EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

The Role of Lawyers in Judicial Proceedings in Europe

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Introduction

On 8 October 2008, the European Commission for the Efficiency of Justice (hereafter the CEPEJ) of the Council of Europe[1] published a report entitled "*European Judicial Systems - Edition 2008 (data 2006): Efficiency and Quality of Justice"*.[2] The Commission also decided at the 12th plenary meeting to continue analysing the facts and figures presented therein in order not only better to understand the functioning of the judicial systems of the member states of the Council of Europe, but also to define the common indicators for evaluating these systems, to identify the major trends and difficulties and, finally, to help public policy on justice enhance quality and efficiency.

In this context the CEPEJ made three calls for projects inviting Europe's research community to work on three specific studies.[3]

This particular study was drawn up as part of the third call for projects by the CEPEJ, focusing on the role of lawyers in judicial proceedings in Europe.

It was established using data on European judicial systems collected by the CEPEJ in 2008 and made available to researchers. The study is based, *inter alia*, on the responses provided by member states of the Council of Europe[4] to a supplementary questionnaire to the questionnaire on evaluating the legal systems of the CEPEJ,[5] established by the study's head researcher. Thus, the study provides a range of the role played by lawyers in the judicial systems of those member states of the Council of Europe that provided the CEPEJ with sufficient data on their judicial systems and responded to the supplementary questionnaire sent to them by the Council of Bars and Law Societies of Europe.[6,7]

In keeping with the call for projects launched by the CEPEJ, this study aims to "*analyse the role of this preeminent player in the judicial cycle, i.e. the lawyer, and the impact of his/her action on the efficiency and quality of judicial proceedings in the Council of Europe's member states in the light of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer*".[8]

In other words, the study aims to examine the profession of lawyer as defined in the tenth recital of Recommendation Rec(2000)21 adopted by the Council of Europe on 25 October 2000, in 35 member states of the Council of Europe to identify the main elements characterising this activity and determine whether it plays a positive role in the various national legal systems studied.

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1 The European Commission for the Efficiency of Justice was created on 28 September 2002 by Resolution No R(2002)12 of the Committee of Ministers of the Council of Europe. Its main objective is to improve the efficiency and functioning of justice in the member states of the Council of Europe.

2 This report was updated in 2010 as part of the new report adopted by the CEPEJ at its 15th plenary meeting (9-10 September 2010) and published on 25 October 2010. This new edition of the report entitled "*European Judicial Systems - Edition 2010 (data 2008): Efficiency and Quality of Justice"* uses data from 45 of the member states of the Council of Europe collected in 2008.

3 The primary subjects analysed in the report by the CEPEJ entitled "*European Judicial Systems - Edition 2008 (data 2006): Efficiency and Quality of Justice"* are as follows:
- The single judge and panels of judges in Europe;
- The role of lawyers in judicial proceedings in Europe and
- The organisation of court-clerk offices in the European judicial systems.

4 In order to conduct this study, the chief researcher drew up a supplementary questionnaire to the questionnaire on evaluating the judicial systems of the CEPEJ. This questionnaire was transmitted to the Ministers of Justice of the member states of the Council of Europe. In most cases the responses provided by the Minister of Justice of each member state examined were verified and supplemented by the respective national bar or law society and the member state itself.

5 The supplementary questionnaire to the questionnaire on evaluating the judicial systems of the CEPEJ is appended to this study as Annex 1.

6 For an overview of the responses to the supplementary questionnaire to the questionnaire on evaluating the judicial systems of the CEPEJ, see Annex 2.

7 The report also takes into account the comments received in October 2011 in response to the submission of a draft report to the Standing Committee of the Council of Bars and Law Societies of Europe (hereinafter 'CCBE') on 9 September 2011.

8 Excerpt of the call for projects launched by the CEPEJ on 10 December 2008, taken from the Internet page http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/exploitation/themes_EN.asp?

The study is divided into two parts in keeping with the wishes of the CEPEJ and above all in order to analyse the measures aimed at preventing procedural excesses by lawyers, the link between the latter and the courts, the modalities used to determine their fees as well as to identify the trends in the data supplied by the CEPEJ and the data collected by the Council of Bars and Law Societies of Europe.

Part I contains a presentation on the role of lawyers in judicial proceedings in 33 member states of the Council of Europe responding to the CEPEJ questionnaire and the supplementary questionnaire of the Council of Bars and Law Societies of Europe[9], although the focus is placed on the founding states of the Council of Europe.[10] As to Chapter I, which is based on the 2010 edition of the CEPEJ study on judicial systems in the member states of the Council of Europe[11], it needs to be noted that various Bars and law societies have indicated that some of the figures regarding their country in that study were incorrect.[12] Where relevant, this has been indicated in the text by way of comments to the tables.

Part II is devoted to analysing the role of lawyers in the judicial systems of two states in Eastern Europe, both members of the Council of Europe: Romania, an eastern state of the Council of Europe and a member of the European Union, and Moldova, member state of the Council of Europe, in which the role of lawyers can be considered representative of the role of their colleagues in other judicial systems in Eastern Europe.

Dividing the study into two parts permits us to compare the role played by lawyers in the judicial systems in the founding states of the Council of Europe and the role of their colleagues in Romania and Moldova and then define recommendations presented by way of conclusion.

Attention is drawn to the fact that throughout the text the term ‘bar association’ is used. In this regard the term ‘association’ does not refer to the legal status that the Bar(s) in question may have under public or private law. Some Bars reject the use of the word ‘association’ in their name, pointing out that they have a public status.

9 The 33 member states of the Council of Europe in question are as follows (in alphabetical order):
Armenia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Norway, the Netherlands, Poland, Portugal, the Republic of Macedonia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom.

10 This was done so that they could be compared to the two states analysed in the second part of the study.

11 CEPEJ, *European Judicial Systems - Edition 2010 (data 2008): Efficiency and Quality of Justice*, Editions of the Council of Europe, 2010.

12 This notably regards the following countries: Ireland, Italy, Poland, Slovakia and the United Kingdom.

Part I: The role of lawyers in judicial proceedings in the member states of the Council of Europe

In the fourth, fifth, sixth and seventh recitals of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer,[13] adopted on 25 October 2000, the Committee of Ministers of the Council of Europe expressed itself in the following terms:

"Underlining the fundamental role that lawyers (…) play in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients;
(…)".
In doing so, the Committee of Ministers announced, before adopting its recommendation on exercising the profession of lawyer, the importance of having the profession of lawyer in any fair judicial system. The Committee stressed, above all else, the essential role that lawyers have to play in enhancing the efficiency and quality of judicial proceedings and, consequently, in consolidating the Rule of Law.

Both of these aspects are examined in the first two Chapters, respectively, of Part I of this study in 33 member states of the Council of Europe.[14] Nevertheless, the focus is placed on the founding states of the Council of Europe, which seem to represent a homogenous group regarding the role of lawyers in their judicial proceedings.[15]

Chapter I: The profession of lawyer

As indicated in Recommendation Rec(2000)21 of the Committee of Ministers of the member states of the Council of Europe on the freedom of exercise of the profession of lawyer, this activity is governed in its very essence by a number of rules (II). Exercising the profession itself is founded on key principles (III). Finally, in every judicial system, the profession of lawyer is characterised by a number of general points (I).

I. General

In Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe defines the lawyer as "a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters".

13 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, p. 1. This recommendation is available on the website of the Council of Europe at *https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=Rec(2000)21&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864 &BackColorLogged=F5D383*

14 The 33 member states of the Council of Europe examined in the first part of the study are as follows (in alphabetical order):
Armenia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Norway, the Netherlands, Poland, Portugal, the Republic of Macedonia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom.

15 The founding states of the Council of Europe are (in alphabetical order): Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, Sweden and the United Kingdom.

The task of the lawyer is thus quite extensive, as it ranges from legal advice to representing clients in court. In France, Portugal and Austria, lawyers can also draw up deeds, except for those that legislation requires to be drawn up by notaries.

In the majority of the 23 non-founding member states of the Council of Europe participating in the study,[16] the lawyer's task is exercised by professionals bearing the title of "advocate" or variations thereof.[17]
Among the founding states of the Council of Europe, respectively Belgium, France, Denmark, Italy, Luxembourg, Norway, the Netherlands and Sweden, members of the profession bear the title of "avocat" or "advocate" with variations in spelling depending on the language used.

In Ireland and in each of the three jurisdictions of the United Kingdom there are two branches of the legal profession: solicitor and barrister or (in Scotland) advocate. Solicitors act on the direct instruction of clients in relation to transactional work and litigation. Traditionally, barristers/advocates were specialist pleaders, who acted on a referral basis, on the instructions of a solicitor, to give advice or to represent clients in court. However, the distinction between the work that is typically done in the context of litigation by a barrister/advocate on the one hand and a solicitor on the other is not necessarily the same in each of these jurisdictions, and, furthermore, has altered in different ways in these jurisdictions in recent times.

In England and Wales a distinction is drawn between the right to conduct litigation and a right of audience. A right of audience is a right to appear in court on behalf of a client. A right to conduct litigation is a right to represent a client in relation to all other aspects of court proceedings. All solicitors have rights to conduct litigation in all courts. All solicitors also have a right of audience in lower courts, and may appear in those courts to represent a client, or may instruct a barrister to appear on behalf of the client. From the High Court up to the Supreme Court, solicitors who have undertaken additional training in advocacy and have acquired a qualification as solicitor-advocates have rights of audience. The right to conduct litigation and/or a right of audience may also be acquired by a member of a professional or other body that has been approved for that purpose.

In Scotland a distinction is similarly drawn between the right to conduct litigation and a right of audience. Solicitors have rights to conduct litigation in all courts. Solicitors also have a right of audience in lower courts, and may appear in those courts to represent a client, or may instruct an advocate to appear on behalf of the client. In the supreme courts of Scotland and in the UK Supreme Court, advocates and solicitors who have undertaken additional training in advocacy and have acquired a qualification as solicitor-advocates have rights of audience. The right to conduct litigation and/or a right of audience may also be acquired by a member of a professional or other body that has been approved for that purpose.

In Northern Ireland the Justice (NI) Act 2011 makes provision for solicitors who have undergone additional training to exercise rights of audience in the High Court and Court of Appeal. However, these provisions are yet to be enacted. Solicitors have always had rights of audience in the Crown Court.

Insofar as Ireland is concerned, solicitors have had full rights of audience in all courts since the early 1970s.

In view of these elements, we can consider that in the 33 member states of the Council of Europe studied, lawyers generally exercise all of the activities included in the definition of a lawyer proposed by the Committee of Ministers of the Council of Europe.

The proportion of lawyers in the judicial systems of the states studied is an important sign that true rule of law exists in a state and that its citizens have the possibility of consulting a lawyer to assert their rights. The report drawn up by the CEPEJ gives a very detailed account of these proportions based on the absolute number of lawyers and legal advisers per 100,000 inhabitants and the number of lawyers (and legal advisers) per judge.[18]

16 These states are Armenia, Austria, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Latvia, Lithuania, Montenegro, Poland, Portugal, the Republic of Macedonia, Slovakia, Slovenia, Spain, Switzerland and Ukraine.

17 In Bulgaria, the Czech Republic, Estonia, Finland, Latvia, Lithuania, Poland, Portugal, Slovakia and Switzerland members of the profession bear the title of "advocate" or variations thereof. In Austria and Germany they bear the title of "*Rechtsanwalt*", in Cyprus and Greece the title of "*Dikigoros*" and in Hungary the title of "*ügyvéd*". Finally, in Slovenia lawyers bear the title of "*Odvandnik/Odvandnica*".

18 CEPEJ, "*European Judicial Systems - Edition 2010 (data 2008): Efficiency and Quality of Justice*, Editions of the Council of Europe, 2010, pp. 237-252.

In the 33 member states of the Council of Europe studied, the proportions are as follows:

Table: Absolute number of lawyers and legal advisors, number per 100,000 inhabitants and per judge[19]

Country	Number of lawyers (w/o legal advisors)	Number of lawyers and legal advisors (value)	Number of lawyers (w/o legal advisors) per 100,000 inhabitants	Number of lawyers and legal advisors per 100,000 inhabitants	Number of lawyers (w/o legal advisors) per judge	Number of lawyers and legal advisors per judge
Armenia	782		24.4		3.6	
Austria	7 229		86.7		4.4	
Belgium	**16 625**		**155.9**		**10.2**[20]	
Bosnia-Herzegovina	1 242		32.3		1.4	
Bulgaria	11 600		151.8		5.4	
Croatia	3 757		84.7		2.0	
Cyprus		2077		260.6		20.8
Czech Republic	8 410		80.6		2.8	
Denmark	**5 246**		**95.8**		**13.8**	
Estonia	665		49.6		2.8	
Finland	1 825		34.4		2.0	
France[21]	**48 461**		**75.8**		**8.3**	
Greece	39 312		350.6		10.5	
Hungary	9 850		98.1		3.4	
Ireland[22]	**2 020**	**10 116**	**45.7**	**228.8**	**13.9**	**69.8**
Italy	**198 000**		**332.1**		**32.4**	
Latvia	1 100		48.4		2.3	
Lithuania	1 590		47.3		2.1	
Luxembourg	**1 732**		**352.0**		**9.4**	
Montenegro	515	665	83.0	107.2	2.1	2.7
Netherlands	**15 547**		**94.8**		**7.2**	
Norway	**5 809**	**5 909**	**122.6**	**124.7**	**10.8**	**11.0**
Poland[23]	27 310		71.6		2.8	
Portugal	27 623		260.2		14.5	
Republic of Macedonia	1 899		92.9		2.9	
Slovakia	4 800[24]		88.9		3.5	
Slovenia	1 169		57.7		1.1	
Spain	120 691		266.5		25.0	
Sweden	**4 540**		**49.4**		**4.4**	
Switzerland	9 498		123.3		8.7	
England and Wales (UK)[25]		**153 710**		**282.3**		**80.8**
Northern Ireland (UK)[26]	**618**	**3 057**	**35.1**	**173.8**	**5.0**	**24.9**
Scotland (UK)[27]	**278**	**10 521**	**5.4**	**203.6**	**1.5**	**58.1**

Comments
France: The distinction between *avocats* and *conseils juridiques* no longer exists in France. However, notaries intervene in drawing up acts.
Germany: The German delegation to the CCBE has indicated that the total number of lawyers in 2008 in Germany was 146,906 and that the number of lawyers per 100,000 inhabitants in 2008 was 178.7.

19 This table is based on the one used in the CEPEJ study on judicial systems in the member states of the Council of Europe. Cf. CEPEJ, *op. cit.*, p. 237-238. At the time the table was drawn up Germany and Ukraine had not yet supplied the requested data.
20 The figures for the founding states of the Council of Europe appear in bold print.
21 See comment.
22 See comment.
23 See comment.
24 See comment.
25 See comment.
26 See comment.
27 See comment.

Ireland: About the numbers regarding Ireland, it should be noted that the Irish delegation to the CCBE said in its comments to the presentation of the preliminary report, on 9 September 2011, that the distinction made by the CEPEJ's report *European judicial systems - Edition 2010 (2008 data): Efficiency and quality of justice* between 'solicitors' and 'barristers' does not apply in Ireland (in the sense that in Ireland there is no distinction between legal advisers and lawyers). Thus, the number of lawyers to be considered for Ireland is 12,136.
Slovakia: The Slovak Bar Association has indicated that this figure is not correct and that the total number of lawyers in 2008 was 4,220. Taking into account the population as at 31 December 2008 – 5,412,254, the number of lawyers per 100,000 inhabitants was 78 (instead of 88). The number of judges in 2008 was 1,332, so that the data are correct (approx. 3).
Poland: The Polish delegation to the CCBE has indicated that this figure is not correct and that the total number of lawyers (both advocates and legal advisers) in 2008 was 34,181. It should also be noted that the status of Polish legal advisers may be different than in other member states as they are fully qualified lawyers covered by lawyer's directives and the professional title of legal adviser is listed in the attachment to the Establishment Directive. Therefore the number of qualified lawyers in Poland should contain members of both legal professions.
England and Wales, Northern Ireland and Scotland (UK): In order to obtain figures for the United Kingdom, it suffices to agglomerate the figures relating to England and Wales, Northern Ireland and Scotland. However, it should be noted that these figures are based on the distinction made by the CEPEJ's report, *European judicial systems - Edition 2010 (2008 data): Efficiency and quality of justice*, between 'lawyers' and 'legal advisers' and the false assumption that this reflects the distinction between solicitors and barristers/advocates. Both solicitors and barristers/advocates are lawyers and figures should be added up for each jurisdiction and listed under the first column (number of lawyers) as opposed to the second. The figures should therefore read: England and Wales (153,710); Northern Ireland (3,675); Scotland (10,800).

II. Rules governing the profession

In principle, the rules governing the essence of the profession of lawyer are those pertaining to the grouping of its members in professional organisations (A), those concerning access to the profession (B), and the conditions for the continuing education of its members (C).

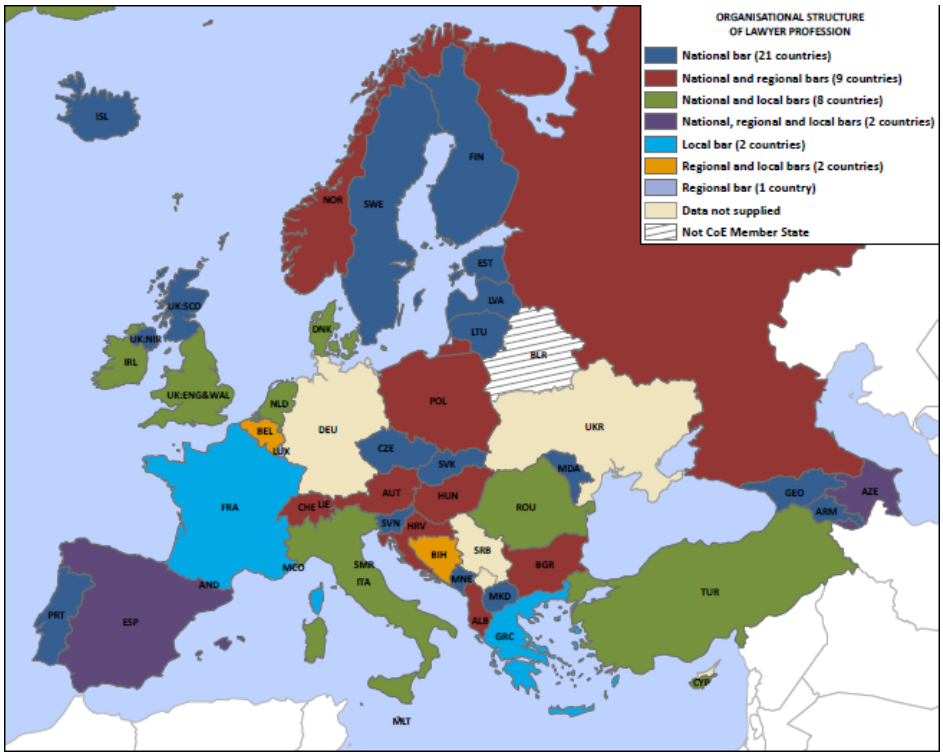
A. Organisation of the profession

The organisational structure of the profession of lawyer is studied in the report on the judicial systems of the member states of the Council of Europe, published by the CEPEJ in 2010.[28]

The organisation of lawyers in national, regional and local bars or law societies is as follows in each of the member states of the Council of Europe:

Graph: Organisational structure of the profession of lawyer

28 CEPEJ, *op. cit.*, p. 241 and p. 253.



In the 33 member states of the Council of Europe included in the study, lawyers are organised in national, regional or local Bars or law societies and in some cases are organised at two or three levels.[29]

In the majority of the 23 non-founding member states of the Council of Europe participating in the study, lawyers are organised in national bar associations. This is the case in Armenia, Estonia, Latvia, Lithuania, Montenegro, Portugal, the Czech Republic, the Republic of Macedonia, Slovakia, Slovenia and Ukraine.

In these countries the lawyers find it is sufficient for the profession to be organised in a single bar association.

In Germany, Austria, Croatia, Poland and Switzerland[30], lawyers have a national organisation and regional bar associations as well, whereas in Bulgaria, Cyprus, and Hungary[31] they have a national organisation and local bar associations. Only in Bosnia-Herzegovina is there no national organisation, but rather a mixture of regional and local bar associations.

Within this group of countries, Spain has Bars organised at three levels (national, regional and local); at the national level it has a general council of lawyers *(Consejo General de Abogacía),* which is the highest body coordinating and regulating the profession, as it dictates the rules of the profession including the ethical principles and those governing disciplinary procedure. Nevertheless, Spanish lawyers are also organised in regional and local bar associations, which have legal personality and lay down the regional and local rules applying to their members.[32] Bars also have some delegated public powers, including management of legal aid and training.

In the group of founding states of the Council of Europe, most of the states also have a bar association at the national level. However, only Finland and Sweden have just one national bar association.[33] In the United Kingdom, professional bodies reflect both the division between the three different jurisdictions and the

29 Germany and Ukraine had not supplied information to the Council of Europe at the time the above map was drawn. This information was, however, available by the time the report was drawn up.

30 In Switzerland, the orders are more specifically organised on a cantonal basis and federated into a single national organisation.

31 Hungary has 20 local Bars and a national Bar established under Article 12(3) of Act No11 on Lawyers (1998).

32 For more information on this matter see B. Nascimbene, *The Legal Profession in the European Union,* Kluwer Law International, 2009, p. 201.

33 Regarding Finland, there are no local bar associations; there are chapters in Finland but these do not have any official tasks.

division of the profession of lawyer between 'solicitors' and 'barristers'/'advocates'. The United Kingdom therefore has six professional bodies, namely the General Council of the Bar of England and Wales, the Law Society of England and Wales, the General Council of the Bar of Northern Ireland, the Law Society of Northern Ireland, the Faculty of Advocates and the Law Society of Scotland.

Denmark, Italy and the Netherlands have a national bar association and local structures while Norway has a national bar association and regional structures. Ireland has two national associations for lawyers and a number of local associations although the latter have no regulatory remit.

Within the group of the founding states of the Council of Europe, France, Luxembourg and Belgium occupy a special position.

In France, there is no regional level. Lawyers are registered with a bar association within the Court of Appeal. Regional Bars meet through the *Conférence des Bâtonniers* (of which the Paris Bar Association is not part). For 20 years now, the legal profession has benefited from a national organisation, the *Conseil National des Barreaux*, which, *inter alia*, represents the profession to public authorities..

Luxembourg also has no national representation of lawyers, who are instead organised in two bar associations, *le Barreau de Luxembourg* and the *Diekirch*, each with its own president and executive council.

Finally, in Belgium, lawyers are organised in local Bars established within each judicial district. These Bars are organised in two community bar associations at the regional level, namely *l'Ordre des Barreaux francophones et germanophone*, representing the French-speaking and German-speaking lawyers, and the *Orde van Vlaamse Balies*, grouping together the Dutch-speaking lawyers, which hold regulatory powers.

B. Access to the profession

In the vast majority of the 33 member states of the Council of Europe included in the study, anyone wishing to become a lawyer must complete a law degree, pass a preliminary examination and be admitted to the Bar.

The founding states of the Council of Europe all require initial training or passing an examination in order to exercise the profession of lawyer.[34] Some of them, such as Belgium, Denmark, the Netherlands and Luxembourg require anyone wishing to exercise the profession of lawyer to complete a law degree, do a three-year internship with a registered lawyer[35] and pass theory examinations and an oral arguments examination at the end of the internship.

In Italy, the internship lasts only 18 months (six of which can be carried out during the academic course) and the only condition is to have a law degree.[36] In Italy, it suffices to be over 21 years of age and have a five-year training contract with a registered lawyer.[37] In Ireland any intending solicitor who has passed the preliminary examinations set by the Law Society of Ireland and who secures a training position can embark on a training contract. No training is required prior to qualification as a barrister in Ireland. Instead the Bar Council Rules state that it is desirable that newly qualified barristers undertake a year's training and almost every such barrister undertakes such training.

In France those who wish to practise law must take an examination that gives them access to one of the regional professional training centres for lawyers, which provide theoretical and practical training for a period

34 In Spain, the situation has recently changed following the entry into force of Law 34/2006 of 30 October 2011 on access to the profession. The Law and the application Decree provide that everyone wanting to become a lawyer has to follow a practical period of training, to accomplish an external internship and to pass an examination. The newly established system is based on active cooperation between Bars and universities as well as between the Ministries of Education and Justice.

35 In Luxembourg, this internship period of 3 years consists of six months of intensive theoretical courses and two-and-a-half years in the actual internship.

36 Article 9 of Decree No 1 of 4 January 2012. For more information on access to the profession in Italy, see B. Nascimbene, *op. cit.*, p. 129.

37 For more information on access to the profession in Ireland, see B. Nascimbene, *op. cit.*, p. 129 and p. 136. The conditions set out above are only valid for the profession of solicitor. As for the Irish Bar, it recommends a training period of no more than one year for barristers. However, this period is often extended to two years, by agreement between students and their tutors.

of 18 months, at the end of which they hold the *Certificat d'Aptitude à la Profession d'Avocat*[38] (CAPA) and can be sworn in.

Moreover, it is possible to enter the profession without taking an examination, provided there is justification of professional experience[39].

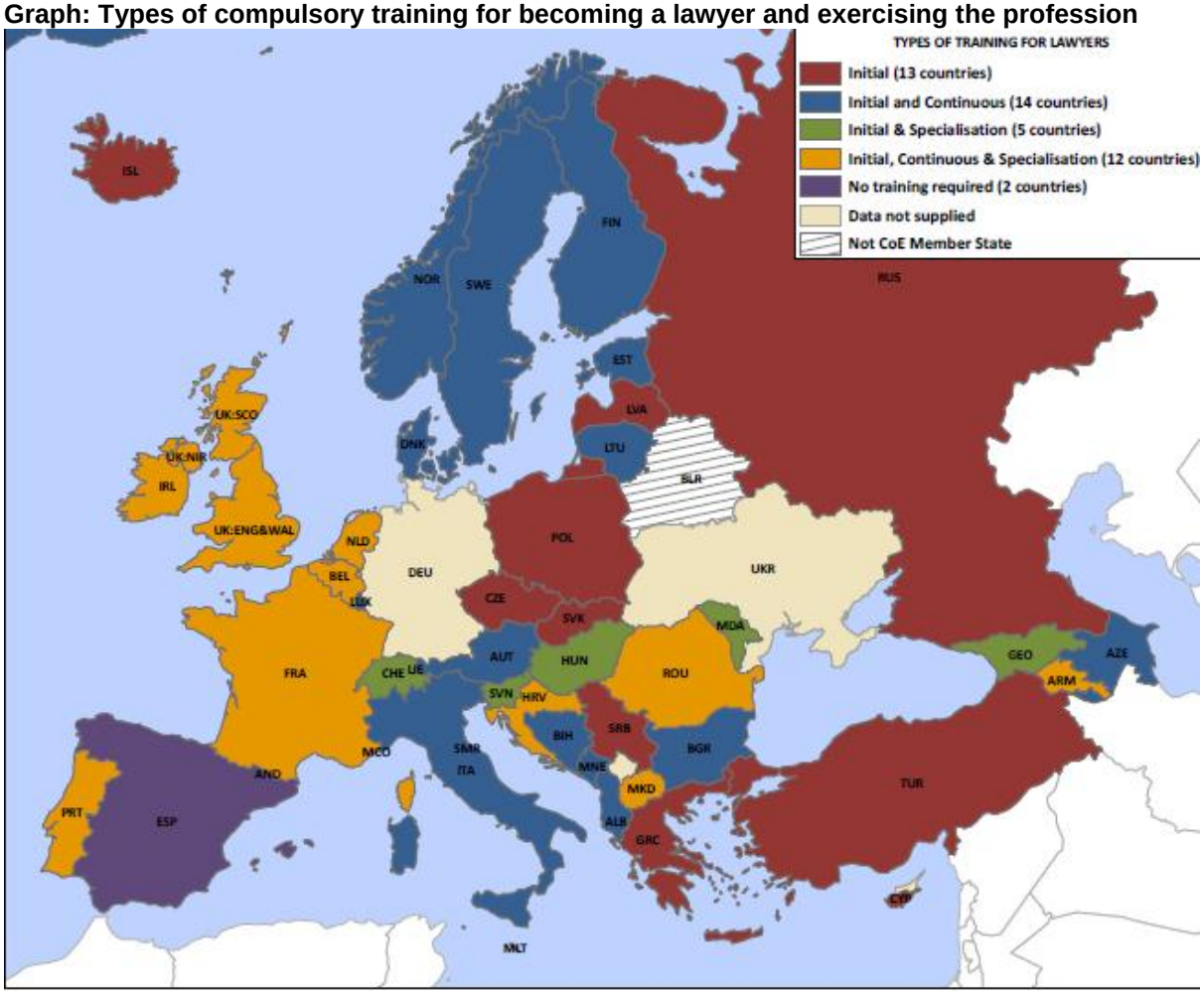
Finally, in the United Kingdom, non-law graduates may become lawyers, provided that they take courses for professional conversion and/or have acquired some work experience. In Ireland, non-law graduates may become solicitors provided that they take the examinations for admission to the Roll of Solicitors and complete their apprenticeship for the relevant period. Intending barristers are not required to have a university law degree but must undertake the Barrister at Law degree provided by the Barristers' professional training school.

C. Continuing education and other training

Once aspiring lawyers are admitted to the Bar, the majority of the 33 member states of the Council of Europe participating in the study require that they continue their education and sometimes even that they specialise. In the member states of the Council of Europe, continuing education and the need for lawyers to specialise is presented in the following manner in the report published by the CEPEJ in 2010 (this information is coupled with the information regarding access to the profession cited above).[40]

38 The success rate for the CAPA – which is the final examination – is over 98%, the real examination being the entrance examination.
39 The preparatory year at Article 98 is open to corporate lawyers, magistrates and some classes of officers.
40 CEPEJ, *op. cit.*, p. 242.

Graph: Types of compulsory training for becoming a lawyer and exercising the profession



Comments

Ireland: barristers and solicitors who practise in Ireland are required to possess general skills. Although in practice many of them do specialise, no specialisation is required to access certain types of cases or functions.

England and Wales (UK): Different examinations are required for *barristers* (BVC) and *solicitors* (LPC) and the schemes for compulsory training also differ.

Of the 23 non-founding member states of the Council of Europe participating in the study, Armenia, Bosnia-Herzegovina, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Lithuania, Montenegro, the Republic of Macedonia, and Ukraine have a system for mandatory continuing general education for lawyers. In Austria there is no such system, but Article 10(6) of the Austrian Law on the Profession of Lawyer (*Rechtsanwaltsordnung*) explicitly provides for a continuing training obligation for lawyers. The latter are free to organise and structure the continuing training. Furthermore, the rules regarding the responsibility borne by a lawyer are so strict and the sanctions so heavy that it is in a lawyer's best interest to pursue continuing education. Finally, in Cyprus, Croatia, Greece, Hungary, Latvia, Poland, Portugal, Slovakia, Slovenia, Spain[41] and Switzerland there is no system for mandatory continuing general education.

In contrast, such a system exists in all of the founding members of the Council of Europe.

As regards the possibility of lawyers' specialising, of the 23 non-founding member states of the Council of Europe participating in the study, only Croatia, Germany, Hungary, the Republic of Macedonia, Portugal, the Czech Republic, Slovenia, Switzerland and Ukraine make specialisation subject to a certain level of diploma, authorisations or certain types of training.

41 In Spain, some courses are required in order to be registered as a specialist lawyer on specific tables for legal aid.

So in Croatia, for instance, a specialisation can only be recognised if a lawyer holds a PhD in law and even then only three years after being conferred this degree and under the condition that the said lawyer has penned at least two academic publications. A specialisation can also be conferred on professionals who have been members of the Bar for more than eight years, have practised in the area of law for which specialisation is being requested and have written at least three academic publications. In the Republic of Macedonia there is a special examination for lawyers wishing to specialise in intellectual property. Finally, in Portugal, a lawyer can claim the title of specialist provided that he or she has practised in the area of law for which specialisation status is being requested for at least ten years and has passed the public examination.[42]

Of the founding states of the Council of Europe, France, Luxembourg, the Netherlands, Norway, and the United Kingdom impose special conditions for the specialisation (or accreditation) of their lawyers.[43] In France specialisations are acquired through continuing professional practice for a period of four years culminating in a test of knowledge and attested to by a certificate issued by the regional centre for professional training. In France, there is no specialism that gives the right to plead before the supreme courts (Court of Cassation and Council of State). Such right is limited to a profession made up of judicial officers, *Avocats aux Conseils*. As for the Netherlands, specialisation is linked to the fact that only those lawyers who are members of the local Bar Association of the Hague may plead civil cases before the Dutch Supreme Court *(Hoge Raad).* In Belgium, for the French and German-speaking bar association, the title of specialist is recognised by the councils of the bar association for lawyers who demonstrate ongoing activity and/or specific training and/or scientific publications in the relevant field.

III. Exercising the profession

In some member states of the Council of Europe representation in judicial proceedings is reserved for qualified professionals, in particular for members of the legal profession (A). Practising law also depends on principles and obligations. The work of a lawyer is thus subject to certain rules of ethics and quality standards (B), the duty to inform clients properly (C) and set fees in moderation (D). In the event of breach of a duty, the lawyer is subject to disciplinary proceedings and sanctions under both civil and criminal law (E).

A. Reservation of representation in judicial proceedings for members of the legal profession

The study of the judicial systems of member states of the Council of Europe published by the CEPEJ in 2010 provides a particularly detailed account of the issue of the reservation of representation in legal proceedings to lawyers.

Reservation of representation to members of the legal profession in the various member states of the Council of Europe participating in the study are presented in the table below.[44]

Table: Monopoly on legal representation[45]

Country	Monopoly on legal representation by lawyers			
	Civil cases	Criminal cases		Administrative cases
		Perpetrator	Victim	
Armenia	No	Yes	No	Yes
Austria	No	No	No	No
Belgium	**Yes**	**Yes**	**Yes**	**No**
Bosnia-Herzegovina	No	No	No	No
Bulgaria	No	No	No	No
Croatia	No	Yes	No	No
Cyprus	Yes	Yes	Yes	Yes
Czech Republic	No	Yes	No	No
Denmark	**No**	**Yes**	**Yes**	**No**
Estonia	No	Yes	No	No

42 Bar Association rule no 204/2006, of 30 October 2006, *Diário da República*, II.
43 Luxembourg, Norway and the United Kingdom, however, did not explain under which conditions in their responses to the questionnaire on evaluating the judicial systems in 2008 by the CEPEJ.
44 This table was taken from the 2010 study of the CEPEJ. Cf. CEPEJ, *op. cit.*, p. 245.
45 The replies pertaining to founding states of the Council of Europe appear in bold print.

Finland	No	No	No	No
France	**Yes**	**Yes**	**Yes**	**Yes**
Germany	Yes	Yes	Yes	Yes
Greece	Yes	Yes	Yes	Yes
Hungary	Yes	Yes	Yes	Yes
Ireland	**Yes**	**Yes**	**Yes**	**Yes**
Italy	**Yes**	**Yes**	**Yes**	**No**
Latvia	No	Yes	No	No
Lithuania	No	Yes	No	No
Luxembourg	**Yes**	**Yes**	**No**	**Yes**
Montenegro	No	Yes	No	No
Netherlands	**Yes**	**Yes**	**No**	**No**
Norway	**No**	**Yes**	**Yes**	**No**
Poland	No	Yes	Yes	No
Portugal	No	Yes	Yes	No
Republic of Macedonia	No	Yes	Yes	No
Slovakia	No	Yes	No	Yes
Slovenia	No	Yes	No	No
Spain	No	No	No	No
Sweden	**No**	**No**	**No**	**No**
Switzerland	Yes	Yes	Yes	No
Ukraine	No	No	No	No
England and Wales (UK)	**No**	**No**	**No**	**No**
Northern Ireland (UK)	**No**	**Yes**	**No**	**No**
Scotland (UK)	**No**[46]	**Yes**	**Yes**[47]	**No**

Comments[48]

Austria: The monopoly on civil cases only exists in district courts *(Bezirksgerichte)* and when the damages in a suit are in excess of EUR 5,000 or in cases before higher courts, in appeals and before supreme civil courts. In criminal cases there is only a monopoly in special cases and a lawyer or university professor may represent the defendant.

Belgium: Lawyers have a monopoly on representation except in certain areas.

Czech Republic: No monopoly except before the supreme courts.

Denmark: Though there is no monopoly in civil cases the Administration of Justice Act provides for the possibility that the court may order a party to litigation to be represented by a lawyer, should the court find that it is not possible to conduct the trial in a reasonable manner without the assistance of a lawyer for the party concerned.

France: There is only a monopoly of representation by lawyers in civil cases before the regional courts and Court of Appeal. Mandatory representation does not exist, be it in social law, in commercial law or in the court of first instance (consumer or housing disputes). In all these matters, citizens may represent themselves before the court on their own or have the assistance of a person who does not have to be a lawyer. In criminal cases, defendants may also represent themselves. In short, monopoly exists but is limited in France; it is generally associated with written procedures.

Hungary: A defence lawyer is required for criminal violations if the law provides for a prison sentence of five years or more, or if the accused is in detention, deaf, mute, blind or mentally incapacitated.

Ireland: *Solicitors* are necessary in all cases, whereas *barristers* act in these same cases when required to do so by a *solicitor*.

Norway: Only those lawyers who are entitled to plead cases before the Supreme Court have access. In other jurisdictions any lawyer may represent a party. With special permission from the court, a few other qualified individuals may represent a party in a case.

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46 The UK delegation to the CCBE has indicated that this response is not correct and should be “Depends on level of court”. See comment.

47 The UK delegation to the CCBE has indicated that this response is not correct and should be “Not applicable”. See comment.

48 These comments were taken from the report of the CEPEJ on judicial systems in Europe. Cf. CEPEJ, *op. cit.*, p. 245. They are supplemented by the responses made by delegations representing the Council of Europe’s member states to the complementary questionnaire to the questionnaire to evaluate the legal systems of the CEPEJ.

Switzerland: In principle, there is no obligation to be represented by a lawyer in Swiss courts except in criminal cases involving a serious offence or, if needed, a lawyer is appointed by the court. However, if a party decides to be represented in court, as a general rule that party must engage a lawyer or someone with the same status.
Scotland: The UK delegation to the CCBE has indicated that the responses that were included in the report of the CEPEJ on judicial systems in Europe. Cf. CEPEJ, *European Judicial Systems - Edition 2010 (data 2008): Efficiency and Quality of Justice* regarding the first and third column for Scotland are not correct and should respectively be "Depends on level of court" and "Not applicable". As a general rule, in civil and criminal proceedings a natural person may either represent himself or herself or be represented by a person who has rights of audience in the court in question. The only exception to the right of a natural person to represent himself or herself is that in criminal cases involving prosecutions for certain sexual offences and certain cases involving child witnesses, the accused must be represented by a lawyer. A non-natural person must generally be represented by a person who has rights of audience in the court in question. Apart from small claims and summary causes in the Sheriff Court (where a person may be represented by an authorised lay representative) rights of audience are reserved to lawyers and to members of other professions qualified to obtain rights of audience. The complainer is not a party to criminal proceedings in Scotland, and so the question of representation of complainers in criminal proceedings does not arise. In administrative tribunals, parties may, as a general rule, represent themselves or be represented, and representation is not reserved to members of the legal profession.

B. Rules of ethics and quality standards

In its Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe stressed that it is aware of the desirability of ensuring a proper exercise of lawyers' responsibilities.[49]

Indeed, as the Council of Europe reminds us in the study on judicial systems in Europe which it produced in 2010, "*The quality of service provided by lawyers is fundamental for the protection of the rights of citizens. Some minimal quality standards are therefore necessary (…)".*[50]

Many of the 23 non-founding member states of the Council of Europe participating in the study (14 states)[51] apply written quality standards when evaluating lawyers' activity[52]. In almost all of these countries (except in Latvia, where only the legislature may enact quality standards for lawyers), the bar association is entrusted either exclusively or in part with drawing up quality standards. It is worth noting that Poland has recently adopted a code of ethics for its lawyers.

Among the founding states of the Council of Europe, Belgium, France, Ireland[53], Italy and Luxembourg have not enacted any quality standard and stand by the traditional ethical principles to evaluate the activity of lawyers. Moreover, all of these states require ongoing training and/or specialisation on the part of lawyers.

Denmark, Ireland and Sweden have quality standards that are enacted by their respective bar associations, whereas in Norway and the Netherlands the legislator and the bar associations work together to produce quality standards. It should be noted that the quality standards in these two countries are in the form of ethical standards (in Norway) and a code of ethics (in the Netherlands).

In Scotland advocates and solicitors are required to comply with ethical standards prescribed by the relevant professional body. Further, lawyers who provide inadequate professional services may be the subject of a complaint to the independent Scottish Legal Complaints Commission.

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49 Seventh recital of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, p. 1. This recommendation is available on the Council of Europe website at the following address: *https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=Rec(2000)21&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=F5D383*

50 CEPEJ, *op. cit.*, p. 247.

51 Armenia, Austria, Croatia, Cyprus, the Czech Republic, Germany, Hungary, Montenegro, Poland, Slovakia, Slovenia and Spain.

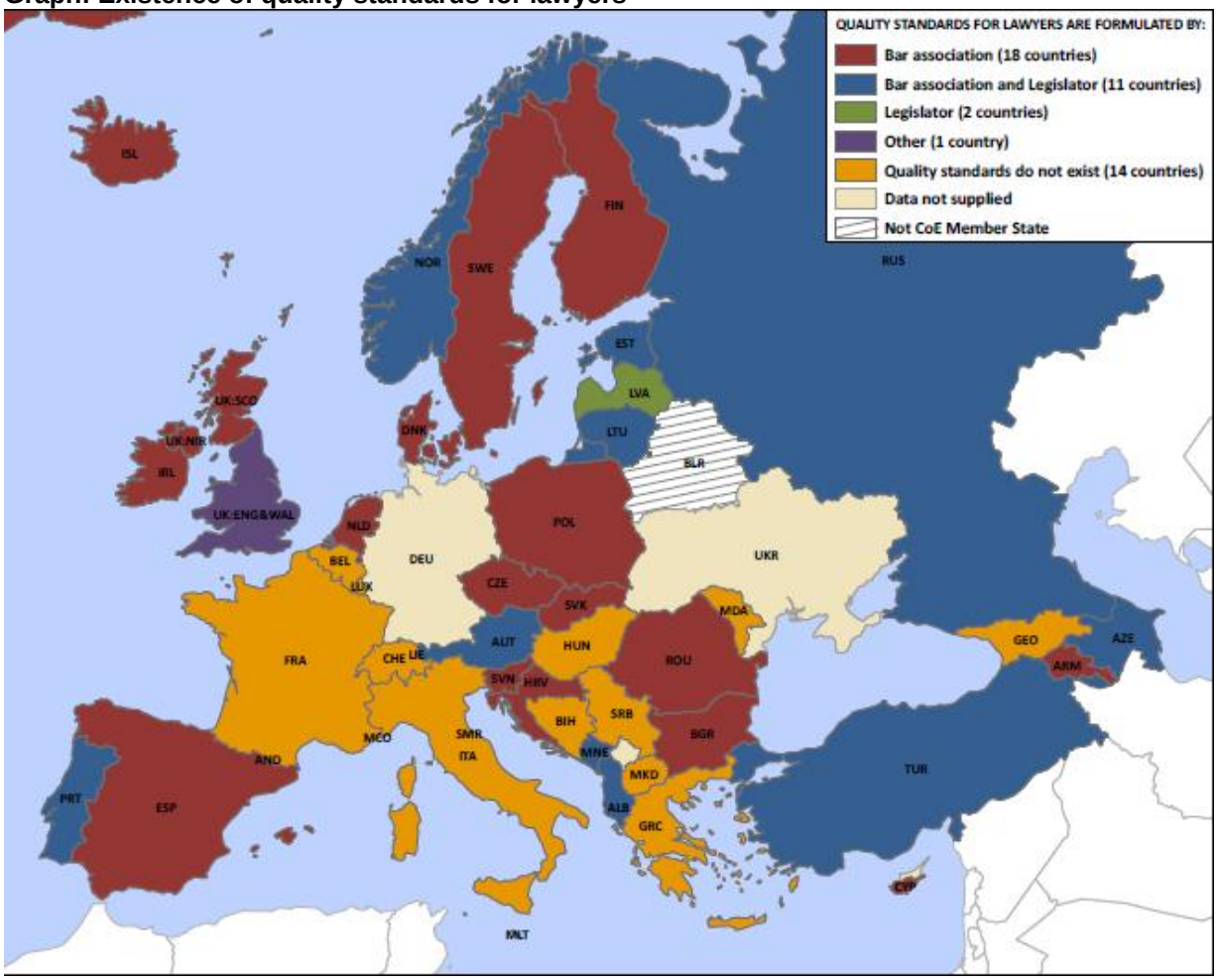
52 The CCBE considers that it is reasonable to assume that the nine countries that have not enacted such quality standards, except Moldova, stand by the traditional ethical principles to evaluate the activity of lawyer.

53 However, the Bar Council and Law Society require compliance with professional standards.

Finally, the representatives of the United Kingdom responding to the questionnaire on the judicial systems of the CEPEJ state that the quality standards applied to lawyers are set by an independent evaluation firm.[54]

The following graph shows which countries participating in the study have quality standards.[55]

Graph: Existence of quality standards for lawyers[56]



As regards the quality standards applied to lawyers providing services in the context of legal aid, please refer to the next Chapter of this study, entitled "The lawyer: an agent for enhancing the efficiency and quality of judicial proceedings".

C. Duty to advise the client[57]

In the third part of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer entitled "The role and duties of the lawyer", the Committee of Ministers of the Council of Europe prescribed the following principle:

"The duties of lawyers towards their clients should include:

54 Of course there are rules of conduct applicable to solicitors, barristers and advocates. Quality standards are meant to assess how law firms are managed.

55 Taken from the report of the CEPEJ produced in 2010. Cf. CEPEJ, *op. cit.*, p. 248.

56 At the time this graph was drawn up, Germany and Ukraine had not provided any response about the existence of quality standards. It should also be pointed out that in this graph Hungary is considered to be a state without quality standards even though quality standards do exist in this country, as they are based on rules of ethics applicable to lawyers.

57 This issue is discussed on the basis of information received from delegations of the member states of the Council of Europe in response to the supplementary questionnaire to the questionnaire on evaluating the judicial systems of the CEPEJ.

a. *Advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;*
b. *(…)".*
c.

Lawyers are thus bound by a duty to inform their clients regarding their legal proceedings and their chances of winning their case, but also regarding the financial costs incurred by such proceedings.[58]

In France, several decisions have been taken regarding information on the financial cost of the proceedings for the client. Fee agreements are compulsory in divorce cases and are highly recommended in other cases.

A little less than half of the non-founding member states of the Council of Europe participating in the study do not have any specific law, directive or ethical rules requiring lawyers to inform their clients of the approximate or estimated duration of the proceedings a client wishes to initiate. These countries are Bosnia-Herzegovina, Bulgaria, Cyprus, Finland, Germany, Hungary, Latvia, Lithuania, Poland, Portugal and the Republic of Macedonia.

In Germany, however, if the lawyer is not bound to inform a client of the approximate length of the proceedings by virtue of laws or rules of ethics, he or she *is* bound by a general duty to advise that client. Thus, the lawyer must provide the client with "detailed and, whenever possible, exhaustive information" on the judicial proceedings the client is considering initiating. Furthermore, the information to be provided and the advice to be given to a client result from the mandate received by the lawyer. So without having been asked, the lawyer is thus bound to explain to the client the risks and opportunities presented by judicial proceedings and the possible duration of such proceedings.

In Hungary, under Article 12.2 of the Code of Conduct for lawyers, every lawyer should discuss with his or her client all significant aspects of the case with which they are entrusted. This rule is sometimes interpreted as requiring lawyers to inform their client about the length of procedures and their chances of succeeding.

In some of the other half of the non-founding member states of the Council of Europe participating in the study, i.e. Croatia, the Czech Republic, Estonia, Greece, Montenegro, Slovakia, Slovenia, Spain, and Ukraine, lawyers are bound to inform their clients of the potential duration of judicial proceedings by virtue of the rules of ethics and codes of conduct they have drawn up. In Switzerland, they are obliged to do so by virtue of the contract of mandate they have concluded with their clients.

The majority of the founding states of the Council of Europe do not have any law, directive or ethical rules requiring lawyers to inform their clients of the approximate or estimated duration of the proceedings they wish to initiate. Thus, in France, and Luxembourg there is no requirement for lawyers to inform their clients in this respect.

In Belgium the lawyer has a general ethical obligation to advise. By virtue of this general duty to advise, the lawyer must inform his or her client of the approximate or estimated duration of the proceedings the client wishes to initiate. The situation is identical in Italy,[59] Norway and Sweden.

In Denmark a lawyer is not obliged to inform his or her client of the approximate or estimated duration of the proceedings to be initiated, but it is customary that such information is provided when relevant.

Thus, if the length of proceedings is essential information for a client, and if the client has expressed this to the lawyer, and the lawyer neglects to inform the client of the length of the proceedings brought or that the client wishes to institute, the lawyer could be sanctioned by the disciplinary board of the bar association, particularly in cases where the client would have taken a different decision had he or she known the approximate length of the proceedings instituted or to institute.

In Scotland, although there is no specific obligation on solicitors or advocates to advise the client of the potential duration of proceedings, such information would routinely be provided if the client so requested or if the lawyer considered, pursuant to his or her general ethical obligations, that it was information that the client should have.

58 This matter is addressed below under D. Fees and disputes

59 Comment sent by the Italian delegation to the CCBE in March 2012. By virtue of Article 40 of the Italian Code of Conduct and the recent Article 9 of Decree No 1 of 4 January 2012, the lawyer is obliged to inform the client of the estimated costs and duration of the proceedings.

Finally, in the Netherlands, lawyers are bound by virtue of their ethics codes to inform their clients of the possible duration of the proceedings they wish to initiate. The issue is also governed by the ethics codes in Ireland.[60]

D. Fees and disputes

As mentioned earlier, the Committee of Ministers of the Council of Europe, in the third part of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, prescribed a principle according to which lawyers are bound to advise their clients of the financial costs of the case.[61]

The information collected from the delegations of the member states of the Council of Europe participating in the study by way of the supplementary questionnaire to the questionnaire on evaluating the judicial systems of the CEPEJ confirms that this recommendation has been followed in the majority of the 33 member states of the Council of Europe examined.

In Armenia, Austria, Bosnia-Herzegovina, the Czech Republic, Estonia, Montenegro, Poland, the Republic of Macedonia, Slovenia, Spain and Ukraine lawyers are bound to inform their clients of the approximate amount of their expenses and fees for the proceedings in question.

In Germany, the principle is established by statute, as is the case in Croatia (where the code of conduct of lawyers is also enforced), Lithuania, Portugal, Slovakia (where the code of ethics is also applied) and Switzerland.

In Belgium,[62] Denmark, the Netherlands, the United Kingdom[63], Norway and Sweden, lawyers must inform their clients of the approximate amount of their expenses and fees for the proceedings in question by virtue of their respective codes of ethics, whereas in France this obligation derives from the law and the codes of ethics. In Ireland, it derives from the law and the code of conduct in respect of solicitors and for barristers it derives from the code of conduct.[64] In Italy, this obligation derives from the law and from the Italian code of conduct.

In Cyprus, Hungary, Latvia and Luxembourg, there is no regulation requiring lawyers to inform their clients of the costs incurred by specific proceedings.

In most of the states where there is no regulation concerning the obligation of a lawyer to inform his or her client of the expenses and fees incurred by specific proceedings, the principle is that the remuneration of a

60 In Ireland, the barrister must inform his or her client if the client so asks. .Furthermore, the Bar Council of Ireland Code of Conduct requires the barrister to inform the court of the probable length of the case when asked and also subsequently inform the court of any developments that significantly affect the information already provided (Article 5.2, Code of Conduct). Furthermore the Code of Conduct of the Law Society of Ireland states that "*a solicitor should, as far as practicable, explain to the client... the length of time the procedures are likely to take*". This is an ongoing duty that solicitors owe to their clients (Clause 2.2 – Proper Standard of Legal Services – Code of Conduct – Law Society of Ireland). It should be noted that these principles are not merely quality standards, as a breach can led to a complaint of professional misconduct before the relevant bodies.

61 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Part III: "Principle III – The role and duties of the lawyer", Point 3, p. 4.

62 In Belgium, an ethics regulation requires French-speaking and German-speaking lawyers to inform their clients of the method used to calculate their expenses and fees. This is not the case, however, for Dutch-speaking lawyers.

63 In Scotland, in a case where an advocate is instructed, this duty would fall on the solicitor, who is the client's agent and is responsible for the conduct of the litigation as a whole, rather than on the advocate.

64 In Ireland, the Law Society of Ireland's Code of Conduct in respect of solicitors states that: "*the solicitor must inform the client in writing of the charges they will incur for the provision of any legal services*" (Clause 2.1 – Acceptance of Instructions – Code of Conduct – Law Society of Ireland).

With regard to barristers, clause 12.6 of the Code of Conduct of the Bar of Ireland requires a barrister on request to provide an instructing solicitor (or client in the case of direct professional access) to provide as soon as practicable particulars in writing regarding the actual fee to be charged or where not possible an estimate of the fee to be charged and where neither are possible the basis on which the charges are to be made. It is important to note that a breach of the respective Codes of Conduct can lead to the making of a complaint to the respective professional bodies.

lawyer is negotiated freely between lawyer and client. As is stated in the CEPEJ study[65], this is not the case[66] in Italy, Montenegro, Slovenia, or Switzerland. In Greece, the Minister of Justice determines the remuneration of lawyers, although it is possible to deviate from these rates on the condition that the lawyer and the client conclude a written agreement.

As regards procedures to be taken when fees are contested, this is possible in the vast majority of the 33 member states of the Council of Europe participating in the study, the exceptions being Armenia, Bulgaria and Latvia.

Most of the claims must be addressed to the bar associations that have the power to attempt to reconcile the clients with their lawyers or, in the case of abuse, to impose disciplinary sanctions on the latter. In some of the founding states of the Council of Europe, such as Luxembourg, a client who wishes to contest the fees billed by his or her lawyer can do so before the disciplinary bodies of the bar associations as well as before civil jurisdictions by naming the lawyer in a civil liability suit. In France, there is a fast and free, specific procedure: arbitration of fees by the President of the Bar. The decision from the President of the Bar may be appealed to the Court of Appeal so that a judge ultimately remains the judge for the lawyer's fees.

E. Disciplinary proceedings in general and sanctions

In Part VI of Recommendation Rec(2000)21 on the freedom of the exercise of the profession of lawyer entitled "Disciplinary measures" the Committee of Ministers of the Council of Europe stated that:

"1. When lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.
2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers."[67]

The principle according to which bar associations and other professional associations of lawyers should be responsible for imposing disciplinary measures on lawyers or participate in such proceedings, is upheld in the 23 non-founding member states of the Council of Europe participating in the study, even in the Czech Republic and Germany, where the bar associations are associated with the judges in disciplinary proceedings and in Bosnia-Herzegovina and Lithuania, where the bar associations are associated with the Ministries of Justice, which impose the disciplinary penalties on lawyers. The principle is the same in the founding states of the Council of Europe – disciplinary measures are enforced either by lawyers' professional associations or the judge in the presence of one or more representatives of the Bars.

In Scotland, complaints about ethical misconduct or inadequate professional services may be made to the independent Scottish Legal Complaints Commission. The Commission itself determines complaints about inadequate professional services. It remits complaints about conduct to the relevant professional body (the Faculty of Advocates or the Law Society of Scotland) for determination.

As regards the types of disciplinary proceedings, the table below shows the figures pertaining to these proceedings for those states that were able to provide statistics. These figures demonstrate, in particular, that most of the disciplinary proceedings initiated in the countries participating in the study involved either ethical misconduct or incompetence.

Table: Number of disciplinary proceedings initiated against lawyers[68]

65 CEPEJ, *op. cit.*, p. 246.
66 Please note that the CEPEJ report mentions Denmark in its enumeration. However, even if in this country Article 126 of the Code of the Administration of Justice sets an upper limit for lawyers' fees and specifies that these must be reasonably established, they are freely negotiated between lawyers and their clients. The CEPEJ's enumeration also mentions Italy. However, according to the Stability Law No 183/2011 fee schedules have been abolished. Moreover, the recent Decree No 1 of 4 January 2012 (Article 9) refers to specific parameters to be used by the courts as a reference to set fees in case of judicial liquidation. These parameters have to be introduced with a ministerial decree (still to be adopted).
67 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Part VI: "Principle VI – Disciplinary proceedings", Points 1 and 2, p. 6.

Country	TOTAL	Ethical misconduct	Incompetence	Criminal violation	Other
Armenia	(5)	5			
Bosnia-Herzegovina	11				
Bulgaria	70	35	0	2	33
Croatia	79	79			
Czech Republic	(63)	63			
Denmark	891				742
Estonia	17	9	0	0	
Finland	401				
Greece	890				
Ireland	38[69]	75%	25%	0	0
Italy	408[70]				
Latvia	0	0	0	0	0
Lithuania	21	21	0	0	0
Luxembourg	4	4	0	0	0
Montenegro	18	18	0	0	0
Poland	(827)	827			
Republic of Macedonia	(159)	63	96		
Slovenia	23	23	0	0	0
Sweden	(213)	95	118		NAP
Switzerland	80	69	9	0	2
Scotland (UK)[71]	853	104	478	2	269

Comments

Bulgaria: Data from 30 October 2009; the figures used here do not include the cases brought before the Supreme Court of Discipline.

Denmark: Data from 2009.

Ireland: The Irish delegation to the CCBE has indicated that this number is not correct and that the total number of disciplinary proceedings initiated against lawyers in 2008/2009 was 159, i.e. 38 cases against barristers at the Barristers' Professional Conduct Tribunal (year 2008/2009) and 121 cases against solicitors at the Solicitors' Disciplinary Tribunal. However a total of 2,129 complaints of which 1,754 complaints were deemed admissible were received by the Law Society in the year 2008/2009. The latter refers the most serious complaints to the Solicitors' Disciplinary Tribunal.

Italy: The Italian Bar Council has indicated that this number is not correct and that the total number of disciplinary proceedings initiated against lawyers in 2008 was 279. In addition, the statistics available refer to the proceedings before the National Council of Bar Associations (the second instance), but not before the 165 local bar associations.

Spain: Spain's National Bar does not keep a register of the number of disciplinary proceedings initiated against lawyers in the various bars in the country.

Switzerland: Data from 16 cantons (out of 26). These cantons which transmitted their data counted 3,122 lawyers.

Scotland (UK): The UK delegation to the CCBE has indicated that the figures regarding Scotland are inaccurate.

Furthermore, the following table includes figures pertaining to sanctions actually imposed after disciplinary proceedings were initiated against a lawyer in those countries that were able to provide the Council of Europe with statistics. These figures demonstrate, in particular, that the penalty most often imposed on lawyers in the countries examined is a reprimand, followed by suspension, removal and fines. The delegation of the Netherlands mentioned that a warning constitutes another sanction applied to lawyers, as is the case in Belgium.

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68 This table is taken from the study on judicial systems of the member states of the Council of Europe published by the CEPEJ in 2010. It was modified for the purposes of this study. The reader should be advised that there are substantial variations between the data provided by the delegations in response to the questionnaire on the judicial systems of the CEPEJ from 2008. Cf. CEPEJ, *op. cit.*, p. 249. It should also be mentioned that many of the member states participating in this study did not respond to the CEPEJ questionnaire on this point.

69 See comment.

70 See comment.

71 See comment.

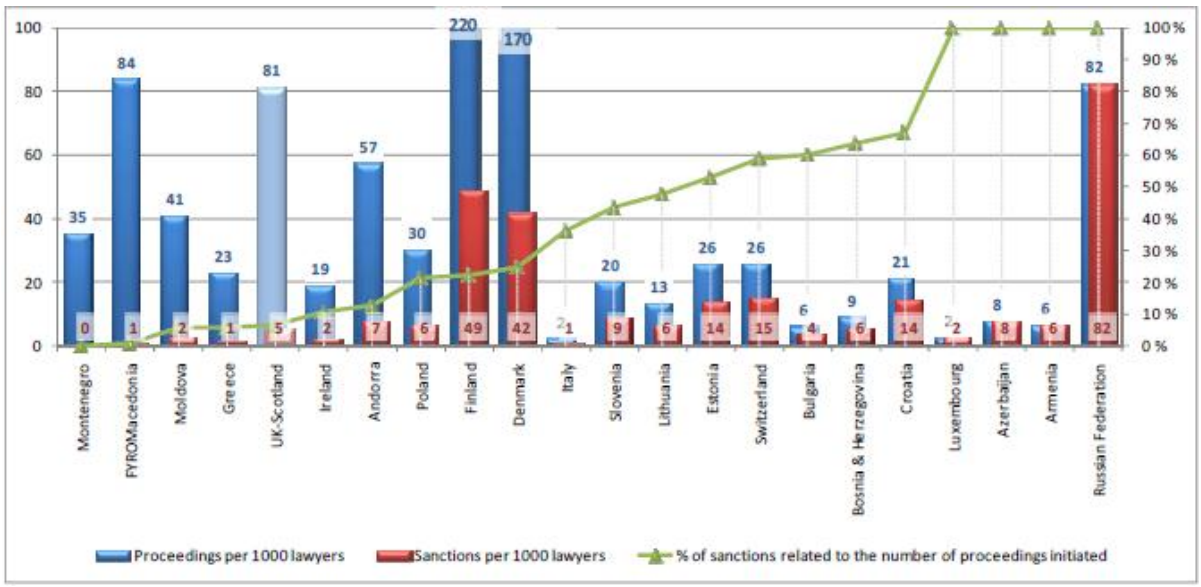
Table: Number of sanctions imposed on lawyers in 2008[72]

Country	TOTAL	Reprimands	Suspension	Removal	Fine	Other
Armenia	5	5				
Bosnia-Herzegovina	7	1	0	0	6	0
Bulgaria	42	2	20	1	19	0
Croatia	53	5	6	18	24	
Czech Republic	63	14	1	2	32	14
Denmark	218	26	2		190	
Estonia	9	8	0	0	1	0
Finland	89	55			2	32
Greece	51		51			
Ireland	(4)[73]				4	0
Italy	148[74]					
Latvia	0	0	0	0	0	0
Lithuania	10	10	0	0	0	0
Luxembourg	4	0	2	1	1	0
Montenegro	0	0	0	0	0	0
Netherlands	281	77	62	14		128
Poland	177	120	19	2	36	
Republic of Macedonia	1			1		
Slovenia	10	2	0	n/a	8	0
Sweden		60-70	1	n/a	n/a	
Switzerland	47	17	3	0	11	16
Scotland (UK)	56	37	2	1	16	n/a

Comments
Ireland: see relevant footnote.
Italy: See relevant footnote. The figure refers only to proceedings before the National Council of Bar Associations (the second instance).
Spain: The number of sanctions imposed in the last five years is 2,720.
Sweden: The sanctions that can be imposed against a lawyer are reprimand, warning and disbarment. Fines are not imposed on lawyers as separate sanctions. They are often combined with a warning.
Switzerland: The data was provided for 16 cantons (out of 26). Those cantons that transmitted their data counted 3,122 lawyers.
Finally, we learn from the following graph that imposing sanctions on lawyers is not common except in Luxembourg and Armenia (where the number of procedures initiated corresponds to the number of sanctions imposed per 1,000 lawyers). In the other member states of the Council of Europe, the number of sanctions imposed does not correspond at all to the number of proceedings initiated with the exception of Estonia, Switzerland, Bulgaria, Bosnia-Herzegovina and Croatia (where for 1,000 proceedings initiated at least 500 sanctions were pronounced).

Graph: Number of sanctions pronounced relative to the number of proceedings initiated per 1,000 lawyers in 2008[75]

72 Cf. CEPEJ, *op. cit.*, p. 250.
73 The Irish delegation to the CCBE has indicated that this number is not correct and that the total number of sanctions imposed on lawyers in 2008 was 84 (7 suspensions, 8 removals, and 55 fines)
74 The Italian Bar Council has indicated that this number is not correct and that the total number of sanctions imposed on lawyers in 2008 was 196 (93 reprimands, 72 suspensions, 16 removals, and 15 other sanctions).
75 This table is taken from the study on judicial systems of the member states of the Council of Europe published by the CEPEJ in 2010. The reader should be advised that there are substantial variations between the data provided by the delegations in response to the questionnaire on the judicial systems of the CEPEJ from 2008. Cf. CEPEJ, *op. cit.*, p. 251.



Comments

Switzerland: The number of lawyers in the cantons able to provide the data was 3,122. That is the number that was used in the calculations (and not the total number of lawyers in the entire country).

IV. Partial conclusions

In this first Chapter, it appears that lawyers are present both in the 23 non-founding member states and in the 10 founding member states of the Council of Europe. As the CEPEJ underlined in its report in 2010, it seems that '*the number of lawyers has increased in Europe between 2004 and 2008 in all the responding member states*' (to the questionnaire sent).[76]

If a sufficient number of lawyers to represent citizens before national courts is not in itself a guarantee of the existence of the rule of law in each state studied, this figure still is an indication of the possibility for citizens to have their rights defended effectively and efficiently.

The recommendations of the Committee of Ministers of the Council of Europe, as far as lawyers' professional bodies at local, regional and national level are concerned, seem to be well respected in all the thirty-three member states of the Council of Europe studied in this first chapter.[77]

On this point, it should be noted that the existence of a national association representing lawyers is essential to protect their interests and those of citizens through the promotion of a coherent set of ethical rules. The absence of such an organisation can create consistency issues in the ethical rules that are adopted, and affect in some way the effectiveness of justice. In Belgium, a Federal Council of the Bars, composed equally of representatives from the *Ordre des barreaux francophones et germanophone* and the *Orde van Vlaamse Balies*, was specifically created to ensure the consistency of the ethical rules adopted. It must be seized before any appeal under section 502 of the Judicial Code is brought before an arbitration tribunal for the annulment of a regulation that would violate, among others, existing ethical rules.[78]

Access to the legal profession (which helps to guarantee the quality and efficiency of justice) is controlled in the 33 member states of the Council of Europe considered in this chapter – even in Spain since the entry into force in October 2011 of Law 34/2006 on access to the legal profession.

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76 CEPEJ, *op. cit.*, p. 252.

77 However, the CCBE is concerned by recent developments in some European countries (such as Ireland and the Netherlands) where national authorities have taken measures against the independence of the profession. The CCBE has taken position on these initiatives, see:
Ireland - http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/110112_Letter__Irel1_1326374114.pdf
The Netherlands - http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/18_10_2011_CCBE_lett1_1327409579.pdf

78 See Articles 502, 504 and 505 of the Belgian Judicial Code.

As for continuing education (which also helps to ensure the quality and efficiency of justice), it is mandatory in the founding states of the Council of Europe and in 12 out of its 23 non-founding member states studied, with the exception of Cyprus, Croatia, Greece, Hungary, Latvia, Poland, Portugal, Slovakia, Slovenia, Spain and Switzerland.

In some of these states, such as Croatia, Hungary, Poland, Portugal, Slovenia and Switzerland, lawyers' specialisation is highly desirable and is subject to compliance with very strict conditions (followed by specific training, the requirement of having certain qualifications or special experience, etc.). This tempers the fact that continuing education is not required in these states.

It is therefore possible to conclude that the second principle of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer of the Council of Europe, relating to legal and continuing education and access to the profession, is well respected in the 23 non-founding member states of the Council of Europe and particularly well respected in its 10 founding member states.

With regard to the exercise of the legal profession, it is clear that the monopoly of representation is not widespread within the 33 member states of the Council of Europe examined, be it in civil or administrative matters. However, this monopoly is promoted in many of these states in criminal matters in the framework of the defence of criminal offenders' interests. It should be stressed that the lack of such a monopoly could have an impact on the quality of proceedings and court decisions.

A large proportion of the 23 non-founding member states of the Council of Europe (14 states out of 23) subjected to the present study apply written quality standards during the evaluation of lawyers' activity.[79] As for founding members, all apply quality standards, either in the form of quality standards maintained by the judiciary power or in the form of rules of conduct or ethical rules maintained by the professional organisations of lawyers.[80].

Lawyers' duty, namely the lawyer's duty to inform his or her clients regarding cases and their likely outcome, but also the lawyer's duty to inform clients on the financial costs of these cases, is itself regulated in 12 out of the 23 non-founding members of the Council of Europe. However, this means that in the other half of these 23 states, the duty of counsel is not specifically regulated, as is the case in most of the founding member states of the Council of Europe.[81]

On this point, members of the Council of Europe should therefore be encouraged to comply with the third point of principle III relating to the role and duties of lawyers in Recommendation Rec(2000)21 of the Council of Europe.

The recommendation of the Council of Europe on lawyers' duty to advise their clients on the financial costs of their case[82] is well followed in all states examined. Fee dispute proceedings exist in almost all 33 member states of the Council of Europe examined in this first chapter, and are generally organised by the Bars.

Finally, in these 33 states examined, disciplinary procedures and sanctions belong to the exclusive competence of Bars, sometimes together with the Ministry of Justice or the judges who preside over the dispute.

Therefore, the recommendation of the Council of Europe whereby Bars or other professional associations of lawyers should be responsible for the enforcement of disciplinary measures against lawyers or, where appropriate, should have the right to be involved[83], is well respected.[84]

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79 The CCBE considers that it is reasonable to assume that the nine countries that have not enacted such quality standards stand by the traditional ethical principles to evaluate the activity of lawyers.

80 These standards lead to sanctions pronounced by the relevant instances, if not respected.

81 It should, however, be noted that if there is no specific rule in these states on the duty to advise, ethical rules that lawyers provide for themselves can be interpreted to address this legal hiatus.

82 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Part III "Principle III - Role and duty of lawyers" point 3, p. 1.

83 Ibid., Part VI "Principle VI - Discipline", point 2, p. 6.

84 Recently, the CCBE has been very concerned by the proposals of the Ministry of Security and Justice in the Netherlands for the introduction of a supervisory council made up solely of non-lawyers, see:
http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/18_10_2011_CCBE_lett1_1327409579.pdf

Chapter II: The lawyer as agent for enhancing the efficiency and quality of judicial proceedings

In the report it produced in 2010, the CEPEJ concludes in the section devoted to the profession of lawyer that "*between 2004 and 2008 the number of lawyers increased in Europe in all of the member states that responded*"[85] to its questionnaire. However, the CEPEJ stressed that *"(…) the fact that there is a sufficient number of lawyers is no guarantee per se that the rights of citizens can be protected effectively".*[86]

This chapter is devoted to the influence that lawyers can have on the efficiency and quality of judicial proceedings. Essentially, it is based on a supplementary questionnaire to the questionnaire on evaluating the legal systems of the CEPEJ sent out to member states of the Council of Europe in September 2009.[87]

Lawyers may play an important role in enhancing the efficiency and quality of judicial proceedings by the application of professional skill in: (a) focusing on the relevant issues; (b) obtaining and providing to the court in an efficient and effective manner evidence relevant to the case; and (c) assisting the court to identify the relevant law. The very involvement of lawyers in the process, quite apart from the necessity to secure the fair representation of parties, should also contribute significantly to the efficiency and quality of the judicial process.

This role, though it is of fundamental importance, is difficult to quantify. In this section we look at certain specific means that lawyers have for enhancing the efficiency and quality of judicial proceedings. We begin by looking at the procedural means lawyers have at their disposal to promote swift and efficient judicial proceedings (I). We then turn our attention to the lawyer's duty of due diligence and briefly analyse the sanctions resulting from the failure to meet this obligation (II). In the third section we analyse the impact of lawyers using information and communication technologies (III). Finally, we come back to the supplementary activities that lawyers can engage in and the consequences that a potential accumulation of activities can have on the efficiency and quality of judicial proceedings (IV).

The objective of this chapter is to determine whether lawyers have the means to enhance the efficiency and quality of judicial proceedings and if so, whether they actually make use of them. These questions are examined for the 23 non-founding member states of the Council of Europe who responded to the supplementary questionnaire to the questionnaire on evaluating the legal systems of the CEPEJ,[88] and in even greater depth for the 10 founding members of the Council of Europe.[89]

I. Means lawyers have at their disposal

The means available to lawyers in the member states of the Council of Europe studied in this part of this report essentially consist of rights established in legal texts to help move along judicial proceedings in civil, administrative and criminal cases (A). Also included here are alternative methods that lawyers can resort to in order to settle disputes when the judicial proceedings are inefficient or too slow or incapable of providing a solution that is satisfying to all of the parties involved in litigation (B).

A. Which means for which proceedings?

In most of the 33 member states of the Council of Europe participating in the study (22 states out of 33) the procedural codes provide lawyers with legal tools to expedite the judicial proceedings they initiate or in which they represent a party in a civil case. In administrative cases the situation is not as favourable (19 states out of 33 having specific legal instruments). In criminal cases, lawyers in only 17 member states have the means at their disposal to expedite proceedings in which their clients are involved.

85 CEPEJ, *op. cit.*, p. 252.
86 *Ibid*.
87 This questionnaire is reproduced in Annex 1 of this study. The responses of the member states and their dates of transmission to the Council of Bars and Law Societies of Europe can be found in a table provided in Annex 2 of this study.
88 These states are as follows (in alphabetical order): Armenia, Austria, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Montenegro, Poland, Portugal, the Republic of Macedonia, Slovakia, Slovenia, Spain, Switzerland and Ukraine.
89 As a reminder, the founding states of the Council of Europe are (in alphabetical order), Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, the Netherlands, Sweden and the United Kingdom.

If we focus on the 23 non-founding member states of the Council of Europe participating in the study, we see that the situation is rather favourable. Lawyers have indeed the means to expedite civil proceedings in 14 of the 23 states, i.e. in over half of these countries. In administrative cases, the proportion is 13 states out of 23. Finally in criminal cases the situation is almost identical to that existing in administrative cases, as the lawyers have the legal means to expedite legal proceedings – whether pending or instituted – in 12 states out of 23.

Within this group of states, Slovenia occupies a special position due to the fact that in 2006 a law was enacted on the right for a trial to be concluded within a reasonable period of time. This law provides three means that can be used by any party or the lawyer of that party to keep the trial from being unreasonably long regardless of the type of case.[90]

Within the group of founding states of the Council of Europe, eight out of 10 have in their respective procedural codes provided tools enabling lawyers to expedite civil proceedings. Belgium and Italy, in particular, encourage shorter, well-structured proceedings by means of a proceedings calendar, which is adopted by the judge at the outset of a trial and determines when the lawyers have to file their closing briefs and when the final hearing will take place. As for administrative cases, six countries out of the 10 provide lawyers with such tools.[91] Finally, in criminal cases, only Danish, French, Irish, Italian, Norwegian and Dutch lawyers have any means at their disposal of expediting slow proceedings or improving the quality of such proceedings. Thus, in France, as part of a judicial inquiry, the lawyer of a party in the proceedings has legal means to expedite the case. The lawyer can ask the investigating judge to perform a number of actions or investigations (providing an expert, hearing witnesses, transport to the scene, providing items useful in the investigation). The lawyer can also ask that the investigation be followed by several investigating judges working jointly in accordance with the provisions of Article 83.1 of the Code of Criminal Procedure. Finally, it bears mentioning that Article 221.2 of the French Code of Criminal Procedure makes it possible to sanction inaction on the part of an investigating judge. In fact, if four months have transpired since the last taking of evidence, the lawyers of the parties or of one of the parties can bring the case before the investigation chamber, which can either discuss the case or send it back to the same investigating judge or one of his or her colleagues for further investigation. Delays are now endemic in many parts of the Irish legal system and therefore the procedural steps that exist may in fact be ineffective. In this regard the European Court of Human Rights recently found a breach of Article 6.1 ECHR guarantees by Ireland with regard to the right to an expeditious criminal trial.

It is, however, important to state that instructions only match a small number of proceedings, and that lawyers are not recognised as having any role in matters that are not submitted to an investigating judge – except during custody.

It should be noted that in Sweden the government has adopted draft legislation entitled “Declaration of priority before the courts”.[92] This legislative proposal is aimed at helping citizens expedite the handling of their cases in court. A request to declare priority can thus be submitted by any lawyer regarding any kind of case.

Furthermore, when proceedings last particularly long, the senior judge may decide to grant the case priority in adjudication. In order to decide if the case is not handled properly, the senior judge must take into account the importance of the case (in terms of workload), the conduct of the parties during the proceedings (whether or not they contributed to expediting the proceedings) and what was at stake for the claimant in the case.

In Scotland, there are rules that are designed to secure the speedy despatch of criminal proceedings at first instance. For example, in proceedings on indictment, a preliminary hearing or first diet must take place within 11 months (High Court) or 12 months (otherwise) of service of the indictment. The accused may not be detained in custody for more than 80 days before an indictment is served, and, if in custody, must be brought to trial within 140 days (High Court) or 110 days (otherwise) of service of the indictment. These time limits may be extended by the court but only on cause shown.

The following table traces the range of special means lawyers dispose of to expedite judicial proceedings in the various member states studied.

90 The lawyer may submit an appeal for supervision of any proceedings. The lawyer may also submit a request to shorten the deadlines in the proceedings if they are too long.
91 France, Ireland, Luxembourg, Norway and the Netherlands.
92 Legislative Proposal 2008/09:213. This legislative proposal was to take effect on 1 January 2010.

Table: Special means provided by legal texts permitting lawyers to enhance the efficiency and quality of judicial proceedings[93]

Country	Do legal texts provide the appropriate tools?		
	Civil cases	Administrative cases	Criminal cases
Armenia	Yes	Yes	Yes
Austria	Yes	Yes	Yes
Belgium	**Yes**	**No**	**No**
Bosnia-Herzegovina	Yes	Yes	Yes
Bulgaria	No	No	No
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czech Republic	Yes	Yes	Yes
Denmark	**Yes**	**Yes**	**Yes**
Estonia	No	No	No
Finland	No	No	No
France	**Yes**	**Yes**	**Yes**
Germany	Yes	Yes	No
Greece	No	No	No
Hungary	No	No	No
Ireland	**Yes**	**Yes**	**Yes**
Italy	**Yes**	**No**	**Yes**
Latvia	No	No	No
Lithuania	Yes	No	Yes
Luxembourg	**Yes**	**Yes**	**No**
Montenegro	Yes	Yes	No
Netherlands	**Yes**	**Yes**	**Yes**
Norway	**Yes**	**Yes**	**Yes**
Poland	Yes	Yes	Yes
Portugal	Yes	Yes	Yes
Republic of Macedonia	Yes	Yes	Yes
Slovakia	No	No	No
Slovenia	Yes	Yes	Yes
Spain	No	No	No
Sweden	**No**	**No**	**No**
Switzerland	Yes	Yes	Yes
Ukraine	Yes	Yes	Yes
United Kingdom	**/**	**/**	**/**

Comments

Croatia: The Code of Civil Procedure confers a certain authority on lawyers to expedite proceedings. Moreover, they are obliged to do so by the code regulating their profession and their code of ethics. Nevertheless, it appears to be very difficult for lawyers to expedite proceedings, the judges being the only ones in control of the duration of proceedings.

Montenegro: In civil, administrative and criminal cases the means available for expediting proceedings are tools regulated by the civil, administrative and criminal procedural codes and available to all of the parties to a dispute and thus are not at the disposal of the lawyers alone. In criminal cases, although the response to the first question in the supplementary questionnaire stipulates that lawyers do not have means provided in legal texts to expedite the proceedings initiated, the response to the second question in the questionnaire clarifies that the criminal procedural code contains several provisions compelling lawyers to adopt a proactive approach in every trial.

Republic of Macedonia: Any lawyer can transmit a request either to the judge in the case, the Ministry of Justice or the Judicial Council to speed up the proceedings that that lawyer initiated or in which he or she represents a party. This applies to civil, administrative and criminal cases.

Slovakia: Although the response to the first question in the supplementary questionnaire stipulates that lawyers do not have means provided in legal texts to expedite the proceedings initiated, the response to the

93 The responses pertaining to founding members of the Council of Europe appear in bold print.

second question in the questionnaire states that any lawyer can make a request to expedite proceedings that have not been dealt with promptly. This applies to civil, administrative and criminal cases.
Switzerland: Various means allow lawyers to expedite the proceedings they institute or in which they represent a party. Thus, in criminal cases, lawyers may ask the authorities to carry out a number of acts or duties of investigation. Generally speaking, in all areas of law, a lawyer may bring a case before a higher authority due to unreasonable delay or denial of justice.

Moreover, in most of the member states of the Council of Europe participating in the study, lawyers are required to file their written submissions (in the form of conclusions, arguments, notes etc.) when judicial proceedings involving civil or administrative matters are introduced. The fact that one part of the proceedings is written seems to enhance the efficiency of the justice system: lawyers have to accurately define the needs of their clients and the legal arguments serving them, while judges have to respond to these arguments and/or take them into account in their verdicts. On the other hand, it is not certain whether holding proceedings partially or entirely in writing helps reduce the time required by such proceedings; however, it ensures that the adversarial system functions more effectively.

In criminal cases the situation is not as clear-cut. Lawyers are obliged to file written submissions in 14 of the 33 countries studied. In Armenia, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Italy,[94] Luxembourg, the Netherlands, Slovakia, Slovenia, Sweden and Switzerland lawyers may present their arguments either orally or in writing. In Ireland, arguments must be presented orally save where directed by the court and in the Court of Criminal Appeal where both oral and written arguments may be made.

The situation for mandatory filing of written documents as part of judicial proceedings appears to be more homogenous among the founding states of the Council of Europe. Within this group only three states (i.e. Belgium, Luxembourg and Sweden), do not require their lawyers to systematically file written arguments in civil cases. As for administrative cases, filing written arguments is mandatory except in Sweden. Finally, in criminal cases the arguments are generally in oral form with the exception of Norway. The obligation to file written arguments in support of a request made in the context of judicial proceedings is examined in the following table for the various member states taking part in the study.

NB: in oral proceedings, lawyers do not have the monopoly in France. Due to the difficulties they raised, oral proceedings are more regulated now to match more written procedures.

Table: Obligation to file written arguments in judicial proceedings[95]

Country	Obligation to file written arguments		
	Civil cases	Administrative cases	Criminal cases
Armenia	Yes	Yes	No
Austria	Yes	Yes	Yes
Belgium	**No**	**Yes**	**No**
Bosnia-Herzegovina	Yes	Yes	No
Bulgaria	No	No	No
Croatia	No	No	No
Cyprus	No	No	No
Czech Republic	Yes	Yes	Yes
Denmark	**Yes**	**Yes**	**Yes**
Estonia	Yes	Yes	No
Finland	No	No	No
France	**Yes[96]**	**Yes**	**No**
Germany	Yes	Yes	No
Greece	Yes	Yes	No
Hungary	Yes	Yes	Yes
Ireland	**Yes**	**Yes**	**No**
Italy	**Yes**	**Yes**	**No[97]**

94 In Italy, the civil party joining criminal proceedings has to file written arguments.
95 The responses pertaining to the founding states of the Council of Europe appear in bold print.
96 Only before the regional court, in civil matters, when representation is mandatory.

Latvia	Yes	Yes	Yes
Lithuania	Yes	Yes	Yes
Luxembourg	**No**	**Yes**	**No**
Montenegro	Yes	Yes	Yes
Netherlands	**Yes**	**Yes**	**No**
Norway	**Yes**	**Yes**	**Yes**
Poland	Yes	Yes	Yes
Portugal	Yes	Yes	Yes
Republic of Macedonia	Yes	Yes	Yes
Slovakia	No	No	No
Slovenia	No	No	No
Spain	Yes	Yes	Yes
Sweden	**No**	**No**	**No**
Switzerland	Yes	Yes	No
Ukraine	Yes	Yes	Yes

Comments

Austria: In criminal cases arguments must be filed in writing, but only in certain matters. Thus, invalidity actions or requests to reactivate proceedings must be introduced in writing and signed by a lawyer.

Bosnia-Herzegovina: The response to the third question in the questionnaire indicates that lawyers may not introduce proceedings in criminal matters. Consequently, they may not submit written arguments for this phase in the proceedings. No information was transmitted concerning the other phases in the proceedings.

Czech Republic: In principle all procedures are in written form. Judges may, however, decide that it is not necessary to file written arguments.

Estonia: In criminal cases, only the arguments developed by a lawyer in response to the prosecution's charges must be drawn up in writing. However, the Criminal Procedures Code is supposed to be modified, as a result of which all of the arguments by the defence will have to be filed in writing.

France: As a general rule, in civil cases when parties are required to be represented by a lawyer, the procedure is written. When representation is not mandatory, the procedure is oral. However, in actual practice, lawyers file written conclusions. The aim of a draft decree being examined by the Council of State is to allow the written submissions produced by the parties to be better taken into account in oral proceedings. As for administrative procedures, they are essentially in writing. Lawyers may formulate oral observations developing the written submissions produced earlier, but in principle they are only heard if the jurisdiction authorises them to make their explanations before the court.

Ireland: The requirement to file written arguments in judicial pleadings will depend significantly on the jurisdiction of the court seized of the case. In civil cases before the High Court, the matter may be subject to rules of court requiring the filing of pleadings or the High Court may direct the filing of written arguments, whereas in the lower courts written arguments are rare. In administrative cases such as judicial review cases the rules of court require the filing of written arguments.

Lithuania: Lawyers may also develop their arguments orally.

Luxembourg: In civil cases a distinction needs to be made between written and oral proceedings. For the lower instances such as a magistrate's court, for example, there is the application initiating proceedings, in which the citations are written, but the rest of the proceedings are oral. Lawyers are nevertheless free to draw up notes on the arguments for the defence and use them during the debate. On the other hand, in the higher courts such as the District Court and the Superior Court of Justice, the parties are obliged to exchange conclusions. As for procedures in administrative proceedings, they are written. The *"référé administratif"* (urgent interlocutory application) is the only exception to this rule. Finally, the procedures in criminal proceedings are exclusively oral, although lawyers do have the possibility of going over their arguments again in written pleadings.

England and Wales (UK)): In criminal matters, the filing of written submissions depends on the stage of the proceedings and the party concerned. At the start of proceedings, the prosecution is of course compelled to file its submissions in writing. The defendant files a written note only if he or she pleads not guilty.

Scotland (UK): In civil cases, the pursuer must set out his claim in writing and the defender must respond in writing. Thereafter, first-instance procedures will generally be oral, although in certain specific types of proceeding (or at the instance of the court) written notes of argument may be required. On appeal, written notes of argument will generally be required in advance of the oral hearing. In criminal cases, the Crown must set out the charges in writing. The defence must give notice of certain types of defence. Thereafter first-

97 See footnote 87 above

instance procedure will generally be oral. On appeal, written notes of argument will generally be required in advance of the oral hearing. In administrative proceedings before tribunals the claimant must generally set out his claim in writing and the respondent may be required to respond.

B. Alternative methods for resolving disputes

The methods for alternative dispute resolution (hereafter ADR) are seen as alternatives to conventional judicial systems. Thus, the term ADR refers to any process aimed at permitting the parties to a conflict to come to their own decision on how to resolve the said conflict. It encompasses such processes as mediation, conciliation and other ways of seeking compromise.

It appears that in some cases these methods allow lawyers to reduce the congestion in judicial systems and promote the resolution of disputes. In some judicial systems, these methods are even considered necessary prerequisites to commencing or continuing proceedings.

Among the non-founding member states of the Council of Europe taking part in the study, 14 states practice mediation, conciliation and arbitration.[98] Most of the other member states in this group have at least two systems for resolving disputes. Showing more fragmented results, 20 member states of this group practice mediation and arbitration and 16 of them allow lawyers to call for conciliation to resolve conflicts between parties.

The non-founding member states of the Council of Europe taking part in the study also provide lawyers with training in the techniques of the respective systems. These training programmes are generally organised by the bar associations (national, regional and local) in collaboration with institutions and organisations specialising in ADR.

The founding members of the Council of Europe present a quite homogenous group as regards recourse to alternative methods for settling disputes. All of these states allow their lawyers recourse to three main means of settling disputes: mediation, conciliation and arbitration.

Two of them, i.e. France and Sweden, have other ADR procedures as well.

In France, the new method of settling disputes, which tends to be introduced in the margins of the judicial systems, is the participatory procedure. The objective of this reform is to contractualise the transactional process between the parties to a dispute, whose respective lawyers are obliged to assist them in the negotiations in order to benefit from the arrangements offered by such proceedings (suspension of the limitation period etc.).

Lawyers play a leading role here in seeking a negotiated solution that is in the interests of their clients, legally relevant and technically viable and practicable. If the procedure is successful, the lawyers can bring it before the competent jurisdiction so that it can officially recognise the agreement reached; and if they fail, they can use a simplified method to bring the case before court and obtain a ruling in proceedings that can be accelerated thanks to the exchanges made before the court was seized.

The participatory procedure enables the amicable resolution of conflicts in compliance with legal rules through lawyers. It can result in drawing up a lawyer's act and therefore enables lawyers used to 'judiciary matters' to strengthen their knowledge in 'legal' matters. The solution to the conflict is indeed developed by the parties, through control and help of their counsel – and greater legal certainty can be achieved together with the active participation of persons in conflict. In Sweden, a method differing from those mentioned above (mediation, conciliation and arbitration) is used, involving the National Board for Consumer Complaints. The board examines only conflicts between businesses and consumers and only at the request of consumers (and not businesses). The decisions of the National Board are in the form of recommendations to the parties involved on the best way to resolve their dispute. Furthermore, in a number of sectors individuals have set up special boards. These initiatives are widespread in the insurance sector, for example. The area of activity of each of these boards is different, but their role is the same: to promote resolution of disputes between parties in a flexible and impartial way.

98 Austria, Croatia, Finland, Germany, Greece, Latvia, Lithuania, Montenegro, Poland, Portugal, Slovakia, Spain and Switzerland.

Finally, in the founding states of the Council of Europe the training of lawyers in alternative methods of dispute resolution is ensured mainly by the bar associations in collaboration with other bodies.[99]

The following table explores whether or not lawyers have the possibility of using mediation, conciliation, arbitration or other alternative means of settling disputes in the 33 member states of the Council of Europe participating in the study.

Table: Alternative methods of dispute resolution[100]

Country	Possibility of resorting to alternative methods of dispute resolution			
	Mediation	Conciliation	Arbitration	Other
Armenia	No	Yes	No	No
Austria	Yes	Yes	Yes	Yes
Belgium	**Yes**	**Yes**	**Yes**	**No**
Bosnia-Herzegovina	Yes	No	Yes	No
Bulgaria	Yes	No	No	No
Croatia	Yes	Yes	Yes	No
Cyprus	No	No	Yes	No
Czech Republic	Yes	No	Yes	No
Denmark	**Yes**	**Yes**	**Yes**	**No**
Estonia	No	No	No	No
Finland	Yes	Yes	Yes	No
France	**Yes**	**Yes**	**Yes**	**Yes**
Germany	Yes	Yes	Yes	Yes
Greece	Yes	Yes	Yes	No
Hungary	Yes	Oui	Oui	No
Ireland	**Yes**	**Yes**	**Yes**	**No**
Italy	**Yes**	**Yes**	**Yes**	**No**
Latvia	Yes	Yes	Yes	No
Lithuania	Yes	Yes	Yes	No
Luxembourg	**Yes**	**Yes**	**Yes**	**No**
Montenegro	Yes	Yes	Yes	No
Norway	**Yes**	**Yes**	**Yes**	**No**
Netherlands	**Yes**	**Yes**	**Yes**	**No**
Poland	Yes	Yes	Yes	No
Portugal	Yes	Yes	Yes	Yes
Republic of Macedonia	No	Yes	No	No
Slovakia	Yes	Yes	Yes	No
Slovenia	Yes	No	Yes	No
Spain	Yes	Yes	Yes	No
Sweden	**Yes**	**Yes**	**Yes**	**Yes**
Switzerland	Yes	Yes	Yes	No
Ukraine	No	No	Yes	No
United Kingdom	**Yes**	**Yes**	**Yes**	**No**

Comments

Austria: In this country mediation, conciliation and arbitration are all available. The goal of mediation is to arrive at an amicable agreement, as with conciliation. However, initiating and continuing mediation proceedings suspends the period of limitation. This is only the case for conciliation if the parties have concluded an agreement to this effect. As regards arbitration, lawyers can only engage in arbitration proceedings to resolve a dispute if the parties have previously concluded an agreement allowing arbitration.
Austria also has other alternative methods for resolving disputes, including collaborative law. This term refers to an extrajudicial method for resolving disputes which resembles mediation in some respects. The only difference resides in the fact that the proceedings are not conducted by an impartial mediator, but rather by the lawyers representing the different parties to the dispute. Furthermore, a few years ago, the Austrian Bar

99 This is the case in Belgium, Ireland, Italy, the Netherlands, Sweden and the United Kingdom. In the other states, such as Luxembourg and Norway, these courses are offered at universities and centres for continuing education.

100 The responses pertaining to the founding states of the Council of Europe appear in bold print.

Association proposed establishing a legal possibility for resolving disputes out of court with the help of agreements drawn up by the lawyers representing the parties in the case. Implementing this procedure *(Anwaltsvergleich)* would help reduce the congestion in the courts.
Estonia: A law will be adopted soon to introduce mediation in the Estonian judicial system.
France: The participatory procedure, a new alternative method for resolving disputes, is currently in the planning stage.
Germany: By virtue of Article 1(3) of the Professional Code for Lawyers (*BORA*), lawyers must assist and advise their clients with the goal of avoiding conflicts and promoting the resolution of disputes. As a matter of principle, they can resort to any kind of extrajudicial dispute resolution, particularly mediation and conciliation.
As for pending cases of civil disputes, Article 278(5) of the Code of Civil Procedure provides for the possibility of alternative dispute resolution. According to Article 15a of the Introductory Law to the Code of Civil Procedure, it is only admissible to introduce an action in certain disputes after such time as an attempt at conciliation has failed.
As for arbitration, it should be stressed that lawyers in Germany can only initiate arbitration proceedings with the goal of resolving a dispute if the parties have already concluded an agreement allowing arbitration to be used.
Finally, Germany has other alternative methods for resolving disputes: in criminal proceedings, mediation can be encouraged between the perpetrators and victims of criminal violations. Provided that such mediation is successful, no ruling is made.
Hungary: Mediation is open in criminal cases and can be proposed by the lawyer of the individual who has committed a criminal offence or by the lawyer of the individual who was the victim of the offence.
Latvia: Alternative methods for resolving disputes are not regulated in Latvia.
Portugal: The response to the fourth question in the supplementary questionnaire indicates that there are other alternative methods for resolving disputes in Portugal, but does not specify what they are.
Spain: The Spanish judicial system offers mediation, conciliation and arbitration. The parties to a dispute can resort to mediation at any point in the judicial proceedings. Although this technique was once reserved for family matters, its use has spread to civil and commercial cases. At present new legislation is being prepared which transposes, in particular, European Directive 2008/52 into Spanish law. Conciliation, on the other hand, is regulated by the Code of Civil Procedure of 1881 and is mainly used on the fringes of the employment courts.

II. Due diligence of lawyers and sanctions if they breach this obligation

In the 33 member states of the Council of Europe included in the study, the due diligence of lawyers is regulated by the codes of ethics the lawyers have established for themselves.

Nevertheless, the definition of this duty is not uniform, as the act of due diligence applies to many aspects of the legal profession. For instance, a lawyer who refuses to give his or her client a detailed account of fees when so requested by the latter violates the obligation of due diligence. By the same token, a lawyer who is not accountable to his or her client regarding the proceedings entrusted to that lawyer also breaches the obligation of due diligence. A lawyer also violates due diligence when accepting a case knowing he or she is unable to initiate proceedings or when neglecting for several years to perform the diligence required for the proceedings.

Here we are looking specifically at the failure to perform due diligence stemming from abuse of process (A). We shall then turn to the recourse available to a litigant whose lawyer is guilty of inaction or abuse of process (B). Finally, we shall consider the issue of quality control as it applies to legal aid. Under certain circumstances, this type of control can prevent lawyers from failing to perform due diligence.

A. Abuse of process

Abuse of process consists of excessive or unreasonable use of process in the context of an adjudication process.[101]

Upon reading this definition, one could say that a lawyer commits abuse of process when he or she instigates legal proceedings with the sole purpose of harming the opposing party, multiplies the legal

101 The term “adjudication process” refers to all actions appropriate to take in order to obtain a ruling in a case.

proceedings even though the additional cases will not necessarily improve the client's legal situation, or unduly prolongs proceedings by being negligent or by needlessly complicating the arguments.
Such a lawyer is liable to sanctions in 21 of the 33 states participating in the study. In these 21 states, sanctions can be imposed on the lawyer by the judge presiding over the case (as is true in Croatia, Estonia and Hungary), by the lawyer's bar association (as is the case in Latvia, Lithuania and Portugal), or a double sanction can be imposed (as in Finland).

In Bulgaria, Cyprus, Germany, Slovakia and Switzerland there are no sanctions for abuse of process, regardless of whether the case is civil, administrative or criminal.

In France, Articles 697 and 698 of the Code of Civil Procedure apply.[102]

In Luxembourg and Poland, no sanctions can be imposed in administrative cases, while in Slovenia no sanctions exist for criminal cases involving abuse of process. Finally, in Ukraine, lawyers can only be sanctioned if they commit abuse of process in criminal cases.

The following table explores whether lawyers can be sanctioned when they commit abuse of process in the 33 member states taking part in the study.

Table: Possibility of sanctioning a lawyer who has committed abuse of process[103]

Country	Can a lawyer be sanctioned when guilty of abuse of process?		
	Civil	Administrative	Criminal
Armenia	Yes	Yes	Yes
Austria	Yes	Yes	Yes
Belgium	**No**	**No**	**No**
Bosnia-Herzegovina	Yes	Yes	Yes
Bulgaria	No	No	No
Croatia	Yes	Yes	Yes
Cyprus	No	No	No
Czech Republic	Yes	Yes	Yes
Denmark	**Yes**	**Yes**	**Yes**
Estonia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	**No**	**No**	**No**
Germany	No	No	No
Greece	Yes	Yes	Yes
Hungary	Yes	Yes	Yes
Ireland	**Yes**	**Yes**	**Yes**
Italy	**Yes**	**Yes**	**Yes**
Latvia	Yes	Yes	Yes
Lithuania	Yes	Yes	Yes
Luxembourg	**Yes**	**No**	**Yes**
Montenegro	Yes	Yes	Yes
Norway	**Yes**	**Yes**	**Yes**
Netherlands	**Yes**	**Yes**	**Yes**
Poland	Yes	No	Yes
Portugal	Yes	Yes	Yes
Republic of Macedonia	Yes	Yes	Yes
Slovakia	No	No	No
Slovenia	Yes	Yes	No
Spain	Yes	Yes	Yes
Sweden	**Yes**	**Yes**	**Yes**

102 Article 697: *Barristers, solicitors and bailiffs may personally be ordered to pay the costs relating to proceedings, acts and enforcement procedures performed outside the framework of their mandate.*
Article 698: *The cost of wrongful proceedings, acts and enforcement proceedings shall be borne by the judicial officers from whom they originate, without prejudice to any damages that may be claimed. The same applies to costs of proceedings, acts and enforcement proceedings that are void due to their fault.*
103 The responses pertaining to the founding members of the Council of Europe appear in bold print.

Switzerland	No	No	No
Ukraine	No	No	Yes
United Kingdom	**/**	**/**	**/**

Comments

Belgium: In civil cases, the party - not the lawyer - who brings a vexatious action may be penalised for bringing a 'frivolous and vexatious' legal action. This is also the case in administrative matters. In criminal cases, no such provision is made (probably because it is a matter in which the procedure is largely inquisitorial). The lawyer who commits abuse of process is subject to a disciplinary sanction.

Croatia: When a lawyer commits abuse of process, the judge in the case can impose a fine. Furthermore, the disciplinary board of the Croatian Bar Association may prosecute the lawyer.

Denmark: The system that allowed the courts to impose a fine on lawyers committing abuse of process has disappeared. Nevertheless, Article 319 of the Code of the Administration of Justice provides that the person who represents a party to litigation and lawyers committing abuse of process may bear the costs of the vexatious proceedings.

Estonia: In this country, when a lawyer commits abuse of process in a civil suit, does not respect the rules of court or is dishonest, incompetent or irresponsible, the judge can force the lawyer to leave the court, keep him or her from pleading cases, impose a fine or even have the lawyer put in prison (for up to 24 hours, renewable 7 times). The judge also informs the Estonian Bar Association of such a decision. The principle is the same if a lawyer commits abuse of process in an administrative case.

In criminal cases, when a lawyer does not appear at the introductory hearing the case is automatically adjourned and the Estonian Bar Association is informed of the lawyer's conduct. In addition, if a lawyer commits abuse of process, does not respect the rules of court or disobeys an order given by the court, a fine can be imposed. Here, again, the Estonian Bar Association is informed of the lawyer's conduct and the amount of the fine imposed.

Finland: The cost of the proceedings can be charged to the lawyer that has abused them. Sanctions can also be taken by the Finnish Bar Association.

Germany: The lawyer's task is to protect his or her client against any forfeit of the latter's rights. To do so, the lawyer is thus obliged to institute proceedings as allowed by the legal provisions in place. Thus, there are no sanctions against initiating proceedings, even wrongfully.

Ireland: Insofar as abuse of process equates to professional negligence, in theory it is possible for a judge to refer the file of the case to the police or the Director of Public Prosecutions, although this sanction is rare. The appropriate remedy in such cases is for a complaint to be made to the respective professional body. Such complaints can be made not simply by the client but also by the judge seized of the case. It is also open to the judge to order the lawyers pay the costs or part of the costs where there has been neglect or default.

Italy: Article 96 of the Code of Civil Procedure decrees that the party to a case who acts in bad faith, i.e. who introduces an action knowing full well that the latter has no legal basis, may be compelled to bear the costs of the proceedings and pay damages to the other party. The principle is the same in administrative and criminal cases.

Latvia: The sanctions are based on the Latvian Code of Ethics and are imposed by the Disciplinary Proceedings Commission.

Lithuania: The sanctions are based on the Lithuanian Code of Ethics for Lawyers and are pronounced by the Council of the Lithuanian Bar.

Luxembourg: In civil cases, a judge can impose a fine on the claimant for initiating a frivolous and vexatious lawsuit if it can be established without a doubt that the claimant acted with malicious intent, ill will, gross recklessness or foolhardiness.

Netherlands: Abuse of process can be punished by making claims for damages, by imposing criminal sanctions and/or by taking disciplinary measures.

Norway: The sanctions are based on the Norwegian Code of Conduct for Lawyers and are pronounced by the Disciplinary Committee.

Poland: Fines can be imposed on lawyers having committed abuse of process in civil and criminal cases.

Portugal: The sanctions are based on the Code of Ethics and are imposed by the Portuguese Bar Association.

Slovenia: By virtue of Article 11 of the Code of Civil Procedure, the court may impose a fine of up to EUR 1,300 on any lawyer committing abuse of process in civil suits. In administrative cases this principle is equally valid by exceptional application of Article 11 of the Code of Civil Procedure to administrative proceedings.

Sweden: Once a lawyer is proven to be dishonest, incompetent or careless, the court may remove him from the case before it.

Ukraine: In criminal cases, if a lawyer is proven to have abused his rights, adversely affected ascertainment of the truth or slowed down the proceedings, the court may remove him from the case before it.

B. Recourse available to litigants in cases of inaction or professional misconduct

In this part of the study we shall be analysing not the disciplinary proceedings that can be initiated against lawyers who do not fulfil their duties or obligations,[104] but rather the procedures, judicial and otherwise, at the disposal of litigants to repair the damage suffered due to inaction or professional misconduct on the part of their lawyer.

Litigants in the 23 non-founding member states of the Council of Europe taking part in the study all have possibilities for collecting damages in cases of inaction or professional misconduct by their lawyers. However, they cannot all resort to the same judicial procedure to do so.

In Germany, a lawyer is obliged to pay damages to the client if the lawyer has culpably violated his or her contractual obligations, thereby harming the client. The German chambers of lawyers have to serve as intermediaries if there is a dispute between lawyer and client.

Nevertheless, neither the lawyer nor the client is obliged to participate in the conciliatory proceedings organised by the chamber. Parallel to the conciliation set up by one of the chambers, a new arbitration unit for lawyers has been established within the Federal Chamber of Lawyers.[105] This unit is independent and not comprised of lawyers.

If it is not possible to reach an amicable settlement regarding the lawyer's responsibility, the client may sue for damages in a civil court.[106]

The situation is the same in Armenia, Austria, Croatia, the Czech Republic[107], Estonia[108], Finland, Hungary, Latvia, Lithuania, Montenegro, Poland, Slovenia, Spain, Switzerland and Ukraine. In countries such as Bosnia-Herzegovina, Bulgaria, Portugal, the Republic of Macedonia and Slovakia, the damage suffered by the client as the result of inaction or misconduct on the part of the lawyer is compensated by recourse to the lawyer's liability or professional indemnity insurance.[109]

Litigants in the founding states of the Council of Europe also have the possibility of claiming damages in the case of inaction or misconduct on the part of their lawyers. The lawyers in these countries are, without any exception, subject to the law on civil and contractual responsibility of professionals. All lawyers have liability insurance.

Generally speaking, the compensation to be made to the client is determined in the course of amicable negotiations. If the case cannot be settled in this fashion, clients can make use of the judicial procedures available to them in these countries in order to be paid damages.[110]

In Scotland, in addition to any claim for damages for any loss caused by professional negligence, a client who considers that his or her lawyer has provided an inadequate professional service may complain to the Scottish Legal Complaints Commission. If the Commission upholds the complaint, it has power to direct the practitioner to pay compensation of up to GBP 20,000.

C. Quality control of legal aid

Quality control in the legal aid provided to citizens without the means to retain a lawyer can be performed at two levels. It can occur *a priori* when the lists are drawn up of lawyers who can provide citizens with legal aid, or it can occur *a posteriori* once the services have been rendered. This type of control is performed systematically.

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104 These proceedings, as well as the sanctions that can be imposed on lawyers, are addressed in Part I Chapter I Subsection III E of this study.
105 This unit was due to begin work at the beginning of 2010.
106 In Germany, however, only the damage caused when a lawyer abuses a client's trust is subject to compensation.
107 The action for damages may be brought before the bar or the civil courts.
108 A damage suit may be filed with the bar association or in civil court.
109 Nevertheless, the delegations did not specify exactly how the lawyer's insurance was to be used.
110 In some countries both the amicable and the judicial procedure can take place concurrently.

Such a system exists in Belgium. Article 508/8 of Belgium's Judicial Code stipulates the following:

"The Bar Association shall monitor the quality of services provided by lawyers in the form of secondary legal aid.

In the case of non-compliance, the Bar Council may take a reasoned decision to remove a lawyer from the list as per Article 508/7 in accordance with the procedure set forth in Articles 458-463."

Thus, quality control of services provided by lawyers in the form of legal aid is performed at two levels:

- *A priori*: This control pertains to the list containing the areas of legal aid the lawyers have declared and for which they have provided proof of their experience or for which they commit to take training organised by the Bar Council or the legal-aid authorities.
- *A posteriori*: This type of quality control also looks at the services provided, i.e. whether the services promised have actually been provided. The Director of the Office of Legal Aid can reduce the amount of points requested contingent on the actual quality of the services provided.

Among the founding states of the Council of Europe, Belgium holds a special place as the only country aside from the United Kingdom to offer quality control of services provided to citizens in the form of legal aid. Within this group, Belgium is also the only country to monitor quality at two levels.

In the other founding states of the Council of Europe, there is no quality control of legal aid.[111] In France, in cases of partial legal aid, an agreement must be signed between the lawyer and the recipient of legal aid. It is subject to the approval of the President of the Bar.

In the United Kingdom, the system for monitoring the quality of the legal aid provided varies from jurisdiction to jurisdiction. It should be noted that in England and Wales there is quality control of legal aid identical to that in Belgium (i.e. two-level quality control).[112]

In 16 of the 23 non-founding member states of the Council of Europe, i.e. Austria[113], Cyprus, the Czech Republic, Finland, Germany, Greece, Hungary, Lithuania, Montenegro, Poland, Portugal, the Republic of Macedonia, Slovakia, Spain,[114] Switzerland and Ukraine, there is no particular quality-control system for legal aid services provided by lawyers.

In the other members of this group, i.e. Armenia, Bosnia-Herzegovina, Bulgaria, Croatia, Estonia, Latvia and Slovenia, quality control of legal assistance is conducted *a posteriori*. In Bulgaria and Latvia, quality control is conducted by the administration responsible for legal aid. In Estonia it is the responsibility of the Ministry of Justice by virtue of a law that came into effect on 1 January 2010, whereas in Croatia it falls to the disciplinary bodies of the Bar Association and the courts. Finally, in Slovenia, quality control is not systematic and is only performed if a complaint is lodged by one or more citizens.

III. The impact of lawyers using ICT on the efficiency and quality of judicial proceedings

111 However, the Danish delegation to the CCBE stresses that even if in Denmark there is no special quality-control regime for the provision of legal aid, the lawyer helping a client is bound by the same quality standards as a remunerated lawyer providing services to a client and could be sanctioned by the disciplinary board if a complaint is brought against him, as is the case with a remunerated lawyer.

112 This control is strict and includes among others an accreditation for solicitors providing advice in the police station and at the end of each case, an assessment of the generated costs to establish if they are justified or not.

113 The Austrian delegation stressed in a comment sent in March 2012 that there is an implicit quality control of the provision of legal aid In Austria. In fact, according to the delegation, the quality of legal-aid services is guaranteed by the long training period in order to become a lawyer (in total 5 years), the continuing training obligation as well as the strict responsibility rules of the profession.

114 There is no quality-control system, but the bars set up quality surveys for those using legal aid. In addition, lawyers who want to provide services as part of legal aid must agree to take mandatory ongoing training before they can even have their names added to the list of lawyers providing such aid. Finally, an observatory for free legal aid has been introduced.

According to many observers of the judicial world, information and communication technologies seem *"to help change (…) the perception of case(s) by liberating practitioners, judges and clerks to the clerks from the inevitable slowness of the material processing of procedures".*[115]

Pierre Chevalier, Magistrate, Head of the Department of Legal Affairs and Keeper of the Seal of the French Ministry of Justice deems *"that simultaneous and rapid exchanges, as well as monitoring of the preparation and constitution of the evidence in a case file by electronic means should by all means save time and travel, reinforce the accusatorial procedure as a result of immediately obtaining information on the evolution of the case, enhance transparency and improve the legal security of the information transmitted (and) facilitate exchanges".*[116]

In some of the founding states of the Council of Europe, in particular Belgium, France and Luxembourg, the lawyers also seem to think that widespread use of information and communication technologies could have a positive impact on the efficiency and quality of judicial proceedings.

However, the use of ICT by lawyers entails computerising law firms (A), training lawyers in such technologies (B) and having or passing the appropriate regulations for using such technologies for judicial purposes (C).

A. Computerisation of law firms

As we stressed above, in order to use ICT for judicial purposes, law firms must be outfitted with the proper electronic equipment.

However, the percentage of lawyers equipped with a computer, computer programs and e-mail services varies greatly among the member states of the Council of Europe participating in the study, as illustrated by the following table.

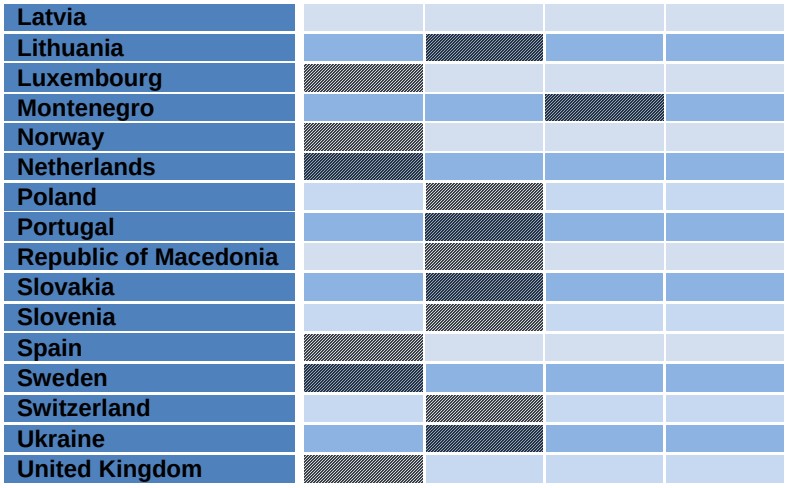
Table: Percentage of lawyers properly equipped for electronic communication with their colleagues, court clerk offices and courts[117]

Country	Percentage of lawyers with electronic equipment			
	100%	> 50%	< 50 %	< 10 %
Armenia				
Austria				
Belgium				
Bosnia-Herzegovina				
Bulgaria				
Croatia				
Cyprus				
Czech Republic				
Denmark				
Estonia				
Finland				
France				
Germany				
Greece				
Hungary				
Ireland				
Italy				

115 **S. Binet, *L'utilisation des nouvelles technologies dans le procès civil: Vers une procédure civile intégralement informatisée?,* Lyon, Université Lumière Lyon II, 2005. Cf. A. Voillequin, "Les systèmes informatiques des Huissiers de Justice", Chronique du Centre Serveur, *Tribune de l'Informatique Juridique*, 2004, n°6, p. 24 and P. Catala, "Procédure et jugement", Chapter 10 of *Le droit à l'épreuve du numérique*, Jux Ex Machina, Paris, Editions Puf., 1998.**

116 P. Chevalier, "Expérience de télé-procédures dans les juridictions françaises", *Droit & Patrimoine*, n°103, April 2002, p. 69.

117 The shaded squares correspond to the percentage of lawyers with electronic equipment in the corresponding country.



Comments
Denmark: The exact number is not available. In the opinion of the representative of the administration of justice responding to the supplementary questionnaire, the vast majority of lawyers have the necessary electronic equipment and use information technologies to communicate. The representatives of the national Bar and Danish Law Society agree with this statement.
Latvia: The exact figure is not available. In the opinion of the representative of the bar association responding to the supplementary questionnaire, the vast majority of lawyers have the necessary electronic equipment and use information technologies to communicate.
Switzerland: The exact figure is 95 percent.
Upon looking at this table, it can be seen immediately that in the founding states of the Council of Europe for which figures are available, 100 percent of the lawyers have the necessary computer equipment for electronic communication with their colleagues and the courts with the exception of Ireland, where the level is only just over 50 percent.

In the other member states of the Council of Europe taking part in the study, the proportion of lawyers with computer equipment ranges from 100 percent in countries such as Austria, Cyprus, Estonia, Germany and Spain, to over 50 percent in Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Finland, Greece, Hungary, Lithuania, Poland, Portugal, the Republic of Macedonia, Slovakia, Slovenia, Switzerland and Ukraine.

Armenia, Italy and Montenegro are trailing behind with less than 50 percent of their lawyers being properly equipped for ICT.

Overall, the lawyers of the member states of the Council of Europe, both founders and non-founders, thus seem to be well equipped to use information and communication technologies.

But have they received sufficient training to use the equipment properly?

B. Access to ICT

Among the non-founding member states of the Council of Europe taking part in the study, Armenia, Austria, Bosnia-Herzegovina, Croatia, the Czech Republic, Germany, Greece, Lithuania, Poland, Portugal and Spain have specific training for lawyers in information and communication technologies.

In some of these member states, the ICT training is provided by businesses, as is the case in Germany and Lithuania. In other states, such as Armenia, Greece and Poland, only the bar associations organise such training. In Bosnia-Herzegovina, the bar associations and courts are responsible for ICT training, whereas in Portugal the responsibility falls to the national bar association and the Ministry of Justice.
Furthermore, Croatia recently set up a programme called “e-advocacy”, under which all lawyers must acquire the necessary computer equipment and have an e-mail program so that they can receive official communication addressed to them.

In Bulgaria, Cyprus, Estonia, Finland, Hungary, Latvia, Montenegro, the Republic of Macedonia, Slovakia, Slovenia and Ukraine, no specific ICT training is available to lawyers. These are also the countries where the lawyers are least well-equipped with information technology.

Among the founding states of the Council of Europe, only Luxembourg and Norway do not have training in information and communication technologies devoted specifically to lawyers. The training in the other countries is offered by specialised businesses and the bar associations in Belgium, by bar associations alone in Italy, by specialised businesses in Denmark and Ireland, and by regional vocational training centres. In France, Bars and the *Conseil National des Barreaux* organise courses to train lawyers in the RPVA (*Réseau privé virtuel des avocats*). The RPVA is the secure computer-based network of the legal profession in France. It is used for lawyers' electronic communications, in particular in the context of the dematerialisation of proceedings with the courts, which are themselves connected through the RPVJ (*Réseau privé virtuel justice*), created in 2005.

C. Regulation of electronic communication

Among the 23 non-founding member states of the Council of Europe participating in the study, Armenia, Cyprus, the Czech Republic, Finland, Greece, Latvia, Lithuania, Montenegro, Slovakia and Switzerland have no specific restrictive regulation concerning electronic communication by lawyers. This is also the case for Ireland, Luxembourg, Norway, Sweden and the Flemish Order of Bar Associations in Belgium, all founding members of the Council of Europe.

In the other non-founding member states of the Council of Europe, electronic communication is regulated by the law on electronic signatures. In Bosnia-Herzegovina, a law on electronic signatures was enacted in 2006, and in Spain a law regulating the use of information and communication technologies in the field of justice is in the process of being adopted[118]. Finally, in Slovenia, electronic communication by lawyers must bear an e-signature and be certified.

It should be noted that in Germany regulation of electronic communication by lawyers is quite sophisticated.

In civil law, the electronic legal relations with the jurisdictions are regulated, in particular, by Article 130a of the Code of Civil Procedure. According to this provision, the federal government and the governments of the *Länder*, each in accordance with its area of responsibility, determine at which point electronic documents may be transmitted to the courts instead of written documents. If the written form is prescribed for communication, i.e. an original signed document that is to be replaced by electronic documents, the latter must bear an electronic signature approved by the law on electronic signatures.

In criminal law, those declarations, requests and/or their motivation which must be formally presented in writing or signed in accordance with the provisions of the Code of Criminal Procedure may be transmitted as electronic documents if they bear an electronic signature approved by the law on electronic signatures and if they are the type of document to be handled by the courts or the public prosecutor's offices.

In Belgium, an ethics regulation issued by the *Ordre des barreaux francophones et germanophones* imposes on the country's French and German-speaking lawyers a number of rules relating to their e-mail addresses and e-mail correspondence that must be identified with an electronic signature.

Electronic signature is also mandatory and regulated for Danish, Italian and Dutch lawyers who communicate electronically. In the Netherlands, the Dutch Bar Association has also set up a certification system called "*BalieNet certificaat*".

Finally, in France, electronic communication by lawyers must also bear an electronic signature.
In fact, Article 1316-1 of the Civil Code applies the principle of equivalence between paper-based and electronic documents. By virtue of this principle, the procedural documents drawn up on paper and in electronic form are subject to exactly the same formalities. Consequently, lawyers' requests, declarations and conclusions drawn up electronically must have an electronic signature so that the author is clearly identified.

118 The profession has also created its own certification authority for lawyers. This authority negotiates and organises interoperability agreements with public services and the Ministry of Justice to provide electronic services to lawyers (see www.redabogacía.org and www.justiciagratuita.es).

In addition, a decree issued by the Ministry of Justice in accordance with Article 748-6 of the Code of Civil Procedure lays down the necessary conditions for guaranteeing the reliability of the identification of parties communicating electronically, the integrity of the documents addressed and the reliability of electronic exchanges in civil, commercial, social, rural and labour matters.

IV. Supplementary activities of lawyers and their impact on the efficiency and quality of judicial proceedings

The authors of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer[119] of the Council of Europe underscored in the sixth recital the importance of the independence of lawyers in exercising their profession.

Yet the fact that the lawyer can be appointed as a mediator (A) or an arbitrator (B) while continuing to exercise the profession can have an impact on his or her independence and, consequently, on the efficiency and quality of justice.

Moreover, the fact that a lawyer may become a judge might detract from the impartiality of judges (C).

A. The lawyer as mediator

In Germany a lawyer may act as a mediator. In doing so the lawyer is not exercising a second profession, but rather continues to practise as a lawyer. Nevertheless, when a lawyer simultaneously provides consultation and mediation services, he or she is prohibited from promoting opposing interests. In addition, if a lawyer advises or has advised a party in his or her capacity as a lawyer, the lawyer may no longer act as a mediator in the case in which that party is involved.

This last principle is the sole modality applied for simultaneously acting as a lawyer and mediator in the Czech Republic, Finland, Lithuania and Spain.

In Austria this modality is supplemented by the requirement that lawyer mediators respect the rules of ethics, including professional secrecy, avoid conflict of interest and preserve their independence. The situation is the same in Bosnia-Herzegovina, Croatia and Slovenia.

In Poland, the Republic of Macedonia and Switzerland, the lawyer mediator only has to avoid conflict of interest.

Finally, in five of the 23 non-founding member states of the Council of Europe, i.e. Armenia, the Czech Republic, Estonia, Hungary, and Latvia, no rules exist for simultaneously acting as a lawyer and mediator.[120]

Among the founding members of the Council of Europe, Danish regulations stipulate that the lawyer mediator must avoid conflict of interest and remain impartial under any circumstances. The same situation prevails in Ireland (where the lawyer mediator must also uphold the European Code of Conduct for Mediators), Norway and Sweden.

In Belgium, the conditions are more stringent: the lawyer mediator is bound by the same rules of ethics applied to a lawyer who does not perform this function and must take particular care to remain independent. This is also the case in Luxembourg.
In Italy, specific rules are provided by Article 55bis of the Italian Code of Conduct. According to this article, a lawyer can act as a mediator if he or she complies with the obligations provided by the regulations of the mediation body, to the extent that they are not in conflict with the Code of Conduct. There are also rules regarding conflicts of interest. Therefore, if a lawyer advises or has advised a party over the past two years, he or she may not act as a mediator in the case in which that party is involved. Moreover, the lawyer may not

119 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, p. 1. This recommendation is available on the website of the Council of Europe at *https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=Rec(2000)21&Language=lanEnglish&Ver=original&Site=&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864*

120 The responses provided by the delegations of Greece, Bulgaria, Portugal and Montenegro were incomprehensible. In Cyprus there is no mediation and hence no lawyer mediator.

accept the appointment if a party of the proceedings is assisted or has been assisted over the past two years by another professional practising in the same chambers or office.

On the other hand, in France and the United Kingdom,[121] there are no modalities governing this dual function.

B. The lawyer as arbitrator

In Germany, a lawyer may simultaneously act as a lawyer and as an arbitrator. However, that lawyer may no longer act in his or her capacity as lawyer in a case in which he or she has already acted as an arbitrator, and vice versa. The same principle applies in Finland, Latvia, the Republic of Macedonia, Slovakia, Slovenia, Spain and Switzerland. The situation is the same in Bosnia-Herzegovina, where the Civil Code regulates the issue of conflict of interest.

In Hungary, any lawyer is entitled to practice as an arbitrator, provided conflicts of interest are avoided.

In Austria, in addition to the obligation to avoid conflict of interest, lawyer arbitrators are also bound to remain impartial.

In Cyprus, Hungary, Lithuania and Ukraine, a lawyer may not exercise the function of arbitrator under any circumstances.

Finally, in Armenia, Croatia, the Czech Republic, Estonia, Poland and Portugal there are no legal conditions governing the dual function of lawyer and arbitrator.

Among the founding states of the Council of Europe, in the Netherlands the sole modality for exercising the dual function of lawyer and arbitrator is that the lawyer must not have been involved in the case in which he or she is being asked to arbitrate.

Danish regulations stipulate that the lawyer arbitrator must remain impartial in dealing with the case entrusted to him or her. Moreover, the lawyer must be independent. In Norway, the arbitrator lawyer must be impartial, independent of the parties to the case and qualified for the task he or she has been entrusted with, by virtue of section 13(1) of the Law on Arbitration. In Sweden the regulation is identical. In Italy, the lawyer mediator has to proceed with impartiality and independence in order to avoid any conflict of interest, and has a duty to maintain confidentiality. Furthermore, if a lawyer advises or has advised a party over the past two years, he or she cannot intervene in the case in which that party is involved. Moreover, the lawyer arbitrator may not accept the appointment in litigation, if a party to the proceedings is assisted or has been assisted over the past two years by a lawyer practising in the same premises.[122]

In Belgium, the conditions allowing a lawyer to act as an arbitrator are even more stringent. Thus, the lawyer arbitrator is expected to respect the same rules of ethics as the lawyer who does not exercise this function and must be particularly careful about remaining loyal and neutral.

In contrast, in France, Italy, Luxembourg and the United Kingdom,[123] there are no arrangements for exercising this double function.

C. May a lawyer become a judge?

In 22 of the 23 non-founding member states of the Council of Europe participating in the study the question of knowing whether a lawyer may become a judge is regulated in the same way.
A lawyer can thus decide to become a judge on the condition that he or she no longer exercise the profession of lawyer and take the appropriate training and examinations to exercise the function of judge.[124]

121 Lawyers must nevertheless take special training in order to become mediators.
122 Article 55bis of the Italian Code of Conduct
123 Lawyers must, however, take special training to become mediators.
124 Lawyers do not have more favourable conditions than normal citizens for enrolling for examinations or passing competitive examinations.

In Switzerland, however, it would seem that a lawyer may serve as a judge while continuing to work as a lawyer. The question of doubling the function of lawyer with a judge's mandate is set at cantonal level. The lawyer who simultaneously acts as a judge must withdraw from any case over which he or she will be presiding as judge or if he or she discovers any conflict of interest between the case in question and those he or she presides over as judge.

The act of a lawyer's becoming a judge is regulated in the same way in the founding states of the Council of Europe as in the 22 states mentioned above, but in an extremely detailed manner.

Thus, a lawyer can decide to become a judge on the condition that he or she no longer exercise the profession of lawyer and take the necessary training or pass the appropriate examination to become a judge. There are, however, those countries where having experience as a lawyer is a necessary prerequisite in order to sit for the examination leading either to specific judicial training or the profession of judge. This is the case in Belgium and Italy, particularly if one wishes to sit on the Supreme Court. In Ireland only practising lawyers may become judges and there is no advance training or examination required.

There are also founding states of the Council of Europe in which a lawyer may be appointed as a substitute judge in a court of appeal, a court of first instance, an employment court, a commercial court or a magistrate's court, all the while still working as a lawyer. These lawyers are appointed as a temporary replacement for judges who are indisposed. They may also sit on the bench in cases where the court is not properly staffed to put someone on the bench in accordance with the provisions of the law. These substitute judges are subject to the same rules of independence and incompatibility as actual judges except with respect to exercising the profession of lawyer and activities related to this profession. Such cases exist in Belgium and Luxembourg.

V. Partial conclusions

The purpose of this Chapter is to determine whether lawyers have the means to make legal proceedings more efficient and enhance their quality, and if so whether these means are effectively implemented.

It appears that lawyers have the legal means to run proceedings that they have instituted or in which they represent a party smoothly, in 14 out of 23 non-founding members of the Council of Europe in civil matters. In administrative cases, this is the case for 13 out of 23 states and in criminal cases, for 12 out of 23 states.

In the founding states of the Council of Europe, lawyers have the means to make legal proceedings more efficient in eight out of 10 states in civil cases, in six out of 10 states in administrative matters, and in five out of 10 states in criminal matters.

These relative figures are counterbalanced by the fact that, in most of the member states of the Council of Europe participating in the study, lawyers are required to file their written submissions (in the form of conclusions, arguments, notes etc.) when judicial proceedings involving civil or administrative matters are introduced.[125] The fact that one part of the proceedings is written seems to enhance the efficiency of the justice system: lawyers have to accurately define the needs of their clients and the legal arguments serving them, while judges have to respond to these arguments and/or take them into account in their judgments.

It would, however, be appropriate to recommend that all members of the Council of Europe, especially those who are not founding members, provide lawyers with further legal means to defend the interests of their clients actively and effectively.

The situation described above is counterbalanced by the fact that lawyers have, in all Council of Europe member states examined, ADR schemes to relieve the pressure on judicial systems and to promote the resolution of disputes between parties.
Training for these techniques is generally supported by national, regional or local Bars together with institutions or organisations specialising in ADR.

Lawyers may be punished for abuse of process in 21 states out of the 33 states examined. They may be sanctioned by the Bars or judges, and may even be sanctioned twice.

125 The situation is more nuanced in criminal cases as lawyers are required to file a written argument in only 14 out of the 33 countries.

Moreover, citizens from the 23 non-founding members of the Council of Europe examined in this study all have opportunities to claim damages in case of inaction or misconduct by their lawyers. Citizens from the founding members of the Council of Europe also have the right to claim damages in case of inaction or misconduct by their lawyers. Lawyers in these countries are in fact, and without exception, subject to professional civil and contractual liability law.

Citizens therefore seem to have the necessary means for the recommendation of the Council of Europe contained in paragraph 3 of Principle III of Recommendation Rec(2000)21 on the free exercise of the profession of lawyer to not go unheeded.

However, the situation is not as positive regarding the quality control of legal aid provided to lower-income groups. Among the 23 non-founding members of the Council of Europe, 16 have no quality control for services provided by lawyers as part of legal aid. Among the founding members of the Council of Europe, only Belgium and the United Kingdom have such control.

The principles set out in Part IV of Recommendation Rec(2000)21 on the free exercise of the profession of lawyer and on access of any individual to a lawyer should be repeated. We emphasise that the quality control of legal aid provided to lower-income groups is a powerful tool for allowing any individual to have effective access to legal services by independent lawyers and to encourage lawyers to provide their services to the economically weak without having their services and duties affected by the fact that they are paid in whole or in part by public funds.

Regarding the impact of ICT used by lawyers on the effectiveness and quality of judicial proceedings, we must conclude that lawyers from the member states of the Council of Europe are fully equipped and trained for effective communication with their colleagues, with courts, bailiffs and other actors of the legal world. Only Armenia, Italy and Montenegro seem to lag behind in this area.

In addition, it should be noted that specific training is provided by Bars in most of the member states that were examined, either directly through speakers from the Bars, through universities or specialised private companies. States in which no training is organised are among those in which lawyers are the least well-equipped with information technology.

In this context, it is particularly distressing to note that among the 23 non-founding member states of the Council of Europe examined in this chapter, 10 have no specific regulations on electronic communications. Within the Council of Europe founding states, Ireland, Luxembourg, Norway and Sweden do not have such regulations either.

A breakthrough on this issue would therefore be desirable to allow practitioners to make the most of ICT, with the primary aim of making judicial and extrajudicial proceedings more effective.

Finally, as for lawyers engaging in activities other than their own, only the combination of the legal profession with the office of judge is regulated within the 33 founding states of the Council of Europe examined in this Chapter.

The combination of the activities of lawyer and mediator on the one hand and the activities of lawyer and arbitrator on the other hand is specifically regulated in some of the founding members of the Council of Europe, not in others. When the combination is regulated, principles primarily focus on the absence of any conflict of interest between the two posts considered.

In our view, principles should be developed so that lawyers appointed as an arbitrator or as a mediator should not lose their independence and should not thereby affect the efficiency and quality of the proceedings started or contemplated.
In this context, the call issued by the drafters of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer[126] of the Council of Europe in recital 6 concerning the importance of the

126 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, p. 1. This recommendation is available at the Council of Europe website at

independence of lawyers in the exercise of their profession, should be repeated. Legal instruments to preserve this independence should be developed, especially in case of a lawyer combining two or more offices.

https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282000%2921&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

Part II: Analysis of the role of the lawyer in judicial proceedings in two East European states: Romania and Moldova

Part II: Analysis of the role of lawyers in judicial proceedings in two east European states: Romania and Moldova

As pointed out in Part I of this study, in the preamble to Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe stressed the importance of this profession in any fair judicial system and the essential role that lawyers have to play in enhancing the efficiency and quality of judicial proceedings[127].

This part of the study is devoted to consideration of these two aspects of the profession of lawyer – the need for its existence and its role in enhancing the efficiency and quality of justice – in the judicial systems of two east European states, both members of the Council of Europe, namely Romania, an eastern state of the Council of Europe and recent European Union member (Chapter I), and Moldova, a Council of Europe member state in which the role of lawyers may be considered representative of that of lawyers generally in the judicial systems of eastern Europe (Chapter II).

This in-depth analysis will enable us to compare the role played by lawyers in the judicial systems of the Council of Europe's founding states – one of the subjects of Part I of this study – with that played by their counterparts in Romania and Moldova, and to put forward some recommendations by way of a conclusion.

Chapter I: The role of lawyers in judicial proceedings in Romania

As we have already repeatedly stressed in this study, the very existence of the profession of lawyer in a country is a guarantee of the rule of law in that country[128]. Furthermore, lawyers and their professional associations play a fundamental role in ensuring protection of human rights and fundamental freedoms, including the right of access to a fair and efficient justice system[129].

The question of the existence of an organised, structured and trained legal profession as recommended by the Committee of Ministers of the Council of Europe in 2000 is considered in the first part of this chapter (I.). Issues relating to the impact of the profession of lawyer on the efficiency and quality of judicial proceedings are addressed in the second part (II.).

These subjects are discussed on the basis of the data on the Romanian judicial system collected by the CEPEJ in 2008 and the information supplied by the Romanian Ministry of Justice and Bar Association on 20 March 2010 in reply to the supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems[130].

I. The profession of lawyer

As explained in Recommendation No R(2000)21 of the Committee of Ministers to the member states of the Council of Europe on the freedom of exercise of the profession of lawyer, this activity is governed in its very essence by a certain number of rules (B). The exercise of the profession is, for its part, founded on a number of major principles (C). Lastly, the profession of lawyer exhibits a number of general features in every judicial system (A).

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[127] See the fourth, fifth, sixth and seventh recitals of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.

[128] See in this connection the sixth recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.

[129] See in this connection the fifth and seventh recitals of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000. See also Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14, Rome, 4 November 1950. This convention is available at the following address: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=005&DF=8/23/2006

[130] The supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems constitutes Appendix 1 to this study.

A. General

In its Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Minister defines "lawyer" as "*a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters*".

The lawyer's mission is therefore quite extensive as it ranges from legal advice to representing clients in court.

In Romania, the function of lawyer is performed by professionals who carry the title of "avocat". There are not different categories of professionals with different titles, such as "solicitor" or "barrister", as there are in Ireland and the United Kingdom.

There are 17 593 lawyers in Romania, which is a relatively large number if compared to the size of the Romanian population. It is also a figure which compares favourably with those of the thirty-three Council of Europe member states studied in Part I.

It should also be noted that Romania has 81.7 lawyers for every 100 000 inhabitants. It may therefore be considered that the inhabitants of Romania are almost as well represented as those of the Council of Europe's founding states.

Romania has 4.2 lawyers for every professional judge. Here again, Romania is well placed in relation to the average for the thirty-three Council of Europe member states studied in Part I. This is also a good figure compared with the ratio of lawyers to professional judges in the Council of Europe's founding states. It can be compared with the figure for Sweden, where there are also 4.2 lawyers for every professional judge[131].

B. Rules governing the profession

The rules governing the essence of the profession of lawyer are mainly those pertaining to the grouping of its members in professional organisations (B.1.), those concerning access to the profession (B.2.) and the arrangements for continuing education of its members (B.3.).

B.1. The organisation of the profession

In Romania, lawyers practise freely and independently in accordance with Law No 51/1995 on the organisation and practice of the profession of lawyer, as amended[132].

In order to practise, every lawyer must be registered on the list of lawyers of the bar association to which he or she belongs. Lawyers are organised into local bars. These are associations having legal personality which include in their rolls the lawyers whose offices are located in their area. There is also a local bar association for the city of Bucharest[133].

These local bars are federated into a national bar (Uniunea Nationala a Barourilor din Romania) situated in Bucharest[134]. The national bar association represents all the country's bars as the chairs of all the country's local bar associations sit on its council.

The situation with regard to the bar association in Romania can therefore be described as comparable to that found in the majority of the Council of Europe's founding states. It will be recalled that, in that group of states, only Luxembourg does not have a national bar able to issue and unify the rules governing the profession. Belgium, for its part, has two national bar associations, one for each linguistic community.

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[131] For further details on the figures given for Romania, see CEPEJ, European Judicial Systems – 2010 Edition (data 2008): Efficiency and Quality of Justice, Council of Europe Publishing, 2010, pp. 257-260.
[132] Law No 51/1995 on the organisation and practice of the profession of lawyer, re-published in the Official Gazette, Part I, No 113, 6 March 2001.
[133] For more information on this aspect, see B. Nascimbene, The Legal Profession in the European Union, Kluwer Law International, 2009, p. 201.
[134] The national bar is governed by the aforementioned Law No. 51/1995. It is the legal successor to the Union of Romanian Lawyers which was officially dissolved on 26 June 2004 following the entry into force of Law No. 255/2004 amending and supplementing Law No. 51/1995 on the organisation and practice of the profession of lawyer.

The organisation of the lawyer's profession in Romania seems fully consistent with Principle V, points 1 and 2, of Recommendation No R(200)21, which call for lawyers to be allowed to form and join local and national associations and for these to be self-governing bodies independent of the authorities.

B.2. Access to the profession

Principle II, point 2, of Recommendation No R(2000)21 reads as follows:

"All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers".

In Romania, anyone wishing to become a lawyer must first take an examination. This examination is organised by the national bar association for all the country's candidate lawyers in accordance with the provisions of Law No 51/1995 on the organisation and practice of the profession of lawyer.

Furthermore, candidate lawyers may only become lawyers if they enjoy civic and political rights, hold a legal qualification, have no criminal record and are medically certified as fit for such work.

Candidate lawyers who pass the above-mentioned national examination start their career with a two-year traineeship during which they carry the title of trainee lawyer. Following this traineeship, they must sit the accreditation examination organised by the National Institute for the Training and Further Training of Lawyers in order to become qualified lawyers[135].

In the light of this information, it is clear that entry into the legal profession in Romania is fully consistent with the principle laid down by the Council of Europe in 2000.

It may also be seen that the lawyer's profession is regulated in the same way in Romania as in the majority of the Council of Europe's founding states, with a two-year traineeship as in Ireland and several examinations to be passed before finally taking up the profession, as in Belgium, Denmark, Italy, the Netherlands, Luxembourg and France.

B.3. Continuing education and other training

Romania has introduced a system of mandatory general continuing education for its lawyers.

In this respect it is comparable to the Council of Europe's founding states, all of which except Italy have such a system.

Romanian lawyers also have opportunities for specialisation. It is possible to acquire the title of specialist in some areas of law. This is reserved for lawyers who have reached a certain level in their further training.

Here again, on the basis of the above information Romania may be considered as having similar specialisation arrangements to those found in the Council of Europe's founding states.

Furthermore, the acquisition of the title of specialist thanks to regular and prolonged attendance of further training courses is fully consistent with the Council of Europe's recommendation to the effect that legal education, including programmes of continuing education, should seek to strengthen lawyers' legal skills[136].

C. Exercising the profession

The exercise of the legal profession and the provision by it of services to society are highly dependent on its having a monopoly of representation (C.1.) and complying with certain principles and obligations. Lawyers' activities are thus subject to certain rules of professional ethics and quality standards (C.2.) and to a duty to

[135] The above information is taken partly from Bruno Nascimbene's study of the legal profession in Europe. See B. Nascimbene, The Legal Profession in the European Union, Kluwer Law International, 2009, p. 185.
[136] Point 3 of Principle II of Recommendation No R(2000)21, entitled "Legal education, training and entry into the legal profession".

inform clients properly (C.3.) and show moderation in setting their fees (C.4). Lawyers who fail in these duties are liable to disciplinary proceedings and civil and criminal penalties (C.5.).

C.1. Monopoly of representation

Lawyers in Romania do not have a monopoly of representation in either civil or criminal matters (whether they are representing the defendant or the victim), or in administrative matters.
They do, however, have a monopoly in representing non-governmental organisations before the courts. They also have a monopoly of representation in human rights cases, family cases (when they represent family members brought before a court) and labour law cases.

It appears, therefore, that Romania has chosen to have a monopoly of representation in matters which it regards as technical in order to guarantee citizens and non-governmental organisations an effective and high level of protection of their rights.

It is regrettable, however, that the defence of citizens' interests in criminal cases was not considered a technical matter enjoying a monopoly of representation. In the great majority of the Council of Europe's founding states, lawyers have a monopoly of representation in criminal matters[137].

C.2. Rules of professional ethics and quality standards

In Romania, the conduct of lawyers is the subject of various regulations issued by the national bar association in the form of rules of professional ethics. Hence, the conduct of professional activities and respect for professional secrecy are governed by the Statute of the Legal Profession. Under this statute, a lawyer can only take up a brief to advise and represent a client on the basis of a written contract signed with his or her client.

The national bar association also sets quality standards for services provided by lawyers.

Romania therefore meets the concern expressed by the Committee of Ministers of the Council of Europe in Recommendation No R(2000)21 regarding the need to ensure the proper exercise of lawyers' responsibilities[138] and hence the need to adopt certain minimum quality standards.

In fact, Romania can be seen as one of the Council of Europe's "good performers" because its national bar association lays down quality standards and, in addition, mandatory continuing education is organised for lawyers.

C.3. Duty to keep clients informed

In Romania, there is no law or regulation requiring lawyers to provide information to their clients, particularly as regards the kind of proceedings they intend to bring, their length and the consequences of such action.

The national bar association considers, however, that lawyers have such an obligation to provide information to their clients under Articles 115, 116 and 145 of the Statute of the Legal Profession[139].

Article 115 of this Statute provides as follows:

"Lawyers shall take all necessary steps to protect the freedoms, rights and legitimate interests of their clients."

Article 116, for its part, states that:

"Lawyers are under an obligation to advise their clients correctly, promptly and conscientiously, and with all due diligence. They shall keep their clients informed of developments in the proceedings entrusted to them".

[137] Except in some parts of the United Kingdom (in England and Wales for the perpetrators and victims of criminal offences and in Northern Ireland for the victims), Denmark and Sweden. In Luxembourg and the Netherlands, lawyers do not have a monopoly in representing the victims of criminal offences.
[138] Seventh recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.
[139] See Articles 115, 116 and 145 of Law No. 51/1995 on the organisation and practice of the profession of lawyer.

Lastly, Article 145 reads as follows:

"(1) Lawyers are obliged to keep their clients reasonably informed about the assistance which can actually be provided to them and the status of their representation and to reply promptly to any requests for information which their clients make to them.
(2) Lawyers shall explain to their clients the circumstances of the case, its status, the possible developments in it and the results which might be obtained, and shall do so in a concrete manner and according to the concrete circumstances of the case".

It should also be noted that, by decision no 1486/2007, the Standing Committee of the Romanian National Bar Association decided that the European Union's Code of Conduct for Lawyers would be applicable as from 1 January 2007 to lawyers practising in Romania, as the Code of Professional Ethics of Romanian Lawyers.

Section 3.1.2. of this Code of Professional Ethics, providing that "*a lawyer shall advise and represent his client promptly, conscientiously and diligently*", accordingly applies to relations between lawyers practising in Romania and their clients. This section 3.1.2. of the code further provides that a lawyer "*(…)shall undertake personal responsibility for the discharge of the instructions given to him and keep his client informed as to the progress of the matter*".

Hence, based on the Code of Conduct for Lawyers drawn up by the European Union, which is applicable as a code of professional ethics, and Law No 51/1995 on the organisation and practice of the profession of lawyer, the Romanian national bar association seems to comply fully with Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, which includes the following principle:

"The duties of lawyers towards their clients should include:
a. advising them on their legal rights and obligations, as well as the likely outcome and consequences of the case, including financial costs;
(…)"[140].

If we compare the situation in Romania with that in the Council of Europe's founding states, we find, on the one hand, that it is identical to that obtaining in Belgium, Norway and Sweden, which are countries where lawyers have a general ethical obligation to advise, and on the other, that it is similar to the situation in the Netherlands and the United Kingdom, where lawyers are obliged under their respective codes of professional ethics to inform their clients about the possible length of the proceedings. It may also be concluded that the obligation to keep clients informed is better regulated in Romania than in France, Ireland and Luxembourg, where there are no regulations requiring lawyers to keep their clients informed.

C.4. Fees and disputes

As mentioned in Part I of this study, the Committee of Ministers of the Council of Europe has stipulated that lawyers should be required to advise their clients on the financial costs of their cases, in Principle III of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer[141].

In Romania, the lawyer's obligation to inform his clients about his fees and the financial costs of their cases is regulated in the same way as the general obligation to keep clients informed. Articles 115, 116 and 145 of the Statute of the Legal Profession apply, as does the Romanian Code of Professional Ethics: lawyers are required to inform their clients about their fees and the financial costs of their cases by virtue of the general obligation to advise[142].

In this respect, therefore, the situation in Romania is identical to that found in the majority of the twenty-three Council of Europe member states dealt with in Part I of this study in which the Committee of Ministers' recommendation has been complied with. It is also identical to the situation found in Belgium, Denmark, the

[140] Recommendation No R52000)21 on the freedom of exercise of the profession of lawyer, Principle III – Role and duty of lawyers, point 3.3.
[141] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle III – Role and duty of lawyers, point 3.
[142] For further information about lawyers' fees and how they are set, see, however, B. Nascimbene, The Legal Profession in the European Union, Kluwer Law International, 2009, p.189.

Netherlands, the United Kingdom, Norway, Sweden, France, Ireland and Italy, where the obligation for lawyers to inform their clients about their fees and the costs of proceedings derives from codes of professional ethics and/or legislation.

In Romania, as in the majority of the thirty-three Council of Europe member states covered in Part I of this study, there is a principle that lawyers are entitled to a remuneration and to reimbursement of the costs incurred in defending their clients' interests, and a principle that lawyers' fees are negotiated freely between themselves and their clients[143]. It should be stressed, however, that in Romania the question of fees must be settled and their amount specified in the representation contract signed between the lawyer and his client, before the lawyer begins to provide his services[144].

As regards procedures for challenging fees, they exist in Romania as they do in the vast majority of the thirty-three Council of Europe member states covered in Part I of this study[145].

C.5. Disciplinary proceedings in general and sanctions

In Principle VI of its Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, entitled "*Disciplinary proceedings*", the Committee of Ministers of the Council of Europe states the following:

"1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers"[146].

The principle that bar associations or other lawyers' professional associations should be responsible for or be entitled to participate in the conduct of disciplinary proceedings concerning lawyers is well respected in Romania. Disciplinary proceedings and measures are the responsibility of an authority independent from the Ministry of Justice and the judiciary. This independent professional association known as the Board of Discipline is attached to the national bar association and includes lawyers among its members. From this point of view, the situation in Romania is the same as in the twenty-three Council of Europe member states dealt with in Part I of the report and the same as the situation described in its founding states.

As regards types of disciplinary proceedings, the Romanian delegation who answered the questionnaire for the CEPEJ evaluation of judicial systems did not indicate the reasons why such proceedings are brought (professional misconduct, incompetence etc). Neither did they supply any information about the sanctions most commonly imposed on Romanian lawyers.

II. The lawyer as an agent for enhancing the efficiency and quality of judicial proceedings

This section is devoted to consideration of the influence which lawyers practising in Romania can have on the efficiency and quality of judicial proceedings.

We will consider the means available to lawyers for promoting swift and efficient judicial proceedings (A), the requirement of due diligence (B) and the impact which information and communication technologies may have on the exercise of the profession (C). Lastly, we will focus on the other activities in which Romanian lawyers may engage in addition to practising as lawyers and the effects this may have on the efficiency and quality of judicial proceedings (D).

[143] Idem, p. 190.
[144] If, for any reason, a lawyer is obliged to begin assisting his client before the representation contract has been signed, the lawyer is obliged to provide the client as soon as possible with a fee proposal. See, in this connection, B. Nascimbene, The Legal Profession in Europe, Kluwer Law International, 2009, p.109.
[145] Disputes relating to fees are settled by the chair of the national bar association in accordance with Article 31 of Law No 51/1995 on the organisation and practice of the profession of lawyer. The procedure for settling such matters is set out in Article 137 of the Statute of the Legal Profession.
[146] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle VI – Disciplinary proceedings, points 1 and 2.

A. Means which lawyers have at their disposal

The means available to lawyers in general consist of rights established in legal texts to help expedite judicial proceedings in civil, administrative and criminal cases (A.1.).

They also include the methods of alternative dispute resolution to which lawyers may have recourse when judicial proceedings are inefficient or too slow, or when they fail to produce a solution satisfying all the parties to a dispute (A.2.).

A.1. Which means for which types of proceedings?

In civil cases, Romanian lawyers can use legal tools contained in the Code of Civil Procedure to expedite proceedings they have initiated or in which they represent a party[147].

For example, under Articles 241-1 to 241-22 of the Code of Civil Procedure, only lawyers may submit evidence in patrimonial cases. When the parties first appear before the court, they must sign an agreement giving authority to their lawyers to submit the evidence relating to the case. This agreement by the parties is recorded in the judgment delivered by the court or in a special document drawn up by one of the lawyers. The Romanian Code of Civil Procedure also lays down very strict time-limits for the submission and examination of evidence and the delivery of the court's judgment.

The Romanian Code of Civil Procedure also stipulates that lawyers must file written pleadings in support of their clients' claims.

In civil matters, lawyers practising in Romania therefore have means at their disposal (particularly in patrimonial cases) to expedite the proceedings they initiate, as is the case in the majority of the twenty-three Council of Europe member states dealt with in Part I of this study, and in seven of the founding states.

In criminal cases, the Romanian Code of Criminal Procedure makes it obligatory to file written pleadings, which must be sent by mail with acknowledgement of receipt to the Public Prosecutor's Department or filed directly with it[148]. It is difficult, however, on the basis of this one detail, to draw conclusions about whether lawyers practising in Romania have effective means at their disposal to expedite criminal proceedings in which they are representing a defendant or a civil party[149].

A.2. Methods of alternative dispute resolution

Lawyers practising in Romania can resort to methods of alternative dispute resolution when judicial proceedings are inefficient or too slow or fail to provide a solution satisfying all the parties to a dispute.

Mediation seems to be the most important of these methods[150]. It applies to all legal matters, but may only be used when personal rights are at issue.

Law No 192/2006 on mediation and the organisation of the profession of mediator provides that the parties to a dispute - both individuals and legal entities – may voluntarily avail themselves of this method of alternative dispute resolution, but only after judicial proceedings have been initiated.

The law also contains various specific provisions relating to mediation in civil matters, for which the court has sole jurisdiction, mediation in family disputes and mediation in criminal matters.

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[147] Where administrative and criminal matters are concerned, the delegation from the Romanian bar association who answered the supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems pointed out that lawyers have means at their disposal to expedite proceedings in which their clients are involved, but did not describe them.

[148] There are, however, exceptions to the obligation to file written pleadings, such as when it is possible to answer the public prosecutor's arguments at a public hearing. In such cases, the oral public defence is recorded in the court's minutes. The same applies in civil and administrative proceedings.

[149] It is also impossible to reach this conclusion where administrative proceedings are concerned because the delegation from the Romanian bar association failed to give any further details on this point, apart from the fact that the filing of written pleadings is obligatory in such proceedings.

[150] Paragraph 1 of Article 3 of Law No 51/1995 on the organisation and practice of the profession of lawyer contains a provision to the effect that lawyers may discharge the responsibility with which they are entrusted by means of mediation.

Lastly, under Articles 1704 to 1717 of the Romanian Civil Code, mediation will have no consequences before a court unless the parties to the dispute sign a mediation agreement providing a solution to the dispute.

Conciliation is the second method of alternative dispute resolution in Romania. This method can be used in all legal matters without any restriction.

Article 720-1 of the Civil Code makes it obligatory to attempt conciliation in commercial matters before initiating proceedings when the claim concerns a significant sum of money.

In other legal matters, conciliation will have no consequences before a court unless the parties to the dispute sign a conciliation agreement providing a solution to it (Articles 1704 to 1717 of the Civil Code).

Arbitration is the third method of alternative dispute resolution in Romania. In accordance with Articles 340 to 371 of the Civil Code, arbitration may only be used in patrimonial cases, and only when such cases do not involve the exercise of rights for which the law prohibits the conclusion of arbitration agreements.

It should also be mentioned that Romanian lawyers receive training in these three methods of alternative dispute resolution at the National Institute for the Training and Further Training of Lawyers.

Romania therefore possesses the three methods of alternative dispute resolution which are available in thirteen of the non-founding states of the Council of Europe considered in Part I of this report[151]. The situation in Romania is also comparable to that found in the group of founding states of the Council of Europe, where lawyers can have recourse to the three main methods of dispute resolution, namely mediation, conciliation and arbitration, and are trained in the use of these tools by the respective bar associations, in co-operation with specific training bodies.

B. Due diligence of lawyers and sanctions if they breach this obligation

In this part of our study we will look at breaches of the lawyer's obligation of due diligence through abuse of process (B.1.). We will then consider the remedies available to litigants whose lawyer is guilty of inaction or abuse of process (B.2.). Lastly, we will address the issue of quality control as it applies to legal aid. Under certain circumstances, this type of control can prevent lawyers from failing to perform due diligence (B.3.).

B.1. Abuse of process

As we explained in Part I of this study, abuse of process consists of excessive or unreasonable use of process in the context of an adjudication process[152].

Upon reading this definition, one could say that a lawyer commits abuse of process when he or she instigates legal proceedings with the sole purpose of harming the opposing party, multiplies the legal proceedings even though the additional cases will not necessarily improve the client's legal situation, or unduly prolongs proceedings by being negligent or by needlessly complicating the arguments.

Contrary to the situation in the majority of the Council of Europe member states dealt with in Part I of this study, abuse of process is not punishable as such in Romania. Only abuses of procedural rights are liable to punishment.

Article 723 of the Code of Civil Procedure provides as follows:

"(1) Procedural rights shall be exercised in good faith and in keeping with the purpose assigned to them by law.
(2) Any party who abuses these rights shall be responsible for any damage caused".

Under this Article 723, a party found guilty of abuse of procedural rights may bring an action for damages against the lawyer who misused the procedural rights granted to him by law.

[151] These are Austria, Croatia, Finland, Germany, Greece, Latvia, Lithuania, Montenegro, Poland, Portugal, Slovakia, Spain and Switzerland.
[152] The term "adjudication process" refers to all actions which it appropriate to take in order to obtain a ruling in a case.

The provisions of Law No 51/1995 relating to disciplinary sanctions are also applicable in such cases[153].

The situation in Romania can therefore be considered similar to that existing in twenty-four of the thirty-three states dealt with in this study, where lawyers guilty of abuse of process may be liable to sanctions imposed by the judge presiding over the case or by the bar association to which they belong, or both.

B.2. Remedies available to litigants in the event of inaction or professional misconduct

In this section we will analyse the procedures, judicial and otherwise, at the disposal of litigants to repair the damage suffered due to inaction or professional misconduct on the part of their lawyer.

In Romania, such procedures, judicial or otherwise, exist, but they are not specifically designed to repair the damage caused by a lawyer. Hence a litigant who suffers damage due to his lawyer's inaction will have to use ordinary law to obtain compensation. Moreover, under Article 40 of Law No 51/1995 on the organisation and practice of the profession of lawyer, Romanian lawyers are obliged to take out insurance for professional liability.

Once again, it can be said that, in this respect, Romanian litigants are in a similar situation to litigants in the twenty-three non-founding member states of the Council of Europe studied in Part I of this report, and in an identical situation to litigants in the founding states. The latter can make use of existing judicial procedures to claim damages in the event of inaction or professional misconduct on the part of their lawyer.

The only difference between the situation of Romanian litigants and that of litigants in the Council of Europe's founding states is that, in the founding states, an amicable procedure always precedes the procedure for claiming compensation for damage caused by inaction or professional misconduct on the part of a lawyer.

B.3. Quality control of legal aid

In its Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe makes the following recommendations with regard to legal aid:

"1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers.
2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.
3. Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.
4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds"[154].

In Romania, a legal aid system has been set up by the Legal Aid Co-ordination Department.

Quality control has been introduced by the national bar association to ensure that persons making use of legal aid are not provided with low-quality services.

Quality control is carried out by the Legal Aid Co-ordination Department according to a quarterly plan approved by the Standing Committee of the National Bar Association. It consists of inspection visits to regional bar associations and impromptu visits to public court hearings.

Romania therefore seems to comply with the recommendation contained in Principle IV of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer.

However, it appears that quality control of legal aid in Romania is always conducted *a posteriori*, after services have been provided.

[153] Mainly Article 38, which lays down the obligations by which lawyers are bound and specifies that any breach of any of these obligations is liable to disciplinary sanctions.
[154] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle IV – Access for all persons to lawyers.

The situation with regard to legal aid in Romania can there be considered identical to the situation in some non-founding member states of the Council of Europe, such as Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Latvia and Slovenia, where there is *a posteriori* quality control of legal aid provided[155].

C. The impact of lawyers using ICT on the efficiency and quality of judicial proceedings

In Romania, as in the other Council of Europe member states, the impact which the use by lawyers of new information and communication technologies can have on the efficiency and quality of judicial proceedings depends to a considerable degree on the computerisation of law firms.

C.1. Computerisation of law firms

However, the delegation from the national bar association who answered the supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems did not have access to statistics on the percentage of lawyers properly equipped for electronic communication with their fellow lawyers, court registries and other judicial players.

C.2. Access to ITC

Regarding training for lawyers in new technologies, the Romanian National Institute for the Training and Further Training of Lawyers runs an optional course devoted specifically to new information and communication technologies.

C.3. Regulation of electronic communication

Although appropriate training in the use of new technologies for judicial purposes is organised for lawyers practising in Romania, there are no specific regulations concerning the use of electronic communications in the judicial world. However, the national bar association, in conjunction with the local bar associations, has drawn up plans for the introduction of such regulations. It is currently awaiting the participation of other judicial players, such as the Ministry of Justice, the Public Prosecutor's Department and the judiciary, to implement these plans.

It should be stressed, however, that the use of electronic signature is regulated by Law No 455/2001 on electronic signature. Under this law, Romanian lawyers can make free use of electronic signature in their communications with their fellow lawyers, court registries and other judicial players.

D. Supplementary activities of lawyers and their impact on the efficiency and quality of judicial proceedings

The sixth recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer[156] stresses the importance of the independence of lawyers in the discharge of their professional duties.

Yet the fact that a lawyer may be appointed as a mediator (D.1.) or as an arbitrator (D.2.) while continuing to exercise the profession can have an impact on his or her independence and, consequently, on the efficiency and quality of justice.

Moreover, the fact that a lawyer may become a judge might detract from the impartiality of judges (D.3.).

D.1. The lawyer as mediator

In Romania, under Law No 192/2006 on the organisation of the profession of mediator read in conjunction with Law No 51/1995 on the organisation and practice of the profession of lawyer, the function of mediator is compatible with the exercise of the profession of lawyer.

[155] For a definition of *a posteriori* control and details of the situation in the Council of Europe member states studied in Part I of this report, see Part I, Chapter II, paragraph II, section C.
[156] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.

It would seem, however, that lawyers are not required to pay particular attention to conflicts of interest and are not obliged to comply with two sets of ethical rules, as in some of the Council of Europe's founding states.

D.2. The lawyer as arbitrator

Under Law No 51/1995 on the organisation and practice of the profession of lawyer, the profession of lawyer is also compatible with the function of arbitrator.

Arbitration is regulated by the Romanian Code of Civil Procedure, which provides that the parties to a dispute may decide to have recourse to arbitration by voluntarily signing an arbitration agreement. This agreement serves also to name the arbitrators – who are also lawyers - chosen by the parties.

Here again, it appears that there are no particular provisions in Romanian law dealing with the question of possible conflicts of interest and lawyers are not required to comply with two sets of ethical rules.

The Romanian rules relating to the exercise of the dual function of lawyer and arbitrator resemble those in force in four out of the ten founding states of the Council of Europe and in certain other Council of Europe member states such as Armenia, Croatia, Estonia, Poland, Portugal and the Czech Republic.

D.3. Can a lawyer become a judge?

Finally, under the provisions of Government Emergency Ordinance No 159/2008 amending and supplementing Law No 51/1995 on the organisation and practice of the profession of lawyer, a lawyer practising in Romania may become a judge.

To enter the judiciary, a Romanian lawyer must pass a national examination organised by the Romanian national bar association.

However, no details are given about whether a lawyer who passes this examination must give up his practice in order to be able to serve as a judge.

It seems, therefore, that this matter is not regulated in Romanian legislation, contrary to the position in twenty-two out of the twenty-three non-founding member states of the Council of Europe dealt with in Part I of this study and in all the Council of Europe's founding states[157].

III. Partial conclusions

By way of a partial conclusion, it may be agreed that, in Romania, lawyers are sufficient in number, in relation to the population figures, to ensure that citizens have easy access to their services and are well represented before the courts.

It may also be agreed that the general regulations governing the profession of lawyer (applying to its organisation, access to it, and continuing and specialised training) comply fully with the provisions of Recommendation No R(2000)21 of the Committee of Ministers.

It may also be seen that the exercise of the profession of lawyer in Romania complies well with the requirements set out by the Committee of Ministers of the Council of Europe in Recommendation No R(2000)21 concerning a monopoly of representation (although such a monopoly would be desirable in criminal matters), the need to adopt ethical rules and certain quality standards, the obligation to keep clients informed, the setting of fees and the existence of procedures for challenging fees, and the existence of disciplinary procedures and sanctions independent of the judiciary.
Furthermore, in terms of the means available to lawyers to enhance the efficiency and quality of judicial proceedings, the situation in Romania can be considered comparable to that found in the other Council of Europe member states considered in Part I of this report, although it would be desirable if the existing rules in criminal and administrative matters were further developed to provide lawyers with more tools enabling them to have a positive impact on judicial proceedings which they have initiated or in which they represent a party.

[157] In these countries, lawyers can only embark on a judicial career if they cease to practise their profession.

The provisions of the Romanian national bar association's code of professional ethics deal efficiently with the obligation of due diligence and the sanctions applicable in the event of breaches of that obligation, even when a lawyer's services are provided in the context of legal aid.

The first exception to this positive picture concerns the use by lawyers of information and communication technologies in their exchanges with fellow lawyers, court registries and other judicial players. Although training in ICTs is provided by the Romanian national bar association, the use of ICTs is by no means widespread in the judicial world and the rules governing electronic communications are not very highly developed.

The second exception to this positive analysis of the lawyer's role in enhancing the efficiency and quality of judicial proceedings concerns the legislation applicable to supplementary activities of lawyers. Indeed, Law No 51/1995 on the organisation and practice of the profession of lawyer does not seem to have taken account of possible conflicts of interest between the function of lawyer and those of mediator, conciliator or judge. Neither does it help to determine which set(s) of ethical rules should be applied by lawyers who exercise other functions, to enable them to retain their independence and thus have a positive influence on ongoing judicial proceedings.

Chapter II: The role of lawyers in judicial proceedings in Moldova

As we pointed out in Chapter I of the second part of this report, the very existence of the profession of lawyer in a country is a guarantee of the rule of law in that country[158].
Furthermore, lawyers and their professional associations play a fundamental role in ensuring protection of human rights and fundamental freedoms, including the right of access to a fair and efficient justice system[159].
The question of the existence of an organised, structured and trained legal profession as recommended by the Committee of Ministers of the Council of Europe in 2000 is considered in the first part of this chapter (I.). Issues relating to the impact of the profession of lawyer on the efficiency and quality of judicial proceedings are addressed in the second part (II.).

These subjects are discussed on the basis of the data on the Moldovan judicial system collected by the CEPEJ in 2008 and the information supplied by the Moldovan Ministry of Justice and Bar Association in August 2009 in reply to the supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems[160].

In this connection, it should be noted that the role of Moldovan lawyers in judicial proceedings is being studied in this report because the situation of lawyers practising in this east European state situated between Romania and Ukraine can be considered as exemplifying that of lawyers practising in the states of this region which are not members of the European Union.

I. The profession of lawyer

As explained in Recommendation No R(2000)21 of the Committee of Ministers to the member states of the Council of Europe on the freedom of exercise of the profession of lawyer, this activity is governed in its essence by a certain number of rules (B). The exercise of the profession is, for its part, founded on a number of major principles (C). Lastly, the profession of lawyer exhibits a number of general features in every judicial system (A).

A. General

[158] See in this connection the sixth recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.
[159] See in this connection the fifth and seventh recitals of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000. See also Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental freedoms as amended by Protocols Nos 11 and 14, Rome, 4 November 1950. This convention is available at the following address: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=005&DF=8/23/2006
[160] The supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems constitutes Appendix 1 to this study.

In Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe defines "lawyer" as "*a person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters*".

The task of the lawyer is thus quite extensive, as it ranges from legal advice to representing clients in court.

In Moldova, the function of lawyer is performed by professionals who carry the title of "avocat".
The Republic of Moldova has 1300 lawyers[161] for a total population of 3 455 000[162]. This means that there are 36.4 lawyers for every 100 000 inhabitants, which is relatively few compared with the figures for the Council of Europe's founding states and the other member states considered in Part I of the report.

However, that figure puts Moldova ahead of Finland, which has only 34.4 lawyers for every 100 000 inhabitants.

The Republic of Moldova has 2.8 lawyers for every professional judge. This figure is unfortunately very low compared with the average for the thirty-three Council of Europe member states considered in Part I. It compares even less favourably with the ratio of lawyers to professional judges in the Council of Europe's founding states[163].

However, even with such a low ratio of lawyers to professional judges, Moldova ranks above such European Union member states as Finland, Latvia, Lithuania and Poland.

B. Rules governing the profession

The rules governing the essence of the profession of lawyer are mainly those pertaining to the grouping of lawyers in professional organisations (B.1.), those concerning access to the profession (B.2.) and the arrangements for continuing education of its members (B.3.).

B.1. Organisation of the profession

In Moldova, lawyers practise freely and independently in accordance with the Law on the organisation of the lawyer's profession[164].

In order to practise, all lawyers must be registered on the list of lawyers of the national bar association of the Republic of Moldova[165]. In Moldova, lawyers are organised into a single bar association at national level[166] known as "*Baroul Avocaţilor din Republica Moldova*".
Consequently, Moldova has neither regional nor local bars.

The organisation of the profession in Moldova accordingly resembles that found in the majority of the twenty-three non-founding member states of the Council of Europe considered in Part I of this study. It is also similar to the situation obtaining in the Council of Europe's founding states, apart from Belgium, France and Luxembourg, where, strictly speaking, there is no national bar.
It can therefore be concluded that, where this point is concerned, Moldova complies well with Principle V, point 1, of Recommendation No R(2000)21, which reads as follows:

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[161] On the basis of the information supplied to the CEPEJ by the Moldovan government in 2008, it may be concluded that the function of legal adviser does not exist in this country.
[162] According to the 2005 census.
[163] For further details on the figures given for Moldova and the founding states of the Council of Europe, see CEPEJ, European Judicial Systems – 2010 Edition (data 2008): Efficiency and Quality of Justice, Council of Europe Publishing, 201, pp. 257-260.
[164] Law No 1260-XV of 19 July 2002.
[165] Under the amendments made to Law No 1260/XV of 19 July 2002 on the organisation of the lawyer's profession, adopted on 13 July 2006, the Moldovan Ministry of Justice was required to transfer management of the register of law firms and the list of lawyers to the Moldovan national bar association. The national bar association thus acquired wider powers, the Ministry of Justice being responsible henceforth only for issuing licences for the exercise of the profession of lawyer following a decision by the national bar association's Licence Committee. The Ministry of Justice appoints 4 (2 lawyers and 2 law professors) out of this committee's 11 members.
[166] See Article 31 of Law No 1260-XV of 19 July 2002.

"1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers"[167].

B.2. Access to the profession

Principle II, point 2, of Recommendation No R(2000)21 reads as follows:

"All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers".

In Moldova, anyone wishing to become a lawyer must first take a specific examination or undergo prior training. However, the Moldovan delegation who answered the CEPEJ questionnaire for the evaluation of judicial systems did not provide any further information about the kind of training organised or the examination which candidates must pass in order to enter the profession, or about whether both arrangements are combined for this purpose.

In the light of this delegation's positive reply to the question in the CEPEJ questionnaire about the need to pass a specific examination or undergo prior training in order to enter the profession of lawyer, it may nevertheless be inferred that, in Moldova, access to the profession of lawyer complies in part with the principle laid down by the Committee of Ministers in 2000.

It is known that some training is necessary to embark on a legal career, but what is not known if whether the question of moral character is taken into account in the rules governing access to the profession.

B.3. Continuing education and other training

The Republic of Moldova does not have a system of mandatory general continuing education for its lawyers.

It differs in this respect from the majority of the twenty-three non-founding member states of the Council of Europe considered in Part I of this report and the founding states, which all have such a system apart from Italy.

Neither has the Republic of Moldova introduced a system of specialisation. Once again, this distinguishes it from the majority of the twenty-three non-founding member states of the Council of Europe and the founding states, considered in Part I of the report.

It must therefore be concluded that, on this point, Moldova does not comply with the Council of Europe recommendation that legal education, including programmes of continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues and support the proper administration of justice[168].

C. Exercising the profession

The exercise of the legal profession and the provision by it of services to society are highly dependent on its having a monopoly of representation (C.1.) and complying with certain principles and obligations. Lawyers' activities are thus subject to certain rules of professional ethics and quality standards (C.2.) and to a duty to inform clients correctly (C.3.) and show moderation in setting their fees (C.4). Lawyers who fail in these duties are liable to disciplinary proceedings and civil and criminal penalties (C.5.).

C.1. Monopoly of representation

In Moldova, lawyers do not have a monopoly of representation before the courts either in civil cases or in administrative disputes. Neither do they have a monopoly in representing the victims in criminal proceedings. In civil and administrative matters, or when they are victims in criminal cases, people can represent themselves or, when they lack the capacity for this, be represented by a relative or guardian.

[167] See Principle V, point 1 – "Associations" in Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.
[168] Point 3 of Principle II entitled "Legal education, training and entry into the legal profession" in Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer.

Lawyers do, however, have a monopoly of representation in defending suspects and accused persons in criminal cases.

As explained in the CEPEJ report on judicial systems[169], when there is no monopoly of representation, this may mean that citizen's rights are less well protected. The lack of a monopoly may also be seen as the lack of a guarantee as regards the smooth and efficient conduct of judicial proceedings. However, mandatory representation by a lawyer may also be seen as a financial obstacle to wide access to the courts, which is therefore not usually the case in Moldova.

C.2. Rules of ethics and quality standards

In Moldova there are no ethical rules or quality standards relating to the conduct of lawyers.

It should therefore be stressed that, in the area of ethical rules and quality standards for lawyers, the situation in Moldova fails completely to satisfy the concerns of the Committee of Ministers of the Council of Europe as set out in Recommendation No R(2000)21 regarding the need to adopt certain minimum quality standards to ensure that lawyers' responsibilities are properly discharged[170].

This is a matter of particular concern in that Moldova does not organise any mandatory continuing education for lawyers which might make it possible to guarantee a certain degree of service quality.

C.3. Duty to keep clients informed

In Moldova, lawyers are not required by any laws or regulations to keep clients informed, particularly as regards the proceedings they propose to initiate, their length and the consequences of such action.
In this respect, therefore, the situation in Moldova is comparable to that found in France, Ireland, Italy and Luxembourg, where there are no regulations requiring lawyers to keep their clients informed.

C.4. Fees and disputes

As already mentioned in Part I of this study, the Committee of Ministers of the Council of Europe stipulated in Principle III of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer[171] that lawyers should be required to advise their clients on the financial costs of their cases.

In Moldova, lawyers are required under Article 22, paragraph 1.h) of Law No 1260-XV of 19 July 2002 to inform their clients of the exact amount of their fees. This information must be recorded in the legal assistance agreement which lawyers sign with their clients. Lawyers who fail to comply with this requirement may be banned from practising.

In this respect, therefore, the situation in Moldova is identical to that found in the majority of the twenty-three Council of Europe member states considered in Part I of this study in which the Committee of Ministers recommendation has been implemented. It is also identical to the situation in Belgium, Denmark, the Netherlands, the United Kingdom, Norway, Sweden, France, Ireland and Italy, where the obligation for lawyers to inform their clients about their fees and the costs of proceedings derives from codes of professional ethics and/or legislation.

In Moldova, as in the majority of the thirty-three Council of Europe member states considered in Part I of this study, there is a principle that lawyers are entitled to a remuneration and to reimbursement of the costs incurred in defending their clients' interests, and a principle that fees are negotiated freely between lawyers and their clients. Lawyers' fees are regulated neither by the Moldovan national bar association nor by the government under legislation.

[169] See CEPEJ, European Judicial Systems – 2010 Edition (data 2008) : Efficiency and Quality of Justice, Council of Europe Publishing, 2010, p.264.
[170] Seventh recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.
[171] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle III – Role and duty of lawyers, point 3.

Lastly, it should be stressed that there is no procedure for challenging fees in Moldova. It is possible, however, to lodge a complaint against a lawyer's services with the national bar association's board of ethics and discipline.

C.5. Disciplinary proceedings in general and sanctions

In Principle VI of its Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, entitled "*Disciplinary proceedings*", the Committee of Ministers of the Council of Europe states the following:

"1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers"[172].

The principle that bar associations or other lawyers' professional associations should be responsible for or be entitled to participate in disciplinary proceedings concerning lawyers is well respected in Moldova. In accordance with Article 41 of Law No 1260-XV of 19 July 2002 on the organisation of the lawyer's profession, the Moldovan national bar association's board of ethics and discipline hears complaints against lawyers' services and cases concerning alleged breaches of rules of conduct and professional ethics.

From this point of view, the situation in Moldova is the same as the situation found in the twenty-three Council of Europe member states considered in Part I of this report and that described in the Council of Europe's founding states.

Regarding the types of disciplinary proceedings, the Moldovan delegation who answered the CEPEJ questionnaire for the evaluation of judicial systems pointed out that all disciplinary proceedings are brought for breaches of ethics.

Where sanctions are concerned, the Moldovan bar association's board of ethics and discipline most commonly issues reprimands. However, suspension and dismissal are also common disciplinary sanctions. The board of ethics and discipline also has occasion to use other types of disciplinary sanctions, although these are not specified.

Under these circumstances, the situation in Moldova must be regarded as being the same as that found in the Council of Europe member states dealt with in Part I of this study which answered the question about disciplinary proceedings in the CEPEJ questionnaire for the evaluation of judicial systems, where the majority of disciplinary proceedings are brought for breaches of professional ethics and/or incompetence.

Furthermore, as in the states studied in Part I of the report which were able to provide the Council of Europe with statistics, reprimand is the sanction most commonly imposed on lawyers, followed by suspension, dismissal and fines.

II. The lawyer as an agent for enhancing the efficiency and quality of judicial proceedings

This section is devoted to consideration of the influence which lawyers practising in Moldova can have on the efficiency and quality of judicial proceedings.

We will consider the means available to lawyers for promoting swift and efficient judicial proceedings (A), the requirement of due diligence (B) and the impact which information and communication technologies may have on the exercise of the profession (C). Lastly, we will focus on the other activities in which Moldovan lawyers may engage in addition to practising as lawyers and the effects this may have on the efficiency and quality of judicial proceedings (D).

[172] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle VI – Disciplinary proceedings, points 1 and 2.

A. Means which lawyers have at their disposal

The means available to lawyers consist essentially of rights established in legal texts to help expedite judicial proceedings in civil, administrative and criminal cases (A.1.).

A.1. Which means for which proceedings?

Unfortunately, lawyers in Moldova do not have such means at their disposal, whether in civil, administrative or criminal matters.

Neither does Moldovan law make it obligatory for lawyers to file written submissions (in the form of conclusions, arguments etc) in support of their claims when judicial proceedings are initiated.

On the other hand, Moldovan lawyers can have recourse to various means of alternative dispute resolution when judicial proceedings are not progressing fast enough or when they fail to provide a solution satisfying all the parties to a dispute (A.2.).

A.2. Methods of alternative dispute resolution

Mediation, conciliation and arbitration are the three main methods of alternative dispute resolution in Moldova.

Mediation is regulated by the Law on mediation.

Under Article 4, paragraph 3 of this law, in the course of a mediation procedure the parties may, by mutual consent, be assisted by their respective lawyers.

Conciliation, which is the second main method of alternative dispute resolution in Moldova, is possible in civil cases as well as in the prosecution of criminal cases.

In civil matters, the lawyer representing a party to a dispute has the opportunity to reach a settlement to close the case under conciliation procedure if such a right is expressly provided for in the rules of conciliation. If a lawyer reaches a settlement on the basis of a right not provided for in the rules of conciliation, the mandate given to him by the person he represents will be declared null and void pursuant to Article 81 of the Code of Civil Procedure.

Lastly, all civil cases may be settled by arbitration provided the parties to the case have given their express agreement to an arbitration clause. Where there is no such clause, a lawyer cannot ask for a civil case to be transferred to an arbitration body. If he does, his mandate will be declared null and void.

Regarding the question of the availability to lawyers of ADR procedures, the situation in Moldova is therefore comparable to that found in thirteen of the non-founding states of the Council of Europe studied in Part I of this report[173] and to that found in the founding states, where lawyers can basically have recourse to mediation, conciliation and arbitration to safeguard the interests of the citizen they represent.

It should also be mentioned that Moldovan lawyers are given training in these three methods of alternative dispute resolution by the Moldovan national bar association. The training courses in ADR organised by the Moldovan bar are provided by non-governmental organisations or international institutions.

B. Due diligence of lawyers and sanctions if they breach this obligation

In this part of our study we will look at breaches of the lawyer's obligation of due diligence through abuse of process (B.1.). We will then consider the remedies available to litigants whose lawyer is guilty of inaction or abuse of process (B.2.). Lastly, we will address the issue of quality control as it applies to legal aid. Under certain circumstances, this type of control can prevent lawyers from failing to perform due diligence (B.3.).

[173] Austria, Croatia, Finland, Germany, Greece, Latvia, Lithuania, Montenegro, Poland, Portugal, Slovakia, Spain and Switzerland.

B.1. Abuse of process

As we explained in Part I of this study, abuse of process consists of excessive or unreasonable use of process in the context of an adjudication process[174].

Upon reading this definition, one could say that a lawyer commits abuse of process when he or she instigates legal proceedings with the sole purpose of harming the opposing party, multiplies the legal proceedings even though the additional cases will not necessarily improve the client's legal situation, or unduly prolongs proceedings by being negligent or by needlessly complicating the arguments.

Contrary to the situation in the majority of the Council of Europe member states dealt with in Part I of this study, abuse of process is not punishable in Moldova, neither when it is committed in civil cases, nor when it takes place in administrative cases, nor even when a lawyer resorts to it in a criminal case.

Litigants do however have the possibility of obtaining damages for inaction or professional misconduct on the part of their lawyers (B.2.).

B.2. Remedies available to litigants in the event of inaction or professional misconduct

In Moldova, under Article 7 of the Code of Civil Procedure, any person who has an interest in so doing may apply to the courts to seek redress for a violation of rights, freedoms or legitimate interests.

In this respect, the situation of Moldovan litigants can be regarded as equivalent to that of litigants in the twenty-three non-founding member states of the Council of Europe studied in Part I of this report, and to that of litigants in the founding states of the Council of Europe. The latter can make use of existing judicial procedures to claim damages in the event of inaction or professional misconduct on the part of their lawyer.

The only difference between the situation of Moldovan litigants and that of litigants in the Council of Europe's founding states is that, in the founding states, an amicable procedure always precedes the procedure for claiming compensation for damage caused by inaction or professional misconduct on the part of a lawyer.

B.3. Quality control of legal aid

In its Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, the Committee of Ministers of the Council of Europe recommends, where legal aid is concerned, that all necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers[175].
It also recommends that lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from public funds[176].

The introduction of quality control of legal aid is one of the methods which can be used to ensure that citizens making use of such aid are not disadvantaged by the fact that they are unable, or only partly able, to pay their lawyers.

Quality control of the legal aid provided to citizens can be performed at two levels. It can occur *a priori* when the lists are drawn up of lawyers who can provide citizens with legal aid, or it can occur *a posteriori* once the services have been rendered. This type of control is performed systematically.

In Moldova, quality control has been introduced by the national bar association to ensure that persons making use of legal aid are not provided with low-quality services.

It appears, therefore, that in this respect Moldova complies with Principle IV of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer.

C. The impact of lawyers using ICT on the efficiency and quality of judicial proceedings

[174] The term "adjudication process" refers to all actions which it is appropriate to take in order to obtain a ruling in a case.
[175] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Principle IV – Access for all persons to lawyers, point 1.
[176] Idem, Principle IV – Access for all persons to lawyers, point 4.

In the Republic of Moldova, as in the other Council of Europe member states, the impact which the use by lawyers of new information and communication technologies can have on the efficiency and quality of judicial proceedings depends to a considerable degree on the computerisation of law firms.

C.1. Computerisation of law firms

However, the delegation from the national bar association who answered the supplementary questionnaire to the CEPEJ questionnaire for the evaluation of judicial systems did not have access to statistics on the percentage of lawyers properly equipped for electronic communication with their fellow lawyers, court registries and other judicial players.

C.2. Access to ICTs

As regards training for lawyers in new technologies, it appears that lawyers do not have access to any specific training in new information and communication technologies.

C.3. Regulation of electronic communication

It also appears that electronic communication by lawyers is not subject to any particular regulations (in terms of certification or electronic signature).

In the light of the foregoing, new information and communication technologies do not seem to be factors which could enable Moldovan lawyers to enhance the efficiency and quality of judicial proceedings, given the non-existence of regulations relating to these new tools.

D. Supplementary activities of lawyers and their impact on the efficiency and quality of judicial proceedings

The sixth recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer[177] stresses the importance of the independence of lawyers in the discharge of their professional duties.

Yet the fact that a lawyer may be appointed as a mediator (D.1.) or as an arbitrator (D.2.) while continuing to exercise the profession can have an impact on his or her independence and, consequently, on the efficiency and quality of justice.

Moreover, the fact that a lawyer may become a judge might detract from the impartiality of judges (D.3.).

D.1. The lawyer as mediator

In Moldova, under Law No 134-XVI of 14 June 2007 on mediation, the exercise of the profession of lawyer is compatible with appointment as a mediator.

However, when a lawyer is chosen as a mediator in a particular case, he may not subsequently represent the interests of any of the parties to the case[178].

The question of possible conflicts of interest is therefore well regulated in Moldova, as it is in Poland, the Former Yugoslav Republic of Macedonia and Switzerland, and in Denmark (as regards Moldova's position in relation to the group of founding states of the Council of Europe).

D.2. The lawyer as arbitrator

Law No 23-XVI of 22 February 2008 on arbitration also provides that the practice of the profession of lawyer is compatible with the function of mediator.

[177] Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.
[178] Article 6, paragraph 2 of Law No 134-XVI of 14 June 2007 on mediation.

Before accepting an appointment as arbitrator, however, a lawyer is required to disclose any circumstances which might cast doubt on his impartiality and independence or anything which might contravene a possible agreement between the parties to the dispute. Pursuant to the provisions of the Law on arbitration, any arbitrator may be challenged by the parties to a case if there are circumstances which might detract from his impartiality and independence or if he lacks the qualities required for the handling of the case[179].

In this respect, the Moldovan regulations governing the exercise of the dual function of lawyer and arbitrator resemble those in force in the majority of the Council of Europe's founding states, where lawyers acting as arbitrators must be impartial, independent of the parties to the case and qualified for the task assigned to them.

D.3. Can a lawyer become a judge?

Under Article 6, paragraph 2 of Law No 544-XIII of 20 July 1995 on the status of judge, any lawyer aged 30 or more who possesses at least five years' professional experience as a lawyer and has passed the qualifying examination can be appointed as a judge at the court of first instance.

However, no details are given about whether such lawyers are obliged to give up their practice in order to be fully eligible to serve as a judge.

The Code of Civil Procedure and the Code of Criminal Procedure do however regulate questions relating to the conflicts of interest which may arise when a person is both judge and lawyer. Under these circumstances, it would seem that a lawyer who satisfies the above requirements and passes the qualifying examination can become a judge without giving up his initial profession.

It thus appears that the combination of the functions of judge and lawyer is not regulated in the same way in Moldova as in the Council of Europe's founding states, where a lawyer cannot embark on a judicial career unless he ceases to practise his profession.

Moldovan law is nonetheless similar to Belgian and Luxembourg law, under which a lawyer can be appointed as a substitute judge at the Court of Appeal, a court of first instance, a labour court, a commercial court or a district court while continuing to practise as a lawyer.

III. Partial conclusions

In the light of the information contained in this chapter we may conclude that, in Moldova, the organisation of the profession of lawyer and access to the profession are regulated in a satisfactory manner in relation to the recommendations made by the Committee of Ministers of the Council of Europe in 2000.

However, the questions of continuing education and specialisation for lawyers are not dealt with in the rules governing the profession.

As regards the exercise of the profession in Moldova, it seems to be difficult – because the law makes no provision for a monopoly of representation – and relatively unregulated. In Moldova, there are no quality standards applicable to the services provided by lawyers, no obligation to keep clients informed about the proceedings initiated and no procedure for disputing fees.

Only disciplinary proceedings and sanctions are covered by the provisions of Law No 1260-XV of 19 July 2002 on the organisation of the profession of lawyer.

Disciplinary proceedings fall within the jurisdiction of the board of ethics and discipline of the Moldovan national bar association, an impartial body independent of the Ministry of Justice and the judiciary, as required by points 1 and 2 of Principle VI of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.

The most common disciplinary sanctions are reprimand, suspension and dismissal, as in most of the Council of Europe member states considered in Part I of this report.

[179] Article 14 of Law No 23-XVI of 22 February 2008 on arbitration.

It seems, therefore, that lawyers are not really fully able to play their part in enhancing the efficiency and quality of judicial proceedings.

This statement is all the more true in that Moldovan lawyers do not have means established in legal texts enabling them to expedite judicial proceedings in civil, administrative and criminal cases, except for the availability of methods of alternative dispute resolution, which, broadly speaking, are organised and regulated in the same way as in the Council of Europe's founding states.

This finding is further justified by the lack of any obligation of due diligence for lawyers and the lack of any related sanctions, particularly when lawyers' services are provided in the context of legal aid, and by the lack of opportunities for lawyers to use information and communication technologies to enhance the efficiency and quality of legal texts.

Only the arrangements governing supplementary activities of lawyers seem to satisfy the concerns of the authors of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer[180] regarding the independence of lawyers in the exercise of their profession.

[180] See the sixth recital of Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000.

Conclusion

1. In Part I Chapter I of this study, it appears that lawyers are well represented both in the 23 non-founding members of the Council of Europe and in its 10 founding member states. In Romania, lawyers are numerous enough to allow citizens to use their services easily and to ensure their proper representation in court. Unfortunately, this is not the case in Moldova.
   If a sufficient number of lawyers to represent citizens before national courts is not in itself a guarantee of the existence of the rule of law in each state studied, this figure is still an indication of the possibility for citizens to have their rights defended effectively and efficiently. It would be desirable to see an increase in the number of Moldovan lawyers in the years to come.
2. In addition, the recommendations of the Committee of Ministers of the Council of Europe concerning lawyers' professional bodies to defend lawyers' interests seem well respected, especially in the founding member states of the Council of Europe, in Romania and in Moldova.
   On this point, it should be noted that the existence of a national association representing lawyers is essential to protect their interests and those of citizens through the promotion of a coherent set of ethical rules. The absence of such an organisation can create consistency issues in the ethical rules that are adopted, and affect in some way the effectiveness of justice.
3. Access to the legal profession (which helps to guarantee the quality and efficiency of justice) is controlled in the 33 member states of the Council of Europe considered in Part I Chapter I of this study – even in Spain since the entry into force in October 2011 of Law 34/2006 on access to the profession of lawyer. The situation is the same in Romania, which is examined in Part II Chapter I of this study and in Moldova, which is examined in Part II Chapter II.
   Continuing education (which also tends to ensure the quality and efficiency of justice) is mandatory in the founding member states of the Council of Europe and in 12 out of its 23 non-founding members. It is also mandatory in Romania, but not in Moldova.
   If the lack of training is counterbalanced in some Council of Europe states examined in Part I of this study through very organised specialisation schemes for lawyers, this is not the case in Moldova.
   We must therefore conclude that the second principle of the Council of Europe Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer relating to legal and continuing education for lawyers and access to the profession is well respected in the 10 founding members of the Council of Europe and in Romania, but only partially in Moldova.
4. With regard to the exercise of the legal profession, it is clear that the reservation of representation to members of the legal profession is not widespread in the founding states of the Council of Europe, be it in civil or administrative matters. However, this reservation of representation is promoted in many of these states in criminal matters in the framework of the defence of criminal offenders' interests. Such reservation of representation would be desirable in criminal matters in Romania[181] and Moldova, at least concerning the interests of defendants.
   It should be stressed that the partial or total lack of such a monopoly could have an impact on the quality of proceedings and court decisions.
5. Quality standards necessary to the proper performance of the legal profession exist in all the founding members of the Council of Europe as well as in Romania, either in the form of rules enacted by the judicial order or in the form of codes of conduct or ethical codes enacted by professional organisations of lawyers. These do not exist in Moldova.
   The adoption of such standards should be promoted, especially in Moldova.
6. Lawyers' duty to advise, namely the duty of lawyers to inform their clients regarding cases and their likely outcome, but also lawyers' duty to inform their clients on the financial costs of these cases, is itself regulated in 12 out of the 23 non-founding members of the Council of Europe. This does mean, however, that in the other half of these 23 states, the duty to advise is not specifically regulated, as is the case in most founding members of the Council of Europe.[182] If the duty to advise is more or less regulated in Romania, it is not regulated at all in Moldova.
   The member states of the Council of Europe should therefore be encouraged to comply with the third point of principle III relating to the role and duties of lawyers in Recommendation Rec(2000)21 of the Council of Europe.

181 However, a monopoly of representation does exist in some matters in Romania, but not in Moldova.
182 It should, however, be noted that if there is no specific rule in these states on the duty to advise, ethical rules that lawyers provide for themselves can be interpreted to address this legal hiatus.

7. The Council of Europe recommendation on lawyers' duty to advise their clients on the financial costs of their case[183] is well followed in all countries examined except in Moldova. Fee-dispute proceedings exist in almost all 33 member states of the Council of Europe examined in Part I of the study as well as in Romania, and are generally organised by Bars. Such proceedings organised by a national Bar do not exist in the Moldovan judicial system.
8. Within the 33 states of the Council of Europe considered in Part I of this study, as well as in Romania and Moldova, which are examined in Part II, disciplinary procedures and sanctions belong to the exclusive competence of Bars, sometimes together with the Ministry of Justice or the judges who preside over the dispute.
   The recommendation of the Council of Europe whereby Bars or other professional associations of lawyers should be responsible for the enforcement of disciplinary measures against lawyers or, where appropriate, should have the right to be involved,[184] is well respected, especially in the founding states of the Council of Europe, in Romania and in Moldova.
9. In view of the elements included in Part I Chapter II of this study, it appears that, generally speaking, lawyers play an important role in enhancing the efficiency and quality of judicial proceedings by the application of professional skill in (a) focusing the relevant issues; (b) obtaining and providing to the court in an efficient and effective manner evidence relevant to the case; and (c) assisting the court to identify the relevant law. The very involvement of lawyers in the process, quite apart from its necessity to secure the fair representation of parties, should also contribute significantly to the efficiency and quality of the judicial process.
10. Lawyers practising in the founding states of the Council of Europe have the legal means to advance the procedures they have brought or in which they represent a party, in eight out of 10 states in civil cases, in six out of 10 states in administrative matters and in five out of 10 states in criminal matters. The situation is roughly comparable in Romania, but is not at all so in Moldova.
    It seems appropriate to recommend Romania to provide more legal means to allow lawyers to defend the interests of their clients actively and effectively. As for Moldova, everything remains to be done in this area.
11. The situation described above is counterbalanced by the fact that Romanian and Moldovan lawyers have ADR schemes that are designed and regulated in the same way as in the founding states of the Council of Europe to relieve pressure on judicial systems and to promote the resolution of disputes between parties.
    Training for these techniques is generally supported by national, regional or local Bars together with institutions or organisations specialising in ADR.
12. Lawyers may be punished for abuse of process in the founding states of the Council of Europe and in Romania. In addition, citizens of these states all have opportunities to claim damages in case of inaction or misconduct by their lawyers.
    Citizens therefore seem to have the necessary means for the recommendation of the Council of Europe contained in paragraph 3 of Principle III of Recommendation Rec(2000)21 on the free exercise of the profession of lawyer to not go unheeded, except in the case of Moldova, where the recommendation should be put into practice.
13. However, the situation is not as positive regarding quality control of legal aid provided to lower-income groups. Among the founding members of the Council of Europe, only Belgium and the United Kingdom have such control. Furthermore, while Romania also provides for legal-aid control, this is not the case in Moldova.
    The principles set out in Part IV of Recommendation Rec(2000)21 on the free exercise of the profession of lawyer and on access of any individual to a lawyer should be repeated.
    We emphasise that the quality control of legal aid provided to lower-income groups is a powerful tool for allowing any individual to have effective access to legal services by independent lawyers and to encourage lawyers to provide their services to the economically weak without having their services and duties affected by the fact that they are paid in whole or in part by public funds.
14. Regarding the impact of ICT used by lawyers on the efficiency and quality of judicial proceedings, although the conclusion is that lawyers from the member states of the Council of Europe are fully equipped and trained for effective communication with their colleagues, with courts, bailiffs and other actors of the legal world, Romanian and Moldovan lawyers are definitely not so equipped or trained.

183 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, Part III '*Principle III - Role and duty of lawyers*' point 3, p. 1.

184 *Ibid.*, Part VI '*Principle VI – Disciplinary proceedings*', point 2, p. 6.

A breakthrough on this issue would therefore be desirable to allow Romanian and Moldovan practitioners to make the most of ICT, with the primary aim of making judicial and extrajudicial proceedings more efficient.

15. Finally, as for lawyers engaging in activities other than their own, only the combination of the legal profession with the office of judge is regulated in the founding states of the Council of Europe and Moldova. This is not the case in Romania.

The combination of the activities of lawyer and mediator on the one hand and the activities of lawyer and arbitrator on the other hand is specifically regulated in some of the founding members of the Council of Europe, but not in Romania or Moldova.

In our view, principles should be developed at different levels in the countries concerned, so that the lawyer appointed as an arbitrator or as a mediator should not lose his or her independence and should not thereby affect the efficiency and quality of the proceedings started or contemplated.

In this context, the call issued by the drafters of Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer[185] of the Council of Europe in recital 6 about the importance of the independence of lawyers in the exercise of their profession, should be repeated. Legal instruments to preserve this independence should be developed, especially in case of a lawyer combining two or more offices.

185 Recommendation Rec(2000)21 on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers of the Council of Europe on 25 October 2000, p. 1. This recommendation is available at the Council of Europe, at https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282000%2921&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383