EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE
(CEPEJ)

ACCESS TO JUSTICE IN EUROPE

Report prepared by the Research Team
on enforcement of court decisions
(University Nancy (France) / Swiss Institute of comparative law)
and discussed by the CEPEJ-GT-EVAL at their 8th meeting

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Julien LHUILLIER
Graduate of and research lecturer at the University of Nancy Law Faculty (France).
Scientific expert of the CEPEJ working group on mediation.

Daria LHUILLIER-SOLENIK
Graduate of the Law Faculties of the European University of Human Sciences in Minsk (Belarus) and the University of Nancy (France).
Research lecturer at the University of Nancy Law Faculty (France)
Former legal adviser to Vlasova and Partners, specialists in international business law.

**La Faculté de Droit,
Sciences Économiques
et Gestion
de l'Université Nancy 2**

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The result has been the creation of collective competences from years of practice with different methodologies: modelling techniques, econometrics, methods of technology evaluation and foresight, experimental economics, to mention only a few.

In addition, BETA has integrated since January 2005 a research team located at the University Nancy 2, which specialises mainly in the economics of law and in social economics.

In June 2007 BETA numbered some 99 staff members with permanent positions (mainly professors and assistant professors of the university, researchers, administrative and technical personnel) and over 70 non–permanent staff (PhD students and post–docs).

To manage the laboratory, BETA set up internal structures : 2 components in Strasbourg organised around some ten research areas and one component in Nancy.

The first component, called « Economics of Change and Management of Systems » (Echanges) gathers all researchers whose work focuses mainly on topics dealing with the evolution of economic structures. It concentrates on the creation, distribution and diffusion of knowledge: from the firm to national systems of innovation as well as training systems. The research carried out insists on the necessary dialogue between conceptual

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The second component, called « Economic Theory and Modelling » (Theme), focuses the core of its activity on economic theory and modelling, as indicated by its labelling. It brings together a group of researchers who share a common methodology, which is characterised by a strong quantitative approach, be it from a theoretical, experimental or econometric point of view. The activity is concentrated therefore around two main topics related to the theory of modelling in the areas of micro and macro–economics: namely on the one hand experimental economics, which complements micro–economic modelling but at the same proves different in its approach and on the other hand the economics of risk and the environment. The history of economic thought rounds up the research coverage of BETA. It is one of the most original features of the research laboratory.

Finally the third and most recent component, called « Economic Research on Governance, Law and Social Issues » (Regles) is located at the University Nancy 2. It became part of BETA in January 2005. It focuses on the economics of law, with the aim to develop an analysis of the dynamics of legal systems, particularly in connection with financial systems. Social economics and its relation to labour and family law represent a second research area. Regulation of risks is one of the research areas which in its dimension of economics of risks as well as in its dimension of economics of property rights contributes to the integration of both sites. The analysis of legal systems is an additional area of competence of Regles.

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Nous contribuons aux projets de recherche financés par les instances suisses et étrangères.

Glossary

For the purposes of the present study the terms listed below have the following meanings:

Access to justice: all the legal and organisational factors affecting the availability and effectiveness of judicial services. Access to justice should enable society to deliver a maximum number of decisions at reasonable cost to the taxpayer, with quality a prime requirement. Access to justice must also give the individual user a quality decision at – a prime requirement – reasonable cost to him or her.

Legal aid (*aide légale/aide judiciaire*): assistance provided by the state to persons who do not have sufficient financial means to defend themselves in court (or to bring judicial proceedings). As thus defined, legal aid is mainly concerned with legal representation in court. However, legal aid may also be concerned with legal advice: not everyone who encounters a legal problem will necessarily take the matter to court (see Fee structure).

Benefit: the objective as actually achieved through quality-oriented access to justice. It has two complementary aspects, the social and the private, according to whether the object is to meet the interests of the community as a whole (social benefit) or those of the individual user (private benefit) (see Benefit and Efficiency).

CEPEJ-GT-ACCES: the study advocates setting up a CEPEJ working party on access to justice. It would be composed of practitioners from representative member countries and the study would provide them with many areas for work and investigation.

Citizen: the individual as provider of assistance to the justice system (see User).

Consultation on justice: one aspect of democratisation of justice (see this term), concerned with promoting citizen involvement in thinking about the future and role of the justice system.

Contractualisation of justice: one aspect of democratisation of justice (see this term). Contractualisation of justice is to be understood as one principle of sound justice administration providing possible guidance in dealings between the courts and the user. It has to do with a court's taking into account the needs expressed by the parties when it decides the procedural arrangements.

National correspondents: to obtain reliable information the CEPEJ has a number of correspondents in the Council of Europe member states. Unless otherwise specified, it is they who assembled the data analysed in this study.

Cost: the total investment in meeting the interests of the community as a whole (social cost) or those of the individual user (private cost). The cost of access to justice is not solely financial: because providing an effective service requires investment in time and quality, it also depends on other, less directly quantifiable indicators (see Benefit and Efficiency).

Procedural cost: the sum total of procedural expenses and legal representation fees (see Fee structure).

Democratisation of justice: the process according to which the justice system, deriving its legitimacy from the people, increasingly involves the citizen (a growing role in the taking of decisions, the increasing part played by private funding in justice costs, etc.). Ultimately it has to do with the justice system's growing enlistment of the citizen (see Judicialisation and Popularisation of justice).

Member states: all the countries which, as members of the Council of Europe, took part in the evaluation of judicial systems (2004-2006). Also their legal apparatus if possessing an autonomous legal system.

New member states: countries which joined the Council of Europe after 1 January 1990; the older member states are those which joined the Council of Europe before 31 December 1989. The distinction allows us to divide the member states into two groups of 23 on the basis of their date of accession (the Council comprised 46 members at the time of the present evaluation).

Older member states (see new member states)

Contingent fees: additional legal representation fees which the user is sometimes asked to pay in the form of a proportion of any compensation awarded by the court or a bonus for a successful result. Contingent fees are prohibited in most European legal systems because of their unforeseeability for the user and the conflict of interest that may arise for the legal representative. However the prohibition is not unanimous. (See also Fee structure.)

Fee structure (*frais de procédure*): the classic procedural costs are made up of court fees (the charge for institution of proceedings) and lawyer's fees. Costs of alternative procedure are those falling to the user of alternative methods of dispute resolution (mediation, etc.). This study treats as procedural expenses only those sums of money payable by the user after any grant of total or partial legal aid (see Legal aid).

Revised scheme: the questionnaire which the CEPEJ sent the national correspondents in the member states to obtain the information needed for evaluating legal systems in Europe. It was revised between the pilot exercise in 2004 and the first report in 2006.

Judicialisation: this has two meanings. It refers firstly to growing involvement of the courts in reviewing the lawfulness of official decisions (e.g. decisions by elected representatives, heads of enterprises or administrative authorities), and secondly to a tendency to prefer the courts for dispute resolution which could be handled by other mechanisms, in particular mediation or friendly settlement. The study underlines the distinction by referring to popularisation of justice and democratisation of justice (see these terms).

Appropriateness of bringing proceedings: this is largely a question of the foreseeability of the length of proceedings and of procedural costs (see Transparency).

Popularisation of justice: here, litigation (formerly beset with political, legal and social obstacles) as an option which much-strengthened powers of the judiciary, equality of all before the law and the media impact of certain cases are making increasingly thinkable. The result is growing use of the justice system by users (see Judicialisation of justice and Democratisation of justice).

Foreseeability of procedural costs: this refers to knowability for the user of the procedural costs of legal representation. Not to be confused with transparency of procedural costs (see this term).

Privatisation of justice: one aspect of democratisation of justice (see this term). It refers to the growing element of private funding in overall judicial costs.

Quality (*quality norms or standards*): quantitative or qualitative criteria indicative of, or for checking on, compliance with the minimum requirements of access to justice.

Efficiency: value in return for capital allocated or any sum of money invested, comparable to an individual's efficiency in his or her job. It is benefit in relation to cost (see these terms).

Transparency of procedural costs: ready availability of information about procedural expenses and legal representatives' fees. Transparency is a prime indicator of the appropriateness of bringing proceedings (see this term). Not to be confused with foreseeability (see this term).

User: the individual user (or would-be user) of the justice system (see Citizen).

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PART ONE: EFFICIENCY OF ACCESS TO JUSTICE AS AN IMPERATIVE

A comparison of different legal systems cannot be based solely on a comparison of abstract rules. The information gathered by the CEPEJ in the field of access to justice[1] clearly shows the importance of the application of these rules and the means employed to give effect to them: how they are actually implemented must therefore be taken into account.

Could a cost/benefit ratio measuring the efficiency of access to justice prove useful in this regard? It is true that some terms sometimes frighten legal practitioners because of their productivist connotations. Nonetheless, the polysemy of the term "efficiency" perfectly embraces the dual investment required of the public judicial service. Efficiency is not only the profitability of the capital used or of a sum invested, but also the performance of someone in their work. In addition to clearly established theoretical rules, the public judicial service requires the deployment of financial and human resources in order to attain its objective, including in the narrower context of "access to justice".

Another feature of the justice system is that it combines a private interest, which concerns the individual only, and a public or social interest, which reflects the demand of society as a whole. In both cases the satisfaction of the individual is addressed, but in one case (private demand), only what concerns him or her is considered, while in the other (social demand), what he or she has in common with other individuals[2] is taken into account. The efficiency of access to justice will therefore consider both these interests, social and private. The social efficiency of access to justice could therefore be understood as the possibility of handing down a maximum of decisions at a reasonable cost to the taxpayer with quality as an imperative; private efficiency, on the other hand, means presenting each user with a high-quality decision at a reasonable cost to him or her as an imperative. Social efficiency (social cost/social benefit) and private efficiency (private cost/private benefit): both aspects of the efficiency of access to justice have the same components: they imply a cost and a benefit.

A. The first component of efficiency: cost

The cost of access to justice is not simply financial; because effective services demand an investment in terms of both time and quality, it is also based on other, less directly quantifiable elements. The bearer of the cost will be different according to whether the aim is to satisfy the interests of the community as a whole (social cost) or those of the user taken in isolation (private cost).

1. Social cost of access to justice

The social cost of access is usually borne by the member state, the court or the judge in charge of the case. In the final analysis, it is therefore the public authorities and their agents who seek to satisfy the interests of the community. Of course, where the investment is financial, the sums allocated come initially from the taxpayer; they are, however, reallocated by the authorities in the budget of the judicial system; strictly speaking, therefore, the cost is not borne directly by the user. Where the investment is organisational, efforts are made by the different links in the chain of the judicial service (from the legislator who passed the law to the judge responsible for applying it), in the name of proper administration of justice.

2. Private cost of access to justice

The private cost of access to justice is borne by users, either directly or through the representatives they pay. While the financial investment (ie legal costs and lawyers' fees, excluding legal aid) is borne almost exclusively by users, the material investment (preparation of case-file, presentation of causes of action, preparation of the defence etc) is sometimes the responsibility of a specialist paid by the user, first and foremost his or her lawyer.

3. Complementary nature of the social cost and private cost of access to justice

Because it must simultaneously satisfy a public interest and a private interest, the operation of a complex service such as the judicial system is based on the sum of the investments, both social and private. It is not a matter of "setting the selfish individual against the group"[3], since in both cases the individual considers his or her interest, either in isolation as a user or collectively with the whole of society. Far from conflicting, the social cost and the private cost of access to justice are linked and complementary.

B. The second component of efficiency: benefit

When an attempt is made to assess efficiency, the benefit considered cannot only be the objective actually achieved. This objective is protean (ie profitability of capital, effectiveness of services etc) and it varies above all according to whether the aim is to satisfy the interests of the community as a whole (social benefit) or those of the user taken in isolation (private benefit).

1. Social benefit of access to justice

For the community, the optimum social benefit as far as access to justice is concerned most certainly means responding to user demand for justice through high-quality decisions. This objective implies the re-establishment of legal certainty in a society (because the social benefit benefits society as a whole), but it may be seen at the different levels of the justice system: for the

member state it is reflected in user confidence and satisfaction with regard to the justice system; for the courts it is reflected in a reduction of the case-load; and for judges it is reflected in the lack of sentences and decisions set aside because of a miscarriage of justice or failure to comply with their professional obligations.

2. Private benefit of access to justice

For the user taken in isolation, the optimum private benefit as far as access to justice is concerned most certainly means obtaining a judicial decision that removes the uncertainty of his or her situation. This objective implies access to an impartial and independent authority, as well as effective judicial mechanisms.

3. Complementary nature of the social benefit and private benefit of access to justice

The data gathered by the CEPEJ on access to justice places our study at the meeting-point of the work of two CEPEJ working groups: the Working Group on the evaluation of judicial systems[4] - which devotes part of its report to access to justice – and the Working Group on quality of justice[5] - which focuses one of its four main areas of work on access to justice.

The information provided by national correspondents to the Working Group on evaluation is of direct relevance to the discussions on the quality of justice: the social benefit of access to justice directly serves the public interest and illustrates the social cohesion role of the public judicial service. The private benefit of access to justice, on the other hand, serves the private interest and ensures legal certainty in a given case. There are not therefore three types of benefit that replace each other in different circumstances (a purely social benefit, a purely private benefit and a combined social and private benefit), but two that usually co-exist, social benefit and private benefit. A measure that is of benefit both to society and the user is not therefore a combined interest: it benefits two distinct interests in a complementary fashion.

C. An imperative: to improve social efficiency and private efficiency

We will began by highlighting the “social efficiency – private efficiency” duality and then seek to illustrate its complementary nature.

1. Efficiency of access to justice

While the efficiency of access to justice is composed of a “social cost → social benefit” relationship (social efficiency) and a “private cost → private benefit” relationship (private efficiency), is it not also composed of “social cost → private benefit” and “private cost → social benefit” relationships?

1.1. Lack of an exclusive "social cost → private benefit" correlation

Are there situations in which the cost is purely social and the benefit purely private? If so, it would not be possible to reduce the efficiency of access to justice simply to social efficiency and private efficiency.

In principle, this type of situation – in which public resources are permanently allocated to the case of a single user – should not exist in the judicial systems of modern European democracies. Such a situation would at best represent waste and at worst favouritism or misappropriation of public funds. It should not therefore be included in the framework of proper administration of justice.

Consequently, where the cost is purely social, it can be stated that the measure always aims to benefit society as a whole (social benefit), even if it sometimes also has repercussions on the case of one user in isolation.

1.2. Lack of an exclusive "private cost → social benefit" correlation

Are there situations in which the cost is purely private and the benefit purely social? This hypothesis would also contradict the model of efficiency of access to justice composed solely of social efficiency and private efficiency.

Such a situation would correspond to that of a philanthropic user who financed, out of his or her own pocket and in connection with his or her own case, access to justice for the whole community, except him- or herself. It is difficult to imagine the institutionalisation of such a system in a member state[6].

Consequently, where the cost is purely private, it can be said that the measure always aims to benefit first and foremost the user in isolation (private benefit) and that its possible benefit to society as a whole is only incidental.

1.3. "Social efficiency – private efficiency" duality

Since a social cost always aims at least to satisfy a social interest (social efficiency) and a private cost always aims to satisfy in the first place a private interest (private efficiency), the efficiency of access to justice has to be viewed from both these angles (and these two angles alone): social efficiency and private efficiency.

2. Complementary nature of "social efficiency – private efficiency"

With regard to access to justice, it is in the public interest that the maximum number of cases should be brought before the judicial system, with quality as an imperative; in other words, the decision handed down should be

capable of putting an end to legal uncertainty without discrimination, without slowing down case-flow in the courts and without excessive cost to the taxpayer. The private interest of the user, on the contrary, is that his or her case is processed by the judicial system without delay and whatever the cost to the taxpayer: any discrimination or slowing of case-flow that might result are of no importance in this regard.

It would therefore be tempting to believe that “social efficiency” and “private efficiency” are contradictory concepts. Closer study shows that the concepts are more complementary: the “social efficiency – private efficiency” duality, according to which one part of the cost of access to justice is purely private and the other purely social, forces one to consider the two concepts as two parts of a whole.

The same conceptual objections clearly show that the social efficiency in no way amounts to the sum of the private efficiencies. We shall therefore consider access to justice from the angle of the two forms of efficiency, public and private, taken separately.

PART TWO: THE SOCIAL EFFICIENCY OF ACCESS TO JUSTICE

Social efficiency (the ratio of social cost to social benefit) is the responsibility of the public authorities and their agents. Where access to justice is concerned, the social cost is directly borne by the member states, the courts and judges.

A. The responsibility of member states

The role of member states in access to justice is not restricted simply to organising the distribution of judicial services in the territory by drawing up judicial maps likely to satisfy people living in towns and rural areas; states are also responsible for creating the conditions that enable the public judicial service to hand down a maximum number of decisions at a reasonable cost to the taxpayer, with quality as an imperative.

1. Territorial distribution of judicial services

The territorial structuring of the judicial system is at the heart of the debate about the physical accessibility of justice, but the data gathered by the CEPEJ offer no information as to the existence in member states of studies of the effectiveness of the territorial distribution of judicial services.

From the point of view of access to justice, the territorial distribution of judicial services comprises two interdependent aspects: firstly, physical proximity to users of the justice system and, secondly, optimal management of resources within the judicial sector. For member states faced with the problem of the geographical distribution of courts, finding solutions often depends on the difficult reconciliation of material and budgetary constraints, user interests and the interests of those working in the justice system.

The need to rationalise public judicial expenditure would appear to justify a certain geographical concentration of these institutions. Where organisation of the justice system is guided by the principle of concentration of judicial services in large cities, the aim is to optimise the working of the system through more centralised management of human and material resources.

Too great a concentration of courts creates the risk of distancing judicial services from users, however. The resulting lack of proximity alone may dissuade users from going to court.

Furthermore, the geographical concentration of judicial services in urban centres may engender or accentuate certain inequalities between users: the territorial concentration of the courts puts people living in rural areas and small towns at a disadvantage, since the infrastructure available to them means that they are not within easy reach of the courts. The less prosperous sections of the population and those with mobility problems are also placed at a disadvantage.

Lastly, the territorial concentration of the courts does not necessarily reduce the amount of litigation.

Geographical concentration of the courts and justice at local community level are not necessarily contradictory, however. In the age of new technology, physical access to the courts will probably become less and less important: the digitisation and dematerialisation of procedures and the use of videoconferencing will gradually help to make judicial services more accessible. Furthermore, the development of new ways of organising the justice system (mobile courts, itinerant judges, neighbourhood mediators etc) and greater adaptability of the procedural framework to user needs may help to enhance the accessibility of justice and the balance between users of the justice system. Despite this, the mobility and "virtualisation" of judicial services are not a panacea for all the problems connected with access to justice. The physical place in which justice is handed down has symbolic importance; for this reason, it should remain present, visible and accessible to users.

All the reasons outlined above justify regular studies of the geographical location of the courts in each member state. Such studies could be forwarded to the Council of Europe. They should permit an objective and apolitical analysis of the physical accessibility of the courts to all categories of users. The findings of such studies could be used as the sociological basis for reforms aimed at adapting the location of courts to economic, demographic and social changes.

2. Quality of proceedings

In any discussion of the quality of access to justice, the question has to be looked at differently according to whether individuals take into account their strictly personal interest or the social interest. From the point of view of the social interest, individuals may expect the member state to make available to them sufficient information on existing procedures, to ensure that those procedures are straightforward and adaptable to the needs of the case and, if necessary, to supervise them.

2.1. Information about proceedings

The role of member states in informing users about procedures is of prime importance. When the Consultative Council of European Judges (CCJE) dealt with access to justice, it stressed the importance of this question, placing it first among the recommendations and conclusions submitted for the attention of the Committee of Ministers of the Council of Europe[7]. For this purpose, it indicated certain points on which it recommended the distribution of relevant information for users, in particular through new technologies.

The data gathered by the CEPEJ show that information has been given on the majority of the points dealt with by the CCJE: information has been

provided to users on the nature of proceedings, the decisions of the higher courts, alternative means of dispute settlement and the length and foreseeable cost of proceedings. Only the existence of information on the risks in the event of abuse of legal proceedings has not been detailed.

2.1.1. Nature of proceedings and decisions of the higher courts

The CEPEJ collected very comprehensive data on the information provided to users about the nature of the proceedings that could be initiated and the major decisions given by the courts. All 47 states consulted replied to the question (question 20). The information gathered indicates that 45 states have official websites or portals (eg Ministry of Justice) giving the public access to legal texts free of charge[8]. Similarly, 41 states give the public free access to the case-law of the higher courts[9]..

2.1.2. Alternative means of dispute settlement

Through a working group specifically devoted to mediation[10], the CEPEJ has also gathered a great deal of information relating to the information distributed to users concerning the alternative means of dispute settlement available to them. It is clear from this that much further progress is possible as regards informing and raising the awareness of both the general public and judicial staff[11].

The most appropriate means of informing the public about mediation procedures and what they involve is to conduct media campaigns using leaflets and brochures[12], the internet[13], posters, special telephone lines, information and advice centres[14], "mediation weeks" relayed by radio and television[15], seminars and lectures[16] and "open days" on mediation in the courts and institutions providing mediation services[17].

In addition to information sessions, the judicial system would benefit by initial and continuing training that included specific elements useful for the day-to-day activity of the courts and if seminars were held jointly with mediators.

2.1.3. Foreseeable length of proceedings

According to the CEPEJ data, only 6 of the 47 states that replied to the question (question 21) make provision for a duty to inform the parties as to the foreseeable length of judicial proceedings[18]. Although a few national correspondents said that such information was not compulsory but was given in practice[19], the number is still very low.

The explanation is probably to be sought in the difficulty member states have in foreseeing the length of proceedings, which may be affected by a great many factors. While some of these factors are theoretically under its control (conduct of the competent authorities), others may change in the course of

proceedings (complexity of the case, conduct of the parties, what is at stake in the case)[20].

Member states need to make such an effort, however: the length and cost of proceedings are closely linked. The assessment of the appropriateness of bringing proceedings is therefore largely dependent on the foreseeability of the length of the proceedings. Such an assessment is essential in the interests of the user taken in isolation, of course, but also in the interest of the individual as a member of the community, since obtaining such information in advance may enable alternative procedures to be sought (better flow management) and reduce the risk of disappointing users who have embarked on proceedings that turn out to be long and costly (greater user satisfaction).

In order to be able to foresee the length of proceedings, the difficulties of such a task have to be taken into account. It is true that a degree of unforeseeability is inherent in any proceedings, but states should put in place systems for estimating the length of proceedings statistically: the national correspondents' replies (questions 69 and 73) show that many states are unable to give precise information, particularly quantitative information, about the length of first and second instance proceedings for divorce, dismissal, theft and intentional homicide cases. It is therefore essential to develop practical instruments that enable the length of judicial proceedings to be measured. For this purpose states could use specific tools developed by the CEPEJ, such as the "Checklist of indicators for the analysis of the lengths of proceedings in the justice system"[21]. This effort would then make it possible to put in place tools for determining the length of proceedings case by case, ensuring flexibility, an individual approach to each case and defining the judge's margin of appreciation through intelligible criteria.

2.1.4. Foreseeable cost of proceedings

The foreseeability of the costs of proceedings means foreseeability to users of the expense of the proceedings and the lawyer's fees. It should not be confused with the transparency of the costs of the proceedings, in other words with the fact that information on enforcement expenses and lawyers' fees should be easily accessible.

In the CEPEJ questionnaire, the question that gives the clearest idea of the extent to which users are informed of the foreseeable cost of proceedings is the one on the transparency of foreseeable lawyers' fees for users (question 94). Lawyers' fees often represent a large proportion of the total costs of proceedings (which are composed of the cost of the proceedings and lawyers' fees).

The national correspondents' replies indicate that in 16 of the 46 states that answered the question[22] it is not easy to obtain information on this point. However, the very wording of the question makes it difficult to understand

the reasons for these difficulties: does it mean that fees are not foreseeable or that they are not transparent?.

It should be noted by way of example that, in some legal systems outside our area of study, lack of information on the fees in force may even be the norm: the publication of fees may even be perceived as a form of advertising that is contrary to the legal rules on competition[23].

2.1.5. Risk in the event of abuse of legal proceedings

Abuses of proceedings are by their nature likely to congest the courts unnecessarily. Several Council of Europe instruments have already urged member states to take action against them[24].

2.2. Simplification of proceedings

2.2.1. Simplified and standardised documents

As the Consultative Council of European Judges has emphasised, access to justice is facilitated by putting in place a "simplified and standardised format for the legal documents needed to initiate and proceed with court actions"[25]. Simplified wording is a form of demystification of legal texts that can reduce the distance between justice system and users.

The information gathered by the CEPEJ (question 20) indicates that, of the 47 states consulted, 41[26] have official internet sites or portals that give the public access to legal documents, such as forms, free of charge.

2.2.2. Simplified proceedings

In minor disputes (civil and administrative matters) or minor offences (criminal matters), access to justice can be optimised by introducing simplified proceedings. The aim of this is to reduce the burden of costs on the state and users. The savings made can be substantial. From a financial point of view, the expenses borne by users may in this way be reduced by almost 50% in some countries[27]; from an organisational point of view, the use of simplified proceedings means the state can make savings in staff[28] and have greater control over case-flow.

In civil matters, 40 of the 43 states that replied (question 65) said they have simplified procedures for small claims[29].

In criminal matters, 35 of the 43 states that replied (question 65) said they have simplified procedures for juvenile offences[30].

In administrative matters, 21 of the 41 states that replied (question 65) said they have simplified proceedings[31].

The popularity of such proceedings makes them a common procedural "acquis" in the Council of Europe[32] area. Their effectiveness often derives from the fact that they do not require the presence of a lawyer because little is at stake in the case or because of the straightforward nature of the facts and proceedings; their compliance with the requirements of a fair trial is derived from the fact that they are subject to subsequent review before higher authorities meeting all the requirements of a "tribunal" within the meaning of Article 6 of the European Convention on Human Rights[33].

The effectiveness of such proceedings should be qualified, however: in France, lawyers are neither required nor used in 92% of proceedings[34], but in Germany, while the presence of lawyers is not compulsory in the first instance *Amtsgericht* court, they are used in most cases since users fear that they will not understand the proceedings or will be unable to defend their interests adequately in court; the same observation applies to Belgium, Italy and Greece, for example[35].

2.3. Adaptation of proceedings

2.3.1. Adaptation of proceedings to the needs of vulnerable people and victims of crime

2.3.1.1. Adaptation in order to improve access to the law: specific information arrangements

The question in the Revised Scheme on the existence of information mechanisms specific to vulnerable categories (question 23) elicited positive replies from 26 states, all groups taken together (victims of domestic violence, rape and terrorism; juvenile witnesses, victims and offenders; ethnic minorities; disabled persons; others). Very few states backed up their replies with information on the substance of their domestic law, however. For example, the Norwegian correspondent said that Norwegian legislation contained very few specific provisions on information arrangements for disabled persons, who are covered by the general information arrangements accessible to all users.

State investment in "popularising" the law, without encroaching on the traditional preserve of legal professionals, is essential in order to provide users with the information needed to make informed decisions as to whether or not to take legal action. It is a question here of access to the law prior to taking any action and committing any funds, enabling the possibilities of legal action and its appropriateness to be assessed. Whatever form it takes (organisation of legal advice, free consultations etc), public investment in the popularisation of the law guides users in their choices, on the one hand, and optimises processing of the flow of complaints, on the other. The social return on such an investment is positive if the information arrangements are effective and accessible to all categories of users. For this reason, the question of the accessibility of the law to users in general and to vulnerable

persons in particular warrants further study in the Council of Europe member states.

On the basis of the information provided by national correspondents, a non-exhaustive list can be made of national information measures on the rights of victims of offences. These measures, which often involve specialised voluntary organisations, are aimed at enhancing the victim's active part in criminal proceedings, based both on the strength they derive from their legislative source and on the practical importance they have for the role of justice in a democratic society.

German law gives victims of criminal offences the right to be informed about criminal proceedings. In order to protect victims, such information may be given under particular conditions and by particular methods, such as videoconferencing[36].

The recently amended Austrian Code of Criminal Procedure makes provision for legal, psychological and social assistance for victims of violence or physical threats and their families, if this is necessary to protect their rights. This includes an initial consultation during which victims can be informed of their rights.

In France, the arrangements for providing information on proceedings are aimed at all victims in the French judicial system; any victim of an offence may apply to the public prosecutor for information on the follow-up to the complaints he or she has lodged. Furthermore, specific information arrangements have been set up in the courts, often with the assistance of voluntary organisations for certain categories of victims: they are publicised via leaflets, brochures, lectures and free telephone hotlines[37].

With regard to the execution of sentences, in some member states victims may ask to be informed about the manner of enforcement of custodial sentences and about the sentenced person's release (France[38], Ireland).

In July 2004 the Norwegian government set up a special committee with responsibility for a plan to enhance the status of victims in criminal proceedings. The report was expected in 2006 and was to contain concrete proposals on the procedural rights of victims.

In Romania, Law No. 211/2004 on protective measures for victims of offences requires the state to introduce information arrangements, psychological assistance, legal aid and financial compensation. Under Article 4 of this law, judges, prosecutors and police officers are required to provide victims with information on:

- the services providing psychological assistance and any other type of assistance to victims, and how they are organised;
- the body to which complaints can be made;
- the right to legal aid and the institutions to which applications for aid can be made;

- the conditions and procedure for granting legal aid;
- the procedural rights of the parties;
- the conditions and procedure for the protection of personal data[39].

In the final analysis, the various national policies principally aim to inform victims of:

- where they can obtain information about their rights
- how they can assert their rights
- the procedures for obtaining compensation.

2.3.1.2. Adaptation in order to improve access to justice: hearing methods and specific procedural rights

1) Specific hearing methods

The information gathered by the CEPEJ makes it possible to compile a list of "good practices" in member states with respect to adaptability of proceedings to the special needs of users (youth, mental or psychological vulnerability or psychological trauma of victims, disability etc.). The details member states provided on the state of their domestic legislation enables existing hearing methods to be divided into four groups: hearing methods that guarantee the confidentiality of the hearing (a), hearing methods that guarantee the accessibility of the hearing (b), hearing methods that guarantee the safety and anonymity of the witness or victim (c), and hearing methods that respect the vulnerability of the witness or the victim (d).

a) Hearing methods that guarantee the confidentiality of the hearing

The confidentiality of hearings is traditionally guaranteed by the possibility of not holding them in public (in camera proceedings). The member states' replies show that in camera proceedings are often reserved for one or more categories of vulnerable persons.

In the Russian Federation, victims of any type of offence against sexual freedom are entitled to have their case heard in camera. Similar provision is made in Albania, Andorra, Armenia, Luxembourg and Malta. In Ireland[40] and Luxembourg, similar provision is also made for cases involving juveniles. In Malta, this type of hearing is in particular available to victims of domestic violence.

The Azerbaijan Code of Criminal Procedure provides for evidence revealing confidential personal, family or commercial information to be examined in camera. In France, the party claiming damages (*la partie civile*) has the right to apply for in camera proceedings[41]. A practice of this kind, enabling the judge to order in camera proceedings where this is justified by the circumstances, regardless of the category of users, would seem better able to guarantee the flexibility and adaptability of proceedings.

b) Hearing methods guaranteeing the accessibility of the hearing

In some states, legislation provides for measures to guarantee the participation of the parties and make justice more accessible to disabled people at every stage of the proceedings.

In France, the investigating judge may go to a person's home or appoint a representative for the purposes of the hearing, if it is impossible for the person to appear in court[42].
In Norway, there are also specific hearing methods for people with mental disabilities, inter alia in cases of sexual abuse.

In the Russian Federation and Lithuania, it is compulsory for a specialised teacher to be present at proceedings involving children of any age who have a mental or physical disability.

c) Hearing methods that guarantee the safety and anonymity of the witness or victim

The information gathered by the CEPEJ shows that a large proportion of member states give priority to the introduction of hearing methods that guarantee the safety and anonymity of the witness or victim (33 member states for rape victims, 41 member states for juvenile victims or witnesses of offences, 25 member states for victims of domestic violence, 21 member states for victims of terrorism; question 23). The details provided by member states provide numerous examples.

Lithuanian legislation enables the anonymity of victims and witnesses of crimes to be preserved where there is a threat to their life or the life of their relatives, to their freedom, health or property.

The legislation of Bosnia-Herzegovina allows witnesses to be heard without appearing in court through the use of technical sound and/or image transmission methods. The grounds for this include age or physical or mental condition or any other substantial circumstance. An expert may be appointed to assist such hearings.

In Ireland, there is provision for teleconferencing and videoconferencing for victims and witnesses of sexual offences, with the prior permission of the court[43]. Any attempt to reveal the identity of the witness is a criminal offence[44].

Luxembourg legislation provides for the possibility of sound or audiovisual recording of the hearing of juvenile victims of offences[45].

The hearing of juveniles, rape victims and victims of domestic violence by videoconference is possible in Malta. In France, there is provision for this in particular for juvenile victims of sexual offences[46].

d) Hearing methods that respect the vulnerability of the witness or victim

The interests of the child, a variable concept but one whose importance is recognised throughout Europe, inspire specific measures in many member states.

In the Russian Federation, a child witness or victim of an offence may be heard in the absence of the defendant. When the hearing is finished, the child may, with the judge's permission, leave the court. Similarly, Lithuanian legislation allows child witnesses and victims of offences to give evidence outside the hearing and not to appear in court.

In Malta, hearings concerning young offenders are held in buildings that are separate from official court premises.

The establishment in some states of procedural systems specific to young offenders (juvenile justice) is aimed at avoiding the social stigmatisation of juveniles and thus facilitating their reintegration.

2. Specific procedural rights

With regard to the protection of vulnerable categories of users, member states usually have the following guarantees: systematic provision of a lawyer at state expense (a), systematic provision of an interpreter at state expense (b), specific procedural rights for juveniles (c), specific procedural rights for disabled people (d), specific procedural rights for victims of offences (e).

a) Systematic provision of a lawyer at state expense

In Germany, representation at the trial by a lawyer is systematic for persons who are partially sighted or hard of hearing or who have a speech impediment. In the Russian Federation and Lithuania, a lawyer's participation in the defence of people with disabilities is also systematic where the disabilities of the persons concerned are such as to prevent them from defending themselves.

Norwegian legislation guarantees victims of terrorism the provision of a lawyer in cases where the terrorist act has caused them serious physical injury or the death of their under-age child. Provision of a lawyer is also guaranteed to juvenile victims of sexual abuse. In Norway, victims of domestic violence also receive free legal assistance.

In Ireland, rape victims are parties to the criminal proceedings and for this purpose enjoy the assistance of a lawyer to ensure prior consultation and represent their interests during the hearing[47].

b) Systematic provision of an interpreter at state expense

In Germany, persons belonging to the Sorbian minority have the right to speak Sorbian in the courts in the districts of their settlement area. In Norway, there are specific regulations that systematically provide people from ethnic minorities with an interpreter at state expense. In Montenegro, there is a right to use the language of the ethnic minority as the language of the proceedings and to simultaneous translation of documents at the request of the person concerned.

In Germany and Monaco, the court must, where appropriate, use an interpreter for the hard of hearing and those with a speech impediment. Legal documents addressed to the blind or partially sighted must be made available to them in a form that enables them to understand them.

It is noteworthy that the member states that systematically provide vulnerable people with an interpreter usually also systematically provide such persons with a lawyer (Germany, Lithuania, Russian Federation etc.).

c) Specific procedural rights for juveniles

The legislation of some member states makes provision for the application of specific procedural rules where the accused is a juvenile (Ireland, Lithuania, Luxembourg[48], Monaco etc.): these rules mainly concern hearing procedures, representation and limitation periods.

C1. Hearing procedures

In the Russian Federation, France[49] and Monaco, children under the age of 16 may not be held liable for refusal to testify or false testimony. Their evidence may not be heard under oath. In Monaco, the hearing is even conducted by a guardianship judge.

In the Russian Federation, the questioning of a juvenile offender may not last more than two hours without a break; the hearing may not be longer than four hours a day.

C2. Representation

In Poland, the Russian Federation and Ukraine, the presence of a specialised teacher and the participation of the juvenile's legal representatives are compulsory at hearings of juvenile witnesses or victims of offences who are under 14. In Lithuania, the participation of the juvenile's legal representative is compulsory each time he or she appears at the proceedings.

In France, legislation provides for the possible appointment of an ad hoc administrator responsible for protecting the interests of juvenile victims of

offences, where this is not completely ensured by his or her legal representatives or by one of them[50].

In Lithuania and Norway, representation of juvenile offenders by a lawyer is compulsory, notwithstanding the presence of their legal representatives. The participation of a lawyer is automatic in Luxembourg where the accused is under 18 years old[51]. Slovenian legislation makes provision for juvenile victims of offences to be accompanied by a legal representative responsible for defending the victim's rights and ensuring his or her physical integrity during the trial. Juveniles who do not have legal representatives are entitled to the services of a court-appointed lawyer[52].

C3. Limitation periods

In cases of offences of a sexual nature, the limitation period is extended and only begins to run from the time the victim reaches his or her majority[53].

d) Specific procedural rights for disabled people

In Ukraine, the presence of a doctor is compulsory when a disabled person takes part in proceedings.

In Poland, under Article 316 of the Code of Criminal Procedure, disabled people may bring the hearing forward if there is a risk that it may be impossible for them to appear at a later date.

e) Specific procedural rights for victims of offences

French law gives people who have suffered personal harm as a direct result of an offence the right to be a party to the proceedings (*partie civile*), in other words to initiate civil proceedings against the offender in the criminal courts in order to obtain compensation for the harm caused by the offence[54]. This right is strengthened by the possibility accorded to certain voluntary associations to exercise the rights of the *partie civile*: these include associations for the support of victims of sexual violence[55], terrorist acts[56] or racism[57], for the support of children who are in danger or victims of ill-treatment[58], sick or disabled people[59], etc.

French legislation also gives rape victims the right to request that the perpetrator be medically examined and a blood sample taken, without the need to seek the latter's consent, in order to determine whether that person has a sexually transmissible disease[60].

2.3.2. Adaptation of proceedings to the urgency of the situation

The urgency of the situation sometimes justifies adapting proceedings in order to ensure that there is effective access to justice. Such measures may, for example, involve the judge being able to make interim decisions

(concerning custody of children etc), to guarantee, where appropriate, the enforcement of a subsequent decision, to preserve evidence and to avoid imminent harm or harm that is difficult to repair. The principle of such procedures is dictated more by the need for immediate judicial intervention than by considerations of appropriateness in the administration of justice. Stemming from the facts, the demand for "emergency" measures cannot be reduced by organisational considerations; such measures are therefore widespread in the Council of Europe.

In civil cases, 41 of the 45 states that replied (question 64) said they had emergency procedures[61].

In criminal cases, 37 of the 45 states that replied (question 64) said they had emergency procedures[62].

In administrative cases, 31 of the 41 states that replied (question 64) said they had emergency procedures[63]. It should, however, be noted that in some states there is no distinction between administrative law and civil law (in Luxembourg, for example).

The popularity of such procedures seems to have made them a common procedural "acquis" in the Council of Europe. In terms of access to justice, their effectiveness is often due to the fact that such measures are directly applicable and strictly managed: not all states have ad hoc procedures, however[64]; instead of introducing specific emergency procedures, some prefer to apply ordinary procedures, but within a shorter timeframe[65].

2.4. Effective user participation in proceedings

It is the responsibility of member states to put in place procedures that enable effective user participation. The extent to which users are directly involved could be assessed by means of questions such as the following: do they have the right to be present or represented at all judicial proceedings? Where they have this right, in what percentage of cases do they fail to exercise it? When they fail to exercise, why is this? When they are represented, is such representation a lawyers' monopoly? Where representation is a lawyers' monopoly, are users able to choose from among a sufficient number of lawyers? The CEPEJ data should enable answers to be found to all these questions.

2.4.1. Right to be present or represented in court

The adversarial principle entails the ability of one party to be informed of and challenge the observations and evidence produced by the other[66]. In some states it may happen that a judgment is handed down without any real defence; this situation applies, for example, in criminal cases to punish the accused for absconding or not wishing to appear at the hearing[67]. It would also seem that the right to be represented in simplified proceedings is not systematic in all member states[68].

The problem is not presented in these terms in the CEPEJ questionnaire. The question that is closest (question 61) is intended to ascertain the percentage of judgements in first instance criminal cases in which the suspect is not actually present or represented. Such quantitative data do not enlighten us as to the procedural reasons put forward in member states to limit users' right to adversarial proceedings.

There are in any case very few replies by member states (question 61)[69]: in most states such information is not available (28 states) and only 8 states are able to give it (see appendix 3)[70]. Despite the explanatory note that accompanied the questionnaire, it is not even certain that the national correspondents' replies are genuinely comparable on this question: do the figures systematically exclude situations in which users have the right to be present or represented but do not exercise it? Do they correspond more to cases of absence of the suspect or cases of non-representation? It is difficult to draw comparisons without a more detailed knowledge of the procedures in the various states.

Nor do national correspondents' replies make it possible to say in what percentage of cases users have the right to be present or represented but fail to exercise it. Users' main reasons therefore remain unknown, despite the interest they present (is it because of excessive procedural costs, insufficient legal aid or because the straightforward nature of the case allows a speedy and less costly trial, etc?).

2.4.2. Methods of representation in court

It is for member states to determine the methods through which users can be represented in court. The national correspondents' replies (question 89) bring out differences according to the type of case (civil, criminal or administrative), the role of the parties in the case (particularly in criminal cases), the type or level of the authority (first instance, appeal court, assize court etc) and the nature of the case (amount at issue).

The first remark obviously concerns the monopoly of representation before the courts sometimes enjoyed by lawyers. While there is a tendency in Europe to give lawyers the monopoly of representation of suspects in criminal cases (27 states as opposed to 9), lawyers do not have a monopoly in either civil cases (8 states as opposed to 27) or administrative cases (25 states as opposed to 9). Nor do lawyers generally have a monopoly over representation of victims of criminal offences, although the trend is less clear (15 states as opposed to 21). (see appendix 4)

The whole point of representation by a lawyer in court is to give users a guarantee of high-quality participation during the proceedings. Such representation satisfies two interests, private and social, in varying proportions according to the nature of the case and the role the different protagonists have in it.

In criminal cases, requiring representation of the suspect by a lawyer of course benefits the individual's private interests but, at least as much, the public interest as well. Through such "guided" access to justice, some societies hope to avoid an innocent person being unjustly found guilty and to ensure that a guilty person is sentenced to the penalty that is most appropriate to his or her actions. This may make the lawyers' monopoly seem like a bastion against error and harshness to any society wishing to put an end to a social disturbance without producing the seeds of another.

In civil and administrative cases, requiring representation of users by a lawyer seems to come down more to the private interests of the individual. If it affects the public interest, that is in practice only because of the greater appropriateness of applications resulting from better drafting of procedural documents and the deterrent nature of lawyers' fees. The interests defended remain private. It therefore seems logical for the lawyers' monopoly to be more widespread in criminal cases, in defending suspects, than in civil and administrative cases. Representation of the interests of victims is situated between these two tendencies, expressing, on the one hand, the victim's private interest in the proceedings and, on the other, the necessary care of victims by society.

The role of voluntary organisations in representing victims and vulnerable individuals has already been referred to (see Part Two, A.2.3.1.1. Adaptation to improve access to law; specific information arrangements). Their role is no less important in civil and administrative cases, where they contribute (in 6 and 10 states respectively), together with trade unions (in 8 states in each case) and, above all, family members (in 14 and 15 states respectively), towards representing the interests of members of the public.

The role of voluntary bodies may be compared with that of representative actions and class actions: the collective nature of these types of actions has the same goal, which is to bring an action against the defendant while at the same time bringing about a greater balance in the rights of parties who are very disproportionate in size and economic resources. Through such actions, a group of users that would otherwise be weak and isolated creates a sort of ad hoc company with a legal personality for the purposes and duration of the proceedings. No question on the CEPEJ questionnaire sought to gather information on this point. It is nonetheless a topical issue in many member states, the importance of which has been emphasised elsewhere[71].

The second remark concerns the member states that give lawyers a monopoly of representation in certain matters, but with numerous exceptions. (see appendix 4). In civil matters, these exceptions above all depend on the level of the court (7 states[72]) and the type of court (4 states[73]); less commonly they depend on the specific nature of the case (2 states[74]). The trend is the same in administrative matters and with respect to the representation of victims of offences (where the main exceptions concern the level of the courts: 4 states[75] and 2 states[76], respectively). In criminal

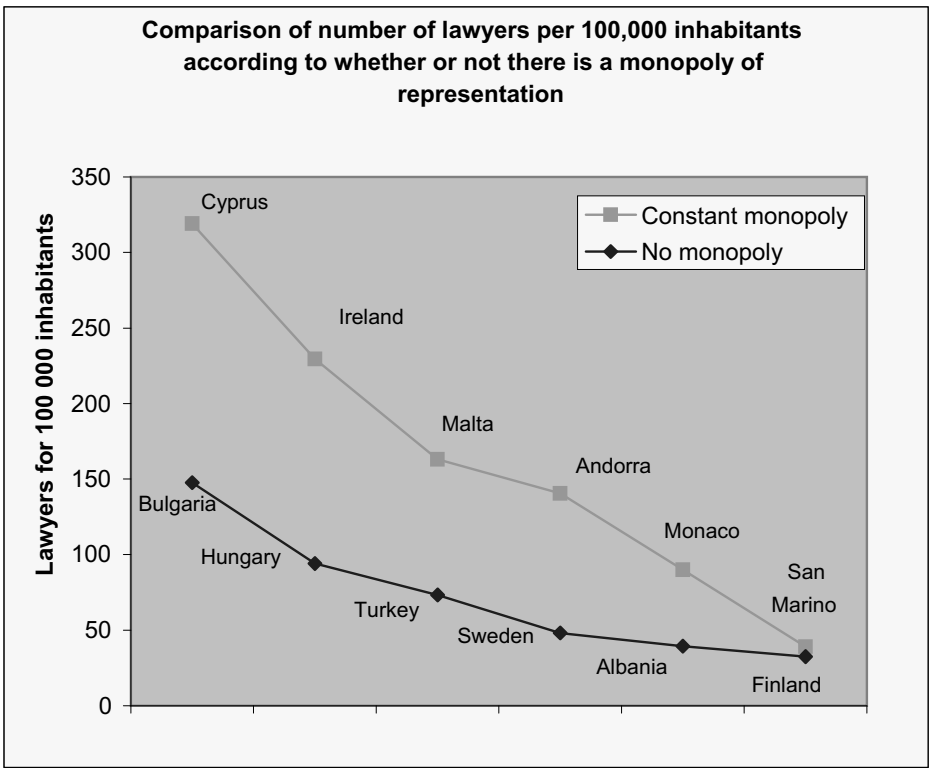
matters, on the other hand, where representation concerns defence of the suspect, it is above all the specific nature of the case that may lead to exceptions to the monopoly (3 states[77]).

The third remark concerns the number of lawyers: where there is a monopoly, can users rely on sufficient competition in the profession? Is the supply sufficient? The CEPEJ data (question 89) show that in most states where there is a monopoly in civil cases there is no monopoly in criminal cases and vice versa; this makes it very difficult to establish a link between monopoly of representation and the number of lawyers in these states.

However, in some states, there is no monopoly whatever the type of case (Albania, Bulgaria, Finland, Hungary, Sweden and Turkey). In each type of case, parties therefore have access to representatives other than lawyers. Conversely, other states impose a monopoly of representation by lawyers in all matters (Andorra, Cyprus, Ireland, Malta, Monaco and San Marino). In these states, the representation conducted elsewhere by other types of representatives is also conducted by lawyers. Is the per capita number of lawyers significantly higher in these states in order to absorb this extra representation?

The data gathered by the CEPEJ (questions 1 and 87-88) show that the per capita number of lawyers (excluding legal advisers and trainees) is appreciably higher in states with a systematic monopoly of representation than in those with none.

Figure 1: Comparison of number of lawyers according to whether or not there is a monopoly of representation



2.5. Supervision of proceedings

The theory of the social efficiency of access to justice is based on the concept of quality. Qualitative assessment of a judicial system from the social point of view brings out the ability of a state to evaluate the functioning of proceedings and prevent possible judicial dysfunction. Therefore, in order to assess the social efficiency of "accessible justice", a further parameter needs to be studied: the supervision of proceedings.

The CEPEJ data enable four aspects of supervision of proceedings to be considered: effective appeal to a higher court (Q. 60), monitoring the performance of the prosecution services (Q 59), monitoring the performance of the courts (Q. 50, 51, 52) and mechanisms for compensating users for judicial dysfunction, and complaints (Q. 28, 31, 32).

2.5.1. Effective appeal to a higher court

The right to effective appeal to a higher court with respect to any case has become established in judicial systems throughout the Council of Europe area: all the member states have made provision for such appeal (Q. 60).

Nevertheless, in some legal systems exercise of this right is subject to certain restrictions. For example, under Turkish legislation, the decisions of first instance courts in civil cases may not be the subject of appeal where they concern a small debt[78]. Similarly, the decisions of the Civil Courts of First Instance concerning guardianship and those of the criminal courts imposing small fines are final and not subject to appeal. The same approach of making exercise of the right of appeal conditional on the amount of the debt at issue is adopted by French[79] and Portuguese[80] legislators. This approach, which is inspired by the wish for proper administration of justice, seeks to ensure legal certainty and to prevent the second degree courts being burdened with minor disputes.

2.5.2. Monitoring and evaluation of prosecution services

The social efficiency of access to justice presupposes that the individual has access to a procedure that can be subject to supervision by the state. The degree of public investment in procedures for supervising the agents of the judicial system (i.e. judges, prosecutors, enforcement agents) is therefore an indicator of the quality of proceedings.

According to the data gathered by the CEPEJ, 41 of the 45 states that replied have mechanisms for the regular monitoring and evaluation of prosecution services (Q. 59). The methods and frequency of such mechanisms vary significantly in different states. They often take the form of weekly[81], monthly[82], quarterly[83], twice-yearly[84] or annual[85] activity reports. Regular inspections of work and performance are carried out either by the Ministry of Justice[86] or by the Public Prosecutor's Department itself at a higher level of the hierarchy[87].

Of the states that replied to question 59, only four have no machinery for supervising or monitoring the work of prosecutors (Armenia, Cyprus, Denmark, San Marino)[88]. This observation raises questions as to the importance of the role played by prosecutors in proceedings in these states.

The CEPEJ data show that the powers of prosecutors vary in different states, whether in criminal (Q. 70), civil or administrative (Q. 71) cases. A lack of machinery for supervising the work of the prosecution services may perhaps be explained by the fact that they play a minor role in proceedings and have few powers or even no powers at all. These possibilities are considered in the following tables comparing the role (extent of powers) of prosecutors (Q. 70, 71) with the existence of supervision of their work (Q. 59).

Table 1: Powers of prosecutors in criminal proceedings and existence of machinery to monitor the work of the prosecution services

Number of States / Role of prosecutors, criminal proceedings (Q.70)	Number of states where prosecutors have this power (Q.70)	Number of states with a regular mechanism for monitoring and evaluating prosecution services (Q. 59) having this power (Q.70)	States with no regular mechanism for monitoring and evaluating prosecution services (Q. 59) in respect of this power (Q. 70)
Conduct or supervise police investigation	40/47	35/40 (87.5%)	Armenia, Denmark
Conduct investigations	32/47	29/32 (91%)	Armenia, San Marino
Apply to the judge to order measures of investigation	42/47	38/42 (90%)	Armenia, Denmark, San Marino
Bring charges	47/47	41/47 (87%)	Armenia, Cyprus, Denmark, San Marino
Present the case in court	46/47	41/46 (89%)	Armenia, Cyprus, Denmark, San Marino
Propose a sentence to the judge	41/47	36/41 (88%)	Armenia, Denmark, San Marino
Appeal	44/47	38/44 (86%)	Armenia, Cyprus, Denmark, San Marino
Supervise enforcement procedure	37/47	23/37 (62%)	Armenia, Denmark
End the case by terminating the proceedings without the need for a judicial decision	40/47	35/40 (87.5%)	Armenia, Cyprus, Denmark, San Marino
End the case by imposing or negotiating a penalty without judicial decision	15/46	14/15 (93%)	Denmark
Other significant powers	16/32	15/16 (94%)	No replies

Table 2: Existence of a mechanism for monitoring the prosecution services and the role of the prosecutor in civil, administrative and criminal proceedings

Member state	Existence of a regular mechanism to monitor/evaluate prosecution services (Q. 59)	Role of prosecutor in civil/administrative matters (Q. 71)	Number of powers* of the prosecutor in criminal proceedings (Q. 70)
Albania	Yes	No	11
Andorra	Yes	Yes	7
Armenia	No	No	9
Austria	Yes	Yes	7
Azerbaijan	Yes	Yes	8
Belgium	Yes	Yes	11
Bosnia-Herzegovina	Yes	Yes	8
Bulgaria	Yes	Yes	8
Croatia	Yes	No	6
Cyprus	No	No	4
Czech Republic	Yes	Yes	9
Denmark	No	Yes	9
Estonia	Yes	No	7
Finland	Yes	No	7
France	Yes	Yes	11
Georgia	Yes	Yes	10
Germany	Yes	No	7
Greece	Yes	Yes	9
Hungary	Yes	No	7
Iceland	Yes	No	7
Ireland	Yes	No	4
Italy	Yes	Yes	8
Latvia	Yes	Yes	10
Liechtenstein	Yes	Yes	8
Lithuania	Yes	Yes	10
Luxembourg	Yes	Yes	11
Malta	Yes	No	8
Moldova	Yes	Yes	10
Monaco	Yes	Yes	10
Netherlands	Yes	No	10
Norway	Yes	Yes	10
Poland	Yes	Yes	8
Portugal	Yes	Yes	9
Romania	Yes	Yes	11
Russian Federation	n/a	Yes	10
San Marino	No	No	7
Slovakia	Yes	Yes	10
Slovenia	Yes	Yes	7
SM-Montenegro	Yes	Yes	8
SM-Serbia	Yes	Yes	8
Spain	Yes	Yes	9
Sweden	Yes	Yes	9
Turkey	Yes	Yes	11
UK-England/Wales	Yes	No	4
UK-Northern Ireland	Yes	No	6
UK-Scotland	Yes	No	6
Ukraine	-	Yes	6

* Question 70 of the Revised Scheme gave member states a list of 11 powers prosecutors might have in criminal proceedings (conduct or supervise police investigation; conduct investigation; when necessary, apply to the judge to order measures of investigation; bring charges; present the case to the court; propose a sentence to the judge; appeal; supervise enforcement procedure; end the case by terminating the proceedings without the need for a judicial decision; end the case by imposing or negotiating a penalty without a judicial decision; other significant powers). The table takes into account the number of powers in the list that were ticked by national correspondents.

Analysis of the data shows that, in criminal cases, of the four member states that do not make provision for any supervision of the work of the prosecution service, Armenia, Denmark and San Marino give prosecutors the widest-ranging powers[89]: from a list of 11 possible powers, Armenia and Denmark give them 9 and San Marino 7. This finding refutes the initial hypothesis that lack of supervision would be synonymous with few or no powers in the matter. Conversely, in the member states where there is no regular mechanism to monitor and evaluate the work of the prosecution services (Q. 59), those services often have very wide powers; this creates a risk of abuse of powers that could be harmful to the quality of proceedings.

In civil cases, on the other hand, the "no supervision – no powers" hypothesis is confirmed for Armenia, Cyprus and San Marino. Prosecutors have no role in civil and administrative proceedings in these member states; the lack of powers justifies the lack of monitoring and evaluation[90].

Taking all types of cases together, the lack of supervision of the work of a prosecutor with wide powers in the trial is a negative indicator of the social efficiency of access to justice. Under-investment by the state in the supervision of proceedings is a source of judicial dysfunction. For this reason, the Council of Europe should recommend to member states where there is no such supervision that they bring themselves into line with the general trend of ensuring the monitoring and evaluation of participants in proceedings who have decision-making powers.

2.5.3. Compensation of users for judicial dysfunction, and complaints

The social efficiency of justice is positive where the state invests to improve or preserve access to high-quality proceedings. The guarantees sometimes take the form of legal and financial arrangements, sometimes of systems to detect the main causes of dysfunction. The information gathered by the CEPEJ makes it possible to study certain procedural and organisational guarantees directly concerning the supervision of proceedings, namely:

- the possibility of compensating users for judicial dysfunction (Q. 28);
- mechanism for lodging a complaint about the functioning of the justice system (Q. 31-32);
- the quality of investigation of complaints (Q. 32);

- the possibility of evaluating judicial activity in order to avoid dysfunction (Q. 50, 51, 52, 53).

The information gathered by the CEPEJ brings out in particular the capacity of European judicial systems to react to three types of dysfunction: wrongful arrest, wrongful conviction and excessive length of proceedings. The data set out in the table below establish the general trend in member states to adopt measures enabling users to lodge a complaint for dysfunction of the judicial system (Q. 31) and to obtain compensation (Q. 28).

Number of states / Dysfunction of the judicial system	Number of states with a compensation system for dysfunction (Q.28)	Number of states allowing both complaints to be made (Q. 31) and compensation to be obtained (Q. 28)
Unlawful arrest	43 out of 46	40 out of 43
Wrongful conviction	42 out of 46	39 out of 42
Excessive length of proceedings	22 out of 44	20 out of 22

The replies to question 28 (central column) show clearly that the proportion of member states that enable users to be compensated for dysfunction of criminal proceedings (wrongful arrest, wrongful conviction) is greater than the proportion of member states that allow compensation for purely procedural dysfunction (excessive length of proceedings). Yet unjustified delays are one of the main factors making for congestion of the courts; they are accordingly a danger to the quality of access to justice and member states should be encouraged to introduce into their systems a mechanism for compensating victims of judicial delays.

Introducing a mechanism at the taxpayer's expense has a number of advantages: the investment of public funds to compensate for judicial delays would certainly lead to stricter supervision of the quality standards with which judicial officers are required to comply. In this way, a compensation mechanism might become a guarantee of greater user confidence in the judicial system.

Furthermore, member states have, with few exceptions (Armenia, Hungary), coupled the compensation mechanism with the possibility of lodging a complaint about a dysfunction of the judicial process. This "good practice", which is henceforth a common procedural "acquis" in the Council of Europe area, should be encouraged in the states that have not yet adopted such measures.

2.5.4. Quality of processing of complaints about the functioning of the judicial system

The existence in the national system of a mechanism enabling users to lodge complaints about dysfunction of the judicial system and to obtain compensation is not in itself sufficient to control access to high-quality

proceedings. Such complaints procedures also need to be effective and able to remedy dysfunction.

The CEPEJ report highlights one of the key indicators of the effectiveness of complaints procedures: their speediness (Question 32). The speediness of complaints procedures depends on the legal guarantees provided for in the domestic legislation of member states, in particular the existence of positive obligations incumbent on the authorities to follow up complaints (Question 32) and process them within the time limits laid down (Question 32) (See table below).

Table 3: Guarantees of the effectiveness of mechanisms for complaining about judicial dysfunction

Body concerned	Number of states imposing on the body a time limit for responding to complaints about judicial dysfunction/ Number of states that replied (Q. 32)	Number of states imposing on the body a time limit for processing complaints about judicial dysfunction/ Number of states that replied (Q. 32)	Number of states imposing on the body a time limit for responding to and processing a complaint about judicial dysfunction/ Number of states that replied (Q. 32)	List of states imposing on the body a time limit for responding to and processing complaints about judicial dysfunction
Court	20/33	16/31	15/31	**Austria, Azerbaijan, Bulgaria, Cyprus, France, Iceland, Latvia, Lithuania, Russian Federation, Slovakia, SM-Montenegro, UK-England/Wales, UK-Northern Ireland, UK-Scotland, Ukraine**
Higher court	23/36	20/34	19/34	Austria, Azerbaijan, Bulgaria, **Croatia**, Cyprus, France, Iceland, **Italy**, Latvia, Lithuania, Russian Federation, **San Marino**, Slovakia, SM-Montenegro, **Spain**, UK-England/Wales, UK-Northern Ireland, UK-Scotland, Ukraine
Ministry of Justice	19/31	14/29	14/29	Azerbaijan, Bulgaria, Croatia, France, Iceland, Latvia, **Moldova**, Russian Federation, Slovakia, SM-Montenegro, UK-England/Wales, UK-Northern Ireland, UK-Scotland, Ukraine
High Council of the Judiciary	11/26	11/25	11/25	Azerbaijan, **Bosnia-Herzegovina**, Bulgaria, Iceland, Moldova, SM-Montenegro, Spain, UK-England/Wales, UK-Northern Ireland, UK-Scotland, Ukraine
Other organisations	10/28	8/26	7/26	Austria, Azerbaijan, Iceland, Russian Federation, Slovakia, SM-Montenegro, Ukraine
				i.e. 21 different states (in bold)

The data set out in the table above show that the effectiveness of complaints procedures is guaranteed by only a small proportion of member states, whether the guarantees concern the time limit for responding to complaints or the time limit for processing them.

The proportion of states with a system that lays down time limits for responding to complaints and processing them is quite small, whether the problem is considered in terms of the bodies concerned (third column) or independently of the bodies concerned (whatever the body concerned, only 21 states impose a time limit for responding and a time limit for processing complaints[91]).

This observation warrants in-depth examination by all the member states of the Council of Europe. Social investment in procedures for complaining about judicial dysfunction cannot "immunise" the system against failures. Complaints procedures whose effectiveness and speediness are not guaranteed may in turn be a source of congestion and delays. In addition, this shortcoming generates uncertainty for users as to the time needed for their complaints to be processed: in the absence of imposed time limits for responding to complaints and/or investigating them, it is difficult for users to foresee the time needed to eliminate the consequences of the dysfunction. In these conditions, the right of access to high-quality proceedings loses all its substance. Consequently, member states should be encouraged to take the necessary steps to guarantee the speediness of complaints procedures and the foreseeability of timeframes for users.

Table 4: Increase in the number of available remedies for dysfunction of the judicial system

An increase in the number of bodies able to receive complaints about judicial dysfunction contributes to the quality of the system. The data gathered (tables below) show that there is a tendency for member states to increase the number of available remedies for judicial dysfunction, at the same time imposing a time limit for responding to complaints and/or a time limit for investigating them.

Body concerned	Number of states imposing a time limit for responding to complaints about judicial dysfunction	Number of states imposing a time limit for processing complaints about judicial dysfunction	Number of states imposing on the same courts a time limit for replying and a time limit for processing complaints about judicial dysfunction
Court only	0	1 (Monaco ?)	0
Higher court only	3 (Italy, Andorra?, San Marino)	2 (Italy, San Marino?)	2 (Italy, San Marino)
Ministry of Justice only	0	0	0
High Council of the Judiciary only	0	1 (Bosnia-Herzegovina)	0

Others	0	0	0
Court and higher court	2 (Cyprus, Lithuania)	2 (Cyprus, Lithuania)	2 (Cyprus, Lithuania)
Court and Ministry of Justice	0	0	0
Court and High Council of the Judiciary	0	0	0
Court and others	0	0	0
Higher court and Ministry of Justice	1 (Croatia)	1 (Croatia)	1 (Croatia)
Higher Court and High Council of the Judiciary	1 (Spain?)	1 (Spain?)	1 (Spain?)
Higher court and others	0	1 (Georgia?)	0
Ministry of Justice and High Council of the Judiciary	1 (Moldova?)	1 (Moldova?)	1 (Moldova?)
Ministry of Justice and others	0	0	0
High Council of the Judiciary and others	0	0	0
Court, higher court and Ministry of Justice	4 (France, Estonia?, Czech Republic?, Romania?)	2 (France, Latvia?)	1 (France)
Court, Ministry of Justice and High Council of the Judiciary	0	0	0
Court, Ministry of Justice and others	1 (Poland)	0	0
Higher court, Ministry of Justice and High Council of the Judiciary	0	0	0
Higher court, Ministry of Justice and others	0	0	0
Ministry of Justice, High Council of the Judiciary and others	0	0	0
Court, higher court and others	1 (Austria?)	1 (Austria?)	1 (Austria?)
Court, High Council of the Judiciary and others	0	0	0

Court, higher court and High Council of the Judiciary	0	0	0
Higher court, High Council of the Judiciary and others	0	0	0
Court, higher court, Ministry of Justice and High Council of the Judiciary	4 (UK-England/Wales, UK-Northern Ireland, UK-Scotland, Bulgaria?)	4 (Iceland, SM-Montenegro, Ukraine, UK-Northern Ireland?)	1 (UK-Northern Ireland?)
Court, higher court, Ministry of Justice and others	3 (Slovakia, Russian Federation?, Latvia?)	2 (Slovakia, Russian Federation?)	2 (Slovakia, Russian Federation?)
Court, higher court, High Council of the Judiciary and others	0	0	0
Court, Ministry of Justice, High Council of the Judiciary and others	1 (Bosnia-Herzegovina)	0	0
Higher court, Ministry of Justice, High Council of the Judiciary and others	0	0	0
Court, higher court, Ministry of Justice, High Council of the Judiciary and others	4 (Azerbaijan, Iceland, SM-Montenegro, Ukraine)	4 (Azerbaijan Bulgaria, UK-England/Wales, UK-Scotland)	1 (Azerbaijan)

Number of available remedies for judicial dysfunction		**Number of states imposing a time limit for replying to a complaint about judicial dysfunction**	**Number of states imposing a time limit for processing a complaint about judicial dysfunction**
SINGLE REMEDY	Single remedy	3	4
MULTIPLE REMEDIES	Two remedies	5	6
	Three remedies	6	3
	Four remedies	8	6
	Five remedies	4	4

Only 3 member states have opted for a system with a single available remedy, in other words before a single type of body, while imposing a time limit for responding.

Only 4 states have opted for a system with a single available remedy while imposing a time limit for processing the complaint.

While states seem to prefer to increase the number of available remedies, this cannot yet be regarded as commonly established in the majority of member states; nonetheless, the experience of the member states that have adopted this approach should be studied in order to examine its effectiveness and possibly to transpose the principle to other national systems.

An increase in the number of available remedies for dysfunction of the judicial system is a positive trend from the point of view of access to justice, as long as the various remedies are coordinated.

2.5.5. Evaluation of the activity of the courts

The effectiveness of the measures taken by member states to counter possible failures of the judicial system does not only depend on steps taken "downstream" of the dysfunction (user compensation, complaints procedures), but also on efforts made "upstream" of the problems. The right to proper administration of justice requires that member states do not simply content themselves with compensating users for judicial dysfunction, but that they identify the causes of dysfunction in order to prevent it in the future.

The CEPEJ focuses particular attention on evaluation of the activity of the courts (Q. 51, 52, 53). It emerges that 43 of the 47 member states that replied require their courts to prepare an annual activity report (Q. 51). Of these 43 states, 40 have a centralised institution responsible for collecting statistical data regarding the functioning of the courts (Q. 50).

The public nature and transparency of the activity of the courts undeniably contribute to the positive image of the judicial system in the eyes of the taxpayer and all users. They also make it possible to identify and eliminate any obstacles to the smooth running of proceedings. As an example, in Estonia, the Constitution and the law require all evaluations of public services to be made public.

Table 5: Table setting out the state of affairs with regard to monitoring of the activity of the courts (Q. 50, 51, 52) in the member states that have set up a user compensation system (Q. 28) and a complaints procedure (Q. 31) for judicial dysfunction

		EXISTENCE OF COMPENSATION SYSTEMS AND COMPLAINTS PROCEDURES			
		Number of states with a compensation system for excessive length of proceedings (Q. 28)	**Number of states with a compensation system for wrongful arrest (Q. 28)**	**Number of states with a compensation system for wrongful conviction (Q. 28)**	**Number of states with a complaints procedure concerning the functioning of the judicial system (Q. 31)**
		22 states	**43 states**	**42 states**	**44 states**
Monitoring set up and data collection	Requirement to prepare an annual activity report (Q. 51)	21/22	40/43	39/42	41/44
	Existence of monitoring of the number of new cases (Q. 52)	22/22	42/43	41/42	43/44
	Existence of monitoring of the number of decisions given (Q. 52)	22/22	42/43	41/42	43/44
	Existence of monitoring of the number of postponed cases (Q. 52)	21/22	39/43	39/42	40/44
	Existence of monitoring of the length of proceedings (Q. 52)	19/22	32/43	31/42	33/44
	Other types of monitoring (Q. 52)	14/22	23/43	23/42	22/44
	Existence of a centralised institution for collecting statistical data on the activity of the courts (Q. 52)	22/22	40/43	39/42	40/44

The data analysed show that an absolute majority of member states combine mechanisms to prevent dysfunction with complaints and compensation procedures. This “good practice” aimed at “prevention rather than cure” should be taken into account by the member states that have not yet adopted this approach.

3. Reasonable cost of proceedings

Member states can help to keep the cost of proceedings reasonable by regulating lawyers' fees and introducing a legal aid system.

3.1. Lawyers' fees

3.1.1. Regulation of lawyers' fees

Some member states have legislation on lawyers' fees (16 member states[92]). Often, however, this legislation establishes the principle of free negotiation of fees (8 states out of 16[93]). It is far less common for free negotiation to be instituted where fees are regulated by the local Bar, however (2 states out of 11[94]). (see appendix 5)

Where the principle of free negotiation is not established (21 states[95]), the risk increases that fees will be set too high or unusually low. Excessive fees are likely to discourage users from accessing the justice system. Low fees may be evidence of anti-competition practices in the profession, where it is organised as a liberal profession.

Respect for users' rights and, where appropriate, free competition among lawyers should lead member states to introduce arrangements with regard to maximum and minimum lawyers' fees. Unfortunately, the data gathered by the CEPEJ do not make it possible to ascertain whether or not such arrangements exist. Nevertheless, this information is available in member states, as other recent sources have shown. For example, in Belgium there is no legal minimum or maximum, but lawyers who cut rates, exceed the limits of a fair rate or ask for excessive fees (even if they comply with the agreement concluded with the client) may be disciplined for breach of professional ethics or have their statements of expenses and fees reviewed by the supervisory authorities[96]. In Greece, the Lawyers' Code lays down detailed regulations on the minimum amount of fees: these depend on the amount at stake in a civil case and may be no less than 2% of the value of the subject of the case[97]. In Poland, fees are in fact freely negotiable because the regulations setting the minimum and maximum amounts of fees do not prohibit the parties from exceeding these limits[98].

These questions are all the more important because our study has already noted the lack of transparency that sometimes exists in member states with regard to lawyers' fees: of the 45 states questioned, only 29 ensure that users can easily establish what lawyers' fees will be (question 94)[99].
(see appendix 5)

Of the 29 states that guarantee the transparency of lawyers' fees, the proportion of those with regulations established by the Bars or the law is not significantly higher than the proportion of states with freely negotiable fees.

Therefore, regulations do not necessarily aim at transparency of fees.(see appendix 6)

3.1.2. Procedure for contesting excessive lawyers' fees

All the member states of the Council of Europe, with the exception of Bulgaria, have procedures enabling users to lodge complaints about the performance of their lawyers. However, only 38 of the 42 member states that replied have a procedure for contesting excessive fees[100] (question 98): this possibility is not therefore universal.

It is, moreover, noteworthy that of the 30 states that allow free negotiation of fees (question 95), only 21 provide users with a procedure for contesting excessive fees (question 98). This state of affairs clearly indicates that in the member states that do not provide for this possibility[101], excessive fees can potentially hinder freedom of access to justice by the poorest users.

Where it exists, as in Belgium, the dispute procedure can enable users to refer the matter to the disciplinary authorities or the courts. These then verify whether or not the contested fees remain within the bounds of a fair rate in the light of the following criteria: the importance of the case, the outcome, the nature of the work, the reputation of the lawyer and the client's financial resources[102].

3.2. Legal aid (= judicial aid)[103]

3.2.1. Fields of legal aid

The role of legal aid, a fundamental guarantee of equal access to justice, is to ensure that users who do not have sufficient resources are assisted by professionals free of charge or at reduced cost or are provided with financial assistance in the framework of court proceedings.

Legal aid is defined as follows: assistance provided by a state to people who do not themselves have sufficient financial resources to defend themselves in court (or to initiate court proceedings). According to this definition, legal aid mainly concerns legal representation in court. But legal aid may also cover legal advice. Not all citizens necessarily go to court when they encounter legal problems. In certain cases, legal consultations may be sufficient to resolve the issue[104].

In the Council of Europe, legal aid systems are widely encouraged through the European Convention on Human Rights[105], the case-law of the Strasbourg court[106], resolutions of the Committee of Ministers[107], recommendations of the Committee of Ministers[108] and an opinion of the Consultative Council of European Judges[109].

Legal aid, which is widespread in Europe, seems to cover criminal cases slightly more than other types of case. In criminal matters, representation in

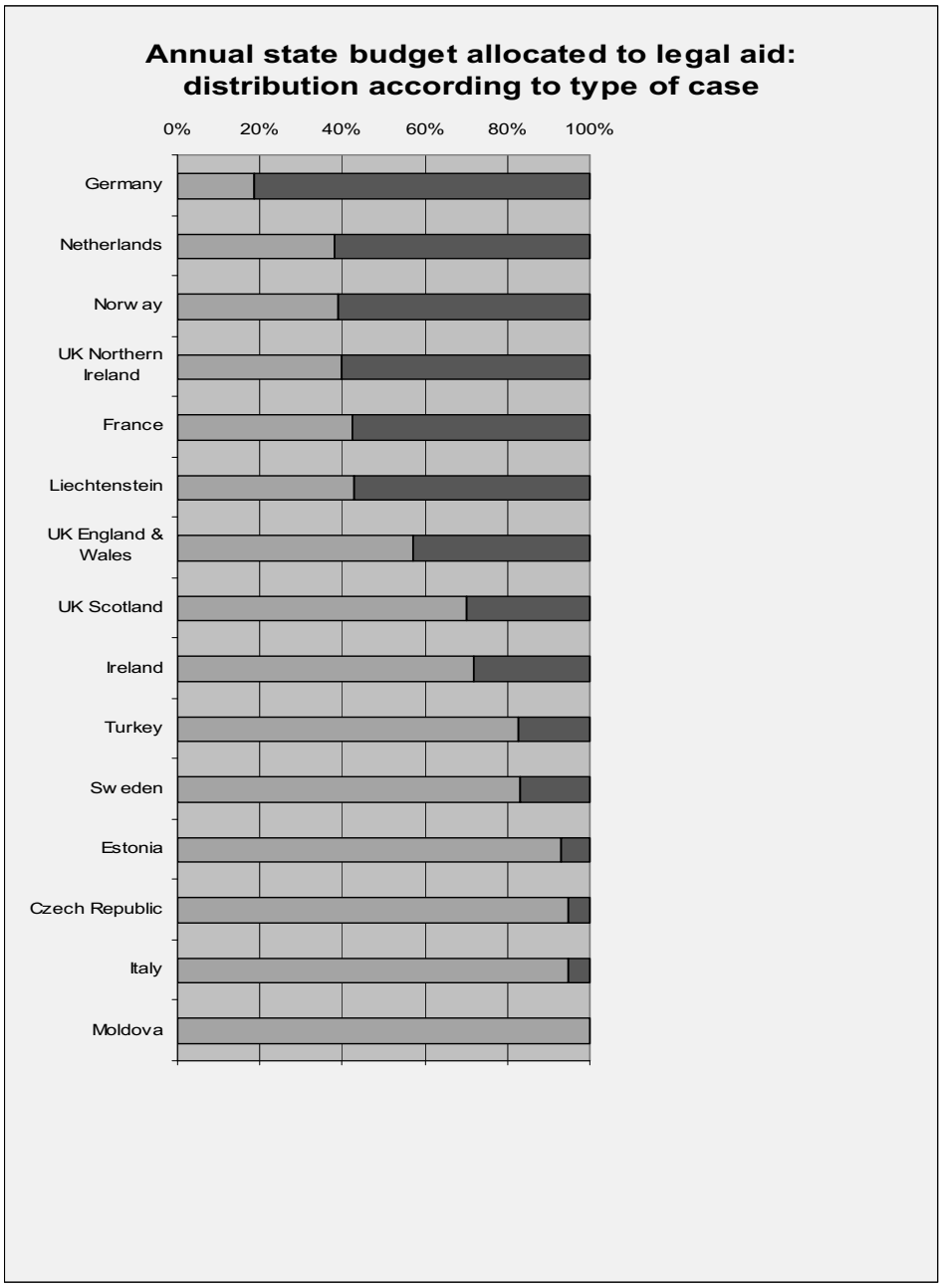
court is covered by legal aid in 44 of the 46 states that replied[110], while other types of case are covered by legal aid in only 38 of the 43 states that replied[111] (question 11). Furthermore, legal advice can be covered by legal aid in 37 states out of 45 in criminal cases[112] and 34 states out of 42 in other cases[113]. Where legal aid programmes exist, they are generally available[114].

The member states that do not provide legal aid to cover legal advice in criminal cases are often those that do not provide it to cover legal advice in other matters[115]. There is no such consistency concerning representation in court, where the states which do not provide legal aid in criminal matters differ from those which do not provide it in other matters. This shows that there are two different types of approach. With respect to representation in court, some states choose to restrict legal aid to criminal matters, others to matters other than criminal. This is a policy choice that is a matter for the appreciation of each member state. With respect to legal advice, on the other hand, it is the very principle of responsibility for the provision such advice that seems to be in question: the states concerned do not favour one type of case or another, they simply refuse to take responsibility for legal advice in any type of case.

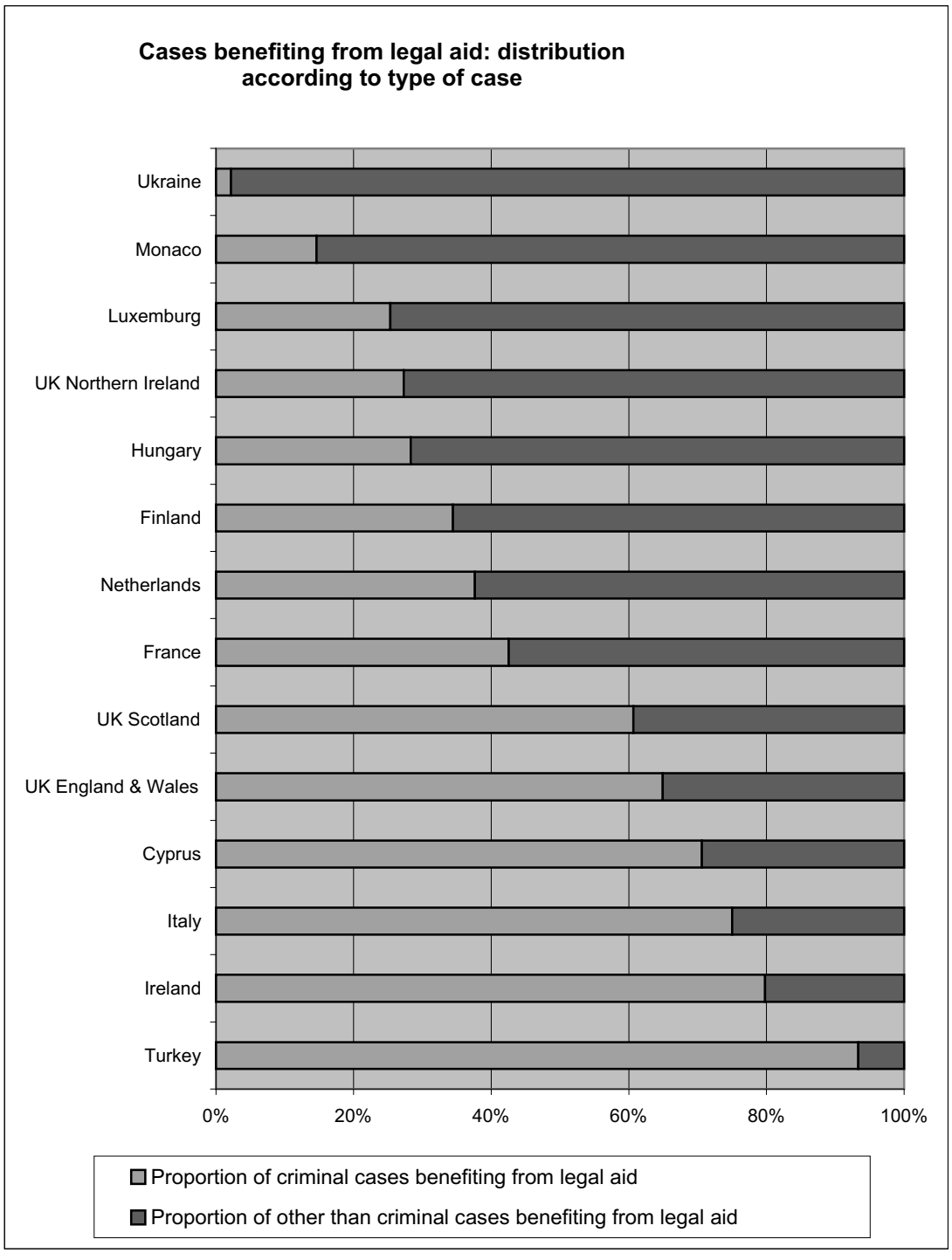
The variability of the fields covered by legal aid should be noted: some states completely exclude it in criminal matters (Denmark), others restrict it to users who have been acq uitted (Iceland[116]), to the most serious cases (Germany[117], Norway) or to users with no legal insurance (Germany, Netherlands, Sweden)[118], or provide it generally (France[119], Italy[120]).

The lack of a legal aid system may in particular be explained by the fact that recourse is had to NGOs in place of the state (Albania). Moreover, some states prefer to restrict themselves in some fields to the distribution of legal information (Latvia).

The above considerations obviously have practical consequences: reflecting the legislation in force, budget allocations to legal aid differ for criminal matters and other matters. Some national correspondents provided information (questions 7 and 8) that enables us to establish the sums allocated to criminal matters and to other matters in the state budget for 2004 (See figure 2: Annual state budget allocated to legal aid: distribution according to type of case).



It is interesting to note the difference in some states, in the distribution of legal aid to different types of cases, between the state budget allocated and the cases actually benefiting from such aid (See figure 3: Cases benefiting from legal aid: distribution according to type of case).


Cases benefiting from legal aid: distribution according to type of case
Ukraine
Monaco
Luxemburg
UK Northern Ireland
Hungary
Finland
Netherlands
France
UK Scotland
UK England & Wales
Cyprus
Italy
Ireland
Turkey
0%
20%
40%
60%
80%
100%
Proportion of criminal cases benefiting from legal aid
Proportion of other than criminal cases benefiting from legal aid

As the two tables above show, some states provide in their budget for proportions of "criminal/other than criminal" cases that are comparable to the proportions of "criminal/other than criminal" cases that actually benefit from legal aid: this is the case in the Netherlands, France and Scotland.

Conversely, there are differences in other states present, either because criminal cases are over-represented in their budget (Ireland, Turkey) or under-represented (UK-Northern Ireland, UK-England/Wales, Italy). None of the replies to the CEPEJ questionnaire offers reasons that might explain these differences.

3.2.2. Regulation of legal aid

In the states that have set up legal aid systems, the high profile of the system may prove very attractive. States have therefore introduced strict regulations on the granting and refusal of legal aid and the consequences of the granting of legal aid for the lawyer in charge of the case.

3.2.2.1. Granting and refusal of legal aid

It is particularly important in states that have set up a legal aid system that the most disadvantaged sections of society should be informed of its existence. The high profile of the system may, however, lead the middle or prosperous social classes to ask for free consultations and representation in court[121].

Many states have introduced conditions for the granting and refusal of legal aid in order to test the validity of such requests[122]. The idea that anyone who cannot afford it should receive the assistance of a lawyer free of charge (or assistance paid for out of public funds) seems to have become a procedural "acquis" throughout the Council of Europe with respect to criminal cases: all the states have set up such a system (question 13), although many of them make it subject to the applicant's income and assets or to the type of case (question 14).

1) <u>Conditions which relate to the applicant</u>

The granting of legal aid seems not to be conditional upon the role the user plays in the proceedings (plaintiff/defendant), whatever the nature of the case[123].

a) States that have not introduced a legal aid system for representation in court

The states that have not introduced a legal aid system for representation in court (but which make provision for it in other fields, such as legal advice) never make the granting of legal aid conditional on examination of the applicant's income and assets (questions 11 and 14).

This is true in criminal matters (Iceland) and in other matters (Latvia, Moldova, Slovakia).

b) States that have introduced a legal aid system for representation in court

The situation is more complex in the states that have introduced a legal aid system for representation in court (questions 11 and 14).

In criminal cases, as in other cases, the majority of states assess the applicant's income and assets before granting legal aid. It seems, however, that the proportion of states making the granting of legal aid conditional on this criterion is slightly lower in criminal cases (criminal cases, 28/43 states; other cases 33/40 states). This tendency is probably due to the public order nature of criminal cases: representation in court is aimed at avoiding the collective vengeance of society on an individual who has disturbed the social order. In such a situation it is essential to guarantee the quality of his or her defence.

In the final analysis, there are only five states (Bosnia-Herzegovina, Czech Republic, Russian Federation, SM-Serbia and Ukraine) where there is no provision for any examination of the applicant's income and assets, irrespective of the nature of the case.

Table 6: Examination of applicant's income for the granting of legal aid in criminal cases

Examination of applicant's income and assets	No examination of applicant's income and assets
Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Slovenia, SM-Montenegro, Spain, UK-England/Wales, UK-Scotland	Armenia, Bosnia-Herzegovina, Czech Republic, Germany, Moldova, Norway, Romania, Russian Federation, San Marino, Slovakia, SM-Serbia, Sweden, Turkey, UK-Northern Ireland, Ukraine
28 states	15 states

Table 7: Examination of the applicant's income for the granting of legal aid in other cases

Examination of applicant's income and assets	No examination of applicant's income and assets
Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Norway, Romania, San Marino, Slovenia, Spain, Sweden, Turkey, UK-Northern Ireland, UK-Scotland	Bosnia-Herzegovina, Czech Republic, Estonia, Russian Federation, SM-Serbia, UK-England/Wales, Ukraine
33 states	7 states

The states that examine the applicant's income and assets may or may not set values for use as criteria. The CEPEJ Scheme asked national correspondents to indicate the monthly income level taken into account, where applicable (question 14). The replies show that there are wide differences among member states.

Table 8: Degree of selectivity of the income level taken into account in member states for the granting of legal aid.

Member states	Income level taken into account (annual income) (question 14)		Gross annual salary (question 4)	Ratio of income taken into account / Gross annual salary	
	Criminal mat.	Other mat.		Criminal mat.	Other mat.
Austria	Variable	Variable	€38,640	Variable	Variable
Belgium	€9,000	€9,000	N/a	N/a	N/a
Denmark	-	N/a	N/a	-	N/a
Estonia	Variable	-	€5,588	Variable	-
Finland	€16,800	€16,800	€33,000	51%	51%
France	€14,928	€14,928	€38,921	38%	38%
Greece	€5,600	N/a	€16,776	33%	N/a
Ireland	Variable	€13,000	€27,780	Variable	47%
Italy	€9,296,22	€9,296,22	€22,254	41%	41%
Latvia	Variable	Variable	€300	Variable	Variable
Liechtenstein	Variable	Variable	€74,592	Variable	Variable
Luxembourg	€15,979,44	€15,979,44	€39,587	40%	40%
Malta	€13,950	€13,950	€11,644	120%	120%
Monaco	Variable	Variable	N/a	Variable	Variable
Netherlands	€18,000	€18,000	€30,642	58%	58%
Norway	-	€27,381	€41,219	-	66%
Poland	Variable	Variable	€6,128	Variable	Variable
Portugal	Variable	Variable	€13,492	Variable	Variable
Slovenia	Not given	Unusable	€13,565	Not given	Unusable
Spain	€11,052	€11,052	€25,060	44%	44%
Sweden	-	€27.368	€31.906	-	86%
UK- England/Wales	Unusable	-	€36.900	Unusable	-
UK- Scotland	-	Variable	€31.061	-	Variable
UK- Northern Ireland	-	€14.276	€33.500	-	43%
				Average 53%	Average 58 %

In some states the income level taken into account is set in advance (Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Spain), which is not always the case either in criminal matters (Estonia, Ireland, etc.) or in other matters (Poland, Portugal etc). Every system may have advantages and disadvantages for users: while they are able to anticipate more easily whether or not legal aid will be granted where the income level taken into account is fixed, their personal situation may, on

the contrary, seem to them to be better taken into account where there is case-by-case study. However, the criteria for granting or refusing legal aid may seem more subjective in this case, which is the option chosen by some states (Northern Ireland, Scotland) that take into account the judicial interest in deciding the case (salary and available capital, contributions, personal injuries etc).

In most cases the income level taken into account, where it is fixed in advance, may be compared with gross average salary. The ratio between the two figures (provided by national correspondents: questions 4 and 14) tells us whether the income criterion is truly selective for the granting of legal aid in each member state. For example, in criminal matters, the income criterion seems to be more selective in Greece (where the user's income must not exceed 33% of the average salary) than in Malta (where the user's income must not exceed 120% of the average salary). The Scandinavian countries (Finland, but especially Sweden and Norway) seem to be concerned to grant legal aid as widely as possible. It is, however, very important to bear in mind that this comparison does not in any way enable the amount or quality of the legal aid granted to be assessed.

Some states lay down very specific selection criteria: for example, in Slovenia, legal aid will only be granted in civil matters to users whose assets do not exceed the value of 20 minimum salaries. In Scotland, a criterion based on available capital has recently been added to income level (€15,754).

Where the income level taken into account is fixed in advance, the data gathered make it possible to compare its degree of selectivity in each matter and between matters. In the member states that indicated the amounts taken into account in criminal matters and other matters, these amounts are always identical. Conversely, the states where there is no examination of income at all upset the balance and give the general impression that legal aid in criminal matters (where the user's income must not exceed 0.53% of the average salary) is more selective than in other matters (where the income must not exceed 0.59% of the average).

In the states where there are legal protection insurance arrangements, legal aid may sometimes not be granted to people who have such a policy (Netherlands, Germany and Sweden). Swedish law even provides that legal aid should be refused to people who do not have such an insurance policy but should have had one[124].

2) Conditions which relate to the case

Restrictions on the granting or refusal of legal aid may also depend on criteria relating to the case, in particular the type of case or proceedings envisaged (question 13). They may also arise from a wrongful or manifestly ill-founded application (question 15).

a) Conditions arising from the type of case or proceedings envisaged

Some states do not give users access to legal aid for unimportant cases, in other words for minor criminal offences and civil cases with little financial impact. This is the case in Norway and Germany, where legal aid is restricted to criminal cases in which representation in court by a lawyer is compulsory. Other states restrict legal aid to a particular type of case, such as civil cases concerning obligations (Armenia), family cases and violations of fundamental rights (Cyprus) etc.

Some types of proceedings may be excluded from legal aid cover. Access to mediation, for example, is facilitated in member states that support users who opt for mediation, particularly financially. Where the parties are required to make a financial contribution (in particular, the offender in criminal cases), it must remain proportionate to income and to the interests at stake. In order for there to be equality before the law and equal access to the law, financial resources should not be an obstacle to mediation: it is not acceptable for certain social categories to be unable to benefit from such services for economic reasons. Member states should ensure that legal aid is available to parties to mediation in the same way as they provide legal aid to parties in court proceedings[125].

b) Conditions arising from a wrongful or ill-founded application

In other than criminal matters, many member states provide for the refusal of legal aid to wrongful or ill-founded applications[126]. Of the 41 states that replied (question 15), 35 states make the merits of the case a criterion for granting legal aid[127]. Assessment of the merits by a competent authority in whatever form should probably be encouraged in the few member states where it does not take place, for example on the basis of criteria such as the amount at stake, the chances of success, the seriousness of the application etc. Once the budget allocated to legal aid is no longer burdened by ill-founded cases, it can be distributed among a smaller number of cases which, at a constant social cost, would optimise the state's social return.

The form of the authority with jurisdiction to take the decision differs considerably in the 35 states that assess the merits of applications (question 16). Two types of authority seem to be favoured, but the data gathered by the CEPEJ do not make it possible to assess their respective effectiveness.

Table 9: Authority with power to assess the merits of applications for legal aid in member states

Authority with power to assess the merits of applications for legal aid (question 16)	List of states concerned	Number of states concerned
A court	Armenia, Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Germany, Greece, Hungary, Liechtenstein, Poland, Romania, Slovakia, Slovenia, Turkey	15
A body external to the court	Denmark, Iceland, Ireland, Luxembourg, Malta, Netherlands, Portugal, San Marino, Spain, UK-England/Wales, UK-Northern Ireland, UK-Scotland	12
A mixed body	Croatia, Italy, Monaco	3
A court and a body external to the court	Finland, Norway, Sweden, Ukraine	4
A court and a mixed body	-	-
A body external to the court and a mixed body	-	-
A court, a body external to the court	Latvia	1

3.2.2.2. Granting of legal aid and remuneration of lawyers

Evaluation of judicial systems should of course concern itself with the existence of legal aid programmes; it should also consider legal aid from the point of view of lawyers' remuneration.

Generally speaking, the lawyers of clients benefiting from legal aid seem far less well paid in Europe than those with "ordinary" clients[128]. In order to avoid sharp increases in legal aid costs, Polish legislation limits the amount paid to court-appointed lawyers to 150% of the minimum fee, for example.

For reasons connected with professional ethics, lawyers do not, however, appear averse to the idea of accepting "assisted" cases. Lawyers in Germany are not reluctant for the simple reason that the public purse is a reliable debtor, while an ordinary client may prove insolvent[129]. In loser-pays-all systems, in which the losing party pays the costs of the winning party, the lawyer may even be stimulated by economic interest: where the winning party was entitled to legal aid, his or her lawyer will sometimes be paid by

the loser at the full fee, while he or she would have been paid far less by the client if the case had been lost[130].

Some states have mechanisms to compensate for lawyers' poor remuneration. Belgian legislation has introduced a "proceedings indemnity" to cover certain services provided by lawyers[131].

3.2.3. Funding of legal aid

3.2.3.1. Links between legal aid and the public budget

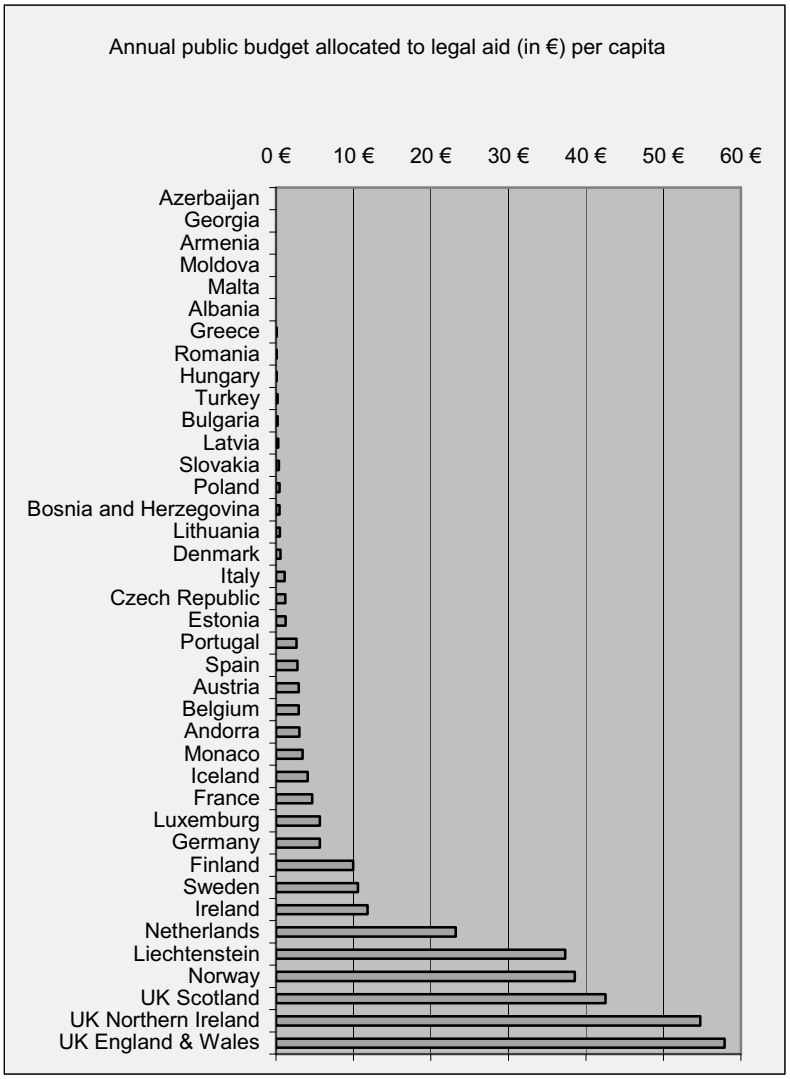
Of the states able to provide complete information on the sources of funding of legal aid (38 states[132]), only a tiny proportion seem not to perform this function directly (in the Czech Republic the Bar is required to fund legal aid, in other words, it is paid for by a professional organisation). Legal aid is almost always publicly funded.

The CEPEJ questionnaire invited states to indicate the annual public budget allocated to legal aid in 2004 (question 7).

We began by comparing the national correspondents' replies with the population of each state (question 1, see figure 4: annual public budget allocated to legal aid in euros per capita, below).

The amount allocated legal aid (in euros per capita) is significantly higher in 6 member states or entities than in the others; in 2004, the three components of the United Kingdom, Liechtenstein, the Netherlands and Norway spent between €23.22 and €52.27 per capita. In the same year, no other state spent more than €11.79 per capita and most of them spent no more than €5.

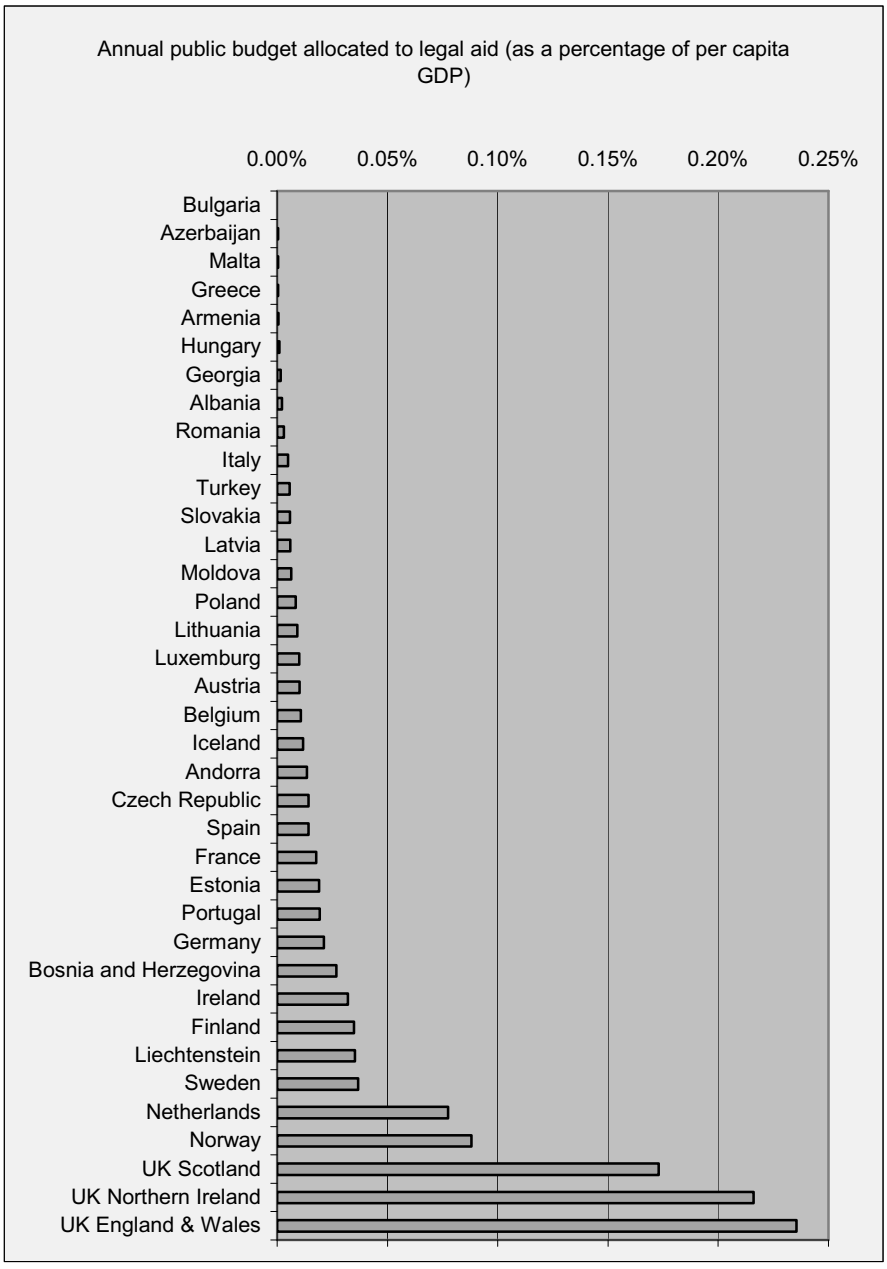
Figure 4



This first graphical representation of the public budget spent on legal aid does not take into account the wealth of the member states, however. This indicator nonetheless seems of great importance: if the state's GDP is taken into consideration, it emerges that of the 20 largest annual public budgets spent on legal aid, 17 are in states that are among the 20 with the largest GDP.

Member states	Population (question 1)	Annual public budget allocated to legal aid (in €) (question 7)	Annual public budget allocated to legal aid (in € per capita)	Classification according to per capita GDP	Per capita GDP (in €) (question 3)
UK England & Wales	53 046 300	3 070 000 000	57,874	15th	€24 579
UK Northern Ireland	1 710 300	93 630 000	54,745	13th	€25 343
UK Scotland	5 078 400	216 000 000	42,533	14th	€24 600
Norway	4 606 363	177 622 000	38,560	3rd	€43 818
Liechtenstein	34 600	1 292 008	37,341	1st	€106 000
Netherlands	16 292 000	378 358 000	23,224	6th	€29 993
Ireland	4 040 000	47 649 000	11,794	4th	€36 737
Sweden	9 034 837	95 455 900	10,565	8th	€28 832
Finland	5 236 611	52 129 000	9,955	9th	€28 646
Germany	82 500 000	468 400 000	5,678	11th	€26 754
Luxemburg	455 000	2 574 828	5,659	2nd	€56 488
France	62 177 400	291 200 000	4,683	12th	€26 511
Iceland	293 577	1 200 000	4,088	5th	€34 700
Monaco	30 020	102 950	3,429	N/a	n/a
Andorra	76 875	230 668	3,001	17th	€22 347
Belgium	10 446 000	30 750 000	2,944	10th	€27 579
Austria	8 206 500	24 100 000	2,937	7th	€29 000
Spain	42 935 001	119 055 984	2,773	18th	€19 502
Portugal	10 529 255	27 632 424	2,624	20th	€13 550
Estonia	1 351 069	1 700 000	1,258	24th	€6 644
Czech Republic	10 220 577	12 273 022	1,201	22nd	€8 446
Italy	58 462 375	66 030 256	1,129	16th	€23 115
Denmark	5 397 640	3 200 000	0,593	N/a	n/a
Lithuania	3 425 300	1 636 208	0,478	26th	€5 264
Bosnia and Herzegovina	3 832 000	1 777 399	0,464	33rd	€1 732
Poland	38 174 000	16 775 566	0,439	27th	€5 246
Slovakia	5 400 000	1 967 026	0,364	25th	€6 200
Latvia	2 319 200	653 490	0,282	28th	€4 777
Bulgaria	7 761 049	1 571 358	0,202	N/a	n/a
Turkey	71 152 000	13 626 853	0,192	29th	€3 359
Hungary	10 097 549	851 333	0,084	23rd	€8 025
Romania	21 673 328	1 810 732	0,084	31st	€2 718
Greece	11 056 800	724 187	0,065	19th	€15 119
Albania	3 069 275	130 550	0,043	32nd	€1 920
Malta	402 668	16 720	0,042	21st	€9 647
Moldova	3 386 000	124 100	0,037	36th	€572
Armenia	3 200 000	50 000	0,016	30th	€2 860
Georgia	4 535 200	69 760	0,015	34th	€923
Azerbaijan	8 347 000	28 500	0,003	35th	€852
Slovenia	1 997 590	n/a	n/a	N/a	n/a

If per capita GDP is factored in when considering the national correspondents' replies, it is possible to calculate the amount of legal aid in 2004 as a percentage of per capita GDP (questions 1, 3 and 7; see figure 5:, annual public budget allocated to legal aid as a percentage of per capita GDP, below).

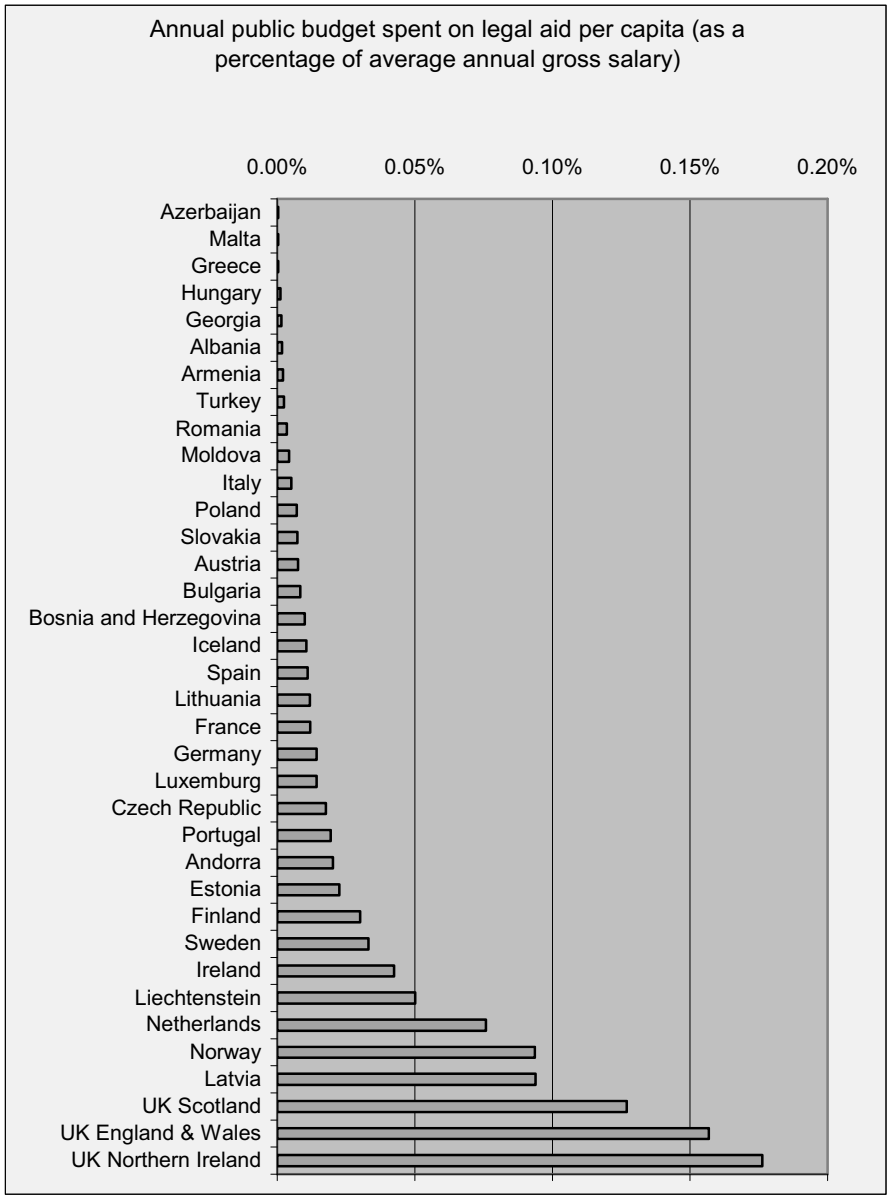


The amount allocated to legal aid (as a percentage of per capita GDP) still seems to be significantly higher in certain member states, but the differences are less marked. For example, in 2004, the three components of the United Kingdom spent the most in terms of percentage of per capita GDP. While, in euros per capita, legal aid funding placed Liechtenstein ahead of the Netherlands and Sweden, when per capita GDP is taken into account, it is Sweden and the Netherlands that contribute the most as a proportion of their wealth.

This second representation probably gives a better idea of the effort made by states whose highly variable levels of wealth make any comparison based solely on sums spent per capita very difficult: taking into account the level of wealth of each state, this approach favours Bosnia-Herzegovina and Estonia, for example.

The effectiveness of legal aid's catalyst role should not be assessed according to the static criterion of the effort made by the state to fund such aid, however, even if it is compared with the wealth of each state. Access to justice is assessed above all by individuals. It is therefore the perception that individuals have of the state's effort that will to some extent determine their satisfaction. It may therefore be interesting to consider the amount of the annual budget devoted to legal aid by comparing it, not with the level of wealth of the state, but with the level of wealth of its population (questions 1, 4, 7; see figure 6:: annual public budget allocated to legal aid as a percentage of average annual gross salary per capita, below).

The degree of satisfaction expressed by the population in each member state concerning per capita public spending on legal aid has to be assessed having regard to criteria such as average salary. An individual who tries to assess the savings legal aid makes possible naturally tends to select average salary as a reference. More generally, this third way of representing annual public spending on legal aid should therefore make it possible to answer the following question: in 2004, what do the sums invested by the state to reduce the private cost of access to justice represent in relation to the wealth of the population?



These three different graphical representations should be considered with caution: it must be borne in mind that some important data are too complex to be included in these figures. For example, the charts do not take into account the number of proceedings in each state (a number depending on the crime rate, the degree of judicialisation of the society etc); nor do they take into account the stringency of the criteria for granting legal aid (often based on the sums received by the applicant). Such data may, however, seriously affect the effectiveness of the measures taken. Nor can the variety

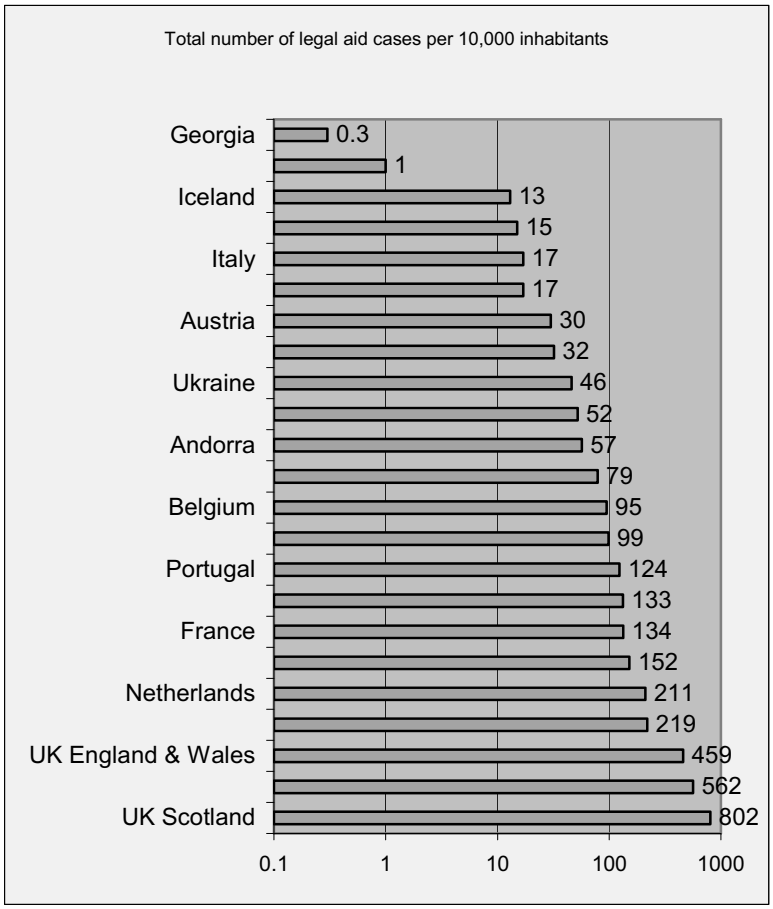
of the procedures in the different member states, even in the course of a single year in the same state[133], be reflected in the charts. In view of this missing information, the utmost caution is called for before any attempt at comparison.

In the final analysis, these charts do not take into account the number of individuals who will share the sums invested. They do not therefore permit a real assessment of the reduction of the private cost of access to justice in relation to the sums invested by the state. It is essential to consider the links between legal aid and the volume of cases brought before the courts.

3.2.3.2. Links between legal aid and the volume of cases brought before the courts

National correspondents were invited to indicate the number of legal aid cases in their country in 2004 (question 12).

Only 23 of the 47 states questioned were able to give information on the total number of such cases. Compared with the respective population of the states, these data can be presented in the form of a graph with a logarithmic scale (see figure 7:: Total number of legal aid cases per 10,000 inhabitants, below)



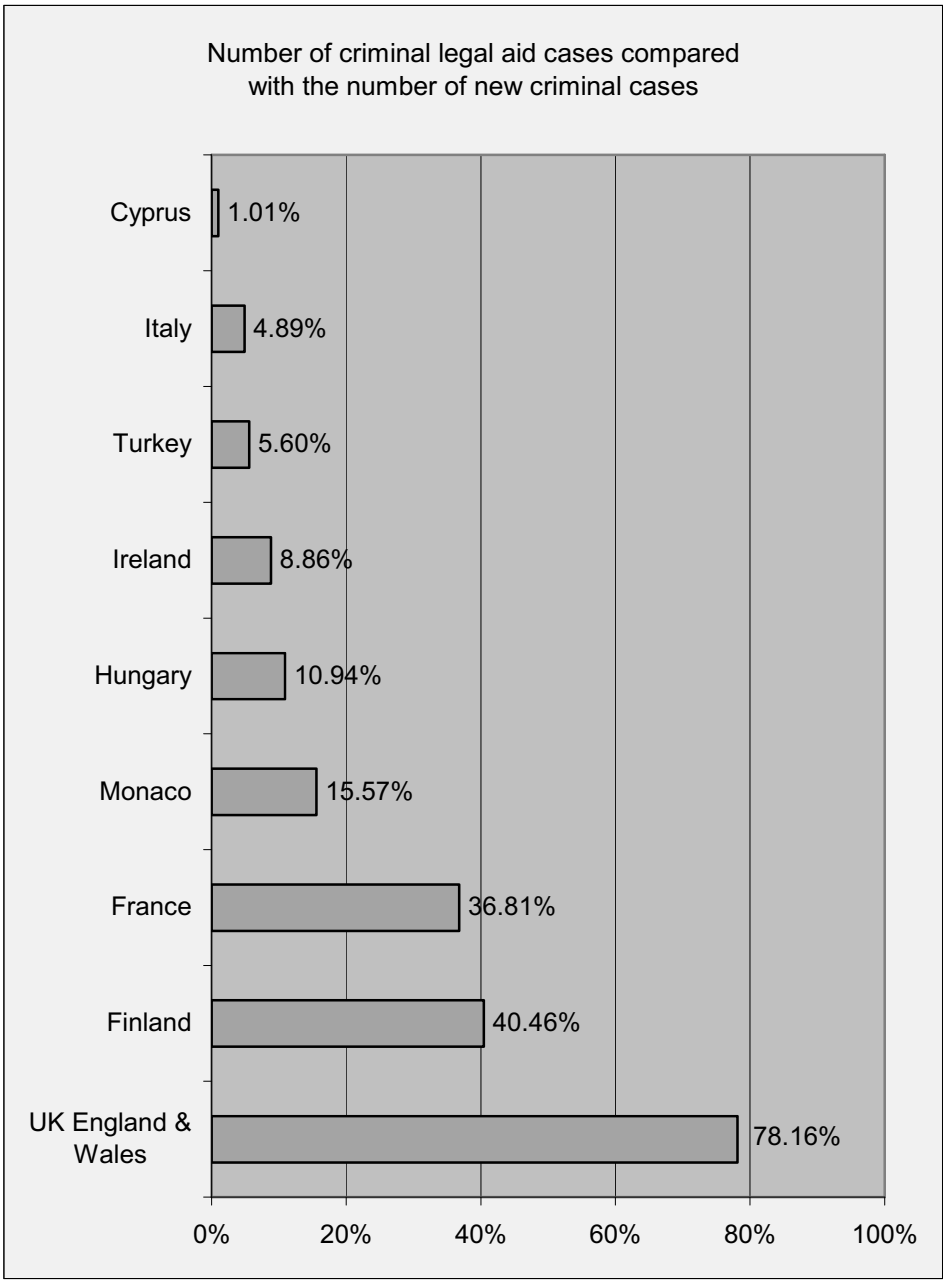
The findings show clearly that legal aid does not occupy the same place in the daily administration of justice in all states. Legal aid may be common in some states (above all, the United Kingdom, but also Monaco, the Netherlands, Finland, France, Romania and Portugal), but almost non-existent in others (Georgia and Croatia). These disparities may be the result of many factors. They may of course be the result of an effort by the state to allocate a large slice of its budget to legal aid (this is, for example, true of the three United Kingdom entities). They may also reflect a low level of litigiousness or a low crime rate that makes it easier for legal aid services to absorb new cases, or criteria for granting legal aid that are less strict than those in other states (UK-Scotland, Monaco and Ireland) or less selective (Netherlands and Finland). Lastly, these disparities may quite simply be explained by differences in the extent of the fields in which legal aid may be applied for in each member state (see above, Part Two, A, 3.2.1. Fields of legal aid).

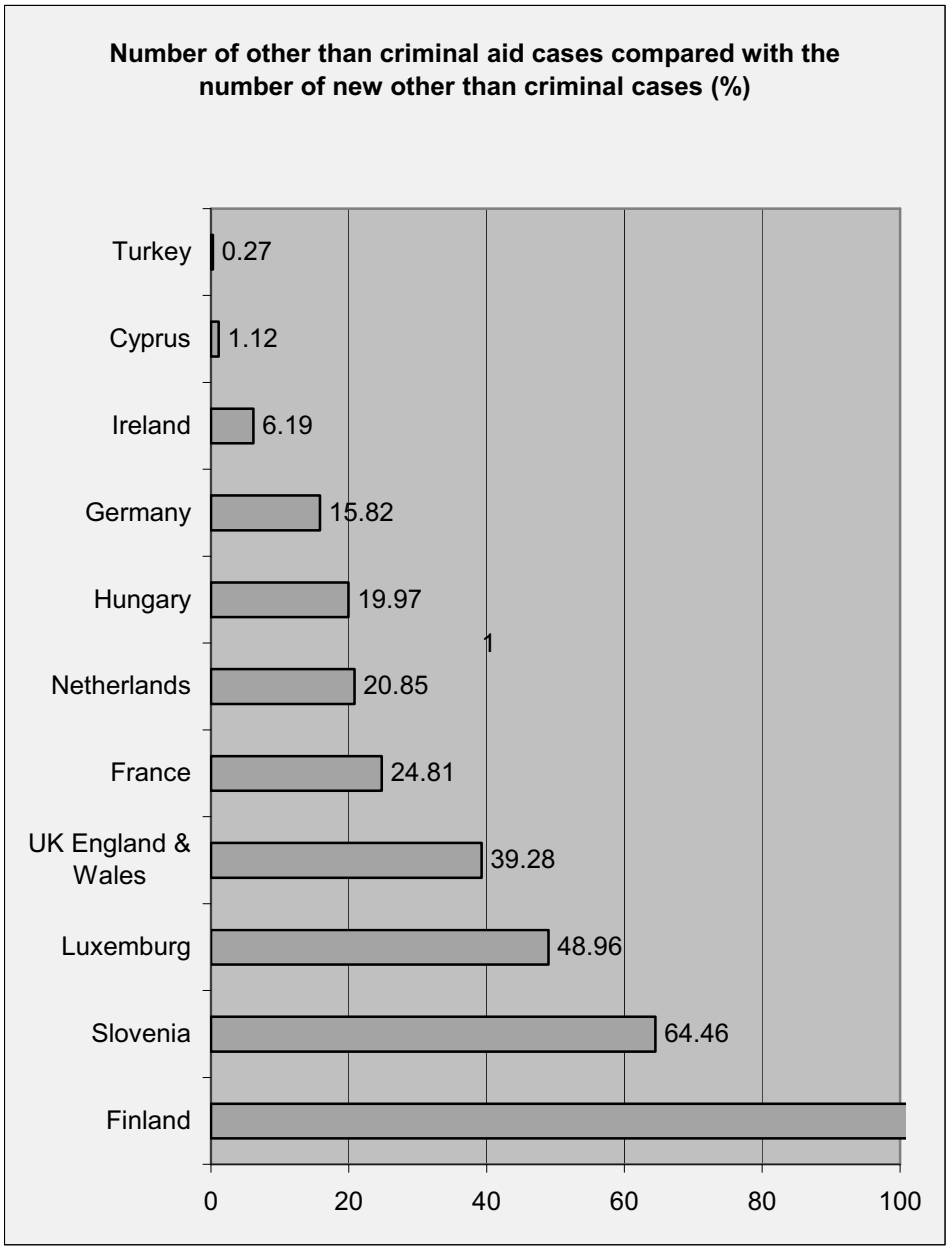
In order to determine the frequency with which legal aid is granted, it would above all be interesting to be able to compare the number of legal aid cases

with the number of new cases. National correspondents were invited to indicate the number of new cases in criminal matters (question 69) and other than criminal matters (question 73) in 2004: the figures obtained can be represented in the form of graphs comparing them with the number of legal aid cases in criminal and other than criminal matters (question 12), (see figures 8 and 9: Number of criminal legal aid cases compared with the number of new criminal cases / Number of other than criminal legal aid cases compared with the number of new other than criminal cases, below).

In criminal matters, 9 states gave complete data; in the other matters, we have been able to use the data provided by 11 states.

A warning must be given in order for these findings to be properly understood. It is not a question here of the percentage of new cases in which legal aid was granted in 2004 (the question was not asked). It is rather one of comparing the flow of new cases (in 2004) with that of cases in which legal aid was granted (in 2004); in the final analysis, these are not always the same cases, but the finding at least make it possible to assess to what extent legal aid is part of the judicial landscape in a given state.

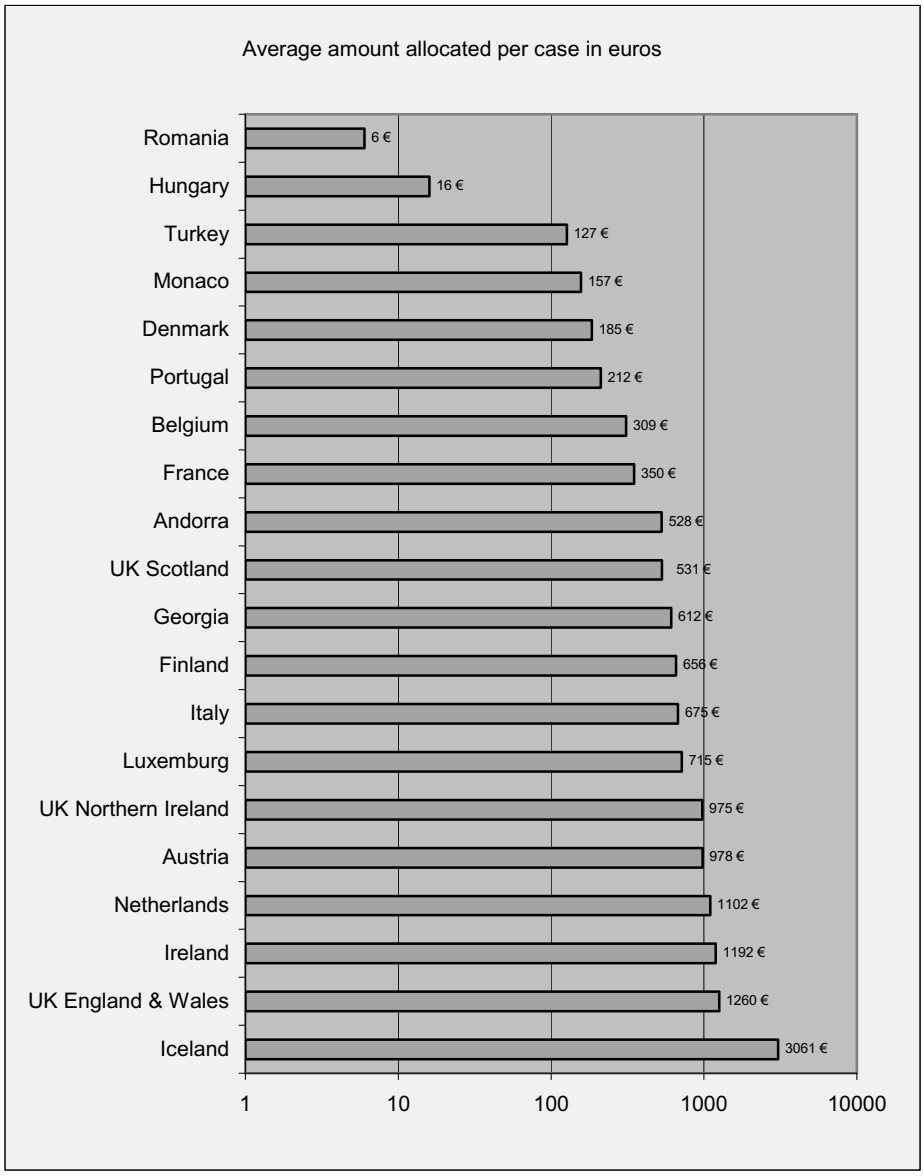

Number of criminal legal aid cases compared with the number of new criminal cases
Cyprus
1.01%
Italy
4.89%
Turkey
5.60%
Ireland
8.86%
Hungary
10.94%
Monaco
15.57%
France
36.81%
Finland
40.46%
UK England & Wales
78.16%
0%
20%
40%
60%
80%
100%



Value for Finland is 170,11

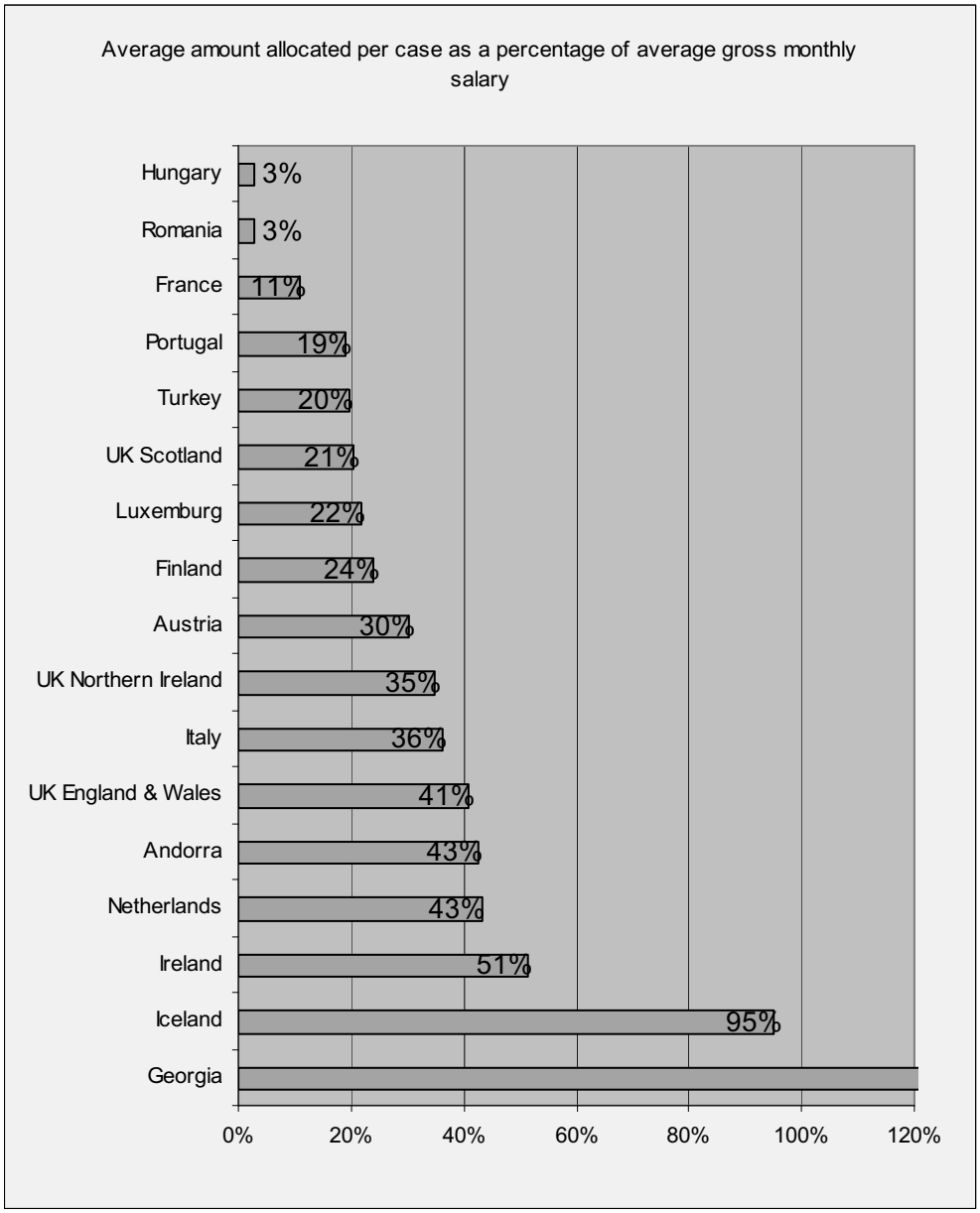
However, the proportion represented by the flow of new cases compared with the number of cases in which legal aid was granted does not fully inform us about the effectiveness of such aid: the average amount allocated to each case reflects another aspect of this effectiveness. Where the amount of the annual public budget allocated can illustrate the state's investment effort in the field of legal aid, the average amount allocated to each case reflects

the benefit derived from that effort (see figure 10: Average amount allocated per case).



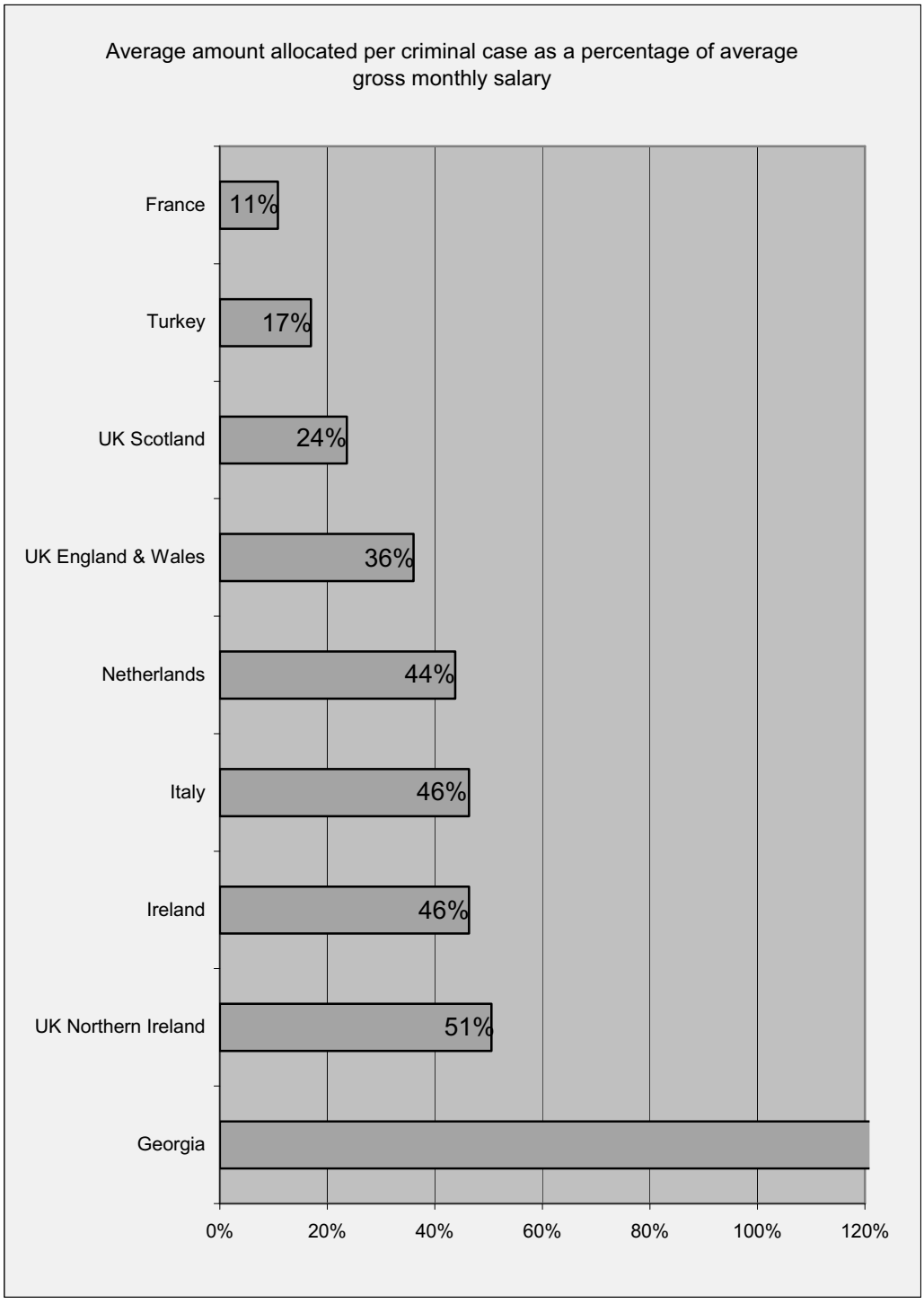
The figure above presents in the form of a logarithmic scale the average amount allocated in euros. It takes into account neither the respective wealth of the member states nor that of their inhabitants. Another representation, better illustrating user perception of the average amount of legal aid received, could be proposed.

The following representation seems to go some way towards doing this: it sets out the average amount allocated per case as a percentage of average gross monthly salary (see figure 11: Average amount allocated per case as a percentage of average gross monthly salary).

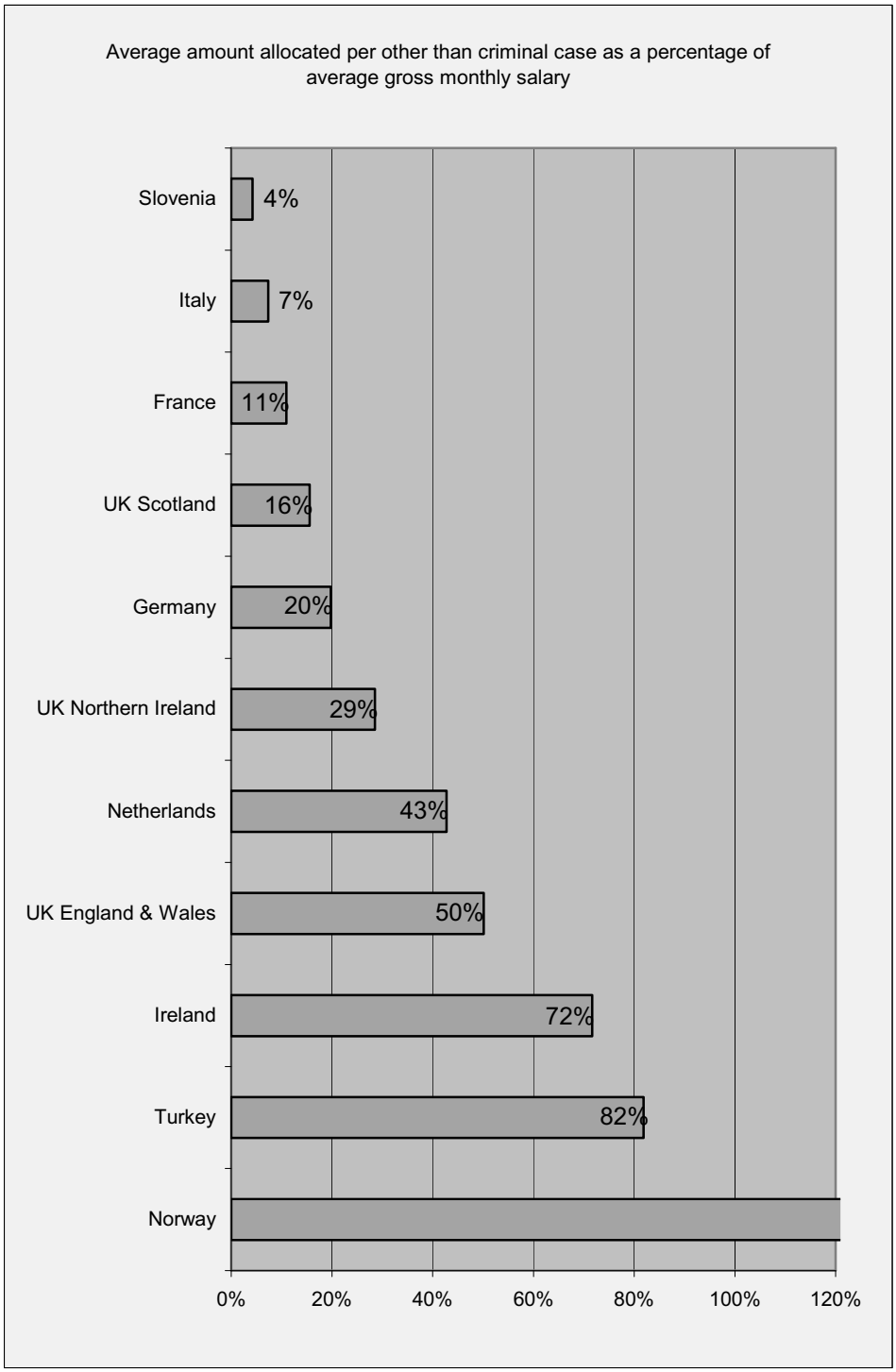


Value for Georgia is 740%

The average amount allocated may even be assessed as a percentage of average gross monthly salary according to the type of case.



Value for Georgia is 8267%



Value for Norway is 392%

B. The responsibility of the courts

The social efficiency of access to justice depends to a great extent on the courts. Because they are often the individual's first contact with the judicial system, in a sense the embodiment of justice, their responsibilities in questions of access to justice go way beyond simply making available an up-to-date list of lawyers. Many other themes of study attest to their involvement, such as access to a court, effective participation in the hearing by the parties, access to alternative means of dispute settlement, reasonable cost and timescale of access to justice, evaluation of user satisfaction etc.

1. Access to the courts

1.1. Access to the courts and reception service

The first contact users have with the court is often with its reception service. Users' first impression will be strongly dependent on how they have been received: is the reception service always open? Is a waiting-room available for people who have been summoned? Are summonses to hearings issued in ways that avoid unnecessary waiting (appointments at precise times, time slots etc)? These questions are of great practical importance to users[134], often lost and ill-at-ease, who expect the judicial system to take them into consideration and give them its full attention.

A certain number of courts have set up such services, either on their own initiative or on the recommendation of their government.

The Regional Court of Linz (Austria) provides users with a "one-stop-shop" for conducting all their business with the court and obtaining any information[135]. In France a "Marianne Charter" has been drawn up that enables government departments and particularly the courts to work individually to put in place optimum reception conditions for users. Locally, each court determines what commitments it intends to make with respect to users and how it plans to do so? [136].

1.2. Access to the courts and the new technologies

For the purposes of this study, it is interesting to compare:

- the general level of computerisation of the courts, in other words, how the new technologies improve the "internal relations" of the courts;
- how the new technologies can improve the accessibility of the courts, in other words, their "external relations" with users.

1.2.1. Internal relations of courts

With the exception of Serbia and Armenia, the general level of computerisation of the courts is recognised throughout the Council of Europe: 45 states said that in general their courts had computer facilities

(question 48). Means of communication dedicated to internal use in the courts are therefore relatively common: the CEPEJ questionnaire (question 49) offered various indicators for measuring the importance of computers in the daily work of judges and clerks of courts (word processing, electronic database of case-law, electronic files, e-mail and internet connection) or the support they provide in the administration and management of courts (case registration system, court management information system, financial information system). In addition to the fact that computerisation of the courts can facilitate certain administrative tasks and enable judges to spend more time dealing with cases, a comparison of the data gathered with those on the external relations of the courts is enlightening from the point of view of access to justice.

1.2.2. External relations of courts

The same question (question 49) identified criteria for measuring the accessibility of courts to users (electronic forms, website, other electronic communication facilities).

1.2.3. Comparison of internal relations/external relations

A first, overall approach shows general trends in the national correspondents' replies. Firstly, member states have more difficulty providing precise data on the internal relations than on the external relations of their courts. (Appendix 7)

Secondly, the national correspondents' replies show that the courts have developed their internal relations more than their external relations. (Appendix 8)

A second approach brings out the differences between the internal relations and the external relations of the courts in each member state. For this purpose, the national correspondents' replies were coded.

Each time one of the equipment criteria listed by the CEPEJ was satisfied in all courts, the state was given a score of 4; for each equipment criterion that was satisfied in more than half the courts, the state was given a score of 3; for each equipment criterion that was satisfied in less than half of the courts, the state was given a score of 2; the score was only 1 for each equipment criterion satisfied in less that one tenth of the courts. The internal relations of the courts were then marked out of 32 (8 criteria) and the external reports out of 12 (3 criteria). The results are presented in detail in the appendix 9.

This approach shows that some states have developed both the external and the internal relations of their courts (for example, Austria had scores of 31/32 (97%) and 12/12 (100%)), while other countries have favoured the internal aspect (for example, Estonia had scores of 32/32 (100%) and 4/12 (33%)) or the external aspect (for example, the Czech Republic scored 26/32 (81%) and 11/12 (97%)). It is therefore possible to show the difference

between day-to-day computerisation within the court (internal relations) and the computerisation used to make the court and the law more accessible to users (external relations) for each member state. These differences are shown in Appendix 10.

The states that lag behind in developing the external relations of their courts can improve user access to justice by giving their courts the means and instructions necessary to make forms, websites and other electronic communications facilities available[137]. However, the added value of the new technologies, particularly the internet, needs to be put into perspective with regard to some aspects of access to justice: for example, the contribution of the internet to access to the law has two limitations. Firstly, in some states such facilitated access as yet concerns only the most prosperous sections of the population who have access to the most modern means of communication; secondly, it is noteworthy that people who use the internet do not always succeed in throwing off a certain distrust: they often check the reliability of information obtained on-line with a lawyer. In the short term, the internet could, nonetheless, enable some practical aspects of access to justice to be improved, for example, directly informing users of the progress of their case, how a court works, etc.

1.3. Access to the courts and vulnerable people

The national correspondents' replies give very little information on the accessibility of court premises (question 23). Only one member state provided useful information on this point: in Malta, all court buildings are equipped in such a way as to be accessible to people with mobility problems. It would, however, be interesting to know if people with mobility problems have reserved parking spaces, a lift, ramps and assistance to gain access to the chambers. It would be very interesting to collect precise information on the degree to which courts are adapted to the needs of people with disabilities..

1.3.1. Local practices guaranteeing effective participation of the parties

At court level, efforts aimed at ensuring the effective participation of vulnerable people are usually organisational in nature (question 23). These are local practices designed to ensure their physical presence and full understanding and enjoyment of their substantive and procedural rights.

1.3.1.1. Local practices for summoning the parties

In the Russian Federation, for example, juvenile offenders are summonsed through their legal representatives or through the social institution caring for them. When juveniles are arrested, their legal representatives are immediately informed and summoned by the competent court. Their

participation, in addition to that of a lawyer, is considered essential in order to safeguard children's interests.

1.3.1.2. Local practices regarding receiving and informing victims of crime

In Estonia, the law requires the courts to communicate to the parties a list of the people able to provide them with legal information[138].

In France, immediately a complaint is lodged, the victim is informed of the existence of local associations able to help him or her with their complaint (aid in becoming a party (*partie civile*) to the case, attendance at the trial etc). According to needs, such victim support associations may call on other, more specialised associations, or even experts (translators, psychologists speaking the victim's mother tongue, etc.).

In Ireland, the national police (Gardaí) provide a free translation and interpretation service for victims of offences at local level. The legal information mechanism for victims is seen as an essential component of accessibility of the courts. To this end, the Court Witness Service provides witnesses summoned to appear in court with information on the proceedings and their role in the trial. This service is organised in the courts by volunteers, with the financial support of the Commission for the Support of Victims of Crime. Where the victim is a foreigner, the national police refer him or her to the Tourist Victim Assistance Service, a body responsible, among other things, for interpreting and legal assistance for foreigners. In addition, in order to ensure the victim's peace of mind, there is a mechanism for monitoring sexual offenders at court level in Ireland. Under the Sex Offenders Act, 2001, anyone found guilty of a sexual offence against another person is required to give his or her name and address to the police station (Garda Síochána) within seven days of the verdict. The Gardaí must be informed of any subsequent change of address within seven days according to the same procedure.

In Iceland, there is an emergency reception facility for rape victims at Landsspitali University Hospitals. The Icelandic correspondent also mentioned the establishment of refuges for juvenile victims of offences. There are similar arrangements in Poland for victims of rape and domestic violence.

In Luxembourg, the prosecution services automatically inform the victim support service of cases of domestic violence so that victims may be cared for.

In Norway, there is a free legal assistance service for victims of domestic violence in the local court.

In the final analysis, with respect to vulnerable people, accessibility of the courts can be assessed from three angles:

- Physical accessibility means equipping the building in order to eliminate or reduce physical obstacles to access.
- Psychological accessibility is connected with the ability of the court staff to receive users and direct them according to their needs. In this sense, the professionalism of reception staff, their ability to manage stressful situations and receive vulnerable people play a key role in dedramatising the court experience.
- Lastly, intellectual accessibility depends on mechanisms to ensure that users are informed of and understand their rights, their role in the proceedings and the course of proceedings.

2. Access to alternative means of dispute settlement

Mediation is now more than a distinct process for settling cases and tends to be an adjunct to the traditional judicial system in Europe, working with it interdependently. The emergence of this idea probably indicates a growth in the role of mediation in many member states.

The idea that mediation plays an important role in access to justice is not new and is also widespread outside the Council of Europe[139].

From the qualitative point of view, mediation often makes it possible for user needs to be better taken into account, particularly in criminal matters, where it may give victims a voice[140]. It also offers access to a new, less confrontational approach to dispute settlement that strives to calm down tensions after redress has been provided and to foster the reintegration of the offender in criminal cases[141].

From the quantitative point of view, the results are more qualified: while civil and family mediation reduce the workload of the judicial system, making judges more available and therefore more accessible, this is not true of criminal mediation[142]; specialists in some member states report very interesting results in this respect, however[143], and predict that in future the beneficial effect of mediation on the administration of justice will increase[144].

While the nature of the mediation procedure is profitable to access to justice, the accessibility of mediation is also in itself a criterion of access to justice[145]. It is therefore particularly important that, once they have been made aware of the procedure, the competent social or judicial authorities should set up good conditions of access and encourage users to go to mediation. The use of mediation should not, for example, create a risk for users, including victims in criminal cases, of the case becoming time-barred: the courts should be able to suspend the limitation period during the mediation procedure[146]. Another example of good practice could be to require the users involved in certain types of case to consider going to mediation before taking the matter to court[147]. This requirement to consider mediation applies above all to civil matters[148] and family matters[149]; it could in future be developed in criminal matters[150].

3. Reasonable timeframe for access to justice

Processing cases within a reasonable time is one of the fundamental guarantees of the European Convention on Human Rights[151]. From the point of view of access to justice, the foreseeability of the length of proceedings and the flow of proceedings are decisive indicators of the cost-efficiency of the judicial system and its image in the eyes of users[152].

For users preparing to initiate court proceedings, lack of foreseeability of the timeframes for processing cases is an important psychological obstacle that may in itself discourage them from taking that step. For users who have already initiated proceedings, an unexpected delay in processing is often synonymous with increased costs.

Excessive length of time in processing cases is therefore a symptom of flaws in flow management visible at local level. For this reason, setting up systems to identify cases that have not been processed within an acceptable time and analysing the reasons for the excessive length of proceedings are the subject of particular attention by the CEPEJ (questions 57-58 of the Revised Scheme). The information gathered by the CEPEJ on this subject makes it possible to measure the capacity for self-diagnosis of the various parts of the judicial system in member states concerning the length of proceedings and delays.

3.1. Identification of cases not processed within a reasonable time

The rise in the number of cases waiting to be heard is a frequent cause of the lengthening of proceedings. For this reason, systems for measuring such backlogs are now a key element in the monitoring and evaluation of the courts in most member states. According to the CEPEJ data (question 57), in civil matters, 39 states out of 45 have a system for measuring the backlog of cases awaiting judgement and of identifying cases not processed within an acceptable time[153]. In criminal matters, 39 out of 44 member states have such a system[154]. The proportions are comparable in administrative matters: there is a system for analysing flow in 34 of the 40 member states which answered the question (question 57)[155]. In the final analysis, 33 member states have such a system for all types of case mentioned[156], five member states seem to restrict the use of such a system to civil and criminal cases (Austria, Greece, Italy, Malta and Norway) and one member state (Albania) only has such a system for civil cases.

In several member states, monitoring systems at local level enable cases that exceed the authorised timeframe to be identified.

In Austria, cases awaiting processing are entered on an electronic database that enables the status of each case to be monitored at every key stage in the proceedings.

In Bosnia-Herzegovina, the courts are responsible for monitoring each new case for a year. This system also enables cases that have not been processed in previous years to be identified.

In Lithuania, compliance with the reasonable time for processing cases is supervised by the President of the higher court. The supervision procedure may be triggered either by a complaint or in the framework of periodic inspections of the activity of the courts. The national department for courts gathers and analyses information on the number of cases that have been in progress for more than six months, as well as the reasons for these prolonged timeframes. The conclusions of this supervisory procedure are submitted to the High Council of Justice.

In the Netherlands, the time taken to process criminal cases is monitored by the prosecution services. There is a comparable system for monitoring civil and administrative cases at the level of each court.

In Portugal, the High National Council of Justice is informed of the number of cases awaiting trial through inspections of the activity of judges and the courts, as well as through complaints lodged by users.

In order to enable a given case to be monitored from the time it is first registered to the end of the proceedings before the appeal authority, the statistical systems in the various courts must be compatible and permit the exchange and centralisation of data. In this connection, the example of Romania is of great interest. The reform of the statistical system under way in this member state provides for centralised data collection. Thus, from the second half of 2006, each case registered will be given a reference number. This system will make it possible to trace the case from one court to another at all levels of proceedings and thus to compile a reliable database on the length of proceedings.

3.2. Analysis of causes of delays in proceedings

The information on delays in proceedings is particularly useful when it enables the causes of delays to be analysed. Only 18 of the 44 member states that replied to question 58 have a method for analysing delays in proceedings[157]. It has to be concluded, therefore, that out of all the member states able to identify cases not processed within a set time (ie 39 states, see question 57), only 18 are able to analyse the causes of these delays.

However, the details given by member states provide several examples of “good practices” that could be taken into account by the states that have not yet adopted this approach. In most cases, analysis of delays is an integral part of the procedures for monitoring and evaluation of the courts (Albania, Finland, Ireland, Lithuania, Turkey, etc.). In Albania, for civil and administrative cases, there is a system for evaluating the work of judges, including estimation of the time taken to process cases. There is a similar

system of self-supervision by judges and analysis of statistical data in Finland and Ireland, this time concerning all types of cases.
The present trend is to digitalise data on delays in the courts and to analyse them using special software (see, for example, Spain, Hungary and the Russian Federation).

4. Evaluation of user satisfaction

The image of the justice system undeniably helps to set the standards for high-quality justice. Changes in the institution, whose democratic accountability has been growing in Europe over the years, mean the public can no longer be ignored in a study of the quality of access to justice. Indeed, this indicator can be of value to member states, as long as they concentrate research, not on the purposes of the justice system as they are seen by a representative sample of the population, but more narrowly on the quality that users acknowledge the procedures and the institution to have. Contemporary issues concerning access to justice are almost exclusively concerned with the system's ability to involve users actively in the proceedings: the very principle of a survey that brings out the confidence and satisfaction of individuals with regard to access to justice presupposes that they have had recourse to it fairly recently.

Only 25 of the 45 states that replied (question 29) said they had set up surveys of users or legal professionals (judges, lawyers, officials, etc.) in order to measure their confidence in the judicial system and their degree of satisfaction with the services delivered (for a general presentation of the data, please refer to Table 19 of the report "European Judicial Systems – Edition 2006"). This figure, which is already low, even seems to need to be revised downwards: a study of the references provided by the national correspondents shows signs of some confusion: some of the surveys seem in fact to concern the whole population and not only users and legal professionals (this is the case, for example, of the references transmitted by Lithuania, Slovenia and UK-Scotland)[158].

The scope of user satisfaction studies may be national or limited to one or more courts. While the references provided seem to show that national surveys above all concern the satisfaction of the population as a whole, the states that conduct surveys at court level question the users more. Such surveys seem to be as common as national surveys (the same number of states, 18 in each case, conduct them), but they are also less systematic (6 states out of 18 conduct systematic surveys at court level, while 10 states out of 18 conduct systematic national surveys). The scope of these surveys is useful, of course, but makes any national extrapolation impossible. In the final analysis, it appears that there is still plenty of room for setting up systematic user surveys at court level in all member states.

Any comparison of the data provided by national correspondents obviously requires the greatest caution. The questions asked and the evaluation

systems used to measure the degree of satisfaction differ in the different countries: the results are not really comparable, therefore.

Nevertheless, these findings show that, in different forms, accessibility is one of the leading criteria of quality of justice, usually along with impartiality, independence, speediness and competence. While impartiality, independence and competence seem to be concepts intimately linked with the democratic accountability of the justice system[159], the criteria of accessibility and speediness seem to point at least as much to the role of the justice system as a public service that has to decide a large number of cases efficiently. On this basis, our data enable us to offer member states four components of satisfaction of access to justice that they can use to draw up studies on access to justice[160].

4.1. First component of satisfaction: users must feel they are involved as actors in proceedings

Access to justice is not perceived in the same way according to whether individuals endure justice (a justice whose cumbersome nature and jargon deprive them of effective participation) or feel rationally guided by it towards the resolution of their problems (an institution that serves them, treating them with respect).

4.1.1. Feeling involved as a user

Showing individuals that their cases will be treated with the necessary respect and attention helps to ease some tensions (satisfaction of their private interests).

- Is the user satisfied with the court's telephone reception service?
- Is the user satisfied with the means of access to the court?
- Is the user satisfied with the reception at the court?
- Has the court put in place a one-stop-shop in order to facilitate the user's business with the court?
- Is the user summoned to the hearing at a specific time? Is that time respected?
- Is the user satisfied with the means of access to the chamber (for example, the court's signposting)?
- Does the user find the chamber appropriate to the nature of his or her case?
- Is the user satisfied with the conduct of the hearing?
- Is the user satisfied with the quality of the court premises?

4.1.2. Feeling involved as a citizen

Treating individuals with respect and dignity when they come into contact with the justice system convinces them that the institution is not simply trying to achieve a quantifiable objective but that, in order to satisfy them, it is also

striving to achieve qualitative objectives (to satisfy the individual's social interest).

- Does the user feel he or she has been treated with humanity (respect for his or her dignity and/or privacy)?
- Was the user impressed or disturbed by the direct contacts he or she had with the court?
- Was the user able to speak before the judge in a satisfactory manner (including without the other party being present for certain sensitive cases such as divorce)?
- Did the user feel that the judicial system was able to adapt to individual cases?
- Did the user have easy access to the judge responsible for his or her case?
- Did the user perceive the judicial system as a public service serving users?

4.2. Second component of satisfaction: users must feel they are "informed" actors in proceedings

For users, winning the case is only one of the factors that will influence the image they have of the justice system. If the codes of justice remain a mystery to them and its formality constantly seems strange, if they do not really understand the roles of the various people involved and cannot make an informed assessment of the merits of the actions they undertake, the rights and channels open to them will remain sources of suspicion and uncertainty. Ultimately, the degree of understanding they achieve will enable them to assume their role as actors and handle their contact with the judicial system more effectively, from the earliest stages of access to justice.

- Is the user adequately informed of the existence of different types of proceedings (including alternative means of dispute settlement)?
- Is the user adequately informed about the course of the different types of proceedings?
- Is the user adequately informed about the roles of the various people involved in the proceedings?
- Is the user adequately informed as to the foreseeable length of the proceedings?
- Is the user adequately informed about the state of progress of the proceedings?
- Does the user have easy access to the case file?
- Is the reception staff of the court sometimes approached by users seeking legal advice that is usually within the competence of lawyers?
- Are lawyers sometimes approached by users encountered in the court who seek practical information that is usually within the competence of the reception service?
- Do lawyers feel that the judicial system is too obscure to their clients?

4.3. Third component of satisfaction: users must feel that they are actors whose vulnerability is taken into consideration, where appropriate

- In sensitive cases, is the user offered psychological assistance as soon as he or she presents himself or herself at the court?
- In sensitive cases, does the court see that the premises are adapted so that the hearing runs smoothly?
- Does the court take into consideration the condition of vulnerable categories, such as juvenile victims or witnesses of offences and people with disabilities (ramps, lifts, Braille pads, etc.), the elderly, victims of sexual or domestic violence, etc?
- Does the user and/or the judge see legal aid as an inferior quality defence?

4.4. Fourth component of satisfaction: users must feel they are actors whose criticisms count

Users' relevant criticisms must be received and taken into account. The judge should also be informed of positive or negative assessments of his or her professional practice. Therefore, if necessary, criticisms should be able to be formulated in such a way as not to lead to conflict with the judge in charge of the user's case.

- Did the user's idea of access to justice before coming into contact with it correspond with the reality? How has this idea changed?
- Is the user satisfied with the court's reception desk service (courtesy, respect, consideration, understanding, competence, efficiency, clarity etc)?
- Is the user satisfied with the judge who received him or her (honesty, respect, understanding, impartiality, competence, efficiency, clarity etc)?

These components and their extensions are only some of the questions that can be used as a basis for surveys of user satisfaction with access to justice. In particular, questions should be included on legal aid, the details of how it is granted and the amounts in each member state. The point at which users are surveyed is also very important, since the outcome of the proceedings tends to influence their assessment: the questions about access can in most cases be asked before the case is decided.

C. The responsibility of judges

1. Information about the proceedings

Only one member state mentioned the influence of the judge in informing the parties about the proceedings (indirectly, through question 23). This was France, where juvenile offenders, parents, the guardian and the person who has custody of the juvenile are kept informed of developments in the

proceedings by the investigating judge or the juvenile judge[161]. This practice is not at all exceptional, however, and many other member states no doubt do the same.

Less commonly, judges may also play an educational role for individuals who in principle have no immediate need for information about proceedings: in the context of civic education, they may meet pupils in order to explain the workings of the justice system or even have them attend hearings.

Judges also have an important role to play in the development of mediation. They should be authorised to organise information sessions on mediation and, if necessary, be required to invite parties to cases to go to mediation[162].

2. Adaptation of proceedings

2.1. Preventive adaptation of proceedings

In Bosnia-Herzegovina, the judge can place a juvenile victim or witness of an offence in a “safe house” in order to guarantee his or her safety.

Spanish legislation[163] enables the judge to take preventive measures in domestic violence cases (ie eviction of the defendant from the conjugal home[164]).

French legislation gives the public prosecutor, the investigating judge, the judge of freedoms and detention and the judge responsible for the execution of sentences the power to prohibit the offender from residing in the conjugal home or appearing in that home or in its immediate vicinity. This measure may be accompanied by health, social or psychological care.

In cases of domestic violence, Irish legislation gives the judge the possibility of issuing an injunction to cease the violence (a safety order) or to leave the conjugal home (a barring order). The judge may even take interim measures before the hearing (immediate protection order) if this is justified by the seriousness of the situation.

In Luxembourg, the judge may expel the perpetrator of domestic violence from the home and issue a *pro tempore* injunction on his or her return.

2.2. Adaptation of the context of proceedings

In the Russian Federation, while a child under the age of 14 must be heard in the presence of a specialised teacher, the hearing of a juvenile over 14 does not necessitate this unless the judge decides otherwise. The child’s living conditions and education, his or her level of mental development and personality and the influence of his or her family circle are the subject of particular attention when this decision is taken. The judge may even summon the legal representatives of a juvenile over the age of 14, if he or she considers their participation necessary.

A juvenile participant in a trial may be removed from the hearing when circumstances or arguments that may be damaging to him or her are mentioned (Russian Federation, Ireland[165]).

In Iceland, there is a "restorative justice" pilot project for juvenile delinquents in the community of Grafarvogur. A similar alternative justice project for minors has been set up in Ireland[166].

3. Cost of proceedings

The cost of proceedings is of course an important aspect of access to justice and the conduct of the judge is important in this connection. As the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) has emphasised[167], all judges should ask themselves about their individual practices: does he or she take into account the cost of proceedings to the parties by limiting the actions he or she orders (expert opinions, payments into court etc)? Does he or she take into account the cost of the proceedings to the parties by giving priority to cases that have a direct impact on the parties' resources (dismissal, maintenance etc)?

4. Quality of proceedings

Judges obviously play an essential role in the quality of the proceedings: they are often in charge of the conduct of proceedings and should ensure that they are audible and comprehensible.

4.1. Conduct of proceedings

Judges' powers concerning the conduct of proceedings should enable them to neutralise certain animosities between the parties: conduct that is attentive to certain organisational questions can strengthen the parties' feeling that they are being given due consideration.

Judges should, in particular, systematically ask the people present at the hearing if there are any reasons why they should be heard first or if they should be heard in a particular way (for example, if they cannot stand for long periods). They should also summon the parties to hearings at specific times: users find it very difficult to be summoned at the same time and to have to wait for hours for their case to be called according to an order that is unclear to them.

4.2. Audibility of proceedings

In order to ensure that the rights of the parties are respected, but also to establish a social link that has been lacking, judges should ensure that the voice of justice is audible. This not only means holding the hearing in a room appropriate to the case, possibly provided with the necessary equipment but, more simply, ensuring that the parties can hear what is being

said and above all that the terms used are intelligible to them. Member states should be invited to develop training for judges for this purpose.

4.3. Understanding of the proceedings

Because judges preside over the proceedings, they are to a great extent responsible for ensuring their appropriateness. Their knowledge of the case should serve to guide them in giving the parties the means to put their arguments forward, to feel that they have been able to come and speak in court and that the court has listened to them. The role of judges in access to justice goes beyond this, however, because justice should be able to reach users and users should be put in a position to understand the action and the decision in the case: access to justice would lose all substance if no effort were made to make the decision in the case understood and as far as possible accepted.

Judges should in particular be trained to be able to provide the parties with basic explanations about the case; in every case, a particular time should be set aside for such explanations. During the proceedings, the parties should whenever possible be invited by the judge to ask for explanations. The reasons for decisions and, in criminal cases, the reasons for the sentences handed down should take into account the need to make them understood and as far as possible accepted.

PART THREE: PRIVATE EFFICIENCY OF ACCESS TO JUSTICE

A. Direct responsibility of users

1. Costs of ordinary proceedings

Initiating court proceedings or being drawn into them obviously results in a duty to bear the costs. From the point of view of access to justice, the management of the financial burden on the user is of particular interest: the proportion of private funding determines the accessibility of judicial services, on the one hand, and the degree of judicialisation of the society, on the other.

It is true that the private cost of justice is determined by a range of factors, some of which are inherent in the very nature of judicial mechanisms. The role of the parties in the trial is a perfect example of this. The adversarial system gives the parties the decisive role in the process of establishing the facts and imposes on them responsibility for the resulting costs. The parties, who are naturally interested in the outcome of the debates, are doubtless prepared to invest more resources in a procedural action than is a judge in an inquisitorial system who is responsible for carrying out the same action, but who has to distribute the public funds at his disposal among different cases. Therefore the adversarial system perhaps lends itself more to a "privatisation" of justice characterised by substantial private investment (financial and non-financial) in the course of the proceedings.

Once the particular characteristics of the system are left aside, however, the private cost of justice remains a universal instrument of measurement with which to assess the financial accessibility of justice for all users.

The financial accessibility of judicial services can be evaluated according to several criteria, including transparency and the possibility of insuring against judicial risks. It is in the light of these criteria that we propose to study in turn the judicial fee structure and then the means by which those costs are reimbursed.

1.1. Judicial fee structure

The principle of transparency requires the information on the judicial fee structure to be accessible and clear in order to avoid contingent elements.

The CEPEJ Report contains no information on fee structure in member states since the Revised Scheme contained no specific questions on the subject.

The most obvious components of judicial costs are probably the cost of initiating proceedings and legal advice costs.

1.1.1. Cost of initiating proceedings

1.1.1.1. General rule concerning payment at the start of proceedings

In civil and administrative matters, the initiation of proceedings in an ordinary court is often subject to the payment of a fee or court costs. This practice is adopted by all member states, with the exception of France, Spain and Luxembourg (question 17).

In criminal matters, the general trend is the reverse. Only 10 states require users of criminal courts to pay a fee at the start of proceedings[168]. In the remaining 37 member states[169], the public interest in criminal cases doubtless justifies the fact that no cost is incurred by initiating proceedings.

These observations need to be qualified, however. The table below shows that a high proportion of member states provides for exceptions to the rule of payment at the start of proceedings (question 17).

Number of states / type of case	Number of states requiring payment when proceedings are initiated		Number of states not requiring payment when proceedings are initiated	
	as an absolute rule	as a general rule, with exceptions	as an absolute rule	as a general rule, with exceptions
In criminal matters	3	7	9	28
In other than criminal matters	9	35	0	3

1.1.1.2. Exceptions to payment at the start of proceedings

The exceptions made to payment at the start of proceedings enable the private cost of justice to be reduced and, as a result, one of the financial obstacles to access to justice to be removed. The details given by member states in reply to question 17 indicate that these exceptions are aimed above all at the poorest people. In some member states, exemption from payment at the start of proceedings is an integral part of legal aid programmes. This is in particular the case in Andorra, Czech Republic, Denmark, Estonia, Georgia, Germany[170], Liechtenstein, Monaco, Norway[171], Slovenia[172] and Turkey. Other states grant this exemption to litigants whose financial resources are insufficient, regardless of whether or not they receive legal aid (Greece, Hungary, Netherlands and Poland). In Poland, the court can grant exemption from the costs of registering the case to users with low incomes and dependants[173]. In the Netherlands, in civil and administrative matters the amount of the fee at the start of proceedings is halved if the user's income is insufficient[174]. The decision as to whether or not to apply the exemption is then left to the discretion of the judge, who will assess the admissibility and merits of the petition.

Total or partial exemption from payment at the start of proceedings may also be required by law. It is then applied automatically. Such a privilege is often strictly regulated and limited to specific types of case and/or particular categories of litigants.

1) Exemption restricted to specific types of case

The information gathered shows a tendency for national legislation to waive the payment of court fees for certain types of case whose particular characteristics call for priority accessibility.

Firstly, there are public order cases in which the parties' rights are not freely available to them: family law cases and maintenance payments (Armenia, Azerbaijan, Croatia and Ireland[175]); cases concerning compensation for personal injury (Romania, Russian Federation); actions for compensation for harm caused by pollution of the environment or unreasonable use of natural resources (Moldova); actions for compensation for infringement of Articles 2 and 3 of the European Convention on Human Rights (Romania); public actions brought by the public prosecutor in the civil courts (Turkey).

Next there are cases involving parties whose power or economic resources are manifestly unequal: cases concerning employment law (Croatia); actions to set aside administrative penalties (Lithuania, Russian Federation and Sweden); consumer cases (Portugal); cases concerning residential tenancy (Ireland) or agricultural tenancy (Italy); actions to claim unpaid retirement pensions (Lithuania). Exemption from payment at the start of proceedings therefore benefits "weak" parties in order to facilitate their taking legal action when their rights have been infringed.

Finally, in some member states, the concern to protect copyright has led the legislator to allow exemption from court fees for cases involving intellectual property (Moldova).

2) Exemption restricted to particular categories of litigants

Analysis of the data shows that in the majority of member states there are legislative provisions exempting certain categories of users from payment of fees at the start of proceedings. In most cases this legal privilege is aimed at people whose status and needs justify favourable access to judicial services. Such legislative measures are often part of a broader general policy to protect vulnerable or economically weak persons.

For example, exemption can apply to people with a physical or mental disability (Bosnia-Herzegovina, Georgia, Moldova and Portugal), maintenance creditors (Armenia and Azerbaijan), consumers (Azerbaijan and Romania), public interest organisations and groups (Moldova and Portugal) or even members of the military (Turkey).

The legislation of Bosnia-Herzegovina enables the court fees payable by a foreign litigant to be paid, if there is provision for this measure in a bilateral treaty and/or the foreign state applies it reciprocally with respect to nationals of the forum state.

1.1.2. Legal advice costs

The question of legal advice costs for which users are directly liable is not studied in depth in the 2006 CEPEJ Report[176]. The Revised Scheme for evaluating judicial systems contained only two questions connected with this subject: question 94 on the transparency of foreseeable lawyers' fees and question 95 on the regulation of fees. Nevertheless, the CEPEJ data enable us to note the points on which users are economically most vulnerable: transparency and foreseeability of lawyers' fees. On the basis of these two criteria, we thought it useful to study more closely the two questions that are at present outside the scope of the Revised Scheme: the requirement to advance lawyers' fees and the possibility of contingent fees.

1.1.2.1. Advances and retainers

The requirement to advance lawyers' fees means the user has to raise funds immediately. The economic pressure of paying fees in advance and then as the lawyers accomplish their work tends to make users more responsible in going to court and to avoid the more frivolous cases.

The CEPEJ data do not provide any information that supports or refutes this observation: there was no question on ways of funding lawyers' fees in the Revised Scheme.

However, comparative research shows that there is a requirement to advance lawyers' fees in several member states of the Council of Europe. In Germany, for example, the law allows lawyers to ask for an advance and to refuse to provide legal services if the payment has not been made within a reasonable time[177]. In Belgium, lawyers frequently ask for advances in the form of retainers. Lawyers are even recommended to request retainers from their clients regularly in order to make them aware of the scale of the work already done or remaining to be done and to take the opportunity to inform them of the cost of the lawyer's work[178]. In Italy, the client advances the fees as the lawyer carries out the work in order to fund the necessary expenses and pay for the work already done[179]. In these member states, the requirement to advance lawyers' fees does not seem to compromise user access to legal services since, if the case is won, the fees can be reimbursed by the losing party within the limits laid down in legislation[180]. There is similar legislation in Greece[181], Poland[182], the Netherlands[183] and Sweden[184].

The question of advances on legal fees and retainers deserves special attention because it concerns the problems of foreseeability and transparency of fees. With respect to foreseeability, the fee scale should

enable users to assess the investment needed for each action their lawyer undertakes. Transparency requires that users receive an account of the work done and remaining to be done before each payment is made.

1.1.2.2. Contingent (or conditional) fees

The problem of transparency and foreseeability of lawyers' fees is linked with the question of contingent fees.

Our study has noted that transparency of lawyers' fees is not yet a common acquis in the member states of the Council of Europe. Easy access to information about the fees in force is guaranteed in only 29 member states (of the 45 that replied to question 94). This means that almost a third of Council of Europe states allow users to run the risks resulting from lack of transparency of fees. The financial uncertainty in these states may compromise access by the poorest people to professional advice and, by extension, to justice. Furthermore, the lack of transparency will probably affect cross-border cases, discouraging foreign users from using legal services in the forum state.

However, free easy access to information on lawyers' expenses and fees is not in itself a sufficient guarantee. Users still have to be able to assess the total cost of advice up to the end of the proceedings.

The majority of European legal systems are generally intolerant of contingent fees in legal practice. Unforeseen costs and fees and *quota litis* agreements are prohibited by law in Germany[185] and Italy[186]. This prohibition is not always applied and seems to be called into question by numerous exceptions.

Comparative research seems to establish that contingent fees are not unknown and may take various forms.

Firstly, some states formally allow *quota litis* agreements, in other words, agreements on a specific percentage of the sum to be recovered, setting the level of the lawyer's remuneration in advance according to the outcome of the trial (for example, by providing that the fees will be a percentage of the damages awarded by the judge). This is in particular the case in Greece[187] and Poland[188], where legislation explicitly allows it. If the case is won, the amount may be up to 20% of the sum at issue.

Secondly, contingent fees may take the form of a performance bonus paid to the lawyer if the case is won. This practice often results in the introduction of a double fee scale: one applicable if the case is won, the other if the case is lost. This is the case in the Netherlands. In Belgium, if the lawyer has informed the client of such a possibility in advance[189], the lawyer may ask for extra fees on the basis of the outcome of the proceedings, despite the fact that he or she is required to make the amount of the fees, costs and outlays payable by the client foreseeable ex ante[190].

Contingent fees therefore engender a risk that fees will be unforeseeable for users. They are also likely to generate conflicts of interest that are contrary to professional ethics, since financial interest may encourage lawyers to give priority to accepting cases that are more likely to be won. These two factors point to psychological, financial and moral barriers to access to justice..

1.2. Reimbursement of court costs

The question of the reimbursement of costs involves considering, firstly, the apportionment of the costs among the parties. The possibility of users having their court costs reimbursed by the opposing party seems to be a sufficient factor in itself to encourage going to court.

The financial aspect of access to justice is also decisive. It prompts a search for ways of relieving the financial burden on users and neutralising the uncertainties of the apportionment of the costs of the case at the end of the proceedings. Diversification of private funding methods, such as legal risk insurance, is now widespread and therefore warrants particular attention.

1.2.1. Burden of costs: loser pays all?

National procedural traditions can be divided into two groups according to the model of cost apportionment. In the first, each party bears his or her own legal expenses, while in the second, the legal expenses, including those incurred by the adversary, are borne by the losing party[191].

The CEPEJ data do not make it possible to establish into which of these groups the national systems of member states fall, since the Revised Scheme did not contain a question on this point.

Comparative law research shows that the system that requires the losing party to finance all or part of the costs is adopted in several states representative of the continental system. According to a widespread opinion among legal writers, the loser-pays-all principle makes it easier for parties who go to court to calculate their risks. This is the case in Germany, where the legislation provides that the losing party must reimburse the costs of the opposing party, including the lawyers' fees[192]. In Belgium, the losing party has to pay the costs[193], but lawyers' expenses and fees are not included in the calculation of those costs. The possibility of recovering lawyers' fees is, however, accepted indirectly in cases for compensation. Any victim of breach of contract who, as a result of that breach, has to take the other contracting party to court may also seek compensation for the damage resulting from the expenses and fees of his or her legal or technical adviser insofar as these are the necessary consequence of non-performance of the contract[194]. The loser-pays-all principle is also adopted in Greece[195], Italy[196], Poland[197] and Sweden[198].

The rule is made more flexible in all member states by numerous exceptions, as well as by the judge's discretionary power to modify the final apportionment of costs between the parties.

1.2.2. Role of the judge in apportioning costs among the parties

In a good number of member states, the judge has discretionary power to modify the apportionment of costs between the parties, which complicates the foreseeability of the financial burden the user will have to bear at the end of the case. This power now seems to be a common procedural acquis, however.

In all the member states except Greece, the judge's decision may concern how the costs are paid by the parties (question 19). In 36 member states, all matters (criminal and other than criminal) are concerned[199]; 8 states restrict this possibility to other than criminal matters[200] and one state restricts it to criminal matters[201].

The financial uncertainty connected with the judge's involvement in the apportionment of costs between the parties may possibly be offset by insurance arrangements covering the payment of these costs.

1.2.3. "Legal protection" insurance schemes

The creation of insurance policies for the cost of legal disputes is part of a tendency to seek alternative sources of funding that allow access to justice. The diversification of sources of funding of legal costs and mutualisation of the risks associated with legal proceedings are now being studied in several member states of the Council of Europe with a view to possible reforms.

The data set out below (see Table 12) show that the majority of member states which allow the judge to influence the distribution of costs give users the possibility of taking out private insurance in anticipation of a dispute. Conversely, private insurance is seldom possible in member states where the legislation does not give the judge discretionary powers with respect to cost apportionment.

Table 12: Judge's influence on apportionment of the costs

Judge's decision on apportionment of the costs / Legal protection insurance			Do judicial decisions have an impact on how court costs are apportioned among the parties? (Q. 19)			
			in criminal cases		in other than criminal cases	
			Number of states that replied in the affirmative	Number of states that replied in the negative	Number of states that replied in the affirmative	Number of states that replied in the negative
			38	**9**	**45**	**2**
Possibility of taking out legal protection insurance (Q.18)	Number of states that replied in the affirmative	26	22	4	26	0
	Number of states that replied in the negative	21	16	5	19	2

A comparative analysis of the data suggests that legal protection insurance is not yet a possibility in all member states (see Table 13 below). The number of states that have adopted private insurance policies for legal costs is comparable to the number where such policies are not available (26 member states as against 21) (question 18).

Of the 21 member states that do not have legal protection insurance[202], 20 give the judge power to influence the apportionment of the costs of the case among the parties through his or her decisions. In Table 12, the data of these 20 member states have been highlighted for ease of reference It emerges that 12 of the 20 states are "new" members of the Council of Europe, in other words, belong to the second "wave" of member states (reference date: from 1 January 1990). As the insurance sector is developing in these states, it is not unlikely that legal protection insurance will soon become established there.

Table 13

Member state	Year of joining Council of Europe	Judicial decisions that can concern how costs are paid by the parties (Question 19)		Private legal protection insurance (Question 18)
		In criminal cases	In other than criminal cases	
Albania	1995	Yes	n/a	No
Andorra	1994	Yes	Yes	No
Armenia	2001	Yes	Yes	No
Austria	1956	Yes	Yes	Yes
Azerbaijan	2001	Yes	Yes	Yes
Belgium	1949	Yes	Yes	Yes
Bosnia-Herzegovina	2002	Yes	Yes	No
Bulgaria	1992	Yes	Yes	No
Croatia	1996	Yes	Yes	No
Cyprus	1961	Yes	Yes	No
Czech Republic	1993	Yes	Yes	No
Denmark	1949	Yes	Yes	Yes
Estonia	1993	Yes	Yes	Yes
Finland	1989	Yes	Yes	Yes
France	1949	Yes	Yes	Yes
Georgia	1999	No	Yes	No
Germany	1950	Yes	Yes	Yes
Greece	1949	No	No	No
Hungary	1990	Yes	Yes	Yes
Ireland	1949	No	Yes	Yes
Iceland	1950	Yes	Yes	Yes
Italy	1949	Yes	Yes	Yes
Latvia	1995	Yes	No	No
Liechtenstein	1978	Yes	Yes	Yes
Lithuania	1993	No	Yes	Yes
Luxembourg	1949	Yes	Yes	Yes
Malta	1965	Yes	Yes	No
Moldova	1995	No	Yes	No
Monaco	2004	No	Yes	No
Netherlands	1949	No	Yes	Yes
Norway	1949	No	Yes	Yes
Poland	1991	Yes	Yes	No
Portugal	1976	Yes	Yes	Yes
Romania	1993	Yes	Yes	No
Russian Federation	1996	Yes	Yes	No
San Marino	1988	Yes	Yes	Yes
Slovakia	1993	No	Yes	No
Slovenia	1993	Yes	Yes	Yes
SM-Montenegro	2003	Yes	Yes	No
SM-Serbia	2003	Yes	Yes	No
Spain	1977	Yes	Yes	Yes
Sweden	1949	Yes	Yes	Yes
Turkey	1949	Yes	Yes	Yes
UK-England/Wales	1949	Yes	Yes	Yes
UK-Northern Ireland	1949	Yes	Yes	Yes
UK-Scotland	1949	Yes	Yes	Yes
Ukraine	1995	Yes	Yes	Yes

The data collected do not enable any further analysis to be made. Apart from the information on the availability of legal protection insurance in member

states, the data say nothing about certain very important questions concerning the popularity, usefulness, accessibility and cost-effectiveness of such systems. Is the insurance policy available to all parties, regardless of their role in the proceedings (plaintiff or defendant)? What is the cost of the policy for the user? Do the insurance policies provide comprehensive cover? Do existing types of policy cover alternative means of dispute settlement?.

In the countries of the Roman-Germanic legal family, comparative research shows a proliferation of legal protection insurance services[203]. In Germany, where such insurance is so widespread as to make legal aid seem secondary[204], their cost is relatively low[205]. Such insurance is even compulsory for certain types of professional and non-professional activities and for certain types of contract. There is no legal protection insurance for cases involving family or inheritance law, however. In the Netherlands, almost 1.3 million people (out of a population of 16.2 million) have specific insurance policies covering the financial risks of possible disputes. The figure is still higher for "disputes" clauses included in vehicle and real estate insurance[206]. In Sweden, 97% of the population have comprehensive cover for legal disputes[207]. In Belgium, a recent reform of May 2006 has made the inclusion of insurance clauses for disputes compulsory in order to facilitate access to justice[208]. This reform simply confirms an existing situation in which most insurers were already offering legal protection insurance, but it will probably result in an increase in the percentage of cases that are comprehensively covered[209].

In countries not belonging to the Romano-Germanic family, legal protection insurance policies are much less common. In Greece[210] and Poland[211], such policies are simply not available for lack of a suitable legal framework and attractive insurance rates. In France[212] and Italy[213], such arrangements exist but there is little demand for them from users. In Italy, their lack of popularity is often explained by low profitability of the services provided and by the practice of underestimating the risks and costs of legal disputes[214].

Whatever form they take, the insurance arrangements studied are of great interest. They make it possible both to free up some of the public funds allocated to financing access to justice and to reduce the private cost to the user. Such insurance also contributes to legal certainty by making it possible to anticipate the judge's decision on the apportionment of costs between the parties, which is often unpredictable. A working group in the framework of the CEPEJ could examine existing legal protection insurance practices; a study of the popularity, accessibility, profitability and effectiveness of such policies would make it possible to assess their real influence on the private efficiency of access to justice.

2. Costs of alternative proceedings

The data collected by the CEPEJ Working Group on Mediation[215] reflect a consensus among the member states concerned[216]: whatever the area in

question, the tendency seems to be to provide direct financial support either through legal aid or by other means.

In civil and family matters, and even more so in criminal matters, legal aid seems to be seen as a guarantee that mediation is affordable[217]. In some countries, however, a contribution may be required of users, and a proportion of the costs may therefore be borne by them[218].

In civil and family matters, the proportion of costs that is not covered by legal aid may be borne by non-governmental organisations (Lithuania, Poland). Even then, however, the formalities involved may be an obstacle to access to mediation (Slovenia). It seems more efficient, where possible, for a public institution to provide user support (Czech Republic)[219]. Indeed, this was the view clearly expressed by the CEPEJ Working Group on Mediation[220].

In criminal matters, public funding is more systematic, although its source varies considerably from one member state to another[221], and the proportion of private funding (churches, donations, NGOs) seems lower than in the case of civil and family matters. Users do not bear the full cost of mediation in any member state. Mediation does not usually entail any costs for victims (Austria, Germany, Romania, Slovenia, United Kingdom). The offender may be required to pay to take part in mediation, or may, as in civil and family matters, receive financial assistance (United Kingdom).

Where a proportion of the mediation costs is borne by users, it is important that the amount should be "reasonable and proportionate to the importance of the issue at stake"[222]. It is also important that, as in the case of classic proceedings, the contribution required is proportional to the user's income[223].

It is difficult to compare the costs to be borne by users in the various member states, as there are as yet no data that make it possible to do so properly. On the one hand, fluctuating exchange rates are a source of error in the case of data from countries that do not provide figures in euros and, on the other, the various countries do not assess mediation costs on the same basis (cost of one hour's mediation/cost of a mediation "session")[224]. It is, on the other hand, possible to compare the costs of mediation and judicial proceedings for users within the same country. While mediation generally seems to be appreciably cheaper for users, this is not always the case (in Lithuania, for instance, the relatively modest costs attached to a trial may give the user the impression that mediation is expensive).

B. Responsibility of users through their paid representatives

The data collected by the CEPEJ provide only a sketchy picture of the relationship between users and their representatives (lawyers, etc), probably because they mainly concern actual judicial systems. Yet this relationship is overwhelmingly important to access to the courts. We shall just provide a few pointers.

Professionals paid by users to represent them, starting with lawyers, may play a very important role in informing users about proceedings and the law that applies. This is true in the case of the member state's domestic law and even more so in the case of disputes involving foreign elements.

1. Information about proceedings in the member state (domestic law)

The data forwarded to the CEPEJ by the national correspondents tell us very little about the information given to users by their representatives in practice.

In any event, if users are to be informed about proceedings, it is necessary for the lawyer to provide relevant information about the workings of the judicial system, the rules governing hearings, the nature and amount of the costs to be borne by the user and the foreseeable risks attached to the proceedings. This information must be provided in a suitable manner, with recourse if necessary to specific forms of conduct where vulnerable people and victims of offences are concerned.

2. Information about proceedings in the other member states (foreign law)

The possibility that unfamiliar foreign law will apply is a considerable risk to the user, and is often sufficient to discourage transfrontier activity and make it difficult to foresee what conduct will be considered a criminal offence and what penalties will be incurred. Without the services of a paid representative, it is difficult for users to cope in the absence of effective co-operation arrangements concerning the provision of information about foreign law[225].

This situation is therefore a drawback for users, especially those who are less well off[226], in that the information it is possible to obtain about procedures and access to the law and the courts depends on what the individual can afford[227]. The success of the search for information about the content of the rules applicable depends largely on how much users are able and willing to invest. In the absence of common standards, the inferior quality of procedures for applying foreign law generates inequalities among users. These concerns are grounds for drafting European instruments to eliminate inequalities in access to justice stemming from the application of foreign law[228].

PART FOUR: EFFICIENCY OF THE JUSTICE SYSTEM AND THE DEGREE OF JUDICIALISATION OF EUROPEAN SOCIETIES

The term "judicialisation" has more than one meaning. In addition to the idea of increasing involvement of judges in reviewing the lawfulness of the acts of certain authorities (elected representatives, company managers, administrative officers etc), it also suggests a propensity to go to court to settle disputes that could be settled in other ways, particularly mediation and out-of-court settlement.

These two definitions would seem to reflect a change whereby going to court is becoming a normal procedure and, for some people, even a habit. To this extent, judicialisation might be regarded as synonymous with *popularisation of justice*: the increased power of the judicial branch, the equality of citizens before the law, the media impact of some cases and the experience of users are making going to court accessible, where it was once difficult for political, legal or social reasons. In short, users are increasingly having recourse to the courts.

In addition to these definitions, judicialisation might also be regarded as synonymous with *democratisation of justice*. Deriving its legitimacy from the people, justice would seem to rest increasingly on the citizen. Subject to budgetary constraints, the courts are increasingly involving citizens in decision-making processes and sometimes give private funding a growing role in meeting the cost of justice. In short, justice is increasingly having recourse to the citizens.

A. Efficiency of the justice system and popularisation of justice

The judicialisation of society is often given as the explanation, if not excuse, for the difficulties encountered by users regarding access to justice. Because it causes congestion, the increase in the number of cases lengthens timeframes and makes justice less available and therefore less accessible[229].

The number of cases in Europe certainly seems to be rising steadily[230]. There are many reasons for this increase.

It may be connected with socio-political factors: in Poland, for example, the number of private cases has risen sharply since 1989[231]. The growing public awareness of individual rights has encouraged the government to set up new court-type bodies (Ombudsman, consumer rights commissioner etc.) that are not unconnected with this development.

The increase in the number of cases may also be the result of economic factors. In Germany, it seems that the increase in private cases (around 10% in 2006) is in part the result of an unfavourable economic climate[232]. The same observation is true of the Netherlands, where the district courts have seen an annual rise in the number of cases of almost 20%[233]: insolvency

cases, employment disputes and actions for the recovery of debt account for a large proportion of new cases.

Technological change also contributes to the proliferation of cases. States are striving to put in place regulations to foster user access to justice and, in order to do so, are adapting their legislation to scientific change; considerable progress in investigation techniques in criminal cases is, for example, resulting in more cases being solved and improved evidence gathering (DNA matching; automatic speed monitoring systems etc).

While the increase in the number of cases is a reality in Europe, such judicialisation of societies cannot on its own free member states, courts and judges of the problems encountered by users regarding access to justice. These three protagonists in the justice system, each at their respective level, can and must respond to user needs: adequate financial resources, adequate court staff (lawyers, judges, clerks of courts etc), the quality of information, introduction of alternative means of dispute settlement, computerisation of the courts etc. The continued collection of data by the CEPEJ in the next few years will make it possible to gauge trends in the judicialisation of European societies.

B. Efficiency of the justice system and democratisation of justice

The judicial systems in member states are adapting to the growing number of cases by increasingly involving citizens in the decision-making process[234] and the administration of justice, as well sometimes giving them an increasing role in meeting the overall cost of justice through private funding.

1. Citizens as actors in the decision-making process

The participation of citizens on people's juries is one form of access to justice. It is true that, here, citizens are not seeking to have their rights as users recognised, but justice is revealed to them – and sometimes even imposed – in its clearest and often its hardest form. As part of their civic responsibility, individuals are called "to the other side of the bar" and, for a time, have the role of judges.

Of the 45 European states able to provide data on this subject (question 39), 21 have introduced people's juries into their judicial system. With the exception of Sweden, where such juries decide on issues of freedom of the press, it is mainly criminal matters that are within their competence, particularly the most serious offences with the heaviest penalties[235].

In the states where the people's jury is already common practice, its scope could be extended (citizens could sit as assessors alongside a professional judge in civil cases or minor criminal cases)[236]. This example could serve as a basis for reflection by the member states that have not yet adopted this approach.

Such a development presupposes that citizens are in a position to play their full part in decision-making, which means financial resources permitting "*a recruitment method well-adapted to duties, ongoing training, regular participation in hearings and compensation*"[237].

2. Citizens as actors in the administration of justice

2.1. Contractualisation of the justice system

The significant efforts made by member states to make their procedures adaptable to user needs prompt questions about how procedures in Europe might develop in the future. Will not the adaptability of procedures – which is at present only considered a criterion of quality of access to justice – change conceptions of the administration of justice by becoming a guiding principle of the relationship between judges and users?

The objectives of access to justice are based on user satisfaction more than on any other aspect of procedure. The principle of proper administration of justice requires that the users' wishes are genuinely taken into consideration in determining the procedural modalities. In order to optimise those modalities, procedure will probably have to leave room for contractualisation of the relationship between judges and users, in other words, it should allow the general rules of procedure to be adapted to the needs of each case as the user perceives them. User needs vary widely, some cases requiring rapid processing, others minute, in-depth study of a point of law, for example. By being able to negotiate how their cases are processed, individuals would become more involved in the cases concerning them.

Such a development could make it possible to agree on an optimal timeframe for deciding the case, which could increase the foreseeability of timeframes and costs of proceedings, while at the same time forestalling some of the possible delaying tactics.

Our study has highlighted the fact that most member states already accept the contractualisation of some of their proceedings, notably with respect to how vulnerable people are given a hearing[238]. The taking into account of users' specific needs should probably be extended to all cases.

2.2. Consultation about the justice system

The participation of citizens in thinking about the future and role of the justice system is a form of access to justice. Civil society could and should play a role in improving the administration of justice. For this purpose, it could be involved in consultative bodies to which key proposals concerning the functioning of the system would be submitted.

Our study has brought out the representative role that can be played in some member states by associations whose object is justice-related (victims,

consumers etc)[239]. Such associations could probably be more involved in plans to improve the quality of justice, particularly its accessibility.

2.3. Privatisation of justice

The overall cost of justice cannot be paid for entirely out of the state budget. The increase in the number of cases and the growing demand for high-quality justice are hardly compatible with budgetary constraints: the natural consequence of all this could be a rise in the proportion of private funding in meeting the overall cost of justice. It is true that analysis of the CEPEJ data does not make it possible to verify this hypothesis directly, but using them in a comparative perspective has at least brought out a significant involvement of civil society in the search for a reduction of the costs that users have to bear.

It would be an oversimplification to say that privatisation of the cost of justice equals a rise in the cost of judicial services. The gradual "privatisation" of judicial costs is determined by a whole range of factors: standard of living, liberalisation of the legal services sector, possible disengagement of the state from funding legal aid programmes, the role of the parties in the case etc. Assessment of the degree of privatisation of funding to improve access to justice requires that all these criteria be taken into account in each member state.

Our first observation concerns the very nature of procedural systems. The existing procedural models are, by their nature, receptive in varying degrees to the rise in the proportion of private capital in the funding of proceedings. For example, the adversarial system gives the parties a decisive role in the process of establishing the facts and makes them liable for the resulting costs. The parties, who are naturally interested in the outcome of the proceedings, are probably prepared to invest more resources in a procedural action than are judges in an inquisitorial system who are responsible for performing the same action, but who also have to distribute the public funds at their disposal among different cases. Whether or not the investment is financial, the adversarial system probably lends itself more to a "privatisation" of justice in the conduct of the proceedings.

Our second observation concerns the degree of public investment in programmes aimed at improving access to the law and to justice. The public legal aid sector is highly developed in some member states[240] and the right to legal aid is even guaranteed by constitutional provisions in Italy, the Netherlands and Spain.

Our study has established that the level of public investment in legal aid programmes for civil cases is significantly lower that for criminal cases in all member states. This is explained by the fact that the community of taxpayers naturally makes it a priority to fund public order cases, such as criminal cases. Conversely, it would be unjust if the cost of all private interest cases were borne by the community of taxpayers.

In member states where the public sector does not completely cover the organisation of legal aid services, the private sector rapidly fills the gap by organising pro bono legal consultations, free legal advice sessions run by consumers associations (Italy), trades unions (France), law faculties ("legal clinics" – in Poland), religious groups (Poland and Sweden) etc. In Poland, the "legal clinics" network is funded by "public interest groups" (the Stefan Batory Foundation, the University Foundation of Legal Clinics) receiving donations allowing a 1% deduction in taxable income.

Our third observation concerns the modern trend towards diversification of the modes of private funding, such as legal risk insurance or mutualisation. The wish to reduce the financial burden on users and to neutralise the uncertainties of the apportionment of costs of once a case has been decided has given rise to private insurance schemes in 26 member states of the Council of Europe. The effect of the development of such schemes is to attract private investment, indirectly contributing to improving access to justice.

Appendix 1 : List and number of member states with simplified procedures:

	Question 65 : Are there simplified procedures in your country?	
	Yes	No
civil cases (small claims)	Germany, Andorra, Armenia, Austria, Azerbaïjan, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Spain, Russian Federation, Finland, France, Georgia, Greece, Hungary, Ireland, Italia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Monaco, Norway, Netherlands, Poland, Portugal, Czech Republic, Romania, San Marino, Slovakia, Slovenia, SM-Montenegro, SM-Serbia, Sweden, Turkey, UK-England & Wales, UK-Northern Ireland, UK-Scotland	Belgium, Estonia, Iceland
criminal cases (petty offences)	Germany, Andorra, Austria, Azerbaïjan, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Spain, Estonia, Russian Federation, Finland, France, Georgia, Greece, Hungary, Italia, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Norway, Poland, Portugal, Czech Republic, Slovakia, Slovenia, SM-Montenegro, SM-Serbia, Turkey, UK England & Wales, UK Northern Ireland, UK-Scotland	Belgium, Ireland, Iceland, Malta, Netherlands, Romania, San Marino, Sweden
administrative cases	Albania, Andorra, Armenia, Azerbaïjan, Croatia, Cyprus, Spain, France, Georgia, Hungary, Liechtenstein, Malta, Moldova, Portugal, Romania, SM-Montenegro, Turkey, UK-England & Wales, UK-Northern Ireland, UK-Scotland, Ukraine	Germany, Belgium, Bosnia and Herzegovina, Denmark, Estonia, Russian Federation, Finland, Ireland, Iceland, Lithuania, Luxembourg, Monaco, Netherlands, Poland, Czech Republic, San Marino, Slovakia, Slovenia, SM-Serbia, Sweden

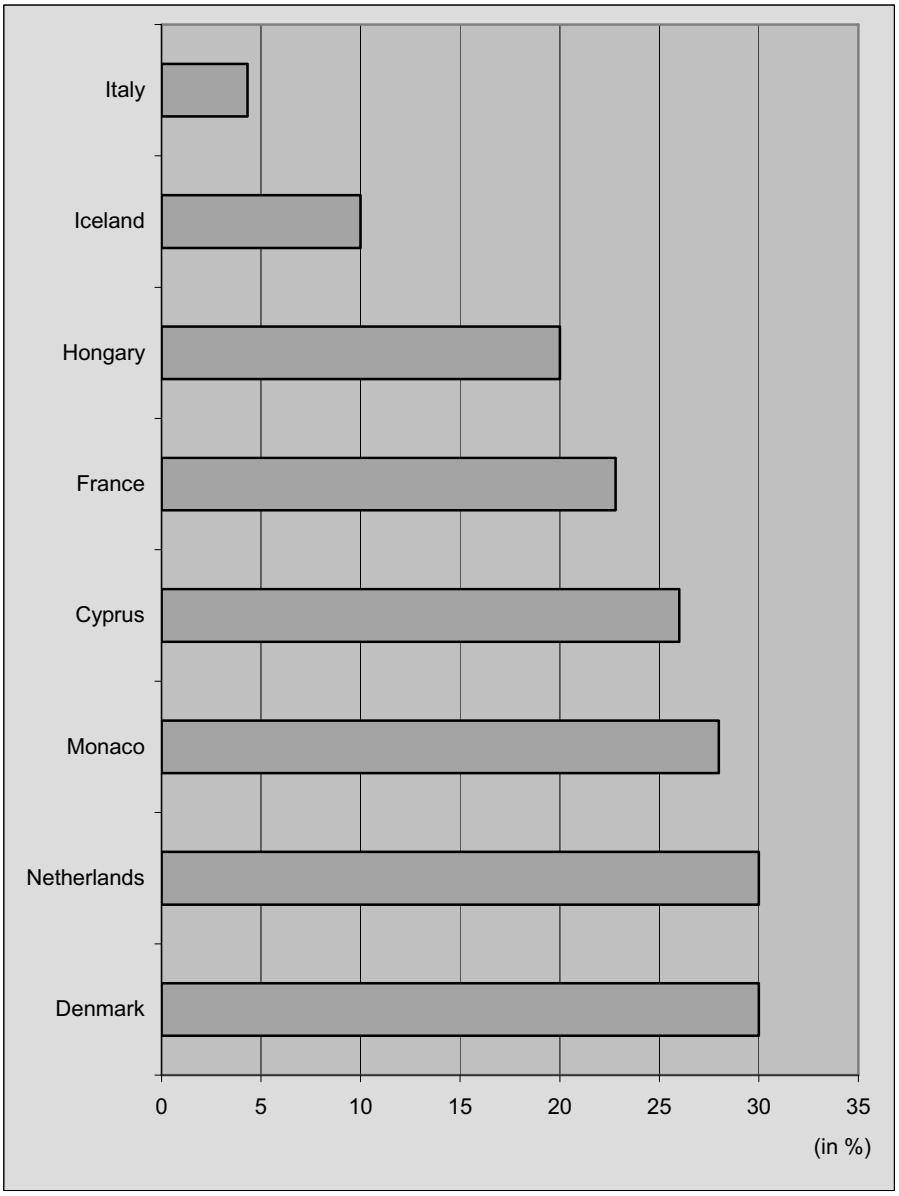
	Question 65 : Are there simplified procedures in your country?	
	Yes	No
civil cases (small claims	40 States	3 States
criminal cases (petty offences)	35 States	8 States
administrative cases	21 States	20 States

Appendix 2 : List and number of member States with urgent procedures:

	Question 64 : Does your country have urgent procedures?	
	Yes	No
Civil cases	Germany, Andorra, Armenia, Austria, Azerbaïjan, Belgium, Bosnia and Herzegovina, Cyprus, Croatia, Russian Federation, France, Georgia, Greece, Hungary, Ireland, Iceland, Italia, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Norway, Netherlands, Poland, Portugal, Czech Republic, Romania, San Marino, Slovakia, Slovenia, SM-Montenegro, SM-Serbia, Spain, Sweden, UK England & Wales, UK Northern Ireland, UK Scotland, Ukraine	Denmark, Estonia, Finland, Turkey
Criminal cases	Albania, Germany, Austria, Azerbaïjan, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Spain, Russian Federation, France, Georgia, Greece, Hungary, Iceland, Ireland, Italia, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Monaco, Norway, Portugal, Czech Republic, Romania, San Marino, Slovakia, Slovenia, SM-Montenegro, SM-Serbia, Sweden, UK England & Wales, UK Northern Ireland, UK Scotland	Andorra, Estonia, Finland, Luxembourg, Netherlands, Poland, Turkey, Ukraine
Administrative cases	Germany, Armenia, Azerbaïjan, Belgium, Cyprus, Croatia, Spain, Russian Federation, France, Hungary, Ireland, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Portugal, Romania, San Marino, Slovenia, SM-Montenegro, SM-Serbia, Sweden, UK England & Wales, UK Northern Ireland, UK Scotland, Ukraine	Andorra, Bosnia and Herzegovina, Denmark, Estonia, Finland, Georgia, Poland, Czech Republic, Slovakia, Turkey

	Question 64: Does your country have urgent procedures?	
	Yes	No
Civil cases	41 States	4 States
Criminal cases	37 States	8 States
Administrative cases	31 States	10 States

Appendix 3 : percentage of judgements in first instance criminal cases in which the suspect is not actually present or represented? (question 61) :



Appendix 4 : Is there a monopoly of representation by lawyers

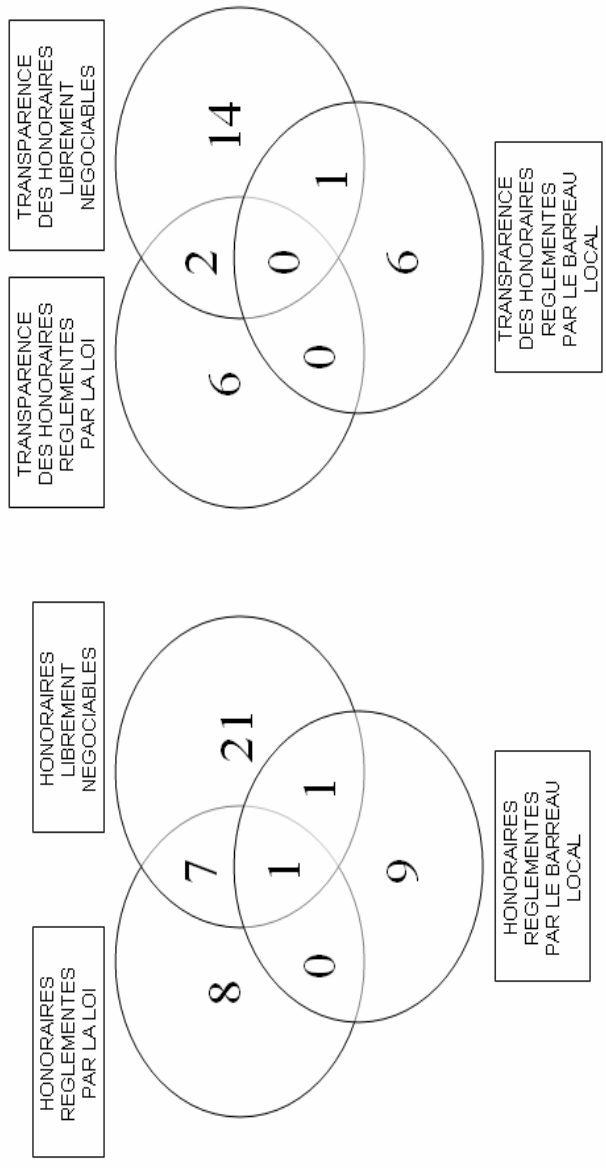
Question 89: Do lawyers have a monopoly of representation?	Civil cases	Criminal cases		Administrative cases
		As defendant of the accused	As representing the victims	
Yes	Andorra, Cyprus, Ireland, Iceland, Malta, Monaco, Netherlands, San Marino	Andorra, Armenia, Azerbaïjan, Belgium, Bosnia and Herzegovina, Cyprus, Croatia, Spain, Russian Federation, France, Greece, Ireland, Italia, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Monaco, Poland, Portugal, Czech Republic, Romania, San Marino, Slovenia, SM-Montenegro, SM-Serbia	Germany, Andorra, Belgium, Cyprus, Croatia, France, Ireland, Italia, Liechtenstein, Lithuania, Malta, Monaco, Poland, Portugal, San Marino	Andorra, Cyprus, France, Greece, Ireland, Malta, Monaco, Netherlands, San Marino
No	Albania, Armenia, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, Russian Federation, Finland, Greece, Hungary, Italia, Latvia, Liechtenstein, Lithuania, Moldova, Norway, Poland, Portugal, Czech Republic, Romania, Slovenia, SM-Montenegro, SM-Serbia, Sweden, Turkey, UK-England/Wales	Albania, Bulgaria, Finland, Hungary, Iceland, Netherlands, Norway, Sweden, Turkey	Albania, Austria, Bosnia and Herzegovina, Bulgaria, Russian Federation, Finland, Hungary, Iceland, Latvia, Luxembourg, Moldova, Netherlands, Norway, Czech Republic, Romania, Slovakia, SM-Montenegro, SM-Serbia, Sweden, Turkey, UK-England/Wales	Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Denmark, Russian Federation, Finland, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Moldova, Poland, Portugal, Czech Republic, Romania, Slovenia, SM-Montenegro, SM-Serbia, Sweden, Turkey, UK-England/Wales

Variable	Type of instance envisaged	Germany, Austria, Azerbaïjan, Luxembourg	Luxembourg	Azerbaïjan	Germany, Azerbaïjan
	Level of instance envisaged	Germany, Austria, Azerbaïjan, Estonia, France, Luxembourg, Slovakia	Estonia	Azerbaïjan, Estonia	Germany, Azerbaïjan, Estonia, Slovakia
	Case specificity	Germany, Austria	Germany, Austria, Slovakia	Slovenia	Luxembourg
No reply		Spain, Georgia, UK-Scotland, UK-Northern Ireland, Ukraine	Denmark, Georgia, UK-England/Wales, UK-Scotland, UK-Northern Ireland, Ukraine	Armenia, Denmark, Spain, Georgia, Greece, UK-Scotland, UK-Northern Ireland, Ukraine	Armenia, Spain, Georgia, Italia, Norway, UK-Scotland, UK-Northern Ireland, Ukraine

Question 89: Do lawyers have a monopoly of representation?	Civil cases	Criminal cases		Administrative cases
		As defendant of the accused	As representing the victims	
Yes	8 States	**27 States**	**15 States**	9 States
No	**27 States**	9 States	**21 States**	25 States
Variable	7 States	5 States	3 States	5 States
No reply	5 States	6 States	8 States	8 States

Appendix 5

Annexe 5 : la réglementation et la transparence des honoraires d'avocats

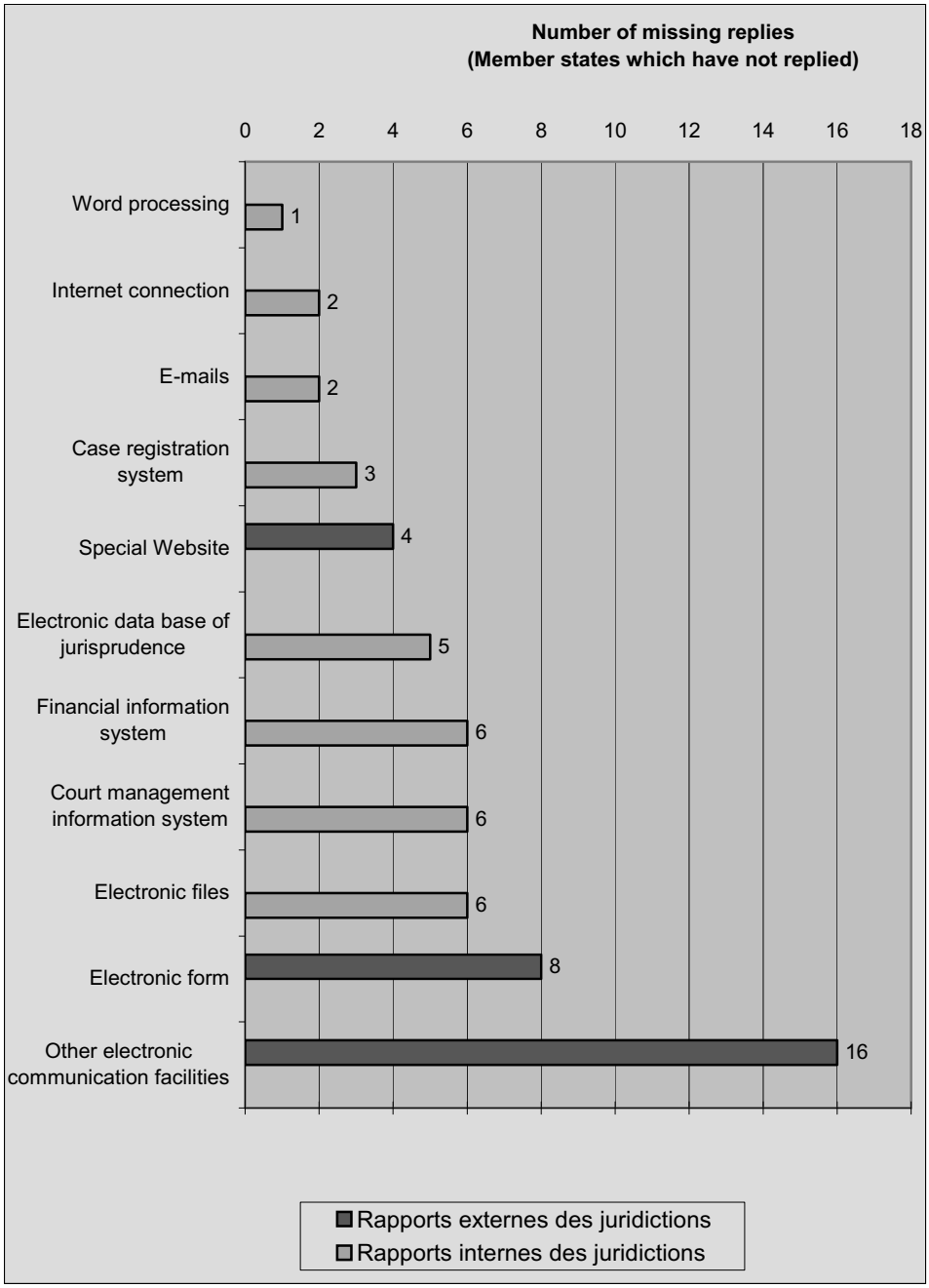


Appendix 6 : Links between regulation and transparency of lawyers' fees

RL : regulated by law
RB : regulated by Bar association
FN : freely negotiated

Fees	Member states		Member states having transparency	
RL+RB+FN	Luxembourg	1	-	0 / 1
RB+FN	Bosnia and Herzegovina	1	Bosnia and Herzegovina	1 / 1
RL+RB	-	-	-	-
RL+FN	Albania, Austria, Latvia, Malta, Moldova, Norway, Poland	7	Albania, Austria	2 / 7
RL	Germany, Greece, Italia, Liechtenstein, Czech Republic, San Marino, Slovakia, SM-Serbia	8	Germany, Liechtenstein, Czech Republic, San Marino, Slovakia, SM-Serbia	6 / 8
RB	Andorra, Cyprus, Croatia, Slovenia, SM-Montenegro, Turkey, UK-Angleterre/Pays-de-Galles, UK-Scotland, UK-Northern Ireland	9	Andorra, Cyprus, Croatia, Slovenia, SM-Montenegro, Turkey	6 / 9
FN	Armenia, Azerbaïjan, Belgium, Bulgaria, Denmark, Spain, Estonia, Russian Federation, Finland, France, Georgia, Hungary, Ireland, Iceland, Lithuania, Monaco, Netherlands, Portugal, Romania, Sweden, Ukraine	21	Armenia, Azerbaïjan, Belgium, Bulgaria, Spain, Estonia, Russian Federation, Finland, France, Hungary, Ireland, Iceland, Netherlands, Ukraine	14 / 21

Appendix 7 : Difficulties of courts to provide data concerning their external reports



Appendix 8 : Comparison of the development of internal and external courts' reports (in percentage of Member States having replied)

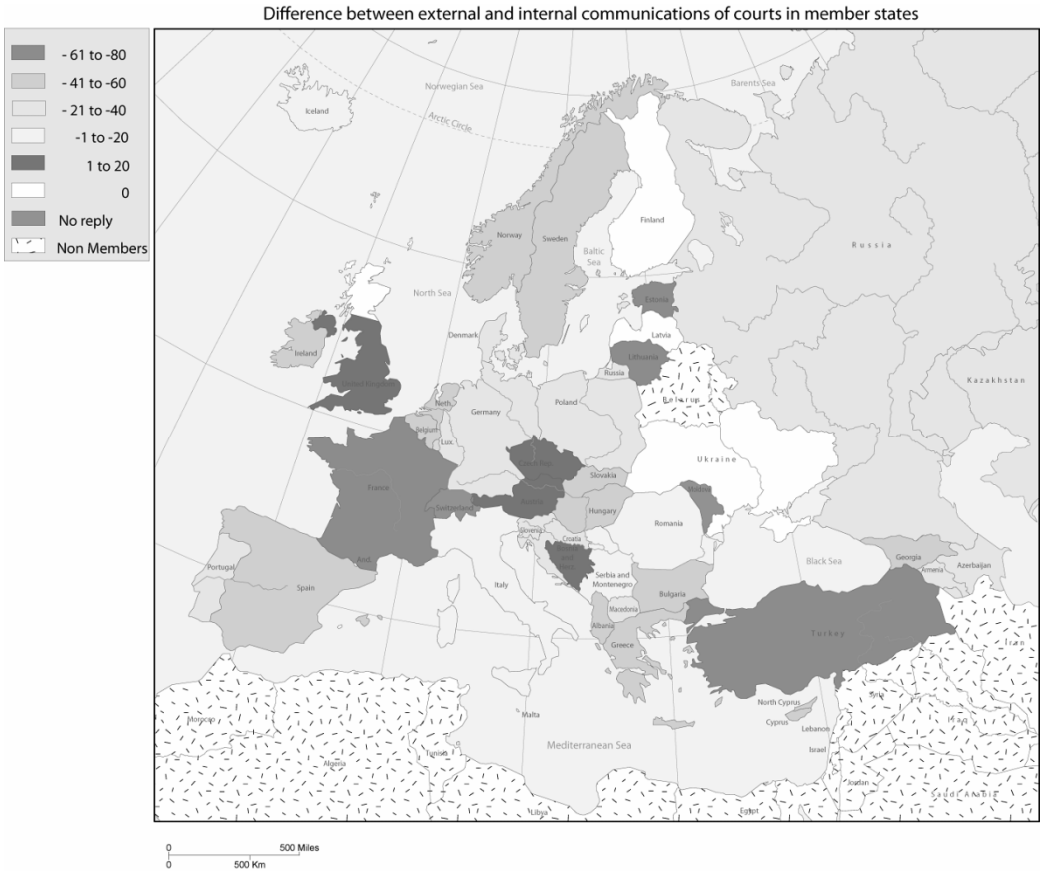
FUNCTIONS		FACILITIES	Facilities present in……			
			100% of courts	+50% of courts	-50% of courts	- 10 % of courts
INTERNAL REPORTS	Direct assistance to the judge/the court clerk	Word processingte	**87%**	11%	2%	-
		Electronic data base of jurisprudence	**79%**	12%	2%	7%
		Electronic files	**49%**	**15%**	2%	34%
		E-mails	**69%**	**15%**	9%	7%
		Internet connection	**73%**	11%	11%	5%
	Administration et gestion	Case registration system	**57%**	**20%**	9%	14%
		Court management information system	41%	**29%**	10%	20%
		Financial information system	**56%**	**17%**	7%	20%
EXTERNAL REPORTS	Communication between the court and the parties	Electronic forms	33%	3%	10%	**54%**
		Special website	42%	12%	**16%**	30%
		Other electronic communication facilities	39%	13%	3%	**45%**

Appendix 9 : Comparison of the development of internal and external reports of the courts (member State by member State)

Country	Direct assistance Word	D.A. Electronic data base of jurisprudence	D.A. Electronic files	D.A. E-mail	D.A. Internet connection	Administration and management Case registration system	Court management information system	Financial information system	MAXI	TOTAL	% Interne	Communication between the court and the parties	Special Website	Other electronic communication facilities	TOTAL	MAXI	% Externe
Albania	4	4	4	4	4	2	2	2	32	26	81	1	1	1	3	12	25
Andorra	4	4		4	4	4	1	1	32	22	69	1	1	4	6	12	50
Armenia	3	3	3	2	2	2	2	1	32	18	56	1	1	1	3	12	25
Austria	4	4	3	4	4	4	4	4	32	31	97	4	4	4	12	12	100
Azerbaijan	4	2	2	3	3	2	1	1	32	18	56	1	2	1	4	12	33
Belgium	4	3	3	4	4	3	3	3	32	27	84	1	1	1	3	12	25
Bosnia Herzegovina	3	1	1	2	2	1	1	1	32	12	38	1	2	2	5	12	42
Bulgaria	4	4	4	4	4	3	3	4	32	30	94	2	3		5	12	42
Croatia	3	3	1	3	3	1	1	3	32	18	56	1	2	1	4	12	33
Cyprus	4	3	1	3	3	1	3	3	32	21	66	1	1	1	3	12	25
Czech Republic	4	4	1	4	4	3	3	3	32	26	81	4	4	3	11	12	92
Denmark	4	4	4	4	4	4	4	2	32	30	94	4	4		8	12	67
Estonia	4	4	4	4	4	4	4	4	32	32	100	4			4	12	33
Finland	4	4	4	4	4	4	4	4	32	32	100	4	4	4	12	12	100
France	4	4	4	4	4	4	4	1	32	29	91	1	1	1	3	12	25
Georgia	4	3	1	1	1	4	3	4	32	21	66	1	1		2	12	17
Germany	4	4	1	3	4	3	3	4	32	26	81	1	3	3	7	12	58
Greece	3	4	3	3	3	3	3	4	32	26	81	1	1	1	3	12	25
Hungary	4	4	4	4	4	3	2	4	32	29	91	1	3		4	12	33
Iceland	4	4	4	4	4	4		4	32	28	88		4	4	8	12	67
Ireland	4	4	4	4	4	3	3	4	32	30	94	2	4		6	12	50
Italy	4	4	3	3	4	3	3	3	32	27	84	3	3	3	9	12	75
Latvia	4	4	4	4	4	4	4	4	32	32	100	4	4	4	12	12	100
Liechtenstein	4		4	4	4	4			32	20	63					12	
Lithuania	4	4	4	4	4	4	3	3	32	30	94	2	2		4	12	33
Luxembourg	4	4	4	4	4	4	4		32	28	88	4	2	4	10	12	83
Malta	4	4	4	4	4	4	4	4	32	32	100	4	4	4	12	12	100
Monaco	4			4		4			32	12	38		4		4	12	33
Montenegro	3			1	1				32	5	16		1		1	12	8
Netherlands	4	4	1	4	4	4	4	4	32	29	91	1	1	4	6	12	50
Norway	4	4	4	4	4	4	4	4	32	32	100	4	3		7	12	58

Poland	4	4	1	2	3	1	1	4	32	20	63	1	1	1	3	12	25
Portugal	4	4	1	4	4	4	3	4	32	28	88	2	4	3	9	12	75
Romania	4	4	1	2	2	1	1	1	32	16	50		4		4	12	33
Russian Federation	4	1		3	2	2	1	4	32	17	53		2	1	3	12	25
San Marino	4				4			4	32	12	38					12	
Serbia	2	1	1	1	2	1	1	1	32	10	31	1	1	1	3	12	25
Slovakia	4	4	1	4	4	4	4	1	32	26	81	1	1	1	3	12	25
Slovenia	4	4	1	4	4	3	3	4	32	27	84	1	4	1	6	12	50
Spain	4	4	4	4	4	4	4	4	32	32	100	1	4		5	12	42
Sweden	4	4	1	4	4	4	4	4	32	29	91	1	4	1	6	12	50
Turkey	4	4	4	4	4	4	2	2	32	28	88	1	2		3	12	25
UK England & Wales	4	4	3	4	4	4	4	3	32	30	94	4	4	4	12	12	100
UK Northern Ireland	4	4	4	4	4	4	4		32	28	88	4	4	4	12	12	100
UK Scotland	4	4	4	4	4	4	4	4	32	32	100	4	4	4	12	12	100
Ukraine	4	4	4	4	4	4	4	4	32	32	100	4	4	4	12	12	100

Appendix 10: Difference between external and internal communications of courts in member States



Appendix 11 : Key data of legal aid in Europe

Country	Annual public budget spent on legal aid (in €) per inhabitants	Annual public budget spent on legal aid in criminal cases (in €) per inhabitant	Annual public budget spent on legal aid in other court cases (in €) per inhabitant	Annual public budget spent on legal aid (in percentage of GDP per inhabitant)	Annual public budget spent on legal aid in criminal cases (in percentage of GDP per inhabitant)	cases (in percentage of GDP per inhabitant)	Annual public budget per inhabitant spent on legal aid (in percentage of average gross annual salary)	Annual public budget per inhabitant spent on legal aid in criminal cases (in percentage of average gross annual salary)	per inhabitant cases (in percentage of average gross annual salary)
Albania	0,043	0,043	n/a	0,002	0,002	n/a	0,002	0,002	n/a
Andorra	3,001	3,001		0,013	0,013		0,020	0,020	
Armenia	0,016			0,001			0,002		
Austria	2,937			0,010			0,008		
Azerbaijan	0,003	n/a	n/a	0,0004	n/a	n/a	0,0003	n/a	n/a
Belgium	2,944	n/a	n/a	0,011	n/a	n/a	n/a	n/a	n/a
Bosnia and Herzegovina	0,464	n/a	n/a	0,027	n/a	n/a	0,010	n/a	n/a
Bulgaria	0,202						0,008		
Czech Republic	1,201	1,137	0,064	0,014	0,013	0,001	0,018	0,017	0,001
Denmark	0,593	n/a	0,593	n/a	n/a	n/a	n/a	n/a	n/a
Estonia	1,258	1,184	0,087	0,019	0,018	0,001	0,023	0,021	0,002
Finland	9,955	n/a	n/a	0,035	n/a	n/a	0,030	n/a	n/a
France	4,683	1,991	2,692	0,018	0,008	0,010	0,012	0,005	0,007
Georgia	0,015			0,002			0,002		
Germany	5,678	1,067	4,611	0,021	0,004	0,017	0,014	0,003	0,012
Greece	0,065	0,065		0,0004	0,0004		0,0004	0,0004	
Hungary	0,084	n/a		0,001	n/a		0,001	n/a	
Iceland	4,088	n/a	n/a	0,012	n/a	n/a	0,011	n/a	n/a
Ireland	11,794	8,450	3,344	0,032	0,023	0,009	0,042	0,030	0,012
Italy	1,129	1,071	0,058	0,005	0,005	0,0003	0,005	0,005	0,0003
Latvia	0,282	0,282	n/a	0,006	0,006	n/a	0,094	0,094	n/a
Liechtenstein	37,341	15,143	20,080	0,035	0,014	0,019	0,050	0,020	0,027

Lithuania	0,478	n/a	n/a	0,009	n/a	n/a	0,012	n/a	n/a
Luxemburg	5,659	n/a	n/a	0,010	n/a	n/a	0,014	n/a	n/a
Malta	0,042			0,0004			0,0004		
Moldova	0,037	0,037	0	0,006	0,006		0,004	0,004	
Monaco	3,429	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Netherlands	23,224	8,881	14,342	0,077	0,030	0,048	0,076	0,029	0,047
Norway	38,560	14,988	23,572	0,088	0,034	0,054	0,094	0,036	0,057
Poland	0,439	n/a	n/a	0,008	n/a	n/a	0,007	n/a	n/a
Portugal	2,624	n/a	n/a	0,019	n/a	n/a	0,019	n/a	n/a
Romania	0,084			0,003			0,003		
Slovakia	0,364	0,364	n/a	0,006	0,006	n/a	0,007	0,007	n/a
Slovenia	n/a	n/a	0,451	n/a	n/a	0,003	n/a	n/a	0,003
Spain	2,773	n/a	n/a	0,014	n/a	n/a	0,011	n/a	n/a
Sweden	10,565	8,798	1,767	0,037	0,031	0,006	0,033	0,028	0,006
Turkey	0,192	0,158	0,033	0,006	0,005	0,001	0,002	0,002	0,0004
UK England & Wales	57,874	32,990	24,884	0,235	0,134	0,101	0,157	0,089	0,067
UK Northern Ireland	54,745	21,610	32,550	0,216	0,085	0,128	0,176	0,070	0,105
UK Scotland	42,533	29,763	12,756	0,173	0,121	0,052	0,127	0,089	0,038

Appendix 12: Key data of legal aid in Europe

Member States	Ratio of average amount allocated per case / average gross monthly salary	Ratio of average amount allocated per criminal case / average gross monthly salary	Ratio of average amount allocated per non criminal case / average gross monthly salary	Ratio of income taken into account / Gross annual salary (criminal matters)	Ratio of income taken into account / Gross annual salary (non criminal matters)	Ratio of number of criminal legal aid cases compared with the number of new criminal cases	Ratio of number of other than criminal legal aid cases compared with the number of new other than criminal cases
Andorra	0,43	N/a	N/a			-	
Austria	0,30	N/a	N/a	Var.	Var.	-	
Belgium	N/a	N/a	N/a	N/a	N/a	-	
Croatia	N/a	N/a	N/a			-	
Cyprus	N/a	N/a	N/a			1,01%	1,12%
Denmark	N/a	N/a	N/a	N/a	N/a	-	
Estonia				Var.	-		
Finland	0,24	N/a	N/a	0,51 salaire	0,51 salaire	40,46%	170,11%
France	0,11	0,11	0,11	0,38 salaire	0,38 salaire	36,81%	24,81%
Georgia	7,40	7,40	N/a				
Germany	N/a	N/a	0,20			-	15,82%
Greece				0,33 salaire	N/a		
Hungary	0,03	N/a	N/a			10,94%	19,97%
Iceland	0,95	N/a	N/a			-	
Ireland	0,51	0,46	0,72	Var.	0,47 salaire	8,86%	6,19%
Italy	0,36	0,46	0,07	0,41 salaire	0,41 salaire	4,89%	
Latvia				Var.	Var.		
Liechtenstein				Var.	Var.		
Luxemburg	0,22	N/a	N/a	0,40 salaire	0,40 salaire		48,96%
Malta				1,20 salaire	1,20 salaire		
Monaco	N/a	N/a	N/a	Var.	Var.	15,57%	

Netherlands	0,43	0,44	0,43	0,58 salaire	0,58 salaire		20,85%
Norway	N/a	N/a	3,92	-	0,66 salaire	-	
Poland				Var.	Var.		
Portugal	0,19	N/a	N/a	Var.	Var.	-	
Romania	0,03	N/a	N/a			-	
Slovenia	N/a	N/a	0,04	-	Inexploitable	-	64,46%
Spain				0,44 salaire	0,44 salaire		
Sweden				-	0,86 salaire		
Turkey	0,20	0,17	0,82			5,60%	0,27%
UK England & Wales	0,41	0,36	0,50	Inexploitable	Inexploitable	78,16%	39,28%
UK Northern Ireland	0,35	0,51	0,29	-	0,43 salaire		
UK Scotland	0,21	0,24	0,16	-	Var.		
Ukraine	N/a	N/a	N/a				

Notes

[1] See Revised Scheme for Evaluating Judicial Systems, adopted by the CEPEJ at its 5th Plenary Meeting (Strasbourg, 15 – 17 June 2005) and approved by the Committee of Ministers on 7 September 2005 (936th meeting of the Ministers' Deputies), II. Access to justice and to all courts, questions 11 to 32.

[2] See CHANTREL, E., GIRAUD, R. and GUIBAUD S., "Quelques pistes d'analyse économique", in BREEN, E. (ed.), *Evaluer la justice, Mission de recherche Droit et justice*, PUF, Paris, 2002, p. 265.

[3] Ibid.

[4] The Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL) is composed of P. ALBERS, J.-P. JEAN (Chair in 2006), F. DE SANTIS, E. GARCIA-MALTRAS DE BLAS, H. GENN, B. Z. GRUSZCZYNSKA, M. VINOGRADOV and K. GRZYBOWSKA.

[5] The Working Group on quality of justice (CEPEJ-GT-QUAL) is composed of E.C.J.W. VOS, D. LIIV (Chair in 2007), F. PAYCHERE, A. POTOCKI, J. RIEDEL, E. VAN DER KAM and M. VINOGRADOV.

[6] This situation should be distinguished from one in which private funds that are not the users are used to finance certain social aspects of access to justice (i.e. when legal aid is funded by a Bar). In these situations too, the donor's action satisfies both public and private interests.

[7] Consultative Council of European Judges (CCJE), Opinion No. 6 (2004) for the attention of the Committee of Ministers on fair trial within a reasonable time and judge's role in trials, taking into account alternative means of dispute settlement, paragraphs 12-19 and sections A1, A2 and A4.

[8] The exceptions are Greece and Monaco (there will soon be a change in Greece, whose national correspondent stated that several websites were under construction).

[9] The exceptions are Greece, Monaco, Norway, Poland and the Russian Federation; Andorra states that a website giving access to the case-law of the Supreme Court and other documents is under construction.

[10] These data are therefore not derived from the replies to the CEPEJ-GT-EVAL questionnaire, but were gathered through a specific questionnaire of the Working Group on mediation (CEPEJ-GT-MED), whose members are N. BETTETO, I. BORZOVÁ, G. COTTON, P. ESCHWEILER, J. LHUILLIER, M.d.C. OLIVEIRA, R. SIMAITIS (Chair in 2007), J. TAGG and A. WERGENS.

[11] See LHUILLER, J. "Evaluation of the impact of the Council of Europe's recommendations in the field of mediation", document CEPEJ (2007) 12; see also www.coe.int/CEPEJ.

[12] As for example in Lithuania.

[13] As for example in Germany and UK-England/Wales.

[14] As for example in Romania.

[15] As for example in Poland and UK-England/Wales.

[16] As for example in Germany.

[17] As for example in Finland and Bosnia-Herzegovina.

[18] These states are Finland, France, Georgia, Greece, Latvia and Moldova.

[19] This is the case in UK-England/Wales, UK-Northern Ireland and UK-Scotland.

[20]These factors have been established by the case-law of the European Court of Human Rights. For more information see F. CALVEZ, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, CEPEJ Studies, No. 3, Council of Europe Publications, Strasbourg, 2007, especially pp. 24-38.

[21] CEPEJ (2005) 12 Rev.

[22] These states are Denmark, Georgia, Greece, Italy, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Poland, Portugal, Romania, Sweden, UK-Northern Ireland and UK-Scotland.

[23] See the proceedings of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) of 20-21 September 2007.

[24] Recommendation No. R (84) 5 of the Committee of Ministers to member states on the principles of civil procedure designed to improve the functioning of justice, Appendix, principle 2-1; CCJE, Opinion No. 6 op. cit., and section A6

[25] CCJE, Opinion No. 6, op. cit., paragraph 18 and section A3.

[26] The exceptions are Georgia, Monaco and the Russian Federation. Andorra, Bosnia-Herzegovina and SM-Montenegro did not reply.

[27] BOULARBAH, H., "Reply for Belgium to the questionnaire *Costs of justice and Legal Aid*", Belgian national report, XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, pp.11 and 14.

[28] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p.17.

[29] The three exceptions are Belgium, Estonia and Iceland. There is some uncertainty with regard to Belgium, for which the information gathered is sometimes contradictory.

[30] The exceptions are Belgium, Iceland, Ireland, Malta, Netherlands, Romania, San Marino and Sweden (uncertainty with regard to Belgium).

[31] The exceptions are Belgium, Bosnia-Herzegovina, Czech Republic, Denmark, Estonia, Finland, Germany, Iceland, Ireland, Lithuania, Luxembourg, Monaco, Netherlands, Poland, Russian Federation, San Marino, Slovakia, Slovenia, SM-Serbia and Sweden.

[32] In some states, such as Poland, simplified proceedings are even compulsory for uncomplicated small claims. In Poland, this type of procedure does not require the presence of a lawyer, decisions are made by a single judge and orders to pay may be effected by non-judge staff. See Article 47 of Polish Code of Civil Procedure.

[33] The standards of a fair trial do not prohibit the implementation of simplified proceedings: see in this connection the ECHR judgment of 23 June 1981, Le Compte, Van Leuven and De Meyere, Series A, No. 43, p. 25 para. 51a; see also CANIVET, G., "Comment concilier le respect des principes de qualité du procès équitable avec les flux d'affaires dont sont saisies les juridictions?", in CAVROIS,

M.-L., DALLE, H. and JEAN J.-P., La qualité de la Justice, Ecole Nationale de la Magistrature, Mission de Recherche "Droit et Justice", La documentation française, 2002, pp.227ff.

[34] BAUDEL, J.-M., "L'accès à la justice: la situation en France", XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p.5.

[35] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, op. cit., p.16.

[36] See above, Part Two, A. 2.3.1.2. Specific procedural rights for victims of offences.

[37] Examples of the vulnerable categories for which such services are available: "*Viol-femmes*" (information service for rape victims on 08.00.05.95.95), "*femmes-information*" (domestic violence, on 01.40.33.80.60), "*Allo enfance maltraitée* (abused children, on 119), *SOS attentats* (with respect to terrorism) and, more generally, victims are invited to dial "*08VICTIMES*" on their telephone (in other words 08.84.28.46.37).

[38] Article 720, art. D 49-67 ff of the French Code of Criminal Procedure.

[39] Law No. 672/2002 on victim protection.

[40] Section 257 of the Children Act, 2001.

[41] Art. 306, para. 3, of the French Code of Criminal Procedure.

[42] Art. 112 of the French Code of Criminal Procedure.

[43] Section 13, 39, of the Criminal Evidence Act, 1992.

[44] Section 4, Criminal Justice Act, 1993; Section 7, Criminal Law Rape Act, 1981.

[45] Articles 48-1 and 158-1 of the Luxembourg Code of Criminal Investigation.

[46] Art. 706-52 of the French Code of Criminal Procedure: the recording may be restricted to sound only if the child or his or her legal representative so requests.

[47] Sec. 26(3), Civil Legal Aid Act, 1995.

[48] See the Law of 10 August 1992 on the protection of juveniles.

[49] Art. 335 of the French Code of Criminal Procedure.

[50] Art. 705-50 of the French Code of Criminal Procedure.

[51] Art. 81(4) of the Luxembourg Code of Criminal Investigation.

[52] Art. 65 of the Slovenian Code of Criminal Procedure.

[53] Art. 7 of the French Code of Criminal Procedure.

[54] Art. 2 of the French Code of Criminal Procedure.

[55] Art. 2-2 of the French Code of Criminal Procedure.

[56] Art. 2-9 of the French Code of Criminal Procedure.

[57] Art. 2-1 of the French Code of Criminal Procedure.

[58] Art. 2-3 of the French Code of Criminal Procedure.

[59] Art. 2-8 of the French Code of Criminal Procedure.

[60] Art. 706-47-2 of the French Code of Criminal Procedure.

[61] The exceptions were Denmark, Estonia, Finland and Turkey.

[62] The exceptions were Andorra, Estonia, Finland, Luxembourg, Netherlands, Poland, Turkey and Ukraine.

[63] The exceptions were Andorra, Bosnia-Herzegovina, Czech Republic, Denmark, Estonia, Finland, Georgia, Poland, Slovakia and Turkey.

[64] For ad hoc procedures, see, for example, the case of Italy where Book 4 of the Code of Civil Procedure provides users with a range of procedures that enable them to obtain the immediate protection of certain interests (order to pay, order to leave the marital home, injunction to restrain etc).

[65] For example, Albania and Lithuania (in administrative cases) and Poland (in criminal cases).

[66] See, among others, the ECHR judgement of 28 August 1991, Brandstetter v. Austria, Series A No. 211, p. 27, para. 67.

[67] The European Court of Human Rights has held that the inadmissibility of an appeal to the Court of Cassation by a person found guilty of an offence who did not comply with an arrest warrant issued against him (ECHR, 23 November 1993, Poitrimol v. France) or who failed to surrender to custody (ECHR, 14 December 1999, Khalfaoui v. France) is a disproportionate sanction that violates the balance that should exist between the wish to guarantee the enforcement of judicial decisions and the right of access to a judge.

[68] CCJE, Opinion No. 6 op. cit., A7 paras. 24-26.

[69] Most member states failed to reply to question 61 (Bulgaria, Greece, Luxembourg, Malta, Romania, SM-Montenegro, Spain, Ukraine) or were unable to find the necessary information (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Ireland, Latvia, Liechtenstein, Moldova, Norway, Poland, Portugal, Russian Federation, San Marino, Slovakia, Slovenia, SM-Serbia, Sweden, Turkey, UK-England/Wales, UK-Northern Ireland, UK-Scotland).

[70] These states are Cyprus, Denmark, France, Hungary, Iceland, Italy, Monaco and the Netherlands.

[71] See the work of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) of 20-21 September 2007.

[72] These states are Austria, Azerbaijan, Estonia, France, Germany, Luxembourg and Slovakia.

[73] These states are Austria, Azerbaijan, Germany and Luxembourg.

[74] These states are Austria and Germany.

[75] This is the case in Azerbaijan, Estonia, Germany and Slovakia.

[76] This is the case in Azerbaijan and Estonia.

[77] This is the case in Austria, Germany and Slovakia.

[78] Turkish legislation defines as “small” a debt of less than €226.24 for decisions handed down by the Civil Court of Peace and of less than €565.6 for decisions handed down by the Civil Courts of First Instance.

[79] Under French legislation, appeal is not possible in criminal cases where the fine imposed is less than €150 (which corresponds to the maximum fine for a category two petty offence). In civil cases, the district court gives final judgement in cases where the sum at issue is €3,800 or less (Arts. R 321-1, R 321-2, R 321-6, R 321-7, R 321-8 and R 321-16 of the Judicial Organisation Code); the same is true in disputes concerning inclusion in and removal from the lists for certain professional elections (Arts, R 321-17, R321-18 and R 321-19 of the Judicial Organisation Code). The local judge gives final judgment on personal actions for recovery of movable property brought by a natural person for the needs of his or her private life up to the value of €1,500 or an undetermined amount the source of which is the performance of an obligation the amount of which does not exceed €1,500 (Art. L331-3 of the Judicial Organisation Code).

[80] According to the information provided by the Portuguese correspondent, there is no effective appeal to a higher court for pecuniary claims below €3,740.98.

[81] This is the case in Monaco and Liechtenstein.

[82] This is the case in Croatia, France and Moldova.

[83] This is the case in Moldova.

[84] This is the case in Moldova and Romania.

[85] This is the case in Czech Republic, France, Moldova, Poland, Romania, Slovakia and SM-Montenegro.

[86] This is the case in Bulgaria, Finland, France, Iceland and Luxembourg.

[87] This is the case in Croatia, Czech Republic, Finland, Georgia, Hungary, Ireland, Liechtenstein, Lithuania and Malta.

[88] Russian Federation and Ukraine did not provide useable data.

[89] Which is not the case in Cyprus, a member state in which prosecutors have only 4 powers: to bring charges, present the case in court, to appeal and to end the case by terminating the proceedings without the need for a judicial decision.

[90] Of the four member states that have no monitoring and evaluation procedures, only Denmark gives prosecutors power to intervene in civil proceedings. In view of the fact that the CEPEJ data provide no information on the range of prosecutors' powers in civil and/or administrative cases, it is not possible to establish whether the lack of supervision of the prosecution services in Denmark is justified by the fact that they play an unimportant part in proceedings. Nonetheless, in view of the wide powers Danish legislation gives the prosecution services in criminal cases, the lack of monitoring and evaluation of their work raises many questions.

[91] These states are Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, France, Italy, Iceland, Latvia, Lithuania, Moldova, Russian Federation, San Marino, Slovakia, SM-Montenegro, Spain, UK-England/Wales, UK-Northern Ireland, UK-Scotland and Ukraine.

[92] These states are Albania, Austria, Czech Republic, Germany, Greece, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Moldova, Norway, Poland, San Marino, Slovakia and SM-Serbia.

[93] These states are Albania, Austria, Latvia, Luxembourg, Malta, Moldova, Norway and Poland.

[94] The states in which fees are regulated by the Bar are Andorra, Bosnia-Herzegovina, Croatia, Cyprus, Luxembourg, Slovenia, SM-Montenegro, Turkey, UK-England/Wales, UK-Northern Ireland and UK-Scotland. Of these, only Bosnia-Herzegovina and Luxembourg introduce in this way the principle of free negotiation of fees.

[95] The member states concerned are Armenia, Azerbaijan, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Georgia, Hungary, Iceland, Ireland, Lithuania, Monaco, Netherlands, Portugal, Romania, Russian Federation, Spain, Sweden and Ukraine.

[96] BOULARBAH, H., Belgian national report to the XVIIth Congress of the International Academy of Comparative Law 16-22 July 2006, Utrecht, Netherlands, p. 10.

[97] Art. 92-99 of the Greek Lawyers' Code.

[98] X., Polish national report to the XVIIth Congress of the International Academy of Comparative Law 16-22 July 2006, Utrecht, Netherlands, p. 2.

[99] The states in which transparency is not ensured are Denmark, Georgia, Greece, Italy, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Poland, Portugal, Romania, Sweden, UK-Northern Ireland, UK-Scotland.

[100] The four states that do not have this type of procedure are Albania, Hungary, Netherlands and Poland.

[101] These states are Albania, Armenia Azerbaijan, Bulgaria, Georgia, Hungary, Netherlands, Poland and Ukraine.

[102] BOULARBAH, H., Belgian national report to the XVIIth Congress of the International Academy of Comparative Law 16-22 July 2006, Utrecht, Netherlands, pp. 9-10.

[103] For the purposes of this study the terms "legal aid" and "judicial aid" are synonymous.

[104] This definition of legal aid is the one the CEPEJ offered to national correspondents during the 2004-2006 evaluation round.

[105] Article 6 of the European Convention on Human Rights states that, in criminal cases, "Everyone charged with a criminal offence has the following minimum rights: … c) to defend himself in person or through legal assistance of his own choosing or, if he has sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

[106] Legal aid may take the form of financial aid or the provision of a court-appointed lawyer (ECHR, 24 November 1993, Imbrioscia v. Switzerland, A. 276; a suspect charged with an offence subject to a heavy sentence must have the benefit of legal aid in order to appeal to the highest court in view of the complexity of the proceedings (ECHR, 28 September 2000, Biba v. Greece).

[107] Resolution 76 (5) on legal aid in civil, commercial and administrative matters; Resolution 78 (8) on legal aid and advice.

[108] Recommendation 81 (7) on measures facilitating access to justice; Recommendation 93 (1) on effective access to law and to justice for the very poor; Recommendation 2005 (12) containing an application form for legal aid abroad for use under the European Agreement on the transmission of applications for legal aid

and its additional protocol.

[109] Opinion No. 6 (2004) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on fair trial within a reasonable time and judge's role in trials, taking into account alternative means of dispute settlement, paras. 21-24.

[110] The two exceptions being Denmark and Iceland.

[111] The five exceptions being Azerbaijan, Bosnia-Herzegovina, Latvia, Moldova and Slovakia.

[112] The eight exceptions being Azerbaijan, Denmark, Italy, Monaco, Poland, San Marino, Sweden and Turkey.

[113] The eight exceptions being Azerbaijan, Bosnia-Herzegovina, Italy, Latvia, Monaco, Poland, San Marino and Turkey.

[114] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, op. cit. p. 22.

[115] See the legislation of Azerbaijan, Italy, Monaco, Poland, San Marino and Turkey.

[116] In Iceland, the state only pays for the cost of a court-appointed lawyer in the event of acquittal. If the accused is found guilty, he or she bears the costs. The defence lawyer is then only paid from the state budget if the person concerned is unable to pay.

[117] In Germany, legal aid in criminal cases involves a lawyer being appointed by the court insofar as the suspect has not yet chosen someone to defend him or her. However, a lawyer is only appointed if it is essential for one to be involved. Under Article 140 of the German Code of Criminal Procedure (*Strafprozessordnung*), this is only the case where the charges, the facts or the law are particularly serious or a particularly heavy sentence is possible. The court-appointed defence lawyer is then paid by the treasury.

[118] See SENAT (France), "L'aide juridique", Les documents de travail du Sénat, série législation comparée, n°LC 137, juillet 2004, p.8.

[119] In France, aid for the assistance of a lawyer concerns representation in court and legal advice, inter alia in connection with mediation and transaction (*composition pénale*), police custody, appearance for preliminary recognition of guilt, and disciplinary proceedings against a prisoner.

[120] In Italy, legal aid may be used to cover the cost incurred by engaging the services of a private detective.

[121] In Germany, under the *Beratungshilfegzetz*, the Legal Aid Act, of 18 June 1980, free legal consultations are available to all citizens who fulfil the conditions for legal aid. Whatever their financial situation, however, the user's first reflex is often to turn to free consultation of lawyers. See on this subject, GOTTWALD, P., "Access to Justice, Costs and Legal Aid", op. cit.. Part 2 g). In France, some Departmental Centres for Access to the Law (CDAD) make the same observation. In Poland, where a draft law on pro bono legal services is under examination, a large proportion of the legal services market is already made up of free assistance: the district courts organise one week of free consultations per year; universities provide free legal services.

[122] In the Netherlands, in order to make users more responsible as regards starting

legal proceedings and to avoid inappropriate actions, the state ensures that beneficiaries pay at least a proportion of the court costs. Under Section 12, paragraph 2, of the Dutch Legal Aid Act, legal aid is refused (1) if the case has no chance of success, (2) if the court costs are unreasonably high in relation to what is at stake in the case, and (3) if it is unnecessary for the user to be represented by a lawyer and he or she can reasonably conduct his or her own defence.

[123] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, op. cit. p. 22.

[124] See SENAT (France), "L'aide juridique", Les documents de travail du Sénat, série législation comparée, n°LC 137, juillet 2004, p.8.

[125] See Draft Guidelines for a better implementation of the existing Recommendations concerning Penal mediation (CEPEJ (2007) 13 PPROV), family and civil mediation (CEPEJ (2007) 14 PROV), and on alternatives to litigation between administrative authorities and private parties (CEPEJ (2007) 15 PROV).

[126] While initially the European Court of Human Rights seems to have considered that the refusal of legal aid in proceedings in which representation by counsel was compulsory, on the grounds that the claim did not appear well-founded, impaired the very essence of the right to a tribunal (ECHR, 20 July 1998, Aerts v. Belgium), it has now recognised the possibility of this type of selection for proceedings where representation is not compulsory (ECHR, 19 September 2000, Gnahoré v. France); the refusal of legal aid in a divorce case on the grounds that no arguable ground of appeal to the Court of Cassation could be made out was not an infringement of the right to access to a court either (ECHR, 26 February 2002, Del Sol v. France).

[127] The five exceptions are Belgium, Bosnia-Herzegovina, France, Georgia and Lithuania.

[128] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, op. cit. p. 23. In some states, the burden on lawyers who lend their support to legal aid has become heavier without a concomitant increase in their remuneration: see SENAT (France), "L'aide juridique", Les documents de travail du Sénat, série législation comparée, n°LC 137, juillet 2004, p.6.

[129] GOTTWALD, P., "Access to Justice, Costs and Legal Aid", op. cit., p. 5.

[130] For examples of loser-pays-all systems with different payment levels, see, for example, GOTTWALD, P., "Access to Justice, Costs and Legal Aid", op. cit., p. 2 f); BAUDEL, J.-M., "L'accès à la justice: la situation en France", op. cit., p.8; VARANO, V., de LUCA, A., *"Access to Justice in Italy"*, Italian national report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p.15.

[131] This may be allocated to the winning party on the basis of Article 1022 of the Judicial Code, but is always very limited: the amount varies between €35.70 and €475.96.

[132] The states are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Turkey, UK-England/Wales, UK-Northern Ireland, UK-Scotland.

[133] In Germany, the Treasury covers all the expenses of beneficiaries of legal aid

occasioned by court proceedings. For this reason, the budget forecasts for legal aid are easily exceeded and do not reflect actual spending. See on this subject, GOTTWALD, P., "Access to Justice, Costs and Legal Aid", op. cit.. Part 5 h).

[134] These questions are directly derived from the work of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) on 20-21 September 2007.

[135] This initiative earned it the Crystal Scales Prize in 2006. See www.coe.int/CEPEJ.

[136] The Marianne Charter is aimed at guaranteeing quality of reception in all its forms (physical, telephonic, electronic, postal). It promotes values such as courtesy, accessibility, speediness and clarity of replies, but also a spirit of attentiveness, rigour and transparency. It is based on 5 sets of commitments: 1) Facilitating user access to the services; 2) Attentive and courteous reception of users; 3) Giving easily understandable replies within the appointed time; 4) Systematically dealing with complaints; 5) Gathering user suggestions for improving the quality of the public service. Each of these includes compulsory commitments and optional commitments.

[137] For a recent example of computerisation of access to the courts, see the French initiative to provide electronic forms: www.justice.gouv.fr. Since 10 April 2007, the clerks of courts other than commercial courts have been taking part in "electronic administration", enabling users to address their applications to the competent courts electronically (e.g. an application form for legal aid). In addition, an "e-Bar" project, that will be extended to all criminal courts as of 1 January 2008, should give everyone working in the justice system access to information and documents in real time and ensure on-line monitoring of proceedings. Exchanges between the courts and lawyers will be made secure through the use of a cryptographic key issued on a strictly personal basis by the General Bar Council.

[138] Work of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) on 20-21 September 2007.

[139] M. CAPELLETTI and B. GARTH, "Introduction" in M. CAPELLETTI (ed.), Access to Justice and Welfare State, Le Monnier Florence, Sijthoff and Noordhoff Int, 1981: describing the progress of access to justice as a succession of waves, the authors identify the third wave, in the 1970s, as the emergence of alternative means of dispute settlement, the most important being mediation.

[140] I. AERTSEN and T. PETERS, "Mediation for reparation: The victim's perspective", in Essays dedicated to the memory of Prof. F. MC CLINTOCK, in *Support for crime victims in a comparative perspective*, Louvain University Press, Louvain, Belgium, 1997, p. 229.

[141] I. AERTSEN, R. MACKAY, C. PELIKAN, J. WILLEMSENS and M. WRIGHT, Rebuilding community connections - mediation and restorative justice in Europe, Council of Europe Publishing, Strasbourg, 2004.

[142] See CCJE, on fair trial within a reasonable time and judge's role in trials, taking into account alternative means of dispute settlement, Opinion No. 6, 2004, para. 145.

[143] For example, in Slovenia, mediation reduces the workload of the criminal justice system: with 837 fewer hearings in 2000 or the equivalent of the work of five judges in a first instance court, mediation enables the resources thus released to be devoted to other cases. See A. MEZNAR, "Victim Offender Mediation in Slovenia", Newsletter of the European Forum for Restorative Justice, February 2002, vol. 3, issue 1, p.1-3.

[144] The CCJE itself recognises that criminal mediation may "have a preventative

effect in respect of future crimes" (Opinion No. 6, op. cit., ibid.), which is not only interesting in terms of crime policy but also in terms of managing case flow. Ultimately, the reductions in the workload brought about by criminal are probably offset in some states by the everyday procedures for using mediation; where it is used to process cases in real time, being a condition for discontinuing the proceedings, criminal mediation is also a factor enhancing access to justice. According to C. LAZERGES, "Médiation pénale, justice pénale et politique criminelle", Revue de science criminelle et de droit pénal comparé, 1997, criminal mediation then becomes "a means of flow management which must be of interest". Conversely, its influence is less marked in cases that are not dealt with immediately or where judges take advantage of it to transmit unimportant cases on which no further action is normally taken or even to clear their desks of excess cases (see in this connection, F. DENAT, "La médiation pénale", in INSTITUT SUISSE DE DROIT COMPARE, La médiation: un mode alternatif de résolution des conflits?, Lausanne, 14 et 15 novembre 1991, Publications de l'Institut suisse de droit comparé n°19, Schulthess Polygraphischer Verlag, Zurich, 1992, particularly p. 59.).

[145] In the case of judicial mediation, an area specially assigned to mediation could be provided in courts.

[146] In this connection, see the guidelines of the Working Group on mediation: CEPEJ (2007) 13; CEPEJ (2007) 14; CEPEJ (2007) 15.

[147] J. LHUILLIER, "Evaluating the impact of the Council of Europe's Recommendations in the field of mediation", CEPEJ (2007) 12.

[148] For example, in Portugal, where an information session on mediation is compulsory for the parties.

[149] For example, in UK-England/Wales, where the trial would be paid for out of public funds.

[150] See J. LHUILLIER, "Overall results and perspectives of penal mediation in Europe", in Mediation in Europe: Present Challenges and Future Developments proceedings of the Conference organised by the Council of Europe and the Ministry of Justice of the Republic of Lithuania, held in Vilnius, Lithuania, on 24 and 25 May 2007, to be published in early 2008.

[151] F. CALVEZ, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, CEPEJ Studies, No. 3, Council of Europe Publications, Strasbourg, 2007.

[152] See the CEPEJ Framework Programme "*A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe*" (CEPEJ (2004) 19 Rev.).

[153] These states are Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, SM-Montenegro, Spain, Sweden, Turkey and UK-England/Wales.

[154] These states are Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian

Federation, San Marino, Slovakia, Slovenia, SM-Montenegro, Spain, Sweden, Turkey and UK-England/Wales.

[155] These states are Andorra, Armenia, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Netherlands, Poland, Portugal, Russian Federation, Romania, San Marino, Slovakia, Slovenia, SM-Montenegro, Spain, Sweden, Turkey, UK-England/Wales and Ukraine.

[156] These states are Andorra, Armenia, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Netherlands, Poland, Portugal, Russian Federation, Romania, San Marino, Slovakia, Slovenia, SM-Montenegro, Spain, Sweden, Turkey and UK-England/Wales.

[157] These states are Albania, Andorra, Armenia, Bulgaria, Cyprus, Finland, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Monaco, Netherlands, Russian Federation, Slovenia, Spain, Turkey and UK-Scotland.

[158] For an example of a study relating to the confidence rate of a representative sample of the population in the administration of justice, see SUBORDINATE COURTS, RESEARCH AND STATISTICS UNIT, *Subordinate Courts Research Bulletin*, Issue n°29, Singapore, July 2003, particularly the classification of states at world level according to the confidence rate recorded.

[159] In other words, the achievement of the objectives of economy, efficiency, effectiveness and transparency of justice, as well as its being subject to control by an external authority able to take action with regard to failures in these duties. See the work of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) on 20-21 September 2007.

[160] This section is based in particular on JEAN, J.-P., "Les demandes des usagers de la justice", in CAVROIS, M.-L., DALLE, H. and JEAN J.-P., La qualité de la Justice, Ecole Nationale de la Magistrature, Mission de Recherche "Droit et Justice", La documentation française, 2002, pp.23ff; see also the "*Enquête de satisfaction des utilisateurs et utilisatrices du Palais de justice de Genève*", report approved by the Commission de gestion du Pouvoir judiciaire at its meeting on 13 May 2002, especially p.18; for comparisons with non-European surveys, see NATIONAL CENTER FOR STATE COURTS, CourTools, Denver, CO, 2005, www.courtools.org.

[161] Art. 10 of Order No. 45-174 of 2 February 1945 on juvenile delinquency.

[162] See Draft Guidelines for a better implementation of the existing Recommendations concerning Penal mediation (CEPEJ (2007) 13 PPROV), family and civil mediation (CEPEJ (2007) 14 PROV), and on alternatives to litigation between administrative authorities and private parties (CEPEJ (2007) 15 PROV).

[163] Law 27/2003 Protection Order for domestic violence victims; Organic Law 1/2004 of 28 December 2004 on Integral Protection Measures against Domestic Violence.

[164] In France there is also provision for this in the context of divorce proceedings (Art. 220-1, para. 3, of the Civil Code).

[165] Sections 251-252 of the Children Act, 2001.

[166] Parts 4 and 8 of the Children Act, 2001; Garda Diversion Programme in operation since 1 May 2002.

[167] See the work of the 2nd meeting of the CEPEJ Working Group on quality of justice (CEPEJ-GT-QUAL) on 20-21 September 2007.

[168] These member states are Andorra, Belgium, Cyprus, Germany, Monaco, Portugal, San Marino, SM-Montenegro, SM-Serbia and Sweden.

[169] Albania, Armenia, Austria, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Romania, Russian Federation, Slovakia, Slovenia, Spain, Turkey, UK-England/Wales, UK-Northern Ireland UK-Scotland and Ukraine.

[170] Article 14 of the German Law on judicial costs (*Gerischtskostengesetz*) exempts from the requirement to advance court costs: 1) beneficiaries of legal aid, 2) plaintiffs exempted from court costs, 3) plaintiffs whose case does not seem desperate or motivated by intent to harm, if advancing court costs would put them in financial difficulty or for other reasons.

[171] Free Legal Aid Act, sections 26, 27.

[172] Art. 168 of the Slovenian Code of Civil Procedure.

[173] Art. 113 of the Polish Code of Civil Procedure; Art. 624 of the Polish Code of Criminal Procedure.

[174] Act on Rates in Civil Cases, section 17, para. 1; General Administrative Law Act, sec. 8.41. From 1 January 2008, Dutch legislation will enable the court fee to be divided by four if the user's monthly income does not exceed €1,477. The amount of the court fee is halved for beneficiaries of legal aid. See also, JONGBLOED, A.W., "Access to Justice, Costs and Legal Aid", op. cit.

[175] *The Children Acts* 1908 to 1989; *the Guardianship of Children Acts* 1964 to 1997; the *Child Care Acts* 1991 and 2001; motions under paragraph 3 of Article 5 of the Luxembourg Convention (within the meaning of *the Child Abduction and Enforcement of Custody Orders Act* 1991 (No. 6 of 1991)).

[176] See "Lawyers" in European Commission for Efficiency of Justice, 2006 Report on the evaluation of judicial systems in Europe (2004 data), CEPEJ Studies, Chapter 10, p. 127.

[177] *Rechtsanwaltsvergütungsgezets* (RVG), 5 May 2004.

[178] Art. 5.1 of the OBFG (French-speaking lawyers' association) regulations of 27 November 2004 on information to be provided by lawyers to their clients with respect to fees, costs and outlays.

[179] Art. 2234 of the Italian Civil Code.

[180] In Italy, this possibility is explicitly established by the Royal Decree of 27 November 1933, No. 1578, Art. 60.

[181] Art. 173 of the Greek Code of Civil Procedure. See also, YESSIOU-FALTSI, P. and PIPSOU, L.-M., *"Access to Justice. Costs and Legal Aid"*, Greek National Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 4.

[182] Polish National Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 1.

[183] JONGBLOED, A.W., "Access to Justice, Costs and Legal Aid", op. cit., p. 7.

[184] See SENAT (France), "L'aide juridique", Les documents de travail du Sénat, série législation comparée, n°LC 137, juillet 2004, p.10.

[185] *Bundesrechtsanwaltsordnung* (BRAO), 1. August 1959, §49b, sec. 2.

[186] Art. 2233, para. 3, of the Italian Civil Code. A bonus payment (*palmario*) payable if the case is won may, however, be provided for in the agreement between lawyer and client.

[187] Art. 93 para. 3, of the Greek Lawyers' Code.

[188] Art. 353 of the Polish Civil Code.

[189] Art. 5 of the OBFG (French-speaking lawyers' association) of 27 November 2004; see also, BIGWOOD, J., "*La détermination des honoraires de l'avocat*" J.T., p. 459 No. 2.4

[190] See the recommendation of the French lawyers' association of the Brussels Bar of 10 February 2004 on foreseeability, information and contractualisation of fees, L.B. 2003-2004, No. 2, p. 154.

[191] MATTEI. U, "Access to Justice. A Renewed Global Issue", report op. cit., p. 12.

[192] Art. 91, para. 2, of the German Code of Civil Procedure.

[193] Art. 1017 and ff. of the Belgian Judicial Code.

[194] Cass. 2 September 2004, R.W. 2004-2005. 535; for further discussion of this, see CALLEWAERT, V. and De CONINCK, B., "La répétibilité des frais et honoraires d'avocats après l'arrêt de la Cour de cassation du 2 septembre 2004. Responsabilités et assurances ", RGAR, 2005, n° 13.944 ; Van DROOGHENBROECK, J.-F. and CLOSSET-MARCHAL, G., "La répétibilité des honoraires d'avocat à l'aune du droit judiciaire", RGAR, 2005, n° 13.945.

[195] Art. 176 of the Greek Code of Civil Procedure.

[196] Royal Decree of 27 November 1933, No. 1578, Art. 60.

[197] X., Polish National Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p.2; in criminal matters, see Art. 632 of the Polish Code of Criminal Procedure.

[198] MATTEI. U, "Access to Justice. A Renewed Global Issue", report op. cit., p. 12.

[199] These states are -

[200] These states are Georgia, Ireland, Lithuania, Moldova, Monaco, Netherlands, Norway and Slovakia.

[201] Latvia.

[202] These states are Albania, Andorra, Armenia, Bosnia-Herzegovina, Bulgaria, Cyprus, Croatia, Czech Republic, Georgia, Greece, Latvia, Malta, Moldova, Monaco, Poland, Romania, Russian Federation, Slovakia, SM-Montenegro, SM-Serbia and Turkey.

[203] MATTEI, U., "Access to Justice. A Renewed Global Issue", report op. cit. p. 14.

[204] See SENAT (France), "L'aide juridique", Les documents de travail du Sénat, série législation comparée, n°LC 137, juillet 2004, p.8.

[205] GOTTWALD, P., "Access to Justice. Costs and Legal Aid", German National

Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 6.

[206] JONGBLOED. A.W., "Access to Justice. Costs and Legal Aid" Dutch National Report, op. cit., p. 9.

[207] MATTEI, U. report op. cit. p. 14.

[208] PARIS, C., "Le regime d'assurance protection juridique", Brussels, Larcier, 2004, p. 576.

[209] See, in particular, BOULARBAH, H., "Costs of Justice and Legal Aid", Belgian National Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands. According to this author, only 1% of cases are now in this situation.

[210] YESSIOU-FALTSI, P. and PIPSOU, L.-M, "Access to Justice. Costs and Legal Aid" Greek National Report, , in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands op. cit., p. 5.

[211] X., Polish National Report, , in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 3.

[212] BAUDEL, J.-M., "L'accès à la justice: la situation en France", French National Report, in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 4.

[213] VARANO, V., de LUCA, A., "Access to Justice in Italy", Italian National Report, in , in XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 5.

[214] Ibid, p. 6.

[215] The data in this section do not come from the replies to the CEPEJ-GT-EVAL questionnaire but were collected by means of a special questionnaire prepared by the Working Group on Mediation (CEPEJ-GT-MED), comprising N. Betteto, I. Borzová, G. Cotton, P. Eschweiler, J. Lhuillier, M.d.C. Oliveira, R. Simaitis (Chair in 2007), J. Tagg and A. Wergens.

[216] Austria, Bosnia and Herzegovina, Czech Republic, Germany, Hungary, Lithuania, Poland, Portugal, Romania, Slovenia, Sweden, United Kingdom.

[217] Some countries are notable exceptions, for example Germany (where mediation can be very expensive).

[218] For further details, see Lhuillier, J., "Analysis on assessment of the impact of Council of Europe recommendations concerning mediation", document CEPEJ 2007 (12).

[219] The studies carried out by the Working Group on Mediation (CEPEJ-GT-MED) revealed that a number of countries do not provide public funding for mediation (Bosnia and Herzegovina, Germany, Hungary, Lithuania, Romania, United Kingdom). Various explanations are given for the lack of such funding: while a shortage of funds is a factor to be taken into account (Hungary), it is not, as is generally thought, the main reason, or at least the only one, since the lack of funding is closely linked to ignorance about mediation and lack of confidence in it. The fact that mediation is not drawn to the attention of the public means that Ministries have no incentive to consider the importance of alternative means of settling disputes, and little effort is therefore made to introduce public funding for mediation schemes (Germany,

Lithuania, Slovenia). Bosnia and Herzegovina is in a special situation: public subsidies for mediation come mainly from foreign donations. Countries where public opinion is not alerted to mediation seem to be less inclined to set up a public funding system. Paradoxically, in many cases the public can be alerted only by means of a government campaign, as the government alone is in a position to increase public awareness.

[220] See the CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, CEPEJ(2007)14, §.34: "For reason of equality before the law and access to law, it is unacceptable for some categories of the population to be excluded from a service on financial grounds. For those with limited financial means, member states should be encouraged to make legal aid available for parties involved in the mediation in the same way that it would provide for legal aid in litigation." See also the similar wording in the CEPEJ Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties, CEPEJ(2007)15, §.42.

[221] Public funding may come from Ministries (Austria, Germany), local sources (in Sweden it is the municipalities that pay) or institutions (prosecution department in Slovenia, local criminal justice agencies in Great Britain, including the police and the probation and prison services).

[222] Recommendation Rec (2002)10 on mediation in civil matters. These conditions are explicitly mentioned only in the most recent of the four recommendations on mediation, but it is hard to imagine that they are not intended to apply in family, criminal and administrative matters.

[223] This principle should at any rate be observed in criminal matters. See the CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, CEPEJ(2007)13, §.34.

[224] Even if these two problems were resolved with new data, it would still be necessary to weight the results in the light of the cost of living in the various member states.

[225] Solenik, D., *L'application de la loi étrangère par les juges du fond anglais et français: réflexions pour une approche convergente dans l'espace européen*, Le Manuscrit, Paris, 2006, pp.249 ff.

[226] Merryman, J. H., "Foreign Law as a Problem", Stanford Journal of International Law, 1983, pp.151-173; reprinted in *The Loneliness of the Comparative Lawyer and other essays in Foreign and Comparative Law*, Kluwer Law International, 1999, pp.518-541.

[227] Solenik, D., *L'application de la loi étrangère dans l'espace judiciaire européen*, doctoral thesis in progress.

[228] See, for instance, in civil and commercial matters, the EU regulations introduced in respect of the law applicable to contractual and non-contractual obligations.

[229] MATTEI, U., "Access to Justice. A Renewed Global Issue?", General Report, XVIIth Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, pp. 8 f.

[230] For example, in Belgium, the statistical data show a steady increase in the number of new cases of almost 5% per year and, in France, the judicial system has been seeing a steady rise in the number of cases for about fifty years; see *Justice en*

chiffres 2004 et 2005: http://www.just.fgov.be/; BOULARBAH, H., Belgian National Report, in XVII[th] Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 4; See also BAUDEL, J.-M., *"L'accès à la justice: la situation en France"*, French National Report, in XVII[th] Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 2.

[231] X., Polish National Report, in XVII[th] Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 1.

[232] GOTTWALD, P., "Access to Justice, Costs and Legal Aid", German National Report, in XVII[th] Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, p. 2.

[233] JONGBLOED, A.W., "Access to Justice Costs and Legal Aid", Dutch National Report, in XVII[th] Congress of the International Academy of Comparative Law, 16-22 July 2006, Utrecht, Netherlands, pp. 3-4.

[234] Citizen participation in the decision-making process (people's juries etc) is not of course wholly motivated by questions relating to case-flow management; other, more conceptual considerations are put forward to justify it (a wish to give court decisions legitimacy in the eyes of the public, a wish to make citizens guarantors of society, a wish to teach people the practice of equity, each knowing that they may themselves be judged in their turn, etc.); see on this subject PERELMAN, Ch., Logique juridique, Nouvelle rhétorique, Dalloz, 1976, pp.162-163; TOCQUEVILLE, A. de, De la Démocratie en Amérique, I, VIII, GF-Flammarion, 1981, pp.371-376.

[235] This is in particular the case in Austria, Azerbaijan, Belgium, France, Ireland, Italy, Malta, Monaco, Norway, Portugal and the Russian Federation.

[236] For a recommendation along these lines for France, see JEAN, J.-P., "Les demandes des usagers de la justice", in CAVROIS, M.-L., DALLE, H. & JEAN J.-P., La qualité de la Justice, Ecole Nationale de la Magistrature, Mission de Recherche "Droit et Justice", La documentation française, 2002, p. 40. The author sets out the distribution of roles according to the following model: the judge would preside over the hearing, decide alone on procedural questions and would be the guarantor of lawfulness. The assessors would participate in the decision on the merits of the case on an equal footing with the judge.

[237] Ibid.

[238] See Part Two, A. 2.3.1.2. Adaptation in order to improve access to justice: hearing methods and specific procedural rights.

[239] See Part Two, A. 2.3.1.1. Adaptation in order to improve access to the law: specific information arrangements, and A. 2.4.2. Methods of representation in court.

[240] This is in particular the case in Belgium, Germany, Greece, Italy, the Netherlands and Spain.