

# CONTRACT

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## **Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union**

**- FINAL REPORT -**

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## PRELIMINARY NOTE

This report (the “Report”) is based on contributions made in the form of specific reports from all members of the team described below (the “Team”)<sup>1</sup>.

This is the English version of the Report. It is available in two languages, English and French. The French version is the reference languages for any interpretative issues.

The Report is based on many documents and contributions, most of which were too large to include here. All documents were transmitted to the European Commission. Only those considered crucial for an understanding of this Report and the analysis, conclusions and recommendations it contains are included herein as annexes. Among the crucial information included in the annexes lie reports made by national experts for each EU Country (“Country Reports”). The content of this Report can only be fully understood if read in conjunction with the Country Reports.

In any event, the objective here is not to deter potential readers by including large quantities of background information but rather to invite the reader to enjoy a synthesized and analytical work.

The terms beginning with capital letters that are not defined in this Report are defined by reference to the offer and the contract as approved by the European Commission (“Offer” and “Contract” respectively).

As Team Leader, I wish to thank the members of the Team, researchers, contact points and other contributors for their dedication to this project and the quality of their input.

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<sup>1</sup> The contents of this Report are the sole responsibility of the Team Leader and can in no way be taken to reflect the views of the European Commission or of those who collaborated or participated in this Report since their participation, limited to specific portions of the Report, was reviewed and re-written to form the Report. The European Commission does not guarantee the accuracy of the data included in this report, nor does it accept responsibility for any use made thereof.

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# PRESENTATION OF THE PROJECT

## INTRODUCTION

The Report implements a study conducted for the European Commission “on the Transparency of Costs of Civil Judicial Proceedings in the European Union” (the “Project”). The context of the project is the creation of an effective European Area of Civil Justice as presented during the European Council at Tampere in 1999 and defined under the Hague Programme as adopted in 2005 and the belief affirmed by the European Commission in its 2006 Green Paper titled “European Transparency Initiative” that *“high standards of transparency are part of the legitimacy of any modern administration. The European public is entitled to expect efficient, accountable and service-minded public institutions and that the power and resources entrusted to political and public bodies are handled with care and never abused for personal gain”*<sup>2</sup>.

The affirmation of a European Area of Civil Justice means that EU citizens have an easy access to justice. Access to justice by EU citizens remains hindered by a number of factors one of which is the lack of transparency in the costs of civil judicial proceedings.

This study constitutes an opportunity to create a typology of the costs of justice in civil litigation proceedings in the EU and to make recommendations and facilitate new initiatives in this area. One of the problems that one faces in this endeavour is the diversity of the tasks attributed to the judicial in the different Member States and the resulting variety of sources of costs.

### Principles

The European Union has made it an objective to guarantee access to justice to its citizens. An effective access to justice means that the costs of accessing justice are affordable to citizens and that information on such costs or sources of costs is itself easily accessible.

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<sup>2</sup> COM(2006) 194 final.

### Justice and economic rights in the European Union (“EU”)

The affirmation of the right of movement or establishment within the EU has to be accompanied by measures that will ensure that such right is a reality rather than just a dream.

Any increase in the movement of people within the EU inevitably leads to a potential increase in the number of cross-border disputes and disputes between people from different nationalities. The failure of Member States to deal with this reality may contribute to the creation of obstacles that hinder the Single Market. These sometimes take the form of legal and administrative barriers<sup>3</sup>.

The Treaty of Rome<sup>4</sup> itself predicted the need for EU action in this field. Article 220 of the Treaty provides that Member States shall enter into negotiations to simplify the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. The philosophy behind this provision was that the free movement of goods, persons and services requires for its effectiveness the free movement of judgments so as to ensure adequate legal protection for nationals of one Member State doing business, or working in other Member States.

The Treaty of Maastricht<sup>5</sup> incorporated judicial cooperation in civil and criminal matters under Title VI as an area of common interest to the EU Member States.

More clearly, the existence of Article 65 in the Treaty of Amsterdam<sup>6</sup> confirms that judicial procedures have long been considered potential legal barriers to the functioning of the Internal Market<sup>7</sup>. Article 65 invites European institutions to take measures as necessary to ensure that the Internal Market functions unhindered, including instances where civil procedure may have an effect on cross-border civil and commercial matters. It should be noted however, that the Treaty of Amsterdam does not bring civil matters under the co-decision making procedures of Article 251 of the EC Treaty. It is the Treaty of Nice<sup>8</sup> that enables measures relating to judicial

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<sup>3</sup> Report from the High Level Group chaired by Wim Kok, *“Facing the Challenge - The Lisbon Strategy for Growth and Employment”*, November 2004, p. 26.

<sup>4</sup> 25 March 1957.

<sup>5</sup> 7 February 1992.

<sup>6</sup> OJ 1997 C 340; 2 October 1997.

<sup>7</sup> In this Report Internal Market and Single Market refer to the same concept.

<sup>8</sup> Official Journal C 80 of 10 March 2001; Signed 26 February 2001; Entered into force on 1 February 2003.

cooperation in civil matters - except family law - to be adopted using the Article 251 procedure.

The European Parliament in its amendments to the European Commission proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure included “(1a) According to Article 65(c) of the Treaty, these measures are to include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States”<sup>9</sup>. The Vienna Action Plan confirms this<sup>10</sup>.

On 30 November 2000, the Council adopted a joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. The Tampere Council affirms the principles and objectives set out above as it seeks to create “a genuine European Area of Justice” where “individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States”<sup>11</sup>. This is echoed again in the Hague Programme of November 5, 2004. The programme in fact refers to simplifying and speeding up the settlement of cross-border litigation on small claims.

#### Justice and fundamental rights in the EU

Access to justice is also a fundamental right recognized by the European Convention on Human Rights (“ECHR”) and the Charter on Fundamental Rights of December 7, 2000<sup>12</sup>. As a whole these provide that access to justice in all types of litigations is a fundamental right recognized by the EU. Article 47 of the Charter recognizes the right to a tribunal in all types of litigations extending thus the provisions under Article 6 of the ECHR. Article 47 states that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

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<sup>9</sup> A6-0387/2006 FINAL.

<sup>10</sup> Council and Commission Action Plan of 3 December 1998 on “*how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice*”; text adopted by the Justice and Home Affairs Council of 3 December 1998 (known as the Vienna Action Plan).

<sup>11</sup> Tampere Council, 15/16 October 1999, EU Bull. 10-1999, pp. 7-15.

<sup>12</sup> O.J. (C 364) 1 (Dec. 7, 2000).



Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". The inclusion of legal aid in the Charter is important in that the cost of justice is recognized as a barrier to effective access to justice and the exercise of fundamental rights as recognized by the Charter. These rights apart from being integrated in the European Constitution have been affirmed by the European Court of Justice. Article 220 of the Treaty of Rome requires that the European Court of Justice "ensure that in the interpretation and application of this Treaty the law is observed". It is based on this that the Court developed general principles such as proportionality, legal certainty and legitimate expectation, equality and fundamental rights<sup>13</sup>.

### **Context**

The European Union has granted a number of rights to its citizens such as the freedom of movement within its borders. These rights have changed the lives of many citizens. Exchanges in the EU have increased manyfold in the last few years. However, EU citizens cannot take full advantage of these rights if they are not accompanied by the granting of other rights such as access to justice.

#### *A rising number of cross-border disputes within the EU*

The cost of access to justice in cross-border dispute constitutes an obstacle if not a deterrent when a legal system is acts as an artificial border against the affirmation of the right of movement. Obtaining a judgment, in particular against a defendant in another Member State, is generally prohibitive and often disproportionate to the amount of the claim involved. Many creditors, faced with uncertain outcomes, unidentifiable costs and lengthy proceedings will not litigate and as a result will seldom risk doing business abroad.

#### *The effect of civil litigation cost related disparities in the EU*

The important variations in the sources of litigation costs and their amount raises obvious concerns as to the effective access to justice in cross-border disputes or in disputes involving EU citizens residing in a Member State without being nationals.

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<sup>13</sup> See Rutili - Case 36/75 (1975) ECR 1219.

These can lead to such citizens not exercising rights that they would exercise if it weren't for the associated costs of litigation.

### Civil litigation cost transparency

Increasing the transparency of costs in the European Area of Justice facilitates access to justice by enabling citizens to factor such costs in their decision-making processes. The final text of the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure includes in the recital that *“it should be appropriate that details of costs to be charged are made public and that the means of setting any such costs are transparent”*<sup>14</sup>.

### Increasing efficiency and lowering costs

Transparency on litigation costs is part of a wider objective of increasing the efficiency of the justice system as it faces an ever-increasing number of litigations. Efficiency can only be measured through the collection of statistical information. Similarly transparency is related to the availability of information. Precise statistical information that relates to the efficiency of judicial procedures is not readily available in many Member States<sup>15</sup>. Too few Member States are able to give precise updated statistical information regarding the time it takes in their own country to obtain an enforceable title<sup>16</sup>. However, the technology to obtain precise statistical results and disseminate information is readily available. The availability of such information is essential and it cannot be stressed too much how crucial a management tool it is to evaluate compliance with relevant EU regulations, to facilitate access to justice, to set targets for future improvements or follow up on past errors. The European Parliament in its amendments to the European Commission proposal for a regulation of the European Parliament and of the Council establishing a European Small Claims Procedure included that *“Member States shall provide the Commission with information relating to the cross-border operation of the European Small Claims Procedure. This information should cover court fees, speed of the procedure, efficiency, ease of use and the internal procedures of the*

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<sup>14</sup> Recital 4.

<sup>15</sup> « *Des Procédures de traitement judiciaire des demandes de faible importance ou non contestées dans les droits des Etats-membres de l'Union Européenne, Exploitation de l'enquête de la Commission européenne sur Les procédures judiciaires applicables aux demandes de faible importance* », Rapport final: Evelyne Serverin, Directeur de recherche au CNRS IDHE-ENS CACHAN, Cachan, 2001. In the report, table 9 on page 34 shows that barely any statistical information is available and that the little information produced allows only a very general overview.

<sup>16</sup> See CEPEJ, 2006 Report on European Judicial Systems, October 5, 2006 at 7.2.

*Member States*<sup>17</sup>. Efforts have been made at the European level and at national levels to use new technologies in such a way that the whole justice system becomes part of a wider network enabling efficiencies and local, national and regional statistics to be drawn<sup>18</sup>.

Recently, Member States have adopted special procedures aimed at accelerating the process of obtaining enforceable titles in cases of small or uncontested claims<sup>19</sup>. Such procedures are known for their efficiency in speeding up the time it takes to obtain an enforceable title<sup>20</sup>. The European Commission itself follows the evolution of these procedures closely<sup>21</sup>.

### EU objectives related to civil justice related costs in the EU

The European Union seeks to create a European Area of Justice<sup>22</sup>. A European Area of Justice would facilitate individuals' and businesses' access to justice by eliminating obstacles that prevent or discourage them from exercising their rights. Complex and costly legal and administrative systems qualify as obstacles to an unhindered access to justice.

The cost of using the justice systems in the EU is one of these obstacles. The main reason for this is four-fold. First the difficult assessment due to the lack of available information of the costs related to legal procedures can constitute an obstacle. Second, the important differences in costs from one Member State to another can also constitute an obstacle. Third, the importance of the costs relative to the amount litigated can clearly become a deterrent. Four, important differences in the Member States legal systems will lead to increased costs to run cases (lawyers, translators, travel, notifications).

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<sup>17</sup> A6-0387/2006 FINAL.

<sup>18</sup> See Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters. See also Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (COM/2006/203) and annexes (SEC/2006/579).

<sup>19</sup> See CEPEJ, 2006 Report on European Judicial Systems, October 5, 2006 at 7.3.

<sup>20</sup> See European Commission Green Paper on a European Order for payment Procedure and on Measures to Simplify and Speed Up Small Claims Litigation, COM (2002) 746 final, 20.12.2002. See also Commission Proposal for a Regulation of the European Parliament and of the Council Creating a European Order for Payment Procedure, COM(2004)173 final/3, 25.05.2004.

<sup>21</sup> [http://ec.europa.eu/civiljustice/simplif\\_accelerat\\_procedures/simplif\\_accelerat\\_procedure\\_fr\\_en.htm](http://ec.europa.eu/civiljustice/simplif_accelerat_procedures/simplif_accelerat_procedure_fr_en.htm)

<sup>22</sup> As defined in the Hague Programme.

The development of the European Area of Civil Justice is proposed as a key objective of the European Councils of Tampere (1999) and The Hague Programme of 2004. This objective carries with it a number of specific objectives which are as follows:

- 1/ Access to justice for citizens notably in cross-border litigation;
- 2/ Mutual recognition of decisions as an effective means of protecting citizens' rights; and
- 3/ Securing the enforcement of rights across European borders.

In particular, the Hague Programme emphasized that the effectiveness of existing instruments on mutual recognition should be increased, by standardising procedures and documents and by developing minimum standards for aspects of procedural law, such as in the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs.

*EU specific action related to the problematic of civil justice related costs in the EU*

- *Legal aid*

Currently, the only European piece of legislation that addresses specifically the costs of civil justice is Council Directive 2003/8/EC of 27 January 2003. This Directive was adopted to improve access to justice in cross-border disputes and improve on existing agreements that had not been ratified by all the Member States and remained seldom used. The Directive establishes minimum common rules relating to legal aid for such disputes. It also creates a national treatment system in respect to the right to legal aid by granting citizens litigating in a Member State other than that in which they reside the same rights to legal aid as citizens resident in that Member State.

The Directive goes further than merely facilitating access to legal aid it also harmonizes legal aid by entitling people with insufficient resources to “appropriate” legal aid. The directive lays down the services that must be provided for the legal aid to be considered appropriate. These are as follows:

- Pre-litigation advice;
- Legal assistance and representation in court;
- Exemption from, or support in respect to, the cost of proceedings, including the costs connected with the cross-border nature of the case.

Lastly, the Directive proposes certain mechanisms for judicial cooperation between Member States. These are designed to facilitate the transmission and processing of legal aid applications.

The legal aid Directive does not provide for minimum standards as regards access to or levels of legal aid. It does not deal with the broader issues of the actual costs of litigation. But it is step forward towards facilitating, through financial support, access to justice for citizens wishing to litigate in Member States other than those in which they reside.

- *Late payments in commercial transactions*

The Directive 2000/35/EC<sup>23</sup> on combating late payments in commercial transactions contains provisions that specifically address the issue of the costs of justice. It is clear from the legislative intent and the wording of the Directive that the costs of justice can act as a deterrent to bringing an action before a court.

- *Small claims*

On December 20, 2002, the European Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation<sup>24</sup>. Following this, the European Commission adopted on 15 March 2005 a proposal for a regulation establishing a “European Small Claims Procedure” (“ESCP”)<sup>25</sup>. This Regulation would apply in civil and commercial matters, whatever the nature of the court or tribunal, where the total value of a monetary or non-monetary claim excluding interest, expenses and outlays equal to or less than 2 000 Euros at the start of the proceedings. The European Commission proposal of the for a Regulation establishing a European Small Claims Procedure (“ESCP”) of 13 March 2005<sup>26</sup> has as its main objective to reduce the costs, delays of judicial procedures which continue to represent a disproportionate burden on claimants in cases of small claims<sup>27</sup>. A small claim is a claim that does not exceed 2000 Euros.

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<sup>23</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions; JO L 200, 8.8.2000 p. 35 - 38.

<sup>24</sup> COM (2002) 746 final.

<sup>25</sup> COM (2005) 87 final. This was amended in a new proposal of 7 February 2006; COM(2006)57 final.

<sup>26</sup> COM (2005) 87 final.

<sup>27</sup> See European Commission Green Paper on a European Order for payment Procedure and on Measures to Simplify and Speed Up Small Claims Litigation, COM (2002) 746 final, 20.12.2002. See also Commission Proposal for a Regulation of the European Parliament and of the Council Creating a European Order for Payment Procedure, COM(2004) 173 final/3, 25.05.2004.

This proposal has been approved but amended by the European Parliament on December 14, 2006. In its final version, the regulation is limited to cross-border disputes.

The ESCP facilitates the introduction of the claim using a specific form that is provided for in the Regulation itself under Annexe 1. This allows for a uniform and simplified procedure for obtaining judgment. It provides for a purely written procedure, unless the court considers an oral hearing is necessary. Further, the nature and extent of evidence, and the ability to use expert evidence is at the court's discretion (Article 7). However, Article 7 also provides that such evidence shall be used only if necessary with costs being taken into account. Courts are expected to render a judgment within 30 days. Finally, parties may be legally represented and even choose non-professional representation. Costs will be payable by the losing party, or at the court's discretion. As per article 11, service of process can be organised by post only. Article 16 provides that in certain circumstances, such as a failure of service or exceptional circumstances that limited the ability of the defendant to object to the claim, the defendant may apply for a review of a judgment. It is left to the law of individual Member States whether there is a right of appeal<sup>28</sup>.

Although the ESCP limits the costs of litigation and is very much cost focused, one issue it does not efficiently address is that of the language in which documents are acceptable to the courts. The ESCP allows for acceptance of documents that are not in the official language of the Forum Member State but there are still circumstances where translation can be imposed on a party<sup>29</sup>. More precisely, a party can impose translation of the other party's documents. Given that the ESCP does not address the standard of translation and that in many Member States, courts only accept official translators' translations, the costs of litigating small claims may again turn out to be prohibitive.

- *Service in the Member States of judicial and extrajudicial documents in civil or commercial matters*

Measures reducing the transmission times of judicial and extrajudicial documents in civil and commercial matters form part of the general effort to develop the legal

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<sup>28</sup> Article 15 of the proposal.

<sup>29</sup> COM (2005) 87 final, at Article 4(7).

cooperation necessary for achieving a European area of freedom, security and justice.

Regulation (EC) No 1348/2000<sup>30</sup> was adopted on May 29, 2000. It aimed at expediting and improving the transmission of judicial and extrajudicial documents between Member States of the European Union<sup>31</sup>.

The first paragraph of the Regulation's preamble states that "*the Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured. To establish such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market*".

This Regulation is based on the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters. It improves a number of provisions of this Convention.

Basically the Regulation facilitates service of process within the EU and proposes instead of the Hague Service Convention system or the Letter Rogatory procedure which involve the use of consular and diplomatic channels simpler means of communication of judicial and extra-judicial documents. The consular and diplomatic steps are eliminated.

A recent case decided by the ECJ on the interpretation of the Regulation shows the ECJ's will to ensure that the Regulation does meet the objective of a more efficient service of process system within the EU. The *Plumex v Young Sports NV* case decided on February 9, 2006 relates to a prejudicial question by Belgian's Supreme Court. The defendant, a Portuguese company, had been served using two means for service of process. The first was organised through the transmitting agencies in Portugal. The second service of process was organised via the post. The defendant argued that the procedural time limits ran starting on the date of service by the transmitting agencies in Portugal rather than the post as under Article 4 to 11 of the

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<sup>30</sup> Council Regulation (EC) No 1348/2000 of 29 May 2000, OJ L 160, 30.6.2000, p. 37-52.

<sup>31</sup> Extended to Denmark by Council Decision of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2006 L 120, 2006/326/EC, p. 23-24.

Regulation. The ECJ considered that since both methods of service are acceptable under the Regulation and under Portuguese law, the procedural time limit start running from the first date that a valid service was effected which is that of the service of the judicial documents by post.

Although the ECJ decision is progressive, the recourse to the ECJ to interpret the Regulation shows that some of its provisions may need rewriting. In fact, the implementation of this Regulation has been difficult. This has been observed by various studies and consultations<sup>32</sup>. The main issues are as follows:

- Service remains slow and beyond the set deadlines in some cases;
- The forms established by the Regulation are not used;
- Document addressees are not sufficiently informed of their right to refuse them;
- Processing costs are not sufficiently clear and assessable and remain excessive in some cases;
- Those in charge of implementing the Regulation are not familiar with it.

As a result a proposal for a regulation amending the Regulation was presented by the Commission the 11 July 2005<sup>33</sup>. This aims at solving different types of practical problems identified above, specifically high costs and lack of transparency concerning sources of costs.

- *Jurisdiction and enforcement of judgments in matrimonial matters*

A Regulation 2201/2003 of November 27, 2003 deals at the European level with the recognition and enforcement of judgments in matrimonial matters and the issues of parental responsibility (Brussels II)<sup>34</sup>.

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<sup>32</sup> December 2002: debate in the European judicial network in civil and commercial matters.

July 2003: public hearing on the application of the Regulation.

April 2004: convocation of a meeting of the Advisory committee on the service of judicial and extrajudicial documents in civil and commercial matters (as provided for in Article 18 of the Regulation) May 2004: study commissioned from the MainStrat consultancy on implementation of the Regulation. February 2005: second hearing.

<sup>33</sup> On the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, (COM(2005)0305 - C6-0232/2005 - 2005/0126(COD)).

<sup>34</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (O.J L 338 , 23/12/2003 P. 1 - 29) and as amended by Regulation 13739/04 of November 8, 2004.



The Regulation sets out rules concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility. It does not determine the applicable law in relation to divorce proceedings.

The increasing number of marriages and divorces involving spouses from different Member States has led the European Commission to propose on July 17, 2006, a text amending the Regulation and extending its scope to divorce matters<sup>35</sup>.

The objective of the new proposal is to provide a clear and comprehensive legal framework in matrimonial matters ensuring legal certainty, predictability, flexibility and access to court. The main features of the proposal include:

- harmonised conflict-of-law rules in matters of divorce; and
- a limited degree of choice for the spouses regarding which law is applicable and which court is competent in proceedings concerning divorce and legal separation.

- *Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

Regulation 44/2001/EC on “jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”<sup>36</sup> was adopted on December 22, 2000<sup>37</sup>. It replaces the 1969 Brussels Convention and is as a result usually referred to as Brussels I.

This regulation provides a method for determining international jurisdiction of the Member States’ courts. Further, it facilitates the recognition of judgments by affirming the principle of an automatic recognition of judgments rendered in the EU. Finally, it expedites enforcement of judgments and other judicial or quasi-judicial decisions.

- *European order for payment procedure*

Regulation 1896/2006 creating a European order for payment procedure has been adopted by the EU on December 12, 2006<sup>38</sup>. The Regulation proposes a simplified

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<sup>35</sup> COM(2006) 399 final.

<sup>36</sup> OJ L 12 of 16.01.2001.

<sup>37</sup> Denmark is not bound by this.

<sup>38</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; OJ L 399 (2006), p. 1. This will apply as of December 12, 2008 except for countries such as Denmark.

procedure for obtaining an enforceable title in cases of uncontested debts. A uniform form or order is issued by a court and served on the defendant. In the absence of an opposition by the defendant to the claim, the order becomes enforceable.

- *Justice and the environment*

The environment is an important topic today. Hence, Council Decision 2005/370/EC of 17 February 2005 on the conclusion of the “Convention on access to information, public participation in decision-making and access to justice in environmental matters” which is in fact the adoption of the Aarhus Convention<sup>39</sup>.

- *European enforcement order for uncontested claims*

On December 20, 2002, the European Commission adopted a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation<sup>40</sup>. Following this, the EU adopted on April 21, 2004 regulation 805/2004 on a “European Enforcement Order for uncontested claims”<sup>41</sup>. The Regulation creates a European enforcement order for uncontested claims. Laying down minimum standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can circulate freely within the EU, it abolishes exequatur procedures.

- *Cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*

Regulation 1206/2001 on “cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters” was adopted on May 28, 2001. It creates a system of direct and expedited transmission and execution of requests between courts for taking evidence<sup>42</sup>. It lays down precise criteria regarding the form and content of the requests for taking evidence.

- *Facilitating the implementation of judicial cooperation in civil matters*

Regulation 743/2002 of April 25, 2002 establishes a “*general Community framework of activities to facilitate the implementation of judicial cooperation in civil*”

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<sup>39</sup> OJ L 124, 17.5.2005, p. 1-3.

<sup>40</sup> COM (2002) 746 final.

<sup>41</sup> OJ L 143 of 30.04.2004. See also Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims.

<sup>42</sup> OJ L 174, 27.06.2001.

*matters*<sup>43</sup>. This is the basis for initiatives taken by the Commission, in compliance with the principle of subsidiarity, for actions supporting organisations that promote judicial cooperation in civil matters.

- *European judicial network*

Council Decision 2001/470/EC of May 28, 2001 paves the way for the creation of the “European Judicial Network in civil and commercial matters”<sup>44</sup>. Basically the network includes professionals involved in judicial matters from all Member States. Their task involves dissemination of information amongst themselves and to the public at large. The implementation of the Decision has been assessed in a recent report by the European Commission which concludes that more can be done provided adequate resources are allocated to the network<sup>45</sup>.

- *Alternative dispute resolution*

Following a Green Paper of 2002<sup>46</sup> on alternative dispute resolution, and a code of conduct for mediators drawn up in 2004 and approved by Mediation experts, a draft Directive on “certain aspects of mediation in civil and commercial matters” was prepared by the European Commission on October 22, 2004<sup>47</sup>. This proposal highlights the advantages of using dispute resolution methods that are more economical and simpler than judicial or quasi-judicial remedies. The proposal offers thus a cost effective method of resolving conflicts and of enforcing decisions. In respect to enforcement, the proposal points to the possibility that absent a voluntary implementation of the settlement agreement, procedures to confirm the agreement in a judgment or decision would be created by Member States. This would effectively allow enforcement of settlements agreements in the EU.

- *Insolvency proceedings*

A Regulation of May 29, 2000 regulates insolvency proceedings in the EU<sup>48</sup>. Again, this piece of legislation is based on the EU’s aim of establishing an area of freedom, security and justice. It replaces bilateral and multilateral agreements between

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<sup>43</sup> OJ L 115, 1.5.2002, p. 1-5.

<sup>44</sup> Council Decision 2001/470/EC: OJ L 174, 27.6.2001; Bull. 5-2001, point 1.4.9.

<sup>45</sup> Report of May 16, 2006; COM(2006) 203 final.

<sup>46</sup> COM(2002) 196 final.

<sup>47</sup> COM(2004) 718 final.

<sup>48</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (O. J L 160, 30/06/2000 P. 1 - 18. See also Council Regulation (EC) No 603/2005 of 12 April 2005 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings.

Member States and seeks to codify how Member States determine jurisdiction in insolvency proceedings and choice of law. Finally, the regulation provides for the automatic recognition in other Member States insolvency proceedings started in one Member State. The stated purpose of this new piece of legislation is to “limit, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims...and permit the free circulation of European orders for payment...”.

### **Objective**

The Project aims at identifying the sources of costs of civil judicial proceedings in each Member State of the EU.

This main objective includes more specific objectives such as:

- defining the proportion of each identified source of cost on the overall cost of civil judicial proceedings,
- comparing the costs incurred by litigants in different Member States,
- identifying variations in sources of costs and costs amounts,
- identifying how transparency of the costs of judicial proceedings and the limitation of differences in sources of costs and costs amounts can foster greater access to justice,
- making recommendations for possible actions at the EU level, possibly through the establishment of minimum standards, to facilitate access to justice by improving the transparency of costs of civil justice,
- generally, identifying links, where appropriate and relevant, between costs of justice and access to justice for the citizens, and
- identifying specific issues pertaining to cross-border disputes.

This Report incorporates the results obtaining in pursuing the above defined objective. It presents such results based on the following structure:

PART I: METHODOLOGY

PART II: FINDINGS

PART III: CASE STUDIES

PART IV: CONCLUSIONS AND RECOMMENDATIONS

## **PART I: METHODOLOGY**

The Project was implemented through three separate assignments as described below.

Assignment 1 aimed at collecting relevant information concerning the sources of the costs of justice and their levels in the different Member States. The information sought included legal materials and social and economic works relevant to the Project.

Assignment 2 aimed at conducting an EU wide survey of professionals and citizens knowledgeable about the costs of justice.

Assignment 3 aimed at obtaining very precise information from local experts (“Country Experts”) on the costs of justice in each Member State. Each Country Expert was in charge of answering a detailed questionnaire and preparing a Country Report.

# 1 ASSIGNMENT 1 - COLLECTING DATA

## 1.1 The Research Team in charge of collecting information

A Research Team (the “Research Team”) was assigned to Assignment 1. The Research Team consulted databases and contacted statistic agencies, relevant Ministries and Courts in order to obtain relevant information. All studies on the subject matter of the Project as well as related subjects were also researched and reviewed.

Assignment 1 also focused on collecting documents, communications, provisions, studies, articles and all other written documents related to the Study using public and private databases.

The material found enabled a first synthesis that described:

- the efficiency of different regulations,
- deficiencies of different regulations, and
- proposals for change.

The Research Team produced:

- a general overview of the situation of costs of justice in the European Union,
- a report on the accessibility of information for the citizens, and
- a report on studies, reports and essays that have been conducted on the subject.

## 1.2 Determination of relevant information to implement Assignment 1

Generally, the Research Team tried to obtain the following type of information on judicial systems and regulations:

- relevant regulations,
- doctrinal papers,
- case law,
- articles, reports, essays, studies,

- studies on wider questions related to changes in judicial systems and costs of civil judicial proceedings,
- indications on the actual trend and reforms regarding the costs of a civil judicial proceedings especially in cross-border cases,
- examples of cross-border litigations and their costs, and
- indications on good practices.

### ***1.2.1 Social and economic perspective***

This Project involved a number of evaluations as follow. These implied taking into consideration the social and economic aspects of costs of justice.

- an evaluation of the transparency of costs of justice;
- a determination of the proportion of each identified source of cost as regards the amount at stake in the dispute;
- a determination of the proportion of each identified source of cost according to the volume of activity;
- a comparison of costs incurred by litigants in the different Member States;
- the identification of variations in sources and amounts of costs;
- the identification of links, where appropriate and relevant, between costs of justice and access to justice for the citizens; and
- the identification of specific issues pertaining to cross-border disputes.

Thus, studies on the economic and social perspective of costs of justice focused mainly on the following topics:

- the costs involved by a civil judicial proceeding;
- the question of the transparency of costs of justice;
- studies on the problems faced by citizens and corporations involved in cross-border cases;
- studies on how citizens perceive their judicial systems;
- studies on the efficiency of the judicial systems of the Member States; and
- studies on the effect of costs on the fairness of legal proceedings and access to justice.

## ***1.2.2 Data collection procedures - Identification and confirmation of data sources***

### ***1.2.2.(a) Country Experts***

Country Experts were asked to provide relevant studies, official schedules of fees, regulations and brochures either in English or in their own language.

### ***1.2.2.(b) Online resources***

A Research Team Assistant under the Team Leader's supervision was designated to collect online data sources. Each identified source was thoroughly researched. In respect to searches on search engines and databases, key words were defined beforehand and communicated to the Research Assistants to ensure uniformity and coherence in the collection process. The research was carried out in several languages.

### ***1.2.2.(c) National legislations***

Official resources on national legislations are listed under [Annex 7](#).

All relevant regulations have been analyzed focusing on the information regarding costs of justice and in order to determine how each piece of legislation was to contribute in the identification and limitation of costs and in the improvement of the transparency of costs of justice.

### ***1.2.2.(d) Official National Studies***

A research effort was carried out involving different ministries of the Member States, the Member States' official judicial bodies and statistics agencies.

The research sought to collect official statistics regarding costs of justice and related information including:

- the average amount of the cost of civil and commercial procedures and of enforcement procedures in the Member States;
- the number of cases and average amount of costs of proceedings in a cross border context;
- the figures related to legal aid applications and legal aid's granting or denial;



- the approximate number of procedures concerned, classified by category and amount of costs ; and
- the average amount of costs required to obtain the main types of civil and commercial decisions in the Member States

The list of different ministries contacted is attached as Annex 3.

The list of judicial institutions contacted is attached as Annexes 2, 5 and 6.

The list of national statistics organizations contacted is attached as Annex 12.

#### ***1.2.2.(e) Studies from European and international organizations***

The European Commission studies for the Efficiency of Justice were obtained.

The CEPEJ study entitled *Answer to the REVISED SCHEME FOR EVALUATING JUDICIAL SYSTEMS 2004* was obtained for each Target Country. The CEPEJ Study on *European Judicial Systems* was also consulted and analyzed. It will serve as a base for the reflection.

Other European and international organizations were contacted regarding their studies.

The updated Reports of the World Bank on judicial proceedings costs in 178 countries were obtained.

#### ***1.2.2.(f) Studies on European regulations***

European regulations were researched, consulted and analyzed by the Research Team. A table of the European main regulations with references to the costs of justice with the name and main articles of the regulations can be found under Annex 8.

All the provisions in the legislation mentioned in the Specifications of the Contract were consulted and analyzed by the Research Team.

### **1.2.2.(g) *Private databases used***

A number of databases were used for studies, essays and articles on the topics relating to the Project.

### **1.2.3 *Conclusion on implementation of Assignment 1***

The databases were designed to provide detailed data, in particular in order to allow for a comparison between the different regulations in the Target Countries.

First, the data from the databases were collected and the first statistics were generated.

Later on, this data was used to complete the findings resulting from the online databases with sources of information such as studies or relevant articles.

The research performed under Assignment 1 took into consideration the expectations of the European Commission, the reality in respect to readily available information and the relevancy of data in respect to the scope and objectives of Assignment 1.

Based on the data sets collected, the Team was able to describe and summarize the situation in terms of how each piece of legislation contributes in the identification and limitation of costs and in the improvement of the transparency of costs of justice and to present this in the Final Report.

## **2 ASSIGNEMENT 2 - ORGANIZATION OF SURVEYS**

The Contract calls for the implementation of the Project partly through the use of surveys. As a result it was deemed important to organize a number of surveys based on the different types of justice related costs. To implement the surveys a master questionnaire was created (the “Questionnaire”).

### **2.1 Preparation of the Questionnaire**

The Questionnaire was not only the main survey tool it was also the basis by which Country Experts contributed to the Project. Their answers to the Questionnaire as attached hereto under Annexes 67 to 93 constitute the foundation for the Country Reports attached hereto under Annexes 24 to 50.

The Questionnaire is included in the General Working Document as attached under Annex 23.

The questionnaire was translated into five languages to facilitate its dissemination and ensure greater participation in the Project.

### **2.2 Preparation of Sub-questionnaires**

The Questionnaire is the backbone of the Project. It was used to create specific questionnaires addressed to people based on each type of identified cost (“Sub-Questionnaires”).

Apart from the Country Expert participation in answering the Questionnaire, surveys were conducted in person, by email, by telephone and through the website [www.costsofjustice.org](http://www.costsofjustice.org) (the “Website”).

These surveys aimed at confirming or infirming the Country Reports. They ensured quality control on the information provided by the Country Experts.

Basically the Questionnaire was divided into Sub-questionnaires based on each type of identified cost.

The following eight Sub-questionnaires were created:

- Sub-questionnaire for courts under Annex 59,
- Sub-questionnaire for translators under Annex 60,
- Sub-questionnaire for lawyers under Annex 61,
- Sub-questionnaire for interpreters under Annex 62,
- Sub-questionnaire for legal aid under Annex 63,
- Sub-questionnaire for witnesses under Annex 64
- Sub-questionnaire for bailiffs under Annex 65, and
- Sub-questionnaire for experts under Annex 66.

From the Sub-questionnaires a short version of each Sub-questionnaire (Short Questionnaire) was created.

The Short Questionnaires are under the following Annexes:

- Short Questionnaire for courts under Annex 51,
- Short Questionnaire for translators under Annex 52,
- Short Questionnaire for lawyers under Annex 53,
- Short Questionnaire for interpreters under Annex 54,
- Short Questionnaire for legal aid under Annex 55,
- Short Questionnaire for witnesses under Annex 56,
- Short Questionnaire for bailiffs under Annex 57, and
- Short Questionnaire for experts under Annex 58.

### **2.3 Targets of the Questionnaire and the Sub-questionnaires**

The Targets of the sub-questionnaires are first and foremost the professionals concerned by the sub-questionnaire.

To obtain participation in the survey the targets of such survey were identified.

### ***2.3.1 Identification of Targets for Sub-questionnaires and Short Questionnaire submission***

The Targets were identified as a result of the following:

- Research carried out by the Research Assistants under the Team Leader's supervision;
- Professionals known to the Team Leader and the contractor (the "Contractor") including members of the Contractor's network;
- Individuals known personally or professionally by Country Experts;
- Professionals working in the field of judicial proceedings such as lawyers, judges, court officers asked to participate in the survey and disseminate the questionnaire; and
- Specialized Sources as listed under Annex 2.

Professionals in each Members State were identified. They were mainly:

- Bailiffs,
- Courts administrators,
- Experts,
- Interpreters,
- Translators,
- Lawyers, and
- Ministries of justice.

Organizations in each Member State were identified. They included:

- Legal aid organizations,
- Ministries of justice,
- Statistics agencies of ministries of justice,
- Legal aid beneficiary associations
- Bar associations,
- Bailiffs associations,
- Lawyers associations,
- Interpreters associations,
- Translators associations,
- Representative organizations of experts, and
- Representative organizations of witnesses.

European organizations were identified. They include organizations that represent:

- Lawyers,
- Judges,
- Bailiffs,
- Translators, and
- Interpreters.

The other specialized sources (“Specialized Sources”) identified to both participate in the study and disseminate it, were as described below and under Annexes 2 to 6 and 15, 19, 20 and 22.

- Courts in the 27 Member States;
- Arbitration organizations and arbitration courts; and
- International and European organizations (CEDH, ECJ...).

All these Targets are listed under Annexes 2 to 6 and 13 to 22.

### ***2.3.2 Specialized sources contacted***

On June 30th 2007, over 8000 professionals had been contacted in the twenty-seven Member States.

Sub-Questionnaires were also aimed at legal professionals. Professional associations and other professionals were also contacted as described under Annexes 2, 15, 17, 19, 20 and 22. They participated and advertised the Project to citizens and other professionals.

The Short Questionnaire targeted online participants. Online participants could answer both the Short questionnaire and the Sub-questionnaire but experience has shown that they prefer answering a maximum of ten questions.

## **2.4 Submission of Sub-questionnaires**

A Research Team was given the tasks of contacting relevant Targets to answer the Sub-questionnaires and Short Questionnaires.

#### ***2.4.1 Submission by means of direct contact***

The Research Team contacted directly members of the legal professions to put the questionnaires directly to them by means of an interview.

The persons and organizations that have been interviewed are:

- Legal experts,
- Bailiffs,
- Ministries of justice in Member States,
- Judges,
- Court administrators.

The lists of these persons and organizations are included under Annexes 2 to 6.

#### ***2.4.2 Submission by means of direct contact***

Targets contacted were invited to disseminate the questionnaire and the information on the Project. Participants could either choose to answer the questionnaire directly by interview or by sending back the completed document to the Research Team or by going online to the Website.

##### ***2.4.2.(a) Creation of the website***

A website was created to both present the Project and facilitate access to the Questionnaire, Sub-questionnaires and Short Questionnaires. The Website is accessible through the domain names acquired for that purpose [www.costsofjustice.org](http://www.costsofjustice.org) and [www.fraisdejustice.org](http://www.fraisdejustice.org). Server space was leased to make the Website function on the Internet. Email addresses were created to ensure coherence and efficiency in contacts made when implementing the Project.

The Website presents the Project to the questionnaires' targets but also to every person contacted during the study and the public at large. Thus, its utility is not limited to facilitating access to the questionnaires. It provides greater visibility on European Union policy in the area of costs of justice. The Website is presented in the English and French languages.

The sixteen sub-questionnaires and short-questionnaires were accessible online in five languages.

#### **2.4.2.(b) Ensuring quality of participation**

The questionnaires were filled in anonymously to respect privacy concerns. However, and in consultation with the Beneficiary, to ascertain that the person answering a questionnaire was a desired target and that she or he contributed only once to the study, a statement was made to that effect before questionnaire was answered. An example of such statement is as follows:

*“By answering this questionnaire you declare that you have not answered this questionnaire before and that you have knowledge of lawyers’ consulting and representation fees within the context of the costs of judicial proceedings”.*

The website offers to answer the Sub-questionnaires and Short Questionnaires following the categories below:

- bailiffs,
- courts,
- experts,
- interpreters,
- translators,
- lawyers,
- legal aid, and
- witnesses.

Annex 11 presents the Website.

### **2.5 Statistical results**

The questionnaires were prepared in such a way as to provide for a number of closed answers. These closed answers enable the generation of statistical results.

Regarding the collection of statistics calculated on the basis of the online answers, interview answers, or Country Report answers, statistics-generating software was acquired and interfaced with the Website. Basically, all completed questionnaires’



answers were inputted into the website database system and fed to the statistics generating software. The statistics were thus directly produced and processed from the online database. Statistics were automatically updated when new verified answers were submitted.

## 2.6 Results

Each Country Expert has submitted his or her answers to the Questionnaire. The completed Questionnaires are attached as follows:

Country	Expert	Annex
Austria	Benedikt Spiegelfeld	<a href="#">Annex 67</a>
Belgium	Yves Brulard	<a href="#">Annex 68</a>
Bulgaria	Atanasova Emiliya	<a href="#">Annex 69</a>
Cyprus	Giannos Georgiades	<a href="#">Annex 70</a>
Czech Republic	Chladek Milan	<a href="#">Annex 71</a>
Denmark	Peter Gjörtler	<a href="#">Annex 72</a>
Estonia	Anu Sander	<a href="#">Annex 73</a>
Finland	Eva Nordman	<a href="#">Annex 74</a>
France	Isabelle Tinel	<a href="#">Annex 75</a>
Germany	Michael Bonsau	<a href="#">Annex 76</a>
Greece	John C. Kyriakides	<a href="#">Annex 77</a>
Hungary	Hedvig, Zsuzsanna Bozsonyik	<a href="#">Annex 78</a>
Ireland	Melissa Jennings	<a href="#">Annex 79</a>
Italy	Enrico Adriano Raffaelli	<a href="#">Annex 80</a>
Latvia	Valters Gencs	<a href="#">Annex 81</a>
Lithuania	Valentinas Mikelenas	<a href="#">Annex 82</a>
Luxembourg	DI STEFANO Mario	<a href="#">Annex 83</a>
Malta	Marse-Ann Farrugia	<a href="#">Annex 84</a>

Country	Expert	Annex
Netherlands	Evelien H. De Jonge-Wiemans	<u>Annex 85</u>
Poland	Piotr Sadownik	<u>Annex 86</u>
Portugal	Ronald Charles Wolf	<u>Annex 87</u>
Romania	Roxana Eftimie	<u>Annex 88</u>
Slovenia	Pipan Nahtigal Nataša	<u>Annex 89</u>
Slovakia	Bartošík Peter	<u>Annex 90</u>
Spain	Juan Ramon Iturriagagoitia Bassas	<u>Annex 91</u>
Sweden	Fredrik Iverström	<u>Annex 92</u>
United Kingdom	Benjamin John Francis Mac Farlane	<u>Annex 93</u>

The Country Experts have also contacted professionals in their country to ask them to participate in the Project by completing Sub-Questionnaires.

Professionals have been contacted in all Member States as listed under the Annexes.

Many have agreed to participate in the study and have completed Sub-questionnaires and Short-Questionnaires.

Annex 1 presents the results obtained.

Currently Sub and Short Questionnaire have been completed for the following countries:

Country	Questionnaire							
	Legal Aid	Interpreters	Witnesses	Translators	Lawyers	Experts	Courts	Bailiffs
Austria	X	X		X	X	X	X	X
Belgium	X	X		X	X	X	X	X
Bulgaria	X	X			X		X	X
Cyprus	X	X		X	X	X	X	
Czech Republic	X	X		X	X	X	X	X
Denmark	X	X		X	X		X	
Estonia	X	X		X	X	X	X	X
Finland		X		X	X	X	X	X
France	X	X		X	X	X	X	X
Germany	X	X		X	X	X		X
Greece	X	X		X	X	X	X	
Hungary		X			X	X	X	X
Ireland	X	X		X	X	X	X	X
Italy	X	X		X	X	X	X	X
Latvia		X		X	X	X	X	
Lithuania	X	X		X	X	X	X	X
Luxembourg		X		X	X	X		
Malta	X	X		X	X		X	X
Netherlands	X	X		X	X	X	X	X
Poland	X	X		X	X			
Portugal	X	X		X	X	X	X	X
Romania		X			X		X	

	Questionnaire							
Country	Legal Aid	Interpreters	Witnesses	Translators	Lawyers	Experts	Courts	Bailiffs
Slovenia	X	X		X	X	X	X	X
Slovakia	X	X		X	X	X	X	X
Spain	X	X	X	X	X			
Sweden		X	X	X	X		X	X
United Kingdom	X	X	X	X	X		X	X

### 3 ASSIGNMENT 3- COUNTRY REPORTS

Each Country Expert has prepared a Country Report on the costs of justice in his or her own country. This involved describing and analyzing the main costs of justice in the different Target Countries in civil judicial proceedings taking into consideration the nature and the type of the proceeding.

#### 3.1 27 Country Experts and Country Reports

The following Country Experts were designated and approved by the European Commission to implement Assignment 3 in the Target Countries. All Country Experts have extensive experience in judicial proceedings; they are mainly lawyers, bailiffs and judges.

The Country Reports are provided as attachments under the Annexes identified below:

Country	Expert	Annex
Austria	Benedikt Spiegelheld	<u>Annex 24</u>
Belgium	Yves Brulard	<u>Annex 25</u>
Bulgaria	Emiliya Atanasova	<u>Annex 26</u>
Cyprus	Giannos Georgiades	<u>Annex 27</u>
Czech Republic	Chladek Milan	<u>Annex 28</u>
Denmark	Peter Gjørtler	<u>Annex 29</u>
Estonia	Anu Sander	<u>Annex 30</u>
Finland	Eva Nordman	<u>Annex 31</u>
France	Isabelle Tinel	<u>Annex 32</u>
Germany	Michael Bonsau	<u>Annex 33</u>
Greece	John C. Kyriakides	<u>Annex 34</u>

Country	Expert	Annex
Hungary	Hedvig, Zsuzsanna Bozsonyik	<a href="#">Annex 35</a>
Ireland	Melissa Jennings	<a href="#">Annex 36</a>
Italy	Enrico Adriano Raffaelli	<a href="#">Annex 37</a>
Latvia	Valters Gencs	<a href="#">Annex 38</a>
Lithuania	Valentinas Mikelenas	<a href="#">Annex 39</a>
Luxembourg	Di Stefano Mario	<a href="#">Annex 40</a>
Malta	Marse-Ann Farrugia	<a href="#">Annex 41</a>
Netherlands	Evelien H. De Jonge-Wiemans	<a href="#">Annex 42</a>
Poland	Piotr Sadownik	<a href="#">Annex 43</a>
Portugal	Ronald Charles Wolf	<a href="#">Annex 44</a>
Romania	Roxana Eftimie	<a href="#">Annex 45</a>
Slovenia	Pipan Nahtigal Nataša	<a href="#">Annex 46</a>
Slovakia	Bartošík Peter	<a href="#">Annex 47</a>
Spain	Emilie Pavageau	<a href="#">Annex 48</a>
Sweden	Fredrik Iverström	<a href="#">Annex 49</a>
United Kingdom	Benjamin John Francis Mac Farlane	<a href="#">Annex 50</a>

### 3.2 Preparing a Working Document for all Country Experts

The General Working Document was prepared for the whole Team by the Team Leader, to ensure that all aspects of the Project were understood by everyone working on the Project. This is provided under [Annex 23](#). The General Working document also included the Questionnaire that each Country Experts was supposed to use in preparing their Country Reports. The reasons for providing the document to the Country Experts are twofold. First, it gave them some background knowledge of the situation at the EU level. Second, it described in great detail, including the Questionnaire, the scope and content of the work to be performed under the Project.

### ***3.2.1 Preparing a uniform Country Report format***

The Project involved preparing twenty-seven Country Reports and a Final Report. This meant that close to thirty relatively voluminous documents would be prepared to be read.

To ensure that the reading was pleasant, the comprehension easy and the findings readily useable, a coherent and uniform whole was preferable. This was reinforced by the fact that the Final Report includes economic and social perspectives on top of a legal analysis. Finally, accessibility is important when the objective of the Project aims precisely at enhancing “transparency” in the costs of justice.

As a result, it was decided that all Country Reports would follow the same format and outline.

The Country Reports are provided in the English language except for the Belgian and Spanish reports. Those that were not in the English or French language have been translated, as the Final Report could only be prepared if the Final Report Expert Team could understand the contents of the Country Reports.

### ***3.2.2 Preparing a Country Report outline for the Country Experts***

All Country Reports follow the same outline as prepared by the Team Leader. The main points that each Country Report develops are as follows:

- A summary of the main sources of costs;
- Level of transparency in the sources of costs;
- Determination of the amounts of costs;
- Level of transparency in determining the actual costs;
- Proportion of each identified cost on the overall cost of civil judicial proceedings;
- Proportion of each identified cost on the overall volume of activity;
- Proportion of each identified cost on the value of disputed claim;
- Specificities in relation to EU cross-border disputes;
- Proportion of each identified cost on the overall cost of civil judicial proceedings;
- Recommendations for EU action/national action;

- Relationship between the costs of justice, the transparency in the costs of justice and access to justice; and
- Conclusions and recommendations.

The outline also provided case studies, which were included in the Questionnaire. Five case studies were completed for each country (civil law, family law, labour law, and two in commercial law).

Each case study was treated from two different perspectives, first from an internal perspective and second from a cross-border perspective. This means that including the two perspectives, it is in fact ten case studies that are presented.

The answers provided in these case studies allow for a practical understanding of the costs involved in litigation. Further, this method highlights clearly the disparities between the Member States as well as the extra costs related to the cross border nature of the dispute.

These Case studies are presented in [Annex 10](#).

### ***3.2.3 Including Questionnaire answers as a substantive component of the Country Reports***

The Questionnaire included in the working document under [Annex 23](#) was answered by the Country Experts in their Country Reports.

These answers provide an extensive overview on the costs and sources of costs of justice in all Member States.

### ***3.2.4 The Final Report and Country Reports***

The Final Report Expert Team prepared the Final Report based on the Draft Country Reports and the results of Assignments 1 and 2.

On top of integrating information obtained through the surveys, the Final Report proposes an analysis and summary of the Country Reports as provided in the findings that follow.



## **PART II: FINDINGS**

# 1 INTRODUCTION

## 1.1 Main sources of costs

The five main sources of costs in the Member States are as follows:

- court fees,
- lawyer's fees,
- bailiffs' fees (or, when there is no status such as bailiff in the Member State, the cost for the judgement enforcement),
- expert fees, and
- translation fees

These are the main sources of costs although they are not systematic costs. Many experts point out that some of these costs are due only for specific proceedings. That is the case not only for translation and interpretation fees, but also for experts' and lawyers' fees.

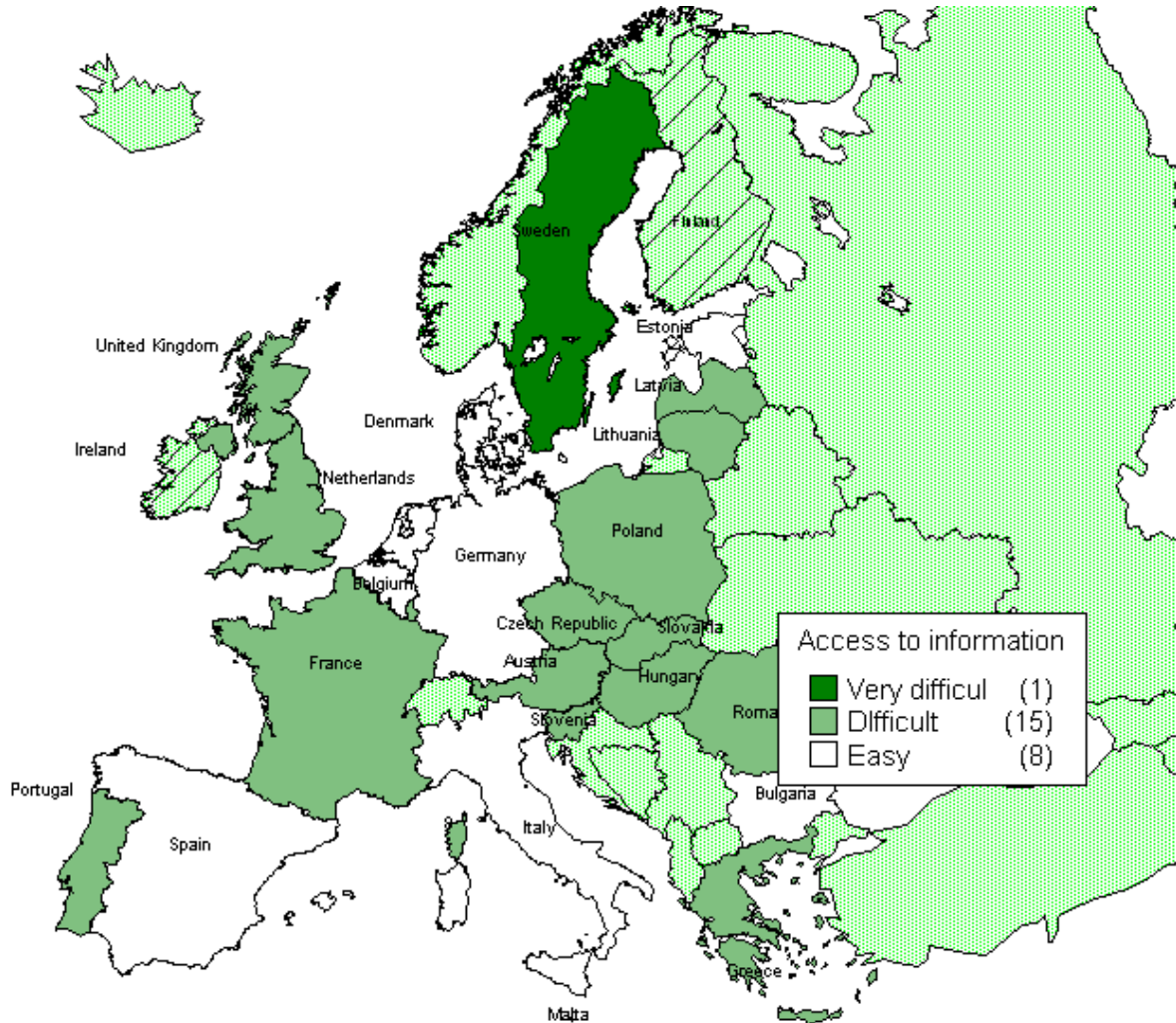
In this study some costs have, sometimes, been taken into account even if they are not directly linked to the functioning of Justice. That is the case for costs relating to transport, as mentioned by the German Expert. These costs exist for litigants all over the European Union and are naturally subject to variations according to the geographical organization of courts and the litigants' place of residence.

It should also be noted that the each Member State's contribution to costs varies. In **Hungary**, for example, translation fees are covered by the State. That is not necessarily the case for other Member States.

Finally, it is worth mentioning that some legal professionals only exist in a limited number of Member States. Such is the case for "avoués" in **France** who have the monopoly on representing the parties before the Courts of Appeal, although their existence does not prevent the parties from using the services of a lawyer at the same time.

## 1.2 Level of transparency

Map 1 - Level of transparency



Source: Country Reports

NB: In light green non-Member States. In light green with lines Member States for which the answer is not applicable.

### 1.2.1 Level of transparency of the various costs of justice

The level of transparency of costs of justice is generally low in Europe.

This affirmation should be tempered by the fact that an overall assessment of the transparency of costs of justice in each Member State is difficult because these costs originate from different sources.

Proceedings fees are predominantly the most transparent fees as they are directly fixed by national legislation in most Member States. Transparency is better ensured when cost levels are determined by regulation.

Even then, it is at times difficult for the parties to access this information or even to understand it. Some regulations required expert help to be understood. They can be very technical, dispersed in a number of regulations and contain many exceptions.

The less transparent costs in most Member States are lawyers' fees, experts' fees and witness compensation.

Lawyers' fees are generally the subject of an agreement between the lawyer and the party at the beginning of the proceedings. They can, however, vary according to many parameters such as the complexity of the case, its duration.... Lawyer's fees or hourly rate are hardly ever published.

This can be mainly explained because of the impossibility to forecast the duration of the proceedings and the difficulties inherent in any proceedings without knowing all the parameters that may arise during the course of a case.

When an expert intervenes in the proceedings, the corresponding costs are also difficult to assess. Nevertheless, an estimate can sometimes be drawn up.

Other sources of costs vary from a Member State to another, and it is difficult to identify a general trend.

### ***1.2.2 Solutions to improve transparency of costs of justice***

Member States have adopted over the years measures to reinforce the transparency of the costs of justice. Recent reforms show a real focus by many Member States on making transparency a priority.

Amongst measures that enhance transparency are:

- clear and accessible - to the lay person - regulations on the costs of justice ,
- information available on websites,
- information centres, especially in Courts,
- communication by professionals of their tariffs before the proceedings or to provide estimates of costs and expenses ,
- publications by relevant professional bodies relating to costs of justice or the average tariffs of the profession.

### ***1.2.3 Transparency of costs and reimbursement***

The evaluation of the costs actually borne by the parties must take into account the potential reimbursement of the costs incurred.

The probability of a reimbursement and the predetermination of its amount should it be ordered is not possible to predict. If it were it would mean that parties would know the outcome of the case before the start of the litigation. However, there are elements that may assist the parties in the evaluation of whether or not to litigate or settle. Such elements would include whether reimbursement is automatic for the winning party and if it is automatic whether it is full or partial. Knowledge of this increases transparency and facilitates the parties' costs and risk assessments.

## **1.3 Regulation of the costs of justice**

Regulation is one of the means to improve transparency provided this regulation is clear and accessible.

### ***1.3.1 Regulation by category***

Many sources of costs are regulated by the Member States. It is possible to highlight some trends according to the results obtained.

It would, nevertheless, be simplistic to conclude that regulation is the best guarantee for transparency of the costs of justice. Some professional services do not lend themselves to regulation.

### **1.3.1.(a) Regulation of the lawyer's fees**

Lawyer's fees are the least regulated fees.

In fact, these fees are only regulated in three Member States, even if in many Member States, control systems have been implemented to monitor abuses.

### **1.3.1.(b) Regulation of the interpreter's, translator's and expert's costs**

Costs relating to those resulting from the intervention of an interpreter, translator or an expert are follow closely lawyers' fees in the level of regulation that pertains to them.

In nearly half of the Member States (twelve), experts' fees are freely determined by the experts. The same applies to translation and interpretation fees.

It is thus possible to draw a parallel between this observation and the results obtained for transparency. Indeed, the least regulated sources of fees are those which appear to be the least transparent.

### **1.3.1.(c) Regulation of bailiff costs**

Bailiff's costs are regulated in most States.

However, these fees are freely fixed for specific acts in **France** and **Lithuania**.

These fees are freely fixed but with maximum and minimum amounts in **Romania**.

In the **United Kingdom**, fees are freely set.

### **1.3.1.(d) Witness compensation**

Witness compensation is regulated in seventeen Member States. In five other Member States, this compensation is determined by the court which settles the claim

Although they are in most cases regulated, these fees are generally not considered transparent in the European Union. This can be explained by the lack of clarity and accessibility of relevant regulations.

Nevertheless, regulations in the Member States are based on very different systems.

Therefore, studying only the existence of the regulation would not give a complete overview of the costs of justice in the European Union, the contents of the regulation must be examined as well.

### **1.3.1.(e) *Proceedings fees regulation***

Conversely, proceedings fees are regulated in twenty-five of the Member States.

In fact such fees are not regulated where they are free. In **France** (except in respect to Commercial Courts) and **Luxembourg** they are free and unregulated.

### **1.3.2 *Type of fee regulation***

The manner in which different Member States regulate the costs of justice varies from one Member State to another. They can be:

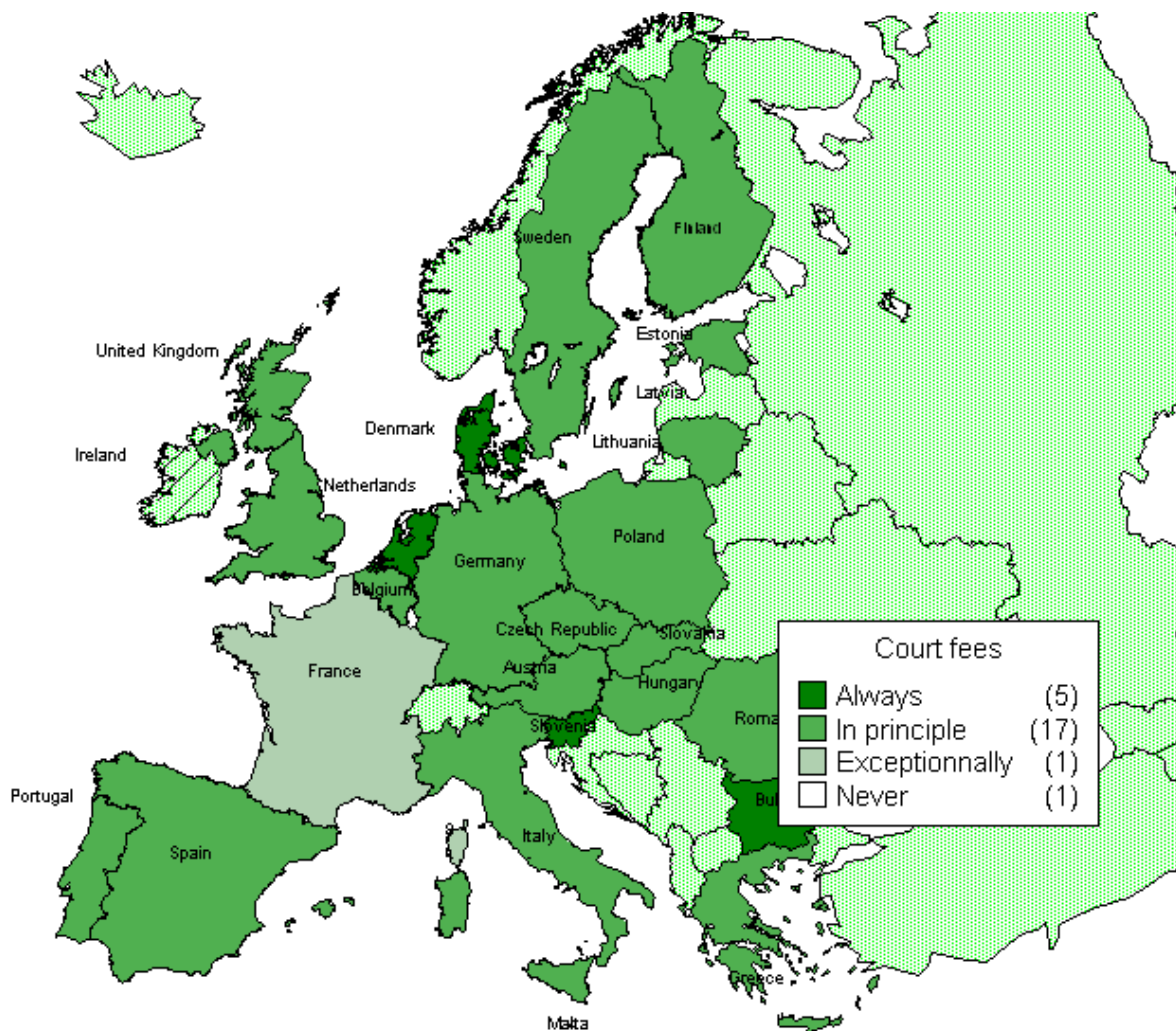
- fixed sums depending on the type of litigation,
- costs fixed on a per page basis (for the expert report or for the translation for instance),
- fees calculated on an hourly basis,
- costs depending on the amount of the litigation,
- costs fixed on a per act basis (especially for bailiffs).

## 2 PROCEEDING FEES

### 2.1 Fees for judicial proceedings

#### 2.1.1 Introduction

Map 2 - Proceedings Fees



Source: Country reports

NB: In light green non-Member States. In light green with lines Member States for which the answer is not applicable.



There are proceedings fees in twenty-five Member States, **France** and **Luxembourg** are the only two Member States in which this notion does not exist.

In **Luxembourg**, the regulation adopted on 27th December 1980 abolished all kinds of proceedings fees including that which granted fees to Court clerks.

In **France**, the situation is slightly different. If a 30th December 1977 law affirms the principle of no proceedings fees, they do exist in commercial courts proceedings. These proceedings costs are fixed in accordance with a schedule (Article 853 of the New Code of Civil Procedure).

### *2.1.2 Allocation of proceeding fees: the example of Greece*

Proceedings fees are usually allocated to the Member State that provides judicial services.

In **Greece**, for instance, proceedings fees are calculated as a portion of the claim provided it is a monetary amount and are due when filing the claim.

Proceedings fees called “dikastiko ensimo” are paid by the claimant, when there is a monetary claim, before the hearing. They represent a series of percentages that correspond to court fees, stamp duties and an allocation for lawyers’ pension and welfare funds. They usually total less than one percent of the claimed amount.

These fees are then collected by the Tax Authorities of the Greek State and allocated to the Lawyers’ Pension and Welfare Funds.

On top of the proceedings fees, enforcement fees must be paid once the decision has been made and are collected by the Tax Authorities. These can be relatively high, depending on the nature of the claim, between half a percent and three percent of the amount adjudicated in the decision.

Case registration fees are 4.50 Euros for the Magistrate Court, 7.90 Euros for the First Degree Court and 29.80 Euros for the Supreme Court.

To these fees must be added 0.50 Euros for each copy of the submissions.

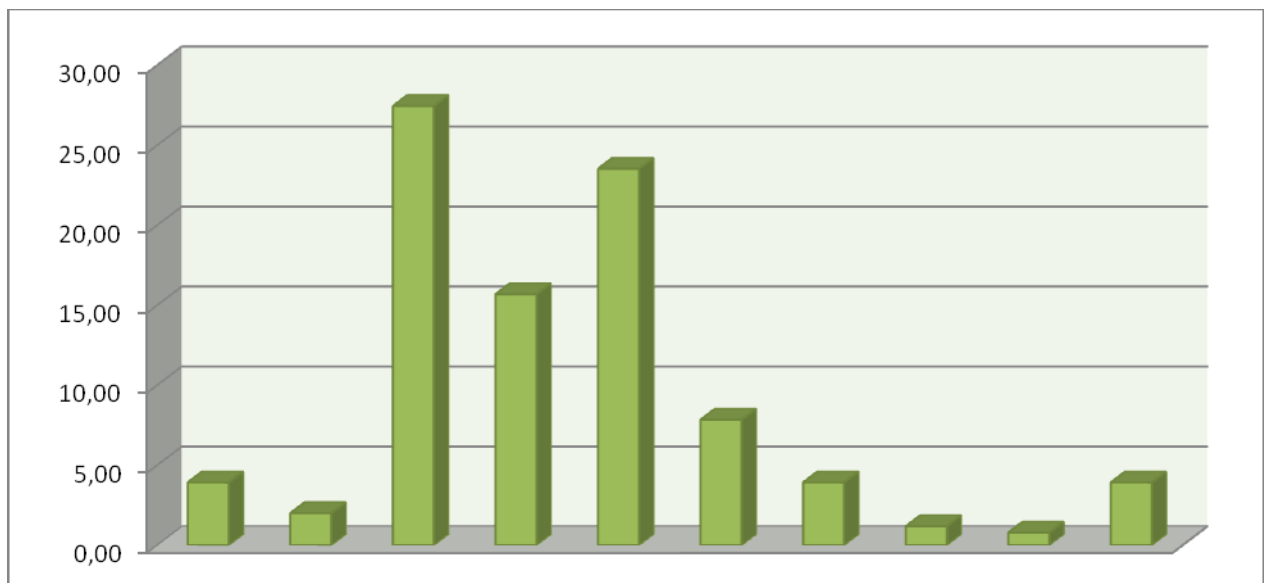
### 2.1.3 Amount of proceeding fees

Proceedings fees rarely prove a stumbling block for the parties to lodge their claim.

Indeed, from a statistical point of view, the questionnaire submitted to the public shows that these fees only exceptionally exceed 1000 Euros.

For example, in a litigation involving family law - for which the amount of the claim could not be calculated in advance - the case studies as completed by the experts show that the proceedings fees do not exceed five hundred Euros and are, in most cases, lower than one hundred Euros.

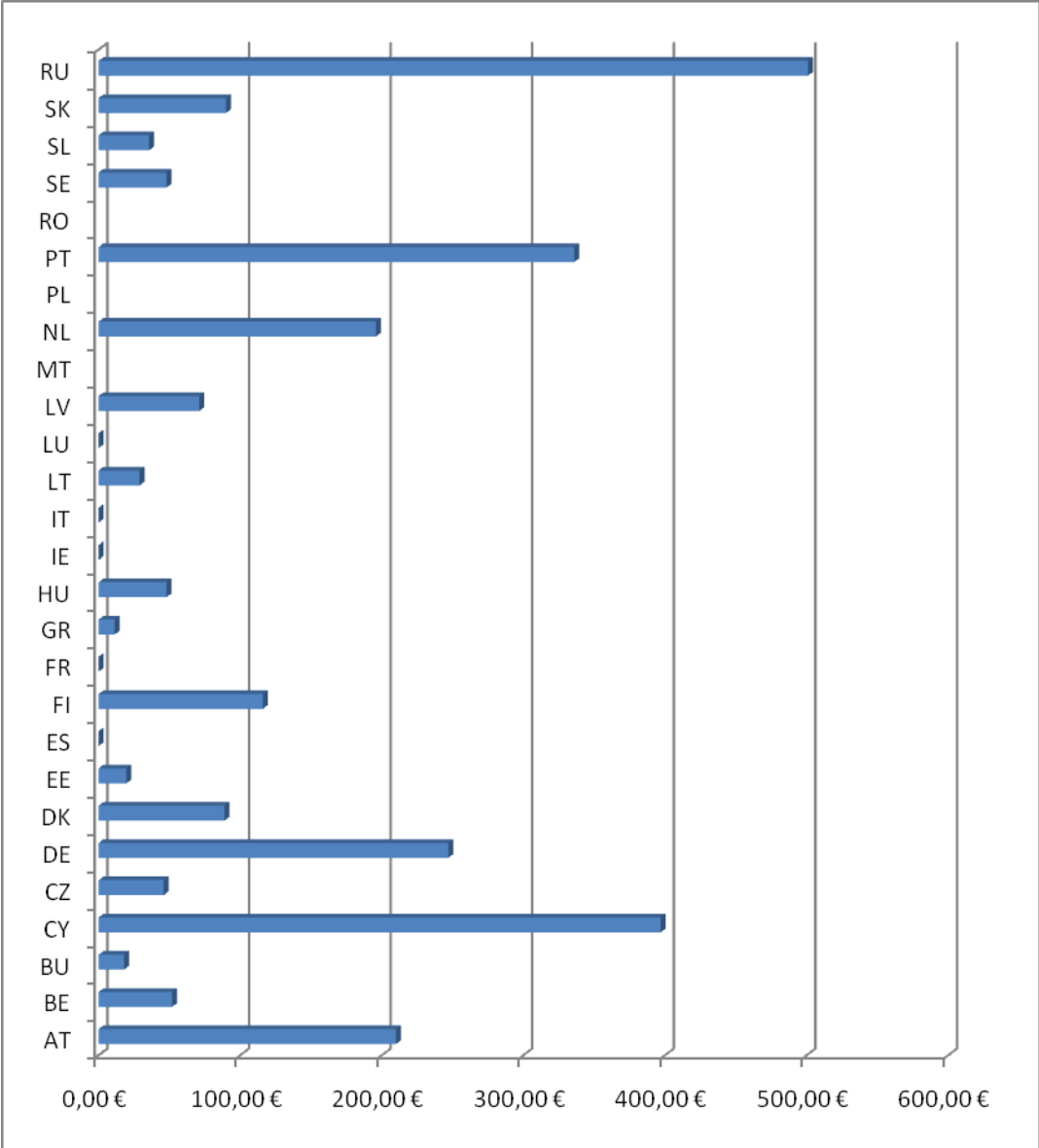
**Graph 1 - Amount of proceeding fees**



Free | 1-19 | 20-49 | 50-99 | 100-249 | 250-349 | 350-499 | 500-749 | 750-999 | +1000 Euros

*Source: public questionnaire*

**Graph 2 - Amount of proceeding fees per Member State**

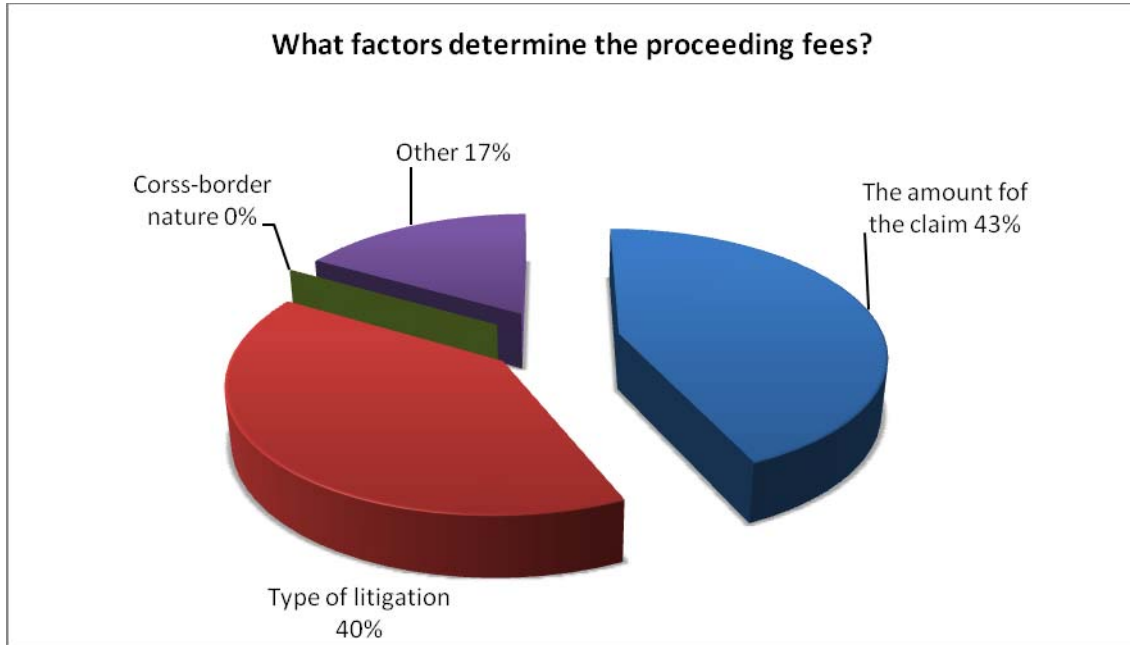


*Source: national report- case study 1-A*

Case 1 A - National situation: a couple gets married. Later they separate and agree to a divorce.

### 2.1.3.(a) Method of calculation of proceedings fees

Graph 3 - Proceeding fees determination factors



Source: Online questionnaire

The method of calculation itself does not vary a lot between Member States. There are three main methods of calculation of proceedings fees.

These are as follows:

- The amount of the claim ;
- The type of litigation ;
- Acts carried out by the court.

Fee calculation is often based on both the amount of the claim and the type of litigation.

Case studies completed by the experts confirm this and show that these fees can considerably vary from type of litigation to another.

There are no significant differences however in cases of cross-border litigations.

Further, the case studies also show that from one Member State to another, proceedings fees also vary significantly based on how these are calculated.

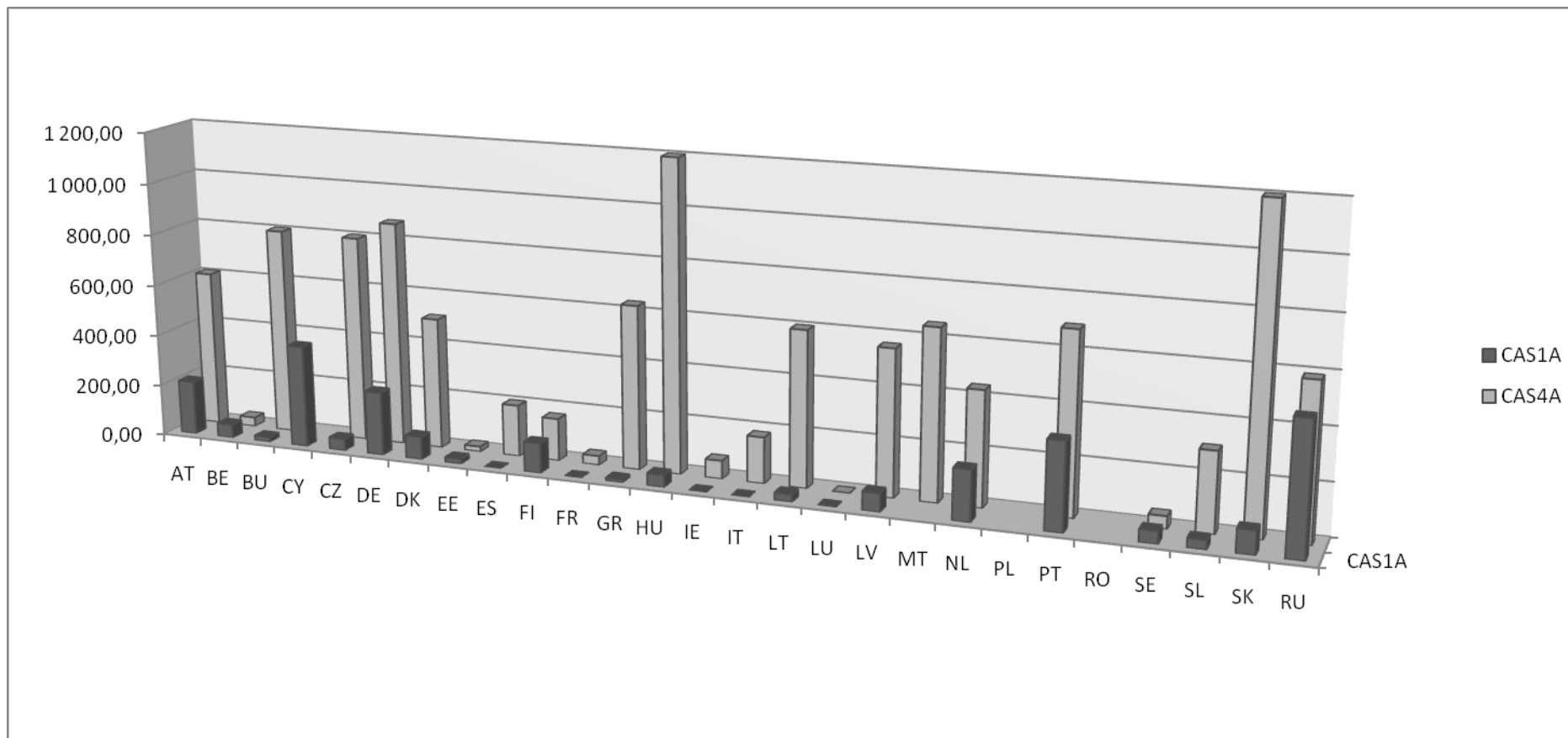
Graph 4 below identify such variations based on two case studies as described below

Case 1 A - National situation: a couple gets married. Later they separate and agree to a divorce.

Case 4 A - National situation: A company delivered goods worth 20000 Euros. The seller has not been paid because the buyer considers that the goods do not conform to what was agreed. The seller believes that the goods are conform to what was agreed and asks for payment in full because he asserts that the goods were purpose made and he will not be able to sell them to someone else.

The seller decides to sue to obtain the full payment of the price.

**Graph 4 - Comparison of the proceeding fees according to the type of litigation**



Source: Country reports - Case studies 1-A and 4-A

**2.1.3.(b) The particular case of Finland, fees based on the stage of the proceedings**

In **Finland**, proceedings fees depend on the stage of the proceedings.

Therefore, proceedings fees are paid at the end of the proceedings.

In all types of civil proceedings, proceedings fees amount to:

- 72 Euros if the litigation ends up before the preliminary hearing;
- 102 Euros if the litigation ends up at a preliminary hearing when only one judge sits;
- 164 Euros if a proper audience with the complete quorum of the court is complete;
- For a divorce, fees amount to 72 Euros.

In cases of divorce, these fees are paid by the party who starts the divorce proceedings or by both parties if the action was introduced jointly. In Finnish divorce proceedings, a six months' waiting period is imposed on the couple to test their determination to pursue divorce proceedings. If the proceedings are interrupted during the waiting period, the fees will then amount to forty-four Euros.

**2.1.3.(c) Patrimonial and amount of claim based fees, a criterion difficult to apply: the case of Lithuania**

In **Lithuania**, the method of calculation for the proceedings fees depends on the patrimonial or non-patrimonial nature of the litigation.

Therefore, in a patrimonial litigation, the amount of the stamp duty depends on the amount of the claim.

In patrimonial cases, fees range from a minimum 14.50 Euros to 2027 Euros + one percent of the amount of the claim (for claims of a least 86 886 Euros).

For a 5000 Euros claim, fees amount to 868.86 Euros plus two percent of the amount of the claim, i.e. 100 Euros. The total amount will therefore be: 968.86 Euros.

In non-patrimonial litigations, proceedings fees are made up of a lump sum based on the proceedings.

Although this method seems quite simple, it has been noted how difficult it is to distinguish between patrimonial and non-patrimonial rights, especially due to a lack of transparency as to the criteria applied to make such a distinction.

Further, courts tend to extend the scope of the definition of patrimonial rights.

For instance, actions for contract annulment are generally considered by the court as patrimonial cases although no goods or funds are to be returned.

A Lithuanian law firm has illustrated the calculation of these fees of proceedings as follows:

*“Our client (natural person) concluded the preliminary agreement with the bank regarding the future sale-purchase of the house. He paid the entire sum for the house (300 000 LTL, i.e. 86 886 Euros) to the bank and was permitted to live in it. As the bank was avoiding from entering into the principal agreement of sale-purchase of the house he claimed for the recognition of the preliminary agreement as principal agreement. As the arbitration clause was established in the preliminary agreement he lodged the action to the arbitration court. After the disadvantageous arbitration award he lodged the request for annulment of the arbitration award to the Court of Appeal stating that the dispute was illegally decided in the arbitration court as it arose from the consumer contract (According to the Law on Commercial Arbitration the disputes arising from the consumer contracts cannot be decided in the arbitration courts). He paid the stamp duty for the request as for the patrimonial claim (7000 LTL, i.e. 2027.34 Euros). The Court of Appeal dismissed the request and also stated that the dispute is non-patrimonial and the stamp duty shall be refunded. Then the cassation appeal was lodged to the Supreme Court of the Republic of Lithuania. The selection panel of the Supreme Court ordered to eliminate the deficiencies of the cassation appeal, i.e. to pay the stamp duty as in patrimonial case. The stamp duty was paid and the cassation appeal was accepted by the Supreme Court. However, the*



*Supreme Court in the final decision, again, emphasized that this case is non-patrimonial and the stamp duty must be refunded to the cassata.”*

These two opposite examples show the difficulties faced by courts making a clear and precise distinction between the two categories.

#### **2.1.3.(d)     *The impact of the number of hearings on the costs of the proceedings***

In principle, the number of hearings has no impact on the proceedings fees.

According to most national experts, the number of hearings does not directly lead to increases in proceedings fees, but can have an impact on the costs of justice, especially on lawyers' fees, experts' fees and on witness compensation.

It should, nevertheless, be noted that in **Estonia**, claims can be decided by the courts without any hearings provided however that both parties and the judge have agreed on this in advance. In particular the judge will accept that no hearings be held if he or she is satisfied that he or she has all the elements necessary to decide on the issues.

In **Romania**, the slowness of the justice system indirectly increases the costs of proceedings which run particularly high. The case back-log in Romania is a major issue even though Romanian Law specifically provides for accelerated procedures in commercial disputes cases. The Civil Proceedings Code places time limits between the hearings. Nevertheless, the high number of litigations makes it difficult for this regulation to be applied, especially in Bucharest or in the largest cities. Moreover, in some cases, the deliberation time can be particularly long.

#### **2.1.3.(e)     *The impact of the cross-border nature of the litigation***

In most Member States, the claimant's nationality or the cross border nature of the litigation has no impact on the amount of the proceedings fees.

- **Reduction of the proceedings fees**

In one isolated case, the cross border nature of the litigation lowers the amount of the proceedings related costs.

In Romania citizen of another country are exempt from paying a security or provision on proceedings costs because of their foreign nationality or because they do not usually live on Romanian territory.

- **Increase of proceedings fees**

In a high number of Member States, the cross-border aspect of the litigation can increase proceedings fees slightly.

There is, nevertheless, no discrimination in applying European Community Laws as long as:

- the cross-border aspect of the litigation does not entail additional costs for the EC litigants
- the additional costs depend on objective factors and their amounts are low

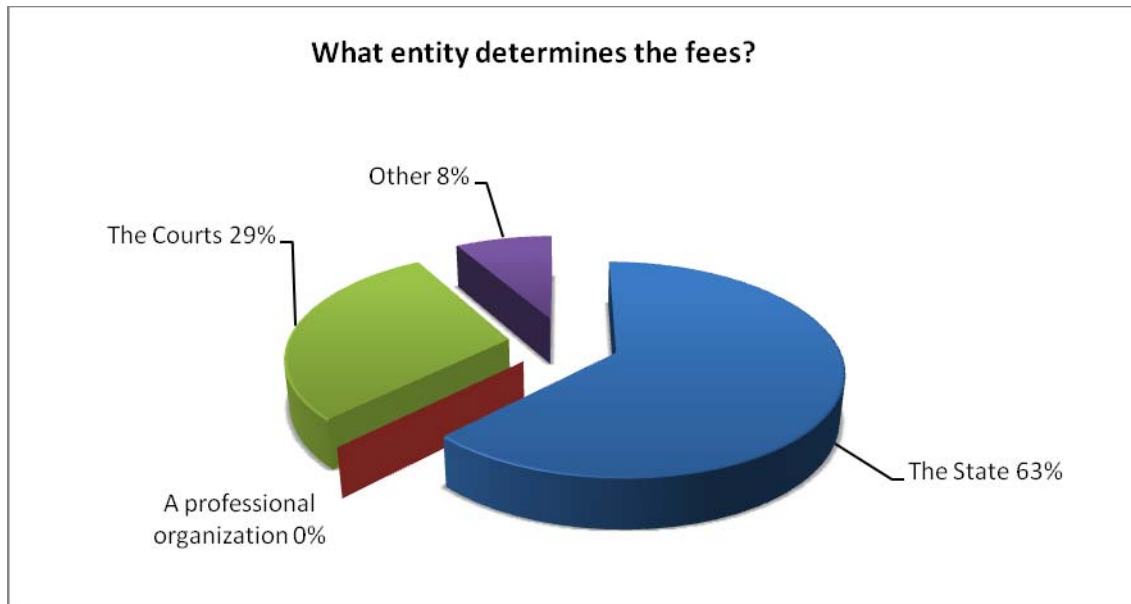
Thus, in **Germany**, additional correspondence fees are to be expected.

In **Lithuania**, when the claimant is not a Lithuanian citizen, the defendant can ask that a sum be deposited by the claimant to cover the payment of the proceedings fees. Still, this security deposit cannot be made when the claim is filed by a national from a Member State which has signed a treaty with Lithuania (the Treaty establishing the European Community or The Hague convention signed on 25th October 1980 on International Access to Justice).

#### ***2.1.4 How are the fees determined?***

Most of the time, costs of justice are fixed by the court or by the State.

**Graph 5 - Entity fixing the costs of justice**



*Source: public questionnaire*

The situation in **Romania** is special.

In Romania, there are two types of proceedings fees:

- the proceedings fees *stricto sensu*, and
- stamp duty.

According to Romanian Law 146/1997 proceedings fees are fixed differently depending on whether the litigation can be evaluated or not. This Law also makes provision for the method of calculation of the proceedings fees, the principle of payment in advance, exceptions to this principle and reimbursement cases.

According to the Civil Code, the court can grant exemptions, reductions, instalments or suspensions for the party who has made a request for legal aid.

The government decree 32/1995 deals with stamps duty. The exemptions, reductions, instalments and suspensions allowed for the proceedings fees themselves do not apply to the stamps duty. The documents - for which stamps are required - are not accepted by the courts if they are not stamped.

The payment is ruled by the 146/1997 Law. Fees must be paid in advance, before the taxable documents are received, prepared or published or before the requested service is rendered. There are few exceptions to this rule.

In practice, when the claim is filed, the party pays the estimated amount of fees.

During the first hearing, the court fixes the amount of proceedings fees to be paid and notifies, if necessary, the obligation to pay extra charges.

When the plaintiff files the claim by mail, and no fees have been paid, the court issues, along with a summons for the first hearing, the amount of the proceedings fees that must be paid.

In any case, during the first hearing the court presiding judge checks that the party has paid the proceedings fees. It is a preliminary question which must be dealt with by the court before any other matters. If it comes to the presiding judge's knowledge that the proceedings fees have not been paid by the party although the said party has been informed to do so, the claim can be cancelled.

Finally, for some claims, fees must be paid before the court (additional claim, counterclaim, action against a guarantor). The court must inform the party that such fees must be paid before the decision is made.

### ***2.1.5 Date and means of payment***

- **Date of payment**

In most Member States, fees must be paid at the time the claim is filed by the court or before the filing.

In some Member States, those fees can be paid afterwards. It is the case in **Finland** for instance, because the amount of fees is fixed according to which stage the proceedings have reached when they were interrupted.

- **Means of payment**

As it has been said previously, the general trend in Member States is to simplify procedure for the payment of proceedings fees.

Means of payment vary for one Member State to another.

In some Member States, coupons or stamps can be bought from the court.

When cash payment is permitted, it is limited to a maximum: 1000 Euros in **Greece** for instance.

In most Member States, transfers of funds are allowed.

More exceptionally, some Member States allow payments by credit cards (In **Finland** for instance).

### ***2.1.6 Exemptions***

In most Member States, exemptions are possible, generally depending on the person's income.

In some Member States, exemptions can be granted according to the type of litigation. They can usually apply to the following types of litigation:

- minors' Law
- Labour Law
- Family Law

This is for instance the case in **Slovakia**.

Are exempt of proceedings fees:

- some types of proceedings : for instance care of minors, failure to fulfil a duty by or illegal interference of administrative bodies, maintenance/alimony between parents and children, or vice versa, etc..),
- specific types of people (plaintiff in proceedings on reimbursement of damages incurred following work accident or occupational illness, in

proceedings regarding an employee's level of disability with a view to making him/her redundant, etc.)

It should be noted that even if the claimant is exempt from paying the fees, the defendant will have to pay the fees in case of claimant's success, except of course if the defendant is also exempt because he or she belongs to an exempted category.

In **Slovenia**, some people are exempt from proceedings fees: government, public authorities, humanitarian authorities, foreign States and their citizens if so agreed by convention.

Italian Law has established an exemption for matters relating to Labour Law, Family Law, and Social Security Law. Such an exemption also exists for minors.

#### ***2.1.7 Simplifying: main objective of the latest reforms***

Of late, some Member States have altered their regulation on proceedings fees. These changes aim at simplifying.

In **Italy**, a presidential decree was adopted on 30th May 2002. This decree introduced a "Contributio Unificato", i.e. a sole contribution.

Since then the claimant has to pay one fee at the start of the proceedings to cover the costs of proceedings.

However, registration fees and stamp duty together with the fee covering the appointment of a public officer are no longer required.

In **Portugal**, important reforms have been recently implemented. Their aim was to improve access to justice by making proceedings easier and favouring costs reduction. Resolution 122/2006 of the 17<sup>th</sup> "Portuguese Constitutional Government" symbolizes the reforms' achievements. The reforms adopted came in force on 23 January, 2008. (published in the diário de republica I, series A, no 140, 23 July 2007). These reforms provide for the modification of the Costs of Justice Code.

Portuguese costs of justice are as a result largely simplified. In the past, parties had to make three payments, two before the start of the proceedings and one at the end of the litigation. From now on, all fees are paid when the claim is filed.

The regulation is based on the same method of calculation as the one included in the previous Code. A prescribed scale is used to calculate proceedings fees which, however, can be increased according to the complexity of the case. Although it is a bit clearer than the previous Code, the new regulation is not easily accessible to the parties and to add to the uncertainty courts can decide, at the end of the litigation whether the fees will be entirely or partially borne by the unsuccessful parties. Most experts believe that the reforms mainly benefits court administrators. However, it is true that if courts can save time on administrative tasks, justice may be better served.

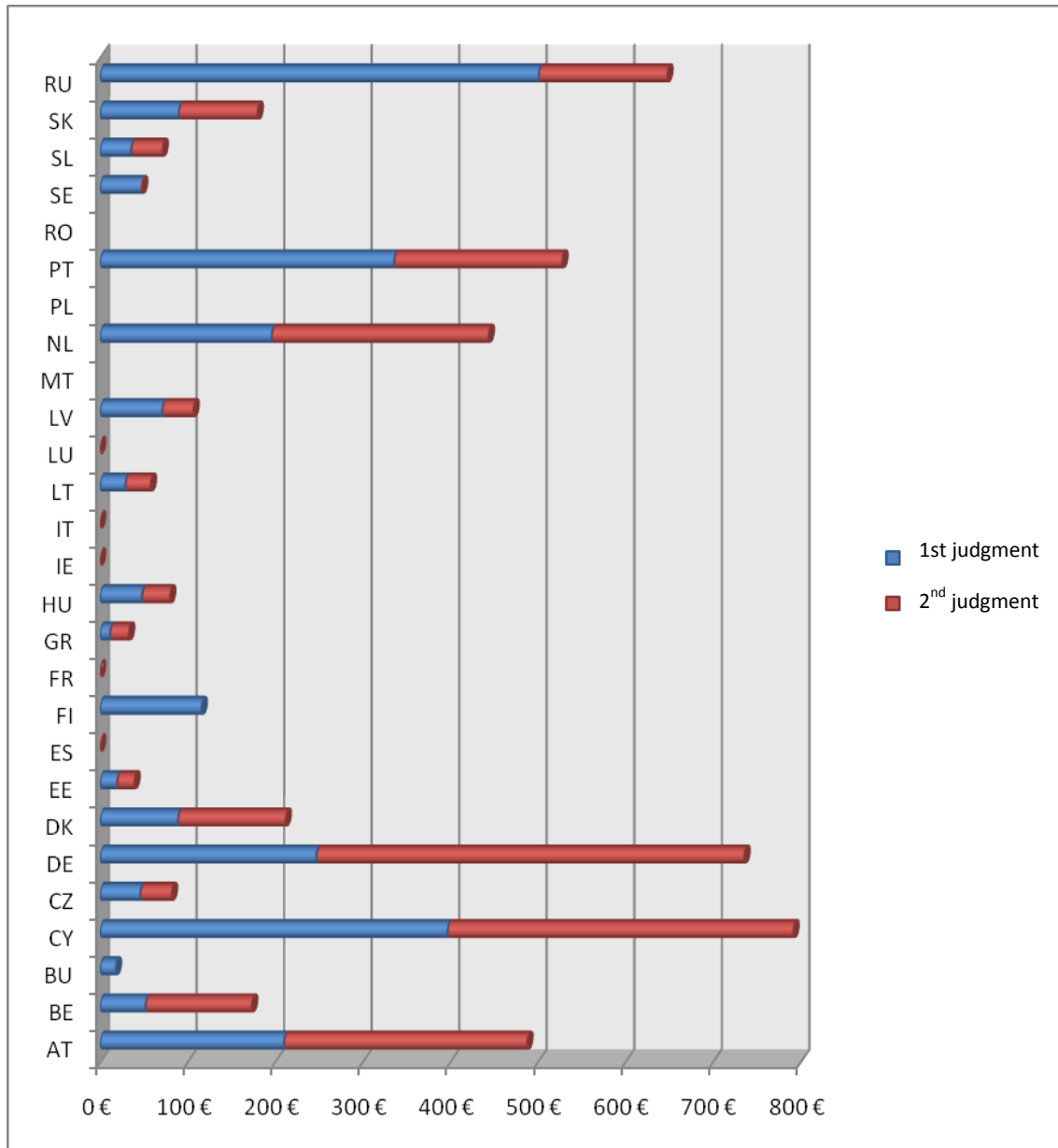
Further, the new regulation states in its preamble that many categories - which were exempt from proceedings fees - will no longer be so in the future.

To summarize, the new Portuguese regulation tends

- to simplify the payment procedure by turning it into one single operation,
- to reduce the number of categories exempt from payment, and
- to increase proceedings fees for complex litigations.

## 2.2 Appeal fees

Graph 6 - Cumulated costs for proceedings fees



Source: Country reports - Case study n° 1-A



Data on appeal fees obtained for each Member States show a marked heterogeneity. The case study submitted to the national experts (summarized in the above graph) shows that a general trend cannot be easily highlighted: fees are sometimes higher or lower and may even be identical to the first Degree fees.

Nevertheless, common characteristics can be found.

In a first category of Member States, there are no proceedings fees at the appeal stage. That is the case in **France**, in **Luxembourg** and in **Sweden**.

In a second category of Member States, fees relating to appeals are the same as those due for the first Degree proceedings. Such is the case in **Slovakia**, **Greece**, **Poland** and the **Czech Republic**

Sometimes, the fees are based on the same principles as those applying for the first Degree (but the amount is not the same), thus, they are calculated according to the type of litigation, and the amount of the claim.

It is for instance the case in:

- **Germany**, the multiplying factor of the first Degree is increased
- **Spain** (fees are usually lower as factual questions are not dealt with)
- **Estonia**,
- **Italy**,
- **Lithuania** (at least for patrimonial cases).

In other Member States, appeal fees amount to fifty percent of the proceedings fees paid before first degree courts. That is the case in **Bulgaria**, **Latvia** and **Romania**.

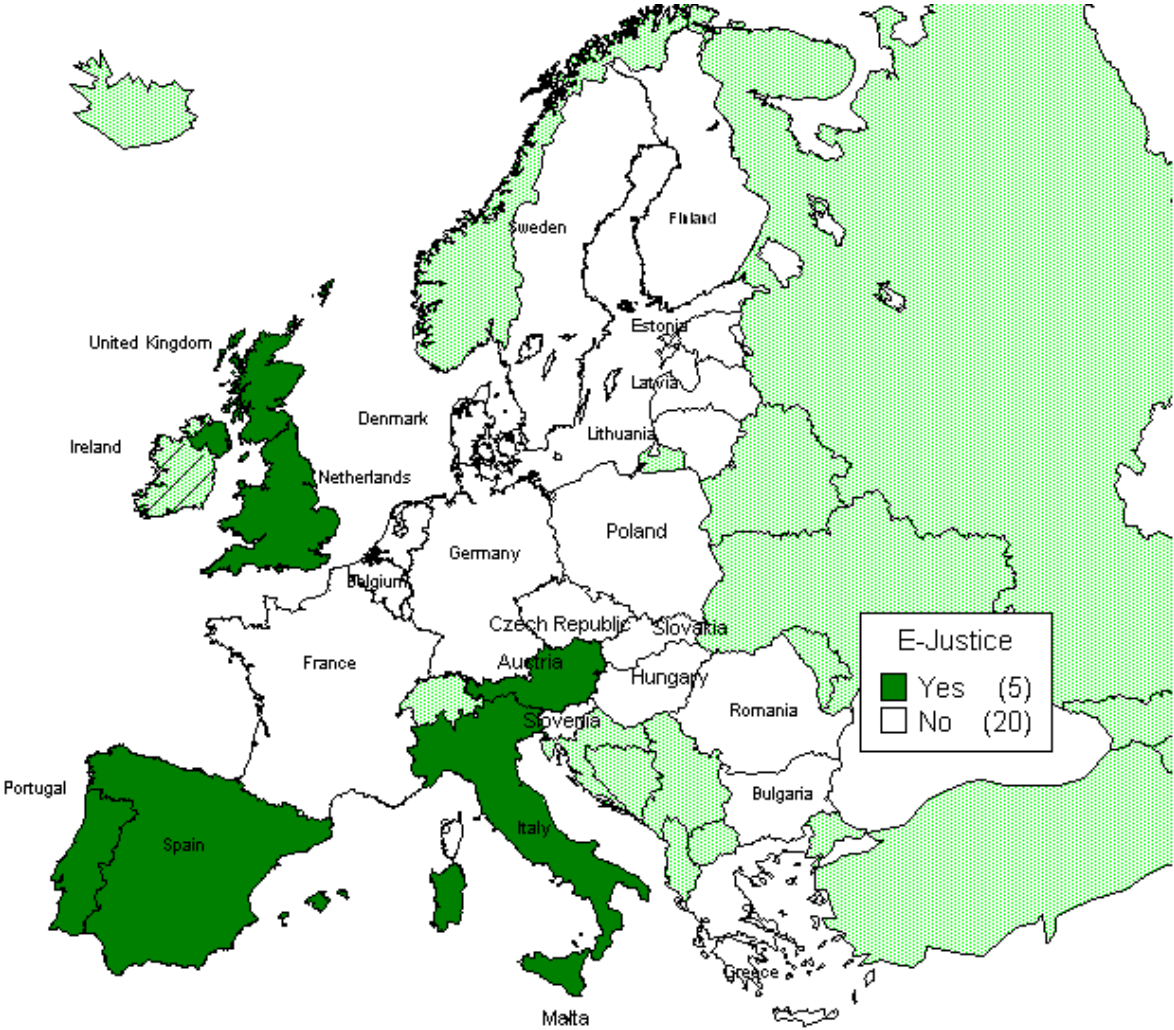
Filing fees amount to 186 Euros for the appeal in **Belgium** and 325 Euros for the appeal to the Supreme Court. Comparatively, in **Greece**, the same filing fees for an appeal amount to 14.80 Euros per lawyer plus 0.50 Euros per certified appeal document and amount to 29.80 Euros per lawyer plus 0.50 Euros per document.

In **Denmark**, proceedings fees are calculated separately for the appeal. In **Portugal**, it is only specified that additional fees will be required if an appeal is made (as stated both in the Code and the Regulation).

Finally, for the reopening of a case, fees amount to six percent of the amount of the litigation in **Hungary** (with a maximum of 3572 Euros) and ninety Euros in **Slovakia**.

### 2.3 E-justice

Map 3 - E-justice



Source: Country Reports

NB: In light green non-Member States. In light green with lines Member States for which the answer is not applicable.

### **2.3.1 Introduction**

E-justice is often a suitable solution, time wise and cost wise, for cross-border litigations because heavy costs - such as lengthy journeys or calling for the services of local representatives - are avoided.

It is possible to distinguish two types of e-justice in the Member States. The first is communications based. Electronic modes of communications are used simply as a means to transmit information. Documents are transmitted online. Hearings are organized through video conferencing. The second is location based. Here the whole proceedings are conducted and managed online.

As a matter of fact, online justice proceedings can only be found in a limited number of Member States. Furthermore, when such proceedings exist or are the subject of a written document which has not come into force yet, they are only allowed for specific matters.

Nevertheless, electronic technologies are used in many Member States at different stages of the proceedings.

Transmitting documents to the courts by electronic means is frequently used.

In such case, a reduction of costs is sometimes provided for.

In **Portugal**, both the Code and the Regulation even go as far as stating that fees will be reduced if electronic means are used.

Besides, the use of videoconferencing during hearings is possible in most Member States.

### **2.3.2 Online proceedings, not much used**

In the three Member States where online proceedings are allowed (**Italy, Austria and United Kingdom**), this has been extended to debt recovery.

However, this situation should change when the (CE) regulation n° 1896/2006, creating a European payment injunction procedure, comes into force on 12<sup>th</sup> December 2008.

### 2.3.2.(a) “Injunctive decrees” in Italy

In Italy, online Justice is developing and it is the subject of a pilot project.

Presentation of the project is drafted in a Brochure provided by the Ministry of Justice. A short excerpt from the full text which can be found on their website (<http://www.processotelematico.giustizia.it/pdapublic/resources/English%20Brochure%20PCT.pdf>) follows:

*“The “on-line civil trial” project represents a key step of the Italian judicial system innovation strategy. It will allow the on-line execution - avoiding to physically go to court clerks’ offices - of operations such as the depositing of legal deeds, transmission of communications and notifications, as well as online consultation of case status, court clerks’ registers, case files and relevant jurisprudence. The project will thus permit a significant abbreviation of court cases, as well as providing operational benefits to all players in the civil justice system - including over 160,000 lawyers. For dimension and contents, it can be considered one of the most significant e-government projects in Europe. The on-line civil trial leverages a series of innovative services already developed by Datamat for the Ministry of Justice, and well received by users: Polis, primarily intended for judges and court clerks, that for the first time permits the creation of a database including relevant jurisprudence; Civil Case Information System, which manages the “electronic dossier” of each case allowing also a more effective analysis and organization of related workloads; PolisWeb, which provides access to key information concerning case files and court hearing schedules, thus significantly reducing the need to visit court clerks’ offices”.*

Moreover, since December 2006, the Court of Milan provides for online civil disputes, but only for cases in which Injunctive Decrees are requested.

To this date, over 500 Injunctive Decrees had been requested online.

On June 15th, 2007, "Il sole 24Ore" published an article on the subject which states:

***Milan saves fourteen million Euros thanks to online Injunctive Decrees***

*Online proceedings doubtlessly produce economic benefits. In Milan, it is now a certainty and the Governor of Italy's Central Bank has publicly shared this opinion. This view is confirmed and supported by the results of an experiment on the use of Injunction decrees conducted in the Civil Court House of Milan from December 2006 to today (a six month period of hearings). This innovation enables the Court to save fourteen million Euros yearly.*

*The application of this online modality to Injunction Decrees also enables to reduce proceedings duration by about two month.*

*This is drawn from a report conducted by the Court of Milan. Over the six month period considered, there were 1722 appeals related to Injunction Decrees for a total value of three hundred fifty million Euros, in other words, this would represent about seven hundred million Euros for a year.*

*It usually takes sixty days for an Injunction Decree. With the online proceedings, the time needed to get an Injunction Decree varies from a minimum of three days to a maximum of five days, it is thus obvious that this latter method is time saving.*

*The conclusions drawn from the Court of Milan's report should be taken into consideration seriously yet not absolutely.*

*The court of Milan is convinced that online proceedings tested with Injunction Decrees should be extended to other proceedings and indeed, Italy's ministry of Justice intends to do so starting in 2010.*

*The court of Milan's evaluation seems to confirm that the investment made by the Bar of Milan for the "access point" needed for the use of online proceedings related to Injunction decrees has given good results. The investment is evaluated around one hundred thousand Euros. This amount*

*can be considered as important, however it should be considered in relation to the number of Injunction Decrees requested to the Court of Milan.*

*The extension of this method to other courts on the Italian territory only depends on other district Bars' will to invest in the creation of new access points from which files could be sent directly from lawyers' offices to the Courts.*

*Obviously, Courts that have such an important "workload" (as compared to the Court of Milan) can be deterred by the amount of the investment, but the major savings made by the Court of Milan should be taken into account.*

*Obviously, online proceedings will constitute a major challenge for Italian Justice, and Italy was the first European country to take a step in this direction.*

On May 2007, the Italian Ministry of Justice approved a bill which aims at introducing e-justice proceedings into the Italian legal system, which should start in 2010 ([http://www.giustizia.it/ministro/com-stampa/xv\\_leg/23.05.07.htm](http://www.giustizia.it/ministro/com-stampa/xv_leg/23.05.07.htm)).

### **2.3.2.(b) Collection procedures in Austria**

In **Austria**, electronic procedures have been implemented, especially in debt collection cases.

As soon as a party receives all necessary information to issue a court order, this data is transferred to a data carrier using special dunning software. The data carrier is then sent to the court. The courts usually deal with the data carrier on the same day or the day following delivery. Next, the court issues the court order and sends it to the debtor on the same day. The payment is not necessarily made with court fee stamps as in traditional proceedings; it can be made via bank transfer within two to five weeks. In automated collection proceedings, court fees are first due after the court order has been issued.

Court fees must be paid by the debtor if the claim has been enforced successfully. The court fees associated with the court order must be paid directly after requesting

a court order. If the legal court order is successful, then the debtor pays and costs are enforced by the debtor.

### ***2.3.2.(c) Online court proceedings in some types of litigation in the United Kingdom***

Finally, in the **United Kingdom**, online proceedings can be used in specific cases: money claim and possession claim for instance. Such systems of claim management can be found on the following websites: [www.moneyclaim.gov.uk](http://www.moneyclaim.gov.uk) and [www.possessionclaim.gov.uk](http://www.possessionclaim.gov.uk).

As regards online ADR proceedings, they can be found on the following website: [www.adrgroup.co.uk/online-dispute/](http://www.adrgroup.co.uk/online-dispute/).

### ***2.3.3 The possibility to communicate with courts via internet is being developed in many Member States***

In some Member States, the opportunity to communicate with courts via internet has already come into force, in others it has been the subject of projects and bills.

Exchange of emails between the parties and the court is possible in many Member States.

In the **Czech Republic**, exchanging emails with the court during proceedings is allowed if these emails are protected by an electronic signature.

In **Estonia**, sending documents to the court by email is common practice. The official document and the email itself must bear the digital signature of the sender.

This also applies to **Germany**.

Nevertheless, this option is not possible in some Member States because the official stamp of the court or signature of court authorized personnel is necessary.

In **Sweden** for instance, sending emails in order to correspond with courts is not possible. Indeed the signature of court authorized personnel is necessary on court documents.

In the **Netherlands**, this type of communication is restricted. Courts can be contacted by email but no questions may be asked regarding specific proceedings.

In **Portugal**, as previously mentioned, both the Code and the regulation allow for a fee reduction when electronic means are used. Thus, it is common for lawyers to use electronic means in order to send documents to courts.

### ***2.3.3.(a) The Belgian “Phoenix” system for the filing and the submission of conclusions***

A system called “Phoenix” as adopted under the laws of 10 July and 5 August 2006 on electronic proceedings but has not come into force yet.

Article 718 of the Judicial Code has been modified in order to allow for the filing of claims by electronic means for summons notified in a traditional way.

Filing will be made on presentation of a copy of the notified act certified by a bailiff.

Electronic filing will entail the electronic payment of the filing fees.

The payment procedure still have to be determined by royal decree (10 July 2006 Law, article 8).

The “submission of conclusions” by email will also be made possible which will help to reduce lawyers’ fees since for instance, a lawyer in Nivelles will be able to submit his/her conclusions by a mere “click” to the court registry in Arlon instead of having to pay for transport and the services of an official process server.



**2.3.3.(b) In France, sending acts by electronic means will be possible as from 1<sup>st</sup> January 2009**

In France, the Law of 28th December 2005 introduced articles 748-1 and following and allows for the courts to send some acts by electronic means. Nevertheless, these articles will only come into force on 1st January 2009.

This regulation allows for all documents to be transmitted by electronic means. The recipient's express consent has to be obtained before using this means of communication.

Finally, the regulation states that the technical means will have to guarantee (following the official regulatory prescriptions issued by the Minister of Justice):

- the reliability, during electronic communication, of the parties identification,
- the integrity of the transmitted documents,
- the security and confidentiality of the exchanges
- and the safeguarding of transmitted data

The date of sending by the sender and the date of receipt by the recipient will also have to be established with certainty.

**2.3.3.(c) Restricted use of this possibility in the United Kingdom due to technical reasons**

Since 2003 court related communications by emails in the **United Kingdom** are allowed. A new regulation came into force on 6th October 2003. It was reviewed in 2004. It allows the parties to communicate documents and to register them by email. Its scope is limited to some county courts and commercial courts. The registration of the documents sent by email is allowed only in the courts which have the appropriate equipment and which are listed by the regulation.

#### ***2.3.4 Online consultation of official documents or acts***

##### ***2.3.4.(a) In Greece, the project of storing claims and legal documents on the Internet***

In **Greece**, a project concerning the uploading of claims and legal documents on the Internet is under study and should be implemented in Athens' and Piraeus' civil courts in the first place and then extended to other courts later on.

##### ***2.3.4.(b) Creation of an electronic file in Belgium***

An electronic file which can be consulted online was set up by a Law adopted on 10th July 2006.

The purpose of the new system is to enable the creation of an electronic file for each case at the beginning of the proceedings. The file regularly fed with new documents uploaded either by the people in charge of the file or by additional elements uploaded by the police, bailiffs, lawyers or the parties themselves.

Article 718 of the Judicial Code was reviewed in order to allow the filing of claims by electronic means for summons notified in a traditional way.

A copy of the notified act whose conformity has been certified by a bailiff will be necessary for filing.

Filing fees will have to be paid for the electronic filing.

Procedure for payment still have to be determined by royal decree (article 8 of the law adopted on 10th July 2006).

#### ***2.3.5 Claim filing by electronic means***

In **Estonia**, a law pertaining to “enforcement by means of a bailiff” claims in insurance and civil right matters came into force on the 25th November 2006. This allows for any such claims to be registered electronically in Ljubljana local court. Nevertheless, such a registration is not available yet because Ljubljana court does

not have the appropriate equipment. This was supposed to be installed in September 2007.

Since August 2007, in **Slovakia**, claims concerning commercial registers can be filed with District Courts via the Internet.

### ***2.3.6 Video-conferencing during hearings***

Audio or video materials can be used in hearings in most Member States.

Video-conferencing during the hearing is, for instance, possible in **Estonia**, in **Germany**, in **Malta**, in the **Netherlands**, and in the **United Kingdom**.

In **France**, the present regulation allows the judge to make video or audio recordings during preliminary “investigation” when it is deemed necessary (in the case of geographical distance). However, this is not very often done in civil matters.

In **Lithuania**, video-conferencing can be used during proceedings in the Arbitration Court. It is also the case in the **Czech Republic** where video-conferencing cannot be used to settle a case in courts but they can for arbitration.

In the **Netherlands**, video-conferencing can take place during hearings. Nevertheless, this remains quite theoretical and has been used only once as far as we know. Still, courts would like to make it a more common occurrence.

In the **United Kingdom**, video-conferencing can be set up. The parties using this device during a hearing will have to pay the incurred expenses to the Court before it is used. Fees amount to more or less thirty-one Euros for every half hour. These expenses are considered like proceedings fees and the court may decide for each party to pay their share.

In **Estonia**, the Civil Proceedings Code allows hearings by video-conferencing only if the jurisdiction and the parties have given their consent and if the appropriate equipment is available. This method is, most of the time, used in penal matters and not much in civil matters.

### **2.3.7 Conclusion**

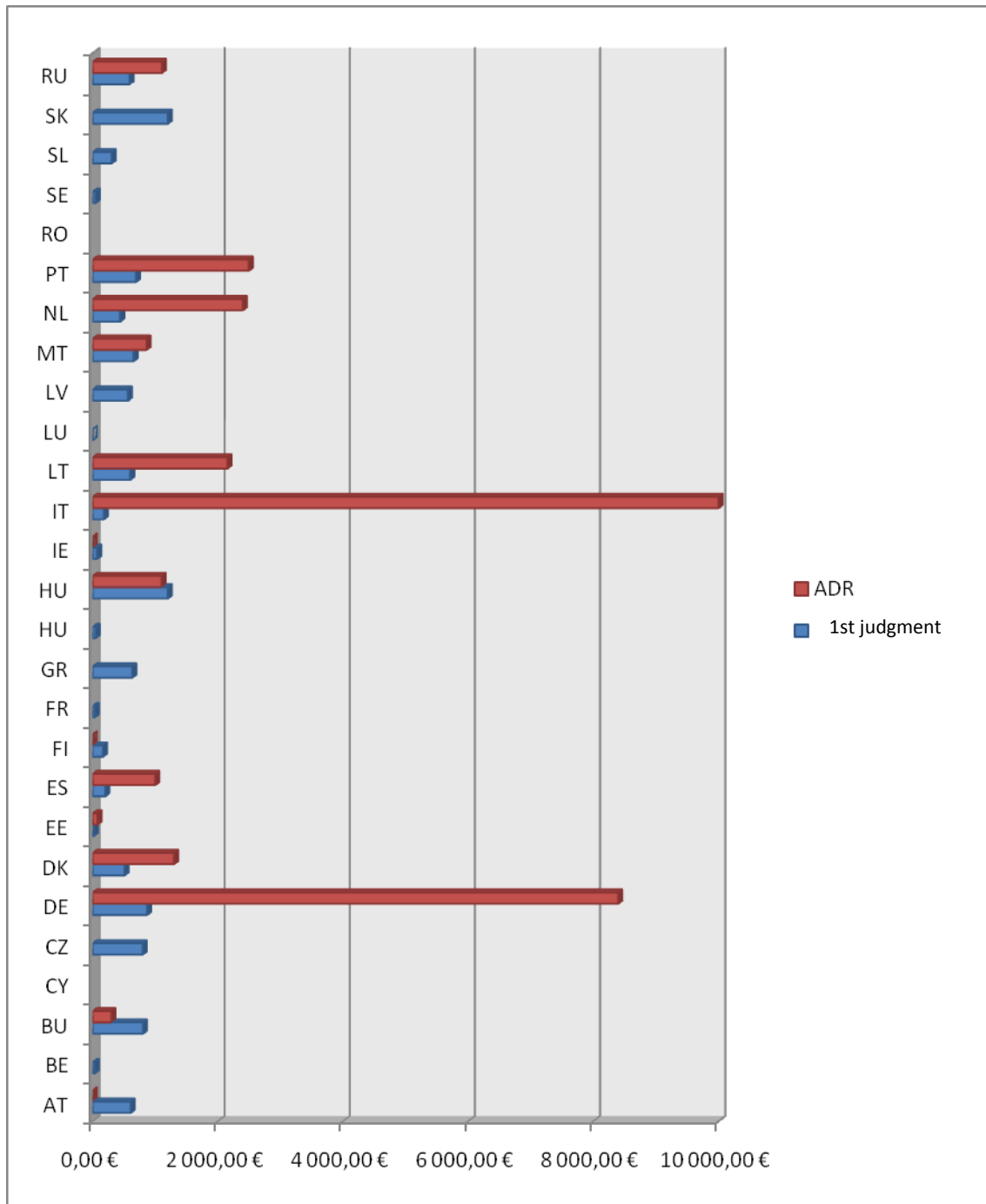
Online proceedings are particularly developed in **Italy**. Although, to do so expensive equipment has to be set up, it will, in the end, save time and money for both the parties and the court.

However, there are debates on the type of justice that this may lead to and the quality of the decisions made.

Finally, the pedagogical quality of this kind of justice towards the parties is also questionable.

## 2.4 Alternative Dispute Resolution (ADR)

Graph 7 - Comparison between ADR fees and proceedings fees



Source: Country report - Case study 4

### **2.4.1 Introduction**

“Alternative Dispute Resolution” systems exist in all Member States. Nevertheless, several meanings can be attributed to the expression, even in the same Member State. Therefore, many criteria must be taken into account in order to study the costs related to this kind of system for resolving disputes.

First, it is necessary to determine the existing categories of ADR by identifying both the form of the arbitration and the cases concerned (it is also useful to determine whether the parties can choose to refer to arbitration or if it is compulsory).

It is then necessary to identify the entity in charge of the ADR procedure: either the Member State’s courts or other intervening parties.

Finally, the costs of the proceedings can vary according to their objectives or their function. In fact, there are various reasons for wanting to avoid public institutions.

Some of these can be the will to control the proceedings, the desire to obtain a quick outcome, and/or the need for a discreet method of resolve a dispute.

In general arbitration fees, when time is taken into account, are cheaper than expenses incurred in normal proceedings. This will however depend on the Forum State. In some countries litigation is very cheap.

Sometimes ADR are also used to settle a matter according to the rules of a particular profession. In this case, the ADR procedure can appear as a very technical justice for certain types of litigation with huge financial issues and which therefore can be quite costly.

### **2.4.2 Types of ADR**

ADR procedures can take place before a public institution or before a person who is independent from a court.

This dichotomy is particularly important in **Lithuania** where there are two different definitions for ADR procedures. On the one hand, ADR can be considered as the

arbitration and conciliation proceedings used outside courts of justice (restricted meaning). On the other hand, there exists a wider definition of ADR when one considers that ADR can also be used before courts.

There are other options in addition to these two categories. In fact, the person in charge of settling the litigation or to manage negotiations between parties can be appointed by the public courts or be independent. Thus, this person can be appointed by the court, belong to a professional body or be totally independent.

This is the case in most Member States.

#### **2.4.2.(a) ADR procedures undertaken by public courts**

The following Member States have set up an ADR procedure undertaken by public courts:

- **Belgium**
- **Denmark** (still a project)
- **Finland**
- **France**
- **Lithuania**
- **Portugal**
- **Slovenia**

In this case, proceedings fees can be the same as in normal proceedings or nonexistent.

In **Denmark**, an amicable settlement of a case is subject to the usual proceedings fees.

- **The duty of the first Degree court in Greece is to attempt conciliation**

In **Greece**, the first Degree court must first attempt to conciliate the parties for a private law conciliation. These proceedings are then virtually free, only the stamp duty is due (besides, it is only due if the conciliation is successful).

If a party asks for it, the first Degree court of competent jurisdiction can also act as a conciliator before any proceedings dealing with substantive issues. There are no proceedings fees except if the claimant does not show up at the conciliation.

In private Law, parties to a litigation for which the High Court has jurisdiction must accept to submit their litigation to an extra judiciary settlement. These proceedings are free; the only fee is the stamp duty if the proceedings lead to an agreement.

- **The experimental project in the local court of Vilnius**

In **Lithuania**, under a test program mediation may be done before the second local court of Vilnius. This project is experimental and there are no court fees. Nevertheless, it can only be used after the claim has been filed with the court, which involves the payment of court fees as in any normal proceedings. If the two parties reach an agreement, 75 percent of those fees will be reimbursed.

Other legal proceedings could be placed in the ADR category (matters concerning Labour Law for instance, where parties must negotiate before any proceedings on substantive issues). These proceedings are also free but cannot be considered as ADR under Lithuanian Law because no mediator intervenes to help with the litigation settlement.

- **ADR on the claimant's initiative in Slovenia**

Article 309 of the civil Procedure Act allows for the person introducing the action to try and solve the litigation by arbitration before the local court of the defendant's place of residence. The Court will make a ruling to invite the opposite party to appear before them and will inform the said party of the terms of the arbitration. The party on whose initiative the arbitration took place has to pay for the costs of this procedure.

If the arbitration fails, the costs will be considered as court fees.

If an agreement is reached ending the litigation, each party pays their own proceedings fees, except if the agreement stipulates differently (article 159).

Finally, article 156 states that if a party does not show up at the hearing, all the fees



will be paid by this party.

The fees relating to the claimant's request for arbitration amount to 7.93 Euros.

If the parties decide to conciliate before the end of the court proceedings, half the fees will be reimbursed to the claimant. A claim for reimbursement must be filed by the claimant with the competent First Degree Court within sixty days after the start of the proceedings and within two years after the above-mentioned fees have been paid.

There are no fees for the conciliation settlement, only the request is subject to payment.

- **In France, arbitration is compulsory in the labour disputes ("Conseil des Prud'hommes"), in divorce cases and in respect to disputes between landlords and tenants.**

In labour disputes, arbitration is a compulsory step before any litigation. The agreement eventually reached by the parties is recorded in the form of minutes. If no agreement is reached, the proceedings go before the labour court.

Conciliation/arbitration is also used in conflicts between landlords and tenants. In fact, in every French district ("Département"), a commission is in charge of dealing with conflicts relating to renting and accommodation. Before filing any claims regarding rents with a court, referring to the commission is compulsory. It is the same for any litigations relating to deposits, service charges, repairs and premises. These proceedings are free. This commission is governed by decree N°2001-653 of 19 July 2001.

Moreover, in divorce cases, article 1108 of the Civil Code provides for a compulsory conciliation for the couple. The family-law judge is, in this case, the conciliator.

#### **2.4.2.(b) ADR procedures out of public courts**

This type of procedure exists in almost every Member State.

Nevertheless, many categories can be identified under this heading. In some countries the parties freely choose their mediator or arbitrator and in others it is designated by the court or certified by a court. Mediators or arbitrators can be:

- completely independent,
- the member of a professional body, and
- certified by the courts.

- **When the ADR procedure is led by a lawyer**

In some Member States, the procedure can be conducted by a lawyer. This is the case in **Austria** for instance. Then, the average lawyer's fees are 180 Euros per hour.

In the **Netherlands**, mediation is the most common form of ADR. In some courts, experiments relating to mediation are carried out. The courts pay for the first two hours of mediation when the parties accept the idea of a compromise. Once these two hours are over, the parties have to pay any further mediation fees. In most cases, the mediator is a lawyer. The fees usually range from 150 to 250 Euros per hour.

In **Luxembourg**, the Bar Association houses a Mediation Centre. This centre, created in partnership with the Grand Duchy of Luxembourg's Chamber of Metiers and the Luxembourg Chamber of Commerce can solve all types of conflicts.

- **Organizations created especially for the ADR procedures**

In most Member States, Arbitration courts have been created. These courts are usually supervised by the Chambers of Commerce.

The fees are usually fixed in advance or negotiated by the parties although they have not much scope for action.

- **Independent arbitrator or mediator**

This type of ADR exists for instance in the **Czech Republic**, in **Belgium**, in **France** for mediation and conciliation and in **Slovakia** for mediation.

In **Slovakia**, according to the Mediation Act n°420/2004, an arbitrator's remuneration is individualized. It is usually set on a per hour basis according to the amount at stake in the dispute or it consists in a lump sum. Mediation is a commercial activity and its cost is not regulated.

It is different in **France**, where the remuneration of the mediator is fixed by the judge if he or she orders the mediation. In principle, conciliation is free. Conciliators designated by a court are on a list drawn up by the Court of Appeal and are volunteers.

- **Mediation ordered or suggested by the judge.**

In some Member States, the judge can suggest or decide on his own initiative or because one of the parties asked for it, that the litigation be settled by an ADR.

It is the case in **France**, in **Belgium** and in **Cyprus**.

In **France**, article 373-2-10 of the Civil Code allows for mediation to be used in family law litigations. Family mediation is used to help build or rebuild family links. It focuses mainly on people's independence and the parents' responsibilities while an impartial, independent and qualified third person is involved but has no binding power: the family mediator.

This type of conflict resolution is only admitted for conflicts concerning people or parties who have capacity (i.e. excluding some family law cases involving minors)

Mediation also concerns commercial disputes, disputes between individuals and financial disputes.

Mediation takes place in accordance with the rules provided for by articles 131-1 and following the civil proceedings Code, i.e. under the control of the judge. In the case of a dispute in the above-mentioned matters, the judge can suggest the parties resort to mediation. Their agreement is then necessary. The process of mediation

cannot exceed three months and must remain confidential. Since mediation takes place out of court, proceedings rules do not apply.

Remuneration of the mediator is fixed by the judge and is borne by the parties who must make a provisional payment before the beginning of the mediation. Nevertheless, people who are granted legal aid are exempt.

Alternative dispute resolution procedures which end up by an agreement between the parties can be made enforceable by the presiding judge of the First Degree court (article 1441-4 of the Civil Proceeding Code). Once this is done, it is legally considered judgement enforcement. Otherwise, contract rules apply. In this case, if the agreement is not adhered to, the matter can be brought before the judge.

In **Belgium**, the law of 21st February 2005 introduced in the Judiciary Code the articles 1724 and following ones relating to mediation. Article 1734 allows for the judge, already in charge of the litigation, to order mediation at the parties' joint request during any proceedings and summary proceedings with the exception of the Supreme Court and the district courts. The judge can certify the agreement thus reached.

In **Cyprus**, decree 49 R.1 of the Proceedings Code states that both parties must agree to resort to arbitration. Nevertheless, the judge can order the matter to be settled by an arbitrator in the case of local or scientific investigations or further examinations or because the litigation is mainly about accountancy.

### ***2.4.3 Recourse to ADR according to the nature of the dispute***

In some Member States, all types of disputes can be the subject of an ADR, that is, for instance, the case in **Austria**.

Nevertheless, in most Member States, the ADR proceedings cannot be used for all litigations. Many criteria have an influence on whether the matter can be submitted to ADR or not.

#### ***2.4.4 Choosing the ADR before the litigation takes place***

This option exists in **Estonia, Hungary and Latvia**.

In **Estonia**, the Arbitration Court of the Estonian Chamber of Commerce settles disputes relating to commercial law providing the parties to the dispute have agreed, either prior or at the time of the dispute, to have it solved by the arbitration court.

In **Hungary**, there are several arbitration courts available providing both parties have agreed to have their dispute arbitrated or if there is an arbitration clause in the contract. Nevertheless, this option is limited to specific matters.

Thus, in **Latvia**, ADRs are allowed if both parties have agreed to have their dispute arbitrated. However, some types of litigations are excluded even if the parties have agreed. There are permanent Arbitration courts and ad hoc courts. There are 127 permanent Arbitration courts.

Arbitration fees are freely determined by the arbitrator and must generally be paid by the claimant.

#### ***2.4.5 Determination of the fees***

The organization determining the ADR costs varies according to the proceedings and to the Member States.

The ADR costs can be fixed by:

- the judge ,
- the organization in charge of the ADR proceedings ,
- the parties with the agreement of the organization in charge of the ADR proceedings ,
- legislation.

Furthermore, in some Member States, the ADR proceedings are free or nearly free.

- **The free determination of the ADR proceedings costs either by the parties or by the organization in charge of the ADR.**

It is difficult to determine whether it is the parties or the mediation, conciliation or arbitration organization who will fix the costs. In most Member States where the costs are freely determined by the mediator, conciliator or arbitrator and the parties, these are usually subject to negotiation.

In some Member States, the ADR proceedings costs cannot be negotiated by the parties who only have the choice to refuse this type of proceedings.

It is the case:

- in **Estonia**, in **Lithuania** and in the **Czech Republic** for the arbitration courts,
- in **Bulgaria** for mediation centres,
- in **Latvia** for arbitrators.

Thus, in **Estonia**, proceedings rules are stated in the regulation of the Arbitration Court. Nevertheless, these costs are difficult to assess. Fees generally depend on the amount of the claim, the number of arbitrators and the subject of the litigation. This type of proceedings is not frequently used in Estonia. ADRs are usually used for cross-border litigations.

In **Latvia**, arbitration fees are freely determined by the arbitrator and must be paid by the claimant.

In **Bulgaria**, each mediation centre has a special tariff. Costs are less expensive by a third than proceedings before the courts.

In the **Czech Republic**, if the litigation is settled by the Arbitration Court, the tariff of this court will apply. Fees then depend on the amount of the litigation. The successful party can then obtain from the unsuccessful one a reimbursement.

In **Lithuania**, there is an Arbitration Court: the Vilnius Commercial Arbitration Court. Proceedings fees for this court are regulated by a decision of the court following a Government's decision taken on 8th December 2003.

In other Member States, however, it seems that the parties can negotiate the proceedings fees with the arbitrator, the mediator or the conciliator.

It is the case:

- in **Germany** for all ADRs ,
- in the **Czech Republic** for the independent arbitrators ,
- in **Austria** for the arbitration proceedings led by lawyers ,
- in **Belgium** for the mediation.

In fact, in **Germany**, deposits for court fees do not apply to ADR. Hence, parties are free to determine the arbitrator's fees and the sharing of the costs between them. If no agreement as such has been signed, the arbitrator's fees will be determined according to usage rules. The arbitration court can settle the distribution.

In the case of a conciliation or a mediation, parties can also determine by themselves the conciliator's or the mediator's fees.

In the **Czech Republic**, if the arbitration is led by an independent arbitrator, both the arbitrator and the parties will determine the costs by agreement.

In **Austria**, proceedings fees for arbitration consist of the fees to be paid to the lawyer in charge of the arbitration and fees for judiciary validation. Lawyer's fees generally amount to 180 Euros per hour and the agreement validation, usually considered by the court as a claim for enforcement, entails the same fees. The certification of the agreement by a solicitor entails additional costs.

The Austrian Civil Proceedings Code allows for litigation settlements to be carried out by arbitration courts independent from the Courts. Parties must then reach an agreement with the arbitrator before the start of the arbitration in order to determine their rights and duties. If minimal proceedings rules have been followed, Courts will validate the agreement.

Costs of such proceedings are regulated. The Vienna rules ("Wiener Regeln") are most of the time applied.

In **Belgium**, mediation costs are shared equally between the parties, unless they otherwise agreed. Usually, fees are fixed on an hourly basis during the first hearing with the mediator. A percentage based on the amount of the litigation can also be fixed beforehand. Civil legal aid can cover mediation costs when the parties' income does not exceed the maximum amounts fixed for legal aid. When the mediator intervenes in legal proceedings, the judge determines who is liable for the costs. The Law stipulates that the mediation fees are part of the recoverable legal costs freely determined by the judge. Nevertheless, since the mediation agreement must state the form and terms of payment, the judge will usually validate the agreement, except if the validity of the said agreement is contested or if the parties have deliberately left aside the question of costs and fees.

#### **2.4.5.(a) Costs fixed or determined by the judge**

In some Member States, the judge is allowed to regulate mediation or arbitration costs:

- in **Belgium** for mediation ,
- in **Cyprus** for arbitration ,
- in **Poland** for mediation ,
- in **France** for mediation.

In **Poland**, mediation fees are generally low. For civil cases, mediator's fees are fixed by the Court. The expenses which can be reimbursed to the mediator are fixed by a Regulation issued by the Ministry of Justice on 30th November 2005.

In **Belgium** and in **Cyprus**, the judge who ordered the mediation or the arbitration can regulate these fees.

In **Belgium**, mediation fees are fixed with the agreement of the parties, and even if the judge has the right to regulate them, this hardly happens.

In **Cyprus**, fees are fixed by the arbitrator, but the Court can then increase or decrease them. Proceedings rules as amended by the 2006 rule fix the costs of services during arbitration proceedings. Thus, Article 28 of the Cypriot Law on arbitration gives power to the Council of Ministers to draw up a list of official



arbitrators and to publish a prescribed schedule of fees to be followed by this arbitrator.

The **Finnish** Central Chamber of Commerce sets up conciliation proceedings for which fees amount to 5000 Euros. Other costs are freely fixed by the parties.

In **France**, mediator's fees are fixed by the judge and must be paid by the parties who must also pay a deposit before the beginning of the mediation. Parties benefiting from legal civil aid are nevertheless exempt.

#### **2.4.5.(b) Method of calculation**

- **Free ADR proceedings**

In some Member States, some proceedings are close to free.

In **Poland**, proceedings in the Consumers Arbitration Tribunal are not subject to fees but parties must pay the expert's fees. They will be reimbursed of these fees by the unsuccessful party.

In **France**, conciliation ordered in family law matters by the family-law judge is free. In other respects, Court can also appoint conciliators from a list drawn up by the Appeal Court presiding judge. They are volunteers.

In **Belgium**, for conciliation, record of the agreement written by the judge does not entail any costs for the parties. It has authentic value and only its copy containing wording that renders it enforceable entails the same taxation as a judgment. In **Belgium**, the Civil Proceedings Code does not fix the costs for arbitration and mediation proceedings. Thus, those costs are freely fixed by an agreement between the parties before the beginning of the proceedings. As it is a fast procedure and because no appeal is possible, those proceedings are less expensive than court proceedings. In case of enforcement by means of a bailiff or annulment, fees for claim filing and registration fees must be expected.

In **Estonia**, the Labour Dispute Committee (whose rules are provided by the Individual Labour disputes Settlement Act) can settle a litigation for a minimum

amount of 50 000 EEK. The proceedings before the Labour Dispute Committee are free, so the only costs incurred by the parties are the lawyer's fees if any.

In **Lithuania**, the only mediation proceedings led by the Courts are those before the second "local Court" in Vilnius. This project is an experimental one. These proceedings are not subject to any fees. Nevertheless, the proceedings are only possible when the claim has been filed with the Court, which entails proceedings fees as in any normal court proceedings. If the parties reach an agreement, up to seventy-five percent of those fees will be reimbursed.

- **According to the fees that should have been paid for Court proceedings**

In **Malta**, in common law matters, arbitration is optional and costs are fixed up to twenty-five percent of the fees that would have been applied for a Court appeal. There is, nevertheless, a minimum amount of 116 Euros to pay. A twenty-five percent rebate is granted on these fees. A minimum of eighty-two Euros is to be paid for emergency arbitration proceedings. Fees amount to seventy Euros when arbitration is compulsory.

In **Portugal**, arbitration can be carried out under the Court control. Since there is no specific legislation, it can be assumed that Court proceedings fees apply.

In **Denmark**, there are no fixed fees for ADR, except for a project set up in Court where common Court fees are applied.

- **Fees fixed by Law**

Are considered as part of this category the proceedings in which fees are directly fixed by law and not as in the above-mentioned cases when ADR organizations are allowed to fix their costs by legislation.

The only example can be found in **Lithuania**. The Vilnius Commercial Arbitration court costs are regulated by a court decision following a Government decision.

- Costs of ADR proceedings may also vary according to the affiliation of the person or of the institution in charge of the procedure to certain organizations.

In Italy, arbitrator's fees are different whether the regulation of the Chamber of Arbitration applies or not.

In the first case, parties accept the regulation of the Chamber of Arbitration and, thus, fees consist of administration fees and arbitrator's fees. It must be noted that there are various Chambers of Arbitration and that each determines their own regulation. Thus, fees may vary from one Chamber to another.

Fees for the Roma Arbitration Chamber are for example fixed according to the amount of the claim:

⇒ Administration fees can vary from 400 Euros for claims under 25 000 Euros to 130 000 Euros for claims over 1 000 000 000 Euros.

⇒ Arbitrator's fees are as follows:

Amount of the dispute                      Arbitrator only                      Arbitration court

VALORE DELLA CONTROVERSA	ONORARIO ARBITRO UNICO		ONORARI COLLEGIO ARBITRALE	
	MIN	MAX	MIN	MAX
da 0 a € 25.000,00	€ 800,00	€ 1.900,00	€ 1.700,00	€ 3.750,00
da € 25.001,00 a € 50.000,00	€ 2.000,00	€ 3.000,00	€ 3.900,00	€ 6.000,00
da € 50.001,00 a € 100.000,00	€ 3.000,00	€ 5.000,00	€ 6.200,00	€ 11.750,00
da € 100.001,00 a € 250.000,00	€ 5.000,00	€ 12.000,00	€ 13.000,00	€ 25.000,00
da € 250.001,00 a € 500.000,00	€ 12.000,00	€ 22.000,00	€ 26.000,00	€ 47.000,00
da € 500.001,00 a € 1.000.000,00	€ 22.000,00	€ 35.000,00	€ 50.000,00	€ 75.000,00
da € 1.000.001,00 a € 2.500.000,00	€ 35.000,00	€ 60.000,00	€ 77.000,00	€ 120.000,00
da € 2.500.001,00 a € 5.000.000,00	€ 60.000,00	€ 90.000,00	€ 120.000,00	€ 180.000,00
da € 5.000.001,00 a € 10.000.000,00	€ 90.000,00	€ 110.000,00	€ 180.000,00	€ 240.000,00
da € 10.000.001,00 a € 25.000.000,00	€ 110.000,00	€ 140.000,00	€ 240.000,00	€ 310.000,00
da € 25.000.001,00 a € 50.000.000,00	€ 140.000,00	€ 190.000,00	€ 310.000,00	€ 400.000,00
da € 50.000.001,00 a € 100.000.000,00	€ 190.000,00	€ 240.000,00	€ 400.000,00	€ 530.000,00
oltre € 100.000.000,00	€ 240.000,00 + 0,05% sull'eccedenza di € 100.000.000,00 Tetto massimo € 258.000,00		€ 530.000,00 + 0,1% sull'eccedenza di € 100.000.000,00 Tetto massimo € 774.000,00	

The above costs refer to arbitrations for national litigations. Costs are different for international arbitrations (please refer to <http://www.cameraarbitralediroma.it/Dati/File/File13.pdf>)

⇒ In the second case, since no reference to the regulation of the Arbitration Chamber is made, arbitrators freely determine their fees.

If the parties contest these fees, the arbitrator has to refer to a judge to have his or her fees approved.

- **Specific costs for international disputes**

In **Malta**, in international arbitration matters, fees are determined according to the amount of the claim. They amount to 370 Euros for a claim under 7400 Euros and to 4400 for a claim ranging between 740 000 and 3 700 000 Euros. Over 3 700 000 Euros, fees are negotiable.

When the amount of the claim cannot be determined, fees amount to a minimum of 925 Euros.

Registration fees amount to 1110 Euros when the dispute is settled by more than one arbitrator.

When a single arbitrator is in charge of the dispute, fees amount to 111 Euros per day of hearing for each party.

When the three arbitrators sit on the Arbitration Tribunal, fees amount to 185 Euros per day of hearing and for each party.

The party who asks for the change of venue when the dispute is to be settled by a single arbitrator must pay 148 Euros. When the dispute has to be settled by more than one arbitrator, the party must pay 259 Euros.

116 Euros must be paid when the dispute is transferred from a court to the Arbitration Court.

There are other costs relating to the arbitration proceedings, such as secretarial services, audio tapes when the proofs are recorded, photocopies, administrative costs, etc:

- eight Euros per hour for administrative services;
- five Euros per page for evidence transcription ;

- two Euros per tape when the evidence is recorded ;
- 0.23 Euro per page for copies of the decision ;
- 0.46 Euro per page for copies certified true to the original;
- cost of postage ;
- twelve Euros per hour for the use of the Arbitration Centre of Malta ;
- costs related to witnesses' subpoena ;
- telecommunication costs ;
- administrative fees for the management of the deposit (one percent or two Euros according to which sum is the highest)
- registration of the arbitration ruling (fifty percent of the deposit fees for an ordinary law claim with a thirty-seven Euros minimum)
- Registration of foreign arbitration ruling.

- **Fixed fees**

Proceedings fees are fixed:

- In **Estonia**, for the registration fees only ;
- In **Poland** for the arbitration centres in charge of specific questions and mediation ;
- In **Finland**, for the central Chamber of Commerce ;
- In **Slovenia** for conciliation.

In **Finland**, the central Chamber of Commerce arranges for conciliation proceedings for which fees amount to 5000 Euros. Other fees are freely determined by the parties.

In **Slovenia**, Article 309 of the Civil Proceedings Act stipulates that the person who intends to start a lawsuit may attempt to solve the dispute by conciliation before the court located on the defendant's place of residence. The court of competent jurisdiction will give a ruling in order to invite the opposite party to appear before them and will inform them of the terms of the settlement. The party initiating such a procedure shall bear the costs of these proceedings. If such a settlement fails, the costs incurred are considered as proceedings costs.

When an agreement is reached and ends up the dispute, each party must bear their own proceedings costs, unless otherwise agreed in the settlement (article 159).

Finally, article 156 stipulates that the party who did not attend the hearing must bear the entire costs of this hearing.

A fee of 7.93 Euros has to be paid by the claimant for the proposal of settlement. Should parties enter into a court settlement during the procedure and before a judgment has been issued, half the court fees incurred for the court case will be reimbursed to the plaintiff. A request for reimbursement has to be filed with the First Degree court of competent jurisdiction within sixty days from the start of the conciliation procedure but no later than two years after payment of the court fees.

There is no court fee to be paid on settlement decisions.

- **According to the amount of the claim**

Proceeding fees are determined according to the amount of the claim:

- in **Luxembourg** for mediation ,
- in **Czech Republic** for the Arbitration Court ,
- in **Hungary** for the Arbitration Court ,
- in **Lithuania** ,
- in **Italy** for arbitration when the parties settle for an Arbitration Chamber conciliation ,
- in **Slovakia**, for the validation of the settlement by the Courts.

In **Hungary**, fees due by the parties for arbitration consist of registration fees, arbitrators' fees and administration costs. Arbitrators' fees and administration fees depend on the claim amount.

Administration fees consist of a lump sum added to a percentage. The lump sum and the percentage vary according to the amount of the litigation. It is also the case in **Lithuania**.

In addition to the arbitrators' fees, parties have to pay proceedings fees up to one percent of the amount of the claim with a 250 000 HUF maximum payment included in the above-mentioned administration fees. These fees must be paid at the start of the proceedings, even when the arbitrator has not yet been chosen.

Registration fees amount to 25 000 HUF.

In **Luxembourg**, mediation fees are determined according to the amount of the claim. For claims under 15 000 Euros, fees amount to 600 Euros (registration fees amount to 150 Euros and mediator's fees amount to 450 Euros). For claims over 15000 Euros, fees depend on the presence of a penalty clause in the contract and on the number of hours needed to settle the dispute. Registration fees thus amount to 150 Euros if a penalty clause is enclosed in the contract and to 300 if not. Mediator's fees amount to 230 per hour (thirty Euros are included in this amount for administration fees).

- **Payment per hour for the person who leads the proceedings**

In **Slovakia**, according to the act n° 420/2004 on mediation, mediators' fees are left to their appreciation and are usually fixed on an hourly basis, in proportion to the amount of the claim or by a lump sum. Mediation is a commercial activity and fees are not fixed by legislation.

In **Slovakia** too, according to the regulation on proceedings fees, the claim for conciliation or alternative settlement registered during the civil proceedings in courts does not entail additional fees. Nevertheless, an agreement validated by the court is subject to fees fixed at two percent of the value of the claim with a minimum of fifteen Euros and a maximum of 1495 Euros. If the amount of the claim cannot be quantified, fees will then amount to fifteen Euros.

If the parties end up the dispute by an agreement before the beginning of the court hearing, ninety percent of the proceedings fees will be reimbursed to them. If the parties end up the dispute by such an agreement after the beginning of the hearing, only fifty percent will be reimbursed.

In **Austria**, it is the same system for arbitration led by a lawyer.

- **Only the proposal is subject to payment**

In **Slovenia**, the Civil Proceedings Act stipulates in its article 309 that the person who files a claim can try to settle the dispute by conciliation before the local court of the defendant's place of residence. The court of competent jurisdiction will give a ruling in order to invite the opposite party to appear before them and will inform the opposite party of the terms of the conciliation. The party initiating such proceedings must bear the related costs. If conciliation fails, fees are considered as proceedings

fees.

If an agreement solving the dispute is reached, each party bears his or her own proceedings' costs, unless the agreement provides for a different distribution (Article 159). Finally, Article 156 provides that when a party does not come to a hearing, this party must bear all the costs of this hearing.

The conciliation proposal introduced by the plaintiff entails a 7.93 Euros fee. If the parties decide to use arbitration before the end of the proceedings before the court, half of the proceedings costs will have to be reimbursed to the plaintiff. The plaintiff has to fill a reimbursement application at the competent first hearing court within 60 days after the beginning of arbitration proceedings but before two years went by since the said costs were paid.

The arbitration decision is not subject to proceedings costs, the proposal only has a high cost for the plaintiff.

- **According to the stage of the proceedings**

In **Slovakia**, as mentioned above, the settlement entails fees only when it is validated by a court. Nevertheless, if no agreement is reached, parties still have to pay some fees.

Thus, if the parties end up the dispute by an agreement before the beginning of the hearing, ninety percent of the fees will be reimbursed to them, but if they reach an agreement after the start of the proceedings, only fifty percent will be reimbursed.

- **Distinction between simple and complex proceedings**

In the **United Kingdom**, mediation can be organised by the National Mediation Assistance Network subsidized by the Department of Constitutional affairs. Mediators who are members of this system charge between 368 and 736 Euros for claims on small amounts and 1104 Euros for fast track or complex proceedings.

- **The Lithuanian system: a lump sum added to a percentage varying according to the number of arbitrators, mediators or conciliators**



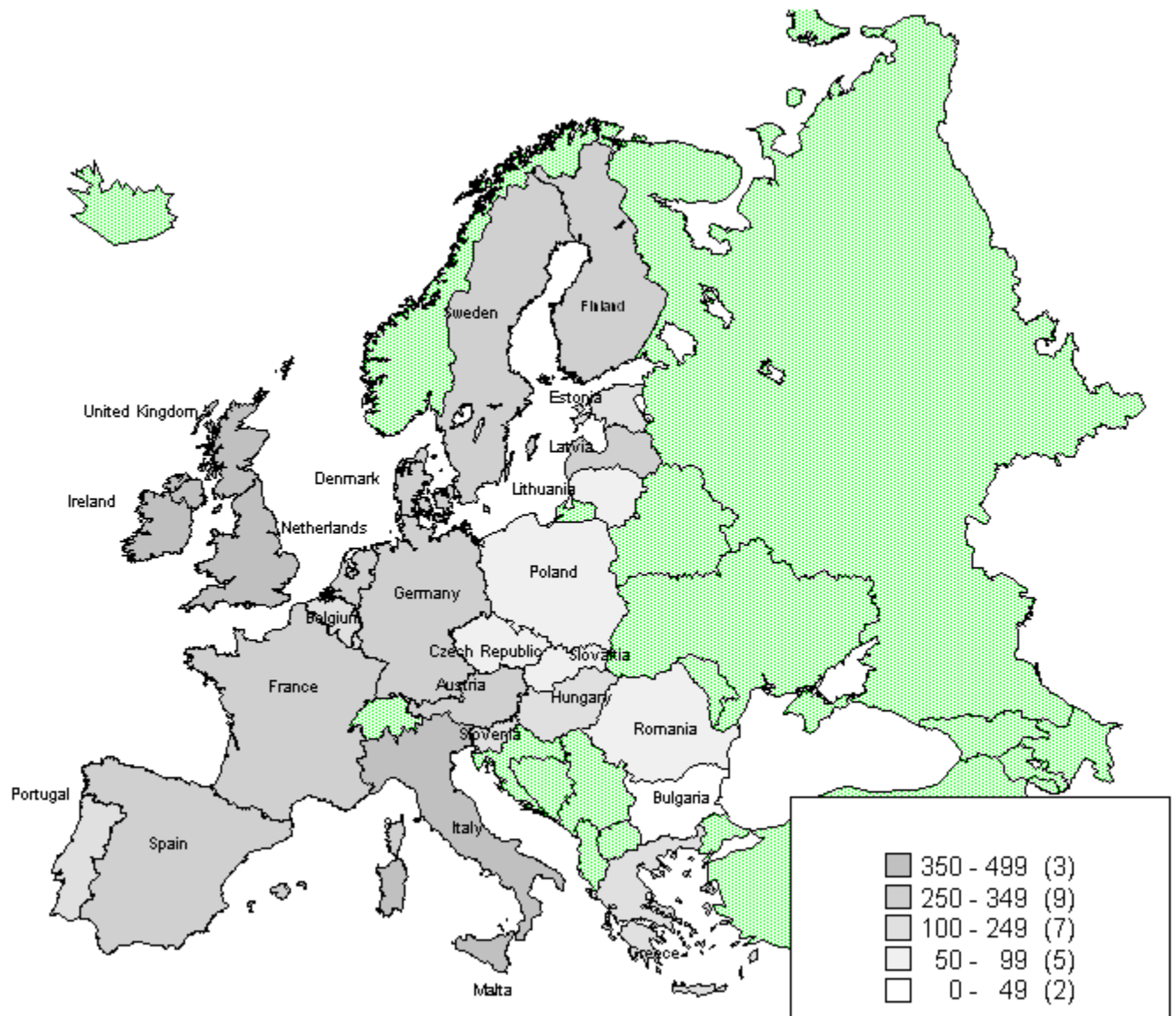
- registration fees (LTL 1500+TVA) ,
- conciliation/mediation fees (two percent of the amount of the litigation) ,
- “compensation” fees.

If two mediators/conciliators are in charge of the litigation, registration fees are increased by twenty percent. If the litigation is led by three mediators/conciliators, registration fees are increased by thirty percent and the mediation/conciliation fees by 1.5 percent.

When three arbitrators are appointed, arbitration fees increase by forty percent. If the claim cannot be calculated, fees consist of administration fees which amount to a lump sum of 682.96 Euros and arbitration fees are between seventeen and sixty-nine Euros per hour including VAT. The amount of the arbitrators’ fees in non-patrimonial cases is fixed by the Senior Judge of the Vilnius Chamber of Arbitration.

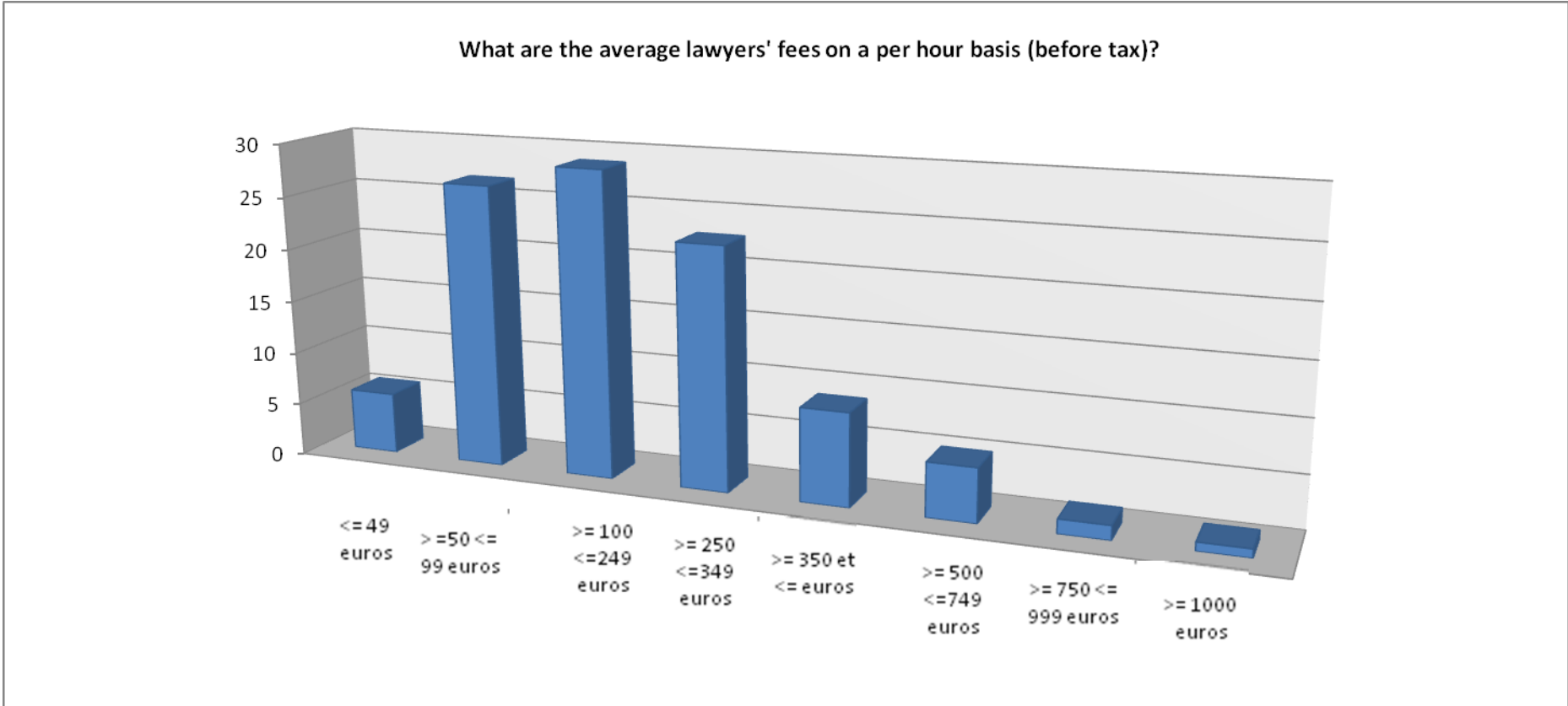
### 3 LAWYERS' FEES

Map 4 - Average level of fees



Source: Country Reports

Graph 8 - Average lawyers' fees on a per hour basis



Source: public questionnaire

Lawyers' fees are an important part of costs of justice.

However, recourse to a lawyer is not always required. In addition, it is possible, under certain conditions and in certain Member States to be represented by a third party who is not a lawyer.

In many Member States, schedules have been established. However, they are generally not binding. Indeed, a movement of deregulation is observed in Europe. Thus, the **Netherlands** since 1997, **Belgium**, **Denmark**, and **Italy** since 2006 have repealed their binding laws on lawyers' fees.

However, there are still various Member States which set schedules for minimum and maximum fees to lawyers.

Furthermore, the existence of a non-binding schedule gives an indication of the fees charged. Freedom of contract, in particular regarding fees makes them particularly difficult to evaluate for the litigant.

In addition, the publication of the fees charged, or at least, of the hourly rate, is rarely imposed by law and the possibility to take the initiative is actually barely ever used.

The mode and time of payment of the fees are freely set by the lawyer in agreement with her or his client in all Member States. Practices vary depending on the type of structures in which lawyers work in the different Member States. Thus, large structures with a large number of lawyers often charge their clients monthly or quarterly, while lawyers working independently or in smaller structures tend to ask for a payment at the end of the proceedings or during the proceedings.

Large structures rarely ask for retainers, except sometimes to new customers, when the customer is insolvent or when the case is important and requires the collaboration of several persons in the firm. The practice of retainers is more widespread among independent lawyers or in small structures.

Since lawyers are free to negotiate their fees with their clients, several billing methods can be identified:

- Hourly billing;
- Flat-rate billing;
- Billing depending on the amount at stake in the dispute or its outcome.

A combination of these options is frequently found. As for success fees, they are prohibited in some Member States and regulated in most others.

Finally, the reimbursement of lawyers' fees is a very important factor in determining the significance of these costs for the litigants. Naturally, the importance of the fees is lessened if they are subject to reimbursement by the opposing party in the wake of a favourable court decision. However, in most Member States, the lawyers' fees the judge demands the losing party to reimburse rarely represent the whole amount actually incurred by the winning party. In some Member States, schedules have been set limiting Judges' discretion to determine the repayable amounts. It is particularly unfortunate that in some Member States, such as France, the principle and the amount of refunded fees are almost arbitrary.

These factors must be taken into account to evaluate the importance of lawyers' fees for the litigant.

There are no obvious links between the number of lawyers and the amount of fees. Thus, the number of lawyers in the UK per 100 000 inhabitants is relatively high while their fees are among the highest in Europe.

**Table 1 - Number of lawyers**

Countries	Q87 Number of lawyers	Number of lawyers without legal advisors and trainees	Number of lawyers without legal advisors and trainees per 100 000 inhabitants
Austria	6 622	2 792	34,0
Belgium	14 876	14 876	142,4
Bulgaria	11 452	11 452	147,6
Cyprus	2 200*	2 200	319,0
Czech Republic	8 235	8 235	80,6
Denmark	4 635	4 635	85,9
Estonia	520	520	38,5
Finland	1 700	1 700	32,5
France	43 977	43 977	70,7
Germany	126 799*	126 799	153,7
Greece	34 000	34 000	307,5
Hungary	9 500	9 500	94,1
Ireland	9 273*	9 273	229,5
Italy	151 470	151 470	259,1
Latvia	800	800	34,5
Lithuania	1 282	1 282	37,4
Luxembourg	946	690	151,6
Malta	657*	657	163,2
Netherlands	13 111	13 111	80,5
Poland	22 516	5 485	14,4
Portugal	22 418	22 418	212,9
Romania	16 000	16 000	73,8
Slovakia	4 100	4 100	75,9
Slovenia	1 040	1 040	52,1
Spain	111 313	111 313	259,3
Sweden	4 354	4 354	48,2
England and Wales	106 486*	106 486	200,7
Northern Ireland	552	552	32,3
Scotland	9 443*	9 443	185,9

Source: CEPEJ 2006

### 3.1 The schedules

**Graph 9 - Existence of a schedule for lawyers' fees**



Source: public questionnaire

**Table 2 - Regulation of lawyers' fees**

Countries	Lawyer's fees are		
	set by Law	set by the Bar	Negotiable
Austria	yes		yes
Belgium			yes
Bulgaria			yes
Cyprus		yes	
Czech Republic	yes	no	no
Denmark			yes
Estonia			yes
Finland			yes
France			yes
Germany	yes	no	no
Greece	yes		
Hungary			yes
Ireland			yes
Italy	yes		
Latvia	yes		yes

Countries	Lawyer's fees are		
	set by Law	set by the Bar	Negotiable
Lithuania			yes
Luxembourg	yes	yes	yes
Malta	yes		yes
Netherlands			yes
Poland	yes	no	yes
Portugal			yes
Romania			yes
Slovakia	yes		
Slovenia		yes	
Spain			yes
Sweden			yes
England and Wales		yes	
Northern Ireland		yes	
Scotland		yes	

Source: CEPEJ 2006

The existence of a schedule has different consequences in the different Member States.

There is no Member State in which lawyers' fees are fully regulated. However, existing schedules can be classified according to their binding value.

On the one hand, schedules can set a minimum fee from which the lawyer may not depart, even contractually. This is the case in **Italy** and **Greece**.

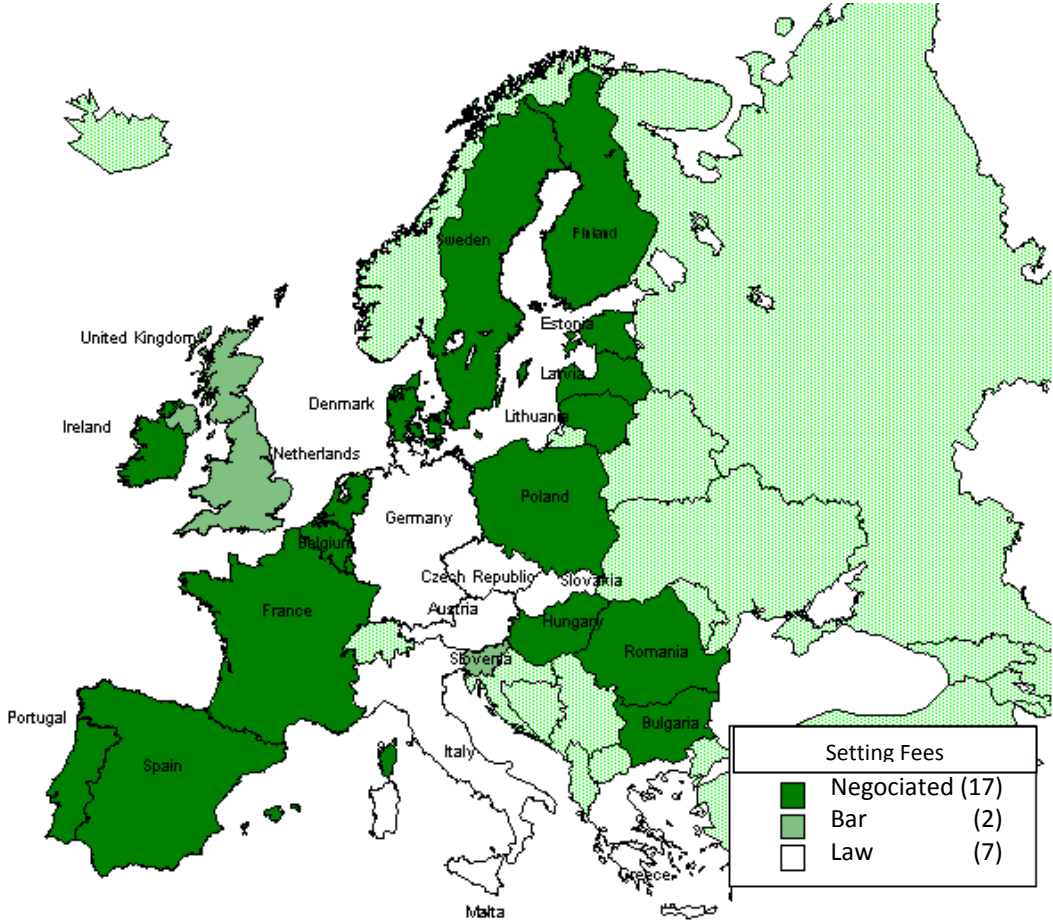
On the other hand, in some Member States, the schedule is binding on a portion of lawyers' fees. This is the case in **Luxembourg**, in **France** (only before the French court of first instance in civil and criminal matters and for "avoués" before the Court of Appeal) and **Malta**. However, in these Member States, freedom to set fees is the rule and the costs that are subject to regulation represent a minor part of lawyer's fees.



In the most Member States, schedules apply only when nothing has been contractually agreed. The study of these schedules, however, gives an idea of practices in each Member State, which is why there is a particular interest to report them within the framework of this study.

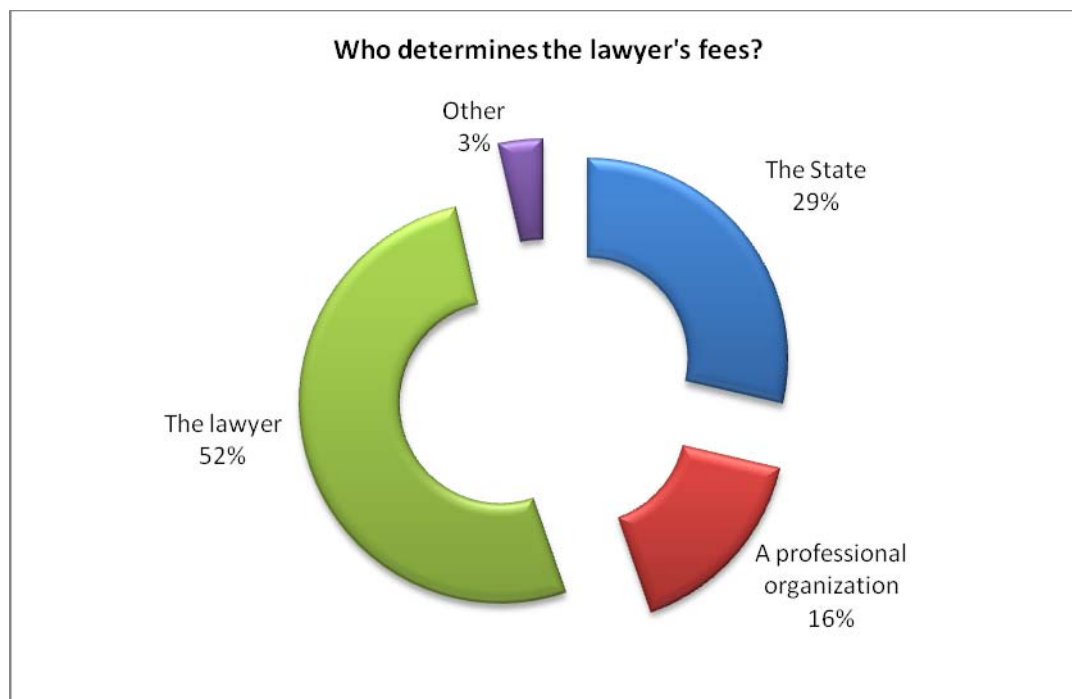
Finally, in some Member States, there is no schedule regarding lawyer' fees.

Map 5 - Setting fees



Source: CEPEJ 2006

**Graph 10 - Determination of lawyers' fees**



Source : public questionnaire

### ***3.1.1 The schedules setting a minimum and / or a maximum: Italy and Greece***

#### ***3.1.1 (a) The system of fees' regulation given up in Italy***

In **Italy**, lawyers' fees are divided into two categories: the remuneration for the lawyer's work and the reimbursement of her or his expenses.

The legislation on lawyers' fees has been recently modified by the Bersani decree which aims at deregulating this issue. The decree repeals the obligation for lawyers to charge a flat fee or a minimum fee.

Before the decree, the law provided the obligation for lawyers to charge a flat fee or a minimum fees and the prohibition of success fees.

Currently, a schedule of fees still exists but it is no longer binding on lawyers who can set lower fees than the fees indicated in the schedule.

The Bersani Decree also allows success fees.

Lawyers' fees are subject to a written agreement between them and their client.

The Bersani Decree limits payment options to non-transferable cheques and banking wire transfers. This provision was adopted in order to prevent cash payments which are now limited to 1000 Euros.

### ***3.1.1 (b) A schedule setting a minimum for fees : Greece***

In **Greece**, several regulations exist regarding lawyers' fees. They all provide a minimum. Thus, the lawyer can freely set her or his fees as long as they are in accordance with these regulations.

Lawyers' Code of Practice concerns disputes the amount of which can be evaluated and provides that lawyer's fees cannot be inferior to two percent of this amount. The Athens Bar Association also provides that its members cannot be paid less than sixty-two Euros per hour. Finally, a ministerial decision provides for a minimum wage schedule depending on the procedure, the amount at stake and the client's status as plaintiff or defendant. The payment is proved by a receipt issued by the Bar.

Most Greek lawyers work in small structures. In general, these lawyers charge a flat-rate to their clients. Recently, a trend towards hourly billing has developed. It is generally practiced by larger structures (over ten lawyers). The hourly rate depends on the lawyer's experience and generally varies from 80 to 360 Euros per hour.

The fees may depend on the court judging the case especially if the lawyer must travel to represent her or his client. In addition, lawyers registered with a Bar Association may represent a client before a court of another Bar, provided they have an applicant on the spot, which entails some expenses.

### ***3.1.2 Schedules fixing part of lawyers' fees***

It is necessary to specify that in **Luxembourg** the fees fixed by schedule represent a small proportion of lawyers' fees and that in **France**, schedules are only used when the representation is mandatory and for attorneys-at-law before the Court of Appeal. In addition, schedules are very rarely used by lawyers. Indeed, these figures represent a guarantee for them and are not mandatory.

**3.1.2.(a) The fees guaranteed before the French court of first instance in civil and criminal matters**

Before the French court of first instance in civil and criminal matters, lawyers' fees are regulated, though in practice they are rarely applied by lawyers who prefer higher free fees. These costs are fixed duties, pleading rights, proportional charges, and expenses before the Court of Appeal.

- **Fixed fees**

Fixed fees are due to the lawyer when she or he represents her or his client before a court in which the representation is mandatory. This fee is set at 6.59 Euros, but can be reduced by half if the amount at stake in the dispute is inferior to 457 Euros.

- **Rights to plead**

The amount of pleading rights is 8.84 Euros. However, this right is only due in the context of certain pleadings.

- **Proportional rights**

Proportional rights are calculated based on the amount at stake in the dispute if it can be assessed. In this case, the proportional amount of duty is calculated as follows.

Dispute Amount	Percentage	Maximum
from 0 € to 1 068 €	3,60 %	max. 38,45 €
from 1 068,01 € to 2 135 €	2,40 %	max. 25,61 €
from 2 135,01 € to 3 964 €	1,20 %	max. 21,95 €
from 3964,01 to 9147 €	0,60 %	max. 31,10 €
over 9147 €	0,30 %	No maximum

If the amount cannot be assessed, proportional rights are calculated by multiplying fixed rights.

- **Expenses**

The expenses include the cost of correspondence, printing and office.

### **3.1.2.(b) Fixed fees before the Court of Appeal**

Regulated fees for attorneys-at-law (representing the parties before the Court of Appeal) are:

- **Basic fees**

Basic fees are calculated in different ways depending on the possibility to evaluate the amount at stake in the dispute.

A basic unit is set and frequently revised by decree. This basic unit is now 2.70 Euros.

The amount at stake is converted into basic units, the number of which indicates the percentage of the amount which the attorney-at-law may claim.

To this percentage another fee can be added depending on the particular difficulty of the case.

- **Expenses**

Expenses allow the attorney-at-law to charge the expenses incurred by her or his mission (with some exceptions).

Before the court of appeal, the client will have to bear the costs of his or her solicitor along with those of his or her lawyer.

### **3.1.2.(c) Regulated costs and basic fees in Luxembourg**

Lawyers' fees are composed by two different categories:

- On the one hand, costs and basic fees, which are fixed by law;
- On the other hand fees freely set by the lawyer.

Costs and fees are regulated and made up in the following manner: in addition to the charges, basic fees are made up of a flat rate of 8.92 Euros divided by two for claims under 743.68 Euros, or for uncontested claims. To this sum a percentage is added ranging from 0.1 percent to three percent of the claim.

Various criteria are applied for the establishment of this sum, its calculation is quite complex. In addition, costs and basic fees are a minor part of the lawyer's remuneration which is mainly constituted by the fees.

Lawyers' fees are set freely and rarely published. These costs are generally determined by an hourly rate. It is estimated that these costs typically range from 150 Euros per hour for an employee to a sum between 300 and 450 Euros per hour for an associated lawyer.

The fees are set freely but following criteria set by the rules of the Bar. These rules include time spent, urgency, the amount of the claim, the degree of difficulty, the result, and the financial capacity of the client.

The costs can be contested before the chairman of the Bar Association. A representative of the Bar then determines whether or not the fees are reasonable. If that representative decides that they are not reasonable, the chairman can personally reduce the fees. On the other hand, if he decides that these fees are reasonable, the client may decide to lodge an appeal before a court, which is not linked with the opinion of the representative of the Bar.

### **3.1.2.(d) *Malta: regulated costs for certain matters***

In **Malta**, lawyers' fees are regulated by the Code of Civil Procedure's organization and by Court rules.

This regulation is published on the website of the Ministry of Justice. Access to this site is free.

The client and her or his lawyer or legal procurator can come to an agreement concerning the fees. This agreement is valid if it does not use a prohibited method of calculation. However, in certain matters (parental authority in particular), fees are necessarily set by the regulation.

In all proceedings, the recourse to a lawyer is mandatory. Indeed, the legislation provides that all written requests must be signed by a lawyer and, when necessary, by a legal procurator. For other acts during the proceedings, a party may represent himself or herself or be represented by a third party. However, the party will necessarily have to resort to a lawyer to submit written documents to the court.

The costs of representation and consultation of lawyers are regulated by the Code of Civil Procedure.

Lawyers' fees are determined by the clerk of Courts, which has the status of State functionary. This schedule takes the amount of the claim into account to set the fees. Success fees are prohibited and an agreement which provides that lawyers' fees will depend on the amount granted to the client by the court is illegal.

The fees are generally set by hour, from zero to forty-nine Euros per hour. VAT is applicable at eighteen percent.

Other criteria are considered to set lawyers' fees:

On the one hand, every application (including a hearing of witness) is subject to a fee of twelve to forty-five Euros. Any hearing before an arbitrator or a legal assistant, if it lasts less than an hour and a half, is the subject of a twenty-eight Euros fee. If the hearing lasts more than an hour and a half and provided that this detail was mentioned in the report of the arbitrator, the legal court, or the clerk in

chief depending on the case, the fees are increased by twenty-four Euros per additional hour.

When the judgment regards a quantifiable claim, the calculation of fees varies according to this claim:

- Per 1 185 Euros bracket: 47 Euros per bracket or ten percent of the sum (the largest sum is applied);
- Per 23 702 Euros bracket: 237 Euros per bracket.

In addition, for any other statement containing a point of law or fact, fees are set from 23 to 233 Euros.

Any court order is subject to a fee between 12 and 119 Euros.

Fees for the decisions or orders are increased by one third in the event of an appeal.

Legal procurators may also ask for fees when they sign a judicial act or for hearings before arbitrators or legal assistants. Their fees represent a third of lawyers' fees. However, when they act without a lawyer's signature being necessary, their fees are the same as those of lawyers in the same situation.

In cases in which the fees are only limited by a minimum and a maximum, they are fixed by the Registrar.

In the event of a claim for alimony, the fees are set at 0.5 percent of the amount of alimony to be paid over a ten years period.

Before the court judging little claims, the fees are 82 Euros for a claim below 582 Euros and are determined by the regulations detailed above for claims exceeding 582 Euros.

In case of appeal against a decision of that court, costs are 175 Euros.



### ***3.1.3 The rates applicable in where the contract terms remain silent***

In **Cyprus**, the rates of the Code of Civil Procedure apply when the parties do not reach an agreement.

In **Latvia**, a regulation provides that a schedule of fees can be adopted by the Council of Ministers to determine lawyer's fees when an agreement is not reached. However, the Council has never adopted such a schedule. Therefore, no regulation exists today on lawyer's fees.

In **Austria**, lawyers' fees are set in accordance with the pricing act of Austrian lawyers and depend mainly on:

- The amount of the claim;
- The number of acts;
- The duration of the hearings.

Another independent schedule was prepared by the association of Austrian Bars. However, hourly billing is permitted, and the schedules only apply when nothing has been contractually agreed.

Some categories of acts have been established by the schedule of Austrian lawyers' pricing act. A rate is established for each category of act. The rate varies according to the nature of the dispute. Then an extra charge can be added for associated costs for travelling or mail among others. Another method consists in increasing schedules of a certain percentage according to the procedure (from one hundred to one hundred and twenty percent for hearings, for example). In this case, the lawyer can no longer claim associated fees.

#### ***3.1.3.(a) Pricing depending on the type of act: Lithuania***

In **Lithuania**, lawyers' fees are usually subject to an agreement with their clients. Nevertheless, the Ministry of Justice has adopted recommendations regarding the calculation of fees.

These recommendations establish a ratio depending on the acts that must be multiplied by the Lithuanian minimum wage:

Type of procedural document	Coefficient
application in extrajudicial procedures (if the case later is decided in court)	0,35
action (counteraction, response to action or counteraction)	3
later preparatory documents (duplication, triplication)	1,75
application to revise judgement by default	1,75
submission of objections regarding the interlocutory court judgement and action; response to the submission	1
application to issue court order	0,5
application to reopen the case	3
appeal	3
appeal (if the attorney participated in the first instance)	2
response to appeal	1,5
cassation appeal	3,5
cassation appeal (if the attorney participated in the first instance or appellate instance)	2,5
other procedural documents	0,5
other documents	0,12
every query in evidence collection process	0,012
one hour of representation in the court session	0,9

These recommendations are used when no agreement has been reached between the lawyer and her or his client.

**3.1.3.(b) The schedules based on the amount of the dispute: the Czech Republic, Hungary, Slovenia and Slovakia**

In the **Czech Republic**, fees are generally determined by agreement between the client and the lawyer.

If no agreement is reached between the client and the lawyer, the "tariff" applies. Under this "tariff", the fees are calculated based on the amount of the claim. When the amount of the claim cannot be assessed, the fee is 5 000 Czech koruna. The amount of the fees varies also depending on the nature of the dispute. Special rates

are provided for the matters in which the evaluation of the claim is difficult (family law, for example).

The "tariff" is made up of a general schedule and of a schedule that applies in certain disputes. The general tariff is as follows:

Tariff value	Fee
up to CZK 500 (approx 19,84 €)	CZK 300 (approx 11,91 €)
between CZK 501 (approx 19,85 €) and CZK 1,000 (approx 39,69 €)	CZK 500 (approx 19,84 €)
between CZK 1,001 (approx 39,70 €) and CZK 5,000 (approx 198,38 €)	CZK 1,000 (approx 39,69 €)
between CZK 5,001 (approx 198,39 €) and CZK 10,000 (approx 396,74 €)	CZK 1,500 (approx 59,48 €)
between CZK 10,001 (approx 396,75 €) and CZK 200,000 (approx 79 290,64 €)	CZK 1,500 (approx 59,48 €) plus CZK 40 (approx 1,59 €) of each initiated CZK 1,000 (approx 39,69 €) sum exceeding an amount of CZK 10,000 (approx 396,74 €)
between CZK 200,001 (approx 79 290,65 €) and CZK 10,000,000 (approx 396 498,18 €)	CZK 9,100 (approx 360,927 €) plus CZK 40 (approx 1,59 €) of each initiated CZK 10,000 (approx 396,74 €) sum exceeding an amount of CZK 200,000 (approx 79 290,64 €)
higher than CZK 10,000,001 (approx 396 498,19 €)	CZK 48,300 (approx 1913,68 €) plus CZK 40 (approx 1,59 €) of each initiated CZK 100,000 (approx 3 962 €) sum exceeding an amount of CZK 10,000,000 (approx 396 498,18 €).

In **Hungary**, the fees are fixed freely between lawyers and their clients regardless of the nature of the case, the amount of the claim or the type of procedure.

In the absence of agreement between the client and her or his lawyer, the court sets the fees by adding a percentage of the amount at stake and an amount calculated from amount at stake but based on minimums and maximums.

The amount of the fees is then set as follows:

Amount claimed	Fees
Under HUF 10,000,000 (approx 39 486,25 €)	5 % of the amount claimed but minimum HUF 10,000 (approx 39,49 €)
Between HUF 10,000,001 (approx 39 486,26 €) and HUF 100,000,000 (approx 395 133,518 €)	HUF 500,000 (approx 1 975,67 €) and 3 % of the amount above HUF 10,000,000 (approx 39 486,25 €), but minimum plus HUF 100,000 (approx 395,64 €)
Above HUF 100,000,001 (approx 395 133,519 €)	HUF 3,200,000 (approx 12 654,87 €) and 1 % of the amount above HUF 100,000,000 (approx 395 133,518 €) but minimum plus HUF 1,000,000 (approx 3953,14 €)

If the amount of the claim cannot be determined, the fees are between 5 000 and 10 000 HUF.

In case of appeal, the fees are twice those stated above.

These fees can also be reduced by the court if it considers that the lawyer did not provide a work deserving so high a remuneration.

In **Slovenia**, lawyers' fees are regulated according to a rate determined by lawyers' professional association in agreement with the Ministry of Justice.

There are two exceptions to this principle:

- When the lawyer has a written agreement with her or his client proposing higher fees;

- In real estate matters, the lawyer may conclude with her or his client an agreement for a success fee of fifteen percent maximum.

These agreements are not taken into account when the court decides to what extent the losing party will have to cover the costs of the winning party.

The rate established by the professional association in agreement with the Ministry of Justice works with a points system. The value of one point is 0.459 Euros. The acts performed by the lawyer are worth a certain number of points.

The value of the points can be increased by the professional association in agreement with the Ministry of Justice when the price index or the wages of judges have increased by ten percent since the value of the points last increased.

Value of the matter in dispute		Value of the attorney's service (points)
Above (points)	Up to (points)	
	750	100
750	3.000	200
3.000	10.000	300
10.000	20.000	400
20.000	35.000	500
35.000	50.000	600
50.000	65.000	700
65.000	80.000	800
80.000	100.000	900
100.000	120.000	1.000

The number of points may also depend on the matter, type of act and competent court. For example, matrimonial disputes account for 160 points.

The number of points can also be increased by the lawyer when the case requires knowledge of a foreign language or foreign law. However, this increase may not exceed one hundred percent.

Points are added later depending on the circumstances. Thus, for the hearing, the lawyer may charge fifty points per half-hour. In addition, for the travelling, the lawyer may charge twenty points for every half-hour away from the firm.

In **Slovakia**, if the parties do not come to an agreement on the fees, regulation of the Ministry of Justice is applied. The fee does not depend on the nature of the dispute or the type of procedure, but are determined by the number of acts, the complexity of the case, and the amount of fees contractually charged by lawyers.

The basic fee is set according to the amount of the claim. If the claim cannot be quantified, the basic fee is one thirteenth of calculation base (currently about 38 Euros) and one sixth for constitutional procedures. The basic fee is then multiplied depending on the number of acts performed. Finally, the lawyer may increase the fees obtained on the basis of the particular difficulty of the case, especially as it requires the knowledge of a foreign language and foreign law.

In addition to the fees, the lawyer may ask the client to reimburse disbursements she or he incurred in connection with her or his mission and compensation for lost time (especially when travelling).

### ***3.1.3.(c) The schedules based on the amount of the claim, the procedure and court: Germany***

Lawyers' fees are usually determined by reference to the regulation on the remuneration of lawyers. However, lawyers are free to agree with their clients on higher fees by written agreement.

Lawyers' fees are usually determined by the amount of the claim. The nature of the dispute does not affect their fees.

The type of procedure and the court concerned have an impact on the amount of fees. Indeed, when they are set in accordance with the Regulation, a multiplier is applied to the basic fee depending on the procedure. This multiplier is one for the recovery procedures and two point five per proceedings before the lowest-level court.

The amount found has yet to be multiplied by a single fee determined on the basis of the amount at stake. This single fee is for example of 301 Euros for a 5000 Euros claim.

### 3.2 Supervision of fees by general rules

In most Member States, lawyers are bound by general rules when they set agreements on their fees with their client.

These rules exist in most Member States. However, it is necessary to present a few examples.

In **Finland**, lawyers determine their fees. Instructions have been established by the Bar Association. However, these instructions being loose, the result is that lawyers set their own fees. These fees must be reasonable.

In **Cyprus**, the lawyers' Code of Conduct lays down rules that lawyers must follow when setting their fees.

Lawyers must respect the following criteria when setting their fees:

- Time spent on the act, its outcome and its significance;
- The importance of services and the urgency of the case;
- The amount of the claim;
- The specificity or the difficulty of the legal issue;
- Her or his competence, experience and specialization;
- The client's financial situation;
- The potential refusal to represent other clients;
- If the use of her or his services is occasional or part of a contractual relationship on the long term;
- His involvement in the examination, the presentation and the development of the case.

In **Romania**, lawyers are free to set their fees taking into account criteria established by the legislation.

The following criteria must be taken into account:

- The time and effort required to complete the mission by the lawyer;
- The nature, novelty and difficulty of the case;
- The importance of the interests at stake;
- The fact that accepting the mission prevented the lawyer from assisting other potential clients (if this can be verified by the client without additional investigations);
- The reputation, experience, qualifications, reputation and expertise of the lawyer;
- Cooperation with experts or other specialists required by the nature, purpose, complexity or difficulty of the case;
- The benefits and results obtained by the client thanks to the work done by the lawyer;
- The client's financial situation;
- Time constraints resulting from the case.

### 3.3 Success fees

Success fees are subject in most of the Member States to a special regulation. The general trend is to ban them when planning that the lawyer would not be paid if her or his client was dismissed from all her or his claims.

In **Germany**, success fees are prohibited. However, German law should be amended in this respect in 2008.

Success fees also are prohibited in **Denmark, Malta and Sweden**.

The most liberal laws in this respect are found in **Slovakia and the United Kingdom**.

Slovakian law allows success fees. The convention can even provide that the lawyer will only be covered for her or his expenses and will not receive any fee if her or his client is dismissed for all her or his claims.

In the **United Kingdom**, success fees can be practiced. There is no minimum limit on this type of agreement. Thus, the agreement may provide that the lawyer will



receive no fee if her or his client is dismissed from all her or his claims. But otherwise, the fees can only be increased by one hundred percent compared to the basic hourly rate usually charged by the lawyer.

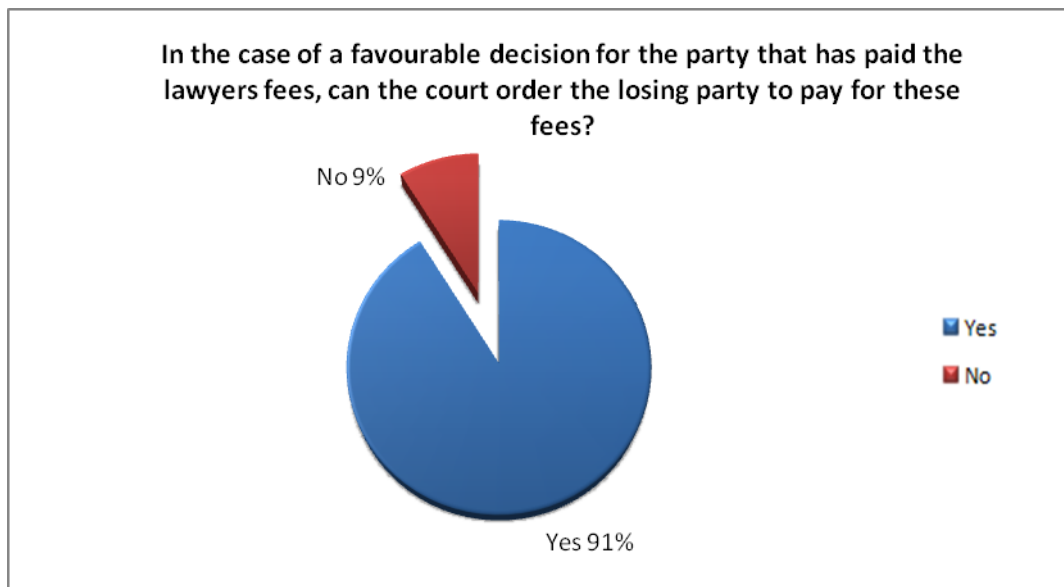
In the **Czech Republic**, success fees are possible to a reasonable extent (the maximum being about twenty-five percent).

In **Lithuania**, success fees are possible if they do not violate the principles of the Bar Association.

In **Belgium, France, Luxembourg, the Netherlands and Romania**, success fees are allowed if they do not constitute the sole remuneration of the lawyer.

### 3.4 The reimbursement of lawyers' fees

**Graph 11 - Reimbursement of lawyers' fees**



*Source: public questionnaire*

Two trends can be distinguished in the Member States:

- On the one hand, the judge can have discretion to determine to which extent the losing party will pay the opposing party's lawyer's fees;
- On the other hand, this choice can be governed by certain rules.

It is necessary to examine the systems within which the judge is limited in the distribution of costs between the parties.

### ***3.4.1 The fixing of a minimum and / or a maximum based on the financial stake of the litigation: Belgium, Estonia, Lithuania, Slovakia and Latvia***

The **Belgian** “Moniteur” published on 31 May, 2007 the Act of 21 April 2007 on the reimbursement of fees and lawyers’ fees. The cost of the procedure is part of the costs. This was already the case before, but the new Section 1018 of the new Judicial Code clearly states it. The notion of compensation “of expenses and proceedings” (Art. 1021) actually covers some material acts formerly borne by solicitors. The cost of the procedure was never intended to cover lawyers’ fees.

The costs of the procedure are not referred to as part of a package that includes lawyers’ fees. It covers expenses and lawyers’ fees as stated clearly in the new (Art. 1022): “the cost of the procedure is a fixed cost related to procedural expenses and lawyers’ fees incurred by the winning party.”

A royal decree has been discussed by the Council of Ministers, after the required notice of the OBF<sup>49</sup> and of the OVB<sup>50</sup> in order to set the basic amounts according to the nature of the case and the importance of the dispute.

They are framed by a maximum and minimum between which the judge will decide, by a motivated decision when he or she receives a request to deviate from the basic amount. The application may therefore focus on the reduction or increase of the basic amount.

In her or his assessment, the judge takes into account:

- The financial capacity of the losing party to reduce the amount of compensation;
- The complexity of the case;
- The agreed contractual allowances for the party who wins the case;

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<sup>49</sup> Francophone and Germanophone Bar Association

<sup>50</sup> Flemish Bar Association

- The obvious unreasonable character of the situation.

The royal decree setting those amounts was submitted to the Council of Ministers on 27 April, 2007.

The periodic Forum of the French Order of the Brussels Bar (No. 125, 15 to 31 May 2007) gives us the content:

Amount at stake assessable in money	Base	Minimum	Maximum
→ 250 €	150 €	75 €	300 €
250 → 750 €	200 €	125 €	500 €
750 → 2.500 €	400 €	200 €	1.000 €
2.500 → 5.000 €	650 €	375 €	1.500 €
5.000 → 10.000 €	900 €	500 €	2.000 €
10.000 → 20.000 €	1.100 €	625 €	2.500 €
20.000 → 40.000 €	2.000 €	1.000 €	4.000 €
40.000 → 60.000 €	2.500 €	1.000 €	5.000 €
60.000 → 100.000 €	3.000 €	1.000 €	6.000 €
100.000 → 250.000 €	5.000 €	1.000 €	10.000 €
250.000 → 500.000 €	7.000 €	1.000 €	14.000 €
500.000 → 1.000.000 €	10.000 €	1.000 €	20.000 €
1.000.000 →	15.000 €	1.000 €	30.000 €

In **Estonia**, although overall the winning party obtains reimbursement of her or his legal fees by the losing party, lawyers' fees are generally not fully reimbursed. A government regulation sets the maximum amount that may be recoverable. This maximum is calculated based on the amount of the claim. For small financial claims, lawyer's fees are generally reimbursed with a maximum of thirty to fifty percent of the claim. For a claim, the amount of which is estimated at between 3 900 Euros and 25 000 Euros, lawyers' fees are reimbursed up to twenty or thirty percent of this claim. If the amount of the demand is more than 100 000 Euros, the maximum reimbursement is 12 143 Euros. If the amount of the claim cannot be evaluated, the reimbursement is 3 195 Euros maximum.

In **Lithuania**, the costs to be borne by the losing party may not exceed the maximum fees of the recommendations adopted by the Ministry of Justice. These

recommendations are also used in the event of a dispute regarding lawyers' fees when agreement has been reached between the lawyer and the client. However, in certain cases, especially when the court recognizes that the case is particularly difficult and requires a particularly long or very technical workload. In addition, the refundable costs to the party at the same time include lawyer's fees and "other costs necessary and reasonable". Thus, if the advice of a jurist was necessary, and if the fees for this counselling are reasonable, the court can provide for those costs to be borne by the losing party.

In **Slovakia**, the reimbursement of lawyers' fees is framed by the rules applicable in case the lawyer and her or his client do not come to an agreement and, even if such an agreement was reached. As stated previously, the regulation of the Ministry of Justice is then used. The fees do not depend on the nature of the dispute or the type of procedure, but are determined by the number of acts, the complexity of the case, and the amount of contractual fees charged by the said lawyers. The basic fee is set according to the amount of the claim. If the request cannot be quantified, the basic fee is one thirteenth of calculation base (currently about thirty-eight Euros) and one sixth for constitutional procedures. The basic fee is then multiplied depending on the number of acts performed.

In **Latvia**, the Civil Procedure Code provides that the fee charged to the losing party may not exceed five percent of the amount awarded to the winning party. On the other hand, concerning claims that cannot be evaluated, in the absence of regulations adopted by the Council of Ministers, distribution rules remain unclear.

#### ***3.4.2 Use of the former schedule of fees: Denmark***

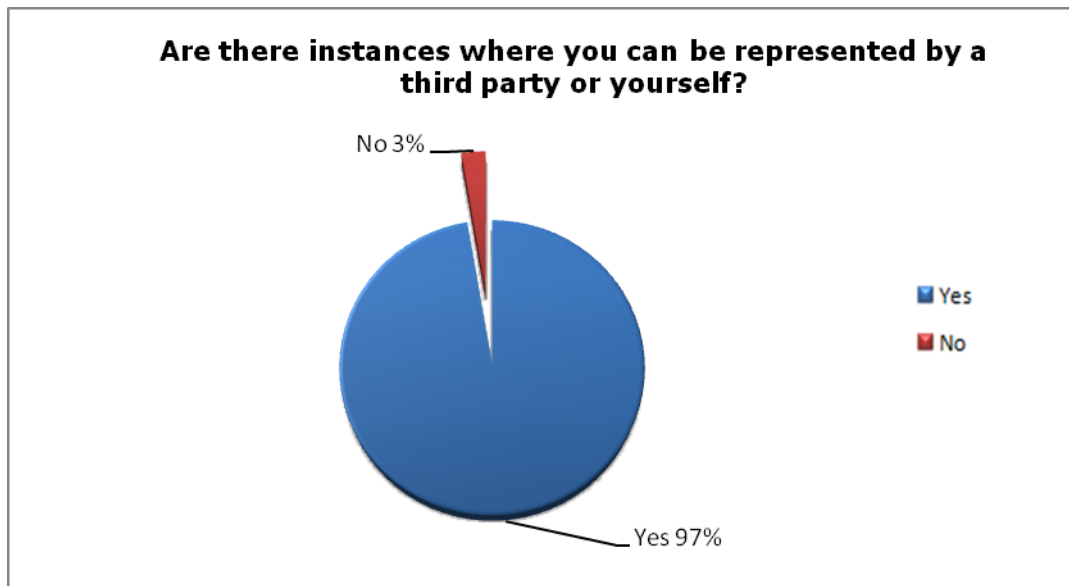
In **Denmark**, the Bar Association had established rules for the setting of fees. These rules were declared contrary to competition law. However, they are still applied by the courts when deciding to have one party pay the other party's lawyers' fees. Thus, the court's decision does not generally cover lawyer's fees entirely because lawyers can charge more than what is provided by the rules of the bar.

### 3.5 The mandatory representation by a lawyer

Making it compulsory for the person subject to trial to be represented before the courts by a lawyer has, obviously, an impact on the costs he or she must bear.

#### 3.5.1 The requirement to be represented by a lawyer

Graph 12 - Mandatory representation by a lawyer



Source : public questionnaire

In most Member States, legal representation is only mandatory before certain courts.

There are a few European Union Member States which have specific legislation:

In **Malta**, legal representation is mandatory before all courts. Maltese legislation provides that all written requests must be signed by a lawyer and, if necessary, a legal procurator. For other acts during the proceedings, a party may represent himself or herself or be represented by a third party. However, the party will necessarily have to resort to a lawyer to submit written documents to the court.

In **Latvia**, legal representation is not compulsory before any court. Recently, the Latvian Constitutional Court has invalidated the provision of the Procedure Code which provided a mandatory representation by a lawyer before the Supreme Court.

Similarly, in **Sweden** there is no type of dispute for which the defendant has the obligation to have recourse to a registered lawyer. However, when the litigant takes a lawyer under a legal insurance, the insurance company often requires that the litigant or the company resorts to a registered lawyer.

In the **United Kingdom**, the litigant may represent her or himself or be represented by a third party other than a lawyer in all disputes.

Moreover, in **Estonia** and **Lithuania**, legal representation is required only in the Supreme Court.

### ***3.5.2 The possibility to be represented by a person other than a lawyer***

The opportunity, for the litigant to be represented by a person other than a lawyer before the courts, affects the legal costs to be paid by this party. The litigant may then choose a cheaper option. However, one should not underestimate the role and function of a lawyer in defending and representing litigants. Lawyers have knowledge, experience, and know the ways of the courts.

#### ***3.5.2.(a) The necessity to have a law degree or a special qualification: Finland, Estonia, Latvia and Lithuania***

In **Finland**, a third party may represent the litigant if she or he holds a Masters of Law. As an exception to this rule, some people may represent the litigant without possessing such a degree:

- A first degree relative;
- A spouse or partner;
- Anyone else in certain proceedings (summary proceedings, non-contentious administrative procedures, registration matters, before the Court of agricultural properties).

In **Estonia**, representation by a lawyer is not necessary except before the Supreme Court.

Third parties can represent the litigant before courts. However, the law limits the categories of persons entitled to do so. They can be:

- A jurist who obtained a law degree;
- A mediator in commercial disputes;
- A party on the authorization of the other parties (a plaintiff for the other plaintiffs or a defendant for the other defendants);
- the parties' grand-parents, parents, children, grand-children or spouses;
- A civil servant or employee of a party if the court finds that she or he has sufficient expertise and experience to fulfil this role;
- Other persons for whom the right to represent a person in implementation of a contract is provided by the law.

In **Latvia**, there are no proceedings for which representation by a lawyer is mandatory. Further, lawyers do not have the monopoly of representation before the courts. Recently, the Constitutional Court of Latvia has quashed the provision of the Code of Procedure which provided for a mandatory representation by a lawyer before the final Court of Appeal. Thus, the litigant may now be represented by a third party other than a lawyer or by her or himself before all courts. However, only costs from the services of a lawyer can be charged to the losing party, and not the fees due for the services of a third party.

In **Lithuania**, representation by a lawyer is not mandatory except before the final Court of Appeal. However, lawyers have the monopoly on representation except in a few cases. Indeed, apart from lawyers only the following type of persons may represent a third party before the courts:

- A plaintiff or a defendant appointed by the others in cases in which there are several defendants or plaintiffs;
- A person who has degrees of a level superior to those of her or his spouse may represent him or her;
- Unions for the representation of their members in social rights disputes.

Employees of a company may also represent their company (in case of appeal only employees with certain academic degrees have this right).

Since 2002, jurists are no longer allowed to represent people in courts. Prior to this new legislation, that of 1964 provided that any person could represent another before the courts.

### **3.5.2.(b)     *The representation by a "reliable" person***

In **Sweden**, there are no disputes for which the litigant has an obligation to call on a registered lawyer. However, when the litigant takes a lawyer under a legal insurance, the insurance company often requires that the litigant or the company resort to a registered lawyer.

The litigant may represent her or himself unless she or he is unable to do so or be represented by any person who is found "reliable" by the courts in regards to her or his honesty, knowledge and past activities.

### **3.5.2.(c)     *The freedom in the choice of the third party***

In the **United Kingdom**, the litigant may represent himself or be represented by a third party other than an lawyer in all types of dispute.



## 4 BAILIFFS FEES

Table 3 - Status of bailiffs, enforcement officers or judicial officers

Member States	Q105 Bailiffs, enforcement officers or judicial officers are			
	Judges	Independently operating professional liberal status's practise	Functionaries in the service of the State	Others
Austria			yes	
Belgium	no	yes	no	yes
Bulgaria <sup>51</sup>			yes	
Cyprus				yes
Czech Republic	no	yes	yes	
Denmark	yes		yes	
Estonia		yes		
Finland			yes	
France		yes		yes
Germany			yes	
Greece	no	yes	yes	
Hungary		yes		
Ireland		yes		yes
Italy			yes	
Latvia		yes		
Lithuania		yes		
Luxembourg		yes		
Malta			yes	
Netherlands		yes		
Poland	no	no	no	yes

<sup>51</sup> In June 2006, the enforcement law was modified. There are two types of bailiffs - State executive magistrates (functionaries) and private enforcement agents.

Member States	Q105 Bailiffs, enforcement officers or judicial officers are			
	Judges	Independently operating professional liberal status's practise	Functionaries in the service of the State	Others
Portugal			yes	yes
Rumania		yes		
Slovakia		yes		
Slovenia		yes		
Spain <sup>52</sup>	yes			
Sweden				yes
England (UK)		yes	yes	yes
Northern Ireland (UK)			yes	
Scotland (UK)		yes	yes	yes

Source: CEPEJ 2006

#### 4.1 Introduction

Bailiffs' fees exist in twenty-six of the Member States.

**Sweden** is the only Member State in which the notion of bailiff does not exist. In **Sweden**, there is no service of process and the expenses related to the enforcement of a court's decisions are paid for by the State.

In **Austria**, bailiff's fees do not exist strictly speaking as a separate item because there is no legal provision regulating them. However, any enforcement costs are included in the court fees. Process service fees are paid when the claim is filed or the appeal made. Enforcement fees are paid to the court when the request for an enforcement is made.

In **Finland**, bailiffs' fees exist but, in civil or commercial litigation, the bailiffs' fees are included in the court fees.

<sup>52</sup> In Spain, Judges are not the enforcement officers, but, according to the Spanish Constitution the judges are in charge of "To judge and to carry out the court judgments».

The profession of bailiff while present in a majority of Member States is not harmonized. Bailiff costs are not always regulated and instead of being separate are sometimes included as part of the court fees and proceedings.

The status of the bailiffs is not uniform in the twenty-seven Member States. The profession of bailiff refers to either a distinct group of civil servants, or of independent professionals, or to both civil servants and private professionals practicing side by side.

In some Member States the profession holds a monopoly on certain legal acts. In **Cyprus**, public functionaries hold a monopoly on the enforcement of court decisions while the independent professionals hold a monopoly on the service of writs. In **Austria**, court functionaries have the monopoly of the enforcement of court's decisions.

By contrast, the role of bailiff is not a monopoly it is difficult to predict who will do enforcement since the role is instead conferred on case by case basis either to court officers or even to independent lawyers. In **Slovakia** and in **Czech Republic** where bailiff's activity seems strictly limited to the enforcement of courts decisions as authorized beforehand by the court, enforcement responsibility is difficult to predict on a case by case basis with authority being conferred either on a court officer or on a lawyer appointed by Ministry of Justice.

In the majority of Members States, the main functions carried out by bailiffs are the ones related to the enforcement of a court's decision and/or process service. An exception is found in **Spain** where the baliff is not an enforcer of judgments but rather is as "technical" representative of the parties. He or she has to manage all the various costs incurred during the judicial proceedings. The service of writs, one of his or her public duty, is rarely used.

We note that based on the surveys conducted, few citizens really understand the role and function of bailiffs. It is most often other legal professionals or the courts that deal with bailiffs.

## ***Bailiffs fees***

In most Member States, bailiffs' fees are charged on the basis of a prescribed schedule, but some acts performed by bailiffs are subject to charge based on a freely negotiated agreement with the client.

Freely negotiated fees may be supplemented by guidelines in the form of a schedule of prices (see for example in **France**).

As a general principle, bailiffs' fees are determined according to the nature of the acts or procedure undertaken. For instance, in some Member States, time spent and/or the distance covered are part of the compensation calculation.

The Country Reports show that although fee schedules often exist, because of a lack of transparency citizens do not understand the pricing structure of services performed by bailiffs. The complex calculation methods employed and the many parameters taken into account are the cause of this confusion.

Clarification of the fees and fee schedules are needed.

In some countries, some fees are calculated based on the amount claimed. This seems totally unjustified when there is no rational connection, between the tasks to be undertaken, the work performed and the amount of the claim.

In addition, the control of acts carried out by the bailiffs and the budget of expenditure (calculation of costs) and fees which are allowed to them is not addressed by the countries' experts.

Consequently, in the interest of transparency, it could be useful and relevant to provide a check and balance control of acts performed by the bailiffs and their fees and expenses. This would be set up at the European level by an institution independent from the profession of the bailiffs.

Finally it seems that these professionals have difficulty understanding the cross-border implications of litigation.

The analysis of the Countries' Reports shows that within the profession of the bailiffs, knowledge of the European law is weak on the European instruments such as:

- 1348/2000 and 1393/2007 regulations on the service of documents abroad ;
- 44/2001 regulation on jurisdiction and the recognition and enforcement of judgements (Brussels I) ;
- 805/2004 regulation creating a European Enforcement Order ;
- 1896/2006 regulation creating a European order for regulation procedure.

Therefore, the creation of a permanent dialogue between bailiffs' associations, following the example of the device set up by the CEPEJ in the Council of Europe, would allow a better access to relevant sources of information, for the officers asked to execute the enforceable titles.

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
AT	“Rechtspfleger” are state’s functionaries	No provision exists which determines the judicial officers’ fees; they are included in court fees.	No	Yes	No but possibility	Restricted to the territorial entity of the court house where their office is located.
BE	independently operating professionals	Statutory tariff.  The documents are rated in the “Arrêté Royal” of 30/11/1976.  <ul style="list-style-type: none"> <li>- par des droits gradués “graduated rights”</li> <li>- Droit proportionnel “proportional right”</li> <li>- par des vacations “sessions”,</li> <li>- Droits fixe “Overheads”</li> </ul>	No	yes	yes	Attached to their jurisdiction (court of first instance).
BG	State’s functionaries  and  independently operating professionals	Statutory tariff :  For the State’s functionaries : <ul style="list-style-type: none"> <li>- The Law for State Charges</li> <li>- <i>Letter C of</i> Tariff No 1</li> <li>- Art. 69 of The Civil Procedure Code, Chapter eight “EXPENSES”,</li> </ul> For the independently operating professionals: <ul style="list-style-type: none"> <li>- Article 78 of The Law on private enforcement agents</li> <li>- Tariff of the fee and expenses on</li> </ul>	No	yes	yes	No information provided

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
		<p>enforcement pursuant to the law on the private enforcement agents</p> <ul style="list-style-type: none"> <li>- Art. 69 of The Civil Procedure Code, Chapter eight "EXPENSES",</li> </ul> <p>For each document a statutory tariff exists.</p> <p>The amount of fees in both tariffs is the same. But private enforcement agent charges additional fee at the amount of 50 % of the fee for he or she respective action carried out on non-working days and on holidays, for sending subpoenas by mail, copy of the complaint, notification and papers.</p> <p>The documents are rated by:</p> <ul style="list-style-type: none"> <li>- droits gradués "graduated rights",</li> <li>- Droits fixe "Overheads"</li> </ul>				
CY	<p>independently operating professionals</p> <p>State's functionaries.</p>	<p>Statutory tariff :</p> <p>Writs are rated in accordance with Appendix C3 of Order 5B of the Civil Procedure Rule:</p> <p style="padding-left: 40px;">Droits fixes "overheads" and travelling expenses (fixed</p>	yes 15%	Yes : states' functionaries .	Yes : independently operating professionals	<p>For independently operating professionals: restricted to the territorial entity where their office is located.</p> <p>For functionaries : Attached to their jurisdiction</p>

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
		<p>amount is added which is analogous to the distance (kilometres) between the place of service and the Court of the dispute).</p> <p>-</p> <p>The enforcements' documents are rated in accordance with Order 44 r. 1 of the Civil Procedure Rules.</p>				
CZ	"Soudni exekutor" are court's functionaries	<p>Bailliffs fees are rated in accordance with the Decree of Ministry of Justice Regulation No 330/2001 Coll :</p> <p>- droits gradués "graduated rights"</p> <p>- or in accordance with an agreement between the bailiff and the client to enforce a non-economic court judgment : droit fixe "overheads" and contingency fees (pourcentage).</p>	yes 19%	yes	No with the exception of enforcement proceedings	nationwide
DE	"Gerichtsvollzieher" are land's functionaries.	<p>Statutory tariff : The documents are rated according to the following provisions :</p> <p>- "Gerichtsvollzieherkostengesetz" (GvKostG) and its annex 1 "Kostenverzeichnis" (KV) ;</p> <p>- ("einstweilige Verfügung"; cf. sections</p>	No	yes	No but possibility in the event of summary interlocutory proceedings	Attached to their jurisdiction



Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
		916 et seq. of the German Civil Procedure Code - ZPO) -cf. 928 et seq. ZPO) ; -GvKostG (cf. section 9 and its annex to the GvKostG) ; droits fixes : “overheads”				
DK	“Foged, Pantefoged ou Told-og skattefoged” are courts functionaries	Statutory tariff : The documents are rated according to the following provisions : Act 2006-09-08 no. 936 - droits fixes “overheads” - droits gradués “graduated rights” according to the economic value of the judgement - travelling expenses	No	yes	No	: Attached to their jurisdiction
EE	“Kohtutäiturid” are independently operating professionals	Statutory tariff : The documents are rated according to : § 22 of the Bailiffs Act. - droits fixes “overheads” - lump sum or time charge - droits gradués “graduated rights”, - disbursements(research, travel)  Details are provided with the provisions of no 58 (December 22, 2005) of the Ministry of Justice “kohtutäiturimäärustik”	Yes 18%	yes	No with the exception of enforcement (for example : warrant for attachments)	restricted to the territorial entity where their office is located

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
ES	“the Agente Judicial, the Oficiales and the Auxiliares” are court functionaries “Les Procuradores” are independently operating professionals	The documents are rated according to the Décret Royal 1373/2003 of 7 november 2003. - droits fixes “overheads” with the possibility to increase or decrease them by 12%. - droits gradués : “graduated rights”	Yes 16%	No	No	Restricted to the territorial of the partidos where their office is located
FI	“Les Ulosottomiehet” are states functionaries	Court fees Act on Execution Fees (L 34/1995) and decree on Execution Fees (OMA 35/1995) - droits fixes : overheads	No	No just possibility	No with the exception of enforcement or precautionary measures	Attached to their jurisdiction
FR	independently operating professionals	Statutory tariff and free fees decree N° 96-1080 of 12 December 1996 modified by the decree n°2007-774 of 10 may 2007, scale’s system: - droits gradués “graduated rights”, - droits proportionnels “proportional rights”, - free fees - droits fixes “overheads” - disbursements (locksmith’s costs, moving costs)	Yes 19,6 %	yes	yes	Unless exceptions, Attached to the jurisdiction (court of first instance) where their office is located.
GR	The “Dikastikcs Epimelitis” are	Statutory tariff: Act 2/52621/0022, droits fixes : “overheads”. Nevertheless	No	yes	Yes with the exception of	Attached to the jurisdiction (court of first instance) where

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
	independently operating professionals	the bailiffs add free fees.			documents from a foreign country	their office is located.
HU	The “Onallo Biroalagi Vegrehajto” are independently operating professionals	Statutory tariff: Section 254 of Act LIII of 1994 on Judicial Enforcement and decree of the Ministry of Justice no 14/2994  <ul style="list-style-type: none"> <li>- droits gradués: “ graduated rights”,</li> <li>- disbursements equal to 50% of the graduated rights,</li> <li>- contingency fees (pourcentage of the liability enforced)</li> </ul>	No	No	No just a possibility	Attached to the jurisdiction (court of first instance) where their office is located.
IE	<ul style="list-style-type: none"> <li>• The “Sheriffs” are independently operating professionals.</li> <li>• The “County registrars” are not funtionaries paid by the State.</li> </ul>	No information provided	No	yes	No with the exception of enforcemnt	Attached to the jurisdiction of the County Borrough.
IT	The ”Ufficiali Giudiziani” are State’s functionaries	Statutory tariff by the decree: D.P.R. 30 May 2002 No. 115 (articles 19 - 39)  The rate is calculated according to: <ul style="list-style-type: none"> <li>- The number of parties,</li> </ul>	No	Yes subject to few exceptions	No the service of writs belongs either to lawyers or courts	Attached to the jurisdiction they receive orders from the judge.

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
		<ul style="list-style-type: none"> <li>- The distance,</li> <li>- The urgency (increases 50% of the rate)</li> </ul> Regarding the enforcement of courts judgements, the rate varies according to the economic value of the judgment and the distance fees are twice higher than those for the service of writs.			employees.	
LT	The “Antsloliy” are independently operating professionals	Statutory tariff: article 21 of the bailiff’s act or in the event of act’s provisions, free fees agreed between the bailiff and the party. Time fees or graduated rights.	Yes 18%	Yes	No just possibility	Attached to one or more districts courts
LU	independently operating professionals	Free fees: Règl. gd. 24 janvier 1991  The documents are rated according to : - droit fixe : “overheads”, -travelling expenses, - droits gradués “graduated rights” calculated in pourcentage from the overheads	Yes 15%	Yes	Yes	Attached to the jurisdiction where their office is located
LV	The “Zvérinatsu tiesu izpilditazu” are independently operating professionals	Statutory tariff: 28.12.2004. Regulations No. 1075 “Regulation of bailiff fees”	Yes 18%	Yes	No competence but no monopoly	Attached to one of the five local courts and to the court of first instance where their office is located.
MT	State’s functionaries	Statutory tariff : Paragraph 6 of Tariff A and Tariff D of Schedule A to the Code of Organisation and Civil Procedure,  The fee is calculated on a per act basis	No	yes	yes	No information provided
NL	The	Statutory tariff :	yes	yes	Yes except for	Nationwide

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
	"Gerechtsdeurwaarders" are independently operating professionals	"Gerechtsdeurwaarderswet" "Besluit Tarieven Ambtshandelingen Gerechtsdeurwaarders"  The rate is a droit fixe "overheads" which varies according to the purpose of the action at law and it is a fixed scale for the enforcement of courts decisions.	19%		tax issues.	
PL	The "Komornik Sadowy" are independently operating professionals	No information provided	No	Yes	No just possibility	Limited to the jurisdiction of the appeal court in the location of his or her residence
PT	The "Solicitadores de execucao" are independently operating professionals	Statutory tariff : No information provided	No	Yes	No except for enforcement of courts decisions	Restricted to their judicial district, with the possibility of an extension thereof, which is an exceptional occurrence
RO	No information provided	Statutory tariff: act no. 188 of November 1, 2000 on bailiffs, published in the Official Gazette no. 559/2000 and Order no. 2550/C of November 14, 2006.  The rate varies from a minimum and a maximum set up by decree no. 2550/C of November 14, 2006	No information provided	Yes	Yes	No information provided
SE	State's functionaries	Fees paid by the State	No	Yes	No, the courts are in charge of the service of writ	No information provided
SI	The "Izvršiteljica" are	Statutory tariff:	Yes	No, only at	No	The "Izvršiteljica" are controlled

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
	independently operating professionals	<p>-The Rules, slo. Pravilnik o tarifi za plačilo dela izvršiteljev in o povračilu stroškov v zvezi z njihovim delom, Official Gazette of the Republic of Slovenia, no. 18/2003 - as amended</p> <p>The rate concerns only the documents for the enforcements of the courts decisions at the request of the court. The rules fix each document and its related fees on the basis of :</p> <ul style="list-style-type: none"> <li>- The demand's value,</li> <li>- value of the seizure,</li> <li>- Time fees if the demand's fees are indeterminable,</li> <li>- Droits fixes "overheads".</li> </ul>	20%	the request of the court		by the judge. The court shares out the files to the different "Izvršiteljica" attached to the court in the location of his residence.
SK	The "sudni exekutori" are State's functionaries	<p>Statutory tariff: provision No. 288/1995 Coll.</p> <p>The rate is calculated :</p> <ul style="list-style-type: none"> <li>- For the enforcement of court decisions with an economic value: 20% of the value (with a minimum and a maximum),</li> <li>- For the enforcement of court judgements without economic value: fixed scale</li> </ul> <p>Nevertheless, it is the court which sets up the bailiff's compensation.</p>	Yes 19%	Yes	No	Nationwide

Member States	Status	Tariff	VAT	Monopoly on the enforcement of courts decisions	Monopoly On the service of writs	Territorial competences
		Besides bailiffs may agree with the client on free fees in addition to the statutory tariff.				
UK	<p>Les High court enforcement officers et les Enforcement officers sont des professionnels indépendants et libéraux.</p> <p>Les County court bailiffs sont des fonctionnaires attachés au tribunal du comté (County court).</p> <p>Les High court enforcement officers sont nommés par le Lord Chancellor</p>	<p>No specific provision of act exist which determines the judicial officers' fees.</p> <p>The rate is made by document with a minimum and a maximum.</p>	Yes 17,5 %	Yes	No just possibility	<p>Nationwide : High court enforcement officers and enforcement officers</p> <p>County court bailiffs are attached to their County court.</p>

## 4.2 Amount of the bailiffs fees

In most Member States, bailiffs' fees are calculated based only on the act to be performed, for example in **Cyprus, Romania, Germany, Belgium, France, Greece, Malta or Latvia**.

In **Luxembourg**, the fees of process service are calculated based on the act to be performed and documents serviced and vary on average from 150 to 550 Euros.

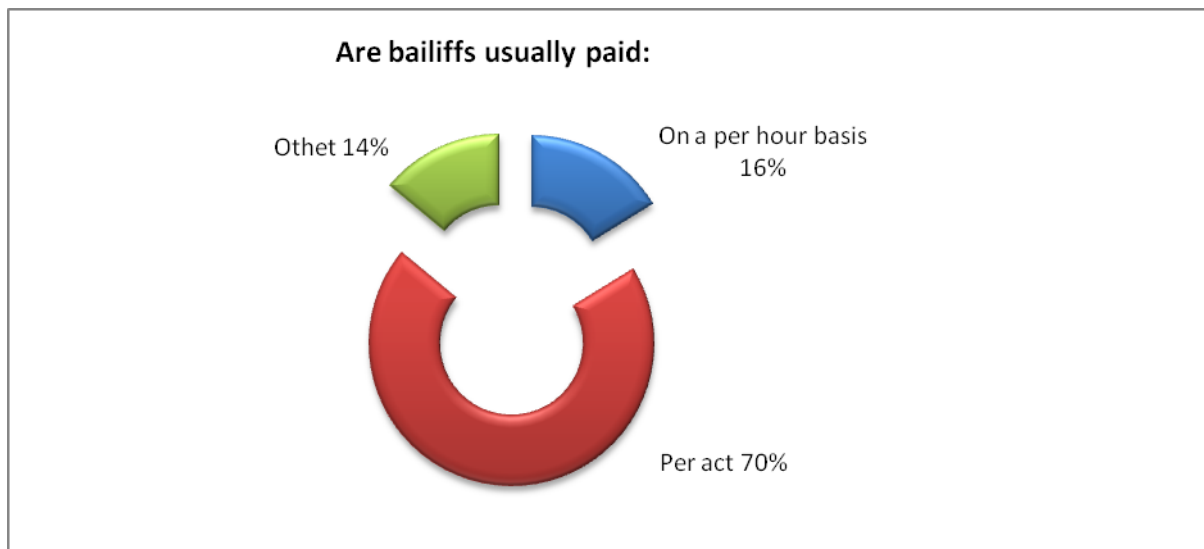
In **Austria**, bailiffs' fees are part of the court fees and not charged separately.

In **Sweden** the cost for service of a document during a court proceeding is usually borne by the State. It is possible for a person to arrange privately for the service of a document. This can be arranged for example through the police authority. In this case, approximately twenty-seven Euros will have to be paid prior to any such service attempts are made. If the police authority is used for such service no VAT is added to the cost.

In **Lithuania**, bailiffs are paid an hourly fee, approximately eighteen Euros per hour for services during a court proceeding.

**Graph 13 - Determination of the bailiffs' compensation within EU 27**





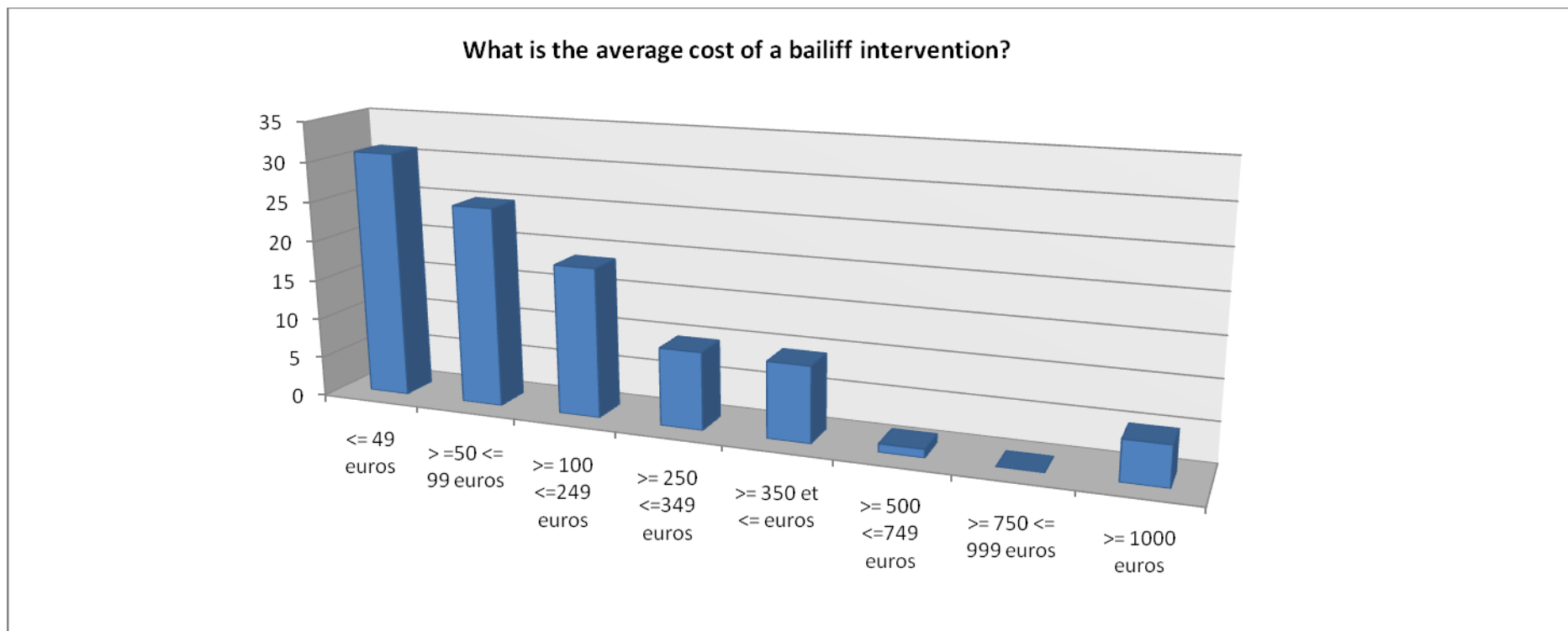
*Source: public questionnaire*

Thirty percent of bailiffs charge an average cost of 49 Euros maximum per task.

Fifty-six percent of bailiffs charge between 50 Euros and 349 Euros per task.

Just four percent of them charge fees up to 1 000 Euros.

Graph 14 - The average cost of bailiff's task within EU 27



Source: public questionnaire

### 4.3 Calculation method

The complexity of the varied methods used in calculating the fees and the different categories of fees translate into little transparency in the determination of bailiffs' costs.

The complexity is not justified even if it is possible to explain by the variety of acts a bailiff may be required to perform. The complexity is often the result of failure to reform the profession and modernize the fee structure.

The tariff's categories could be reduced and include more lump sums but this would mean overhauling the system at the European level.

Likewise, even if in most Member States bailiffs' fees are charged on the basis of a statutory tariff, some tasks are charged in addition to the tariff, with fees usually freely negotiated with the client. Sometimes the non scheduled fees are assessed solely by the bailiff, based on factors which cannot be checked and controlled easily by the parties (for example in France).

As a general principle, bailiffs' fees are determined based on the nature of documents to be served. In some Member States, time and distance, are also taken into account in the calculation of the bailiff's compensation.

Most Member States use least one of the three compensation calculation methods that follow:

- the overheads fixed fees,
- the graduated fees (calculated according to either the sum or the nature of the litigation);
- and the disbursements which are mostly travelling expenses.

These three calculation methods are quite often combined.

The clearest and most transparent calculation method is found in **Cyprus**. For every service of a document, there is a fixed sum, to which a fixed amount is added which is based on the distance (kilometres) between the place of service and the Court of the dispute.

<b>FEES OF PRIVATE BAILIFFS</b>	
<b>Distance between the place of notification of the act and the competent court</b>	<b>Fee (euro)</b>
Fixed sum for every document served	<b>2.75</b>
Up to <b>10</b> kilometres from Court of dispute	<b>0.90</b>
Up to <b>20</b> kilometres from Court of dispute	<b>2.75</b>
Up to <b>30</b> kilometres from Court of dispute	<b>4.50</b>
Up to <b>50</b> kilometres from Court of dispute	<b>7.00</b>
Beyond <b>50</b> kilometres from Court of dispute	<b>11.50</b>

According to Order 44 r. 1 of the Cypriot Civil Procedure Rules, bailiffs have the power to do all things necessary for the enforcement of a decision, for the seizure and sale of movable property upon receipt of the writ.

Bailiffs are public servants and as a result, any fee collected under the procedure of execution of a writ belongs to the State of **Cyprus**.

We can contrast the transparency and the simplicity of the calculation method of bailiffs' fees in **Cyprus** with the complexity and non transparency found in **France**.

In document to determine the bailiffs' compensation in **France**, four calculation methods are combined:

- "Droits fixe" Overhead for payment of work carried out according to the nature of the document as well as the statutory cost occurred. Overhead granted to the bailiffs are calculated by prime rate. The prime rate is settled at 2.20 Euros (before tax). The number of prime rate is assessed for each document, demand or legal form in accordance with the statutory tariff,
- "Droit proportionnel" proportional right for payment of debts collection and cash collection. The "Droit proportionnel" proportional right is calculated upon amounts collected or recovered out with a percentage which fluctuates in accordance with the liabilities. Contrary to all other factors of the bailiffs compensation, part of the proportional right is charged to the creditor,

- Right to start an action for payment of some necessary documents for procurement or collection of legally binding order,
- In some specific cases: Costs for conducting the case. Those costs are granted to the bailiff commissioned to manage the collection file in case of payment delays granted to the debtor sued by a judicial decision or any other legal binding order.

To all these previous sums, French Bailiffs charge in addition travelling expenses, disbursements and sometimes non schedule fees.

As can be seen, the French calculation methods are complex and often come from difficult to track dispersed rules which may or may not intersect and sometimes lack clarity. Needless to say that it is difficult to contest bailiffs' fees in France. More transparency would help citizens understand how they are calculated and enable them to contest abusive fees.

#### ***4.3.1 The particular case of Hungary and Czech Republic: bailiffs' fees partially paid with contingency fees***

In **Hungary** and **Czech Republic**, bailiffs' fees are partially calculated according to the result (profit) obtained by the bailiff.

In **Hungary** this is due to the fact that in case of non voluntary enforcement of a court judgment, the injured party has no other choice but to resort to a Bailiff to enforce the court judgment. A certain amount (EUR 324) has to be advanced by the party requesting the enforcement in debt collection cases.

Subject to the amount of the claim to be enforced, the bailiff is entitled to the following fees:

Amount claimed	Bailiff's fee
below EUR 400	EUR 16
between EUR 400 and EUR 4,000	EUR 16 and 3% of the amount above EUR 400
between EUR 4,000 and EUR 20,000	EUR 124 and 2% of the amount above EUR 4,000
between EUR 20,000 and EUR 40,000	EUR 444 and 1% of the amount above EUR 20,000
exceeding EUR 40,000	EUR 644 and 0.5% of the amount above EUR 40,000

In case of successful collection of the debt, the bailiff is also entitled to commission. The commission is calculated as follows:

Collected amount	Bailiff's commission
below EUR 2,0000	10 %
between EUR 20,001 and EUR 40,000	EUR 2,000 and 8% of the amount enforced above EUR 2,0001
above EUR 40,001	EUR 3,600 and 5% of the amount enforced above EUR 40,001

In addition to the above fee, the bailiff is entitled to a flat fee expense-compensation, which is fifty percent of the fee calculated according to the above table.

In **Czech Republic**, public officers (lawyers appointed by Ministry of justice but who are not employees of the courts) or courts employees which act as bailiffs have competence to enforce a court judgment.

Nevertheless, the beneficiary of a court decision who wishes to use the execution of a writ of its decision, has to put down, beforehand, a "Motion", a specific proceeding in front of the court and to do so, has to pay the following court fees :

- for any amount to recover inferior or equal in 563,509 € (CZK 15 000), the court fees are 11,271 € (CZK 300),

- if the sum is superior to 563,509 € ( 15 000 CZK), the court fees amount to two percent of the sum with a maximum of 1 878,46 € (CZK 50 000),
- for any other case the court fees are 37,5724 € (CZK 1 000).

The commission is calculated as follows:

Actually enforced amount	Fee
up to CZK 3 000 000 (approx € 109 091)	15 % of the amount, however not less than CZK 3 000 (approx € 109)
for exceeding amount with a maximum of CZK 40 000 000 (approx € 1 454 546)	10 % of the amount
for exceeding amount with a maximum of CZK 50 000 000 (approx € 1 818 182)	5 % of the amount
for exceeding amount with a maximum of CZK 250 000 000 (approx € 9 090 909)	1 % of the amount

Within the framework of an enforcement of courts decisions, the average cost of a bailiff intervention varies between 300 Euros and 2 000 Euros according to the value of the outstanding debts.

In case the bailiff fails to recover on the judgment, the creditor has to pay the bailiff a minimum fee of 127 Euros. According to the **Czech Republic Report**, this sum corresponds only to the expenses paid by the bailiff in the course of his duty.

#### ***4.3.2 The particular specificity in Hungary: preliminary procedure to the execution of a writ of a decision of justice for the foreign creditors proceedings***

In **Hungary**, in the case of involuntary collection from the losing party, the winning party can initiate judicial enforcement proceedings against him/her.

However, before doing so, creditors are obliged to collect the amount of their claim from the bank account of the debtor via bank encashment.

Unfortunately, foreign creditors can only make a use of the bank encashment system if they have a Hungarian bank account, since foreign bank accounts are not attached to the domestic bank encashment system.

Therefore, if the winning party does not have a (Hungarian) bank account, he/she might request the enforcement court to issue a transfer decree against the bank of the debtor. In the transfer decree, the court obliges the accounting bank to transfer the claimed amount to the bank account indicated by the winning party (usually such accounts are the bank accounts of the attorneys).

The creditor has to pay court fees in the amount of three percent of the claim (debt) limited to a maximum of 1 800 Euros.

If the balance of the debtor's account does not cover the claim, the plaintiff has no other choice but to file an application to the enforcement court and ask for the issuance of an enforcement sheet.

The issuance of such document is subject to a duty payment, i.e. the plaintiff must pay one per cent of the claim limited to a maximum of six hundred Euros.

Simultaneously with the issuance of the enforcement sheet, the court notifies the competent bailiff of the commencement of the enforcement procedure.

The bailiff sends an official notification to the plaintiff about his/her fee and expenses.

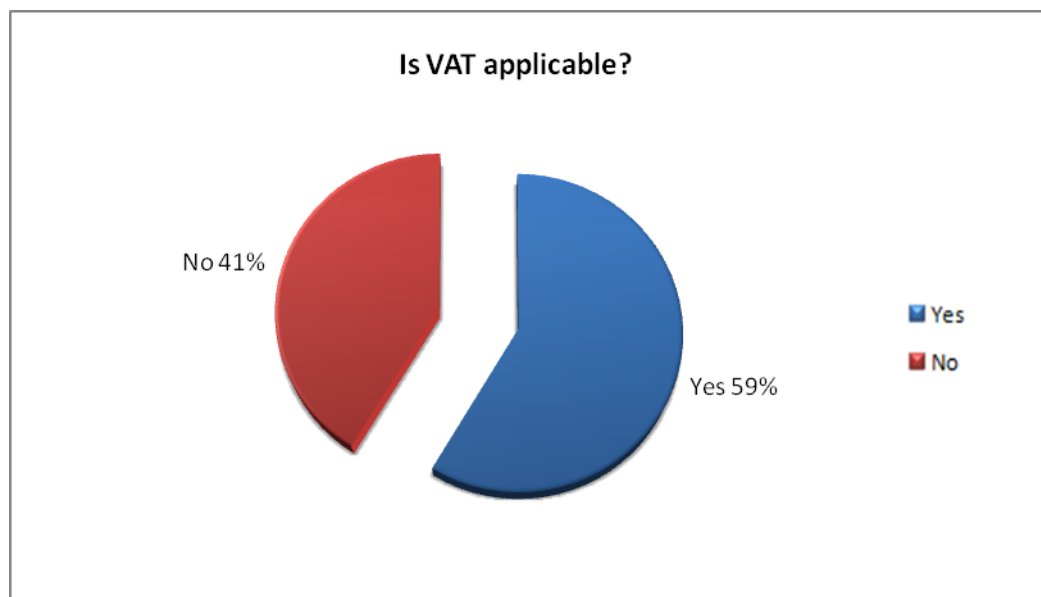
In the case of debt collection, the plaintiff pays the bailiff a fifty percent retainer of the fees and forecasted expenses up to a maximum of 330 Euros including a 6 Euros fee for service to the debtor.

The bailiff starts his or her work only after receiving the fee to be advanced.



### 4.3.3 Subjection to VAT

**Graph 15 - Subjection to VAT of the bailiff's compensation**



*Source: public questionnaire*

The application or not of the VAT to bailiff's fees is described in the majority of the country reports. VAT is rated:

- at 15 percent in **Luxembourg** and **Cyprus**,
- at 16 percent in **Spain**,
- at 17,5 percent in **United Kingdom**,
- at 18 percent in **Estonia**, **Lithuania** and **Latvia**,
- at 19 percent in **Czech Republic**, **Slovakia** and the **Netherlands**,
- at 19,6 percent in **France**, at 20 percent in **Slovenia**.
- No information is provided for **Romania**.

There is no VAT on bailiffs' fees in the other fourteen Member States.

### 4.3.4 *The influence of the number of parties on the cost of the document*

In most Member States, the number of parties involved in the proceedings has no direct impact on bailiffs' fees.

However in **Italy**, there is an exception where the number of parties' notifications will lead to high fees. Indeed, bailiffs' fees are determined by the number of the receivers to whom notifications are addressed.

#### ***4.3.5 The moment and the means of payment***

In most of Members States, bailiff's fees must be paid, in full or partially before service is carried out.

The practice of the retainer is common and often regulated.

In **Estonia**, the retainer paid by the creditor is reimbursed by the bailiff within ten days after the full payment of bailiff's fees by the debtor.

In some Member States, these fees can be adjusted during the process.

This is the case in **Cyprus** where every month, the bailiff sends for payment, the recapitulative invoice of all the documents, which he carried out during the aforementioned month, to the lawyer engaging his services.

As previously seen for other legal costs, recent reforms in Member States seem aimed at the simplification of payment procedures.

In the majority of Members States, bank transfers are authorized and the payment by bank card is allowed (in **Finland** notably).

**Italy**, however, is an exception as the payments of bailiffs' fees are made in cash.

#### ***4.3.6 The incidence of the cross-border nature of the dispute in the amount of bailiff's fees***

The application of the European instruments, among others the regulation 1348/2000 on the service of documents abroad, is not always implemented by the bailiffs.

In the majority of Member States notably in **Austria, Hungary, Finland, Italy, Portugal, Poland, Latvia, Lithuania, Czech Republic, the United Kingdom**, the

bailiff is not the competent authority implementing regulation 1348/2000 on the service of documents abroad.

In **Greece, Slovakia and Slovenia**, it is the Ministry of justice which is the competent authority. This lack of competent authority may explain partially the reason why bailiffs are not well versed in other Members States' regulations.

In contrast in **France, Belgium, Luxemburg and Netherlands**, bailiffs are the competent entities for the service of documents to and from foreign countries and as a consequence are better versed in other member states' regulations.

Some Member States, such as **France** have set up a specific tariff on the service of documents served in or from another Member State.

Any document from a foreign Member State that must be served in **France** is charged with the lump sum of fifty Euros.

When a French document is intended to be served in another Member State, the transmission of the demand to the public prosecutor's office or to the competent foreign authority (cf. art. 684 of the NCPC) made by the bailiff, is charged with a lump sum, expressed in base rate (16,5), either :

- 0,5 if the document is related to a pecuniary liability lower than 128 Euros : 18,15 Euros lump sum,
- or one if the document is related to a pecuniary liability from 128 Euros to 1 280 Euros (or in the absence of definite pecuniary liability) : 36,30 Euros lump sum,
- or two if the document is related to a pecuniary liability superior to 1 280 Euros : 72.60 Euros lump sum.

Based on reports that bailiffs had little knowledge of regulations in Member States other than their own, the new regulation (payment) (IT) n°1393 / 2007 of the European Parliament and the council, of November 13th, 2007 concerning the service of legal and extrajudicial documents in civil or commercial matters abroad, sets up guidelines for an academic and practical plan to improve the transmission of documents between countries.

To this end, it defines a framework for the communication between the local bailiff's entities appointed by Member States.

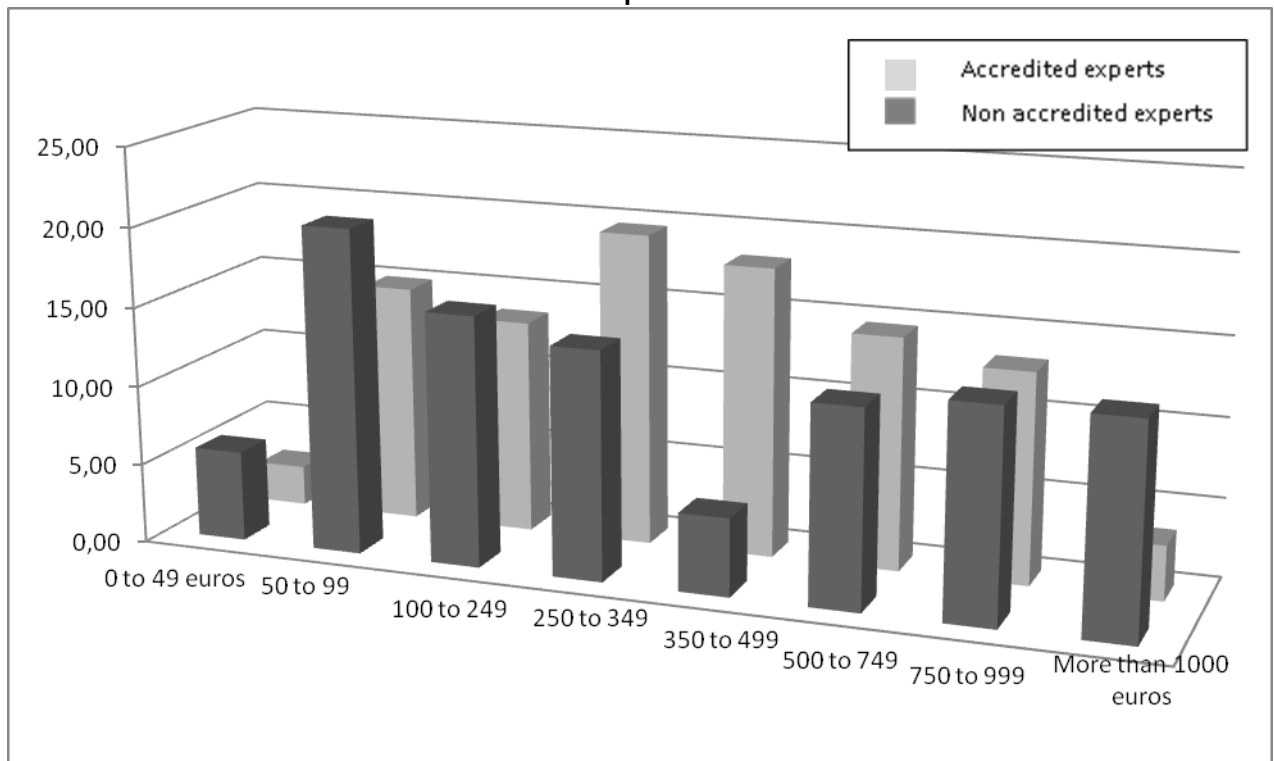
This regulation will overrule the regulation n° 1348 / 2000 of the council of May 29th, 2000 and will enter into force at the end of 2008.

## 5 OTHER FEES

### 5.1 Experts

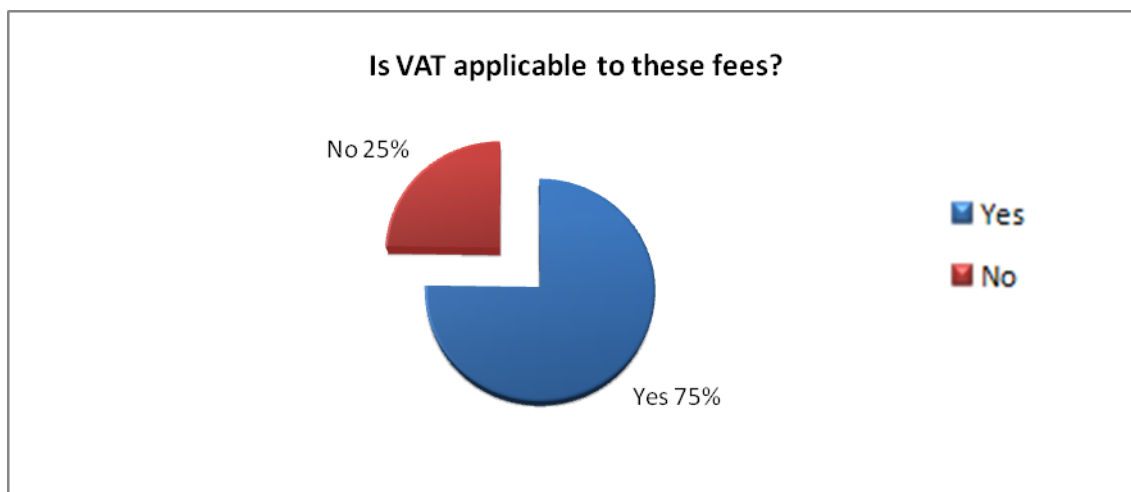
**Graph 16 - Experts Fees**

**What is the average amount of these fees for accredited experts and non accredited experts?**



*Source: public questionnaire*

**Graph 17 - VAT and Experts Fees**



*Source: public questionnaire*

Access to information concerning the experts' fees varies widely between Member States. The methods used for calculating such fees are also difficult to ascertain.

Experts' fees are seldom regulated.

When experts' fees are regulated, they are usually included in publications proposed by the Ministry of Justice that can be found either on an Internet website or in brochures. Since they are regulated, information about these fees can also be found in the legislation adopted on the matter. However, this type of information might appear rather technical and legislative sources are often quite difficult to access.

When the costs are freely set by the experts, access to information is more difficult. This is the case in **The Netherlands**, where experts' fees are not predictable and generally represent a significant portion of the litigation costs. This is an important issue for litigants because expert intervention may occur long after litigation has started and the resulting costs of the expert may place a litigant into a position where they feel that they have no choice but to continue what is becoming a very expensive litigation. Litigants need to be able to assess the need for experts and related costs from the outset so that they can make more informed decisions as to the appropriateness of litigation.

In most Member States, experts may be affiliated to organizations or associations. In some Member States, these associations regulate their members' fees. Even where

professional organizations do not regulate the fees of their members, they sometimes publish relevant information.

Thus in **Luxembourg**, experts are represented by the House of experts from the Grand Duchy. This Organization publishes information about the conditions under which experts' services may be used and lists a schedule of experts' fees.

In **Greece**, the only organization publishing experts' fees for their members is the Technical Chamber of Commerce. These experts' fees range from 800 to 1000 Euros, depending on the nature of the litigation. Information is also more easily accessed thanks to the list of experts - accredited or not - drawn up by the Ministry of Justice or the courts. With these lists, the individual can contact the experts listed and enquire directly about expert's fees.

In the **Czech Republic**, in particular, the regional courts are required to prepare such lists which are then centralized on a general list at the Ministry of Justice level.

In **Greece, Bulgaria, Hungary, Lithuania, Slovenia, Portugal, Slovakia, Spain, France, the Czech Republic, Germany**, and in **Austria** such lists are drawn up.

Experts appearing on such lists are usually accredited. Registration on these lists is subject to numerous conditions. In some Member States in particular, the expert is required to take an examination to obtain accreditation.

Thanks to these lists and the accreditation system, a professional body of experts is thus created ensuring a certainty as to the experts' competence. This issue has financial implications. For instance, an expert appointed for a matter in which he or she has limited expertise may spend more time on the case. Hence, accreditation or certification systems can prove useful.

However, in most of these Member States an expert who is not on the list may be appointed under certain conditions.

In the **Czech Republic**, for example, a court may appoint an expert who is not on the list of accredited experts in the following circumstances:

- no competent expert in the area in question appears on the list,

- the designated expert on the list is unable to fulfil the mission,
- the listed expert's costs appraisal for the mission is unreasonable.

An appointed expert, whose name is not listed, must take an oath before the court.

When such lists are not available, the individual may contact experts directly.

For example, in **Malta** there is a list which cannot be directly accessed by litigants. However, information on fees is available on the Ministry of Justice's website.

In **Finland**, information on experts' fees can only be accessed by contacting directly the expert.

In **Sweden**, there is no list of experts and experts are not accredited. Information on fees is available free of charge by contacting an expert.

As for most legal fees, experts' fees are hardly predictable if they are not regulated or controlled by official organizations.

The proportion of experts' fees in litigation costs varies greatly from one Member State to the other. Thus, the lack of transparency will have less impact in a Member State where the experts' fees do not represent a substantial portion of the legal costs. Moreover, in some Member States, it is uncommon to call on experts' services.

Thus, in **Finland**, the experts' appraisal is mainly used in litigations concerning child custody. In this case, the experts, called on to give their opinions are employed by organizations for childhood protection, and are, therefore, civil-servants who are not paid to give their advice to the court. In addition, when the expert is not a civil-servant, the fees are usually negligible considering the importance of the dispute. As a result, the lack of transparency regarding these expenses has limited consequences.

In **Belgium** in particular, experts' fees sometimes exceed the amount at stake in the dispute. It would be appropriate, therefore, for the experts to take into account the importance and value of the case when determining the means to implement.



Moreover, in some Member States, the information would be more accessible if it was centralized and written in terms easy for anyone to understand.

The experts' fees are fixed in a very heterogeneous way among Member States. In addition, within the same Member State, a distinction is made between legal or accredited experts and "private" experts. The method of remuneration usually varies between these two categories.

The experts' fees may be fixed according to a scale preset by law or the organization in charge of the experts, or set by the court itself or by the expert.

### ***5.1.1 The regulated experts' fees***

Fees can be regulated in a simple way, i.e. the rate set by the legislation can be applied without any other parameters.

In other cases, it is the court that decides of the remuneration. In this case, it is often bound by legislation.

Furthermore, in some Member States, only some fees are regulated, or only recourse to certain experts is regulated.

Finally, the method of calculation varies among Member States. They may include the followings factors:

- an hourly rate,
- a percentage of the case value,
- a minimum rate per act,
- a rate depending on the expert's area of expertise.

**Graph 18 – Who determines the experts' fee?**

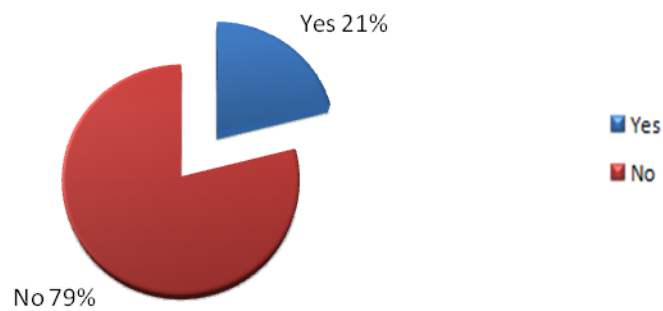
### Who determines the expert's compensation?



Source: public questionnaire

**Graph 19 - Impact of the type of litigation on the expert's fee**

### Do the fees depend on the nature of the litigation for a non accredited expert?



Source: public questionnaire

**5.1.1.(a) *The experts' fees are fixed by the court in accordance with the legislation***

In most Member States where experts' fees are regulated, they are fixed by the court at the end of the litigation. However, the flexibility of the court varies from one Member State to another.

For example, in **Bulgaria**, the expert's remuneration is determined by the court that appointed him/her and is based on (i) the complexity of the matter at hand, (ii) the qualifications required, (iii) the time spent, and (iv) disbursements.

The Supreme Court determines the rules for fixing the fees. The Court also determines the terms for payment of the fees and reimbursement of expenses.

In civil law, commercial law, family law, inheritance law and property law, the remuneration of the expert may not be less than 15.38 Euros. Beyond this minimum amount the complexity of the mission and expert's qualification are taken into account in the expert's remuneration.

In practice, experts' fees are higher than the minimum. Indeed, in litigation before the regional courts, and before the first Degree Federal court, experts' fees often exceed the minimum by 100 or 150 Euros.

The amount of experts' fees ranges from fifty Euros for a mission led by one expert to five hundred Euros for a mission led by three experts. When the dispute is a complex one, the court may appoint three experts. In this case, the court appoints one expert, and each party appoints an additional expert.

In **Hungary**, the expenses are determined by the court. This decision may be appealed by the expert or parties. The fee should be paid in advance by the party who has requested the expert's services.

The total cost of experts work includes the experts' fees, costs and expenses to attend the hearing.

The fees are set by the legislation. If the work of the expert does not appear in the list provided by the legislation, the hourly rate is 6.40 Euros. The fees are determined by the law depending on the nature of the expert's mission. The fee for a single mission ranges from 6.40 to 32 Euros per hour.

The expert may be reimbursed of his/her expenses on top of his fees. The expert's working time and the amount of fees is determined by the court based on a form filled out by the expert.

In Italy, the experts may receive fees, travel expenses, and a reimbursement of costs incurred during their mission. Variable costs or fixed costs and hourly rates are fixed by legislation. These scales are setting fees by reference to professional rates concerning the same area of expertise but adapted to the legal nature of the mission.

These scales determine fees paid based on the time spent for the mission and provide details of hourly rates, by making a distinction between the first hour of work and the following hours, by increasing the amount if it is a matter of urgency, by setting a maximum number of working hours per day as well as the possibility to go beyond this limit in case the mission is completed before the judicial authorities.

The hourly rate for an expert is set according to the value of the property being valued and determined with the objective information mentioned on the court decision whereas for a legal consultation the referential is the litigation amount.

Where it is impossible to apply these criteria, the costs are determined in proportion to the time needed to complete the mission.

The average amount of the fee is generally 5000 Euros.

The expenses are determined by the judge in two stages:

- the judge asks for funds to be deposited at the time the expert is appointed. This amount will be paid by the party who asked for the expert's services;
- the judge determines what is left to be paid to the expert once the report has been submitted.

The expert's remuneration can also be determined by agreement negotiated with the court.

In **Slovenia**, when the expert is appointed by the court, his/her fees are determined according to a point system - each point is worth: 0.459 Euros. The number of points allocated will vary according to the amount of work carried out by the expert.

In **Romania**, the court ordering the appraisal determines the experts' remuneration. The expert may ask for the reimbursement of his/her travel and accommodation expenses plus the payment of a daily allowance.

The costs of an expert's intervention are usually between 84 Euros and 198 Euros depending on the type of and duration of the mission.

If the expert finds that the fees set by the court are inadequate, he/she asked for them to be increased. This request must be supported and is subject to the parties' agreement.

However, in case of extra-judicial appraisal (i.e. who is asked for by a party dealing directly with the expert), the fees are set by contract.

In the **Czech Republic**, and in some cases, the costs are calculated in accordance with a fee schedule.

The average hourly rate is less than fifty Euros. This rate may vary depending on the nature of the mission.

The remuneration of the expert is fixed by the court if the appraisal is ordered by the Court or by the expert himself/herself if the appraisal has been requested by either party or both.

#### **5.1.1.(b) Regulated fees setting**

In **Germany**, experts' fees vary according to their field of expertise and are calculated on an hourly basis varying from fifty to ninety-five Euros per hour. Experts' fees are part of the proceeding fees.

In **Luxembourg**, experts receive a set hourly fee plus travel expenses and the daily allowance for functioning and subsistence. The experts' fees are based on the consumer index, and are periodically updated. For 2007 the expert fee was set at 55.15 Euros per hour.

In **Malta**, experts who are chartered accountants' fees charge a fee that represents one percent of the amount at stake in the dispute, with a minimum of twelve Euros and a maximum of 2 329 Euros.

For other expertise, fees also depend on the amount at stake:

- from zero to 1 165 Euros, fees are twelve Euros;
- above 1 165 Euros, fees amount to twelve Euros to which two Euros are added for every 233 Euros bracket;
- fees may not exceed 1 165 Euros.

These fees include the remuneration for writing the report, accounts and statements, for holding analysis sessions, and for attendance in court.

Moreover, the tariff provides that the court has discretionary powers to increase experts' fees, after hearing the interested parties.

When the expert is an architect and her or his assignment is land surveying or the valuation of real-estate property, his or her fee is established on the basis of either the size of the land or the value of the property.

He or she may also claim extra compensation for travelling to the site of the inspection and writing the report. These extra fees vary and may be determined either considering the nature of the expenses (seven Euros to reimburse travelling expenses) or the time spent (hourly rate).

The remuneration of architects appointed as arbitrators may not exceed 116 Euros for each point of law studied. Fees for calculation of the amount of damages amount to a maximum of 233 Euros.

Fees amount to thirty-five Euros for the first hour of hearing before the court or arbitrator and thirty-one Euros for each additional half-hour.

In **Poland**, experts' fees are also regulated when the expert intervenes by order of the court.

#### **5.1.1.(c) *Distinction based on experts' specialization***

In some Member States, experts' fees are only regulated in certain fields.

In **Austria** for example, special tariffs exist for doctors, anthropologists, dentists, veterinarians, medical analysis experts and motorcycles experts.

#### **5.1.1.(d) *Distinction based on the categories of fees***

In some Member States, a distinction is made between categories of experts' fees. Only certain categories are regulated.

In **Cyprus**, the legislation provides for a maximum amount which can be paid to an expert for an appearance before a Court. According to this legislation, the criteria for determining the amount of compensation owed experts to experts are the time spent on travelling to the Court and returning to their place of residence and the time spent on attending Court. This amount corresponds to ninety Euros maximum for the first appearance before the court and forty-five Euros for the following appearances.

For all the other missions of the expert (for example, writing of a report), legislation does not set any fees.

This system appears straightforward and transparent. However, this is mitigated by the possibility given to experts to ask the parties for a contribution in addition to the maximum fees set by the legislation.

Experts may ask the parties for an extra payment in addition to the maximum fees set by law. Medical experts often resort to this possibility and usually ask much higher fee (approximately 900 Euros)

When she or he refuses such an agreement, the plaintiff cannot be assured that the medical expert is going to come to the hearing, except if she or he asks the Court to order the expert to do so, which could be prejudicial to the expert's testimony.

### **5.1.2 Fees set by the Judge**

In **Denmark**, experts' fees are not set by the legislation but by the Court according to the particular circumstances and the mission of the expert. For disputes regarding real estate, average expert's fees amount to 1 300 Euros.

#### **5.1.2.(a) Experts' fees set by association organization**

In some Member States, experts belong to institutions or associations by which they are sometimes employed or that allow them to be designated as judicial experts by Courts.

In **Estonia**, different type of experts may intervene in the course of a litigation and can be:

- A forensic expert or other qualified person employed by a State forensic institution, whose duty is to conduct examinations. Currently, there are two State forensic institutions in Estonia: The Estonian Forensic Medical Expertise Bureau and the Estonian Forensic Centre under Police jurisdiction;
- An officially certified expert listed on the list of officially certified experts kept by the Ministry of Justice.
- Or another person with specific expertise appointed by the court. The court may appoint a person as an expert if the person has the necessary knowledge and experience to provide an opinion. The court must consider the parties' opinions when appointing an expert. If an officially certified expert is available to conduct the analysis, then other persons can only be appointed as experts for specific reasons.

The procedure for calculating fees and compensation for experts' expenses is different depending on whether the examination is conducted by an officially certified expert or another expert.



The costs of an examination conducted by a legal expert are determined by the legal institution taking into account time and resources spent on the examination and the costs incurred by the expert. An invoice presenting these costs must be attached to the expert's report.

Hourly rates depend on the expert's mission. Average fees are available online. Hourly rate for The Estonian Forensic Science Institute varies from 9.50 Euros to 46.50 Euros. For example, expert fees for a handwriting analysis are 11.50 Euros. The fees for forensic medical, biological and chemical examinations conducted in The Estonian Forensic Medical Expertise Bureau are usually set prices.

Costs related to examinations conducted by officially certified experts and other persons who are appointed experts by the court must be compensated in accordance with the code of Civil Procedure.

In civil court proceedings the costs related to experts who are not employed by a State forensic institution consist of:

- The expert's fees set according to the nature of the mission. Minimum and maximum hourly rates have been fixed by government. In order to set this amount, the court takes into account: the expert's qualification, the mission's complexity, the expenses incurred by the use of specific instruments and the particular circumstances which led to the expert's appointment. The minimum hourly fee of an expert is tenfold the general minimum hourly wage established by the Government. The maximum hourly fee of an expert is forty-fold the general minimum hourly wage. The general minimum hourly wage is 21.50 EEK (i.e. 1.40 Euro) for 2007, thus, experts fees range between fourteen and fifty-six Euros per hour;

Costs to be reimbursed to the expert:

- costs related to the preparation and compilation of her or his expert's opinion up to twenty percent of the expert's fee ;
- travelling expenses set by law;
- other costs arising from court proceedings (accommodation and meals).

When the proceeding takes place outside the place of residence of the expert, she or he will be compensated for the travel and accommodation expenses and paid a daily allowance similar to those paid to employees sent on business trips.

The minimum daily allowance is three Euros. The minimum compensation for travelling expenses is thirteen Euros per day

In **Lithuania**, experts' fees consist of:

- compensation for the time spent on their mission,
- compensation for travelling and daily expenses, and
- compensation for the work of analysis.

Compensations for the time spent on the mission, travelling and daily expenses are regulated.

Compensation for the expert depends on the type of expertise required. When the expert is appointed by the legal forensic institute (this is actually what usually happens), her or his fees depend on the regulations adopted by the institute.

Fees do not depend on the type of dispute. For example, when an expert from the Forensic Science Centre of Lithuania ("FSCL") is appointed, her or his fees will be calculated as shown here after (C standing for compensation):

$C = (V \times L \times I) + ((V \times L \times I) \times 18\%) \text{ VAT}$ , where:

*V* - average hourly rate for an FSCL employee,

*L* - hours spent for the expertise by the expert, and

*I* - coefficient of annual expenditures.

However, when a private (not officially certified) expert is appointed by the court, her or his fees will depend on an agreement concluded between the expert and the Court. The fees may then depend on the nature of the dispute, especially if it is quite complex.

Generally, experts' fees vary from 100 to 499 Euros.

In **Luxembourg**, the Chamber of experts provides parallel services to the legal system with a radically different fee system. This fee system is based on the expert's degrees and experience. Experts charge an hourly fee ranging from 64.81 to 120.20 Euros, depending on the type of examination required. This system includes the costs for technicians working along with the experts and their secretaries.

The Chamber's fee system is indexed to that of the Grand Duchy of Luxembourg's Order of Architects and Consulting Engineers.

In other respects, despite not having relevant diplomas, certain particularly qualified individuals can become experts for these institutes

Thus, the differences of salary prompt some experts to refuse interventions before certain courts in order to favour private examinations.

In **Latvia**, experts belonging to non-governmental institutions generally have their wages reimbursed within the institution.

In **Finland**, if the expert analysis is handled by an authority or a public office holder, they cannot receive any compensation except in specific cases.

#### **5.1.2.(b) Fees freely set by the appointed expert**

In many Member States, fees are freely set by the expert, sometimes with reference to tariffs. In most of those Member States, these fees can be controlled by the Court.

In **Belgium** for example, there is no pricing schedule for experts set by law or executive regulations. Thus, experts freely set the amount of their fees.

Nevertheless, they often refer to schedules set by experts' associations specialized in a specific field (such as real estate experts associations) or with reference to the fee they would charge if they were intervening as private experts in these fields.

These fees can nevertheless be reviewed by the Court since the Code of Civil Proceeding provides that the fees are set according to their qualifications, the complexity of the case and the value of the claim, etc... Therefore, amounts of fees are quite often reduced considering these criteria.

The amount of fees is submitted to the agreement of the parties. Within fifteen days of the submission of the report, parties are generally invited to give their agreement on the amount of fees and compensations asked by the expert (article 984 of the Judiciary Code).

When an agreement is reached, the amount of the fees is borne by the party who requested the expert's intervention or the party who resumed it if it was ordered by the Court. At first, the costs will thus be borne by the party who requested the expert analysis, that is to say the most diligent.

When a no agreement is reached after the delay above mentioned, or in the absence of an express and notified agreement, the judge, to whom the matter has been brought by the expert or one of the parties, can set the amount of fees after hearing the expert and the parties in the Chamber council. Judgment will be enforceable against the parties who requested the expert's intervention or against the parties who resumed if it was ordered by the court.

The same experts are nevertheless quite often appointed by the same Court, so that they get an average salary in proportion with the market value.

Costs of the intervention of an expert are particularly important. They sometimes prevent parties taking legal action.

In **Belgium**, a parliamentary bill adopted by the Chamber aims at renewing the experts' intervention during proceedings. The objective of this new piece of legislation is to limit recourse to experts and the extent of expert intervention. Some professional have already noticed that the new procedure would not necessarily have a positive impact on the costs of proceedings because there are still formal and substance issues likely to multiply objections and thus to lengthen the proceedings. Nevertheless, the new legislation will may provide for better information of the parties on the approximate cost of this investigative measure and its payment from the beginning of the proceedings.

In **France**, recourse to an expert is very common, especially in disputes regarding construction and engineering or when technical or accounting investigations are needed to solve the case.

Experts' fees are controlled by the Courts but may sometimes be very substantial. The order appointing the expert sets the sum on account of the expert's fees, which has to be paid to the Court. A special judge ("Juge Taxateur") decides whether or not to accept the expert's proposal for her or his fees. She or he may decide to reduce the expert fees but only after receiving the expert's observations. The special judge can also decide to raise the expert fees, and which party will bear this increase.

Finally, the expert may ask for additional fees, in the course of her or his intervention and she or he may also ask the full or staggered payment of her or his fees.

Fees vary according to the nature of the dispute. Fees are calculated on an hourly basis and may vary from one hundred to one hundred and fifty Euros per hour on average. The highest rate per hour belongs to medical expert fees, and is around 180 Euros per hour (Before tax). It is quite usual to have insurance examination fees around 6 000 Euros (Before tax) or NTIC (computer science and telecommunication) expertise fees around 4 000 Euros before tax.

In **Greece**, the law does not regulate experts' fees so that the fees are set freely by the experts. However, if a dispute arises between a litigant party and an expert regarding the fees, such fees will be determined by a court taking into consideration the work the Expert carried out and the required scientific knowledge.

The Technical Chamber of Commerce publishes its members' fees; they charge between 800 and 1 000 Euros according to the nature of the dispute.

In **Lithuania**, when a non accredited expert is appointed, her or his fees may depend on an agreement between her or him and the Court. The remuneration then depends on the nature of the case, in particular if it is complex.

In the **Netherlands**, it is almost impossible to determine the costs of an expert's intervention in advance. Experts set their fees freely based on considerations such as the time spent, the information to gather, and their field of expertise. The average hourly rate is about 130 Euros. A simple straightforward analysis will cost about 1 500 Euros. An analysis in a complex dispute regarding insurance matters will cost about 15 000 Euros.

In **Slovakia**, expert's fees are determined by agreement between the expert and her or his client. If the parties fail to reach an agreement, relevant provisions of the regulation on Tariff Fees shall be used.

The pricing schedule provided by law is determined as follows:

- on the basis of the number of hours spent,
- by a percentage from the initial value of the object to analyze, and
- possibly by a flat fee depending on the field of the mission and number of acts done by the expert.

These fees can be increased, in cases of special circumstances or emergencies. The fees can also be increased by up to fifty percent, if the client requests the immediate performance of the act. On the other hand, the fees can be reduced, or not be paid at all, if the expert's intervention was only partial, poorly conducted or late. The average amount of experts' fees is between 150 and 450 Euros. The expert is also entitled to claim the reimbursement of her or his expenses (three Euros per hour for travelling expenses, if the intervention needs to be conducted in a place other than the one where the expert usually works).

In **Romania**, extra-judiciary (performed by experts or other specialists in a certain field, at the request of natural or legal persons regarding situations that are not directly related to the judicial activity) experts' fees are set by agreement between the parties.

In the **United Kingdom**, expert's fees are always freely set by the experts. These fees generally vary from 100 to 249 Euros.

In **Sweden**, experts designated by a litigant freely set their fees. These fees must be borne by the litigant who requested the expert's intervention. The court will usually

order the losing party to reimburse the winning party its costs to the extent they were reasonably incurred to safeguard that party's interest when the expert's examination was conducted in the interest of both parties. The average hourly rate is usually between fifty and ninety-nine Euros.

In **Latvia**, private experts are free to set their fees.

In **Spain**, the various legal experts, who may be called on to intervene during legal proceedings, are free to set their own fees. This is also true for the experts designated by the parties. The litigant can nevertheless bargain with the expert she or he designated whereas the fees of a legal expert are not negotiable as the party does not choose her or his intervention. Legal experts will nevertheless set their fees according to specific professional criteria which may have been established by the professional association they belong to. It must be noted that forensic pathologists' fees are paid by the State when they have to evaluate personal damages caused to the victim of a car accident or of an assault. These experts are generally physically present on the Court's premises where they meet the victims in order to write a medical report which will later be used by the victim to obtain compensation (via insurance companies) from the opposing party.

In **Estonia**, experts other than legal experts are remunerated on the basis of their claim. The court sets a thirty days period for submission of the sum total of the claim. If the court does not set such a limitation period, the experts can submit their claim within one year.

In **Finland**, experts' fees are freely set by them, according to their hourly rate, their rate per act, their daily rate or a lump sum.

#### **5.1.2.(c) Conclusion**

Fees for experts' intervention are a source of costs which does not carry the same weight in all Member States.

In **Finland** in particular, experts are rarely called on.

In **Bulgaria**, experts' fees vary from fifty Euros for the intervention of one expert to 150 Euros for the intervention of three experts.

In **France**, the costs of experts' intervention are particularly high. Thus, it is quite common to have experts' fees around 6 000 Euros in insurance matter or experts' fees around 4 000 Euros in NTIC (computer science and telecommunication) matters.

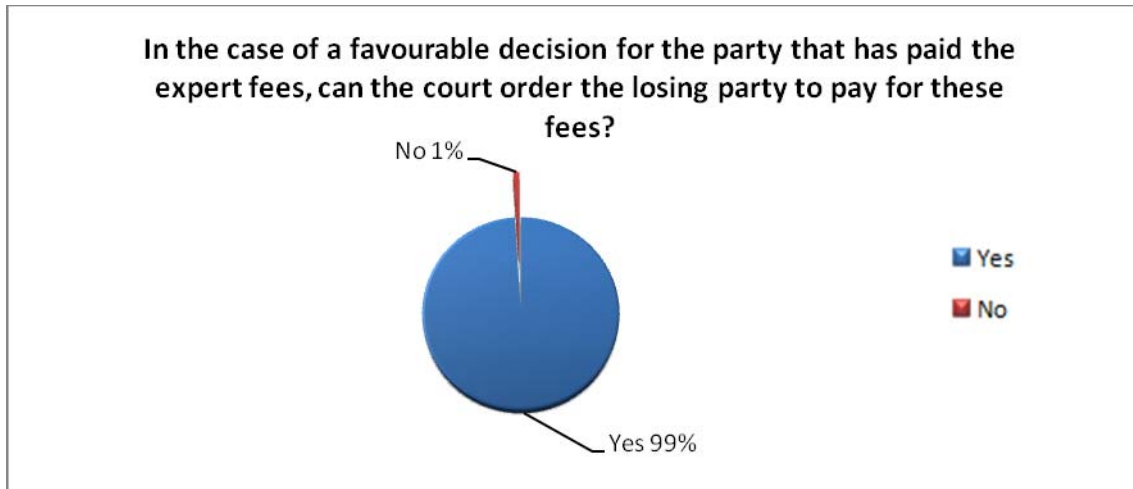
In **Italy** as well, the costs of experts' intervention generally amount to 5 000 Euros. These disparities are more significant than the differences between the average income in these two Member States.

The hourly rate varies significantly between Member States. For example, the hourly rate can vary from 6.40 Euros in **Hungary** for experts who are not certified to an hourly rate between 100 and 249 Euros in the **United Kingdom** or between 150 and 450 Euros in **Slovenia**.

### 5.1.3 The party paying for expert fees

**Graph 20 - Reimbursement of expert fees**





Source: public questionnaire

**Graph 21 - Support of expert fees by the court**



Source: public questionnaire

When it comes to experts' intervention, determining which party will have to bear the costs by law is crucial in litigants' decision to take legal action.

In the vast majority of Member States, expert fees are borne by the losing party which reimburses costs potentially advanced by the party who won. In case of mixed success, the costs will be divided up between the two parties.

In most cases, the party who requested the expert's examination to the court, or in the interest of which the expert's analysis is conducted, has an obligation to make a down payment to the expert.

Finally, in some Member States, fees are borne by the court or the State.

***5.1.3.(a) The costs borne by the most "diligent" party reimbursed if she or he wins the trial***

Thus, in **Belgium**, Article 990 of the Judicial Code provides the right for experts to postpone the performance of their mission until the most diligent party has deposited a down payment at the Clerk's office to ensure, in a variable proportion, the payment of their fees and reimbursement of their expenses. Any other mode of down payment compels the expert to return the payment.

In case of an objection from a party or when the party who has an obligation does not pay the provision, the judge who ordered the expert's intervention may issue an enforceable judgment equal to the amount that she or he determines following a request submitted by the most diligent party, after possibly hearing comments from the interested parties in court chambers.

Such a decision is not open to judicial review.

The party against whom the decision is delivered must then place the amount required in escrow with the Clerk's office. This sum remains deposited at the office until experts' fees and expenses have definitely been taxed or that the parties have declared their agreement on amounts, if the case is settled.

The experts then take their due amount, out of the moneys placed in escrow. Any remaining balance is returned to the party who deposited the payment.

When the examination involves considerable expenses for the experts, the competent judge may, upon motivated request from the experts, allow them to take out, during the course of their mission, a portion of the payment deposited in the Clerk's office.

However, in practice, experts freely ask the most "diligent" party to make down payments directly to them. Sometimes experts refuse to submit their final report as

long as their fees have not been fully paid. This is contrary to the law which states that fees must be deposited at the Clerk's office and that the expert cannot accept direct payment. However, the no sanction is attached to the violation of the law. As a result it is seldom respected. Parties do not want to upset the expert and therefore readily agree to pay directly the down payment.

**5.1.3.(b)      *The cost borne by the party who requested the expert's intervention***

In the **Czech Republic**, the expert is paid by the party requesting her or his intervention. This amount is reimbursed if she or he wins the case. The parties may request the intervention of an expert in the preliminary stages. A down payment is generally asked to the party who requested the intervention.

In **Denmark**, the costs are borne by the party who requested the expert's intervention. There are no cases in which the costs are paid by the court. The court may order the reimbursement of these costs by the losing party.

In **Greece**, the party who won the case may be reimbursed expenses incurred in connection with the expert's intervention. This party must produce evidence of these expenses before the court. The court may also decide that the costs of intervention of a non accredited expert will be reimbursed to the successful party.

In **Hungary**, experts' fees are advanced by the party who benefits from the expert's intervention.

The parties can decide to call on a non accredited expert to prove their claims. However, the findings of non accredited experts are regarded as personal statements of the party who resorted to such an expert.

In **Lithuania**, if the expert's intervention was requested by one or all the parties, they have to pay a deposit covering the expert's fees to the court. This deposit corresponds to the total amount of expert costs. If the expert's intervention was requested by both parties, they must pay an equal share. With the exception of cases expressly provided by law, there should be no direct payments from the parties to the experts. If the appointment of an expert is necessary for the plaintiff,

because she or he has requested it or because the court decides so, the expert has a right to collect an allowance from the litigant. The same goes for the defendant. The expert must be paid before she or he submits the report to the court. The court in its decision determines which party will ultimately bear the costs, usually the losing party. The court never pays the expert. The payment of expenses is generally subject to an advance by the party or by the court. When the court ordered the examination at the request of either party or to support the assertions of a party, the court may order the said party to pay a guarantee. The portion of the expenses not covered by this guarantee is paid by the State which has a right to ask the parties to reimburse these expenses as part of the proceedings costs. When the expert intervened on the request of a party, the payment is usually made at the end of the mission. The losing party will generally be sentenced by the court to reimburse the expenses of the party who has made the advance. The court may deny this reimbursement if the expert's intervention proved useless. Finally, the court only allows reimbursements to the tune of the fee schedule provided by the court.

In **Romania**, the party requesting the expert's intervention from the court must bear the costs and pay the sum determined by the court within five days. In case of refusal, the evidence cannot be taken into account by the court. The party who requested the expert's intervention, and has therefore paid the fees, may recover these costs from the opposing party if the latter is dismissed. When the court partially accepted the claims of the parties, it decides on the distribution of costs between them.

In the **United Kingdom**, if the payment is made after the expert has submitted her or his report, a retainer is usually paid. If the court rules in favour of the party who paid the retainer, the court may order the losing party to reimburse these costs.

In **Latvia**, the court requires the losing party to reimburse experts' costs to the opposing party only if the latter requests it and if these costs are reasonable.

In **Spain**, in practice, the legal expert, once appointed at the request of one or both parties, and before writing the report for which her or his services were solicited, may submit expressly a written request to the court, within three days after her or his appointment, to have a deposit paid. The request is then forwarded to the party who requested the intervention so that she or he can make the payment either

directly to the expert on her or his bank account, or on account of the Deposit and Consignment Office of the Court which judges the dispute within a maximum five days. If after this time limit the payment is not made, the expert will not be bound to submit the requested report. The party ordered to pay the costs will not only assume the costs and fees of professionals by whom she or she was defended, but also those of the various professionals who intervened during the proceedings to represent and defend the opposing party, such as lawyers, prosecutors and experts. Article 241 of the Code of Civil Procedure stipulates expressly that to lawyers' and prosecutors' fees included in the costs are added fees of the experts who intervened at the request of the opposing party, whose claim was assessed. This party must not only bear the expert's fees but her or his expenses such as the sums paid to official organizations responsible for the accreditation of the documents attached to the expert's report. However, Article 36 of the Law on free legal aid provides that if the party ordered to pay the costs was granted free legal aid, she or he will be under an obligation to pay the costs of the opposing party as well as her or his own, if during the three years following the judgment putting an end to the proceedings, her or his economic situation improves, to exceed twice the minimum inter-professional wage for natural persons and three times the annual minimum inter-professional wage for legal entities.

***5.1.3.(c) The costs borne by the court ordering the expert's intervention reimbursed by the parties***

In the **Czech Republic**, the expert is paid by the court which ordered her or his intervention. This amount is reimbursed to the court by the losing party. The examination of an expert can be requested by the parties in the pre dispute stage.

In **Estonia**, experts appointed by the court are paid by the court. The court orders the reimbursement to the party ordered to pay the costs of the dispute; usually the losing party. However, the distribution is done on a case by case basis. The party ordered to pay the costs must receive the court's decision about the charges within one year after the judgment.

The court may request an advance payment from the party who requested the appointment of an expert or both parties if the intervention of the expert was decided by the court. If the parties do not pay a down payment, the court may deny

the parties' requests. The court must pay the expert it appointed regardless of payments made by the parties as an advance, even if its decision condemns one party to pay these costs.

In **Slovenia** and **Slovakia**, when the court has ordered the expert's intervention, it must bear the related costs. These costs will later be borne by the losing party.

In **Slovakia**, the payment of experts' fees is generally subject to an advance by the party or the court. When the court ordered the expert's intervention at the request of either party or to support the assertions of a party, the court may request payment of a guarantee by the concerned party. The portion of the costs not covered by this guarantee is paid by the State which has a right to ask the parties to reimburse these costs as part of the proceedings' costs. When a party called on the expert's services, the payment is usually made at the end of the mission. These costs will be borne by the losing party or distributed between the two parties. The court may also deny the reimbursement of these costs to the party who advanced them if the expert's intervention proved useless.

#### ***5.1.3.(d) The down payment charged to the party designated by the court***

In **France**, the court determines which party is under an obligation to pay the expert's costs, possibly in the form of down payment to the expert (usually the party who requested the expert's intervention to the court). This payment is designed to cover the expenses of the expert: printing costs (between 0,2 and 0,5 Euro per page), correspondence costs (the public tariff in force), travelling expenses, and costs for opening a case (about sixty Euros).

The down payment is made to the office of the court where the expert's intervention is ordered.

The costs are borne by the party who requested the expert's intervention unless the court decides otherwise (when this party wins the case in particular). Indeed, these expenses are part of the costs and are generally borne by the losing party. Moreover, according to the legislation, it is prohibited for experts to receive remuneration directly from a party, in any form whatsoever, even as reimbursement

of expenses, except by order of the judge. The judge may also decide that the costs will be shared between the parties.

In **Luxembourg**, when the judge appoints the expert, she or he sets the amount to be paid in advance by the parties. Once the expert began her or his mission, she or he may ask for additional advances. When the expert has completed the mission, she or he makes her or his report to the court. If the parties agree on the amount to be paid to the expert or the amount determined by the judge, the judge authorizes the payment of the expert from the funds advanced by the parties. The judge orders either the reimbursement of the remainder of the advanced sum or one party to pay the expert's additional fees. The expert only presents her or his final report when her or his costs have been fully covered. The judge usually orders the losing party to reimburse the costs advanced for the payment of the expert's fees by the winning party, and to pay additional fees if necessary. The judge may also order that the costs be shared between the two parties.

In the **Netherlands**, the expert is appointed by a party directly, which will then have the burden of paying for her or his intervention and to whom these expenses may be reimbursed if he or she wins the trial. A party may also request that the court orders an expert's intervention.

The experts are free to ask for a retainer. In civil matters, when the court and both parties asked the expert to answer a specific question, the court asks the parties to make a security deposit.

The court may decide that experts' fees will be borne by one of the parties, usually the losing party. Sharing the cost between the parties is also possible. This will also depend on the outcome of the report. The court freely decides on apportionment.

The party who resorted to an expert before the beginning of litigation may request reimbursement of these costs by the losing party.

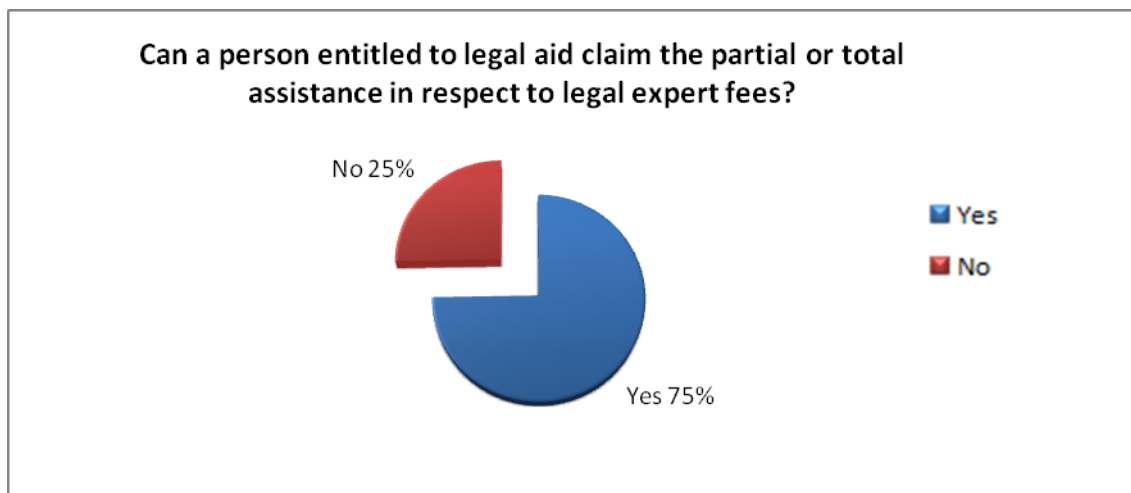
The winning party may only be fully reimbursed for expenses if the expert was appointed by the court. This party is only partially reimbursed of the expenses when he or she personally called on the expert.

### 5.1.3.(e) *The experts' fees covered by public funds*

In **Lithuania**, if the expert's intervention was decided by the court, the expert is paid by public fund.

### 5.1.4 *Costs covered by legal aid*

Graph 22 - Experts' fees and legal aid



Source : public questionnaire

The coverage of experts' fees by legal aid differs in the Member States.

In some Member States, legal aid covers experts' fees in the same way as the other costs it covers. This is the case in **Romania**, the **United Kingdom** and **Bulgaria** if the beneficiary requests it, **Denmark**, **France**, **Italy**, **Lithuania**, **Luxembourg**, **Malta**, **Slovenia**, **Belgium** and **Spain**.

In other Member States, experts' fees are not usually covered by legal aid as in the **Netherlands**.

Finally, in **Sweden** for instance experts fees are covered up to 1 070 Euros. Thus, costs beyond this amount are borne by the beneficiary of legal aid.

In **Cyprus**, there is no provision in the legislation concerning the coverage of experts' fees by legal aid. Legal aid covers legal experts' interventions but not private experts'. If the court orders an expert's intervention and appoints an expert, the beneficiary may ask the competent court or judge to have the expert's fees covered



by legal aid. As regards private experts' interventions, the beneficiary of legal aid may ask the court to have her or his expenses covered.

In the **Czech Republic**, legal aid does not cover the costs of an expert's intervention when it is requested by a party. Legal aid, however, covers costs related to experts' interventions required by the court.

In **Slovakia**, the experts' fees are not covered by legal aid because these costs are part of proceedings costs. Thus, the party must benefit from an exemption of proceedings fees to be exempted from payment of experts' fees. However, it is likely that the person who is granted legal aid will be exempted from experts' fees by the Court itself.

In **Germany**, the granting of legal aid means that litigation costs are staggered. Legal aid covers all proceedings costs, including experts' fees.

In **Estonia**, legal aid may cover experts' fees if the court decides so according to specific circumstances. In general, experts' fees are rarely covered by legal aid, except in cases where the expert's intervention is absolutely crucial to the dispute.

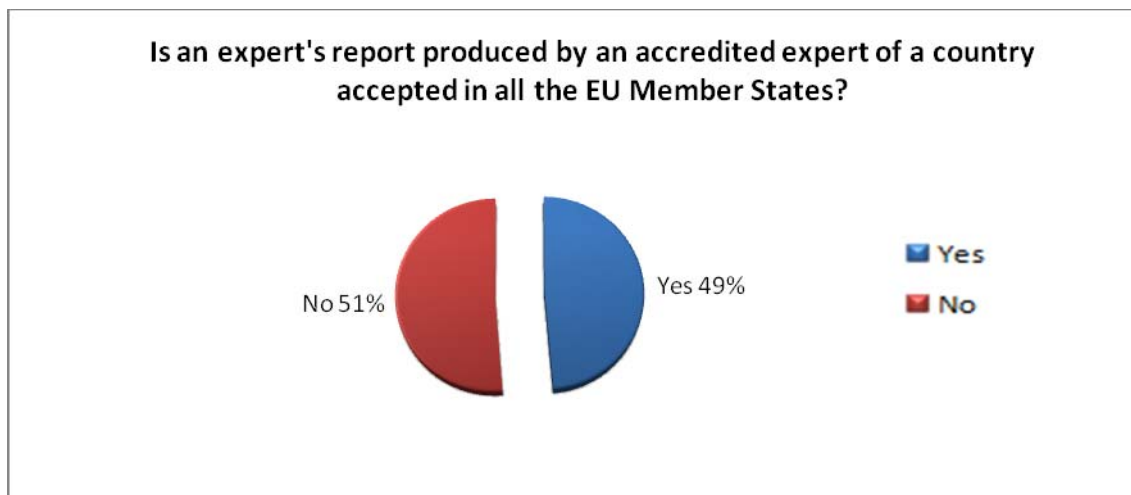
In **Finland**, there is no restriction for legal aid as regards experts' fees. The only limitation is that the costs covered by legal aid should not be of minimal importance to the beneficiary. The decision granting legal aid determines which costs will be covered by it.

In **Hungary**, the party receiving legal aid is entitled to exemption or suspension of legal expenses including experts' fees.

In **Lithuania**, the expenses are borne by the losing party. If it benefited from legal aid, costs are supported by the State.

#### ***5.1.5 Cross-border aspect***

**Graph 23 Expertise and legal aid (EU27)**



*Source: public questionnaire*

In cases of cross border litigation two main questions can be asked in respect to experts. First, can an expert from one Member State automatically be an expert in another Member State? Second, can a report from an expert in one Member State be recognized in another Member State?

From these questions stem a third question directly relevant to this study. Are citizens aware of the possibilities to use existing reports or expert from their Member State in litigation taking place in another Member State?

This is important because expert fees can be high and freedom of movement of experts and unhindered circulation of their reports may save considerable time and money.

The answers to these questions are far from clear.

Difficulties often arise for cross-border litigants when the object of the expert's analysis is located abroad or when an examination conducted by an expert in another Member State is necessary for a party to prove her or his claims.

#### ***5.1.5.(a) The examination conducted by a foreign expert***

In most Member States, there is a distinction between the intervention of an expert sought by either party unilaterally and the intervention of an expert ordered by a

court. Basically, the report from an expert as ordered by the court will have more evidentiary value than that commissioned by one of the parties.

When the experts' analysis is conducted in another Member State, the issue is to decide whether it should be considered as a unilateral or legal analysis.

In some Member States, experts' analysis in another Member State will automatically be considered as a piece of evidence by the court.

- **The admission as evidence**

In **Malta**, all reports of experts made in another Member State are considered as evidence.

In other Member States, admission of an expert's report, even as evidence, is subject to conditions.

In **Slovenia**, the admission as evidence, of a report by an expert from another Member State is left to the discretion of the court and if admissible the weight given to such evidence will also be freely determined by the court.

- **The admission of experts' analysis conducted abroad at the discretion of the court**

In some Member States, the choice of admission of an analysis conducted by an expert from another Member State is subject to the discretion of the court. It is so in **Slovenia** as indicated above.

In the **Czech Republic**, the admission of an analysis conducted by an expert accredited in another Member State will not be automatically recognized as a valid expert's analysis.

Similarly, in **Germany**, reports and findings of experts accredited in other Member State can be used by the court at its discretion.

In **Luxembourg**, there is no specific provision on reports from abroad. It would appear that, again, this decision will be left to the wisdom of the court.

- **The admission of the report depending on the person who ordered it**

In **Finland**, the question of admission of an expert report depends on how the intervention of the expert was sought. Indeed, the report will be admitted as a report in **Finland** if the expert's intervention was ordered by a court. In contrast, if the expert's intervention was requested directly by one party, the report will only be considered as a simple deposition.

- **The translation**

In **Greece**, an expert's examination carried out by a person from another Member State must be translated into Greek in order to be admissible before a court.

- **Automatic admission of an expert's report from another Member State**

In the **Netherlands**, a report prepared by an expert from another Member State will be accepted as one prepared by an expert in the Netherlands when it is relevant to the dispute in question.

In **Slovenia**, reports produced by an expert from another Member State are recognized but rarely used.

#### ***5.1.5.(b) The recourse to an expert from another Member State during the dispute***

This question is rarely the subject of specific rules in Member States.

In **Denmark**, experts are appointed by the court but are not required to be accredited before the appointment. Since there is no accreditation in Denmark, experts from other Member States will be recognized.

In **Estonia**, an expert residing in another Member State may be paid higher fees if this type of compensation is common in her or his country of origin and that the

participation of this expert in the procedure is absolutely necessary. The expert is reimbursed for travelling expenses, expenses related to her or his stay in Estonia.

In **Ireland**, it is not unusual for an expert from a non-English speaking country to intervene in proceedings, although the cost of the expert's intervention is then higher. The financial resources of the parties affect the expert to which they resort, especially when a company intends to save its reputation or when it has an insurance covering this type of costs.

In **Slovakia**, to be included on the list of the Ministry of Justice, experts accredited in other Member States must pass a special exam and prove they can perform an activity similar to that of experts on the list of the Ministry of justice.

## 5.2 Interpreters and translators

Through the principle of free access to courts, all national regulations allow any person - including those who do not speak the language of the Forum State and thus the language used by the courts - to appear before the courts. This is due to increased international trading, to the free movement of goods, services and people giving rise to cross-border litigations.

The case of **Spain** is particularly interesting in this respect because of the number of visitors that come to Spain and do not speak Spanish. In Spain the role of translators and interpreters has become essential in procedures.

It even happens that several official languages are recognized by the State. This is especially true in **Cyprus** where both languages recognized by the Court are Greek and Turkish. The same applies to **Belgium** where the judge accepts that the submitted documents be either in French, or German or Dutch.

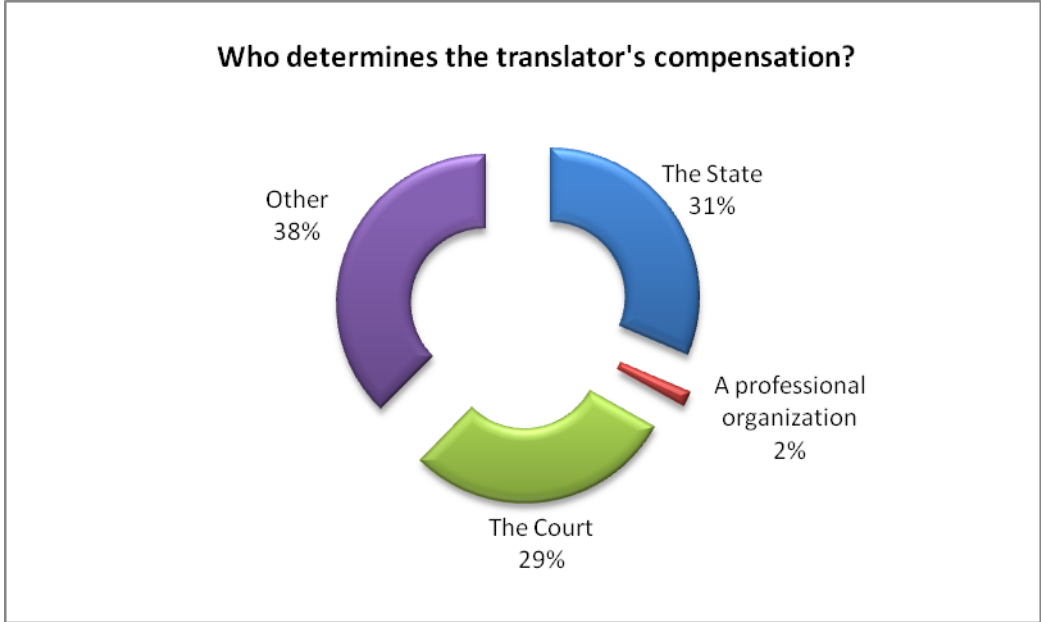
Similarly, in **Denmark**, documents in English are also accepted.

**Malta** the official languages are English and Maltese

In **Finland**, both Finnish and Swedish are recognized.

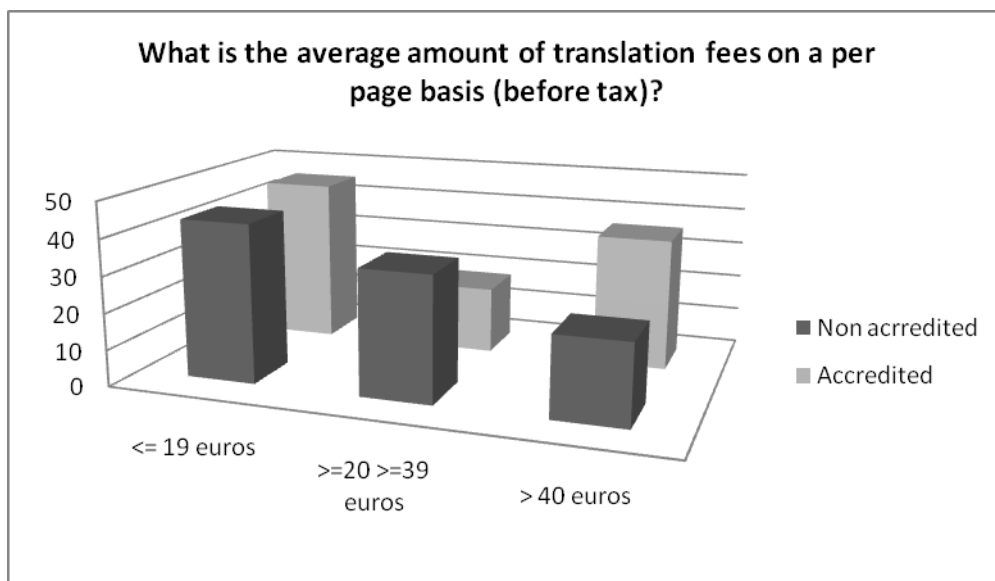
Although the access to law and courts by anyone, even if they cannot speak the language of the Forum State, is a principle recognized by national legislation, the costs of interpreters and translators are not usually regulated. In most countries, the fees are freely determined by both interpreters and translators. The criteria used to justify the differences in fees are usually the same.

**Graph 24 – Determination of translation costs**



Source : public questionnaire

**Graph 25 – Average cost of translation per page**



Source : public questionnaire

### ***5.2.1 Criteria used in determining rates relating to the intervention of a translator / interpreter during the procedure***

When the judge requires for the submitted documents to be translated, translators' fees can be calculated on different bases:

Depending on the number of characters: Generally the scale is set for 55 characters that correspond to a line. It is used, for example, in **Germany, Austria and Luxembourg**. Significant differences in rates can be observed. In Austria, costs vary between 1.09 and 2.03 Euros (roughly the same rates in Luxembourg), while in Germany they vary between 1.25 and 4 Euros for the same number of characters.

Depending on the number of words: Costs vary between 0.05 and 0.20 Euros on average. This is the case of **Bulgaria, Denmark, Spain, and Finland**. In other countries like **Sweden, The Netherlands and Malta**, the rates can go from 0.49 Euros / word and up to 1.49 Euros / word in the **United Kingdom**.

Depending on the number of pages: This calculation basis is the most commonly used which explains the differences in tariffs. On average, prices vary between 8.50 and 24 Euros per page in **Bulgaria, Estonia, Greece, Italy, Latvia, Lithuania, Malta and Slovakia**. In Scandinavian countries such as **Sweden, Denmark and Finland**, the

average cost is 40 Euros per page. **Slovenia** is rather expensive as the cost can reach 50.49 Euros per page.

Depending on the number of hours: Concerning these tariffs, there is no real similarity in what is applied.

- **France** → 15 to 20 Euros per hour;
- **Luxembourg** → average : 43.58 Euros / hour;
- **Czech Republic** → from 3.74 to 13.10 Euros per hour;
- **Romania** → minimum of 5.93 Euros per hour.

It must be said that **Ireland** is the only country where a rate based on the number of days is implemented (about one hundred Euros per day). The same appears in the data provided by the National Experts.

In **Cyprus** the average fees charged by translators during the proceedings are 85 Euros. These vary from 68 to 102 Euros for a procedure.

When an interpreter is required to translate the words of any parties or the witnesses' and to explain the course of the proceedings to those concerned, the fees are calculated on an hourly basis depending on the number of days during which the interpreter was needed. The charges are all different. Some other factors may affect interpreters' fees such as simultaneous or delayed translation, or the specificity of language (sign language, communication with deaf, blind and hearing-impaired;  
**Slovakia**)

The same is true when the service takes place outside of normal working hours (between 8 pm and 8 am), outside the normal working days (Saturdays, Sundays and public holidays), during holidays and when the translators' and the interpreters' work must be carried out in an emergency situation. In these cases, costs may be increased from fifty percent to one hundred percent (e.g.: **Romania, Slovenia**).

The difficulty, the specificity of the language translated (translator or interpreter), as well as the technicality of the terminology of the document to be translated have also a bearing on the fees. In **Greece**, for instance, costs can vary significantly depending on the nature of the documents like birth or marriage certificates, bank



statements, personal correspondence or political documents, medical, economic or scientific reports or even autopsy reports and court decisions.

In **Lithuania, Slovenia, Slovakia** and **Austria**, the difficulty and rarity of the language is a readily accepted criterion in setting rates. The costs are always lower for European languages like English and French whereas languages such as Japanese, Chinese or Arabic generate higher costs.

The case of **Slovenia** presents a particular feature because distinction is made between the translators and interpreters appointed by the Court and those chosen by the party. Costs vary depending on this distinction. When they are appointed by the Court, prices will be fixed by the Court. If it is a party who employ a translator or interpreter, the fees will result from an agreement between the parties and the translator or interpreter. On average, in the case of an appointment by the Court, the costs vary between 25.25 and 41.31 Euros / page while in the other case they vary between 25.87 and 50.49 Euros / page.

Additional compensation: In some countries provisions are made in the form of allowances or compensations for expenses covering the cost of daily life. These allowances can cover the costs of transport, accommodation and catering. For example, in **Estonia**, the sum of three Euros per day minimum is granted for meals and thirteen Euros per day for housing costs. Some similar amounts are granted in **Italy, Lithuania, Poland, Romania** and **Slovakia**.

### 5.2.2 VAT

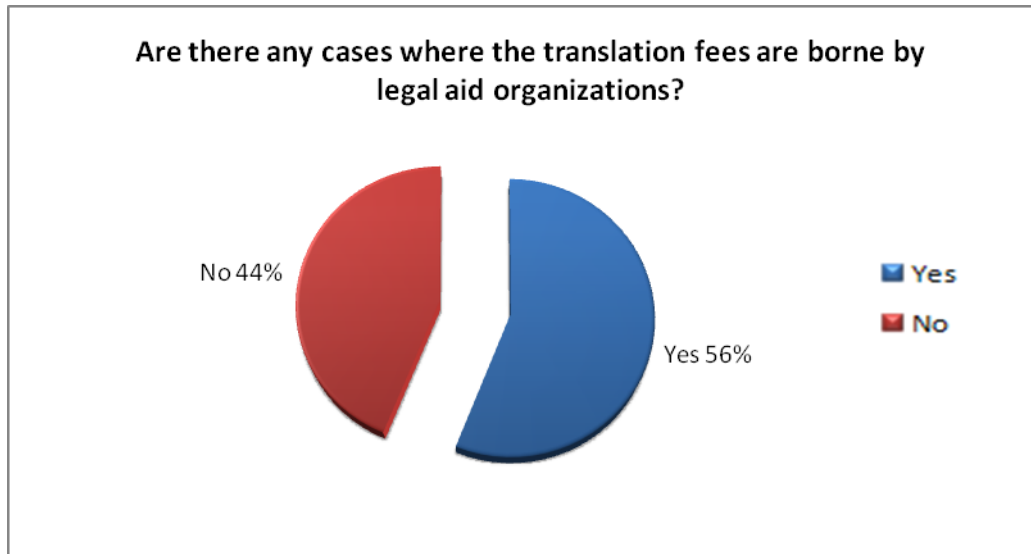
Benefits are usually subject to VAT.

It is, for example, set at eighteen percent in **Estonia, Lithuania, Malta** and **Latvia**, nineteen percent in the **Czech Republic** and **Greece**, twenty percent in **Slovenia** and **Italy** and twenty-five percent in **Sweden** and **Denmark**. Regarding **Malta** and **Denmark**, VAT, respectively eighteen and twenty-five percent, does not apply in the case of cross-border litigations.

In **Romania**, the **United Kingdom** and **Slovakia**, VAT is also at a standard rate.

### 5.2.3 The issue of legal aids and of who pays the proceedings costs relating to interpreters and translators

Graph 26 – Translation costs and legal aid (EU 27)



Source : public questionnaire

In principle, the proceedings costs concerning the intervention of an interpreter to make the proceedings comprehensible and a translator to translate the documents must be borne by the party who requires this service and if both sides require it, they will have each to pay half the costs.

However, sometimes because access to courts is a fundamental right recognized by all countries, some of them consider that the cost of interpreters must consequently be borne by the State. Such is the case in the following countries:

- in **Belgium**,
- in **Bulgaria** when it is a cross-border litigation,
- in **Lithuania** ,
- in **Cyprus** when it is a criminal procedure,
- in **France** in the event of cross-border litigation and criminal proceedings,
- in **Hungary** although costs must be paid in advance by the parties,
- in **Finland** when it is a translation Finnish / Swedish.

In most countries, when the winning party is the one that has paid in advance the proceedings costs relating to translators and interpreters' work, the Court may require the other party to pay back the expenses incurred. However, in **Cyprus** and **Latvia**, this possibility is ruled out. The winning party cannot ask for a refund. This is

also the case in **Romania** if the losing party has pleaded guilty. **Greece** accepts the system of reimbursement of payments made by the winning party, but in practice it should not exceed two percent of these amounts.

In **Slovenia**, a "secure payment" is required by the Court in the event of a cross-border case to compensate translators and interpreters for their services.

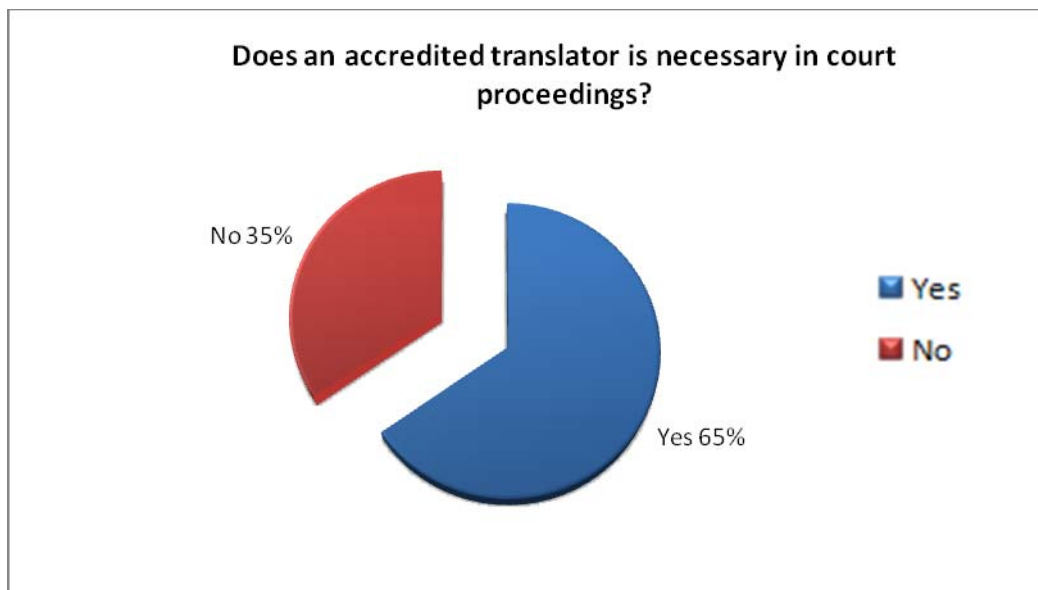
With regard to the legal aid system, most countries agree that these aids pay for the translators' and interpreters' fees when the situation makes it necessary to call on their services. Indeed, there are times when financial assistance is provided to relieve the party of these expenses: i.e. when the losing party who has to pay for the proceedings costs cannot do so due to his/her lack of financial resources.

However, in some countries, legal aid does not cover translators' or interpreters' fees:

- in **Bulgaria** when it is not a cross-border litigation;
- in **The Netherlands**;
- in **Latvia** (when it is not a cross-border litigation);
- in **Poland**;
- in the **Czech Republic**;
- in **Romania**;
- in **Slovenia** even if the party can be exempt from fees due to his/her lack of financial resources.

#### ***5.2.4 Skills and requirements for translators and interpreters***

**Graph 27 – Requirement for a certified translation**



*Source : public questionnaire*

The laws and requirements differ respecting the skills required for translators and interpreters. In some cases they must be accredited to appear before the Court or when they provide document translations. In other cases, accreditation is not required.

Indeed, in many countries, in principle, acts submitted to the court must be translated by an accredited translator but in practice it happens that the judge agrees that the documents do not have to be translated by a certified person. The same is true for the interpreter who does not have to be accredited to appear before the Court.

This is the case in **Belgium, Denmark, Estonia** (must still prove their skills), **Finland, Latvia** (where neither translators nor interpreters need be accredited), **Lithuania** (where there is no accreditation by the Court), the **Czech Republic, Romania, the United Kingdom, Slovenia and Sweden**.

In **Austria**, the interpreter must prove he is qualified with a Degree and professional experience of at least two years. Some knowledge of the legal system, procedures and legal vocabulary is also required. He is responsible for errors related to the work he/she carries out. In **Bulgaria**, only accredited translators can do certified translations and are not supposed to make translation errors and reveal the secrets of the investigation.

In **France**, all translators must also be accredited when they work for the Court. Similar requirements are found in **Greece** (even if they do not need to be accredited if they appear before the Civil Court), **The Netherlands**, **Ireland** and **Luxembourg** (however, this can be bypassed in case the accredited translator is unavailable).

In **Denmark**, as well as **Lithuania**, **Malta**, the **United Kingdom**, **Slovakia** and **Slovenia**, when a translator is accredited in another Member State, he / she will have the same right before their courts as if he / she were accredited from that country.

However in **the Netherlands**, **Luxembourg** and in **the Czech Republic** a translator accredited in another country will not be automatically admitted before their courts.

Some characteristics:

In **Greece**, the translation must be made either by a lawyer or by the department of the Ministry of Foreign Affairs, or by translators / interpreters who graduated from the University of Corfu.

In **Hungary**, official translations, translation accreditations and certification of copies of foreign documents can only be carried out by the Office for National Translation and Translation Certification (OFFI). However, “private” translators can also be called on.

In **Romania**, in order to be certified you have to be a Romanian citizen, or from the European Union or the European Economic Community, have a Degree in a foreign language, be of sound mind, have a good professional reputation and do not have a criminal record. Similar skills are required in **Slovakia** and **Slovenia**.

## 5.3 Witnesses

### 5.3.1 Witness definition

Before considering the financial aspect of the witness status, it seems necessary to define the word “witness” and who can be asked to participate in a litigation in this capacity.

The twenty-seven Member States of the European Union hold a very similar notion as to what is meant by the word “witness”.

Generally speaking, a witness may be any individual who is fit to testify. The person must have some knowledge of the facts related to the case and be able to contribute to solving the case. Some knowledge of the facts - which can be “direct” or “indirect” - is required in the **United Kingdom**, for example.

**Sweden** says a person can testify if he/she is no party to the case.

**Finland** prohibits witnesses who could see their own situations bettered or disadvantaged by the decision to be made.

**Belgium** has a slightly different view, namely, that the witness is the person whom the judge agrees to hear.

In the **Czech Republic** a legal representative of a legal organization can be a witness provided there is no other means of collecting data.

In **Greece**, any person of sound mind can be recognized as a witness whatever their age or nationality.

- **Incompatibilities with the status of witness**

Some incompatibilities with the status of a witness, however, are listed by Member States. In general one must be of sound mind, not be suffering from a mental disorder or a disease that would make the testimony hardly credible.

**Sweden** believes that such persons may testify, but the appreciation of the scope of the testimony will be at the judge's discretion.

**Spain** believes that a person who does not possess his / her senses could not testify in a case in which perception requires them to know and assess the facts.

Infants cannot be considered witnesses. The age limit varies between countries. In **France** it is minors, i.e. children under eighteen who cannot testify. In **Latvia** the age limit is set at seven years. In **Greece**, in principle, the minimum age is fourteen years, except if his/her testimony is indispensable to the case or if it is considered that a minor has the ability to act with proper judgment (**Spain**).

In **Greece**, persons unable to testify fall into two categories: the first category which excludes some people in all cases, the second category is the case-by-case decided by the judge on the basis of a complaint lodged by the party whose interests will suffer from the testimony.

- **Professional confidentiality, other incompatibilities, and the refusal to testify**  
Generally speaking, Member States consider that professional or medical confidentiality should not be violated.

In **Latvia**, a witness cannot be a priest as he is sworn to secrecy, people who by virtue of their position or profession cannot disclose certain information they have in their possession, minors against their parents, grandparents, brothers or sisters.

In **Austria**, public officers and the mediators cannot be called as witnesses if it means a breach of their duty of confidentiality.

In **France**, minors, legally incompetent adults and people with certain convictions cannot be witnesses.

### ***5.3.2 Information, truthfulness expected from witnesses and witnesses' rights***

Where there are no incompatibilities physically, mentally, professionally, ethically, a person can be recognized as a witness with the witness status.

The witness has duties but also some rights.

- **Information access**

Information can be accessed in different ways: by public or private websites or by calling the courts. Lawyers will also give this type of information either free of charge, such is the case in **Italy**, or will be charging fees as in **Slovenia** which will range from twenty to forty-nine Euros.

Information is more or less difficult to access depending on the country. In **Malta**, the relevant information is published separately in the legislation which creates difficulties as regards transparency. It also seems to be the case in **France** where the person who does not have a certain legal knowledge will have trouble finding and understanding regulations concerning witnesses.

In the **United Kingdom**, although these data are neither available from the courts nor information centres, online access to information is regarded as easy.

The **Czech Republic** and **Slovakia** have developed a mechanism whereby a judge must advise the witness of his / her rights and duties prior to his / her hearing.

- **The duty of the witness: an obligation of truthfulness**

Regarding these duties, the witness must testify on the facts which he/she is aware of.

Usually under oath he/she must tell the truth (or follow his/her religious beliefs as it is the case in the **United Kingdom**). The fact of committing perjury or false testimony could expose him / her to prosecution and a conviction as in Latvia for example

In **Finland**, the witness who conceals information, or makes a false testimony before the courts will be sentenced to up to three years' imprisonment.



### ***5.3.3 The right of the witness to be compensated***

The witness will also have some rights such as the reimbursement of the expenses he incurred in carrying out his/her task.

- **Type of compensation**

Most Member States provide witnesses with a right to compensation covering his/her costs, expenses and loss of income caused by his/her testimony.

Either regulation recognizes such rights and fixes precisely the amounts and types of costs that the witness is entitled to recover or it leaves such determination to the courts based on receipts or evidence produced by the witness.

Travel expenses are generally taken into account whatever means of transportation is used to go to court. Some means of transportation need the court's prior approval before they are used. This is the case for air travel in **Latvia**.

The witness may choose to take his/her car to go to court. Thus, he/she can be reimbursed for the cost of petrol based on a price per kilometre. In France, for example, it is 0.006 Euros / km - in the Netherlands: 0.28 Euros / km.

In addition, meals and hotel expenses will be taken into account during the time he / she acts as a witness.

In **Austria**, a fixed sum is allocated for each meal; 3.4 Euros for breakfast; 7.3 Euros for lunch and dinner. A second example can be mentioned: **France**, which gives 15.25 Euros per day for meals and 60 Euros for one night.

**Finland** compensates the witness for his / her expenses related to the performance of the witness duty. This may include the cost of childcare.

Some countries such as **Spain**, **Italy** and **Poland**, provide compensation for people who accompany minors or severely incapacitated witnesses.

In **Ireland**, the possibility to compensate medical expenses incurred during the time they have to stand as witnesses, for example for diabetics to go to a hospital for their treatment, has been considered.

The time spent in hearing is also compensated in most Member States such as **Germany**, the Republic of **Cyprus** or **France**.

However, in some countries witnesses may also be paid. It is the case in **Malta**, the **United Kingdom**, **Belgium** and **Luxembourg**, and this in addition to their expenses.

In **The Netherlands**, the expenses mentioned above are taken into account but other costs entailed by the witness' travelling can be added.

In **Finland**, the amount of compensation is determined according to various criteria. First, the law sets the upper limits of compensation when legal aid is granted. Then, the court determines the final amount of compensation if there is a disagreement between the witness and the party who has called him/her. Finally most of the time, an agreement is reached between the parties and witnesses that define compensation levels.

- **Loss of income**

Finally, the countries of the European Union compensate witnesses for their loss of income.

The witness will be able to obtain compensation by providing receipts.

The calculation will be made per hour in **Estonia**. In **France** it will be based on the minimum wage (SMIC) and number of hours spent in court.

In **Latvia**, there is another system: the witness will be paid by his/her employer for the time which is necessary for him/her to do his/her duty. The employer will be entitled to ask the court to be reimbursed for the salary / wages paid. The amount of salary / wages taken into consideration will be the one paid for a "normal" working day.

In **Romania**, the witness can request to be compensated according to his / her status, occupation or depending on the distance he / she travelled to come to court and the time spent in court.

**Slovenia** sets up a system whereby the witness is entitled to be compensated if he (or she) spends more than eight hours outside his (or her) residence.

It should be noted that in the countries of the European Union, the nature of the dispute does not affect the compensation of witnesses.

- **Compensation according to a preset scale or table**

In some Member States, compensation will be determined by a table or a scale.

This is the case in **Austria**, depending on the costs of travel and daily allowances. A compensation of 12.10 Euros per hour is granted in addition to the loss of income refundable when evidence is provided.

This is also the case in **Belgium, Denmark, Hungary, Italy** and **Malta**.

In the **United Kingdom**, witnesses' compensation is based on a table designed by the Attorney General. He lays down rights, conditions, rates and amounts that witnesses can claim. It is a daily allowance based on the period of time he/she is away from home or his/her place of work on top of his/her meals and hotel expenses. This may also vary if the witness is a professional or for example if he/she is a doctor. It ranges from 100 to 439 Euros per day.

Regarding the Republic of **Cyprus**, the table is set according to the nature of the witness' activity whether he/she is banker or a construction worker or a civil-servant.

In **Portugal**, there is a table operating on a cost per unit bases (CPU), each unit is worth ninety-six Euros. The table is updated annually.

- **Who pays for witnesses' compensation?**

The answer to this question varies from one Member State to another.

Some Member States have set up a system of security deposits to cover the expenses incurred by witnesses. In **Cyprus**, for example, if the summoned witness is a civil-servant, the relevant party will have to pay a security deposit to the Court Registrar's Accounts Department amounting to forty-seven Euros to cover the agent's loss of income.

In **Belgium**, in accordance with Article 953 of the Judicial Code - before the scheduled hearing - the party, who requested a witness' testimony, must pay a deposit to the Clerk, covering the fee and reimbursement of expenses (such as travel expenses). In practice, it should be paid when the witness list is submitted. At the end of the trial, these costs will be borne by the losing party. It should be noted that this does not apply when the party, who has to pay the security deposit, receives legal aid.

In **Bulgaria**, witness' compensation is paid in advance by the party requiring the testimony. The compensation amount is determined by the court.

Usually, it is the party who asks for the testimony who will have to bear the cost.

This is the case in **Italy**. But the winning party will be entitled to ask for the reimbursement of all costs incurred including those related to witnesses.

Usually, the winning party may ask to be reimbursed for all costs relating to witnesses. This is the case in **Sweden**, the **United Kingdom**, the **Netherlands**, the **Czech Republic**, **Luxembourg**, and **Slovenia**.

In **Lithuania**, when the court summons the witness/witnesses, the State pays for their compensation. If the witness is called by either party, the security deposit paid at the outset of the trial will cover the witnesses' compensation.

In other Member States, such as **Denmark** witnesses' compensation is borne by the court out of the State budget. Therefore, the parties involved in the dispute are not requested to pay for it.

Another system is found in **Estonia** and **Slovakia**. In these countries, witnesses who have been heard during trial will be compensated by the State. The State will be reimbursed for those expenses by the losing party.

In addition, sometimes, in the case of a fifty-fifty decision, the costs relating to witnesses will be equally split up between the parties, even if the witnesses were summoned by the court.

It is worth mentioning that in **Estonia**, the court may refuse to hear a witness if the party refused to pay the security deposit to cover witness costs. And as mentioned above, part of the witness' compensation will be paid by his/her employer (his salary), who will, in turn, be reimbursed later on.

In **Spain** the payment of compensation shall be made by the General Directorate of Justice when witnesses were called to appear in front the judges or criminal courts by the Prosecutor or compulsory by the courts, due to the economic situation of the party sentenced, the judge officially declaring that there is no need for that conviction. For the criminal jurisdiction is section 722 of the Code of Criminal Procedure, which provides for the payment of compensation to those witnesses subpoena ahead the court and only if they making the request personally. It does not therefore automatically by the Administration. The witness who requests to provide vouchers entitling it to the perception of an allowance that is calculated in accordance with rules and a predetermined scale. Each Autonomous Community is free to determine its own schedule. Article 375 of the Code of Civil Procedure also provides the right for witnesses to be compensated by the party who asked them to appear before the court. The amount of the compensation is set by the Court on a case per case basis taking into account expenses receipts provided by the witness. Only travel expenses and the amount of earnings lost as a result of his appearance are compensated. Some Autonomous Communities, as the Valencia (Circular 3 / 2002), making use of their prerogatives in legislative and regulatory matters, have drawn precisely the documents to be submitted by the witness who which to file claims costs for reimbursement, as well as the criteria for calculating the allowance.

In **Sweden**, **Finland** and the Republic of **Cyprus**, it should be noted that the party who pays the costs relating to witnesses will do so but only if the amount is considered "reasonable".

- **Legal aid and witness compensation**

The parties named by the court will have to pay the costs relating to witnesses at the end of the proceedings.

But if the party ordered to pay has been granted legal aid, he will be exempt from paying these costs. This is the case in most Member States, as in **Malta** or in the **United Kingdom**, for example.

In some Member States, if the losing party is unable to pay these costs as they would be too great a burden on his/her financial situation. The compensation will then be borne by the court. This is what is applied in **Sweden** and in the **Czech Republic** for example.

In **Sweden**, when the party has been granted legal aid, the compensation will be paid by the State according to a preset scale with a maximum of about seventy-five Euros.

A similar system exists in **Slovenia**, where the witness' compensation is paid by the losing party. The court may decide otherwise considering the losing party's financial situation.

However, the amount of the compensation allocated to the witness does not vary depending on the fact that the party who requested her or his testimony benefits from legal aid. It is the case in the **Netherlands**.

In **Lithuania**, the situation may, at first glance, seem more complicated. People who benefit from the second legal aid are exempt from the stamp fees and other costs of litigation. There are no explicit rules that specify the procedure whereby people receiving legal aid are exempt from paying witnesses' compensation. But one may assume so as witnesses' compensation is included in the proceedings costs. Witnesses are compensated by the courts out of their budget. The first aid covers one hundred percent of the costs, the second one fifty percent.

In **Hungary**, the law provides that the party benefiting from legal aid does not have to advance the costs of witnesses' compensation. These will be paid in advance by the State.

In **Spain**, Article 6 of the Law 1 / 1996 does not expressly recognize the right for the legal aid beneficiary to be exempt from the reimbursement of costs incurred by witnesses during the hearing.

In **Slovakia** witness compensation is not covered by legal aid.

- **How long does it take for the witness to be compensated?**

Usually, there is a fixed time-limit for the witness to ask for compensation. To do so, he must address the court.

In **Poland** the time-limit is very short: three days after the testimony. The same applies to **Slovakia** and the **Czech Republic**.

In **Romania** the deadline is five days.

In **Austria**, this can be done within fourteen days after the last hearing standing as a witness before the court.

In some countries, the application may be made immediately after the hearing. This is the case in **Germany**, and in **Estonia**.

In **Germany**, for example, the request can be made directly at the end of the hearing. Otherwise, the witness will have three months to claim.

In **Hungary**, in practice it is the court who will address the witness to enquire if he/she wants to be compensated for his/her expenses.

- **Is there a tax on witness compensation?**

In **Denmark**, VAT is not applicable to witness compensation. This also applies in **Italy**, **Malta**, the **United Kingdom**, the **Czech Republic**, and **Luxembourg**.

A tax stamp for the subpoena will be requested in **Ireland**, in the Republic of **Cyprus** (3.5 Euros), and in **Lithuania**.

- **The case of foreign witnesses**

**Cyprus** compensates the costs incurred by a witness who does not reside in this Member State.

In **Lithuania**, the situation is similar. The witness who resides in another Member State will receive greater compensation than a witness residing on the national territory, if only for his/her travel expenses.

**Estonia** will compensate the foreign witness at a higher rate than the rate set by national law, especially if such compensation is the norm in his/her own Member State and that this person must imperatively be heard during the proceedings. The reimbursement will cover his/her travel expenses and his/her loss of income. Participation of the person is essential to the trial.

#### ***5.3.4 Compensation sometimes inappropriate in practice***

In most Member States, we have just seen that witnesses asked to go to the court and testify are usually compensated.

However, it should be noted that in some Member States of the European Union, compensation is rather low which may force the witnesses to renounce their right to compensation but also to give up testifying or even coming forward.

It would appear that this is the case in Denmark, where compensation is five Euros for two hours with a minimum of ten Euros covering four hours of court appearance.

In Estonia, if the testimony is not going to cause any financial loss to the witness, the lowest rate taken from the hourly compensation table will be applied by the Government, i.e. 1.40 Euros per hour.

In **Hungary**, the hourly rates are low. They range from 0.40 Euros for their daily allowance to 1.30 Euros for witnesses who do not have a salary.



Similarly in Italy, where compensation will be different if the witness resides in or outside the area where the hearing will take place with a maximum rate of 1.29 Euros if the witness can go home in one day with the reimbursement of travel expenses, which has for consequences that these benefits are usually not applied or asked for.

In **Malta**, witnesses are entitled to compensation for their presence in the courts according to different preset scales depending on court levels ranging from 0.06 to 1 Euro per hour. If they are Government employees, they are not entitled to any compensation when they are summoned but they will be still reimbursed for their travel expenses and daily allowance.

In **Belgium**, a compensation of 4.96 Euros is paid to witnesses, but it does not include loss of income caused if it is not covered by their employer or if the witness is self-employed.

In Greece, the Civil Procedure Code allows for witness' compensation but, in practice, such compensation appears to be low ("dormant").

#### 5.4 Recording

The recording is an administrative formality related to advertising certain legal acts, which consists in copying the act totally or partially on an official registry and letting the parties have copies if needed.

In the EU Member States the expenses related to copying documents or their certification will also be included.

##### *5.4.1 The absence of recording costs in some Member States*

Some Member States include these costs in the proceedings costs. This is the case of **Austria, Malta** and the **Netherlands**.

In some Member States, there are no recording costs as such. They are not direct.

This is the case in **Romania** (for civil and commercial matters) and **Slovenia**.

In **Belgium**, however, by paying for the copyrights, it is possible to obtain a copy of the court record.

In **France**, recording costs exist only in exceptional cases.

In **Greece**, costs covering recording of the court minutes are not charged to the parties (except if they want them certified).

In **Ireland**, there are no recording costs, but the parties have to pay 12.25 Euros per page for each copy made by the court. These documents will also be available on the court website.

In **Lithuania**, there are no recording costs as such. The procedural court documents are issued to participants without any additional charges. But for the second issue, this one will be charged 2.90 Euros per copy and 0.29 Euros per page. In addition, theoretically, there is no possibility of making copies of documents recorded in the case. However, in practice, there is a rate of 0.08 Euros per page because it is widely used by the courts.

In **Latvia**, the parties are not charged but recording costs may apply in case of ADR litigation.

#### ***5.4.2 Determination of recording costs***

##### ***5.4.2.(a) Some countries have set up a system of recording costs per page.***

This is the case in **Germany**, the **Czech Republic**, **Poland**, **Bulgaria**, **Cyprus**, **Hungary**, **Sweden**, and **Slovenia**.

In **Bulgaria**, recorded documents are paid as follows: one point five Euro for the first page and one Euro for the following page, three Euros added to have them certified.

This is also the case in **Cyprus** where a distinction is made between recordings of hearings and recordings of decisions.

In **Hungary**, the party that requests a recording is charged: 0.40 Euros per page.

**Sweden** also applies a charge per page ranging from zero Euros (less than ten pages) and ten Euros for documents of ten pages and over. The same applies to audio tapes and video tapes.

In **Slovenia**, fees will be charged by the Department of Justice at the Chamber of Notaries' instigation. The certification costs are fixed in points (one point equals 0,459 Euros). A certification costs 2,295 Euros per page (five points). The parties receive free of charge all relevant and necessary documents during the proceedings. However, if a party wants a second copy, it will be charged 0.0793 Euros per page (one point). If it is a court document, the price will be 2,379 Euros per page (thirty points). If the copy is a machine-made document (computer printer), it will be charged: 0.40 Euros per page (five points). The rates increase by fifty percent if the document is written in a foreign language.

**5.4.2.(b) *Some other Member States apply fees per document.***

This is the case in **Denmark** (23.47 Euros per document).

The **Netherlands** will charge 3.18 Euros from the second copy of the decision and 0.18 Euros per extra page.

**5.4.2.(c) *Others have drawn up a table according to the documents to be recorded.***

This is the case in **Estonia**, where various costs will be applied per recorded page depending on the nature of the document:

- Ruling or court decision: 0.64 Euros per page;
- Other court decisions: 0.06 Euros per page;
- Recording by "apostil": 14.71 Euros per page.

In **Luxembourg**, the rights depend on the nature of the case judged by the court. The tax is either set at twelve Euros if the act does not concern trade and activities on values and properties or it will be calculated proportionally if the act or the

contract concerns values or property; this tax does not exceed fifteen percent of the amount of the dispute.

In the **United Kingdom**, fees are calculated on the basis of both the type and nature of the complaint and it is the recorder who will determine the amount of costs but it should not exceed the amount determined by the court.

In **Italy** it is a particular system which is set up, in fact the cost of transcripts will be charged if acts of the court or its judgments result of a grant or an assignment to treaties not yet extinct for a period of more than three years. In the case of judgments concerned with the establishment, transfer or modification of a real achievement right as: the transfer of ownership of real property, the constitution, transfer or modification of the usufruct on a real estate and on superficial law, the constitution, or modification of the right to use or the right to live in a real estate, where the real estate would be leased for a period exceeding nine years.

The amount payable on the costs of transcription change depends on the type of act and they are easily identifiable by consulting table of the Legislative Decree no347 of October 31, 1990, updated periodically.

The average cost of transcription is located between 100 and 249 Euros and according to Article 2679 of the Italian Civil Code, "those who request a transcript are obliged to anticipate the costs that it generates, and they must be repaid by the party". If more than one person is interested each of them will pay its corresponding share.

### ***5.4.3 Who does the recording?***

The recording is usually done by the courts.

This is the case in **Estonia**. However, in that Member State, for a decision made by foreign jurisdictions belonging to the APOSTIL Convention, the decision does not have to be legalized.

The **Czech Republic** distinguishes those made by the courts and those made by notaries. In both cases, the fees are calculated per page amounting to 0.77 Euros for

documents in Czech or Slovak language, to 1.92 Euros per page for an act in a foreign language. Concerning notaries' acts, their costs amount to 1.15 Euros per page.

In **Hungary**, documents not yet registered can be copied by public notaries.

In **Italy**, recordings are made in the province register and subsequent services are often carried out by private companies who also carry out all tasks requested by the concerned parties.

In **Poland**, some documents may be certified by a lawyer, legal adviser or according to the document only by a notary.

In The **United Kingdom**, there is a collective agreement between recording services and the courts. Some transcribers are officially authorized by the courts to record court debates.

In **Slovenia**, if a certified copy of one document is needed, it will be done by the public notary unless otherwise stipulated by law.

#### ***5.4.4 Who bears these costs?***

Generally speaking, when they exist as such, recording fees will be paid by the party or the person who requested such documents.

This is the case in the **Czech Republic, Greece, Italy, Luxembourg, Portugal, Sweden, the United Kingdom, and Slovenia.**

In **Slovenia**, a notary will agree to reduce her or his fees at the request of a party who has serious financial difficulties, and if nobody else can pay.

In some Member States, the party who wins the case may be reimbursed of these costs by the losing party.

This is the case in the **Czech Republic, Slovenia, Hungary, Sweden, and the United Kingdom.**

In the **United Kingdom**, when the request is made by the court itself, costs shall be borne by both parties jointly and equally.

#### ***5.4.5 The imposition of VAT***

Regarding the **Czech Republic**, VAT will apply only if notaries are VAT registered.

In the **United Kingdom** VAT is applicable.

Finally, in **Sweden** VAT is not applicable.

#### ***5.4.6 Legal aid and recording fees***

**Spain** does not include the recording cost in legal aid.

In **Luxembourg**, a party who has been granted legal aid does not pay for the recording costs. If the person has employed a professional to help with the procedure, recording costs will be included in his/her fees.

In some cases in the **United Kingdom**, costs can be settled by a legal aid organization.

#### ***5.4.7 Access to information***

The parties can also consult relevant websites (public or private) to obtain information about fees and costs or go to a lawyer. Generally, this information is free.

In **Sweden**, information on the cost for copying court documents is available by contacting the courts directly or by contacting the court national administration.

In the **United Kingdom**, information is available online on public websites or in brochures. The courts also provide such information. Organizations who are allowed to do recordings can also give this type of information.

In **Slovenia**, information is available on the Internet.

## 5.5 Insurance

In general, insurance premiums vary according to the provisions of the contract binding the insurer and the insured. However, there exist some common elements.

In **Austria**, legal protection through insurance is possible. This kind of insurance policy is taken out by individuals or corporations in order to insure themselves against the costs inherent to any legal action taken against them or they could take against others in civil and criminal proceedings.

The average cost of these insurance policies depends on the type of protection and level of compensation provided by the contract and usually is between 70 and 200 Euros for a year. In general, the costs covered by the insurance are: proceedings costs, lawyers' fees, the costs from experts' intervention, travelling expenses for witnesses and all the other costs related to the proceedings.

In the **Czech Republic**, insurance premiums also vary according to the extent of coverage. Some insurance policies cover representation fees and experts' fees. However, experts' fees are covered if the expertise is ordered by the Court. The costs related to the intervention of an expert sought by the parties are not usually covered except if it is provided for in the contract.

In **Germany**, legal insurance policies usually cover the costs related to contractual disputes and disputes concerning labour, renting or property law. The conditions of these policies depend on the agreement reached by the insurer and the insured and on the provisions of the contract.

Average annual costs vary from 250 to 400 Euros. In principle, the policies cover the fees of lawyers, experts and bailiffs along with witnesses' compensation.

In **Luxembourg**, the so-called standard insurance policy covers proceedings costs and lawyers (representation) fees. Some insurance policies also cover experts' fees whereas other policies do not cover proceedings costs for divorce cases. The National

Report evaluates these costs around 150 Euros for a year but points out that this is not necessarily the average.

In **Malta**, insurance costs correspond to 1,5 percent of the amount at stake in the dispute. In other words, for instance, for a dispute with 1 000 Euros at stake, the costs will come up to 1 500 Euros. This type of insurance covers all proceedings fees and costs of justice.

In **Portugal**, insurance policies cover proceedings costs when the amount at stake in the dispute is at least 15 000 Euros but does not exceed 500 000 Euros.

In **Slovakia**, insurance premiums also depend on the person and on the nature of the dispute covered. For example, according to the insurance company D.A.S, annual costs are:

- thirty-six Euros for a dispute concerning labour law with a 15 000 Euros amount;
- sixty Euros when the dispute regards family law for a 15 000 Euros amount;
- Fifteen Euros for a dispute concerning property law or relations between neighbours for a 15 000 Euros amount.

Insurance usually covers representation (lawyer) and experts' fees, proceedings' costs, travelling expenses for the person insured if his or her presence before the Court is required, ADR costs and witnesses' compensations.

In the **United Kingdom**, when it comes to commercial cases, the rates of costs vary between twenty and forty percent of the amount at stake in the dispute. Generally, policies cover the costs incurred and advanced by the party insured and by the opposing party.

Cross border disputes may not have any impact on the conditions of insurance and the fees of the insurance contract. This is the case in **Austria**, the **Czech Republic**, in **Malta** where insurance policies cover the whole territory of the European Union, while in **Slovakia** it depends on the agreement between the insurer and the insured (contract).



Finally, in the **United Kingdom**, costs are also higher, but insurance policies only cover them if the insured is a British citizen, if he or she resides in a country of the European community, if the dispute is under British law and if the case is judged by a British court.

## 5.6 Extra costs

In this section, other extra costs than those specifically mentioned in the report will be considered.

The present report deals with each of the following sources of costs:

- lawyers' fees;
- costs of experts' intervention;
- costs related to translation and interpretation;
- bailiffs' fees;
- recording fees ;
- costs related to ADR;

Thus, few costs can be found apart from the ones mentioned above.

There are in all Member States, some travelling expenses for the litigant. These depend on the number of courts and their distribution on the national territory. These expenses can constitute an obstacle to access of justice if they are too important.

Other proceedings costs listed in the Member States are usually found only for certain types of disputes. Most of the time, they are difficult to foresee for the parties as they come up during the trial.

The extra costs described below have been listed in Member States.

### 5.6.1 *Search for evidence*

Thus, in **Hungary**, the submission of an application can lead to an investigation. The Court may thus decide to put an individual, an object or a place under surveillance. The cost of such a process is determined by the judges.

The costs pertaining to the search of evidence exist also in the **Czech Republic** and **Latvia**.

### ***5.6.2 Itinerant Justice***

In some countries, if necessary, the judge may travel to the place where the dispute arose.

Thus, in **Hungary**, the judge may decide to do so. He or she then personally determines the corresponding extra costs. The travelling expenses of the judge and others costs will then be included in the proceedings costs.

In **Portugal**, extra costs exist when it is necessary to go abroad in order to gather evidence or for the travelling expenses of judges. It is often the case in disputes regarding property.

### ***5.6.3 Costs specific to certain proceedings***

In **Malta**, for disputes before the court of consumers' complaints, there are extra costs for each final decision:

- Nine Euros for claims inferior or equal to 1 165 Euros ;
- Nineteen Euros when the claim 1 165 Euros ;
- Costs of publication in the papers.

This type of costs also exists in **Latvia**.

### ***5.6.4 Specific costs to disputes in succession matters***

In some Member States, inheritance rights entail extra costs.

Thus, in **Latvia**, there are costs called "safeguarding costs" for the inheritance and the making of an inventory regarding the inheritance.

In the **Czech Republic**, resort to a notary is necessary for the enforcement of decisions of the legal representative designated to take care of the succession. Furthermore, the parties must pay the executor's remuneration and reimburse his or her expenses.

#### ***5.6.5 Costs related to the designation of a receiver***

In many Member States, receivers can be designated to represent a party.

Thus, in **Hungary**, a receiver can be designated if a party is legally incompetent, if a corporation has not or longer a legal representative or if one of the parties does not have a known place of residence nor a legal representative. The remuneration of the receiver is set the same way as lawyers' fees.

#### ***5.6.6 Administrative expenses***

Administrative tasks carried out during the hearing can sometimes be the source of extra costs in certain countries.

It is the case in **Slovakia**, in particular when a paper copy of the file is needed. The fees are then 1.5 Euros per ten copied pages.

## 6 LEGAL AID

The issue of legal aid proves crucial when it comes to determining the actual costs of justice. The cost of legal aid is usually borne by the State. The present study does not consider this aspect which could be called the cost of justice or legal aid for the Member States. It focuses on the reduction of costs of justice for the litigant entailed by legal aid<sup>53</sup>. Since legal aid may, when granted, lead to a reduction of costs of justice, access to information on legal aid is within the field of application of this study.

Several elements can limit the efficiency of legal aid. Information on the possibilities offered by legal aid may be difficult to access. Granting conditions may be too strict. The type of costs covered may be too limited.

Differences between Member States may increase, for cross-border litigants the limits of the importance and access to this aid.

Great disparities exist among Member states as regards granting conditions and the extent of the costs covered. As a result, the use of legal aid varies greatly between the different Member States. In **Cyprus**, for instance, the percentage of court cases for which legal aid is granted is low between two and five percent whereas in **the Netherlands** it reaches forty percent.

These differences remain despite the adoption of a specific Directive on 27<sup>th</sup> January, 2003, the Directive 2003/8/CE. Indeed, it only concerns cross border litigations.

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<sup>53</sup> Even if this reduction is relative insofar as the litigant is also a tax payer. In order to evaluate precisely the extent of this reduction it would be necessary to determine each tax payer's contribution to legal aid through taxes.

## 6.1 European Union's intervention regarding legal aid

The study of Member States' various legal aid systems in cross border disputes must be conducted in the light of the Council's Directive 2003/8/CE.

The legal aid Directive is the regulatory consequence of the European Commission Green Paper on judicial assistance of 9 February 2000. The Green Paper highlights the problems that cross-border litigants have to face in the European Union. It focuses, in particular, on legal aid and the right of citizens of Member State A to bring or defend an action in another Member State B in the same way and using the same means as citizens of Member State B.

The green paper prompted numerous reactions ascertaining the need of an intervention in this matter. Moreover, it is important to note that the conventions on this matter (1977 Strasbourg agreement on the transmission of legal aid applications and The Hague convention of 1980 to facilitate international access to justice) had not been ratified by all Member States.

However, the legal aid Directive does not provide for minimum standards as regards access to or levels of legal aid. It does not deal with the broader issues of the actual costs of litigation. But it is an undeniable step forward towards facilitating, through financial support, access to justice for citizens wishing to litigate in Member States other than those in which they reside.

Basically, the Directive establishes minimum common rules relating to legal aid for cross-border disputes. It also creates a national treatment system in respect to the right to legal aid by granting citizens litigating in a Member State other than that in which they reside the same rights to legal aid as citizens resident in that Member State.

The Directive goes further than merely facilitating access to legal aid it also harmonizes legal aid by entitling people with insufficient resources to "appropriate" legal aid. The directive lays down the services that must be provided for the legal aid to be considered appropriate. These are as follows:

- Pre-litigation advice;
- Legal assistance and representation in court;
- Exemption from, or support in respect to, the cost of proceedings, including the costs connected with the cross-border nature of the case.

Lastly, the Directive proposes certain mechanisms for judicial cooperation between Member States. These are designed to facilitate the transmission and processing of legal aid applications.

#### ***6.1.1 The motives that led to the adoption of this Directive***

The development of the European Area of Civil Justice was proposed as a key objective of the European Councils of Tampere (1999) and The Hague Programme of 2004. This objective carried with it a number of specific objectives which are as follows:

- Access to justice for citizens notably in cross-border litigation;
- Mutual recognition of decisions as an effective means of protecting citizens' rights; and
- Securing the enforcement of rights across European borders.

In particular, the Hague Programme emphasized that the effectiveness of existing instruments on mutual recognition should be increased, by standardizing procedures and documents and by developing minimum standards for aspects of procedural law, such as in the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs.

#### ***6.1.2 The application's field of the Directive***

The Directive concerns any decision made in civil law. This includes commercial, labour and consumer law, regardless of the court before which the dispute is decided. However, it excludes tax law, administrative law and customs legislation.

According to the Directive, a "cross border dispute" designates any litigation in which a party applying for legal aid on the Directive's account usually resides in a Member State other than the Member State in which the decision is to be enforced. The cross border character of the dispute is determined when the application for legal aid is first presented.

The Directive applies to European citizens as well as to citizens of other countries who regularly reside in one of the Member States and who do not have sufficient financial means to afford justice related costs.

In accordance with article 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and to the Treaty establishing the European Community, **Denmark** did not take part in the Directive's adoption and therefore is not bound by the Directive's provisions.

The Directive sets up minimal rules concerning cross border disputes. On some issues such as payment of costs by the losing party, the Directive grants Member State leeway.

In many Member States the Directive had a particularly positive effect both for cross-border litigants and in purely internal cases. These Member States were forced to reform their legal aid system.

In some Member States, the very concept of legal aid was introduced as a consequence the Directive. In **Hungary**, the legal aid system was introduced in 2003 and is to be implemented in 2008.

In **Greece**, a new legal aid system was introduced in 2004. The former system was considered insufficient and had become obsolete.

In **Cyprus**, a 2002 law implementing the Directive introduced legal aid to the country.

In **Italy**, the Directive was implemented through a decree adopted on 27<sup>th</sup> May, 2005.

In **Poland**, a new regulation on legal aid is under consideration. Presently, the only forms of legal aid provided for litigants, whose financial resources are not sufficient to afford the legal costs related to a dispute, are limited to full or partial exemption of proceeding fees and the right to a court appointed lawyer. Legal aid only covers regulated fees as well as essential costs.

Since the Directive introduces a minimum of standards, each legal system retains its specificities. In particular to understand how the costs of justice are impacted by legal aid, it is necessary to study the existing legal system in each Member State and the changes brought by the implementation of the Directive.

Except where otherwise specified in the following analysis, national rules as presented in the Country Reports are deemed to apply to cross-border litigations.

Before studying legal aid systems in Member States and provisions that implement the Directive, it is relevant within the context of this Study to determine the accessibility of information on legal aid.

## 6.2 Information on Legal Aid

It is important to identify sources of information and languages in which it is provided.

For example, in **Finland**, information regarding legal aid is available on public and private websites. The Ministry of Justice publishes a brochure in four languages available on paper and online. Information is also available from professionals.

Information on costs of justice is thus widely available and easily accessible.

However, in some Member States, access to information appears more difficult.

Thus, in **Greece**, information is only available from lawyers or at the courts. Specific information is available online but is mainly directed at professionals and only available in the Greek language. One can see a parallel between the little use of legal aid in Greece and the difficulty to access relevant information.

In **Latvia**, information is available on the Ministry of Justice's website but only in the Latvian language. Some brochures are also published in the Latvian language. However, a hotline exists to provide information in the Latvian, Russian, English and German languages.

In **Malta**, information regarding legal aid can be found on the Ministry of Justice's website, on which the Civil Proceedings Code is published. Court clerks and lawyers or "legal procurators" also constitute easily accessible sources of information.



This information is free and available both in the Maltese and English languages: Malta's official languages.

In the Netherlands, information on legal aid is easily accessible. It is available on a dedicated legal aid website as well as through brochures that can be downloaded on from such website. It is also possible to get these brochures through the courts systems or legal aid centres.

However, most of the information is only available in the Dutch language.

Moreover, the legal aid application form is only available in the Dutch language and legal aid does not cover translation fees nor the lawyers' fees incurred to fill up the form.

In Slovenia, free information regarding legal aid can be found on a number of websites. The relevant information can also be gathered by contacting "district courts" or legal information centres where brochures are available. Most lawyers also provide free information as regards legal aid.

In Sweden, information on legal aid can be obtained at no cost from legal aid centre and courts. This information can also be obtained by contacting a lawyer.

### **6.3 Legal aid granting conditions**

It should be noted that, as provided in the Directive, legal aid may be denied to an individual who can benefit from alternative sources of financing. This provision of the Directive targets "legal protection" insurance policies.

For example, Article 508/20 of the Belgian "Code Judiciaire" indicates that the State may obtain reimbursement of the legal aid provided when a "legal protection" insurance policy covers the relevant costs.

#### ***6.3.1 The proceedings concerned***

As stated above, the Directive applies to civil and commercial disputes.

### **6.3.1.(a) Regulations on different types of procedures**

The Directive also provides that “Member States need not provide legal assistance or representation in the courts or tribunals in proceedings especially designed to enable litigants to make their case in person, except when the courts or any other competent authority otherwise decide in order to ensure equality of parties or in view of the complexity of the case.”

The Directive also enables Member States to take the nature of the case into consideration and reject a legal aid demand “when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss or when the application concerns a claim rising directly out of the applicant's trade or self-employed profession”.

- **Restrictions related to the field of law**

Below is an outline of different regulations applicable in cases of national disputes. It is not clear whether these rules are also applicable to cross border disputes as Member States’ regulations are not explicit on this, neither affirming nor denying application of such rules to cross border disputes. One can assume that such rules apply to cross-border disputes as well, even if they are sometimes in contradiction with the Directive’s provisions. In this perspective the application of the Directive is too recent provide answers<sup>54</sup>.

In **Finland**, legal aid is available for all types of disputes.

In **Denmark**, legal aid is available for most types of disputes, including conciliation, arbitration, divorce, separation, parental rights and responsibilities, alimony, domestic violence, the issue of paternal rights, death and estate duties, road traffic accidents, harassment, dismissals for economic reasons, disability, social aid, pensions, health, war veterans, asylum rights, consumers protection, contracts, human rights, education, property rights, civil status, and other cases...

In **Estonia** and in **France**, legal aid can be granted in most areas. However, in civil and commercial matters, it is not granted to a party if the dispute arises at a time that such party has a commercial activity.

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<sup>54</sup> A study on the Directive’s impact would be interesting.

In **Luxembourg**, legal aid does not cover proceedings related to road traffic accidents. It does not usually cover disputes related to the commercial or professional activities of an individual in business, an industrialist, a professional or a craftsman.

In **Slovenia**, legal aid as such does not cover the following domains: adoption, pensions, health, war veterans, consumers' protection, contracts of agency and representation, contracts, education, property rental, real estate and civil status.

However, in Slovenia, legal aid covers legal advice, representation before all courts, the constitutional Court of Slovenia, international courts, and before any Slovenian organization specialized in alternation dispute resolutions; and includes the exemption of proceedings costs.

Legal aid cannot be granted to an entrepreneur in the context of his or her business activity. However, this person can be exempted from costs of justice (in particular proceedings costs) if he or she can justify of insufficient means to pay those costs and that the payment of those costs would jeopardize his or her business activity. In such cases, the court can also set terms of payment.

In **Sweden**, legal aid can be granted for most types of dispute. However, it is not granted when a public defence counsel or a special counsel, in cases of personal injuries, is appointed. Legal aid is not granted either for particularly simple acts such as preparing a will. Legal aid is granted for custody and divorce matters only where special circumstances warrant it.

Moreover, legal aid is completely excluded of certain fields such as matrimonial agreements or tax returns.

In the **United Kingdom**, legal aid is not granted in certain fields such as welfare law, law of succession or commercial law. As regards property law, legal aid is automatically granted for disputes that concern renting or real property (sale or purchase of a house when a judicial decision is involved) or in cases of divorce or legal separation. For personal damages, legal aid is available when the damage was caused by an assault or recklessness.

In **Lithuania**, legal aid can be denied when the proceedings concerned aim at repairing a moral wrong causing no material losses.

In **Ireland**, as regards disputes in national law, the granting of legal aid depends on the legal field concerned by the dispute. Parties to disputes in commercial law cannot receive legal aid. Legal aid is always possible for family law matters and in certain civil disputes such as personal damages, labour law, civil and political rights.

- **Restrictions according to the technical simplicity of the case and the non compulsory assistance of a lawyer**

**Irish** law provides that if the assistance of a lawyer proves necessary to ensure equality between the parties, or because the dispute is particularly complex, legal aid may be granted in similar cases as indicated above.

In the **Netherlands**, in order for an applicant to benefit from legal aid, the dispute has to be complex enough for it to be necessary. The same is true in **Estonia** where legal aid is denied if it is established that the applicant can defend himself or herself.

In **Spain**, proceedings for which the assistance of a lawyer is not compulsory cannot be covered by legal aid. These are usually oral proceedings with amounts at stake not exceeding 900 Euros (“*judicio verbal*”), or recovery proceedings for an amount inferior to 30 000 Euros.

#### ***6.3.1.(b) Regulations regarding the financial importance of the dispute***

The Directive also provides that Member States should take into account the importance of the case for the applicant when ruling on the merits of the application which constitutes a granting condition.

#### ***6.3.1.(c) Establishment of a ceiling on the amount of the dispute***

In the **Netherlands**, legal aid is only granted if the amount in dispute exceeds 180 Euros.

In **Slovakia**, legal aid is only granted if the amount at stake exceeds the minimum wage (227 Euros per month for an employee) except for disputes in which the amount at stake cannot be determined.

In **Spain**, applications for legal aid can be made for all types of proceedings, contentious or not, for which the amount at stake exceeds 900 Euros and for any application, original submission, objection to the original submission by the defendant, enforcement of a legal decision, or appeal. Exceptionally, for proceedings with an amount inferior to 900 Euros, a litigant may have the right to apply for legal aid if the opposite party is represented by a prosecutor or a lawyer, or if the judge demands it to ensure equality between the parties.

In **Sweden**, legal aid cannot be granted if the amount of the dispute is less than 4250 Euros.

In **Finland**, legal aid is not granted if the dispute is of limited importance to the applicant, if legal aid proves unnecessary or if the dispute is considered abusive.

#### ***6.3.1.(d) Concrete appreciation of the dispute's importance for the litigant***

In **Slovenia**, the dispute must have a certain impact on the personal or financial status of the applicant.

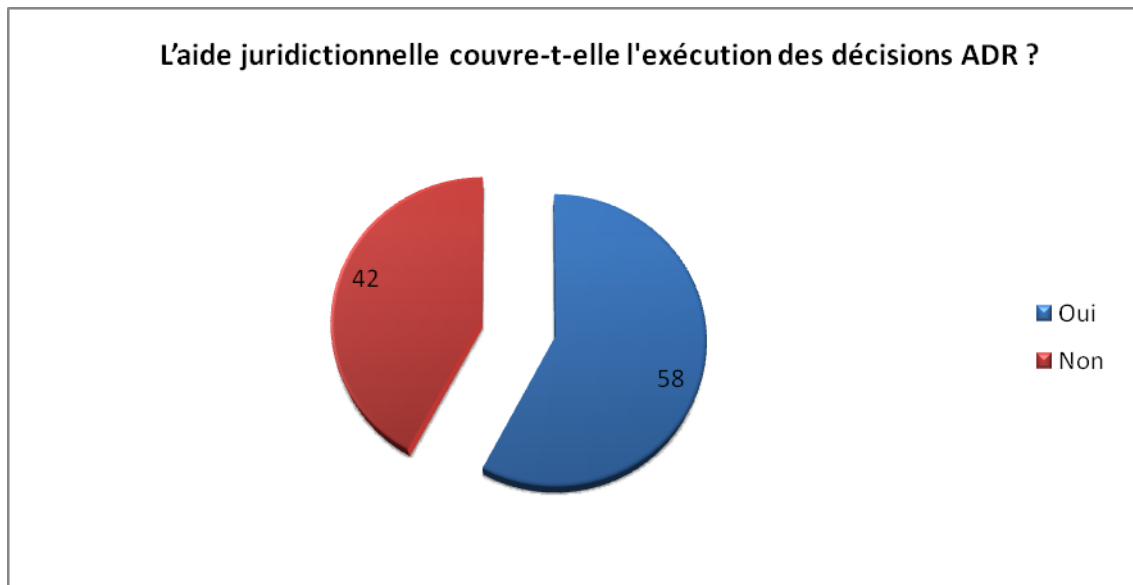
In **Denmark**, legal aid is not granted when the profit that could be obtained from the dispute is unreasonably small as compared to the expenses incurred by legal aid.

Legal aid can be granted to the litigant who wishes to have an arbitral award enforced since he or she will have to resort to the competent court for this.

Finally, if a party appeals against a decision, the lawyer who represented the legal aid beneficiary on first hearing can remain this party's lawyer for the appeal, which is explained by the brevity of the period granted to lodge an appeal (five days to appeal and twenty days to initiate appeal proceedings).

### 6.3.1.(e) Regulations regarding extra judiciary proceedings

Graph 28 - Legal aid and ADR decisions enforcement



Source: public questionnaire

The Directive provides that the benefit of legal aid will have to be extended to extra judiciary proceedings of dispute resolution, under certain conditions. Thus, legal aid must be granted in the same conditions for extra judiciary proceedings when the law requires that they be resorted to or when a court refers the parties to these proceedings.

There are particular situations on this matter in several Member States.

In **Germany**, if ADR proceedings lead to the obtaining of a writ of execution and can be enforced in accordance with the Code of Civil Procedure, then legal aid can cover ADR costs and enforcement costs. This regulation appears applicable to cross border disputes if the said proceedings cover all the proceedings made compulsory by law or ordered by the judge.

In **Estonia**, the law provides that legal aid cannot be granted for disputes resolved through ADR. It seems that this regulation cannot be applied to cross border disputes when the resort to such proceedings is made compulsory by law or ordered by a judge.

In **Luxembourg**, arbitration is considered an extra judiciary proceeding and is covered by legal aid. It should be emphasized that the other extra judiciary proceedings are only covered by legal aid in cross border disputes where the parties are legally required to resort to such proceedings or ordered to do so by a court.

### **6.3.2 Financial conditions**

The Directive provides that Member States should grant legal aid to the persons concerned by the Directive (v. supra application field) who, because of their financial circumstances, are cannot afford in part or totally the costs of justice covered by legal aid.

Thus, the Directive states that an applicant's financial situation should be assessed by the jurisdiction of the forum, taking into account various objective factors such as wages, capital or family situation, including an assessment of the resources of the persons financially depending on the applicant.

The Directive leaves it to the Member States' discretion to establish a threshold above which the applicant to legal aid is deemed able to pay for part or all of the costs of justice described in the Directive.

However, the Directive states that if cross border litigants' wages go beyond the threshold they may still benefit from legal aid if they can demonstrate that they are not able to afford the costs of justice covered by the Directive because of the difference in the standards of living in the forum Member State and in the Member State of their habitual residence.

One notes the existence of important differences in each Member State's methodology for evaluating the level of income of those that apply for legal aid. Income as such is not the only main parameter. And even the determination of what elements fall into the basket called "income" varies from one Member State to another. In some Member States for example amounts from income and property are taken into consideration and in others Members States although income and property may also be included in the basket, deductions are applied to such amounts.

Further, some Member States have created a system of legal aid that distinguishes between total and partial aid and within partial legal aid the different degrees of partial aid based on revenue levels. Some systems of partial legal aid thus provide an aid the importance of which is proportionally inversed to the level of revenue. Some Member States divide partial legal aid into about ten gradual percentages which correspond to different income ceilings. On the contrary, some other Member States only establish one distinction between partial legal aid (fifty percent) and full legal aid (one hundred percent). The consequence is that for example a European citizen who would benefit from a fifty percent partial aid in his or her Member State of habitual residence may only benefit from a twenty percent partial aid in the Member State of the forum.

Finally, in a majority of Member States, automatic rights to legal aid have been created for people belonging to specific social categories. This may be the case for the unemployed for example. Belonging to such a category means that no demonstration of need has to be made. The consequence here is that what may be recognized as a category creating an automatic right to legal aid in one Member State may not be recognized as such in another. A citizen may be required to demonstrate the need for legal aid in the Member State of the forum when she or he would not have to in his or her own.

In **Cyprus**, there are no fixed ceilings of income to the granting of legal aid.

#### **6.3.2.(a) *Distinction between full and partial legal aid***

In **Lithuania, Romania, Slovenia, Greece, France, Belgium, Finland, Sweden, the Czech Republic and Portugal**, the amount of legal aid will depend on the applicant's revenue levels.

In **Finland**, the authority in charge of granting legal aid may decide whether it will be total or partial depending on the applicant's revenues. The decision to grant legal aid also sets, in the form of a percentage of costs, beneficiary's contribution.

In **France**, the percentage of the costs of proceedings taken in charge by legal aid varies according to the applicant's income.



Monthly Income level (Euros)	Percentage of the amount of costs covered by legal aid
Up to 875	100 %
875 to 914	85 %
915 to 964	70 %
965 to 1 034	55 %
1035 to 1 113	40 %
1 114 to 1 212	25 %
1 212 to 1 311	15 %

These ceilings are raised by 157 Euros for each of the first two dependent persons, and by 99 Euros per person from the third dependent person.

In **Greece**, legal aid granting may concern part or all costs related to the proceedings, and if specifically requested, the appointment of a lawyer and /or a public notary and /or a bailiff to represent and defend the beneficiary before the courts and provide him or her with the services and assistance as requested. The judge has the discretionary power to grant full or partial legal aid.

In **Sweden**, the individual benefiting from legal aid still has to pay part of the costs. The percentage of these costs varies according to his or her income level and is called “legal aid fee”:

Annual Income level (Euros)	Percentage of the amount of costs NOT covered by legal aid and to be paid for by the beneficiary
Up to 5347	2 %
5 348 to 10 695	5%
10 696 to 12 834	10%
12 835 to 16 043	20%
16 044 to 21 390	30%
21 391 and above	40% with a minimum of 535 Euros

The costs paid for by the beneficiary are reimbursed to him or her if he or she wins. In such a case the losing party pays the beneficiary the amounts of costs equivalent

to that which the beneficiary effectively paid and the remained is paid to the legal aid service.

In **Lithuania**, the degree of coverage of costs of justice by legal aid is determined by two thresholds: a first threshold beneath which the beneficiary is fully covered for costs of justice and a second threshold beneath which the beneficiary is covered for fifty percent of the costs.

In **the Netherlands**, except in criminal proceedings, the system systematically imposes on the beneficiary a minimum contribution towards costs by the beneficiary as in Sweden. However, the system can be considered as similar to the systems found in other Member States which grant full and partial legal aid insofar as the amount of the costs left for the beneficiary to pay is calculated according to his or her income.

There are five categories of costs that are borne by the beneficiary to pay spanning from 92 to 690 Euros according to his or her income level.

There are two income ceilings used for the determination of the right to legal aid, based on whether the applicant lives alone or not. The ceiling for a person living alone is a yearly income of 22 400 Euros. For a person living with someone or with children, the ceiling yearly income is 31 700 Euros.

Finally, even if the applicant meets the requirements regarding income level, legal aid can be denied if he or she owns more than 19 522 Euros in savings or investments

In **Belgium**, the following categories of persons benefit total legal aid:

- Lone persons who can justify with any document, to be assessed by the Legal Aid Office, that their monthly disposable income is below 795 Euros ;
- Lone persons with a dependent, or living with a spouse or any other person with whom they constitute a household, if they can justify with any document to be assessed by the Legal Aid Office, that the household's monthly disposable income is below 1022 Euros.

Whereas the following categories benefit from partial aid because of their income level:

- Lone persons who can justify with any document to be assessed by the legal Aid Office, that their monthly disposable income is between 795 and 1022 Euros ;
- Lone persons with a dependent, or living with a spouse or any other person with whom they constitute a household, if they can justify with any document to be assessed by the Legal Aid Office, that the household's monthly disposable income is between 1022 and 1247 Euros.

### **6.3.2.(b) Ceilings**

The countries which set a ceiling regarding income for legal aid entitlement without making calculations for everyday expenses fit in this category. The countries described in the paragraphs below fit this profile.

In **Denmark**, the annual income of an applicant to legal aid must be under 33 000 Euros, which is slightly below the average income in Denmark.

In **France**, only the individual's income is taken into account. The ceilings are raised by 157 Euros for each of the first two dependent persons, and by 99 Euros from the third dependent person.

In **Greece**, the ceiling for legal aid granting is fixed to two thirds of the minimum wage for an employee according to the general national labour agreement, that is to say about 511.66 Euros per month or 6 140 Euros for a year .

In **Italy**, legal aid is granted to individual's whose yearly income is inferior to 9 723.84 Euros.

In **Latvia**, individuals whose income for the last three months does not exceed minimum wage (170.74 Euros per month) and who do not possess property which could constitute a source of income or who do possess property but it is used as the family home are granted legal aid.

This ceiling is increased by fifty percent for each person dependent of the applicant and belonging to one of the following categories: a juvenile, a child under the age of twenty-four and who remains a student, an unemployed parent or grand-parent, a

orphan brother or a sister under eighteen years of age, a person who benefits from a pension paid by the applicant, a person in trusteeship.

In **Malta**, in order to obtain legal aid, the applicant declares under oath that besides the possession at stake in the dispute he or she does not own any other property worth more than 3 000 Maltese lira (not taking into account personal property reasonably necessary to everyday life that belongs to the applicant and his or her family) and that his or her annual income does not exceed the minimum income for individuals over the age of eighteen.

In the **Czech Republic**, legal aid covers the proceedings costs as well as the lawyer's fees and expenses. Lawyer's fees and expenses can be fully or partially covered according to what the Bar indicates.

In **Sweden**, the average annual income is 25 670 Euros. The ceiling for legal aid granting is set at 27 500 Euros. For legal aid to be granted, it is necessary to prove that the party needs legal representation and that it is not unreasonable for the State to pay the costs of the dispute.

In the **United Kingdom**, legal aid is granted when the applicant and his or her spouse earn, together, less than 984 Euros per month. Their monthly gross income must not exceed 3 565 Euros. Moreover, the applicant must not have a capital superior to 11 715 Euros.

Ceilings for legal aid were amended in April 2007. The new ceilings are listed below:

Gross Income Cap	£2435 <sup>55</sup> (€ 3565 approx)
Disposable Income Limit	£672 (€ 984 approx)
Lower Income Limit (contributory levels of service)	£289 (€ 423 approx)
Capital Limit	£3000 <sup>56</sup> (€ 4393 approx) (Controlled Legal

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<sup>55</sup> A higher limit applies for families with more than 4 children, with £205 added for the 5th and each additional child dependent.

	Representation (immigration matters) £8000 (€ 11,715) all other levels of service [including Controlled Legal Representation (asylum matters)].
Dependants Allowances	
Partner	£146.62 (€ 214 approx) per month
Dependant aged 15 or under	£206.75 (€ 302 approx) per month
Dependant aged 16 or over	£206.75 (€ 302 approx) per month

In **Hungary**, legal aid is granted to individuals whose monthly disposable income does not exceed the minimum retirement pension and who do not own property or other valuable assets. The costs only advanced as a cash advance when the beneficiary's income is superior to the minimum retirement pension but inferior to forty-three percent of the average gross national income.

In **Spain**, the family unit of the applicant (spouse and minor children) must have an income inferior to twice the minimum inter-professional wage ("MIW") when the application is made. The MIW is set annually by Royal Decree of the government. For 2007, the Royal Decree 1632/06 of 29 December, 2006 published in the State Official Bulletin n° 312 on 30 December, 2006 sets the MIW at 19.02 Euros per day, 570.60 Euros per month and 7 988.40 Euros per year. For temporary workers (whose services in the same company are not used for more than 120 days), the MIW is set to 27.02 Euros per day and for cleaning operatives it is set to 4.47 Euros per working hour.

For all judicial proceedings that relate to family matters (divorce, lawsuit of a child against his or her parents, etc.), only the financial resources of the individual who wishes to take legal action are taken into account.

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<sup>56</sup> This limit is to remain at £3000 (€ 4393 approx) for the time being with the intention to raise it to £8000 (€ 11715) pending the outcome of consultation on an appropriate contribution scheme.

The applicant must not own obvious signs of an economic comfort he claims not to enjoy (based on property, car, investments, and so on.)

The applicant's standard of living must also be substantiated. The provision of negative certificates is not sufficient insofar as everyone needs to meet primary expenses one way or another (thanks to one's own income or to one's spouse's, to public aids, personal savings, etc.)

Individuals who apply for asylum can benefit from legal aid if they can prove their income is insufficient.

### ***6.3.2.(c) Taking into account legal aid applicants' concrete expenses***

In **Austria**, the court decides on granting legal aid taking the applicant's financial situation into account. The financial situation is assessed with regards to several factors such as income, capital, family situation and the income of the individuals dependent on the applicant are also considered. The applicants must present evidence of their income, housing conditions, real property, savings, potential life insurance, various objects such as patents, jewellery and vehicles they own, as well as their obligations or debts. The monthly minimum wage in Austria is 726 Euros.

In **Finland**, legal aid is based on the applicant's income, his or her expenses, wealth and maintenance liability. The applicant's spouse or partner's income are taken into account except when this person is the opposing party to the dispute.

Taxes must be deducted from monthly income in order to calculate the applicant's actual income. Deductions also have to be made for housing and daily expenses, pension payments to children or a potential ex-spouse and the payments to be made in application of a judicial decision. These deductions must only be made if they amount to more than 250 Euros. Moreover, a 250 Euros deduction shall be made for each child under eighteen years of age.

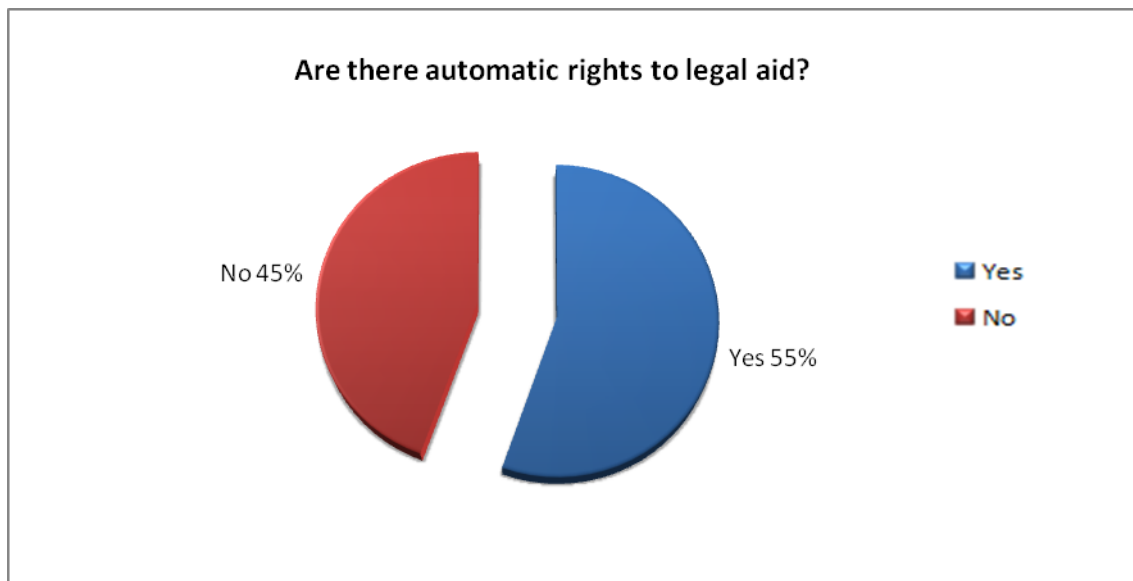
Efforts have been made to facilitate access to legal aid by citizens of other Member States. Application forms are translated into the English language and the regulations of the Ministry of Justice are translated into several languages

In **Luxembourg**, the calculation to assess an individual's financial situation is based on periodic income and other property. This calculation is rather complex and is determined on a case by case basis. Thirty percent of income is not taken into account. The same goes for certain obligations such as family support obligations. Furthermore, if the applicant tenants the place that he or she lives in, 123.94 Euros are deducted for purposes of the determination of the revenue ceiling. However, if the applicant owns the place, the 123.94 Euros are added to her or his income. Moreover, dependents give rights to deductions. This ceiling is 1 118.54 Euros for a single individual.

In **Portugal**, in order to benefit from legal aid, the applicant must have insufficient financial means. In 2007, minimum wage was 403 Euros per month. This minimum wage is used to calculate "financial insufficiency" which permits to benefit from legal aid. Thus, the ceiling for granting legal aid is one fifth of the minimum wage, or 80.60 Euros per month. This ceiling is the same whether the applicant lives on his or her own, with a spouse or partner, or even with children. The law also provides for several categories of persons whose income may be above the ceilings - but lower than 806 Euros for the household - but who, because they belong to a specific category, will still benefit from legal aid. In order to calculate incomes, daily and housing expenses are deducted from disposable income.

### ***6.3.3 Individuals benefiting from legal aid automatically because they fall into a category***

**Graph 29 - Automatic rights to legal aid**



*Source : public questionnaire*

In many Member States, some categories of persons automatically benefit from legal aid. In these cases, income assessment is not conducted. Other assessments, such as the one to determine if the application has any merit, which exists in all Member States, are nevertheless conducted.

In general, the fact that the applicant to legal aid falls into one of these categories proves his low income level.

However, when it comes to cross border disputes, there are no guarantees that the categorization applied in one Member State will be recognized in another Member State nor that the category to which a litigant belongs in her or his Member State will be automatically recognized in another Member State.

In **France**, individuals who benefit from the “revenu minimum d’insertion” or the social integration minimum wage and from the “allocation supplémentaire” or extra allowance are automatically granted legal aid without any income assessment.

In **Hungary**, individuals who fall into the following categories can benefit from legal aid:

- individuals who receive social assistance regardless of their income or property ,



- individuals who benefit from public healthcare regardless of their income or property ,
- homeless individuals, regardless of their income or property ,
- individuals registered as refugees regardless of their income or property ,
- individuals who apply for a visa or residence permit regardless of their income or property ,
- individuals who support a child benefiting from the child welfare subsidy ,
- individuals who cannot use their property and for whom legal services are unavailable ,
- individuals who cannot use legal services because of their personal situation ,
- individuals who have spent their income on another purpose.

In **Latvia**, legal aid is granted to individuals who are not able to pay (fully or partially) the costs related to the dispute because of an emergency situation or inability to access income or property as outlined below:

- Individuals who cannot meet costs because of a natural disaster, or in cases of absolute necessity or similar situations ,
- individuals fully depend on local government funding ,
- Individuals who need legal aid within the framework of an asylum application.

In **Lithuania**, the citizens of the Republic of Lithuania, citizens from other Member States and other natural persons legally residing in the Republic of Lithuania or another Member State benefit from legal aid if they:

- are eligible for criminal legal aid according to the Code of Criminal Proceedings ,
- are the injured party in cases of damages sustained as a result of a criminal offence, even if the issue of damages compensation is presented to a criminal court ,
- are eligible for a social allowance in accordance the Republic of Lithuania law on social aid for families and individuals with low income ,
- are supported by the State in a special care institution ,
- are severely handicapped individuals or in trusteeship ,
- can prove they could not use their property or fund for an objective reason and that for the same reason, their income and property do not actually exceed the ceiling for legal aid ,

- suffer from severe mental disorders when the issue of their committal to the mental institution is within the field of application of the Lithuanian law on mental health care.
- Furthermore, other individuals protected under international treaties ratified by Lithuania are entitled to legal aid as well.

In **Luxembourg**, individual resources are considered insufficient (i) when individuals benefit from the guaranteed minimal wage, (ii) when they are eligible for guaranteed minimal wage, or (iii) when their financial situation does not make them eligible for this type of wage but the payment of the costs related to the dispute would make them eligible.

In **Slovenia**, if the applicant receives aids from “Cash Social Assistance”, he or she benefits from legal aid without his or her income being assessed nor his or her household’s.

For, certain types of disputes the assessment of income is not a factor for determining the right to legal aid. Thus, in disputes regarding human rights or fundamental liberties violation, when the applicant for legal aid wishes to take legal action before the constitutional court of Slovenia or international arbitration courts, the conditions concerning income are not taken into account.

In the **United Kingdom**, if the applicant receives “income support, income based jobseeker’s allowance or the guarantee credit part of Pension Credit”, he or she automatically benefits from legal aid.

Specific regulations also apply if the applicant seeks asylum and is eligible for an aid from the national service for the support of asylum seekers.

In **Belgium**, the persons who benefit from legal aid because of their social situation are:

- the beneficiaries of allowances paid as social integration income or social support, on presentation of a valid decision from the public social aid centre concerned,

- the beneficiaries of allowances paid as guaranteed income for elderly persons, on presentation of the annual certificate of the national pension office,
- the beneficiaries of allowances replacing income for handicapped persons who do not receive a social integration allowance, on presentation of the decision of the minister in charge of social security or of the competent civil servant,
- individuals who support a child benefiting from guaranteed family allowances, on presentation of the certificate delivered by the national office of family allowances for salaried workers,
- social tenants, who, in Flemish regions and in Brussels-capital, pay a rent which corresponds to half of the original rent or who, in Wallonia, pay the minimum rent, on presentation of their latest rent calculation record,
- minors, on presentation of an identification card or any other document proving their age,
- foreigners, to apply for a residence permit or for an administrative or an appeal against a decision taken in accordance with the laws on access to the territory, residence, stay, foreigner's establishment and removal, on presentation of relevant evidence,
- asylum seekers, individuals who present a declaration or an application for the recognition of their status of refugees or who present an application to obtain the status of displaced persons, on presentation of relevant evidence,
- Individuals involved in collective debt reimbursement proceedings under certain conditions.

In general, if an applicant to legal aid falls into one of these categories of beneficiaries, there is no need to consider the composition of his or her household, nor the income of its members (Decision of the "Legal Aid Commission" of 12 November 2004 and 20 January 2005).

Moreover, individuals in a said "temporary situation of weakness" benefit from legal aid.

The latter benefit from full legal aid based on the presumption that their means are insufficient.

This category includes:

- prisoners ,
- defendants in criminal cases subject to summary proceedings ,
- mentally ill individuals subject of a measure provided by the law of 26 June 1990 on the protection of the mentally ill persons.

However, the presumption may be reversed.

It is only valid as long as the legal aid beneficiary is in prison, criminal defendant in a trial or is the object of a protection measure (mentally ill).

The replacement of a court appointed lawyer by a lawyer who does not work under the legal aid scheme entails the reversal of the presumption as well as the withdrawal of legal aid (Decisions of the “Legal Aid Commission” of 22 January 2004).

When the temporary situation concerned ends, the maintenance of legal aid is evaluated according to the usual factors (income and social situation).

Individuals in exceptional excessive debt benefit from legal aid automatically. In general, it is considered that there is a case of exceptional debt when the disposable income is reduced to an amount inferior to the social integration income.

#### ***6.3.4 Other conditions for the granting of legal aid related to the core of the dispute***

Member States may refuse legal aid for claims that are obviously without merit.

All Member States have adopted such regulations.

In certain Member States, these regulations present specificities.

Thus, in **Germany**, in order for an applicant to be granted legal aid, it must be demonstrated that another person not benefiting from legal aid because of her or his income level would have resorted to a legal action within the context of a similar dispute. In other words, it must be demonstrated that legal action is necessary for

the party concerned, and that she or she does not take legal action only because she or he is likely to benefit from legal aid.

In **Malta**, the applicant to legal aid must certify under oath that he or she personally considers there exist reasonable grounds to file a claim or respond to a claim, and therefore to be a party in a dispute.

Under the Directive, Member States are allowed to reject “applications for legal aid in respect of manifestly unfounded actions or on grounds related to the merits of the case in so far as pre-litigation advice is offered and access to justice is guaranteed”.

In certain Member States such as **Lithuania**, **Estonia** and **the Netherlands**, an investigation is conducted to ensure that the applicant is not trying to take advantage of the legal aid system.

Thus the authorities check in order to make sure that the applicant applies for his or her own rights and legitimate interests. If the facts establish that the applicant is acting for other interests (apart from cases of representation), the application for legal aid will be rejected. Legal aid is also denied when the rights that form the basis for the claim have been transferred to the applicant for the sole end of obtaining legal aid.

Finally, legal aid will be denied if it has already been granted to the applicant for the same issue.

In the **Netherlands** and **Estonia**, the authority who receives the application checks whether legal aid was not requested to promote the interests of a third party who would not be entitled to such aid.

In most Member States, legal aid is denied when the individual could benefit from the same services through legal protection insurance.

In **Sweden**, the investigations into the existence of an applicable insurance policy are very extensive. Indeed, legal aid will be denied even if the applicant does not benefit from legal protection insurance if it is established, considering his or her financial means, that he or she should have taken a policy out. The cause for this

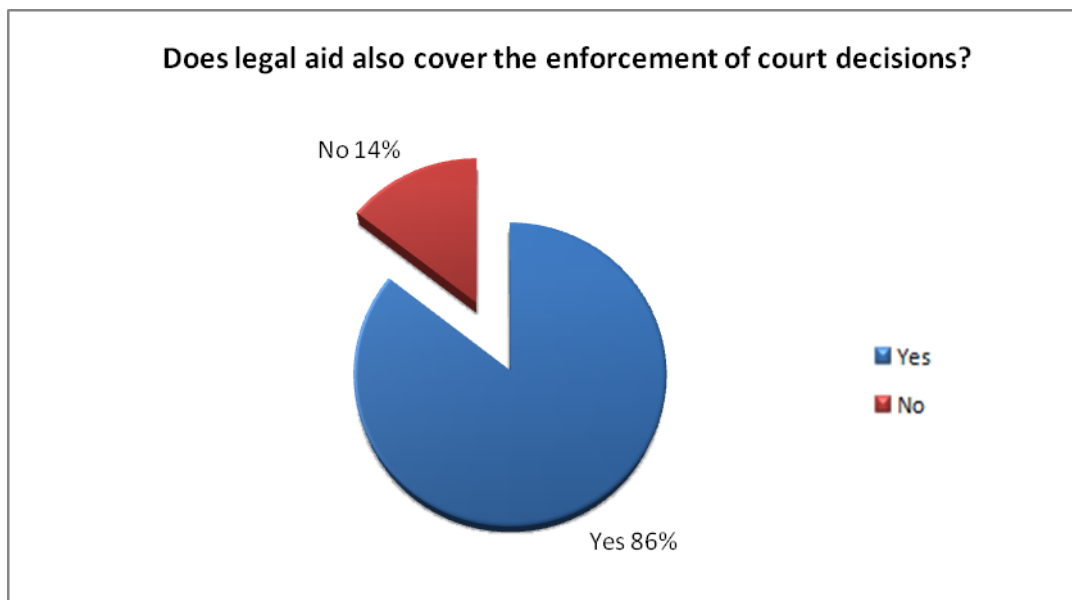
condition, surprising at first, is that the ceiling for partial legal aid is particularly high in Sweden.

## 6.4 Costs covered by legal aid

### 6.4.1 Types of costs covered

#### 6.4.1.(a) “Appropriate” legal aid

Graph 30 - Legal aid and decision enforcement



Source : public questionnaire

The Directive guarantees “appropriate” legal aid. It defines “appropriate legal aid” as an aid which includes:

- pre-trial advice to settle the matter before filing a law suit ;
- legal support and representation, along with either an exemption from costs or the payment of the beneficiary’s costs of justice, including the costs related to the cross border nature of the proceedings (as described below) and the legal representation paid to accomplish acts during the proceedings.

The Directive is quite precise on certain types of costs and less so on others.

In **Lithuania**, secondary legal aid (the one that covers writing acts, the client's defence and his or her representation before the courts as well as the enforcement proceedings) is provided by lawyers who have an agreement with the State. Legal aid services choose the lawyers through a tender process. Lawyers are paid according to a scale set by the government.

In **Luxembourg**, if the judge decides that a lawyer should be appointed to represent a party, such information is transmitted to the President of the Bar Association. The president of the Bar then checks if the person's income meets the required thresholds and appoints the lawyer chosen by the beneficiary, or, if the beneficiary has not made a choice or if the president of the Bar considers the choice inappropriate, appoints another lawyer.

Moreover, the Directive leaves more discretion to the Member States regarding the definition of "costs of justice" as it only states as falling into this category the fees due to the cross border nature of the dispute and the fees of the trustees appointed by the judge that are to implement the different procedural acts. Furthermore, the text mentions possible "exemption" and "payment" of these costs, which does not provide an obligation to "guarantee" the fees, as for other costs.

Hence, the covering of costs of justice by legal aid varies from a Member State to another.

- **The covering of legal representation costs by legal aid**

The covering of legal representation costs is fully paid for in all Member States except in **Poland** where the legal aid system has not been adopted yet and in **Hungary** where it will come into effect in 2008.

There exist differences between Member States in respect to the payment of the legal representatives. Even if the fees are covered by legal aid, the wages paid to the lawyer matter insofar as low wages could deter lawyers from accepting clients who benefit from legal aid.

In **Austria**, representation by a lawyer is provided within the framework of legal aid at low costs or tax free.

In **Estonia**, the lawyer who intervenes for a legal aid beneficiary is paid 13.40 Euros per half-hour and 27 Euros an hour by the State, on which to add the eighteen percent VAT rate.

In **Finland**, legal aid covers lawyers' fees invoiced on the basis of an hourly wage, limited to one hundred hours per case. However, the court may decide, given the circumstances, that this limit can be exceeded. Should the court allow excess, it will set new limits.

In **Latvia**, the following costs are covered by legal aid:

- legal consulting for 9.96 Euros per hour for three hours maximum ;
- writing of legal acts for 14.23 Euros per hour for three hours maximum ;
- writing of an appeal application for 28.46 Euros per hour ;
- writing of a final appeal application for 42.69 Euros per hour ;
- representation before the courts for 14.23 Euros per hour for a maximum of forty hours ;
- Examination of the case for 7.11 Euros.

These maximum costs can be exceeded for cases in which the absence of legal aid would cause major damages to the fundamental rights of the party concerned.

In **Luxembourg**, hourly wages are 82.73 Euros for a registered lawyer and 55.15 Euros for a non-registered lawyer or a student lawyer doing his or her internship.

In **the Netherlands**, the legal representation fee is based on a point system where the complexity of the matter determines the number of points attributed.

These points correspond to the sum the lawyer will receive as wages. Each point is worth 106 Euros, and the average number of points granted is eight, which represents an 848 Euros payment added to the client's personal contribution (from 92 to 690 Euros). Eight points represent circa twenty-four hours of work. Thus the average invoiced fees without legal aid would have been 180 x 24 Euros, that is to say 4320 Euros without VAT, or 5550 Euros if VAT is included.



In **Sweden**, the costs covered by legal aid are the lawyers' fees (one hundred hours maximum), the fees related to the search for evidence, investigation costs, application fees and some arbitration and enforcement fees.

In **Austria**, lawyers' fees are set according to a special schedule called the RATG schedule.

In **Belgium**, the system of lawyers' compensation is based on the granting of points. The value of the points is determined annually based on the State's budget on the one hand to which provisions and proceedings allowances actually paid or supposedly paid are added, and on the other hand, on the number of points granted to all the lawyers in the Kingdom, by a joint proposition of O.B.F.G. (Association of French-speaking and German-speaking Bars of Belgium) and O.V.B. (Association of Flemish Bars - Orde van Vlaamse Balies) which is presented to the Ministry of justice before February 1st of each year.

The appointed lawyer cannot address directly the legal aid beneficiary to demand the payment of his or her fees.

At the very most, when partial legal aid is granted, the Legal Aid Office can allow the appointed lawyer to receive a retainer called "taxation", at the moment of his or her appointment.

The legal aid applicant is then immediately informed.

The "taxation" cannot exceed 125 Euros, and is not less than 25 Euros except under particular circumstances. Additional provisions can be granted further in the process, once a year.

If the lawyer does not receive the "taxation", he or she may suspend his or her intervention and even ask for the suspension of legal aid.

In **Ireland**, lawyers who represent a client benefiting from legal aid are paid a salary and cannot benefit from extra compensation if they win the case.

In the **Netherlands**, the lawyer sends his or her invoice directly to the Legal Aid Office.

- **The choice of a lawyer**

The choice of a lawyer by the client or another entity is crucial. In most Member States, when the beneficiary fails to find a lawyer who agrees on representing him or her, the Bar guarantees one.

This is the case in **Cyprus**, the **Czech Republic**, **France**, **Lithuania** and **Luxembourg**.

Indeed, in **Cyprus**, the party who benefits from legal aid can use the services of any lawyer who accepts to represent him or her within the framework of legal aid. If the party does not find a lawyer, the Cyprus Bar appoints one. The appointed lawyer may refuse the appointment. Moreover, the lawyer may ask for the payment of his or her fees at any stage of the proceedings.

In the **Czech Republic**, the person who is granted legal aid can ask the Bar association to appoint his or her lawyer if he or she has not found one. When appointing a lawyer, the Bar determines the conditions under which the legal aid is granted.

In **France**, the beneficiary is entitled to free services from legal professionals whom he or she can choose freely (lawyer, member of the legal professions). Otherwise, the president of the Bar appoints a lawyer. Other professionals are appointed by the president of their own professional organization. These professionals are paid by the State, on the basis of a lump sum. If legal aid is partial, the beneficiary has to pay part of the costs.

In **Lithuania**, secondary legal aid (the one that covers writing acts, the client's defence and his or her representation before the courts as well as the enforcement proceedings) is provided by lawyers who have an agreement with the State. Legal aid

services choose the lawyers through a tender process. Lawyers are paid according to a scale set by the government.

In **Luxembourg**, if the judge decides that a lawyer should be appointed to represent a person, such information is transmitted to the President of the Bar Association. The president of the Bar then checks if the person's income meets the required thresholds and appoints the lawyer chosen by the beneficiary, or, if the beneficiary has not made a choice or if the president of the Bar considers the choice inappropriate, appoints another lawyer.

Except in cases of conflict of interests, the lawyer has to agree to represent the client.

In emergency situations, the president of the Bar may appoint temporarily a lawyer who will be discharged if the client does not fulfil the financial conditions.

In **Spain**, legal aid is granted by a proceeding, which entails the appointment of a new lawyer and a new prosecutor.

- **Costs that are covered**

In **Austria**, all necessary proceedings costs are covered by legal aid as well as expert's fees, witnesses' compensation and interpretation costs.

In **Belgium**, legal aid is divided into two concepts: on the one hand juridical support, that is to say advice and representation provided by a lawyer and on the other hand judicial support for proceedings costs.

In the **Czech Republic**, legal aid covers proceedings costs and bailiffs' fees if necessary.

In **Estonia**, the beneficiary of legal aid can be granted the following allowances:

- exemption from State, proceedings and security costs ;
- Payment by instalments of these costs ;
- exemption from the obligation to pay a security to cover the expenses or losses that the claim can generate ;

- exemption from payment of the appointed lawyer's fees ;
- exemption from costs related to the decision's enforcement, or payment of these costs by instalments;
- Complete or partial exemption from fees related to potential pre-dispute proceedings.

In **Finland**, legal aid covers the following fees within the framework of national disputes:

- fees of the appointed lawyer or of the lawyer approved by the legal aid office, fully or partially covered according to what was determined in the decision granting legal aid ;
- interpretation and translation fees necessary to the dispute ;
- administrative fees as well as the reimbursement of various fees set out by the court to which the case is submitted ;
- the compensation of witnesses used by the beneficiary of legal aid ;
- fees needed to obtain evidence as needed by the party benefiting from legal aid and for the resolution of the dispute ;
- travelling expenses if the presence of the beneficiary is required at the hearing;
- Enforcement fees and the costs that are subject to advance payments.

Legal aid also covers fees related to the enforcement of the decision.

For cross border disputes, legal aid is paid to the beneficiary in the same conditions as for a national dispute.

The decisions to grant legal aid must also determine which proportion of the expenses are covered by the aid according to the beneficiary's income. This proportion is given in the form of a percentage.

In **France**, beneficiaries have a right to free costs of justice. Thus, if the intervention of an expert is required, the State advances the costs of the expert that result from the enforcement of this measure.

In **Lithuania**, secondary aid concerns the writing of acts, the client's representation before the courts (in extra judiciary proceedings ordered by the court or provided by law) as well as the enforcement proceeding.

In **Luxembourg**, the following costs are covered by legal aid:

- stamp and registration duties;
- proceedings costs ;
- lawyers' fees ;
- bailiffs' fees ;
- notaries' fees ;
- technical consultation fees ;
- witnesses' compensation ;
- translation and interpretation fees ;
- affidavit of Law and customs fees;
- travelling expenses ;
- taxes and fees related to registration, mortgage or security documents ;
- Publication costs.

When legal aid is granted, it usually covers all the applicable costs. Partial legal aid is not frequently used in **Luxembourg**.

In **Malta**, legal aid covers all the proceedings costs, including enforcement costs.

In **the Netherlands**, in national disputes, proceedings costs, bailiffs and experts fees and translation costs are not covered by legal aid.

In **Portugal**, legal aid includes:

- complete or partial exemption from the judicial tax and other trial costs ;
- postponement of the payment of judicial taxes and other trial costs ;
- Either the appointment of a lawyer and the payment of his or her fees, or the payment of fees to the lawyer chosen by the beneficiary.

The third and final aspect can coexist with either of the first two.

In **Romania**, legal aid includes:

- exemption, reduction, payment by instalments or suspension of proceedings costs, stamp and security expenses ;
- Representation and counselling fees of a lawyer appointed by the Bar.

In **Slovenia**, fees are paid by the court on its own budget. If a person makes the request, a lawyer may be appointed by the court to represent him or her if it is deemed necessary and urgent to protect the interests of the applicant. The lawyer's fees are then paid by the court on its own budget.

In **Slovakia**, legal aid covers the following costs: representation costs, as well as costs encountered during the proceedings, before the presentation of the dispute, after the decision of the court and for amicable settlements.

In the **United Kingdom**, legal aid covers the costs reasonably justified within the framework of the dispute.

In **Italy**, legal aid covers the following costs:

- copies of certain acts needed by the opposing party ;
- Court expenses including travel as necessary to the resolution of the dispute ;
- travel expenses of the witnesses ;
- guarantee costs ;
- lawyers' fees ;
- costs related to the publication of the decision ;
- proceedings costs ;
- stamp expenses ;
- notification costs ;
- Mortgage and cadastral taxes.

In **Spain**, the following costs are covered by legal aid:

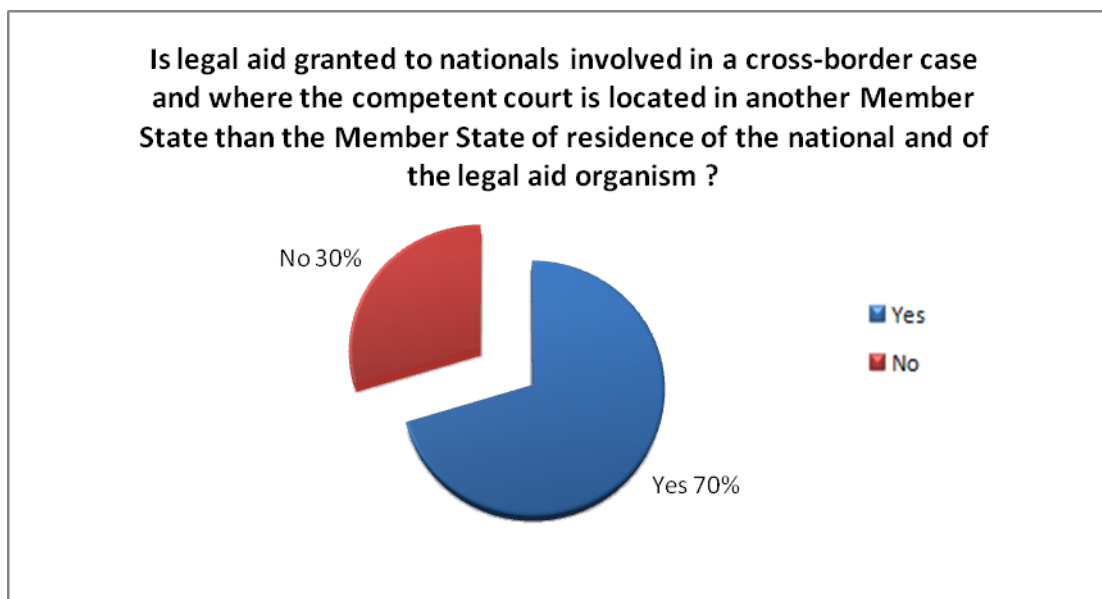
- Free publication of announcements in official papers ;
- Exemption from the payment of a guarantee required in principle by the law when lodging an appeal ;
- Free assistance of an expert ;
- Obtaining of free copies, certified copies true to the original and public notary certified acts under the conditions provided by Article 130 of the "Notarial Regulation" ;

- Eighty percent off the fees to be perceived by the notary for public writing and obtaining copies and certified copies of public notary certified acts not included in the previous article ;
- Eighty percent off existing charges for obtaining documents or compulsory registration on the Commercial and Property Register directly connected to the proceedings, whether necessary in order to substantiate the litigant's claim or because they are directly required by the judge ;
- Full exemption from the costs related to obtaining or creating certain acts or documents of the previous article if the beneficiary proves that his or her income is inferior to the minimum inter-professional wage ;
- Expenses due to the required intervention of a translator or interpreter for cases in which legal aid could be granted to a foreigner.

Moreover, the law on Family Arbitration in Catalonia explicitly provides that if the parties benefit from legal aid, the arbitrator's services are completely free. Free arbitration is granted individually taking each party's financial situation into account. Hence, if a party does not benefit from legal aid, it shall pay half the arbitrator's fees.

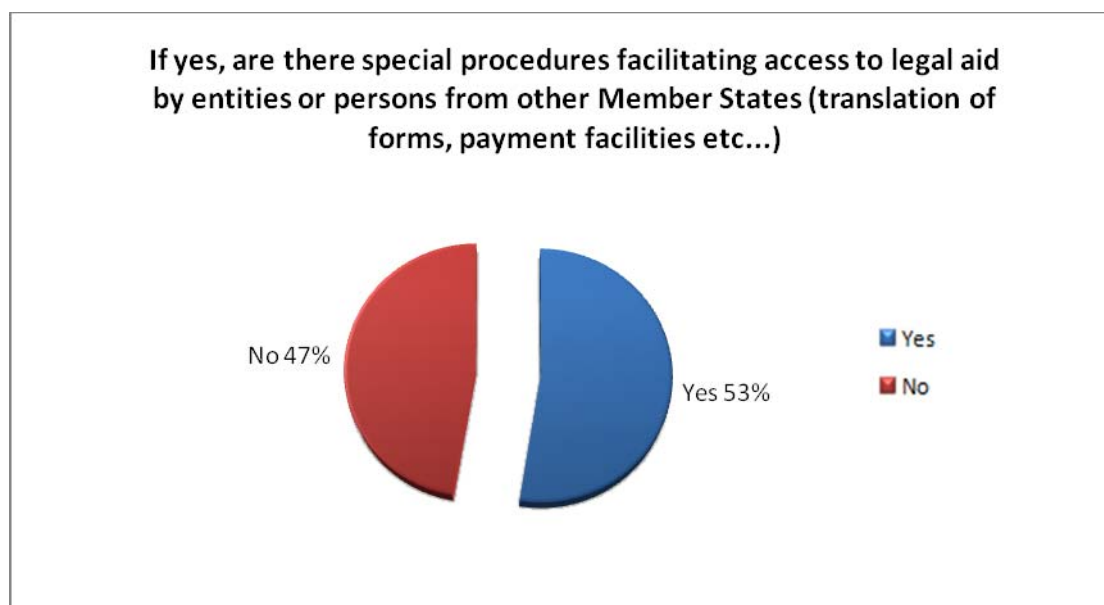
#### 6.4.1.(b) Fees related to the cross border nature of the dispute

Graph 31 - Legal aid and cross border dispute



Source: public questionnaire

**Graph 32 - Special legal aid proceedings in cross border disputes**



*Source: public questionnaire*

The Directive mentions precisely the nature of the costs described. Thus, Member States are forced to provide legal aid covering these costs and they are not given an important leeway on this matter.

The costs related to the cross border nature of the proceedings concerned by the Directive are:

- “interpretation fees;
- translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and
- travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in



court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means”;

The Directive provides a distribution of the costs between the Member State, where the applicant usually resides, and the Forum Member State.

Thus, the Member State where the applicant usually resides provides legal aid for the costs incurred on its territory such as the assistance of a lawyer or any other person entitled by law to provide legal advice, until the application for legal aid as well as its translation and that of the necessary related documents are received in the forum Member State, in accordance with the Directive, when the application for legal aid is presented to the authorities of the forum Member State.

#### ***6.4.2 Principle of continuity***

Article 9-1 of the Directive provides that “Legal aid shall continue to be granted totally or partially to recipients to cover expenses incurred in having a judgment enforced in the Member State where the court is sitting.” Hence, once granted legal aid covers the whole proceeding duration. This includes decision’s recognition and enforcement, regardless of the level of jurisdiction and the Member State where decision is due to be enforced.

Article 9-2 of the Directive provides that “A recipient who in the Member State where the court is sitting has received legal aid shall receive legal aid provided for by the law of the Member State where recognition or enforcement is sought.”

Legal aid is granted under conditions defined by the Directive for the enforcement of genuine acts in another Member State than the Forum Member State.

Finally, legal aid must be available to the beneficiary if an appeal is lodged, either by or against the beneficiary, subject to the conditions provided during the first trial.

The Directive provides that Member States may resort to a new determination on whether the conditions for granting legal aid remain met at all stages of the procedure.

The Directive leaves the Member States free to decide whether or not to impose a second control on the legal aid beneficiary when an appeal is lodged. Thus, regulations differ on this point in the Member States.

However, the only two possibilities left to the Member States in case of appeal are the following: they can either choose an automatic legal aid renewal or provide for a new control.

In the following countries, legal aid is automatically renewed in case of appeal: **Austria** in most disputes, **Cyprus**, the **Czech Republic**, **Malta**, the **Netherlands**, **Slovakia**, **Sweden** and **France**.

In the following Member States, legal aid granting in case of an appeal is subjected to a new examination of the conditions: **Denmark**, **Luxembourg**, **Slovenia**, the **United Kingdom**, **Germany** and **Finland**.

In **Finland**, legal aid is granted for certain proceedings determined by the legal aid office. This may then extend to other proceedings. However, if there are no specifications, legal aid is granted for the whole dispute and not only for one stage. It covers all the different proceedings.

In certain Member States such as **Germany**, if the appeal is lodged by the opposing party, the court does not provide an evaluation on the chances of success of one of the parties as for the first degree trial.

#### 6.5 The legal aid beneficiary's contribution to costs

Member States can decide that the beneficiary of legal aid still has to pay a reasonable contribution toward costs taking his or her financial situation into consideration. This is so when partial legal aid is granted.

Some Member States have also set up legal aid systems which only advance the costs for the beneficiary who can reimburse these by instalments.

Moreover, in certain systems, the beneficiary has an obligation to reimburse the costs that have been covered by legal aid if he or she wins the case and benefits from the payment of a sum as a result of the legal decision. This is the case in England for example.

## **6.6 Grant of Legal aid**

### ***6.6.1 Legal aid granted following the payment of a security deposit***

In certain Member States, the beneficiary of legal aid is asked to pay a security deposit.

Thus, in **Belgium**, for bailiffs, experts' fees, and other similar costs such as experts' costs, the beneficiary of legal aid is required to pay the deposit directly to the bailiff or expert.

However, in cases of emergency only, the appointed lawyer can ask the beneficiary to pay him or her within the strict limits of the costs of justice or of the outlays (costs of enrolling on cause list, request right, tax stamp, etc.) to incur, informing the beneficiary that he or she will not be able to undertake any step until this payment is received.

### ***6.6.2 Legal aid granted but following a deposit or repayment of costs by instalments***

The following paragraph presents systems concerning disputes that do not contain a cross-border element. Given the current state of law, it is difficult to determine whether the Member States involved would apply the same rules in cases of cross border disputes.

In some Member States, reimbursement is provided as soon as legal aid is granted. In such cases, legal aid is merely a cash/credit facility. In other Member States, reimbursement only occurs if the beneficiary wins the case and receives a sum as part of the enforcement of the decision for which the aid was granted.

**6.6.2.(a) *Legal aid reimbursement regardless of the dispute's outcome***

This system is in force in **Austria, Germany and Hungary.**

In **Austria**, when possible, the beneficiary must reimburse legal aid within a three years period. The speed of reimbursement will depend on the evolution of his or her financial situation. Courts also may set monthly repayments.

In **Germany**, the institution which decides on the granting of legal aid, determines at the same time whether or not the beneficiary shall reimburse it. This reimbursement can be paid cash for the whole sum advanced or may be divided into several instalments. The terms of reimbursement are set taking into consideration to the beneficiary's current financial situation. It is possible to change the terms of reimbursement when the financial situation of the beneficiary radically changes.

In **Hungary**, costs are advanced but not paid for by the State if the beneficiary's income is superior to the minimum retirement pension but less than forty-three percent of the average gross national income.

**6.6.2.(b) *Legal aid reimbursement conditioned by the dispute's outcome***

In certain cases, the party benefiting from legal aid may have an obligation to reimburse all or part of the costs covered by this aid at the end of the proceedings.

In **Estonia**, contrary to the system set up in other Member States, the court deciding on the dispute may decide that the beneficiary of legal aid will have to reimburse the costs advanced by legal aid if he or she loses the trial.

In other Member States, the beneficiary of legal aid shall reimburse the costs covered by it if he or she wins the case. This is the case in the following countries: **Belgium, Italy, Malta, Cyprus, the Czech Republic, the Netherlands, Slovenia, Slovakia, the United Kingdom and Spain.**

In **Belgium**, even if full or partial legal aid is granted, the Legal Aid Office may allow the appointed lawyer to claim extra fees “... *when the beneficiary has made a profit from the lawyer’s intervention in such a way if this profit had existed on the day the application was presented, this aid would have been denied.*” (Article 508/20-§1-2° of the Belgium Judicial Code), except in cases of claim of alimony.

In **Italy**, if the beneficiary wins the case and if the decision puts him or her in a financial position that would have enabled him or her to pay the costs of justice, the State may ask this party to reimburse the costs incurred. This is possible when the party receives by virtue of the decision at least one sixth of the costs incurred, or when the charges were dropped, or in case of a “discharge of judgment” (in this case the opposing party can then be required to pay the costs).

In case the parties settle before a decision is made, the costs are shared between the parties and cannot be entirely borne by the party benefiting from legal aid.

In **Malta**, if the party who benefited from legal aid wins the case, he or she can have an obligation to reimburse the costs to the clerks, the arbitrators, the legal curators or his or her lawyer. This party retains the right to ask for the reimbursement by the opposing party of the costs actually incurred at the end of the trial.

Similarly, in **Cyprus**, if the beneficiary wins the case, he or she must reimburse the costs covered by legal aid.

In the **Czech Republic**, the beneficiary must reimburse the costs advanced by way of legal aid if he or she wins the case and his or her social and financial conditions were improved by the decision.

In the **Netherlands**, the withdrawal of legal aid is ordered when the outcome of the dispute leads to the beneficiary being granted a sum superior to 9 849 Euros.

In **Slovenia**, natural persons may be exempted from proceedings costs if the payment of these costs substantially reduces their means of living along with the means of their family. The proceedings fees may then be subject to an exemption or to a payment by instalments. The same goes for a legal entity when the payment of the proceedings costs could endanger the business activity.

However, if the beneficiary receives income or property as part of the decision enforcement, then he or she may have the obligation to reimburse the Republic of Slovenia of a sum equal to the difference between the costs covered by legal aid and the amount paid by the opposing party.

Furthermore, in Slovenia, the beneficiary of legal aid may have an obligation to reimburse the costs advanced by way of legal aid if his or her income increases within a one year period from the decision so as to exceed the ceiling provided for legal aid granting.

In **Slovakia**, the court, may order the reimbursement of the legal aid provided. The legal aid centre may also decide ex officio that the beneficiary should reimburse the costs over a three year period after the court decision.

In the **United Kingdom**, when the beneficiary of legal aid wins the case, he or she may have an obligation to reimburse this aid if as a result of the decision his or her financial situation is enhanced. The reimbursement of legal representation fees in particular is called the “statutory charge”.

In certain cases the payment of this statutory charge may be postponed for the following reasons:

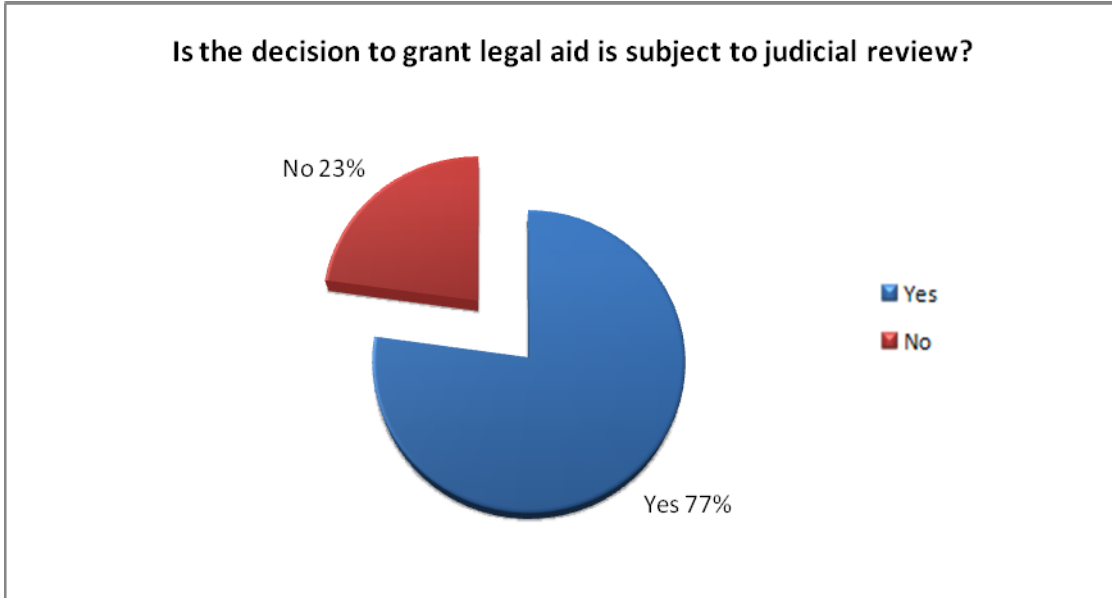
- real estate obtained from the dispute is the main residence of the beneficiary or of his or her dependents ;
- The money obtained from the dispute is used to buy a main residence for the beneficiary or his or her dependents.

In **Spain**, the law provides that if the beneficiary gets a financial gain from the judgment, he or she has to pay legal representation fees, within the limit of a third of such financial gain.

Legal representatives will then have to reimburse the compensation that they received from the legal aid agency to represent the beneficiary.

### 6.7 Appealing a refusal to grant legal aid

Graph 33 - Judicial examination of the decision related to legal aid



Source : public questionnaire

The Directive provides that: “Member States shall make provision for review of or appeals against decisions rejecting legal aid applications. Member States may exempt cases where the request for legal aid is rejected by a court or tribunal against whose decision on the subject of the case there is no judicial remedy under national law or by a court of appeal.”

Thus, Member States have set up different appeal mechanisms and exceptions to judicial review. These mechanisms are described below.

### ***6.7.1 The limits on the right to appeal against the decision refusing to grant legal aid, based on the amount at stake***

In **Austria**, the applicant may lodge an appeal against the decision denying him or her legal aid only if the sum at stake in the dispute is greater than 2 000 Euros.

### ***6.7.2 Appeal before a court***

In **Finland**, the applicant must be informed of the possibility to lodge an appeal in case of a refusal to grant legal aid. The decision on the application for legal aid is taken by the legal aid office. An appeal may be lodged before a court. However, when the legal aid office is informed that the applicant has lodged an appeal it can decide to review its own decision thus suspending the court proceeding. If the office considers that there is no reason to change its decision, the application the court proceeding resumes.

In **Germany**, the decision on legal aid can be subject to judicial review. The right to lodge an appeal belongs to the applicant and to the Public Treasury.

In **Malta**, the official in charge of granting legal aid prepares a motivated decision. If the decision constitutes a refusal to grant the aid, an appeal can be lodged before a first degree court.

### ***6.7.3 Administrative appeal***

In certain Member States, it is not possible to appeal the decision regarding the granting of legal aid, and it is only possible to lodge an appeal in administrative law.

In the **Netherlands**, the legal aid centre is a State institution and its decisions can be appealed in accordance to administrative law. The same goes for **Slovenia**.

In some other Member States, the appeal is examined by a hierarchically higher institution.



Thus, in **Luxembourg**, since the president of the Bar decides on the granting of legal aid, the applicant can lodge an appeal before the disciplinary commission of the Bar.

#### ***6.7.4 Second examination of the application by the organ which denied the grant***

In **France**, the applicant who was denied legal aid can ask for a new deliberation of the office and its president, if the refusal is based on too high an income level.

#### ***6.7.5 The double review***

In **Latvia**, the decisions of the administrative service in charge of legal aid can be appealed before the Ministry of Justice, the decision of which can also be appealed before the administrative court.

#### ***6.7.6 Granting of a provisional legal aid before the final decision***

In **Portugal**, the situation is particular. Indeed, legal aid is granted by social services which have a thirty-day period to give a decision on the application. During this period, the costs are suspended for the applicant. However, if the decision is negative, the applicant will have to pay the costs advanced during this period. Thus, a plaintiff can wait for the decision regarding legal aid granting before taking legal action. However, summoned defendant will not have this option and will find out whether he or she has to bear the costs of justice after the proceedings have started.

The situation is similar in **Spain**. Indeed, the law provides for the temporary appointment of a lawyer and a prosecutor by the Bar until the legal aid institution adopts a decision on the grant of legal aid. If the decision is positive, the applicant who fulfils the required conditions (insufficient economic means) will be granted free legal aid. To the contrary, if the decision refuses to grant legal aid, the applicant will have to pay legal representation fees in accordance with the terms of Article 27 of law 1/1996. The applicant can appeal the decision. In case of an

appeal, if the Commission gives no answer during a thirty days period the decision is deemed favourable to the applicant.

In the case of a refusal with the prescribed time period, an appeal can be lodged before the competent courts.

#### ***6.7.7 The establishment of an automatic right to legal aid***

In the **United Kingdom**, the right to legal aid is an automatic right if the person fulfils the required criteria. Appeals may be lodged against the decision of the legal aid agency.

#### **6.8 The existence of a primary legal aid**

In some Member States, a primary legal aid was set up. This aid is granted prior to the legal aid granted as a result of an official decision. It consists in a first advice given by a lawyer or any other person entitled by law to provide legal advice on the different courses of action and the right to legal aid.

In **Belgium**, this type of assistance is called “primary legal aid” and is defined as follows: it is “legal aid granted in the form of practical information, legal information, a first legal opinion or a referral to an authority or specialized organization” (translation of Article 508/1 of the “Code Judiciaire”).

Primary legal aid is granted in the form of a ten to fifteen minute consultation. If the required advice needs to be longer, the applicant to legal aid is then referred, according to the case, to the secondary legal aid (“legal aid office on duty”) or to a specialized legal aid organization.

Primary aid is thus a filter prior to secondary aid. It is available for every people, regardless of nationality, regularity of residence or income and it is completely free.

In **Lithuania**, there are two types of legal aid: primary aid and secondary aid.

Primary aid consists in the provision of information and legal advice alongside with the writing of acts for the State and municipalities except for proceedings documents. This primary aid also covers advice and preparation of settlement agreements. The interview regarding primary aid cannot exceed one hour.

Primary legal aid is granted by municipality officers with legal competence.

Secondary aid covers the writing of documents, defence and representation before a court, including enforcement proceedings, representation in case the dispute is subjected to a primary extra judiciary procedure when this is established by law or by a court decision. This sort of legal aid also covers the costs of the dispute due to civil proceedings, costs related to administrative proceedings and costs related to hearings in a civil action conducted within the framework of criminal proceedings.

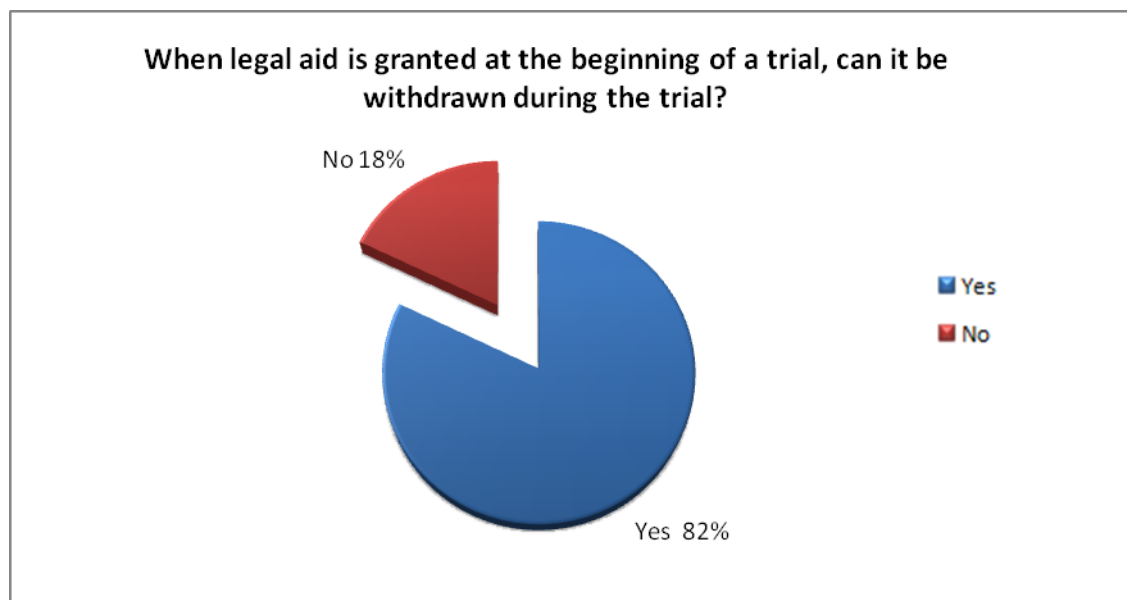
In **Slovenia**, individuals eligible for legal aid can receive a free first consultation regarding the dispute without prior checking of the applicant's financial situation. This free first consultation is also available in non-contentious administrative matters, although legal aid is not available for these procedures.

In **Slovakia**, individuals wishing to apply for legal aid must seek consultation at the "Legal Aid Centre" or with registered lawyers. The fee for the first consultation is 4.50 Euros. During this consultation, information is provided on necessary conditions to be fulfilled to obtain legal aid. This consultation is open to all natural persons.

In **Sweden**, a first consultation with a lawyer is compulsory to apply for legal aid.

## 6.9 Legal aid withdrawal

Graph 34 - Withdrawal of legal aid during the trial



Source: public questionnaire

The Directive leaves discretion to the Member States to provide for the possibility for the competent authority to demand full or partial reimbursement of legal aid by the beneficiary, if his or her financial situation has markedly improved after the aid was granted or if the aid was granted on the basis of false information provided by the beneficiary.

In most Member States, a system of withdrawal of legal aid has been set up. However, the conditions and consequences of this withdrawal differ from one Member State to another.

### 6.9.1 The conditions for the withdrawal of legal aid

In **Italy**, the change in the financial situation of the beneficiary must be significant for legal aid to be withdrawn.

In **Romania**, any person with an interest can provide evidence that the information provided by the beneficiary is false. Legal aid is then withdrawn and the beneficiary shall reimburse the costs advanced.

In **Slovakia**, the entity which decides on the granting of legal aid checks every six months whether the person still fulfils the criteria.

In **Sweden**, as mentioned above, a percentage of the costs of proceedings are automatically borne by the beneficiary. Legal aid may thus be withdrawn if the beneficiary does not pay his or her portion of the costs. Legal aid also may be withdrawn, as in all other Member States, if the beneficiary's financial situation changes or if the information provided is false. There is also a possibility to withdraw legal aid if it is no longer reasonable for the State to cover the costs of justice.

In **Belgium**, legal aid may be withdrawn "when the applicant no longer fulfils the conditions of article 508/13...", in other words legal aid is withdrawn, if the conditions that, as initially fulfilled, enabled the grant of legal aid are not met anymore. Legal aid may also be withdrawn "... *when the beneficiary obviously does not participate to the defense of his or her own interests*". A decision to withdraw legal aid is made by the President of the "Legal Aid Office".

In **Slovakia**, legal aid can be withdrawn for the following reasons:

- the beneficiary does not come to an agreement with the lawyer appointed by him or her or does not give power to the "Legal Aid Centre" to appoint him or her a lawyer within the three-month time period which follows the final decision on the granting of legal aid;
- the beneficiary does not cooperate sufficiently with the "Legal Aid Centre" or the appointed lawyer ;
- the beneficiary's income and property ownership circumstances have changed during the proceedings, and the beneficiary is no longer in a situation that justifies a granting of legal aid ;
- legal aid was granted on the basis of false or incomplete information;
- The beneficiary does not provide the "Legal Aid Centre" with evidence of his or her financial situation within an eight-day time period of a request for such information (or a longer period if specified in the request).

In **Finland**, legal aid may be withdrawn by the Legal Aid Office which granted it, if changes are observed in the financial situation of the beneficiary and that the granting conditions are no longer met. Moreover, legal aid can be withdrawn if the granting conditions never existed.

The court judging the dispute must withdraw legal aid if its granting conditions are not or no longer met.

### ***6.9.2 Consequences of the withdrawal***

The main issue is to determine whether those who benefited from legal aid before it was withdrawn should also reimburse the costs that were covered by the legal aid up to the time when the legal aid was withdrawn.

In **Cyprus**, legal aid may be withdrawn if the conditions for which it was granted are no longer fulfilled. The withdrawal of legal aid does not jeopardize the possibility for the lawyer to ask for the payment by the legal aid organization of acts done up to the withdrawal.

In **Hungary**, if information provided proves to be false, the beneficiary reimburses all incurred costs.

In **Finland**, costs reimbursement in case of withdrawal of legal aid is not automatic. It is decided by the courts. The court decision on the withdrawal must precise and state whether it is retroactive or not, in other words, it must state whether the former beneficiary has to reimburse the costs covered up to the time of the decision, and to what extent.

Thus, legal aid may have to be reimbursed under certain circumstances, in particular when the conditions that lead to its granting were never fulfilled. However, the court deciding the dispute has the obligation to withdraw legal aid if the conditions of grant are not or no longer fulfilled.

In the **Netherlands** and in **Spain**, the beneficiary of legal aid has an obligation to reimburse lawyers' fees and all others costs covered up to the time of withdrawal of the legal aid.

In **Greece**, a fine is provided for giving out false information in order to obtain legal aid. It can go from 15 to 150 Euros.

#### 6.10 The reimbursement of the costs

As regards reimbursement by the losing party of the winning party's costs, the Directive leaves Member States relative discretion. However, the reimbursement of the costs owed by the beneficiary to the opposing party must be operated in similar conditions for national disputes and cross-border cases.

In general, Member States are free to adopt different regulations concerning costs reimbursement. However, these regulations may not lead to differences in treatment of domestic litigations and cross-border litigations.

A distinction has to be made between costs incurred by the beneficiary and the costs incurred by the opposing party.

##### ***6.10.1 Reimbursement of the costs incurred by the party who does not benefit from legal aid***

When a party loses a case, in a majority of Member States the losing party may end up paying for the winning party's costs.

However, in a majority of Member States, legal aid does not cover the winning party's costs in cases where the beneficiary of the aid is the losing party. These will have to be paid out of the legal aid beneficiary's own pocket.

For example, in **Slovenia** and the **Czech Republic** legal aid covers the costs of the beneficiary but under no circumstance does it cover the costs of the other party even if such party is awarded costs by the court.

In **Greece**, if the beneficiary of legal aid is the winning party, the costs of proceeding, lawyer fees and/or other professional costs, for which the beneficiary was covered by legal aid may be ordered to be paid for by the losing party who then pays the State directly.

In **Slovakia**, if the beneficiary of the legal aid is required to pay for the costs of proceeding he/she is charged with by the jurisdiction, such costs will be paid directly to the lawyer and not to the beneficiary.

However, in **France**, the judge may decide that the Trésor public (the French State) shall pay a part of these costs. If the beneficiary loses his/her trial or is sentenced to pay the costs, he/she has to personally bear such costs, but the court may decide that the Trésor public shall also contribute toward costs to ensure that the winning party actually obtains reimbursement. Furthermore, the judge may sentence the aid beneficiary to pay a lump sum instead of the full winning party's costs basing its decision on equity or on the parties' economic situation.

#### ***6.10.2 The reimbursement of legal aid by the opposing party***

In **Estonia**, if the beneficiary of legal aid loses the case, courts generally order that legal aid be reimbursed. The court may also decide that a losing party reimburse the legal aid costs to winning party beneficiary of such legal aid.

In **Finland**, the losing party to a winning party beneficiary of legal aid may be sentenced to reimburse legal aid costs together with a late payment interests starting one month after the date of the judicial decision.

In **Slovenia**, if the legal aid beneficiary wins his/her case and if the decision orders that his/her costs shall be borne by the losing party, the latter shall reimburse such amounts directly to the Republic of Slovenia. If on the other hand, the losing party is not financially able to reimburse such costs and that the legal aid beneficiary obtains, as a result of the decision, assets, other than those related to alimony or compensation for personal injury, it is that winning party which will have to pay for such costs.

Similarly, the legal aid beneficiary who wins a case may be required to pay the difference between the amounts paid for by the losing party and the actual amounts spent be legal aid on the case if a difference exists.

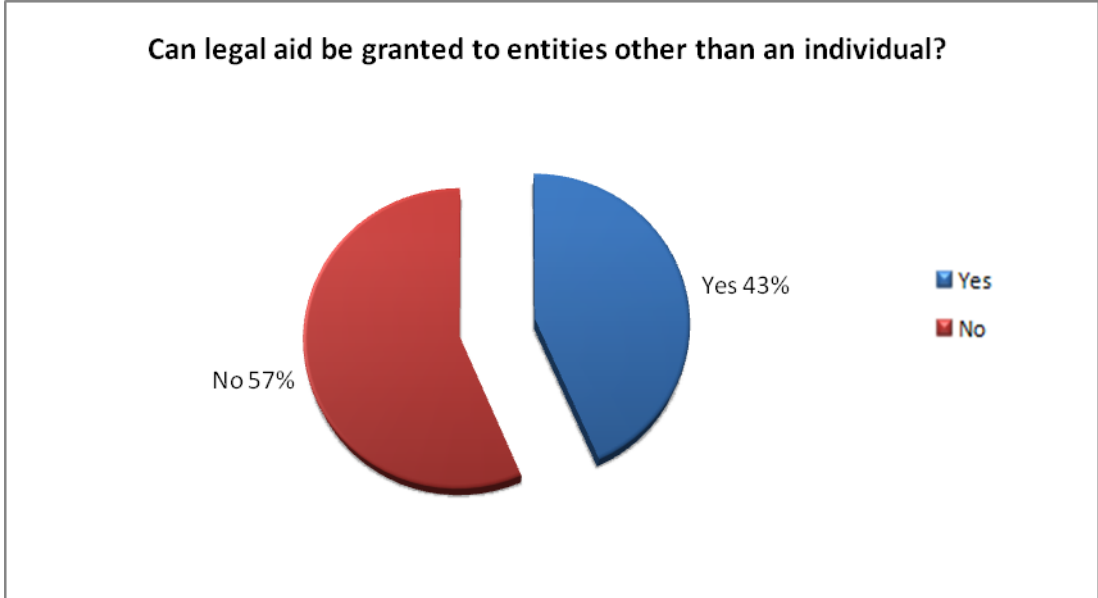


In **Sweden**, costs not covered initially by legal aid are reimbursed in case of a favourable decision. Those costs that were paid for by legal aid are reimbursed directly to the State by the losing party.

Finally, in **the United Kingdom**, the court deciding the case may order the losing party pay the costs of legal aid.

**6.11 The difference between natural persons and legal entities**

**Graph 35 - The difference between natural persons and legal entities**



*Source: public questionnaire*

The Directive deals only with natural persons. Hence, it is important to assess whether legal entities are also eligible to legal aid in each Member State.

In general, for those Member States that grant the benefit of legal aid to legal entities, special criteria apply.

The only Member State for which the scope of legal aid granting to legal entities is large is Germany. In **Germany** any legal entity that can validly file a claim before the courts may benefit from legal aid.

In **Austria**, legal aid may be granted to natural persons and to legal entities in cases where such entities' directors and shareholders are insolvent.

In **Sweden**, legal aid may only be granted to natural persons and to estates.

In **Spain**, legal aid may be granted to the following legal entities: Social Security entities, legal entities whose taxable revenue for corporate tax is lower than three times the annual guaranteed minimum wage, State accredited associations, and foundations.

In a few Member States, eligibility to legal aid is determined by the non-profit feature of the entity.

Hence in **Italy**, legal aid is also granted to non-profit organizations which do not have any economic activity.

In **Estonia and Slovenia**, legal entities are granted legal aid under certain conditions.

These legal entities must be foundations or non-profit organizations registered on an official list of organizations that benefit from tax incentives or similar regulations.

They are only granted legal aid for actions mentioned in their articles of incorporation in as far as such action benefits the public at large. They apply for example to consumer or environment protection organizations.

The legal entity's registered office must be in Estonia or in another Member State.

In **Slovenia** legal entities may be exempt from certain costs (in particular procedural costs) if they can demonstrate that they do not have the necessary means to pay for such costs and that the payment of such costs would endanger the survival of the business. In these cases, courts can also allow special payment schedules.

In **France**, legal aid may exceptionally be granted to non-profit organizations whose registered office is in France and which lack sufficient resources to go to court. Legal aid may also be granted in specific circumstances to building management bodies.

In some Member States, the director of a company may be granted legal aid for a litigation concerning the company he or she is a director of.

This is the case in **Finland** where otherwise legal aid may not be granted to legal entities.

Finally, in some Member States, access to legal aid for legal entities is excluded.

It is so in the **Czech Republic** as regards to cross-border litigations.

This exclusion also applies in **Romania, Latvia, Luxembourg, the United Kingdom and Lithuania**.

## **PART III: CASE STUDIES**

To provide a practical insight into how costs are spread over the time of a trial and what the proportion of each cost is in relation to the other, the Country Experts presented five case studies. For each case study, the “cross-border” factor was taken into consideration. A detailed description and analysis of all results obtained is presented in each Country Report as attached hereto. The following is only a summary of the case studies.

Two out of the five case studies are described in table format here under to enable a more direct evaluation and comparison of proceedings’ costs in the EU.

To make the comparison easy, only the most significant costs usually found in the cases studied were taken into account. These follow:

- Proceedings costs;
- Lawyer’s fees;
- Bailiff’s fees;
- Appeal costs.

A series of assumptions was used to make relevant comparisons. These are as follows:

- Determination of transcription costs = judgement is ten pages long;
- The proceedings costs do not exclude other costs such as exequatur, transcription of decision on a foreign register, ...;
- In the case of an appeal, the costs of appeal only, i.e. of second (or higher?) authority, are taken into account, Supreme Court costs excluded;
- The evidentiary costs are not taken into account (official transcript of the marriage agreement or of the birth certificate);
- The amount of time spent by the lawyer is fifteen hours in case no 1 and twenty hours in case no 4;
- In case of translation, the number of pages is fifty;
- The costs of bailiffs as regards implementation of decisions are not taken into account.

# 1 CASE NO 1 - FAMILY LAW

## 1.1 Wording

The following case study was submitted to the Country Experts:

***“Case Study number 1 - Family law - Divorce (excluding division of matrimonial property)”***

*In the following Case Study please advise the party that files for divorce on litigation costs.*

***Case A - National situation: a couple gets married. Later they separate and agree to a divorce.***

***Case B - Transnational situation: Two nationals from a same Member State (Member State A) get married. The marriage is celebrated in Member State A. After the wedding, the couple moves to live and work in another Member State (Member State B) where they establish their residence. Shortly thereafter the couple separates with the wife returning to Member State A and the husband remaining in Member State B. The couple agrees to a divorce. Upon her return to Member State A, the wife immediately files for a divorce before the courts of Member State B<sup>57</sup>”.***

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<sup>57</sup> N.B : Article 3 of Regulation EC n° 2201/2003 provides that: *“In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State(a) in whose territory:*

- the spouses are habitually resident, or*
- the spouses were last habitually resident, insofar as one of them still resides there”*

## 1.2 Evaluation of the costs

		Cost of proceeding (1st judicial decision)	Appeal	Lawyer	Bailiff	Total of the costs of justice (1st degree)
<b>AT</b>	CAS1A	€210.00	€278.00	€2 049.74	€0.00	€2 259.74
	CAS1B	€210.00	€278.00	€2 049.74	€0.00	€2 259.74
<b>BE</b>	CAS1A	€52.00	€121.50	€1 500.00	€0.00	€1 552.00
	CAS1B	€52.00	€121.50	€1 500.00	€0.00	€1 552.00
<b>BU</b>	CAS1A	€18.00	€18.00	€82.00		€100.00
	CAS1B	€18.00	€18.00	€82.00		€100.00
<b>CY</b>	CAS1A	€397.00	€395.00	€1 200.00	€930.00	€2 527.00
	CAS1B	€397.00	€395.00	€2 250.00	€1 325.00	€3 972.00
<b>CZ</b>	CAS1A	€46.00	€36.00	€364.00	€0.00	€410.00
	CAS1B	€46.00	€36.00	€364.00	€0.00	€410.00
<b>DE</b>	CAS1A	€247.00	€489.00	€391.30	€0.00	€638.30
	CAS1B	€247.00	€489.00	€391.30	€0.00	€638.30
<b>DK</b>	CAS1A	€89.00	€123.00	€1 500.00	€0.00	€1 589.00
	CAS1B	€89.00	€123.00	€1 500.00	€0.00	€1 589.00
<b>EE</b>	CAS1A	€19.60	€19.60	€2 237.00	€460.00	€2 716.60
	CAS1B	€19.60	€19.60	€4 793.00	€460.00	€5 272.60
<b>ES</b>	CAS1A	€0.00	€0.00	€1 500.00	€150.00	€1 650.00
	CAS1B	€0.00	€0.00	€1 500.00	€150.00	€1 650.00
<b>FI</b>	CAS1A	€116.00	€2.00	€975.00	€110.00	€1 201.00
	CAS1B	€116.00	€2.00	€975.00	€110.00	€1 201.00
<b>FR</b>	CAS1A	€0.00	€0.00	€975.00	€110.00	€1 085.00

		Cost of proceeding (1st judicial decision)	Appeal	Lawyer	Bailiff	Total of the costs of justice (1st degree)
	CAS1B	€0.00	€0.00	€975.00	€110.00	€1 085.00
<b>GR</b>	CAS1A	€11.50	€21.50	€1 500.00	€0.00	€1 511.50
	CAS1B	€11.50	€21.50	€1 500.00	€0.00	€1 511.50
<b>HU</b>	CAS1A	€48.00	€32.00	€200.00	€0.00	€248.00
	CAS1B	€48.00	€32.00	€400.00	€0.00	€448.00
<b>IE</b>	CAS1A	€0.00	€0.00	€3 000.00	€25.00	€3 025.00
	CAS1B	€0.00	€0.00	€3 000.00	€25.00	€3 025.00
<b>IT</b>	CAS1A	€0.00	€0.00	€4 000.00	€0.00	€4 000.00
	CAS1B	€0.00	€0.00	€4 000.00	€0.00	€4 000.00
<b>LT</b>	CAS1A	€28.96	€28.96	€1 000.00	€28.96	€1 057.92
	CAS1B	€28.96	€28.96	€1 000.00	€28.96	€1 057.92
<b>LU</b>	CAS1A	€0.00	€0.00	€2 500.00	€0.00	€2 500.00
	CAS1B	€0.00	€0.00	€2 500.00	€150.00	€2 650.00
<b>LV</b>	CAS1A	€71.14	€35.57	€711.44	€0.00	€782.58
	CAS1B	€71.14	€35.57	€711.44	€0.00	€782.58
<b>MT</b>	CAS1A	NA	NA	NA	NA	NA
	CAS1B	NA	NA	NA	NA	NA
<b>NL</b>	CAS1A	€196.00	€248.00	€1 200.00	€81.16	€1 477.16
	CAS1B	€196.00	€248.00	€1 200.00	€81.16	€1 477.16
<b>PL</b>	CAS1A	€225.00	€155.00	€2 860.00	€0.00	€3 085.00
	CAS1B	€485.00	€155.00	€2 860.00	€0.00	€3 345.00
<b>PT</b>	CAS1A	€336.00	€192.00	€1 500.00	€1 008.00	€2 844.00
	CAS1B	€912.00	€480.00	€1 500.00	€1 008.00	€3 420.00
<b>SE</b>	CAS1A	€48.00	€0.00	€427.00	€0.00	€475.00
	CAS1B	€48.00	€0.00	€427.00	€0.00	€475.00
<b>SL</b>	CAS1A	€35.68	€35.68	€586.70	€0.00	€622.38
	CAS1B	€35.68	€35.68	€586.70	€0.00	€622.38



		<b>Cost of proceeding (1st judicial decision)</b>	<b>Appeal</b>	<b>Lawyer</b>	<b>Bailiff</b>	<b>Total of the costs of justice (1st degree)</b>
<b>SK</b>	CAS1A	€90.00	€90.00	€300.00	€0.00	€390.00
	CAS1B	€90.00	€90.00	€800.00	€0.00	€890.00
<b>UK</b>	CAS1A	€501.00	€147.00	€1 843.00	€0.00	€2 344.00
	CAS1B	€501.00	€147.00	€1 843.00	€0.00	€2 344.00

## 2 CASE NO 4 - COMMERCIAL LAW

### 2.1 Case

The following case was submitted to the Country Experts:

***“Situation no 4 - Commercial law - Contract***

*You have to advise the seller on the costs of the proceeding.*

***Case A - Domestic situation:*** *a company delivered goods for an amount of 20 000 Euros. It was not paid since the buyer considers that the goods are not in conformity.*

*The seller decides to go to court in order to obtain payment.*

***Case B - Cross-border situation:*** *a company whose registered office is in Member State B delivered goods for an amount of 20 000 Euros. The agreement is subject to the law of Member State B and written in the language of Member State B. This company was not paid since the buyer who is in Member State A considers that the goods are not in conformity.*

*The seller decides to go to court before the jurisdictions of Member State A as permitted by the agreement.”*

## 2.2 Evaluation of the costs

		Costs of proceeding (1st judicial decision)	Appeal	Lawyer	Bailiff	Total of the costs of justice (1st degree)
<b>AT</b>	CASE4A	€607.00	€934.00	€8 870.42	€0.00	€9 477.42
	CASE4B	€607.00	€934.00	€8 870.42	€0.00	€9 477.42
<b>BE</b>	CASE4A	€35.00	€186.00	€2 000.00	€420.00	€2 455.00
	CASE4B	€35.00	€186.00	€2 000.00	€420.00	€2 455.00
<b>BU</b>	CASE4A	€803.25	€400.00	€570.00	€1 400.00	€2 773.25
	CASE4B	€803.25	€400.00	€570.00	€1 400.00	€2 773.25
<b>CY</b>	CASE4A	€397.00	€395.00	€1 200.00	€930.00	€2 527.00
	CASE4B	€397.00	€395.00	€2 250.00	€1 325.00	€3 972.00
<b>CZ</b>	CASE4A	€800.00	€800.00	€1 607.00	€107.00	€2 514.00
	CASE4B	€800.00	€800.00	€2 727.00	€107.00	€3 634.00
<b>DE</b>	CASE4A	€869.00	€1 157.00	€839.80	€98.00	€1 806.80
	CASE4B	€869.00	€1 157.00	€839.80	€98.00	€1 806.80
<b>DK</b>	CASE4A	€509.00	€509.00	€2 600.00	€100.00	€3 209.00
	CASE4B	€509.00	€509.00	€2 600.00	€100.00	€3 209.00
<b>EE</b>	CASE4A	€19.60	€19.60	€4 793.00	€2 029.00	€6 841.60
	CASE4B	€19.60	€19.60	€4 793.00	€2 029.00	€6 841.60
<b>ES</b>	CASE4A	€200.00	€350.00	€4 000.00	€0.00	€4 200.00
	CASE4B	€200.00	€350.00	€4 000.00	€0.00	€4 200.00
<b>FI</b>	CASE4A	€164.00	€164.00	€6 000.00	€418.00	€6 582.00
	CASE4B	€164.00	€164.00	€6 000.00	€418.00	€6 582.00
<b>FR</b>	CASE4A	€0.00	€0.00	€5 000.00	€130.00	€5 130.00
	CASE4B	€0.00	€0.00	€5 000.00	€130.00	€5 130.00

		<b>Costs of proceeding (1st judicial decision)</b>	<b>Appeal</b>	<b>Lawyer</b>	<b>Bailiff</b>	<b>Total of the costs of justice (1st degree)</b>
<b>GR</b>	CASE4A	€632.96*	€505.40	€1 800.00	€80.00	€2 512.96
	CASE4B	€632.96	€505.40	€1 800.00	€80.00	€2 512.96
<b>HU</b>	CASE4A	€1 200.00	€1 200.00	€1 500.00	€300.00	€3 000.00
	CASE4B	€1 200.00	€1 200.00	€1 500.00	€300.00	€3 000.00
<b>IE</b>	CASE4A	€70.00	€100.00	€4 000.00	€100.00	€4 170.00
	CASE4B	€70.00	€100.00	€4 000.00	€100.00	€4 170.00
<b>IT</b>	CASE4A	€178.00		€6 000.00	€150.00	€6 328.00
	CASE4B	€178.00		€6 000.00	€150.00	€6 328.00
<b>LT</b>	CASE4A	€600.00	€600.00	€2 300.00	€28.96	€2 928.96
	CASE4B	€600.00	€600.00	€2 300.00	€28.96	€2 928.96
<b>LU</b>	CASE4A	€0.00	€0.00	€3 000.00	€1 050.00	€4 050.00
	CASE4B	€0.00	€0.00	€3 000.00	€1 050.00	€4 050.00
<b>LV</b>	CASE4A	€561.89	€280.95	€2 489.00	€27.60	€3 078.49
	CASE4B	€561.89	€280.95	€2 489.00	€27.60	€3 078.49
<b>MT</b>	CASE4A	€654.00	€1 050.00	€1 020.00	€14.00	€1 688.00
	CASE4B	€654.00	€1 050.00	€1 020.00	€14.00	€1 688.00
<b>NL</b>	CASE4A	€440.00	€600.00	€7 500.00	€81.16	€8 021.16
	CASE4B	€440.00	€600.00	€7 500.00	€81.16	€8 021.16
<b>PL</b>	CASE4A	€1 174.00	€1 000.00	€3 332.00	€400.00	€4 906.00
	CASE4B	€1 174.00	€1 000.00	€3 332.00	€400.00	€4 906.00
<b>PT</b>	CASE4A	€691.50	€960.00	€1 500.00	€1 152.00	€3 343.50
	CASE4B	€691.50	€960.00	€1 500.00	€1 152.00	€3 343.50
<b>SE</b>	CASE4A	€48.00	€0.00	€2 140.00	€0.00	€2 188.00
	CASE4B	€48.00	€0.00	€2 600.00	€0.00	€2 648.00
<b>SL</b>	CASE4A	€303.90	€402.90	€495.72	€0.00	€799.62
	CASE4B	€303.90	€402.90	€990.00	€0.00	€1 293.90
<b>SK</b>	CASE4A	€1 200.00	€1 200.00	€600.00	€4 000.00	€5 800.00
	CASE4B	€1 200.00	€1 200.00	€1 000.00	€4 000.00	€6 200.00

		<b>Costs of proceeding (1st judicial decision)</b>	<b>Appeal</b>	<b>Lawyer</b>	<b>Bailiff</b>	<b>Total of the costs of justice (1st degree)</b>
<b>RU</b>	CASE4A	€589.00	€885.00	€5 897.00	€0.00	€6 486.00
	CASE4B	€589.00	€885.00	€5 897.00	€0.00	€6 486.00

\*Includes obtaining an enforceable title which is the major cost component of this item (480 Euros) and is only incurred in case the claimant wins the case and the decision is a money amount.

## **PART IV: CONCLUSIONS AND RECOMMENDATIONS**

# 1 THE ECONOMIC APPROACH

The costs of judicial proceedings have the object of economics studies. The economic approach is paramount for these questions.

In his work of reference on the costs of accidents<sup>58</sup>, Guido Calabresi introduced three categories of costs that are related to the costs of justice. These can be summarized within the context of the present study as follows:

- The primary costs corresponding to the amount at stake in the dispute (the damages in civil liability cases) ;
- The secondary costs corresponding to the costs the parties could have paid in order to avoid the dispute (exercising care in order to avoid accidents) ;
- Lastly, the tertiary costs which cover all the costs the parties have to pay to go before a judge in order to obtain a judicial resolution of the dispute.

Surprisingly, most studies on this matter tend to consider the tertiary costs as negligible so that they only compare primary and secondary costs. The reason for this probably resides in the fact that the parties do not have to “pay” the judge or the judicial administration of cases at least not directly.

But it is also unrealistic with regard to all the sources of costs of the actual judicial proceedings. These costs are at the core of the litigants’ decisions to take legal action or not.

The notions of costs transparency and foreseeability in respect of the proceedings are becoming essential.

The foreseeability of the costs involved in the dispute implies the possibility to assess the cost of the whole proceedings.

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<sup>58</sup> Guido Calabresi, *The Costs of Accidents, a legal and economic analysis*, Yale University Press, 1970.

If the establishment of a schedule of prices may ensure the transparency in the costs of execution, it does not however ensure their foreseeability. The actual costs will depend on various criteria such as the solvency and the behaviour of the debtor, the adaptability of the proceedings (the possibility to choose the most suitable one), the accessibility of the debtor's patrimonial information, etc. It is indeed difficult at the beginning of the proceedings to know the number of acts that will be needed to achieve a result.

### 1.1 The costs of civil proceedings

Several stages can be distinguished within the proceedings, and each one has specific costs:

- The pre-dispute stage encompasses all the steps needed to define the strategy to adopt and includes the costs incurred in finding a counsel and paying them. One case distinguish in terms of costs between the recourse to outside counsel and the use of an inside counsel when one exists.
- The dispute stage includes the costs generated by collecting and evaluating evidence using other legal professionals, in particular experts and bailiffs and the judicial costs involved in submitting such evidence.
- Finally the stage of execution of the decision may generate some extra costs for the litigant such as the costs related to conservatory or constraining measures aiming at collecting a debt. Such costs may vary considerably from one Member State to another.

Economic analysis is relevant to distinguish clearly between different types of costs. Set prices for example are those that remain unchanged regardless of the activity size or the volume of production. For instance, the number of cases dealt with yearly by a court will not have an impact on the set costs inherent to the proceedings. The "Nouveau Plan Comptable" (French Accounting Code) provides a clarifying definition and states that "they are expenses linked to the existence of the company and they correspond for each calculation period to a given production ability". For instance, in respect to the subject matter at hand, the number of cases dealt with yearly by a court will not have an impact on the set costs inherent to the proceedings. The costs of infrastructure or general management are examples of such costs.



Unlike set costs, variable costs are expenses that change according to the volume of activity. They take into account the expenses that are directly related to the numbers of services provided over a certain period. For instance, they cover the costs generated by the staff hired specifically for the proceedings, the running and investment expenses that are directly connected to these proceedings can also be considered variable costs.

It should also be noted that although this falls outside the scope of the present study, judicial proceedings imply costs for the State, the litigant and the other representatives of the law. It is thus possible to distinguish the public cost defined as the amount of the public expense allocated to the functioning of justice (the judges' salaries, the running of the courts, legal aid etc.) on the one hand and on the other hand the private costs in the sense of the costs of resorting to justice for the litigant. The present study focuses on the latter category of costs but these are intricately linked and although some countries may indicate low costs for litigants, this may in fact be the result of high costs taken in charge by the State and consequently high taxes. To evaluate the costs of justice fully, one would need to determine what litigants pay in terms of justice both as a result of the fees that they pay and as a result of their contribution as tax payers. In the same vein, what may be seen as important costs borne by litigants in some Member States may in fact be the result of little contributions made by tax payers toward the justice system. Thus, any EU effort toward harmonization in terms of costs or transparency needs to take each Member States' contribution to the justice system.

In the pre-litigation stage, the main costs to take into consideration are linked to finding counsel and paying counsel's pre-litigation fees. The litigant's first concern is to assess the opportunity cost of taking legal action and to evaluate the expenses inherent by obtaining relevant information and making appropriate requests.

The opportunity cost is at the core of this financial reasoning. This is particularly true when going to court will, potentially, yield more money than not taking any action. This cost appears in the value given to the difference between taking action and not doing anything. For example, for a car constructor who delivers twenty-five vehicles to a company who ascertains that only twenty vehicles were ordered: the car constructor needs to assess whether the cost inherent to the proceedings is low enough compared to his acceptance of the payment of only twenty vehicles, taking

the length of the proceedings into consideration, his client's refusal to pay for his merchandise, etc. The opportunity cost thus appears as the implicit cost representing the value of the choice he gives up when he decides to resort to such proceedings. This person should also make sure that the opportunity cost is not too high compared to settling the case which usually involves a shorter resolution period.

At first, the opportunity cost is a non monetary cost, but if the judicial proceedings are engaged, then this cost may potentially be taken into account in the litigant's budget. But even if no legal action is taken, these costs should be counted in the potential litigant's budget, as well as in the budgets of advisory organizations (legal advice associations, legal aid), the costs being in principle higher for the litigant, except in cases when s/he receives legal aid or another form of legal financial assistance which represents a cost for the community.

In the proceedings' stage, a number of costs linked to the proceedings can be borne either by the public budget or by the litigant's budget: the costs regarding the constitution of a case, the search for evidence, the determination of an expert and their intervention, the advice received during the proceedings, the amount of compensation received or paid. The costs inherent to identifying witnesses, the lawyer's fees, the various expenses such as the stamps fees are mostly paid for by the litigant except when s/he receives legal aid. The notification of acts, the hearing expenses, and the salary of the judicial staff are costs borne by the court. For the litigant, many expenses are transaction costs, in other words linked to the proceedings themselves and the costs they generate in terms of fees, travel...

The notion of financial cost related to the resolution of disputes refers to a set of concepts the relevance of which depends on the defined aim. Since the economic analysis focuses on the litigants' behaviours, it tends to bring in contrast the costs of an amicable settlement between the conflicting parties (which we will call the settlement costs) and the costs related to the proceedings in the cases of judicial action. The costs difference between these two modes of conflicts resolutions as it is perceived by the litigant will enable him/her to make a decision on the opportunity to take action. The main economic impacts of the costs of justice reside in this kind of decision-making.

## 1.2 The choice between settlement and judgment

The economic analysis, and in particular game theory, presents civil disputes as a coordination problem between rational agents defending their own interest.

In such a context, the issue is to determine under which circumstances a judge's intervention will be needed to resolve the dispute. By analogy with a commercial exchange, the establishment of a direct agreement between the parties can be considered. For the plaintiff, it would consist in giving up his/her right to sue in exchange for a payment from the defendant. This solution presents the advantage to release a sum of money that corresponds to the amount of the expenses that the parties would have had to incur had they gone to court. These costs encompass all the expenses related to the hearings, the acts and the judicial proceedings. They include the rights, compensation, taxes or fees perceived by the courts or the tax administration, witnesses, experts and lawyers. Taking this sum into consideration, the parties have an incentive to avoid a trial. However, difficulties may arise due to the excessive optimism of at least one of the parties regarding the outcome of the trial, a party's knowledge of undisclosed information - giving it an edge -, or the disagreement on the distribution of the surplus money.

For instance, the following hypothetical example illustrates the application of game theory principles to civil litigation. In civil liability disputes: the defendant has a 0.75 chance of being found responsible during his/her trial and the estimated damages if found liable are 100 000 Euros. The plaintiff hopes, on the basis of the defendant being found guilty, to collect a sum supposedly equal to 75 000 Euros. If we add the trial expenses, estimated at 10 000 Euros for each party, we find that under these circumstances any agreement ranging from 65 000 to 85 000 Euros would be more advantageous for both parties. The plaintiff expects to obtain 65 000 Euros ( $75\,000 - 10\,000$ ) in case of a favourable judgment and the defendant expects to lose 85 000 Euros ( $75\,000 + 10\,000$ ). It should be noted that the incentive to cooperate is even greater in cases of risk aversion as the function of the gain will be greater than the gain itself.

What sort of reasoning leads the parties to go to court anyway? What are the decisive elements?

In the above example, the main factor seems to reside in the parties' expectation to win or lose the trial. That is to say the litigants' beliefs play a crucial part. As long as those beliefs concur, there are no obstacles to reach an agreement. In this particular case, if the plaintiff assesses his chances to win the trial at 0.75 and the defendant assesses his chances to lose at 0.75, pure economic analysis warrants an agreement between the parties rather than a trial. But on the contrary, if the defendant assesses his chances of losing the trial at 0.25, the demonstration that an agreement between the parties can be reached becomes arduous and even impossible. Indeed, the plaintiff still demands 65 000 Euros, but the defendant now only offers 35 000 Euros. The parties' proposals are no longer compatible and the agreement becomes unreachable due a negotiation margin that becomes too small.

In general, when the parties reach an agreement without the intervention of a judge, it means they managed to agree on an "amount" that is satisfactory to them both by comparison to going to trial, the costs and risks of trial, and the expected outcome of the trial. Nevertheless, the potential existence of such an "amount" does not guarantee that an agreement will be reached.

Indeed economic models on conflict resolution (Landes [1972], Shavell [1982]) point out the problem which resides in the perception of the surplus related to the signing of an agreement in comparison with a trial. From this perspective, the litigants' claims (the proportion of the surplus they want to obtain) depend on their expectations regarding the judge's decision. There is no reason whatsoever why their expectations should concur. The parties' excessive optimism or what one could call irrational exuberance as regards the outcome of the trial constitutes an explanation for judicial actions. It should also be noted that trials play other functions than just that of settling a dispute. Some plaintiffs refuse to settle in order to send a message to other potential defendants or to contribute to the case law on a specific subject.

### ***1.2.1 Cost anticipation and litigants information***

Economic analysis faces the issue of explaining why the parties have differing beliefs, in other words to grasp the reason why one of the parties remains optimistic on his or her chances of obtaining a favourable outcome at trial when the other party anticipates a similar outcome. Indeed, the economic theory (Auman [1976]) predicts that the players' beliefs should theoretically concur during the course of the

negotiation. The explanation usually proposed is based on the existence of information asymmetry between the players (Bebchuck, 1984). The idea being that the parties have different pieces of information at their disposal which can have an impact on the trial's outcome. For instance, the plaintiff may be in possession of information regarding the accurate extent of his/her damages or the defendant may have information regarding his/her degree of negligence prior to the occurrence of the damage. The works published over the last twenty years show that the presence of such information leads to a positive probability of failure in negotiations between the parties (Deffains, 1997). The intuition that leads to this result can be clarified simply by reviewing the previous example. Let us imagine that the plaintiff is able to present a "strong" case or a "weak" case to the court based on the information s/he possesses. In the "strong" case hypothesis, the expected gain from the trial is 100 000 Euros and in the latter instance the expected gain is 50 000 Euros. We should add that the plaintiff is aware of the quality of his case whereas the defendant is unaware of these elements, he only knows that he has a fifty-fifty chance to come up against a "strong" case that would cost him/her 100 000 Euros. Using the non cooperative players' theory, it is easy to understand that under these circumstances, the "strong" cases will necessarily fail in the negotiation. Indeed, a plaintiff with a "weak" case will accept 40 000 Euros to negotiate (50 000 - 10 000) whereas a plaintiff with a "strong" case will demand at least 90 000 Euros (100 000 - 10 000). Consequently, as the defendant ignores which type of plaintiff he is dealing with, the only way to reach an agreement for sure is to propose 90 000 Euros and this is not in his/her best interest as it would cost him/her more than if s/he proposed 40 000 Euros. Indeed, choosing the option which ensures the signing of an agreement, his/her expected loss is 90 000 Euros whereas if s/he only proposes 40 000 Euros, his/her expected loss only comes to 75 000 Euros ( $110\,000 \times 0.5$ ) + ( $40\,000 \times 0.5$ ). S/he thus chooses to adopt the latter strategy and all the "strong" cases end up before the judge.

The models of strategic behaviours developed within game theory puts forward a rather interesting explanation on conflicts' resolution outside the courts. This contributes to revealing the truth about the manner in which the agents shape their beliefs regarding the trial's expected outcome as well as on the origin of a potential excessive optimism.

In general, the strategic nature of negotiation has prevailed in the analysis through the elaboration of games based on imperfect information (Cooter and Rubinfeld [1989]).

Negotiation strategies may as such impact the choices made as regards settlement and trial. In order to explain conflicts' resolution in court, it is not necessary to assume that the parties' beliefs are systematically biased. The existence of asymmetries in the information possessed by the players, leading to differences in their beliefs on the outcome of the trial and the judgments may be the result of the parties' negotiation strategies. The literature dealing with pre-judgment negotiation establishes a few restrictive rules on the nature of negotiations, sometimes viewed as static (Bebchuck [1984, Nalebuff [1987]), and sometimes as dynamic integrating a psychological dimension focused on the present to complete with endogenous offers (Spier [1992]).

In most models, one of the parties is able to make a "final offer" which leaves the other party the freedom to accept or refuse. The crucial element then resides in the choice of the party who makes the offer. Two categories of model have been developed. On the one hand, the screening model in which the uninformed party makes the offer so that no information is given out by its action. In these models, when judicial action is taken, the uninformed party dictates the negotiation's terms in a first stage. In a second stage, the party in possession of private information accepts or refuses the offer. If the parties manage to come to an agreement, the judge no longer plays a part other than recording and registering the end of the dispute when the case is struck off the court's case list. The uninformed party's maximum offer is then used to select between the various unobservable types of the opposite party. On the other hand, when the better informed party plays first, the private information may be given out within the signal models' framework. The models proposed contribute to clarify the reason why the parties engaged in costly trials may fail to come to an agreement. A realistic approach of conflicts' resolution must be based on a negotiation theory.

### ***1.2.2 The implications of the economic approach***

Despite a seeming simplicity, the implications of this economic approach of conflicts' resolution are rather intricate particularly when the parties are able to make offers and counter-offers (Deffains and Doriat, 1999). From costs and information discrepancies originate the opportunistic behaviours which lead to balanced situations when all disputes are not resolved amicably by the parties. The economy of justice emphasizes here an anti-selection issue since the players pretend to be what they are not, "weak cases", and try to be taken for "strong cases".

This analysis framework assumes the asymmetries are given and it is necessary to think about the reasons why the parties do not reveal their private information to the opposite party. Obviously, in the above case, the party in possession of private information is prompted to reveal his or her data so as to make a 90 000 Euros agreement possible. The problem with the adverse selection principle is that the defendant will not be inclined to follow the plaintiff as this sort of declarations lacks credibility.

Based on this reasoning, the economic analysis reveals several interesting results concerning the choice between settlement and judgment:

- The settlement chance rate increases as the costs of the trial and the hearing fees increase. On this basis, some works allow for the comparison of negotiation incentive under different systems of hearings' fees distribution. It appears that the American regulation which ascribes its own trial expenses to each party encourages conflicts resolution by settlement compared to the British regulation which proceeds to a transfer of the expenses to the losing party's charge. The French regulation on condemnation to the expenses has a neutral effect on this.
- The settlement chance rate increases when the information held by the parties is similar (in other words, the more symmetric the information, the stronger the incentive to cooperate) ;
- When both parties are optimistic on the outcome of the trial, the settlement chance rate decreases with the amount at stake (the higher the damages expected from the outcome of the trial, the more optimist the parties will be) ;
- When a dynamic negotiation is engaged (with offers and counter-offers), a deadline effect comes into play and becomes a strategic variable itself. It is

interesting to come to an agreement “on the court’s front steps” because a quick negotiation would have betrayed the “weakness” of a case, and thus a relative disadvantage in the negotiation. In that case the negotiation is purposefully slowed by the parties and displaces the issues at hand from the substance of the negotiation to the nerves of the parties. Waiting until the last minute may then become a means to build up a strategic advantage. In practice, this deadline effect was found present in most national systems, including in the lower-level and first instance Courts in France (Deffains and Doriat [1999]), which tends to validate the part played by information discrepancies in conflicts’ resolution.

### ***1.2.3 The indirect effects: cross border disputes***

The economic analysis must be based on empirical studies to be truly convincing. Some empirical studies have been carried out, but they remained unknown or unrecognized, perhaps due to their very specific field that they explore. There are no statistical or econometrical studies on proceedings costs in general. There are studies concerning certain types of litigations. The most interesting deal with litigations on contractual issues, in particular when these litigations involve companies engaged in cross border trading activities. These studies give an idea on the costs impact on the strategies of the economic actors and on the possible consequences on these costs on the amount and value of the trade.

## **1.3 Normative Aspects**

The purpose of the economic studies on legal issues generally goes beyond the explanation of judicial decisions. They include reflections on how to improve judicial systems in terms of their efficiency, in other words to limit the social cost of justice. The starting point resides in the idea that the good “justice” resulting from court activities serves public good (non rivalry and non exclusion). For this very reason, access to justice (dispute resolution and production of judicial precedents) is organized by the State which ensures impartiality, independence and effective enforcement. The fees for services provided by the courts in every European country are low to ensure access to all. They are also monitored so that the price paid by the litigants differs from the marginal cost of production of these services and there is



virtually no competition between the courts. In the end, the adjustment of supply and demand is mainly the result of judicial delays rather than of the costs of access to the courts.

The goal here is to take a look at public policies that aim at regulating the number of disputes by acting directly on the demand for justice. These policies take on various forms and they intervene at different stages of the dispute: when the decision to sue is taken, and when the means of resolution of the dispute is chosen (settlement, arbitration or judgment). Different variables can be identified as likely to have an impact on the number of prosecutions and judgments, including:

- Increase of courts' capacity;
- Trials' costs and their distribution between the parties; and
- Changes in judicial proceedings.

The functioning of the justice market is usually described as mechanisms capable of ensuring the achievement of a balance when short term supply is rigid. In this perspective the delays and costs of access to the courts influence the "demand" for trials. This analysis led to unconvincing results in respect to the impact of judicial reforms focused on the shortening of the proceedings or on the increase of the supply (Deffains and Doriat, 2001). Easing access to justice leads to an increased demand for trials. Policies based on the proceedings' costs being at the litigants' charge should, as a result, be favoured. These policies can influence the amount of the costs or their distribution between the parties. The studies show that the increase of trials costs contributes to reduce the number of judicial actions and to increase the rate of settlements. A cut in these costs could have the opposite effect. However, increasing costs may also mean that justice becomes available only to those who can afford it. These results have led to expanding the scope of the analysis to all the devices that impact the costs of access to justice, and in particular legal aid. This led to the conclusion that any system of assistance to take legal action favours the resort to a judge and increases the inflationary spiral of costs of justice. All the instruments to regulate the flow of considered judicial actions, within the framework of the justice's economy, are thus based on incentive mechanisms insofar as none calls into question the fundamental principle of free access to justice.

The option of resorting increasingly to alternative modes of conflict resolution has also been analyzed. The motivations behind promoting arbitration or mediation can

be analyzed in order to justify these devices on social and private grounds. These modes of resolution are based on the intervention of a third party whose function is to communicate the information to the parties.

### ***1.3.1 The regulations on the distribution of costs of justice***

The regulations regarding the distribution of judicial proceedings costs between the parties differ from country to country. Each system has its own logic: the American regulation which leaves each party in charge of its own expenses is based on a pricing logic. Indeed, it considers that justice, as a service made available to the litigants has a cost and thus that all parties regardless of the trial's outcome should pay to have access to this service. The English regulation, which provides for the losing party to pay the entire proceedings fees, is based on a compensative logic according to which the losing party owes the winning party's expenses. In other words, the party who has the law on its side should not have to bear the expenses to have the court do them justice. The French regulation on condemnation to the expenses is based on the same compensative logic.

We pointed out earlier that few conflicts are resolved by trials in the United Kingdom although more than in the US. In France, on the other hand, virtually all conflicts are resolved in court. One of the differences between the three systems resides in the regulation that concerns the allocation of the costs associated to the proceedings. The amount of the expenses, incurred during the conflict resolution process, which the winning party is able to recover, that is to say reimbursed by the losing party, differs from one country to the next. In most countries, the costs distribution is related to the outcome of the trial. In Great Britain, the losing party has to pay for all the expenses of the winning party. The French system is based on the separation of the recoverable costs (taxes, pleading rights ...) and the irrecoverable costs (for instance the lawyer's fees). The former are paid by the losing party whereas the latter remain at each party's charge. Other regulations may be considered. Under the regulations that favour the plaintiff, the defendant has to pay for the plaintiff's expenses if s/he wins the trial. Under the regulations that favour the defendant, it is the contrary. Other solutions consist in distributing the costs according to the amount obtained from the trial (Katz, 2000).

Thus, the costs and their distribution between the parties have an impact on numerous elements of the conflict resolution process: from the decision to sue to the choice between a trial and a settlement, and also the estimation of the expenses to put in.

### ***1.3.2 Regulations on the distribution of costs and resorting to the judicial system***

The threat to sue someone needs to be credible, that is to say that the costs implied by the proceedings and the conflict resolution should be covered by the gains expected from the trial, otherwise, the threat is hardly credible. Thus, the capacity to afford part or the whole of the other party's costs will play a crucial part in the decision to resort to judicial proceedings.

It is possible to demonstrate that the regulations which provide for a distribution of the costs based on the outcome of the trial tend to increase the rate of complaints lodged by plaintiffs with cases that combine low value and a strong probability to win. On the contrary, the American regulations encourage the plaintiffs with high value complaints, but weak probability to win to take legal action. The selection of conflicts that end up before the judge is thus different according to the regulations of costs distribution in force (Shavell, 1982).

US law is more restrictive than UK law in respect to the possibility of settlement. In some US cases, settlement is not an option. Thus, when the amounts at stake are high or the issue of little importance, the British regulation encourages the plaintiffs whose probability of winning is above average to take legal action, whereas the American regulation tends to dissuade them from doing so. When the sums at stake are low or the issue important, the British regulation tends to dissuade plaintiffs whose probability of winning is below average from taking legal action, when they would have been encouraged to do so by the American regulation.

Furthermore, it is possible to argue that the British regulation tends to dissuade plaintiffs whose action is not justifiable insofar as the expected gains are smaller than the anticipated costs. The empirical study by Hughes and Snyder (1995) shows that the success rate of plaintiffs and the amounts gained are much higher under the British regulation than under the American regulation. Contrary to an argument often

used, they conclude that the regulations based on the distribution of the costs do not constitute anti-plaintiffs measures.

### ***1.3.3 Regulations on the distribution of costs and negotiation***

In respect to negotiation, the regulations on costs distribution tend to limit settlement as an option. The regulations that establish the distribution of the costs on the outcome of the trial have two opposite effects. On the one hand, they force litigants to take the other party's expenses into account, in case they lose the trial, this constitutes an incentive to negotiate. On the other hand, under these regulations the party hoping to win the trial expects to be exempt from its expenses, which constitutes an incentive to go to trial. Since the optimists are more numerous than the pessimists, negotiation tends to lose ground. However discrepancies on the expected amount at stake can counterbalance the effect of discrepancies on probabilities.

The conclusions of models based on the parties' optimism or pessimism are comforted by strategic models (Deffains, 1997). The English regulation tends to encourage settlement negotiations in conflicts with diverging expectations as to the probability of victory and discourage settlement negotiations in the case of reverse expectations.

Coursey and Stanley (1988) built an experiment to evaluate the strengths of incentives to negotiate from an empirical perspective. The agents were asked to negotiate the distribution among themselves of a certain number of tokens converted in money at the end of the experiment. If, after a while, they did not come to an agreement, the distribution would be randomly. This latter solution is expensive as it implies a forty percent loss of the tokens' value. The negotiations are conducted under three different regulations of expenses allocation: the American regulation, the British regulation and the 68<sup>59</sup> regulation. The results show that the agents come to an agreement more often under the British regulation than under the American regulation. The 68 regulation proves the most favourable to negotiation.

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<sup>59</sup> This regulation provides that the party who loses the trial pays all the costs when the last negotiation offer it refused was higher than the result of the trial.

#### ***1.3.4 Regulations on the distribution of costs and expenses***

The regulations that link the trial's cost to the chance rate of losing contribute to the increase of potential losses. It thus seems natural they should have an impact on prudential behaviours adopted by the agents. It is important to bear in mind that the ultimate purpose of a judicial system is to prompt individuals to avoid conflicts and take the necessary precautions to do so. Hylton (1993) demonstrates that the caution standards are more respected under the British regulation than under the American regulation. Under the latter, the offenders can evade their responsibility when the costs the victim incurs in taking legal action are greater than the damages at stake. This is not possible under the British regulation as it provides for a complete internalization of the costs. However, these conclusions are only valid when the judgment is perfect, in other words only if the courts make no mistakes. Insofar as errors of judgment can be committed, neither regulation provides the optimal incentives (Polinsky and Shavell 1989).

Besides, if the parties are considered to be rational individuals as regards their choices on necessary expenses to win the trial, any additional expense which increases the amount to be won from the trial is profitable, as long as the increase is greater than the expense incurred. The amount of each party's expenses is thus determined by a set of elements among which the amount at stake, the secondary cost of the expense and the decision's consideration of the parties' efforts. It follows that the costs distribution leads the parties to increase their expenses (Hause 1989). Indeed, the regulations imply that one of the parties will not necessarily have to bear all its expenses, which means a reduction of the marginal cost related to additional expenses. They also contribute to increase the amounts at stake since the expenses can be "won" in the trial.

It is difficult to draw conclusions on the merits of the costs distribution regulations since their positive and negative impacts on various elements are intertwined. Such regulations can be considered desirable in conflicts pertaining to small amounts. Indeed, in such circumstances, there is a high probability that the plaintiff will not resort to the judicial system because of level of expenses involved even if he or she is within his or her rights. In such a case, a regulation on costs distribution can enable the plaintiff to take legal action, which will prove beneficial as regards dissuasion. If individuals are aware that legal proceedings are not viable in minor disputes, the judicial system is no longer dissuasive. A commonly admitted argument

in favour of costs distribution regulations is that the party who wins the trial thus proves the validity of this case and should not have to bear the costs “to have the truth exposed”.

#### 1.4 The choice of proceedings

The analysis of the variety of proceedings used in civil disputes refers to the idea of optimal degree of judicial institutions complexity developed by Kaplow (1991). According to Kaplow, precise regulations are advantageous insofar as their foreseeability impacts behaviour, but they have a higher production cost compared to “standards” and general regulations (the costs being the result of the needed information to produce the regulations). Therefore, the optimal complexity would reside in this costs/benefits calculation. Without a doubt, the main interest of this question is to be applied to proceedings. Arbitration between simple and complex proceedings would then exist. The latter are advantageous insofar as they impact behaviours efficiently but they are costly to produce given the information that needs to be collected before these proceedings are implemented. On the other hand, the former are less costly to produce, but they are not as fitted to the different cases likely to come up. Thus, it would be possible to determine an optimal degree which would take into account the characteristics of the judicial issues at hand as well as the citizens’ preference. This approach is certainly incomplete. For instance, it neglects the fact that simple regulations can constitute an advantage in cases of strong uncertainty. However, it highlights the importance of the way courts implement judicial regulations. Given the characteristics of the conflict in terms of costs and delay, this concern becomes crucial.

Practices can differ from a court to another. Moreover there exist discrepancies between the regulations and their implementation... For example, even when the issue at hand is of a commercial nature, the regulation states that the parties’ representation is not compulsory; in practice, the parties are virtually always represented by a lawyer; the proceedings are theoretically oral when, in fact they are written most of the time” (Cadiet, 2005). Moreover, it appears that “processual economic law is the scene of a mixture which is rarely tolerated by the judicial system... this dispersal, which first appears incoherent, is the reason why economic disputes are particularly complex, fractious to systematization and difficult to

implement” (Frison Roche, 2003). Consequently, the coexistence of heterogeneous procedures may constitute a means for the parties involved to take advantage of this situation in organizing some kind of a race to the decision, since the economics of time prompt parties to stop at the first judgment delivered.

Precisely, the main issues of this heterogeneity in the proceedings (once the general adhesion to the principle of a fair trial has been established) are judicial formalism and processing of economic information by the judges, in particular in respect to the evidence submission during trial.

The question of formalism was recently discussed by the developers of the World Bank project “Doing Business”. It is generally accepted that procedural constraints imposed on economic agents relative to the access to justice and the resolution of conflicts result in costs. Djankov, La Porta, Lopez-de-Silanes and Shleifer (2003) thus proposed an index based on several dichotomous variables collected through a questionnaire sent to law firms in over one hundred countries. The formalism index developed by Djankov, La Porta, Lopez-de-Silanes and Shleifer includes seven elements:

- the level of professionalism required from the participants (judges, lawyers) ;
- the importance of the written form compared to the oral form ;
- the presence or absence of a need for legal justification (references to articles from the different codes) ;
- the rules of evidence ;
- the power of an appeal compared to the first hearing ;
- the formalities to take legal action ;
- And the number of steps in a trial.

The justification for the interest taken in formalism when trying to evaluate various institutional arrangements is the importance given to the elements that allow the courts to function more or less well. Formalism is an index which aims at measuring the quality of different judicial systems, compared to an ideal system in which a conflict could be solved fairly by a third person, without proceeding constraints, appeals or written formalities. We have chosen debt recovery as an example of the importance of formalism. In a survey carried out in a number of countries, the resulting ranking shows that France and Germany’s systems are overly burdensome as compared to economic actors’ expectations.

Coordination modes of economic exchanges:

	Weak judicial formalism	Strong judicial formalism
Strong constraint (authority)	Administered exchanges (coercion)	Integrated exchanges (hierarchy)
Weak constraint (consensus)	Relationship exchange (convention)	Contract exchange (formalism)

Administered exchanges (authoritarian or little formalized), which intervene in particular when the principal has a strong influence on its agent, are similar to administered channels in which a member compels his/her fellow members to do as he or she pleases. Integrated exchanges (authoritarian or formalized) correspond to the situation in which the principal uses the “hierarchy” as a means of risk and uncertainty reduction, although control does not guarantee the eradication of the actors’ opportunism.

The Relationship exchange concept (consensus and little formalized), is based on the efficient outputs of mutual agreement. According to the judicial context and the trust level between the agents, the exchange achieved through a mutual agreement will be formalized or not in order to reduce the risks related to the contract not being filled. Contract exchanges (consensus and formalized) thus cover all the contracts based on a strong legal ground, with a potential third party intervention. An efficient conflict resolution device likely to be used in one of the exchange categories mentioned in the matrix needs to integrate the economic agents’ relationship parameters.

The formalism index approach does not integrate the detailed characteristics of the judicial systems related to the processing of information by the courts. Considering *common law* and civil law traditions, it is clear to us that the main differences lie in evidence issues. As regards civil disputes, the *common law* imposes a special “evidence standard” -the “predominance of probabilities”- and it resorts to precise exclusion rules regarding the non admission of evidence. On the contrary, there are no exclusion rules in the civil law tradition (the evidence is “free”) and the evidence standard remains vague. On the other hand, it seems that the burden of proof is often reversed and evidence “formalities”, such as the existence of a written document, are more common in the civil law tradition. There are also major



differences in the examinations of the cases, in particular in respect to the judicial officer's role and the court's prerogatives regarding the proceedings' direction. Civil law courts enjoy a greater discretion than *common law* courts.

From a conceptual perspective, issues related to the evidence are intertwined with the dichotomy between "rules" and "standards" (Ayres and Gertner, 1989) and the notion of "Incomplete Law" (Dari Mattiacci and Deffains, 2007). Law is "incomplete" insofar as it must be based either on detailed requirements which are not necessarily adapted to contingencies, or on vague standards that call for an interpretation. Thus, the court's discretionary powers are more or less framed by inadmissibility regulations, by an evidence standard, by the requirement of "formalities" for legal evidence, by the impossibility to examine the cases directly (question the witnesses directly) or to require the intervention of an expert, etc. The contrary would consist in a court with complete discretionary powers over these matters.

On all these points, the judicial systems that exist in the different European countries are very different one from the other. Thus, it is legitimate to wonder about the potential impact this can have on conflict resolution efficiency, disputes' costs, the incentives on behaviours that can lead to conflicts, and in a word the very efficiency of the contracts. Similarly, the judicial systems differ on the purely accusatorial degree of the proceedings; the evidence can be left entirely at the parties' initiative or at the court's initiative which gives it an "inquisitorial" aspect (appointment of neutral experts...). Some analyses show the advantages, cost related, of purely accusatorial proceedings (Tirole and Dewatripont, 1999). However, these analyses neglect the possibility of such proceedings being translated *a contrario* by an excessive collection of evidence and therefore excessive costs (Palumbo, 2001). Emons and Fluet showed that it was advantageous, from the perspective of arbitration between instruction costs and risks of errors, to leave an initiative margin to the courts toward inquisitorial proceedings.

This comparative approach to legal systems proposes a new evaluation scale of the economic efficiency of the different modes of dispute resolution. It refers to the consideration of the information during trial. "Processing data" refers to the way law uses specific cases' characteristics to produce judicial solutions. Two different modes of data processing - or two extreme proof schemes - can be presented: on the one hand, the accusatorial proceedings and, on the other, the inquisitorial

proceedings. These notions do not reflect scrupulously the practices observed; in the first case the judge dominates the proceedings insofar as he or she decides who appears before the court and when. He or she can also subpoena witnesses and experts, question them directly and decide on the weight to lend to their statements. In the second case, the judge's passivity is greater; his part consists mainly in evaluating the parties' evidence and making sure the evidentiary rules are respected. Here, the parties "control" the proceedings.

Both data processing modes, either centralized (through the judge's investigation exercise), or decentralized (in the parties hands), have merits. In order to illustrate this point, let us consider a trial as a costly mechanism to reveal information, in which the information is considered as unverifiable by the legislator. Moreover the legislator, as law maker, tries to implement the most efficient regulation for the public, one that reduces as much as possible the social costs. Finally only the judge and parties of the trial are allowed to use the information available. In such a context, the legislator is tempted to grant more power to the judge who is able to make use of the information, even more so since he or she can hardly foresee the impact a regulation concerning the *ex ante* behaviour would have on the future parties of a trial. However, the decentralization of law making is desirable as long as the judge pursues the same goal as the legislator. In this classical issue of the delegation of making the good to a third party (here the law), the power granted to the judge (referred to as the agent) needs to be supervised by the legislator (referred to as the principal) since the agent can use the information which the principal cannot check to pursue his or her own interest instead of the principal's interest, the agent could even be corrupted by one of the parties. How should the agent or the judge be supervised? The appeal can constitute a first possibility insofar as the agent or the judge will integrate his expectations on the decision of the judge on appeal in the formation of his or her own decision. The parties can also be granted a special part in the supervision of the court's activities. To this effect, the legislator or the principal simply has to compel the parties at trial to produce the information needed to resolve the conflict. The parties, who find themselves with the burden of the proof, limit the decision power of the judge by collecting evidence of the other party's fraudulent behaviour. This decentralized production of information then echoes the decentralized production of the law insofar as the parties are given incentives to produce as much information as possible, thus limiting the risks of error in the court's decision. In the opposite case, that of a judge "at the

service of the law”, the supervision is not needed as much since the judge’s powers are limited to the interpretation and implementation of the law.

Thus, in order to process unverifiable information, it may be wise to grant the judges with investigative powers (their powers being limited by law texts). However, those in favour of accusatorial proceedings can put forward the argument of a lower value of transaction costs related to these proceedings as compared to those generated by inquisitorial proceedings. It is easy to imagine that it would cost less to leave it to the parties to bear the costs of production of the relevant information for trial. Nevertheless, this analysis remains incomplete insofar as it assumes there is only one sort of cost inherent to a trial.

As a matter of fact, there are a variety of costs generated by the trial itself. Tullock (1988) identifies two types of costs. First, he identifies the resources invested by the court and the parties in order to reveal the truth. Second he outlines the resources incurred by the parties to mislead the court. Tullock is very critical as regards to *common law* in that it favours the accusatorial system of *discovery*<sup>60</sup>. Indeed, this system implies that an important part of the resources are invested to mislead the court, for a simple reason: during trial, the parties, who dominate the proceedings, will resort to resources in order to impose their point of view. It means that part of the resources will be spent to reveal the truth while the rest of the resources will be spent to mislead the court. In a system ruled by the judge, this tendency is very much toned down. This is all the more interesting as this conclusion only concerns trial’s costs distribution. If the absolute amounts were considered, the odds are that this phenomenon’s scope would be even greater. From this perspective, mostly disregarded in the World Bank’s reports, it appears that, of the two systems, the *common law* one is less efficient (Deffains, 2007).

In respect to disputes, the choice of proceedings is of utmost importance. If some fundamental principles, such as the right to a fair trial, are recognized all around the world, it is not the case of procedural efficiency. Certain domains such as industrial property rights or competition policy are dealt with similarly from a procedural standpoint. But other domains, such as the right to collective proceedings know

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<sup>60</sup> In fact, Tullock opposes judicial systems as accusatorial or inquisitorial proceedings. This distinction does not perfectly fit the common law tradition and civil law tradition, thus in our case, we will rather talk about systems in which the proceedings are « dominated » by the parties and systems in which the proceedings are « dominated » by the judge.

major differences between countries. However, from an economic perspective, the major issue seems to reside in excessive formalism and the far from optimal economic data processing done by the courts in most cases. All these problems refer to the judges' ability to access and use the information in the best conditions. In all of this procedural chaos, one should ask what the place of contractual justice is.

### **1.5 The efficiency of alternative modes of dispute resolution**

In most judicial systems, civil law provides for the possibility of a compromise. Whether we consider article 2044 of Belgium's law, article 1965 of Italy's law, article 1809 of Spain's law, article 1248 of Portugal's law, or article 2044 of France's law, transaction is always present in private law. The two main aspects of this legal act should be emphasized:

- It constitutes a contractual act, thus implying a negotiation, compromise and a final agreement, in other words all the opposing parties should give up their claims.
- It provides an end to the conflict.

Alternative modes of dispute resolution are thus created in civil law as demonstrations of contractual liberty of law subjects. This liberty enables them to compromise on the existence, the extent and the exercise of their subjective rights in order to end the conflict.

Alternative modes of dispute resolution appear, at first, as a means to save oneself a trial. This constitutes their main advantage. This is a "negative" approach as it is based on the will to avoid the intervention of a judge rather than on the virtues and advantages of the transaction process. But this constitutes its first function, as is generally emphasized by the economic analysis of law when it considers a trial as the failure of the parties to negotiate.

At the same time, alternative modes of dispute resolution appear, on the whole, as a diversion technique. The transaction then seems to be a means to prevent and solve conflicts before resorting to judicial proceedings which can only benefit from this alleviation insofar as they will be quicker if less numerous. Alternative modes of dispute resolution can also be used at various stages: they can allow for the

conclusion of the conflict before it reaches the point when it has to be presented to a judge, but they can also put an end to the dispute when the case has just been submitted to the judge. Some authors talk about the idea of a “mediation is the law’s shadow”.

Nevertheless, alternative modes of dispute resolution do not make judicial proceedings useless since these cannot be completely replaced, but they could, in principle, be used to solve repetitive, factual or minor conflicts and leave more important cases to judicial proceedings.

Loïc Cadiet emphasizes that “the expansion of conventions related to disputes’ resolution is thus a return to basics”. This reconciliation of contract and trial occurs at the same time as new reflections on justice and economy emerge. This simultaneity is quite natural. Economy, in some respects, is at the roots of justice. Economy is, indeed, an incentive to manage the judicial institution more rationally and it prevents litigants from resorting to the judicial institution in order to avoid the costs and delays of jurisdictional processing of their dispute. That trials cost is an element likely to have an impact on the number of legal actions taken. The high costs of going to trial will act as a deterrent, preferring instead conflict resolution by settlement (Deffains et Doriat-Duban [1999]). The first solution consists in not taking any measure, this leads to a development of a market for alternative dispute resolution. The right to a judge, which has been recognized by the international conventions as a fundamental liberty for over half a century, imposes free access to justice and thus presupposes the existence of legal aid devices to assist those in need. However, the exercise has its own limits since any system of assistance to finance legal action favours the resort to a judge and automatically increases the inflationary spiral of costs of justice. The virtuous circle then becomes vicious. The British experience of legal aid gives us a pertinent illustration, and so does France’s, where the consequences have led to the emergence of a discourse which promotes alternative modes of dispute resolution and the determination of a policy that would extend the benefit of legal aid to the transactional modes of dispute resolution in order to counterbalance the judicial effect of the legal aid system.

## 1.6 Legal aid and lawyers' fees

From an economic perspective the judicial system can be considered as a mechanism which prompts agents to anticipate the harmful consequences of their decisions by providing other agents with the means to take legal action to remedy “externalities” they suffer. Economic experts specialized in the field of legal systems analysis justify the fact that litigants have to pay to use judicial institutions for an efficiency purpose (Posner, 1998). But other arguments based on equality can be presented: if justice is considered as a fundamental right, an exclusion from the judicial system based on a resources constraint would constitute an obvious violation of this right. Under these circumstances, the economist studying the conditions of access to justice identifies two major issues: the first one, focusing on efficiency, consists in the research of a device allowing individuals with limited means to have access to justice while avoiding social losses related to the incentives to take further legal action. The second issue, this time focusing on fairness, is to know whether judicial services must be considered as fundamental rights and, if not, how to differentiate between them. These inevitable arbitrations in terms of efficiency and fairness can be achieved by various means. The first means is insurance based. It consists in ensuring the possibility for litigants to transfer their risks of loss and/or the fees charge to an insurer. The second means provides for a similar type of transfer but to lawyers this time with fees proportional to the results obtained (*quota litis* pact). The third means is based on social justice. It is redistributive by nature and ensures financial support to all those with insufficient means to access justice. In practice, these different means exist in countries with rather similar development level. If the United States policy makers have widely chosen the insurance-based means with the *quota litis* pact, European Member States, where the Welfare State traditionally plays an important part, have favoured the redistributive means through the legal aid system.

From this perspective, the economic analysis focuses on conditions to resorting to justice and the conflicts resolution methods individuals choose. It emphasizes the issue of information asymmetry between the litigants as well as the impact of various variables on the decision to take legal action and on the choice in the methods of dispute resolution. Among these variables, the analysis focuses particularly on trial costs. Studies have proved that a policy favouring an increase of trials' costs is likely to reduce the number of judicial proceedings and to increase the settlement rate. On the contrary, a reduction in hearing costs will constitute an

incentive for litigants to resort to a judge to solve their conflicts. These results invite an extension of the analysis to all the devices which may have an impact on the costs of access to courts of justice, and in particular legal aid.

Financial support, whether total or partial, is justified by solidarity and equality principles. However, insofar as the costs of access to justice play a crucial part in the plaintiff's decision to go to court and in the parties' choice between settlement and judgment, any legal aid type support is likely to influence directly the number of complaints and the dispute's outcome. Loïc Cadiet [1994] states that "*costs of justice alleviation are an important element in the courts' access liberation*".

### ***1.6.1 Legal aid's impact on the incentive to take legal action***

Legal aid provides a total or partial reduction of the costs of justice. Indeed, not only does it cover the trials' costs, it also covers the negotiation costs incurred before the beginning of trial. This results in variations in the individual incentives to take legal action, as compared to a litigant who would not benefit from legal aid. To be precise, a non legal aid beneficiary plaintiff takes legal action when the gains he or she expects from a settlement or the judgment are superior to the proceeding, negotiation and trial costs he or she incurs. When the plaintiff benefits from complete legal aid, these costs are entirely or partially paid for by the State. Thus the net benefit expected from a trial has greater chances of being positive for a person benefiting from legal aid than for another litigant. Some legal actions would not have been taken had there been no legal aid system because the expected gains would not have been sufficient compared to the trial's costs. Consequently, legal aid increases the number of judicial proceedings.

It becomes possible to prove, on the basis of this result, that legal aid can turn "economically undesirable" claims into economically justified ones. These proceedings are economically undesirable because they are instituted even though the gains expected from the trial are lesser than the trial and proceedings costs. Their occurrence is traditionally due to the possibility for the plaintiff to force the defendant to a settlement thanks to the costs imbalance (trial's impact on the defendant's reputation), to an information asymmetry or to a timing discrepancy in the hearing fees payment. Legal aid gives an extra justification to this type of

proceedings because it erases their undesirable aspect making their net expected gain positive. In other terms, legal aid allows “economically undesirable” proceedings to become “economically justified”.

Legal aid is likely to increase, *ceteris paribus*, the number of judicial proceedings as compared to a situation where it would not exist because it reduces the proceedings, trial and negotiation costs. Thus, it participates in making judicial proceedings - which would not have been taken had it not existed - profitable. Moreover, it allows certain actions to become economically justified because the legal aid beneficiary plaintiffs see their net gains increase when they escape costs of access to justice.

However, these results only concern the consequences of legal aid on private incentives to sue. It is necessary to consider also the social incentives to sue, in other words how society can benefit from the proceedings brought by an individual (Shavell, 1982). Here, in a legal aid system, the issue of convergence between the litigant’s and society’s interests arises.

### **1.6.2 Legal aid’s impact on public well being**

Legal aid’s social efficiency comes into question in respect to its ability to reconcile private and social incentives to take legal action. The concurrence is particularly justified in civil disputes, when agents are prompted to adopt a cautious behaviour<sup>61</sup>.

The socially optimal nature of the regulations impacting the costs of access to justice depends exclusively on the social aim pursued. It is necessary to evaluate the excess and deficiencies of judicial proceedings before giving an opinion on the socially desirable aspect of legal actions taken by beneficiaries of State support. More precisely, when an excess or a deficiency in judicial proceedings exists, it can be corrected by altering the incentives that certain litigants’ categories have to sue. Insofar as legal aid favours judicial proceedings, it then becomes possible to define a policy to adopt as regards financial support to access justice, whether the number of proceedings needs to be increased or reduced.

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<sup>61</sup> Calabresi (1970) and later Shavell (1987) define the optimal level of caution as the level that allows for the reduction of the social cost of accidents, constituted by the loss related to the damages sustained and the resolution costs of the conflicts resulting from the damages.



Generally, if private incentives to sue are not sufficient because the persons who caused the damages take too little caution compared to the level of caution which minimizes the social cost of accidents, then legal aid acts in favour of social well being: facilitating the resort to justice for poorer litigants, it reinforces the incentives for persons responsible for damages to be cautious. On the other hand, if resorting to justice is assessed as socially excessive because the persons responsible for damages are too cautious given the level which minimizes the social cost of conflicts, then it becomes appropriate to limit the incentives for victims to take legal action. Limiting such incentives may consist in reducing the amount of legal aid or in lowering the income ceilings that condition is granting so as to directly reduce the number of legal proceedings. However, the adoption of such a measure would penalize legal aid beneficiaries and implicitly consider them as more responsible for the social excess of proceedings than wealthier litigants. In other words, such an analysis holds legal aid beneficiaries alone responsible for courts' cluttered state without looking in the other groups for reasons to the excessive demands on justice. Thus reducing the worst-offs' access to justice, socially desirable proceedings (insofar as they contribute to prompt the persons likely to cause damage to be cautious) may be given up when socially undesirable proceedings are started on the sole ground that the litigants have sufficient financial means.

Moreover, the analysis indicates that a concurrence between social and private motivations for conflicts can be achieved, when private incentives to take legal action are excessive, through regulations reducing the number of legal proceedings. However, it is appropriate to use caution when interpreting the aim related to these regulations. Indeed they are not intended to prompt victims to give their compensation up; particularly when the damage caused is limited. More precisely, the crucial element for social well being maximum improvement does not reside in the number of judicial proceedings but in the number of victims compensated regardless of the compensation mode (judgment or settlement) because the total amount of compensation paid determines the level of caution of the persons responsible for damage. The possibility to reach an agreement and the threat to go to court if the agreement is not reached may then constitute a sufficient incentive for the persons likely to cause damage to respect caution standards. For example, a French law of 1998 eases right of access while limiting access to justice and thus does not restrict the incentives to the persons likely to cause damage to use caution

by limiting the rate of trials only to substitute a negotiated compensation for compensation that would result from trial. The second fold of the study on the impact of legal aid on access to law and justice consists in evaluating the impact of legal aid on settlement rate, once the proceedings are started.

### ***1.6.3 Legal aid's impact on the modes of dispute resolution***

When an agreement is reached with the plaintiff's minimum claim being inferior to the defendant's maximal offer, then some money is saved. The plaintiff's minimal claim corresponds to his expected gain minus trial costs, plus negotiation costs. The defendant's maximal offer corresponds to his expected loss from the court's decision, plus the trial's costs, minus the negotiation costs.

If the plaintiff is granted full or partial legal aid, he or she evades the payment of all or part of the negotiation costs and also of trial costs (except for the defendant's costs if the plaintiff loses). Consequently, legal aid's impact on the chances of amicable dispute resolution is undetermined because it varies according to the relative importance of negotiation costs in comparison with the trial's costs. For the same reasons, the granting of a financial aid to the sole defendant has an undetermined impact on the chances to reach an agreement. Finally, when both parties benefit from legal aid, the plaintiff's minimal claim and the defendant's maximal offer may increase or decrease. Thus, it is impossible to know whether legal aid is unfavourable to settlement options and if it constitutes a greater incentive for parties to resort to a judge to solve their conflict.

This result is conform to economic models' conclusions which establish that a reduction of trial costs tends to increase their rate because it increases the relative advantage of a trial compared to a settlement while a reduction of negotiation costs favours an amicable resolution of conflicts. The legal aid's specificity resides in the combination of trial costs reduction along with a reduction of negotiation costs. Insofar as both costs reductions have opposite impacts, the reduction of trials costs favours a judicial decision while the reduction of negotiation costs favours settlement; legal aid's impact on the rate of amicable dispute resolution depends on the relative importance of the two opposite effects.

The increase in the scope of legal aid to include pre-proceedings transactions provides for a fraction of agreements, which, under the former legal aid system, were reached after judicial action was taken, and can now be settled before the beginning of proceedings. The increase in the scope of legal aid to include the pre-trial stage thus leads to faster agreement conclusions rather than to an increase in agreement rate.

### 1.7 Lawyers' fees consideration

The analysis of judicial disputes resolution assumes that the parties are in direct contact. At first, we conduct our reflection as if the parties were never represented by lawyers, or as if lawyers and clients were one and the same party, supposing that the lawyer will receive a percentage of the payment his or her client obtains. This approach is not satisfying given that information asymmetries exist between a lawyer and his or her client. First, when they sign the contract which binds them, the client may have more information than his or her lawyer regarding the facts which led him or her before the court and thus on his or her potential success rate; second, the lawyer may be better informed than his or her client in respect to his or her competence and the efforts he or she intends to make. Given these anti-selection and ethical risk phenomena, the market can fail to provide constant high quality legal services and the quality of lawyers' services since the clients will only get an "average" quality of the service.

The issue at hand here concerns the optimal fee convention within the framework of the principal-agent relationship which binds the lawyer to his or her client. It consists in wondering whether the agent (the lawyer) can accept that his or her fees should be fully or partially determined by the result obtained in the conflict's outcome. In fact, there are several conceivable systems:

- A set lump sum salary is determined regardless of the outcome and time spent on the case.
- Fees are calculated on the basis of time spent on the case using an hourly rate.
- The success fee is a fee based on the parties' (lawyer and his or her client) prior agreement that a lump sum will be added to the fees if the client's aim is reached.

- The contingency fee (*pactum de quota litis*): the fees amount is determined on the basis of a percentage of the increase of patrimony obtained by the client thanks to his or her lawyer's intervention.

There is a major hostility towards systems which provide for the lawyers' fees to depend on the trial's outcome. Contingency fees or *pactum de quota litis* in particular is forbidden in numerous countries such as France and Great Britain.

It is generally criticized on several points:

- allowing the lawyer to support the conflict financially, favours a surge of "undesirable" trials;
- the outcome fee is generally considered "excessive" ;
- The lawyer's profit-sharing in the case generates a conflict of interest with the client which usually prevents the reaching of a negotiated solution. Yet, recent studies on the subjects come to rather mixed conclusions (Danzon, 1983; Miceli and Segerson, 1991; Rubinfeld and Scotchmer, 1994).

Schwartz and Mitchell (1970), on the ground of what a client would choose if he or she paid his or her lawyer by the hour, concluded on lesser efforts from the lawyer and thus lower average gains before the courts. Their argument was that with such a system, the client would be prepared to pay his or her lawyer to the point when the expected gain equals the lawyer's hourly fee to the margin. On the other hand, with contingency fees, the lawyer decides on the time he or she will spend on the case making sure that his or her hourly rate is equal to his share of the expected gain. This last regulation implies a lesser effort for each case and thus a lower success rate compared to an hourly rate system in a situation of complete/symmetrical information.

Danzon (1983) proves that both extreme visions are false insofar as competition on the judicial services market can prompt lawyers, paid through the outcome fee, to act in accordance with the wishes of their well informed clients paying them an hourly rate. However, if competition is not perfect, there is a tendency to produce a lesser effort compared with the clients' wishes. The contingency fee system could then improve the situation of a client who experiences a risk aversion. The argument put forward is based on the fact that the number of judicial proceedings will certainly be greater with the contingency fee system, not because this system

constitutes an incentive to take legal action or because the fees are excessive, but because it protects the client against risk. Numerous clients experiencing risk aversion would not be willing to incur the conflict's costs with an hourly rate system without any certainties on the final outcome. Rubinfeld and Scotchmer (1994) also show that within the framework of a principal-agent model the main advantage of the contingency fee system is to ensure an optimal distribution of risk insofar as the percentage gain received by the lawyer is significant in respect to the "quality" of the client's case.

In a context which invites to a more rational management of conflicts and in which high costs dissuade litigants from going to trial, it is important not to neglect the economic dimension of the conditions of access to justice. If the "right to a judge" derives from the principle of free access to justice, it is nevertheless necessary to monitor the efficiency of the devices chosen to fulfil this right. European countries and the United States of America have made very different choices. On the one hand, in the USA, the *contingency fees* system guarantees access to court for the greatest number by operating a transfer of risks to the lawyers' firms at the cost of numerous drifting. On the other hand, the legal aid system is favoured by most European countries. It enables the worst-offs to benefit from the State's financial support and contributes to bringing private incentives into line with social interests. However, transparency and foreseeability of judicial decisions still need to be evaluated.

### **1.8 Transparency and foreseeability in proceedings**

The foreseeability of the costs of judicial proceedings includes proceedings costs as such and lawyers' fees, as brought to the parties' knowledge. It should not be confused with the transparency of proceedings costs, in other words with the fact that information regarding the implementation costs and lawyer's fees are made readily available to the litigants.

The issue of proceedings costs (including implementation costs) is a crucial element in the analysis of judicial decisions' implementation. Indeed, costs can become an obstacle to litigants' access to a judge, in particular when the litigant considers them too high in regards to the debt to be collected. For this reason, most countries

endeavour to adopt costs regulations that guarantee their transparency and foreseeability.

### ***1.8.1 The proceedings' transparency***

Ensuring proceedings costs transparency amounts to ensuring an easier access to information regarding proceedings costs (and the possible fees of professionals in charge of the decision implementation). Indeed, it is possible to place a pricing table of proceedings acts at the parties' disposal with the professionals in charge of the decision implementation, in the courts and consumers associations, in the proceedings codes (when the Member States have such codes) or online. This pricing table must be readily understandable by the user. Ensuring transparency also depends on the obligation to indicate costs of legal acts, making this a necessary element in the validity of the act itself.

Most European countries provide a system that ensures costs transparency of proceedings. Because users' and services' mobility increases in Europe, enforcement of judicial decisions at an international level is bound to develop. It is, indeed, crucial that costs transparency goes beyond the internal framework; Member States should agree on a database on the pricing of the most frequent acts. Once this list is established and fees determined by each Member State, it should be advertised on a scale as large as possible so that users can access the information, even from other Member States.

The consideration of proceedings costs means, for the plaintiff, to evaluate his or her legal action's opportunity comparing the costs to incur against the debt amount and the defendant's apparent solvency.

Once his or her economic calculation done, the plaintiff decides whether or not he or she wishes to take legal action against the defendant. When the plaintiff is likely to receive legal aid, legal action might then seem more appropriate. In such a situation, a systematic monitoring of costs should be performed by the State's service in charge of legal aid. If the beneficiary's representative unjustifiably profits from legal aid (by increasing the fees) measures should then be available to punish him or her: for example, the acts regarded as excessive should not be paid for and would thus remain at the representative's charge (as it is the case in France).

We note that in certain countries, part of the proceedings costs (those related to the implementation in particular) are directly paid for by the State. The issue of the implementation's relevance is not raised for the plaintiff as he or she does have to incur the implementation's costs, the relevance of taking legal action matters little. In case he or she wins, the implementation costs will virtually always be incurred by the defendant. If the plaintiff loses, the costs will be borne by the whole community. Without calling the rightfulness of legal aid into question, this conclusion leads us to wonder about the appropriateness that resides in having implementation costs borne by the community when implementation tends to satisfy private interest of a party (the interest of party A against party B) who does not have to worry about the relevance of his or her action. The basic assumption is that the State seeks to ensure access for all to justice. Thus, the State ensures its judicial system is accessible to all from the beginning of the proceedings to the implementation of the decision: it controls every stage. This search of accessibility should not harm the proceedings' efficiency. But this search of accessibility allows users to take action even though the action is irrelevant or unmeritorious, the implementation services are needlessly cluttered and average implementation delays are increased.

Requiring from the agent that he or she chooses the most efficient proceedings and limits the proceedings costs implies, by way of compensation, a quicker access to the defendant's solvency situation so as to act in the most appropriate manner. The relevance to act resides in ensuring a certain control over the costs in comparison with the debt to collect (balance between the debt and the chosen proceedings).

### ***1.8.2 Foreseeability of proceedings costs***

The foreseeability requires the possibility to evaluate the entire proceedings cost. If the setting up of a pricing table ensures costs transparency, it does not however ensure their foreseeability. Indeed, the idea of foreseeability is complicated. It depends on numerous criteria: the debtor's behaviour and solvency, the proceedings flexibility (that is to say the possibility for the plaintiff to choose the proceedings he or she deems most appropriate), the access to the debtor's assets information, *etc.* It is difficult, at the beginning of judicial proceedings, to know how many acts will be needed to reach the conflict's outcome. Furthermore, the litigant's legitimate

fear to be unable to collect his or her debt and yet to have to pay the proceedings fees to his professional representative may constitute an obstacle to the judicial decisions' efficiency. The smaller the debt, the greater the fear: any proceedings act can then turn out to be expensive in comparison with the sum to collect. Indeed, the economic analysis justifies resorting to collective actions on this basis.

In this matter, the English experience has provided a specific implementation system allocated to small debts. Thus, the *County Court Bailiffs* have a monopoly on the implementation of debts under 600 pounds. The implementation cost of these small debts is then paid for by the court. On the other hand, for debts superior to 600 pounds, the litigant has to resort to a liberal and independent enforcement officer, whom he pays according to a fee with the possibility to negotiate. This system was recently set up in the country; it would be interesting to evaluate it so as to determine if the experiment is worth considering in other countries.

A means to ensure greater foreseeability as regards the proceedings costs would be to require from the agents that they inform their clients on the foreseeable cost of the proceedings at the beginning and again each time a new act is considered. This could constitute "good practice" so long as it does not go against competition law regulations.

Concerning implementation proceedings, it seems all the more important to question the regulation or the negotiation of costs, as in private systems, the implementation agent is paid through the proceedings fees and possible outcome bonuses as, for instance, in the Netherland. In the public system itself, in which the implementation agent is in theory a State employee, there are nevertheless a few exceptions such as in Germany where the implementation agent is directly paid by the defendant.

In absolute terms, two systems are possible as regards implementation costs: the Member State can provide a detailed and precise regulation regarding proceedings costs as well as fees; it can also let the parties negotiate freely for part or all the costs. Virtually all Member States regulate enforcement costs: these costs are thus regulated by the State in private systems and in public systems". When a regulation is considered, its respect implies the possibility to take legal action against an agent who does not respect it. To ensure the regulation's full efficiency, it seems necessary to generalize the supervision system. The possibility to sue appears as the



simplest system and the least costly to set up (*a posteriori* control). Besides, even if enforcement costs are regulated, they remain, in certain situations, fully or partly negotiable. The freedom of negotiation should constitute, in principle, an advantage for the litigants, as it tends to lower enforcement costs. Nevertheless, it is appropriate to use caution. Indeed, the reference market in the enforcement field is a much segmented one, either because the law limits each bailiff's territory, or because implementation agents will limit themselves to a certain area. Given the nature of enforcement work, the market can hardly extend to a national scale. Naturally, this market segmentation is likely to favour agreements between professionals. Moreover, the enforcement agent - whose fees constitute his or her salary- can be tempted to keep these fees very high, in particular for proceedings acts the costs of which are passed on to the debtor.

### 1.9 Conclusion

The economic analysis offers a new perspective for the analysis of civil proceedings costs from the pre trial stage to the implementation stage. It thus contributes to casting a new light on numerous aspects of the behaviours of litigants dealing with those costs. Strategies likely to be chosen need to be brought out before any standardization proposition to improve the judicial systems operation can be made.

## 2 RECOMMENDATIONS

### 2.1 A better protection of European citizens

#### *2.1.1 Punishing the trial's losing party, not the winning party.*

The present study (“COJ study”) shows that justice is not done to the winning party even when the court’s decision is in their favour. Wealthy individuals or big companies, who have the means to be adequately represented wherever the forum is, are less concerned by this affirmation. However, for the average citizen, taking legal action in a cross border conflict is too costly and the uncertainties related to the costs of justice have an irrefutable deterring effect. Further in many countries, the winning party does not automatically get a full reimbursement for the costs incurred. Further, enforcement costs remain by and large at the winning party’s charge.

#### *2.1.1.(a) Reimbursement by the losing party and costs of justice*

Costs of justice also include the risks related to the consequences of the conflict. One of these consequences is an unfavourable decision which may compel a party to pay for the expenses of the winning party. In other words, the losing party may find himself/herself in a situation where the decision doubles his/her costs of justice. However, this is not clear cut in all Member States. In some, costs award to the winning party is limited to basic court proceedings. In other, it covers all costs. To make matters even more complex, in some country the costs award is automatic as prescribed by regulation whilst in others it has to be based on a request formally made by the winning party and the court will have complete discretion as whether to grant it and in respect to the amount.

In practice, in some countries, the compensation is rather meagre and rarely amounts to more than ten percent of the expenses incurred. In other countries, the

reimbursement covers all the expenses. These differences add to the lack of transparency in the costs of justice. Standardizing regulations in this field would provide greater transparency. It is possible to imagine an automatic reimbursement system with fixed ceilings according to the amounts at stake, the nature of the conflict and the losing party's income levels.

In general the losing party should pay for the costs of justice incurred by both parties. Further, if the losing party is a beneficiary of legal aid, legal aid should pay for the winning party's costs. It is clear that if the losing party is a beneficiary of legal aid, any decision awarding costs to the winning party will be without effect.

#### ***2.1.1.(b) Enforcement costs to be borne by the losing party***

This study confirms that currently recovery or judgment enforcement costs are borne by the winning party. The reason for this may be that enforcement costs arise post-judgment and that for practical reasons it is not possible to order the reimbursement of what has not been expended yet. It is also clear that it is the winning party that has an interest in enforcement. Further, one current measure that exists is the possibility to request that legal interest be attached to the decision so that any amount owed bears interest starting from the date of the decision. But the legal interest is usually inflation based.

It is thus appropriate to reverse the situation and make the losing party's position less comfortable. The court's decision could determine that the enforcement costs should be borne by the losing party. In a transparent system, the evaluation of reasonable enforcement costs should not be impossible. A lump sum could also be imposed and automatically applied if the losing party does not pay off his/her debt within a certain time limit following the notification of the decision. It is possible to imagine a system of automatic late fees (higher than the legal interest rate which does not cover recovery costs as it is not its function) the purpose of which would be to prompt the losing party to pay off his or her debt.

### **2.1.2 Representation by a lawyer**

National reports show that in many countries, representation by a lawyer is not compulsory for certain types of conflicts. However, it is clear that given the linguistic diversity in the European Union countries, it is in a foreign party's interest to seek legal representation. This results in a *de facto* extra cost for the European citizen who is party in a Member State other than his or her Member State of origin.

A possible solution would be to make representation by a lawyer compulsory for all conflicts or for any conflicts where parties are from different Member States ("Diversity of Parties to a Conflict" or "DPC")<sup>62</sup>. This would cancel the risk of discrimination towards the non resident citizen without, obviously, reducing the costs of justice.

Another solution would consist in developing interpretation and translation services that would be made automatically available and paid for by the Member States, so as to allow personal representation. The information regarding the possibility of personal representation with free interpreting services should be given to the foreign party in his/her native language at the very moment of the conflict's notification. There are examples of this in the European Union. These could be generalized. The foreign party should be entitled to free translation and interpreting services if he or she decides to represent him or herself.

### **2.1.3 Legal aid**

#### **2.1.3.(a) Legal aid and technology**

Access to legal aid could be facilitated in cross border cases thanks to online (i) provision of information, (ii) applications, (iii) case updating, (iv) documents delivery, (v) applications' evaluation and (vi) decision. These systems would allow a better follow-up of cases, as well as a greater transparency on the difficulties to access legal aid in cases where two Member States are involved. It would enable Member States, when it proves necessary to communicate together in order to determine the questions related to differences in living standards.

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<sup>62</sup> Which involve parties residing in two different Member States.

The creation of a European Judicial Atlas in Civil Matters (“the Atlas”) constitutes a major effort towards greater transparency of legal aid application proceedings. However, the Atlas only contains the law of four countries out of twenty-six<sup>63</sup> and only in the national language of each country. Thus, it is incomplete and only provides very limited, partial, mostly non translated and thus hardly usable information.

The Atlas could benefit from the use of new technologies allowing, in particular, for third party edits to be taken into consideration, by proposing an explanatory guide or allowing each Member State to update their own regulations in this field directly or through citizens who would contribute with a similar form to Wikipedia’s. It appears more appropriate to develop exogenous systems of information enrichment rather than to undertake major tasks which require constant updating and renewed resources. Further, it is generally better to be by a limited number of parties who are not interested parties (there is no real incentive for Member States to constantly update their information).

### ***2.1.3.(b) Legal aid and cooperation between Member States***

There are important differences between the various legal aid systems. The objectives here are not to evaluate these systems but rather to report any difficulties in obtaining legal aid in cases where two different Member States are involved. The COJ study indicates that the European Union’s efforts, the main result of which is the adoption of Council Directive 2003/8/CE of January 27, 2003 to improve access to justice in cross border cases thanks to the creation of common minimal standards related to legal aid granted in such cases<sup>64</sup>, are not as efficient as expected. The Directive mentioned above applies, regardless of the competent court, to all civil and commercial proceedings with a cross border aspect, that is to say, according to its terms, to any trial in which the party who submits a legal aid application currently or usually resides in another Member State than the one in which the trial takes place or the Member State where the decision must be implemented.

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<sup>63</sup> Except Denmark who does not participate to the Directive’s adoption and is not bound or submitted to its implementation.

<sup>64</sup> OJ L 26 of 31.1.2003, p. 41.

The evaluation of Directive 2003/8/CE's impact is not the purpose of the present study<sup>65</sup>. However, in practice, numerous difficulties arise in the implementation of the Directive's provisions.

1/ Information regarding legal aid is not always available and when it is available it is in the language of the forum, not in the language of the party who needs it. A foreign party thus needs to resort to a local lawyer (of the forum) whom she or he will have to pay, despite his/her limited resources, in order to be able to determine the legal aid system's granting conditions. A local lawyer's consultation (in the party's Member State of residence) before the application for legal aid should, in principle, be covered by legal aid, but there are no guarantees in this respect if he or she is not a lawyer in the forum state. The processes to obtain legal aid are also difficult to understand and to use.

2/ The forum lays down the conditions to legal aid granting. These conditions provide for the presentation of documents or evidence of the claimant's situation. These must be delivered in the language of the forum. The claiming party is thus, once again, being forced to invest his/her meagre resources in translation and certification fees, which do not guarantee the aid's granting. Member States do allow, in their regulation, for the possibility to obtain a reimbursement or an advance on translation fees, but the information on how to proceed is not always easy to get, neither are granting of advance nor the issue of reimbursement of advances if the application is denied and remains unsolved.

3/ If the party that applies for legal aid has resources superior to the threshold established by the forum, he or she will only be granted legal aid if he or she is able to prove that the difference in living standards between the forum<sup>66</sup> and the Member State where the said party usually resides makes it impossible for him or her to bear the

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<sup>65</sup> It would certainly be appropriate to undertake such an evaluation in the near future since Member States were supposed to implement the Decision by November 30, 2004 (Clauses of point a paragraph two of article three were to be implemented no later the May 30, 2006).

<sup>66</sup> Decision 2003/8/CE does not provide specific obligations to the authorities of the State of jurisdiction.

proceedings fees. If this idea has some merits it illustrates the gap between those who conceived it and the persons intended to benefit from it. Indeed, it may prove difficult for most citizens or for that matter legal aid services to propose an economic analysis of the differences in the standards of living between Member States.

In order to improve the implementation of legal aid in cases of DPC, it first would be appropriate to analyze Directive 2003/8/CE's impact.

In general, it is to facilitate the granting of legal aid to parties involved in DPC cases by giving the party, subjected to a foreign jurisdiction, the choice to apply and receive legal aid either from the forum or from his or her Member State of residence. Once the legal aid is granted, the Member State granting it becomes responsible for its payment and supplying related information, so that the beneficiary does not have to worry about the payments by one or the other Member State.

This recommendation does not correspond to Directive 2003/8/CE's provisions which make the forum responsible for legal aid. The choice between the Member State of residence<sup>67</sup> and the forum only concerns the proceedings of application for legal aid. The application is then forwarded to the authorities of the forum according to 1977 European Agreement<sup>68</sup> on the Transmission of Applications for Legal Aid, within the time limit imposed by the Decision, thanks to the form intended for this use which was designed by the European Commission<sup>69</sup>.

The recommendation above proposes a different perspective. It focuses more on the protection of the party for whom the conflict is abroad. It allows him/her to benefit from the legal aid system of the Member State with which he/she is familiar and in which he or she is a tax payer. This recommendation allows this party to defend his/her interests more efficiently before the local granting authority and thus ensures a better access to legal aid through an authority who better understands the

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<sup>67</sup> Here, the notion of residence encompasses all the conditions laid down in Paragraph 13 of Decision 2003/8/CE

<sup>68</sup> The European Agreement on the Transmission of Applications for Legal Aid ratified in Strasbourg on January 27, 1977 as modified by the additional agreement to the European Agreement on the Transmission of Applications for Legal Aid, ratified in 2001 in Moscow.

<sup>69</sup> OJ L 225 31.8.2005, p. 0023-0027.

specific situation of the party as they are local<sup>70</sup>. Issues of differences in living standards become irrelevant.

#### ***2.1.4 Legal protection insurance***

Legal protection insurance is a relatively recent branch of insurance.

Legal protection insurance concerns the payment of conflict resolution fees by the insurer instead of the insured.

Council Directive 87/344/CEE of June 22, 1987 on the coordination of legal, statutory and administrative measures on legal protection insurance<sup>71</sup> sets a framework for this kind of insurance policies when they are offered in Member States. This Directive aims at ensuring greater transparency from insurance companies who propose this sort of policy and at avoiding conflicts of interests. It puts forward the principle of specialization for insurance companies, the individualization of this insurance policy as compared to other types of insurance policies and allows the insured, under certain conditions, to choose his or her legal representative.

##### ***2.1.4.(a) Favouring the development of legal protection insurance***

Legal protection insurance is particularly developed in Germany, France and Great Britain, but not so much in the other Member States. Further, the territory covered is often limited to the national territory.

Promoting the development of legal protection insurance while providing it with a precise framework is important as this type of insurance policy may in the future complement legal aid systems. The cost of legal aid can be very high and some countries have already taken steps, a part of constant efforts to limit public deficits, to limit the extent to which legal aid is provided. It should be noted that, certain subjects, such as crime and family conflicts are not well suited for legal protection insurance.

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<sup>70</sup> It would be useful to check statistically whether applications by parties from other Member States have the same granting rate as the applications by locals.

<sup>71</sup> OJ L 225 31.8.2005, p. 0023-0027.



One of the reasons why this type of insurance policy remains undeveloped on a transnational scale has to do with the difficulties to evaluate risks and costs in order to determine precisely the amount of premiums. This is the heart of the present study. Greater transparency in information on costs of justice, an easier evaluation of the potential costs, could:

- favour the creation of legal protection insurance policies covering the territory of the European Union,
- foster greater competition between insurance companies by eliminating entry barriers, and
- lead to cheaper insurance products thanks to increased competition, greater costs visibility and to more people subscribing to these products thus providing an enhanced mutualisation of risks.

Another possibility would consist in forcing insurance companies to extend risk coverage to the European Union. Premiums would definitely initially increase but coverage would be guaranteed.

Finally, one can imagine the creation of a European compensatory fund to cover legal risk which, when necessary, would compensate the party bearing the costs of justice in a country where that party does not reside, by paying the difference between what that party could have expected to pay in their own Member State and what they actually paid. This compensatory device could be based on similar principles as those allowing for differences in living standards to be taken into account in legal aid matters.

#### ***2.1.4.(b) Providing a framework for the development of legal protection insurance***

Legal protection insurance has been a major success in certain Member States over the last few years. However, despite Directive 87/344, in some Member States it remains hindered by “the lack of transparency and difficulty to read their contracts for the insured<sup>72</sup>”. First, this type of policy is not explained clearly enough to the insured. Second insurance companies tend to exclude coverage if the insured can

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<sup>72</sup> See the French Senate Information Report prepared by the Finance Commission, of Budget Control and National Accounts on Legal Aid, number 23, 9 October, 2007 on [www.senat.fr/rap/r07-023/r07-0233.html](http://www.senat.fr/rap/r07-023/r07-0233.html).

obtain legal aid. It is necessary to prevent insurances companies from excluding coverage in cases in which the insured can be granted legal aid.

Finally conflict of interest and independence issues may arise for lawyers who represent both the insured and the insurance company<sup>73</sup>.

A European regulation could harmonize the framework of legal protection insurance and favour the development of a European market for this type of policy.

### ***2.1.5 European Fund for legal aid***

#### ***2.1.5.(a) Legal aid***

A European fund for legal aid could be set up to resolve issues arising from the important differences that exist between Member States in the field of legal aid, in particular concerning:

- (i) granting conditions,
- (ii) the complexity of proceedings, and
- (iii) the difficulties that arise in the evaluation living standards in a Member State compared to another Member State.

The fund would evaluate legal aid needs and grant these aids to parties involved in disputes.

#### ***2.1.5.(b) Enforcement aid***

Collection and implementation of legal decisions in the European Union are expenses generally paid for by the winning party. If this party does not reside in the Member State where the decision is to be implemented, the implementation costs become difficult to evaluate and the party is rarely aware of the most efficient proceedings available to collect a debt or implement a decision. Moreover, debtors often shirk their obligations by transferring their assets to other countries or parties.

Thus, a European fund for recovery could facilitate enforcement of judicial decisions. The fund could for example pay the sums due and obtain the transfer of

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<sup>73</sup> A French regulation of February 19, 2007 addresses this.

the rights attached to the decision. As a specialised fund, with resources and easy access to governments it would be more efficient in enforcing decisions.

#### **2.1.5.(c) Legal assistance**

On the same model presented for legal protection insurance, a European Fund for legal assistance could be designed. It would only be used in Diversity of Parties Conflict, and would pay for the expenses incurred for the gathering of necessary information ensuring equal access to justice. It would compensate for the difference between the costs of proceedings in a foreign Member State and the costs of similar proceedings in the Member State of residence.

#### **2.1.6 The responsibility of the plaintiff or of the jurisdiction Member State Party**

The plaintiff before a local court has a natural advantage over the foreign opposing party. The plaintiff initiates the proceedings and does so before local courts for his/her convenience. Thus, the situation between the parties is unbalanced from the start. Besides, the local party is in a better position to master local information. To correct this, the plaintiff could be compelled to make translations of relevant information in the other party's language available to that party. Failure to do so would constitute a procedural flaw the result of which would be a right granted to the responding party to bring the case before his/her national court.

#### **2.1.7 The use of the *Forum non conveniens* principle**

Using a principle similar to the Anglo-Saxon equity principle of *forum non conveniens* could be useful in the context of DPC. According to this principle, a court declines their territorial jurisdiction if, in the interest of justice, they consider that another court is in a better position to hear the case. A party can make a *forum non conveniens* argument when he/she can prove for example that:

- another court is better suited given the case's circumstances ;
- it would be easier to present the evidence, including experts and witnesses, to another court ;
- transportation costs for experts and witnesses are prohibitive ;
- the dispute calls for the intervention of local experts ;

- A court other than the Forum Member State would provide a quicker and less expensive decision.

Thus, this principle could easily apply to Diversity of Parties Conflict. In accordance with a European principle of *forum non conveniens* one of the parties could obtain from the court, before which the case was taken, to use the *forum non conveniens* principle for reasons which would include:

- the difficulties to access information,
- lack of procedure translations,
- non transparency in the costs of justice,
- the absence of easily available free interpretation and translation services,
- the implementation of measures which prevent, in practice, a party's representation by a lawyer from another Member State;
- etc.

The application of the EU *forum non conveniens* principle would be subject to the demonstration by a party that if the trial were to take place in a court of his/her country of residence, the other party would benefit from (i) access to information, (ii) free translation and (iii) interpretation services.

The advantage of implementing such a system is that it would tend to improve justice quality in Diversity of Parties Conflict and foster the highest common denominator. Member States, wanting to ensure that their nationals will have access to their own courts, would react and implement measures to improve their judicial systems. This improvement and global positive effect on justice quality in every country would eventually lead to the obsolescence of the EU *forum non conveniens* principle.

## 2.2 Better information for European citizens

Information plays a crucial part in the transparency of costs of justice. Access to justice for citizens depends on it. Information on costs, even if only enabling an approximate determination of costs, allows for:

- (i) a better evaluation potential liabilities, a better management of risks,
- (ii) more settlements as information asymmetries regress, and
- (iii) beyond that limits the dissuasive effect of an opaque justice system.

As a result, the sporadic information that can currently be found constitutes an obvious obstacle to transparency and to access to justice. Insufficient information dissuades parties from resorting to justice as a conflict resolution mode, which has several consequences. These are outlined below:

- 1/ creates an obstacle to the freedom of movement in general;
- 2/ creates an obstacle to the freedom of establishment of legal professionals in particular;
- 3/ makes contractual relationships between persons from different Member States more difficult; each party insisting on the prevalence of his or her Member State's jurisdiction (the determination of the jurisdiction provision is partly based on factors such as the amount of costs involved in case of a conflict, access to information on costs, procedures and the law, suspicion towards foreign judges);
- 4/ Makes it easier for unscrupulous persons to commit abuses as they know they will not be sued because of the complexity or opacity of the judicial system to which they are answerable.

### ***2.2.1 Information on costs of justice***

The COJ study has shown that, generally, legal professionals know the expenses related to their profession as well as the sources of costs of justice. However, their knowledge on the amount of these costs appears limited mainly to their profession. There are three reasons for this.

First, costs are difficult to evaluate as each conflict differs from the other. A judgement in absentia will, in principle, be less costly than a judgement where both parties are present or represented. By nature, certain proceedings take longer than others. An amicable divorce will not be as costly as a contentious one. Some cases are more complex than others. Clients with deep pockets may generate more costs. Commercial cases may lead to more costs because business interests are at stake and because expenses are usually tax deductible.

Further, in the course of the study, legal professionals have shown a certain reluctance to disclose the amount in respect to costs of justice.

Second, the regulations' complexity combined in some Member States with an important decentralization of the authorities in charge, makes it difficult to collect relevant information for just one profession, let alone for several professions. This complexity has a direct impact on costs of justice and certain legal professionals are now selling their knowledge as sources of information on these costs.

Third, some of the questions that were asked in the course of implementing this study were not necessarily relevant to all Member States. Judicial systems can greatly differ and questions which are relevant to a profession in one country are inappropriate in another. Hence some answers highlight more the irrelevance of a specific question's rather than an ignorance of the concrete situation the question refers to. There is also a tendency by the professions to fail to properly answer a question because of their focus on the details of an exception that the answer might invite.

Taking these elements into consideration, three recommendations come to mind. First, it appears necessary to take further measures to force the publication of certain professions' hourly fees in order to improve transparency. Second, Member States must undertake reforms to simplify their regulations (i) on the sources of costs of justice, (ii) on indirect tax application related to costs of justice as well as (iii) on the costs themselves. Third, it would be appropriate to ensure that legal professionals focus on their profession instead of turning into sellers of information which should be public, meaning everyone should have access to it.

### ***2.2.2 The study's limits...data***

The national reports presented are the fruit of a meticulous and arduous work spread over nearly nine months and that required from national experts to contact members of all legal professions. For this very reason the information they contain is precious, but it should not be! Indeed, it should be easy within a European Area of Civil Justice to collect this information as it is crucial to ensure access to justice for all. Each report illustrates the complexities of each national judicial system and the impossibility to gather all the relevant information for someone other than a legal professional. Hence, we understand that an appreciable amount of legal professionals' fees, and thus of the costs of justice, sometimes come from the

determination of where the information is rather than from the information itself. This is partly the result of regulatory outgrowth.

This also provides an explanation for the frequent differences in the answers given by legal professionals in the course of the study. These differences stem from the fact that for some questions the answer was not obvious and depending on circumstances could lead to several different answers. However, during interviews with legal professionals answers were direct and straightforward, which indicates that differences may be emphasized depending on how the study is conducted.

When reading certain reports, however, one becomes aware of the major recent efforts undergone by Member States, professional associations and other public and private organizations to facilitate access to information in their national language at least. However, even though the information exists, and can even be found online quite often, it is seldom centralized.

Information centralization by Member States appears necessary before centralization on a European scale is even considered. Within many Member States, justice related costs are determined on a local level.

As indicated above rationalization of regulations would provide greater clarity. Moreover, information centralization and rationalization could be led simultaneously.

### ***2.2.3 Transparency and technology***

Technological means exist to provide, at relatively low cost, statistics as well as precise, up to date information on the costs of judicial proceedings and the sources of costs of justice. The reason why these statistics and information are not systematically available and standardized could lie in the fear of what it would reveal. Certain countries assert a principle of free justice but the multiplication of various proceedings fees highlights a different situation. Detailed information, frequently updated, and the acknowledgement of the actual situation would truly have a positive impact in the long run, forcing Member States to act.

Once set up, the technological solutions have an immediate effect on relevant dissemination systems, on costs and index changes. The main difficulty resides in

collecting all the information once and updating it regularly. Member States could be required to update it according to evolutions. To ensure that the information is updated, if a party relies on the information the differences between the information available and the reality as regards the sources and amount of costs would not be opposable.

#### ***2.2.4 Professional associations' part***

There are professional associations for legal professions. They are generally well organized and efficient. They perform important functions for their members whose professions are usually regulated. Some of these associations enjoy recognition at a European level. Numerous associations have contributed to the present study and it appears obvious that they would be ideal intermediaries for projects aiming at improving transparency of sources of costs of justice as well as on the costs themselves. Bar associations regularly publish information and studies on these issues. Actions or programs, on specific issues, requiring greater cooperation between different legal profession associations within the European Union could bear interesting fruit. In particular, the creation of European justice Offices could be considered, an equivalent to European Information Centres on legal matters for businesses, and funding directed towards organizations related to existing legal profession associations which, by definition, have an interest and ability to give out information to European citizens.

Competition issues may arise from facilitating access to information and allowing cooperation between legal professionals<sup>74</sup>. It would be appropriate to consider this issue if the recommendation is accepted. It is also important to bear in mind in any reform to be undertaken that some legal professions, such as lawyers, have a general interest mission and facilitate access to justice.

#### ***2.2.5 For a greater level of transparency: overcoming the language barrier***

Language is identified as one of the main obstacles to costs of justice transparency and to access to justice. The language barrier prevents proceedings from unfolding

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<sup>74</sup> See judgement ECJ, Feb.19, 2002, case C-309/99: Rec. ECJ 2002, I, p. 1577 and ECJ, Dec.5, 2006, joint cases C-94/04 and 202/04 Cipolla.



smoothly. It is a consequence of the multiplicity of languages spoken in the EU. It slows proceedings down, is a source of opacity and extra costs. The extra costs created by this obstacle seem out of proportion to other justice related costs; they also seem unjustified.

#### **2.2.5.(a) *Adopting a single language for proceedings***

One solution would consist in favouring a main language for the proceedings. However, the use of a single or even main language remains very problematic even if most experts and participants in surveys indicate that it would be good that systematically have an English version of relevant documents.

#### **2.2.5.(b) *Bilateral translation in cross border conflicts***

As stated above, a plaintiff filing a claim before his or her court of residence has an immediate advantage over the foreign opposing party. It may be fair to require that a citizen taking legal action against another Member State's citizen should provide the defendant with a translated presentation of his or her Member States' legal system. Further, the plaintiff would be obliged to provide a list of sources of costs and the contact details of the authorities or organizations providing legal services and legal aid.

On the same model, the EU could compel their Member States to provide systematic translated presentation of their legal system. This would be done automatically. Process servers or the likes would deliver such information together with the case file.

Ensuring a level playing field between the litigants may also have a positive effect on enforcement of decisions. A defendant who feels that he or she is not at a disadvantage and has a real opportunity to have his or her case heard will be more involved in defending his or her case and more likely to implement the result. Lack of information, knowledge or of trust in the impartiality of another judicial system may lead to more default judgments or unenforced decisions.

### **2.2.5.(c) *Centralizing translations in all EU official languages***

A centralized system, on the Judicial Atlas model, with each Member State's law translated in all EU official languages would provide greater visibility of legal systems for citizens to use, together with free information.

### **2.2.5.(d) *Translation fees: to be borne by the State?***

Member States could bear translation fees so language would not encroach on the principle of justice for all.

Further, the case studies undertaken herein provide estimates of costs in straightforward disputes. These could be translated in all languages and published, provided they are updated every five years, by the Ministry of Justice of every Member State. They should provide information on what the sources of costs are and how costs are calculated. They only provide estimates in very simple cases but as outlined before even an estimate can help.

### **2.2.5.(e) *Creation of Justice Offices***

As already mentioned in respect to information, in order to overcome the language issue, the creation of European Justice Offices in each Member State could be considered. These Offices would be at the citizens' disposal and would provide information about the legal system of other Member States in the national language, thanks to cooperation between the different European Justice Offices and networking.

### **2.2.6 *Transparency of lawyers' fees***

Certain justice related costs are fixed and of little importance, but lawyers' fees are neither. Without imposing a schedule of fees, which may be an issue in respect to competition law and may undermine the lawyers' special function of facilitating access to justice, there could be a reinforcement of the informational and advisory role of lawyers in the pre conflict stage and the obligation of a written agreement between the lawyer and his or her client. At the pre conflict stage, the lawyer would have to provide his or her potential client with information on his or her rights and

obligations and his or her success rate if any. The written agreement would not only cover the pre conflict information but the information on costs including in case the client loses the trial (if the other party's expenses are reimbursed) or the lodging of an appeal. The hourly rate of a lawyer should also be more easily determined. Whether the lawyer then chooses to apply such rate or a lower rate because of his or her client's financial situation is not an issue.

### ***2.2.7 The VAT issue***

VAT, its rates, exemptions and general complexity have an impact on the costs of justice transparency and access to justice in the European Union, particularly for private individuals.

The COJ study shows that legal professionals are not always certain as to when VAT applies in cases of national conflict, so it is even worse when it comes to cross border conflicts. In certain cases, VAT exemption concerns an entire profession, as is the case for lawyers in Belgium. In other countries, it does not apply to persons whose turnover is beneath a certain threshold. To some legal professionals, VAT applies in cross-border disputes, but none are absolutely certain.

It appears that the Forum's lawyer will charge VAT at local rate to his or her client, who resides in another Member State. In other words, a private individual residing in Belgium, who is usually not charged VAT on lawyers' representation services (twenty-one percent exemption) will be charged an extra 19,6 percent for VAT alone if he is involved in a legal conflict in France and hires a French lawyer.

VAT can be a 20 percent increase on one of the most important costs in a trial: the lawyer's cost.

It should be noted that private citizens cannot be reimbursed this expense or deduct it from their taxes so it is important that this issue is addressed given the confusion amongst legal professionals as to its application.

Finally, VAT is sometimes applied to legal aid although it seems of limited use except to add "red tape" or hinder further the enforcement of the principle of access to justice for all.

Besides the lack of transparency in its application, a high rate of VAT makes access to justice difficult for private individuals.

Legal professionals have a mission of general interest to carry out. They facilitate access to justice and guarantee rights recognized by constitutions and international agreements. It appears appropriate for these professions be subjected to a low rate of VAT or no VAT at all as the extra costs is in fact a cost those who need access to justice, private individuals. If a VAT exemption is not possible a distinction could be made between the services directly related to access to justice and other services offered by legal professionals. VAT could also be altogether replaced by a legal aid tax.

As for legal aid, it should be exempt from VAT when provided by the Member State. It would be wrong to consider that VAT has no impact on the financial situation of beneficiaries when legal aid is entirely paid for by the State. Management, collection and reimbursement of VAT entail important costs too often disregarded. All these are extra costs to the State, to the legal professionals and to the beneficiaries.

It would be appropriate to rationalize and simplify VAT application throughout the EU in the area of judicial services. Again, a 20 percent VAT rate on legal services is a very important cost for litigants. The uncertain application of VAT also constitutes a cost and creates insecurity especially if at the end of the day the bill is unexpectedly increased by 20 percent. Both have an impact on access to justice.

A number of recommendations on the application of VAT have been made above. The recommendation that the authors of this study favour is to exempt from VAT legal services that are directly related to access to justice. This would increase transparency for EU citizens who have to litigate in other countries than their own and make access to justice more affordable in many countries. Such a recommendation could be incorporated within the framework of the 2008 general debates on VAT in the European Union.

## 2.3 Recognition by the European Union of the specifically European character of a situation involving citizens of different Member States (“Diversity”)

### 2.3.1 Developing European Alternative Modes of Dispute Resolution (“EAMDR”)

The European Union has considered using EAMDR to resolve conflicts in certain cases<sup>75</sup>.

Online systems of alternative modes or dispute resolution are becoming crucial to quicken proceedings, unburden judicial systems and fill the need of the Single Market. The alternative dispute resolution system (“ADR”), established to solve conflicts concerning domain names connected to the “.eu” is an example of the opportunities that ADR presents<sup>76</sup>.

The Czech Arbitration<sup>77</sup> Court manages the first online system to resolve disputes in all EU languages in a quick, efficient and transparent manner<sup>78</sup>.

Proceedings from beginning to end are organized online. The plaintiff and the defendant receive a login and password. The list of arbitrators includes experts from all the Member States who are able to grant awards in all the languages (with a summary in English). Administrative staff is also able to use any EU language. Proceedings follow precise schedules and most awards are rendered within three months.

The only disadvantage to remain is the arbitration cost: 1990 Euros for a single panel (1 000 Euros for the arbitrator and 990 Euros for the Court).

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<sup>75</sup> See the Green Paper on ADR in civil and commercial law. COM/2002/0196 final, April, 2002. See the Commission’s recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, L 109, 19.04.2001, P. 0056 - 0061. See also the Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Text with EEA relevance), L 115, 17/04/1998 P. 0031 - 0034

<sup>76</sup> See EC regulation 733/2002 of the European Parliament and Council of 22 April, 2002 on the implementation of the .eu Top Level Domain et Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

<sup>77</sup> The Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic is a non for profit organization funded in 1949. The Czech Arbitration Court was nominated on April 12, 2005 by EURid to provide an ADR for .eu domains.

<sup>78</sup> See [www.adr.eu](http://www.adr.eu)

The reason costs are high may be linked to expense incurred in setting up the system. Once these set up costs are paid for, and efficiency is improved through experience, the costs should decrease. The time period needed to obtain a decision could also be reduced and it represents part of the cost. The system set up by the Czech Arbitration Court could be used as a model - in general for dispute resolution proceedings and not just as an example of an efficient ADR system -for a means of dispute resolution involving parties in cross border disputes.

A few Member States actively promote ADR use in minor claims resolution and collection issues. Among them, Great Britain launched a telephone service in 2005 to provide information on mediation for conflicts related to minor claims and professional conflicts<sup>79</sup>. The purpose is not to promote ADR so as to transfer a task that should befall to the State to private and semi private organizations but rather to facilitate access to a range of dispute resolution means as wide as possible.

### ***2.3.2 Creating European courts***

The creation of European courts in cases of Diversity of Parties to a Conflict, based on the American model, could be considered in order to facilitate access to justice and legal aid granting as well as to balance the costs between parties. The American model can help design a jurisdiction competent to hear cases involving conflicts between citizens of two different Member States.

Without necessarily creating a European civil law or adopting the US system, the role of such courts could be limited to (i) solving legal aid issues, (ii) determining which national jurisdiction is competent and refer the case to a court there and (iii) facilitating access to information. Access to justice would benefit from a neutral body deciding on the above mentioned questions. The costs of justice would be more acceptable in a process that is considered fair and more transparent in general. Such a court would have an informational duty. It would not just refer a matter to a competent local court. It would actually also dispense information on costs and procedures before the designated court. Provision of information could become the responsibility of the court's administrators rather than falling on the judge. Moreover, the judge's status before such a court would have to be defined but one could imagine a mobile corpus of judges from different countries divided into

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<sup>79</sup> <http://www.direct.gov.uk>

European Courts and sitting together - by groups of three in one Member State or another - once every so often to resolve Diversity cases. One can also imagine the increased use of online services to enable the court to resolve urgent matters without having to travel to another site.

One could also imagine a more ambitious system, similar to the one implemented in the United States where federal courts have exclusive jurisdiction over some matters and concurrent jurisdiction over others. In the case where a party is from one State and the other party is from another State, and the amount in controversy exceeds 75 000 dollars, concurrent jurisdiction and Federal jurisdiction are possible<sup>80</sup>. This means that the plaintiff may bring the action before either State courts or US District courts (Federal courts). If the plaintiff chooses to bring the action before a State court, the defendant may apply to remove the cause to the competent District court. If the action ends up in the District court, the court will apply substantive State law to the matter, based on conflicts of laws rules applicable in the State in which the District court is located, and Federal rules of procedure.

The creation of mixed courts is also a possibility. This would include legal professionals from two different Member States arguing their cases based on their own legal systems with judges deciding in equity rather than law.

These options involve complexities that may lead to further difficulties in understanding an already complicated system. The first involves the creation of a new set of rules applicable at a supra national level. The second involves conciliating different rules on a case by case basis and issues in respect to interpretation of national laws.

The recommendation that is formulated here provides for a more limited scope of action by European Courts; A scope of action that aims at enhancing transparency and access to justice for parties residing in two different Member States.

In any case the creation of a body of European courts in DPC matters is a question that should be addressed in another study. The question is only relevant here in the context of a recommendation aimed at facilitating (i) access to information, (ii)

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<sup>80</sup> We are only making here a short and incomplete presentation of the US model.

access to legal aid and (iii) at ensuring that the interests of a party going to trial before a court in another Member State will be taken into consideration.

### ***2.3.3 A pragmatic approach to freedom of establishment and costs of justice***

Lawyers' fees constitute a major part of costs of justice. They are also difficult to evaluate for several reasons.

First, in certain countries, regulations forbid the publication of lawyers' services fees.

Second, each case is unique and lawyers are most often paid according to the time spent on a case. Thus, it is impossible to precisely evaluate in advance legal fees attached to a case. However, the study shows major differences between hourly rates in the different Member States. Thus, it is only fair for a party to be able to use a lawyer from the Member State in which he or she resides. That party will (i) have better knowledge of the rates which are related to a practice and culture characteristic of his or her Member State (ii) will find it easier to negotiate potential discounts, an all-inclusive price, and will be able to understand and to follow the case sufficiently so as to limit the number of hours the lawyer spends on it or alternatively be able to implement cost-benefit reasoned analysis of the case. This is not possible, however, in respect to conflicts in which the Forum Member State is not the Member State of residence of one of the parties.

The study shows that in many cases, it is impossible for a lawyer practicing in a Member State to represent a party from his or her Member State before a court in another Member State. According to some lawyers, it is against the law to actually try to represent a client in another Member State<sup>81</sup>. Other lawyers think that if it is not against the law, the local system would in any case be too complex for a foreign lawyer to provide adequate representation. Most lawyers, when considering the reality of their profession, think that it would be difficult, if not ethically questionable, for a lawyer to represent a client before the courts of a country the language and law of which he or she does not master.

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<sup>81</sup> This would be against European law.



This recommendation entails the creation of a system through which a party could use his/her lawyer from the beginning to the end of the proceedings even if this lawyer consults a local lawyer on local aspects or for local hearings, the party only being obliged to pay the local lawyer's fees at the same hourly rate as his or her national lawyer. In other words, Member State A's party could resort to a lawyer practicing in Member State B through his or her lawyer in Member State A at the rate of Member State A's lawyer. Lawyers would not lose out as the system would automatically balance itself with the multiplication of cases. Further, this would enable a one-stop shop for litigants and create more networking opportunities for legal professionals. Issues may arise in respect to professional responsibility and would have to be addressed.

#### ***2.3.4 Free movement of experts, experts' conclusions or reports***

The COJ study shows that reports by certified or accredited experts are not necessarily accepted or considered as evidence in other Member States. In numerous Member States, it is left to the judge to determine the evidentiary value of a foreign expert's report. Further experts accredited in one Member State may not be so in another.

Thus, instead of being able to save on the cost of a second expert report, the party is better off ordering a new report from an expert accredited by the Forum Member State.

This recommendation proposes the adoption of a European principle of recognition of experts and experts' reports provided the expert is accredited in at least one Member State. Reports should be taken into account as if they were written by local experts provided they are relevant to the dispute at hand. The language of the report should not constitute an obstacle to its admissibility by the Forum Member State or its use by the competent court. In short, the work performed by an expert accredited in one Member State would be accepted as work performed by an accredited expert in all Member States.

### ***2.3.5 Diversity of Parties Conflict proceedings language***

Within the framework of the present study, experts and participants in the surveys have suggested favouring one main proceedings language which would also be the language in which information is supplied. In particular, some experts suggested imposing on Member States that all the documents concerning legal proceedings and their costs be translated into English systematically.

### ***2.3.6 The forum's recognition of its responsibility***

To prevent the language issue from encroaching on the principle of justice for all, the Member State of jurisdiction could be compelled to present information concerning costs of justice to the foreign party in its national language. The failure to provide such information would be constitute a procedural error. Some Member States already offer free translation services for documents and information. It would be appropriate to generalize this practice; Even more so when the jurisdiction is imposed as a matter of public order or policy<sup>82</sup>. The Member State imposing territorial jurisdiction should facilitate foreign parties' access to information on sources and amount of proceedings costs in the foreign party's national language without such party having to request it.

### ***2.3.7 The recognition of a European competence***

Few legal professionals have an actual cross border expertise. Few are able to evaluate precisely the costs and to precisely describe proceedings in other Member States. This inability is the result of the difficulty to access information and of a lack of knowledge and experience.

European citizens should not have to pay for legal professionals' lack of experience and knowledge.

Thus, European certification asserting a linguistic, legal or procedural ability with respect to more than one Member State could be provided. The certificate could, for example, attest to a professional's knowledge and experience dealing with Diversity

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<sup>82</sup> The field of application of public order could be changed taking European integration into consideration.

of Parties Conflicts, his or her qualification/knowledge of one or more languages and/or his or her knowledge of legal aid proceedings in different Member State.

#### **2.4 Simultaneous treatment of costs' sources and amount transparency and time period of the conflict resolution**

The present study focused on following the orientation defined by the European Commission. The definition of costs of justice retained for the study concerned what traditionally is meant by this expression.

The definition of costs of justice could be widened to include the time factor and consider, given the delays in obtaining a judicial decision in some Member States, that this factor increases costs significantly and limits access to justice.

Time is also an important factor in the enforcement of decisions.

The whole duration of a trial, from the time a decision is made to file a claim to the decision's actual enforcement, is a factor that needs to be taken into account when costs of justice are under consideration. It is not just a question of the number of steps necessary to obtain enforcement of a decision but of the time the overall procedure takes. If time could be precisely evaluated from the outset, parties could make an informed decision based on the value that they give their time, their need for the amounts claimed over time, the depreciation of the amounts claimed over time and the likelihood of effective enforcement of a decision over time (if one assumes that a decision can be rendered five years after a claim is filed, the chances that the defendant has disappeared or has hidden their assets are greater than if the decision is rendered after one year). The time factor has not been thoroughly studied here but its existence and importance need to be acknowledged. This factor is also taken into consideration because of its impact on other costs of justice.

The time factor includes several components, in particular "duration", "stages" and "parties' involvement".

The "duration" corresponds to the calculation of the number of days one has to wait to obtain a compensation following a lawsuit. This duration has a cost of its own, which can be evaluated. Sometimes, this cost is reimbursed as legal interest, but

hardly ever entirely, even when a European law provides for its reimbursement<sup>83</sup>. There are few studies on this matter on a European scale. Some cases, divorces cases especially, often require long proceedings or waiting periods which make the matter difficult to analyze. This subject is very important and it is recommended that a study be organized to reveal the issues and help determine generate future policies on this matter.

The “steps” component refers to the number of steps to complete in order to obtain compensation. Each step involves extra costs especially for intermediation (translation, interpretation, legal representation, and enforcement agents), hearings, travel, etc. In some countries a single and relatively simple judicial action involves over forty different steps. The more the steps, the more legal professionals have to be used and the more costly the procedure. In effect, knowing the number of steps may provide an idea of the time that a legal representative will spend on some aspects of a case. In terms of transparency, it is clear that a procedure weighed with a myriad steps is more likely foster less transparency than one that includes one or two steps. The cost, for the State, of making complex procedures transparent is also more important.

The “parties’ involvement” element is never recognized. It corresponds to the personal investment that legal action requires from the person who participates in a suit. It is difficult to take into consideration. In some countries, representation by a lawyer is compulsory and one can easily resort to legal professionals at each stage of the proceedings, hence a limited personal involvement from the parties. However, a trial requires several hours of preparation, multiple exchanges with legal professionals as well as travel time and time to be present at hearings.

Some countries, in late payments cases, acknowledge that the time needed to send a formal notification letter to a debtor has a cost which should not be borne by the party who suffers from the late payment. Although the costs linked to the involvement of each party in the proceedings should not necessarily be reimbursed, they are nevertheless real and their recognition is crucial in the evaluation of costs of justice in general.

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<sup>83</sup> Many judges still refuse to prescribe the interest on non payment which are automatically due as regards late payments as a direct violation of the Late Payments Directive.

### ***2.4.1 Limiting the number of procedural steps needed to obtain an enforceable title and its enforcement***

The procedural maze is partly responsible for the lack of transparency of costs of justice.

In 2005, the World Bank (“WB”) organized the only worldwide study regarding judicial proceedings. The WB study shows there often are many procedural steps before one can obtain an enforceable title and its enforcement. These steps do not include the delays and extra steps added by the cross border nature of a conflict.

People’s reluctance to take judicial action is also related to its difficulties and costs. Too many steps have to be completed before a forced recovery can be implemented.

The WB study presents the MINIMUM number of steps necessary between the application and the specific performance.

EU’s average was calculated in order to compare it with that of each Member State.

Member State <sup>84</sup>	Number of stages to obtain a decision and its enforcement
Europe	22.2
OECD	19.5
AT	20
BE	27
BG	NC
CY	NC
CZ	21
DE	26
DK	15

<sup>84</sup> Germany (DE) ; Austria (AT) ; Belgium (BE) ; Bulgaria (BG) ; Cyprus (CY) ; Denmark (DK) ; Spain (ES) ; Estonia (EE) ; Finland (FI) ; France (FR) ; Greece (EL); Hungary (HU); Ireland (IE); Italy (IT); Latvia (LV); Lithuania (LT); Luxembourg (LU); Malta (MT); The Netherlands (NL); Poland (PL); Portugal (PT); Czech Republic (CZ); Romania (RO); United Kingdom (UK); Slovakia (SK); Slovenia (SI); Sweden (SE).

EE	25
EL	14
ES	23
FI	27
FR	21
HU	21
IE	16
IT	18
LT	17
LU	NC
LV	20
MT	NC
NL	22
PL	41
PT	24
RO	NC
SE	23
SK	27
SI	26
UK	14

Source World Bank/IFC survey 2005.

Recently, some countries have implemented proceedings to limit the number of steps for certain specific disputes. However, in general an important number of steps remain to be completed and they add to the global lack of transparency and particularly in the evaluation of costs of justice.

### 2.4.2 Standardizing time limits for specific performance

The study on Late Payment<sup>85</sup> in the European Union showed that delays in judicial decisions' enforcement can have a deterring impact on persons who wish to take legal action<sup>86</sup>.

It is necessary to make procedures for the enforcement of decisions more transparent, easier and faster<sup>87</sup>. The WB study presents the number of days necessary to proceed to the forced recovery of a debt.

Member State <sup>88</sup>	Number of days needed to proceed to a forced recovery
AT	90
BE	60
BG	NC
CY	NC
CZ	90
DE	55
DK	28
EE	20
EL	90
ES	49
FI	60
FR	29
HU	90

<sup>85</sup> Study regarding European law's efficiency to fight late payments, commissioned by the European Commission, 2006.

<sup>86</sup> If debtors do not respond to dunning letters there is little reason to believe that they will respond to a decision against them.

<sup>87</sup> This is not taken into account in the European payment order.

<sup>88</sup> Germany (DE) ; Austria (AT) ; Belgium (BE) ; Bulgaria (BG) ; Cyprus (CY) ; Denmark (DK) ; Spain (ES) ; Estonia (EE) ; Finland (FI) ; France (FR) ; Greece (EL); Hungary (HU); Ireland (IE); Italy (IT); Latvia (LV); Lithuania (LT); Luxembourg (LU); Malta (MT); The Netherlands (NL); Poland (PL); Portugal (PT); Czech Republic (CZ); Romania (RO); United Kingdom (UK); Slovakia (SK); Slovenia (SI); Sweden (SE).

IE	45
IT	270
LT	70
LU	NC
LV	120
MT	NC
NL	20
PL	160
PT	120
RO	NC
SE	21
SK	110
SI	360
UK	56

Source World Bank/IFC survey 2005.

The time periods presented in 2005 by the WB seem optimistic. More recent WB studies give a more realistic and ominous picture of the situation. Other European studies indicate time periods likely to deter even the most obstinate parties.

The study on Late Payments<sup>89</sup> in the European Union came to the conclusion that in France delays could be three times as long as those indicated in the WB study, due in part to the slowness of the banks in indicating the amount that can be seized. This is also confirmed in other Member States by the very recent CEPEJ study which shows that it takes over thirty days for competent authorities in the Czech Republic, Greece and Hungary simply to notify a judicial decision to a party<sup>90</sup>. Thus, two conclusions can be drawn from what was presented above. First, time periods in recovery proceedings are long. Second, there is no official or statistical information available regarding those delays and studies on this matter as they present different conclusions which do not throw any light on the problem. The first recommendation

<sup>89</sup> Study regarding European law's efficiency to fight late payments, commissioned by the European Commission, 2006.

<sup>90</sup> European Commission for the Efficiency of Justice (CEPEJ) Report, European Judicial Systems, Edition 2006, 5 October, 2006.



would be to implement measures favouring quickness in decisions' enforcement, especially those which make the party entitled to a right primary creditor, or that simplify notification proceedings<sup>91</sup>. Quicker proceedings limit the duration element and thus decrease the global cost of justice. The second recommendation would aim at imposing on Member States that they should publish and make available yearly statistical reports on the duration of judicial procedures.

In certain Member States, the issue of lengthy judicial decision enforcement has been identified and solutions were identified and implemented. In 2005, Professor Baldwin indicated that: *"In my own research on this question, only a minority of the claimants who succeeded at small claims hearings received payment from the other party in full and in the time specified in the court order. A substantial minority received nothing at all. Nor are the court-based enforcement options very effective in securing payment. In my view, ineffective enforcement procedures undermine the credibility and integrity of the civil courts—and the credibility and integrity of small claims—more than any other factor"*<sup>92</sup>. Some European measures, such as the European Enforcement Order for Uncontested Claims<sup>93</sup>, have been implemented to quicken recovery proceedings. These measures appear efficient according to the COJ study participants. However, they remain limited to specific subject matters and do not facilitate the evaluation of the time it takes to enforce judicial decisions.

The European Enforcement Order as regards uncontested claims is a first step. However, standardization is necessary even when the debt is contested<sup>94</sup>. Once an enforceable title is obtained in Europe, the enforcement procedure should be transparent, simple, quick and cheap. It would be appropriate to provide a more constrained framework aimed at limiting enforcement delays.

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<sup>91</sup> Today banks pay themselves before they transfer the assets to the creditor which not only stretches proceedings but puts the bank before the creditor who should have priority because of the possession of a judicial decision. .

<sup>92</sup> House of Commons Constitutional Affairs Committee, The courts: small claims, First Report of Session 2005-06 Report, together with formal minutes, oral and written evidence, published 22 November 2005, E53, 16(v)

<sup>93</sup> [Regulation \(EC\) No 805/2004. Regulation \(EC\) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure](#) will apply as of December 12th, 2008.

<sup>94</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Official Journal L 143, 30/04/2004 P. 0015 - 0039.

Facilitating enforcement of decision or making it speedier will ensure that instruments such as the late payments Directive will gain in efficiency.

Finally, there are too few Member States, with systems enabling them to measure the time it takes to enforce decisions. The first step would be to set up such systems, as they would enable European citizens to determine more precisely what they should expect, in terms of timing, to obtain the enforcement of a decision.

Access to justice should not just be limited to the right to obtain a judicial decision. It should include the right to obtain the enforcement of such decision. New ways to ensure prompt compliance with judicial decisions may need to be explored as it becomes easier to avoid the consequences of an unfavourable decision in an enlarged European Union.

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