Court (art. 102 al. 1 LTF³⁹), can dismiss an appeal on the only ground of the applicant's submission without the need to set a deadline to the other parties to reply. The Swiss Supreme Court makes a heavy use of this option, with the result that the final judgment is rendered in a very large number of cases within one year after the complaint was introduced, sometimes even in of 2 or 3 months. The relative speed of proceedings before the Swiss Federal Tribunal can largely be explained by the possibility of ending the appeal proceedings before the parties' observations clutter the file.

122. Italy has created a filtering section at the Court of Cassation (art. 376 CCP), which, following simplified proceedings, gives a decision on manifestly inadmissible or ill-founded appeals (if there is no violation of the fair-trial guarantees or if the challenged judgment is in line with the case law of the Court of Cassation and there are no reasons to confirm or overturn that case law) or on manifestly well-founded appeals. As far as ordinary appeals are concerned, the conditions for their admissibility have been made more stringent since 2012 (art. 342 CCP) and filtering procedures have been introduced to declare inadmissible those appeals unlikely to be allowed by the court (art. 348-bis and 348-ter CCP).

³⁹ Law on the Federal Tribunal of 17 June 2005.

123. A similar system exists in Germany for appeal proceedings (§ 522 al. 2 ZPO), the court may dismiss the appeal on the sole basis of parties' written submissions, after having duly notified them, when the appeal has no chance of success or whether the conditions for intervention by the court of second instance are not met.

5.3 Reduction in the number of cases referred back to the trial or appeal court for review

124. Several countries – as for example Germany (§ 538 al. 2 ZPO), Italy (art. 354 CPC), Poland, Slovakia and Switzerland (art. 318 al. 1 litt. c CPC) - have introduced provisions limiting the possibility for appeal courts to overturn trial court decisions and refer them back for review.

125. In addition, Slovakia has introduced provisions requiring the Court of Cassation to finally determine cases on the merits when the appeal judgment has been overturned. The Supreme Court stays in any case free to statute or not on the substance in Switzerland (art. 107 al. 2 LTF), Germany (§ 563 al. 3 ZPO), Italy (art. 384 CPC) as well as in France (art. L. 411-3 COJ). In the first two countries, the referral remains relatively rare outside of cases where new evidence should be given, while it is still the rule in France.

126. In Romania, the “Little Reform” limits the possibility of cassation with referral back to the lower court only once during the proceedings. The High Court of Cassation and of Justice applies this new jurisprudential orientation, by keeping the case for an examination on the ground, even if evidence is still needed.

5.4 Use of simplified and/or summary first-instance proceedings

127. In Austria, before a civil claim can be brought before a court of first instance, it is compulsory to employ the default summons procedure for debts up to EUR 75 000 (see art. 244 ff. of the Austrian Code of Civil Procedure). Apparently, only 10% of default summonses are contested by the defendant and subsequently result in ordinary proceedings.

128. In Switzerland, the injunction proceedings to pay her the jurisdiction of administrative authorities and are almost always used.

129. In France too, several types of simplified proceedings are employed, for example summary proceedings in the case of orders to pay and orders to act. Summary proceedings are also widely used. Especially in cases in which the obligation is not seriously disputable (art. 808 CCP), the president of the Regional Court (or a delegated judge) may order a payment into court, thus provisionally settling the case, which often ends up discouraging the initiation of proceedings on the merits and, accordingly, *de facto* constitutes a final decision.

130. In Italy too, when the case is not complex, the judge can adopt simplified proceedings as opposed to so-called “ordinary” proceedings (art. 702-bis ff. CCP).

131. In Switzerland, the Civil Procedure Code is experiencing a summary procedure "for clear and obvious cases" or when "the state of affairs is not disputed or [if it is] likely to be immediately proven" and that "the legal situation is clear" (art. 257 CPC). Judgments in such proceedings are invested with the authority of *res judicata* as any other decision of the civil judge. Beside this, the Law on Debt Enforcement and Bankruptcy allows the creditor to obtain, still through a summary procedure, the continuation of the enforcement proceedings despite the debtor's opposition to pay order (art. 80-83 LP⁴⁰). In this case, the judge's decision has not authority of *res judicata*.

132. In the Netherlands, summary proceedings (*kort geding*) before the court president similar to the French system are employed for settling most disputes (art. 289 CCP).

133. In Slovakia, the scope of proceedings to obtain a court order has been extended to orders to act or to cease-and-desist orders.

134. In that country, as in Slovenia, summary proceedings by default have been introduced for settling minor disputes. In Greece, general application has been given to the rule that failure to appear in civil proceedings is considered a confession.

⁴⁰ Federal law on prosecution for debts and bankruptcy of 11 April 1889.

5.5 Reduction in the number of public court hearings

135. In Greece, there is a general rule that decisions are taken in chambers. The new Romanian Code of Civil Procedure has brought about a change to the structure of civil proceedings, the preparatory phase now taking place in chambers and the arguments on the merits being presented at a public court hearing.

136. In Slovakia, broader categories of cases can be decided without a hearing before administrative courts. Furthermore, appeal courts can decide on a higher number of questions, without holding a hearing. A similar tendency can be found in Germany (§ 522 ZPO).

5.6 Reduced obligation to motivate the decision

137. In Germany, the principle is applied that the reasoning of the decision to appeal should not be in the form of an exhaustive statement of the factual and legal reasons for the decision. As the aim is to amend or confirm the first-instance decision, the new decision only needs to contain corrections made to the original one (cf. § 540 ZPO).

138. In Poland, appeal judgments have to contain a summary statement of reasons. The parties can request a more detailed statement.

139. In Switzerland, the decisions of trial courts are motivated only on request of the parties (art. 239 al. 2 CPC). Regarding the decisions on appeal by the cantonal courts, there is a debate on whether the motivation is needed immediately or only upon request of the parties. In practice, decisions are always motivated, and because most cantons also now publish them on internet.

5.7 Critical remarks

140. Although effective in terms of reducing judicial service provision and sparing use of resources, the measures described here must always be balanced against respect for the right of access to a court and the guarantees of a fair trial. In other words, it should not be forgotten that, having regard to Article 6.1 ECHR, Council of Europe countries must in all cases provide access to an independent and impartial tribunal that will take a decision within a reasonable time after a fair trial.

141. Accordingly, the adoption of summary proceedings at first instance, which represents in many states an effective mean to process quickly a given type of cases while reducing the courts' workload, must always go hand in hand with safeguards to protect, if appropriate in subsequent proceedings, the adversarial principle and equality of arms.

142. With regard to reducing access to appeal and cassation proceedings and filtering mechanisms for these legal remedies, it should be reiterated that, although in civil cases the introduction of these remedies is not an imperative requirement deriving from Article 6.1 ECHR in the non-criminal field, Article 6.1 does apply once they have been put in place⁴¹. Admittedly, it is quite understandable that the rules governing the right of access to courts of appeal and cassation do not necessarily have to correspond to those governing the right of access to a court of first instance, that a certain formalism is permissible and that filtering mechanisms are definitely conceivable at this stage of proceedings, but the fact remains that the limitations applied must not restrict an individual's open access in such a way or to such an extent that the very substance of this right is affected. They will only be compatible with Article 6.1 if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means and the aim⁴².

143. Furthermore, it should be remembered that these legal avenues constitute the principal tools for redressing violations of several aspects of the right to a fair trial (right to adversarial proceedings, equality of arms, right to a reasoned decision, right to a tribunal established by law, right to an impartial judge), in addition to review proceedings and challenge mechanisms and the settlement of jurisdictional disputes. In this way, litigants can obtain redress for a violation in connection with the conduct of the proceedings, since respect for the right to a fair trial must be assessed in the light of the entire proceedings, and, more

⁴¹ This has been consistently affirmed in the case law of the ECtHR since the *Delcourt v. Belgium* case, Application No. 2689/65, § 25, 17 January 1970.

⁴² For the application of these principles to judicial remedies, see, among the most recent cases, *Hansen v. Norway*, Application No. 15319/09, §§ 71-74, 2 October 2014; *Mazzoni v. Italy*, Application No. 20485/06, §§ 39-41, 16 June 2015 and *Arribas Anton v. Spain*, Application No. 16563/11, §§ 41-42, 20 January 2015.

generally, obtain a better quality decision. The aim, therefore, is to strike the right balance between this requirement on the one hand and protection of the reasonable time requirement on the other⁴³.

144. As to the systems in which the appeal or the cassation proceeding are eligible only in case of contradiction of the decision contested with the case-law of the higher courts, the risk of excessively reducing the space for the case-law development cannot be excluded.

145. Having regard to Article 6.1 ECHR, the reduction of the obligation to provide reasons and the elimination of public proceedings must be considered with extra caution, especially at first instance.

6. Lines of action with regard to the “demand for justice”, non-judicial settlement of disputes and abuse of procedural rights

146. Finally, discussion should not stop at measures to improve the operation of the judicial system and the conduct of proceedings. It is also necessary to consider these issues, especially the courts' excessive caseload, from the point of view of the “demand for justice” and the abuse of procedural rights.

147. In this connection, it should be borne in mind that access to a court and court proceedings does not constitute an “inconvenience” for the state. It is a mean of protecting the rights of litigants (especially the most vulnerable) and upholding the rule of law.

148. At the same time, there are also measures which may be envisaged to help ease the burden on the courts, tackle certain sources of disputes, reduce litigation brought before the state courts and, finally, ensure that the proper conduct of judicial proceedings is not affected by abusive practices.

6.1 Reduction in courts' non-contentious work

149. A first area of focus, which is envisaged by the CoE since a long time⁴⁴, may be the courts' non-contentious work: the management of business registers, non-contentious divorces, the registration and certification of certain documents and the issuing of certain certificates can be assigned to other administrative authorities, notaries or other professionals.

150. Bulgaria, for example, has set up a business register managed by an administrative authority separate from the courts.

151. Several measures of this type were introduced in France by the draft reform “J21”. Firstly, the registration of a “civil solidarity pact” (*pacte civil de solidarité* – PACS) should be of the responsibility of the public records officer at the town hall⁴⁵. Then, the judicial supervision of guardianship will be reduced when one of the minor child's parent has died or is deprived of the exercise of parental authority: in fact, Act No. 2015-177 authorises the Government to issue an order to limit the cases in which the permission of the guardianship judge is required; thus, only acts that could affect in serious and substantial manner, the heritage of the minor must be systematically previously granted permission by the judge.

152. In Italy, the parties can sign a divorce agreement drawn up with the help of lawyers, which is submitted to the Public Prosecutor's Office for approval (art. 6 of Legislative Decree No. 132 of 2014). Moreover, if spouses have no minor children, their legal separation and divorce can take place via an agreement concluded before the public records officer (art. 12 of Legislative Decree No. 132 of 2014).

153. Similarly, in Romania the “Little Reform” Law assigned notaries and public records officers responsibilities in amicable divorce matters when the spouses have no minor children.

154. In Turkey, notaries' powers have also been extended in non-contentious proceedings (for example, in estate matters or when a spouse has been invited to return to the conjugal home).

155. Both Poland and Portugal have given notaries certification powers in matters of succession.

⁴³ On this subject, see in particular Articles 1(a) and 7 of Recommendation No. R (95) 5 of the Committee of Ministers on the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases, adopted on 7 February 1995.

⁴⁴ See in this sense item II of the recommendation R(86)12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts, adopted on 16 September 1986.

⁴⁵ See former art. 17 of the draft Law No. 35-2015.

156. In Slovakia too, estate proceedings have been simplified. They are conducted by notaries, who are empowered to issue certificates of inheritance, under a court authorisation.

157. The “déjudicialisation” of certain activities should be carried out by taking into account the increase in costs that it might bring for individuals and the need to offer guarantees of reliability equivalent to those of a judge.

6.2 Conciliation and mediation

158. Conciliation and mediation are channels of dispute resolutions of which the advantages for the individuals, the companies and the public administrations are now universally recognised. Also, given that conciliation and mediation may contribute to unclog judicial systems and to finalise the proceedings within a shorter period, they are increasingly promoted within the CoE countries⁴⁶.

159. In Germany, pursuant to Article 278(2) of the Code of Civil Procedure, as amended in 2001, the first hearing in court proceedings is an attempt to bring about an amicable settlement, unless there seems to be no possibility of reaching an agreement or if an attempt to negotiate an out-of-court settlement has already failed.

160. In Belgium, when the Family and Youth Court was set up, provision was made for it to have a division responsible for out-of-court settlements. In this division, the judge does not rule on the dispute but proposes possible solutions to the parties without influencing them. To be more precise, the judge-conciliator must assess the possibility that the mediation will bear fruit and forward the case file to an accredited mediator if the two parties agree.

161. In France, Draft Law No. 35 on class actions and the organisation of the courts, approved by the Senate on 5 November 2015, provides for two approaches with regard to alternative ways of settling disputes. Firstly, it established the principle that a judicial conciliator will attempt to reach an amicable settlement in the case of a minor day-to-day dispute before the case is brought before a court. Secondly, before any matter is referred to the Social Affairs Court, provision is made for complaints against decisions taken by social security institutions and agricultural mutual insurance funds for employed or self-employed persons to be submitted to an amicable settlement commission set up within each association’s board of management.

162. The Netherlands have adopted several measures to avoid the judicial settlement of disputes in several types of case. For example, consumer associations play an important role before proceedings are instituted in cases involving consumer rights because they are mixed-membership institutions for the settlement of disputes. In commercial cases, commercial arbitration is often provided by sector organisations, for example the construction sector. In the insurance sector, technical experts (in road accidents) are accredited by the insurers, which themselves provide their customers with a legal expertise service. Lawyers are normally consulted with a view to initiating proceedings after the failure of all these ways of reaching an amicable settlement. After proceedings have been instituted, co-operative conduct by the parties is encouraged with the help of judges who act both as decision-makers and as mediators. Recently, the Legal Aid Office, in partnership with other stakeholders, has launched and made available to the parties to family litigation an online platform (Rechtswizer⁴⁷) which - with the assistance, if necessary, of professionals mediators - to negotiate and conclude friendly settlements regarding the various aspects of the couple's end-of-life (childcare, family housing, other properties, etc.).

163. In the United Kingdom, in view of the success of the pilot project launched in 2005 at the Manchester Court, a Small Claims Mediation Service was established in all jurisdictions in the country⁴⁸. This service provides the parties with a means of resolving disputes, available before or even during the legal proceedings, which appears to offer significant benefits in terms of costs and timeframes; a practice of voluntary execution of friendly settlements concluded after mediation was also noted⁴⁹.

⁴⁶ In this sense, see item I of the recommendation R(86)12 of the Committee of Ministers concerning measures to prevent and reduce the excessive workload in the courts, adopted on 16 September 1986.

⁴⁷ Special distinction within the Crystal Scale Award 2015 of the CEPEJ.

⁴⁸ See the project “Mediation for small claims attached to the court”, special distinction within the Crystal Scale Award 2006 of the CEPEJ.

⁴⁹ See the project « The Small Claims Mediation Service », Crystal Scale Award 2008 of the CEPEJ.

164. In recent years, Italy has also tried to facilitate the amicable settlement of disputes. On the one hand, anyone considering bringing an action for damages as a result of a road accident or any other action claiming payment of an amount up to EUR 50 000 must invite the other party to negotiate on the matter with the assistance of their respective lawyers. On the other hand, at the first hearing and throughout the proceedings, the judge can propose an amicable settlement (see Article 185-bis of the Code of Civil Procedure).

165. Except statutory exception, the introduction of a legal action in Switzerland can be done only after a failed attempt at conciliation, usually conducted before the competent court or another court designated to this effect (art. 197 CPC).

166. In Turkey, the first hearing devoted to the preliminary examination of the case contains an attempt at conciliation. The judge can moreover order the holding of a further hearing for this purpose (art. 140 al. 2 CPC).

167. With regard to judicial conciliation, we must ensure that the activities conducted by the judge to facilitate the amicable settlement of the dispute does not compromise its impartiality and, in particular, that this activity is not analysed as a real anticipation of the decision⁵⁰.

168. Generally, countries of the European Union have adopted measures to encourage the resolution of disputes through mediation, in the light of EU Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

169. Over the years, Greece has made efforts in the mediation field, notably by training and accrediting professional mediators.

170. In Italy, the attempt to bring about extra-judicial mediation is a precondition for bringing a matter before a court in a wide range of cases (inheritance, co-ownership, medical liability, etc.). At the same time, throughout the judicial proceedings the judge has the power to refer the parties to a mediator.

171. In "the former Yugoslav Republic of Macedonia", at the preparatory hearing, the judge informs the parties of the possibility of resolving the dispute through extra-judicial mediation.

172. In Romania, the judge is obliged to try to resolve a civil dispute by means of an amicable settlement with the help of a mediator. If it is the judge who recommends mediation, the parties (assisted by their lawyers) must at least participate in an initial meeting, which is free of charge. If the parties reach an agreement in the mediation process, it is formalised by a court judgment and the parties can recover their legal costs. The new Code of Civil Procedure has introduced a request for conciliation as a precondition for legal action to be brought against an administrative authority (the authority must be asked to revoke its decision within 30 days) and for commercial disputes over a sum of money (the other party must be informed of the request, documentary evidence must be provided and a meeting must be requested to negotiate an agreement).

173. Possible actions that may encourage these methods of settling disputes (especially in certain types of disputes) include increasing the amount of information given to citizens on the characteristics and advantages of conciliation and mediation, ensuring the professionalism of conciliators and mediators, and providing for forms of financial assistance (with regard to costs, legal aid and tax benefits)⁵¹. In countries where they are not standard practice, it would also be desirable to gear lawyers' training and earnings to the profile of a legal expert who assists his or her clients before legal action is taken, and subsequently during the various proceedings to resolve the dispute.

⁵⁰ In this respect, it may be recalled that the pilot project "Judicial Mediation", continued between 2003 and 2005 in the Antwerp Court of Appeal District (special award under the CEPEJ 2005 Crystal Scale Award) provided for the creation of a file of mediation different from that of the judicial procedure as well as the stepping back of the case of the judge who was previously involved in a failed mediation.

⁵¹ For more details, reference may be made to several Council of Europe instruments, in particular Recommendation (98)1 on family mediation, Recommendation (99)19 on mediation in penal matters, Recommendation (2001)9 on alternatives to litigation between administrative authorities and private parties and Recommendation (2002)10 on mediation in civil matters. With regard in particular to the work of CEPEJ, mention should be made of the activities of GT-MED and the sections on mediation in the reports evaluating judicial systems. Projects in this field were also welcomed by the CEPEJ in the framework of the Crystal Scale Award: beyond the examples mentioned in the text, see "Mediation attached to the courts and the accelerated settlement of civil disputes in the court district of Ljubljana" (project chosen at the 2005 edition) as well as "The Practice of Mediation in family litigation in the Tarascon TGI (13): a change of judicial culture" (project distinguished at the 2005 edition).

6.3 Class actions and other measures to curb the practices of administrative authorities or major economic players which are sources of legal disputes

174. Big caseloads are often the result of uncertainty concerning the interpretation and application of rules of law. They are also the result of practices (or inaction) by certain agencies or organisations (administrative authorities, health/retirement insurance funds, large companies, etc.), which are able to reach large groups of individuals. In these cases, the problem has to be tackled at source, by penalising the illegal behaviour of these “players”, clarifying the legislation or changing the administrative practices that lead to disputes and introducing effective class actions⁵².

175. First, mention should be made of the example of Romania, which has introduced both a means of speeding up execution and the possibility of awarding compensation for delays in executing judgments delivered against an administrative authority. To be more precise, the courts can rule on possible delays in executing judgments finding in favour of private individuals and impose a judicial fine on the head of the institution concerned. The fine amounts to 20% of the guaranteed minimum gross salary for each day of delay and must be paid to the state, whereas the compensation continues to be payable to the creditor.

176. Italy and Poland, for example, also provide for penalties to be imposed in cases where an administrative authority fails to execute an administrative court judgment finding against it. The authorities concerned and their officials are therefore encouraged to comply with court decisions, which reduce the number of subsequent lawsuits that may result from their inaction.

177. On a field close to the cooperation of the administration to reduce litigation, we can mention the exceptional measures adopted in Italy by Article 3, paragraph 2 bis of Legislative Decree No. 40/2010 in order to close the proceedings pending before the tax court of third instance. These measures originate from complaints which are pending on the effective date of the conversion of this decree law, for over ten years and for which the administration of state finances was unsuccessful at first and second instance. The closing is automatic for tax procedures still pending before the *Commissione Tributaria centrale* while it is subject to payment by the taxpayer of 5% of the value of the dispute for pending tax proceedings before the Court of Cassation⁵³. These forecasts do not apply to tax procedures concerning the taxpayer's refund.

178. If this line of intervention takes place in a moment where the litigation between the administration and a party has already started, it is desirable in first place that the administrative procedure is conducted according to the law and speedily.

179. On this aspect, several measures have been introduced in Poland to improve administrative procedures and reduce the number of breaches of the law or delays caused by officials, which often result in litigation. For example, the procedure for issuing construction permits has been digitised and placed under the supervision of the Chief Buildings Inspector, the aim being to speed up the procedure in question. The possibility of complaining not only about administrative decisions but also about procedural delays by the authority has also been introduced. Moreover, several changes in substantive law now make it possible to raise the issue of the liability of both the administrative authority and its officials in respect of a breach of the law or delays during administrative procedures. Finally, unlawful acts and malpractices committed by officials which are discovered during judicial proceedings can be reported directly to their hierarchical superiors with a view to disciplinary action.

180. Even non-litigious judicial proceedings, which add to the workload of judges, can be speeded up by improving administrative procedures. This has happened in Slovenia following improvements to the way the digital land registry operates.

181. Regarding the prevention and settlement of disputes resulting from uncertainty about the legal and regulatory framework, a type of “model proceeding” has been proposed in Greece for cases involving new issues or issues that result in a large number of legal actions, the aim being to create a precedent. The parties to the proceedings or the General Commissioner of Administrative Courts can ask for the case to be dealt with directly as a matter of priority by a panel of three judges of the Council of State. Likewise, the administrative court can request a preliminary ruling to the Council of State on the new issue or the issue

⁵² These measures are in line with the principles set out in the Saturn guidelines for judicial time management, Section II. C).

⁵³ For a compatibility assessment with the law of the European Union on VAT, see the judgment of the Court of Justice of 29 March 2012 in Case C-500/10. Moreover, this automatic closure - which was subsequently qualified as “best before” (*estinzione*) by an authentic interpretation of law - could pose interrogatives in the field of right to cost recovery procedures contained in the third instance by the taxpayer.

which can give rise to a high number of complaints. In the meantime, the proceedings concerned and all the proceedings in which the same issue arises are stayed. After the panel has reached its decision, the cases that only involve the issue that has been resolved can be decided *in camera* unless the parties object.

182. Still in the interests of ensuring the uniform interpretation and application of the law, in cases where an administrative court finds in a decision that a law is contrary to the Greek Constitution, the remedies available to challenge that decision will be fast-tracked and dealt with *extra ordinem* in order to clear up any uncertainty about the applicability of the law as soon as possible.

183. In France, Draft Law No. 35, approved by the Senate on 5 November 2015⁵⁴, provides for the introduction of a model class action for combating discrimination. The right to take legal action is granted either to associations with national certification that recognises their experience and their representative character with regard to combating discrimination, or to trade unions. This action may be taken by those associations with the aim either of putting an end to the breach mentioned in the first sub-paragraph or establishing the liability of the person who caused the damage in order to obtain compensation for the personal harm sustained, or in order to pursue both objectives. By contrast, the trade unions can only take this action to pursue the first of these objectives. When the class action seeks to obtain compensation for the harm sustained, the judge will rule on the defendant's liability, determine the group of people in respect of whom the defendant is liable, lay down the criteria for being considered a member of the group and specify the damage to be remedied for each of the categories of individuals. When the evidence produced and the nature of the damage allow the judge to do so, he or she can also decide to implement a collective procedure for assessing the damages, of which he or she will determine the amount or assessment criteria, and authorise the plaintiff to negotiate the compensation with the defendant. Individuals who meet the membership criteria and wish to rely on the judgment as to liability can join the group and are then entitled to obtain compensation from the person judged liable for the damage suffered and, to this end, can take advantage of the negotiations or any subsequent action undertaken by the association.

184. As far as class actions are concerned, the Netherlands have closely followed the US model, especially with regard to class settlements. To be more precise, according to the Class Settlement Act of 27 July 2005, the Amsterdam Court of Appeal can declare that the settlement of a dispute concluded by certain representatives of the group is binding on anyone who has sustained the same type of damage and can therefore be considered a member of the group, with the exception of those who explicitly opt out of the effects of that agreement. It has accordingly been possible to deal effectively with a large number of disputes that had factual and legal aspects in common and would probably have clogged up the Dutch judicial system.

6.4 Practical measures to combat the abuse of procedural rights

185. Finally, mention should be made of the various measures that can be introduced to combat the abuse of procedural rights from the point of view of access to a court and, above all, to defence lawyers.

186. In Romania, for example, the Council for the Judiciary has amended the regulations governing the operation of the courts in order to make it easier to identify cases that are on the list of cases of the same court and involve the same subject-matter, the same cause and the same parties. Although these provisions have resulted in additional work for court registrars, since it is they who are tasked with identifying these cases, they have made the courts' work more efficient with respect to possible abusive practices by specifying a single body to examine them – an aspect that makes the work of the other departments easier and can also reduce the total duration of the proceedings.

187. With regard to abuses of defence rights, Romania has eliminated the automatic suspensive effect that applied in civil proceedings when an objection of illegality of an individual administrative decision was raised.

188. In Belgium, under the Law amending the Judicial Code, in order to reduce the backlog of cases, courts have the power to impose fines on parties that employ manifestly abusive or dilatory tactics.

189. In Italy, the main penalty for abuse of procedural rights used to be an order for damages against losing parties who had brought or conducted their case in bad faith or committed serious misconduct. However, use of this form of tortious liability, which is governed by Article 96 of the Code of Civil Procedure, was not very common in practice because it was hard for the winning party to provide proof of the subjective element (bad faith or serious misconduct on the part of the other party and of the damage actually suffered).

⁵⁴ Draft Law no. 35 on class actions and the organisation of the courts.

Accordingly, in order to ensure the imposition of a more effective penalty, the law has empowered the courts to issue a fine “in all cases”, i.e. those involving the abuse of procedural rights.

190. In Greece, several delays in administrative court proceedings were caused by the administrative authorities’ practice of delaying the submission of necessary documents. Now, when a case is adjourned because the authority has not provided the file, the law has established a presumption of truth in favour of the person exercising the remedy.

191. In “the former Yugoslav Republic of Macedonia”, provision has been made for financial penalties to be imposed on administrative authorities that fail to submit necessary documents.

192. Finally, although the lawyer plays a key role in protecting citizens’ rights, it is necessary to ensure that the system of judicial protection of rights is not abused by professionals for the sole purpose of financial gain. It is therefore also important to monitor compliance with the rules of professional ethics and to impose the appropriate penalties for violations that have a major impact on the proper administration of justice. Some ECtHR decisions declaring an application inadmissible on the grounds that it constitutes an abuse under Article 35(3) (a) ECHR offer an interesting insight into certain practices of this type both in the context of domestic proceedings and in proceedings before the ECtHR⁵⁵.

7. The success of the reforms: a question of method and resources

193. The success or failure of measures in the areas outlined above depends on several factors:

- ✓ Comprehensive approach: the unreasonable length of proceedings in a given judicial system is a multi-faceted problem which is often caused by a range of different factors, and, therefore, must be approached in an organic and a comprehensive manner, without neglecting the social and cultural aspects specific to each country which might influence the impact on the intended actions.
- ✓ Consultation and dialogue: the decision-making centre could be better informed about the causes of problems and the most effective solutions, taking into account the views of the various players in the judicial system, which also helps to prepare the ground for the introduction of reforms;
- ✓ Discussion and communication: the introduction of rules of poor technical quality, constant changes to measures adopted and inconsistency in the reform process should be avoided, since all these factors lead to confusion among judicial staff;
- ✓ Monitoring of results, both at the statistical level and with regard to staff feedback. This process, which requires a good quality of the collection and analysis of data, should be objective, its outcome must not be guided by the results predicted at the beginning of the implementation of the reform⁵⁶.

194. Above all, it should be remembered that “the judicial system needs to have sufficient resources to cope with its regular workload in due time. The resources have to be distributed according to the needs and must be used efficiently”⁵⁷.

195. For all the above-mentioned aspects, the Council of Europe member states can take advantage of the *revised Guidelines of the SATURN Centre for judicial time management*, the *Time management checklist* and the work of analysing and evaluating judicial systems carried out by CEPEJ.

⁵⁵ See for example *Basileo and Others v. Italy*, decision of 23 August 2011; *Petrović v. Serbia*, decision of 18 October 2011; *Bekauri v. Georgia*, decision of 10 April 2012; *Simonetti (II) and Simonetti (III) v. Italy*, decision of 10 July 2012; *De Cristofaro and Others v. Italy*, decision of 10 July 2012.

⁵⁶ In this regard, States can rely on the *CEPEJ Guidelines on judicial statistics* and, more generally, on the tools made available by the Working Group on evaluation of judicial systems (CEPEJ-GT -EVAL)

⁵⁷ See the *revised Guidelines of the Saturn Centre for judicial time management*, Section II, A), 1.

Conclusions

In general

- a) Access to the judge and the court proceedings are not a "cost" or "inconvenience" for the state: they are essential means in a stato protect the rights of individuals (especially the most vulnerable) and reaffirm the primacy of law. Therefore, the judicial system must have adequate resources to carry out its regular work in due time.
- b) The proper functioning of justice is under a shared responsibility among the various public authorities as well as the staff involved.
- c) The actions capable of reducing the overload of courts and timeframes of procedures must take place in accordance with the respect of the guarantees arising from art. 6 ECHR and, more generally, of the relevant elements of international and European law on human rights.
- d) The actions capable of reducing the overload of courts and timeframes of procedures should follow the principle of proportionality: among the various possible measures, it would be desirable to prioritise those which have the least possible impact on other justice quality aspects. Similarly, the reform process should ensure the overall coherence of actions within the national legal system and safeguard the overall balance in the administration of justice.
- e) The success or failure of any reform may depend on the manner in which it is designed and implemented: comprehensive approach, consultation and dialogue, reflection and communication, and monitoring results of actions undertaken are all essential phases in this regard. Thus, a long-term reform policy on justice seems preferable to emergency measures, adopted under constraint.

In particular

- f) Specialisation of judges can contribute to the quality and speed of justice, but should be combined with arrangements for rotating or alternating staff at specialised courts or in specialised sections. The members of the latter should also offer the same guarantees of independence as judges in the ordinary courts.
- g) Changes in the boundaries of judicial districts, leading possibly to the closing down of some courts or their attachment to others, can contribute to a more rational distribution of available resources, but it is necessary not to overlook the potential risks in terms of access to a court.
- h) The granting of wider powers to lay judges, which helps to reduce the workload of professional judges, should be accompanied by the establishment of appropriate guarantees, which should gradually be brought closer to those attaching to the status of professional judge, in order to ensure their independence and impartiality.
- i) While the use of single judges may be regarded as an established practice in the CoE countries, especially in courts of first instance, the fact remains that, in the absence of collegiate decision-making, impartiality is mainly ensured by the guarantees attaching to the judge's status.
- j) Flexible systems for posting and transferring staff make it possible to respond promptly to the needs of understaffed courts and, if necessary, cope with temporary bottlenecks, but they may contribute to making staff feel less committed to the service and pose significant risks as far as the independence of judges is concerned.
- k) The use of support staff (court clerks, legal secretaries, etc.) and an increase in the number of tasks carried out by them can contribute to the productivity of judges and the quality of justice, provided they receive appropriate theoretical and practical training.
- l) The computerisation of case registration and management and the digitisation of case files and communications have clear advantages for the administration of justice since computer systems meet users' needs and cause no unforeseen obstacles to access to a court.
- m) Monitoring of judicial activity and rewarding measures can be effective means of reducing the length of proceedings but may prove problematic as far as ensuring the independence of judges and

promoting the quality of justice are concerned. In particular, the assessment of judges must be based on structured procedures and objective criteria, which must not be reduced to quantitative indicators. Moreover, monitoring a court's overall performance seems less problematical insofar as it is seen as a collective process involving the staff concerned and is aimed less at the identification of individual responsibilities than at collective management of the operation of the court and dissemination of the most effective working methods.

- n) A certain trend seems to be emerging in the CoE countries towards the involvement of judges in managing procedural timeframes in order to ensure, in co-operation with the parties and their lawyers, the efficient handling of cases. However, judges can only play a really active role in ensuring the smooth conduct of proceedings if they have the resources needed to manage their caseloads efficiently and do not have a disproportionate workload.
- o) When the length of proceedings, the number of hearings and foreclosures are established by law, the possibility to adapt the procedure to the requirements of the case is limited. Besides, a certain level of flexibility in the sense of an use of judicial resources commensurate with the requirements of each case concerned may be ensured providing various types of proceedings (or different "circuits") depending on the nature, the value and complexity of the case.
- p) Holding a preparatory hearing in principle represents a means to simplify the preparation of the case and to avoid any possible slowdown the proceedings.
- q) Although effective in terms of reducing judicial service provision and more sparing use of resources, the adoption of summary proceedings at first instance must always go hand in hand with safeguards to protect, perhaps in subsequent proceedings, the adversarial principle and equality of arms. Having regard to Article 6.1 ECHR, the reduction of the obligation to provide reasons and the elimination of public proceedings must be considered with extra caution.
- r) As regards reducing access to appeal and cassation proceedings and introducing filtering mechanisms for these legal remedies, it should be remembered that that these legal avenues constitute the principal tools for redressing violations of several aspects of the right to a fair trial and, more generally, ensure that a better-quality decision is delivered. The aim, therefore, is to strike the right balance between this requirement on the one hand and protection of the reasonable time principle on the other.
- s) The reduction in courts' non-contentious work, which can be a mean to ease the burden on the judicial system must be taking into account the costs' increase that it might bring to individuals and the need to offer guarantees of reliability equivalent to those of a judge..
- t) Conciliation and mediation can be encouraged by providing citizens with more information about what they involve and their advantages, ensuring the professionalism of conciliators and mediators and providing for forms of financial support for these methods of settling disputes. It would also be desirable to gear the training and earnings of lawyers to the profile of a legal expert who assists clients before legal action is taken and subsequently during the various proceedings to resolve the dispute.
- u) In order to curb practices of the administrative authorities or major economic players which are sources of mass litigation, consideration should be given to the establishment of class actions and to other preventive or punitive measures.

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N.B: This Good Practice Guide was drawn up based on the work of the scientific expert Francesco De Santis, avv.francescodesantis@gmail.com. The author is a researcher in the law of civil procedure at the University of Naples "Federico II" and a lawyer practicing in Naples. He has been exercising the functions of assistant lawyer to the ECtHR. The author wishes to thank Mr. and Mrs. Valentin Rétornaz, Ms Andreea Maria Rosu and Ms Silvia Blasi for suggestions and assistance in his research.