2016

Caseflow Management Handbook

GUIDE FOR ENHANCED COURT ADMINISTRATION IN CIVIL PROCEEDINGS

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This handbook is a practical guide aiming to facilitate Caseflow Management (CFM) improvement efforts in European civil proceedings. The objective is to increase information exchange between countries and to enhance improvement by analyzing and describing CFM improvement areas, needs, efforts and practices.

The handbook is conducted based on literature, interviews and expert workshops. Literature reviews has been used to formulate the subjects and improvement areas and to conduct general analysis of them. The examples presented in the handbook are collected and formulated based on individual interviews (judges, clerks, court administrators and court managers) and available court improvement material. At the moment the handbook includes examples altogether from 12 different European countries (Austria, Belgium, Czech Republic, Finland, Germany, Estonia, Italy, Netherlands, Portugal, Slovenia, Spain and Sweden). The role of the examples is to give a short and enliven overview of practical experiences related to the subject at hand. Examples are formulated diversely: including both broader descriptions of procedures, as well as more detailed practice explanations and individual opinions. Expert workshops have been arranged to analyze, refine and summarize the results from literature reviews and interviews. Court operation experts (both practitioners and academics) have participated to the workshops.

More examples can be found from the Appendix 1: Inventory of Caseflow Management practices in European civil proceedings. A collection of European civil proceeding schemas can be found from Appendix 2.

1. Introduction

The way civil cases are handled is regulated in the codes of civil procedure, and is connected with legal tradition, the managerial attitude and competence of the judge and of the design and functioning of court organizations. Civil proceedings are traditionally characterized by a dominant position of the parties and a passive role of the court. The litigants control the content and progress of the proceedings while the court oversees the procedure as a passive actor. The acceleration of proceedings by means of ICT and simplification of the rules of civil procedure is important, but has also encountered resistance from judges and the bar association in several countries.

Court logistics deals mainly with organizing and planning operations in a way which reduces idle time of case files in the process. The search for court effectiveness, which can be defined as the level of accomplishment of the established targets (ratio between established targets/targets accomplished), and court efficiency, which can be defined as the ratio between the accomplished targets and the resources used to accomplish them (ratio between accomplished targets /resource input) has become part of the agenda in many justice systems, also stimulated by the work of the CEPEJ, the commission for the efficiency of justice of the Council of Europe.

Court operations cannot avoid planning with effective utilization of monitoring data. The enhancement of logistics in court operations depends heavily on the willingness of judges to actively manage targets and operations, co-operate with internal and external functionaries and stakeholders, and take overall responsibility for the progress of the cases (for example by denying a request for postponement and demanding parties to engage in timely exchanges with clear deadlines). This also involves a willingness to restrict the number of hearings per case and to try a settlement after the parties have submitted their points of view. Mediation, conciliations and settlement procedures are supported by the law of civil procedure in many countries and they have to increase particularly for some kind of disputes

which are better addressed by different kind of procedure than a full-fledged trial. A basic problem in first instance proceedings is the possibility of appeal against interlocutory decisions concerning, for example the submission of evidence. The possibility of such an appeal should be discouraged because it can prolong the proceedings, usually without clear equal benefits for the parties involved in the case.

Ideally, a well-managed case in a civil procedure could elapse in the following way: prior to the hearing, the parties would submit one document to the court in which they explain the core of the dispute, the possible defenses of the other party, the evidence to be submitted in the proceedings, and the witnesses that could be heard (the court needs a complete picture of the case as early as possible and the parties therefore need to supply sufficient information in their statements of claim and statement of defense and indicate the evidences they have at their disposal). Following this written round, the court then orders a personal appearance of the parties. The importance of the hearing requires the judge to take an active part in the proceedings and the court should be attributed the competence to take measures to accelerate the procedure. These measures could be taken ex officio or at the request of one of the parties. They could possibly include, for example, fixing time limits, peremptory time limits, and the dissolution of the right to state a claim or the refusal of acts that are masked statements. This may be backed up by the judge to impose a fine on each party that deliberately tries to delay the case.

An important organizational aspect in improving caseflow, is the way a court organizes and divides work and duties. Within the court, for civil proceedings a certain specialization may help to speed up proceedings. Specialization may regard the subject of the cases (e.g. insolvency, trade, family), but also the kind of procedure (e.g., ordinary and summary proceedings). This presupposes a large enough number of judges, court clerks and hearing rooms available to the court. Specialization may enhance timeliness of court proceedings because for judges and court clerks it will take less time to understand the case and it will enable judges and court clerks to establish routines.

This research also shows that an area, where there have not yet been sufficient improvements and sharing of innovative procedures and practices are the EU cross-border disputes. Such disputes are characterized with specific requirements which would need specific solutions, for example through specialization.

Also the expert witnesses, who may assess or find, measure, analyze, test, and interpret the evidence, occupy a sensitive position in proceedings. With the advance of science and technology, the appointment of experts has become more and more frequent, making their timeliness and effectiveness impact the caseflow. They can be either a bottleneck or a precious resource depending on the efforts of managing them. It is important to set clear definitions for the mission of the experts, state clear demands for their qualification, set unambiguous time limits for them and simplify the expert witness procedures for more straightforward cases. Expert witnesses may also contribute to or, if trained properly, even lead conciliation between the parties, alternatively managed by professionals in conciliation, supported by the expert witnesses themselves.

The role of court management and leadership in creating change and innovative organizational culture would need to be increased. Improvement of court caseflow has traditionally been connected to the introduction of timeframes and active management of them. Central challenge has been the acceptance and accomplishment of timeframes. It is important that courts take a more holistic view in managing different areas of performance, taken into account also the capacity management and the use of resources. Targets for performance need to be in balance, realistic and widely accepted among court personnel and judges in order to be effective. Influential performance management is not possible without the use of accurate data and online monitoring, with clear responsibilities for judges or a team of court clerks and judges to take action regarding the cases that are in risk to be delayed.

Improving the utilization of ICT and digitalization tools in different areas of court operations is at the basis of managing the modern court environment. A clear trend in Europe is the movement towards e-justice, where most of court documents and communication have become electronic. The implementation of such systems are currently undertaken in several European judiciaries. The design and implementation processes of these digital- justice-chains have not yet been easy nor very successful, requiring more time and resources than initially expected. In order to have good benchmarking examples in the future, the factors influencing the success and failures in different phases of these change processes should be thoroughly studied. Based on the experience from the large scale ICT projects in different countries, it can be said that the introduction and implementation of ICT solutions to courts need to be carried out gradually, leaving room and time for participation, testing and adoption of new working methods and techniques for judges, court personnel, and advocates.

Another factor relevant to the timeliness of court proceedings is the size of the backlogs. "Backlog" is the number or percentage of pending cases that have not been solved within an established timeframe. For example, in several countries the expectation is to solve most of the cases within one year, so the pending cases older than one year will be the backlog. In other countries the expectation can be 2 years, so the backlog is the number of pending cases that last over this timeframe. A high number of backlogged cases can affect the quality of procedures and of the judgments. When judges and court clerks have the experience that it doesn't matter how much effort they put into handling cases for the amount of cases waiting for them, this makes their work discouraging. High numbers of old pending cases make the monitoring and the use of monitoring data in managing operations also more difficult. Working away the backlog is imperative before major improvement efforts can be started effectively. Usually it will demand the temporary deployment of extra judges and court clerks, for example in the shape of a 'flying brigade', or by removal from the list of old cases which have become irrelevant.

Where tradition prevails, the way forward seems to be to change the rules of civil procedure. By creating competences (and obligations) for the judges to manage their cases actively, they will be explicitly backed up legally for directing proceedings more effectively. Moreover, the introduction of IT-systems, allowing to file proceedings on-line and an electronic caseflow management system and more precise targets for timeframes could make a change. It is essential that judges and managers take responsibility for the timeliness of proceedings, and that this is supported by legislation with clear competences. From a timeliness perspective, civil procedures can no longer be left entirely to the parties with the judge in a passive role.

Effective improvement of timeliness and caseflow in civil proceedings is not only a matter of implementing some specific tool or technique. It is an multilateral task involving and combining several procedural, organizational and managerial aspects and elements which all need to be comprehensively encountered and addressed in the improvement work: simplification of rules and procedures, practical division of work and specialization, utilization of alternative disputes resolutions, active management of parties and witnesses, the use of appropriate monitoring data to manage performance and human resources, effective use of ICT and constant improvement of digitalization efforts, as well as clear procedures and rules connected to cases crossing national borders or cases affected by other special requirements and circumstances.

2. Legislative measures for timeliness in civil proceedings

This section describes how timeliness of justice can be improved by legislative measures in some selected procedures. The focus is on developing European common models, especially in simplifying the small claim and uncontested claims, improving the ordinary civil proceedings, promoting mediation and conciliation tools and reducing the number of appeals.

2.1 Simplifying small claims procedures

An area of improvement is the application of specific rules on civil proceedings for those cases which can be dealt with in specific and simplified proceedings. One example of such cases are the small value disputes. Many (but not all) European Union Countries provide in their legislations a procedure ad hoc for such claims. National small claims procedures are applicable for those cases whose value is within a range from 600,00 Euro up to 15.000,00 Euro (for example: Spain: 6.000,00 Euro, art. 250.2 of Spanish Law No. 1/2000; Portugal: 15.000,00 Euro, art. 8 of Portuguese Law No. 54/2013; Germany: 600,00 Euros, Art. 495a ZivilProzessOrdnung, Italy: 5.000,00 Euro, art. 7 of the Italian Code of civil proceedings; Estonia: 2.000,00 Euro, Art 405 of the Estonian Civil Procedure Code; Slovenia: 2000 EUR for the cases of private individuals and 4000 EUR for commercial cases, art. 431 and 432 of the Slovenian Civil Procedure Code.)

The civil proceeding schemas (presented in Appendix 2) show that the majority of the procedural activities is concentrated in just one hearing, including the taking of evidences, and the hearing of witnesses.

The trend is to strengthen the use of simplified procedures to speed up the pace of litigation and court productivity, e.g. recent modifications of the Italian and Portuguese Law clearly follows the trend since the maximum value for simplified procedures has been increased to 5.000,00 Euro and 15.000,00 Euro. However, within the EU, the possibility to use such a simplified procedure is still scattered. It would be useful if national rules and procedures on small claims could be harmonized in order to implement a **European common model** of procedures and rules for small claims. The basis for the model could be taken from the European small claims procedure (EC Regulation No. 861/2007) which aims to create a common model of civil proceedings within the European Union for small claims procedures. (The EC Regulation No. 861/2007 was amended on the 24th of December 2015 by Regulation No. 2421/2015 that will come into effect on July 14th 2017).

The schema of such European common procedure is presented in Appendix 2. It seems evident from the schema that such European model tends to concentrate as much as possible the procedural activities at the initial stage of the proceeding. The main difference between such European model and the national ones described before, is that in the European small claims procedure the hearing is not required. It will take place only if one of the parties so requires or if the Court deems it as necessary.

The key-issues in using the EC Regulation No.861/2007 as a basis for designing European common model are:

- The regulation establishes a non-compulsory model of civil proceedings for small claims throughout the European Union countries (except for Denmark), in each official languages of the European Union. Small claims are thereby defined as those claims whose value is not higher than 5.000,00 Euro (value amended, previously 2.000 EUR in EC Regulation 2421/2015).

- According to the regulation, a hearing is required only if one of the parties requires it and the court considers it necessary for the final decision. This entails that the procedure is fast and parties do not need to move to the country where the seized court is located.
- The regulation sets out a common model form of the claim and of the response (the main documents filed by the parties within such procedure) in order to simplify both the task of the citizens and of the court.
- The regulation establishes that for such procedure the legal assistance of an advocate or other professional is not necessary. This helps the citizen reduce legal expenses and improves the access to justice. On the other hand, the regulation strongly recommends national countries to provide efficient mechanisms of public legal assistance (for instance, ad hoc offices within each National Court or an ad hoc web site and/or call center providing all the information needed for a citizen to easily and correctly file his or her claim).

2.2 Simplifying uncontested money claim procedures

It is quite frequent that a money claim (e.g. an invoice not paid) is not contested, meaning that the defendant does not challenge what is alleged by the plaintiff. In such cases, there is no need to apply a full-scale procedure. Many (but not all) European countries provide a procedure, which aims to ascertain whether the claim is actually contested or not (the so called "injunctive, payment order or monitory proceedings").

The model of these kind of proceedings differs among countries. In some countries, such procedures are applicable to all kind of matters (i.e. Italy, art. 633 and followings of the Italian Code of civil proceedings; (see the schemas in Appendix 2) Spain, art. 812 and followings of the Spanish Law No. 1/2000, Germany, § 689 I clause 2, Zivilprozessordnung), while other countries have some limitations (Portugal, the injunction procedure is applicable for claims up to 15.000,00 Euro according to art. 3 and following of the Legislative Decree No. 62/2013). Main difference is between countries adopting "*pure monitory procedures*" and countries adopting a *"mixed model*".

> *Pure monitory proceedings: in case the defendant does not challenge within a specific deadline an injunction order issued by the Court on the basis of the sole allegations of the plaintiff, that order becomes definitive and has the same value of a decision issued at the end of the ordinary proceedings. The plaintiff is not required to allege any evidence to obtain the order for injunction. Just in case of challenge of the order by the defendant, plaintiff shall be called to allege all the evidences (i.e. Portugal).*
>
> *Mixed model: plaintiff is required to allege some evidences (i.e. invoices) together with the claim in order to obtain an injunction order for payment (i.e. Italy).*

Even a third intermediate model used in Europe can be identified. This type of model is applied for instance in Germany (§ 689 I clause 2, Zivilprozessordnung). According to the procedure, in case the defendant does not challenge within a specific deadline an injunction order issued by the Court on the basis of the sole allegations of the plaintiff, then that order becomes enforceable, but still not definitive. Whenever the defendant does not challenge it even after a second deadline, then the order becomes also definitive, such as a decision issued at the end of the ordinary court procedure. The plaintiff is not required to allege any evidence to obtain the order for injunction. Just in case of challenge by the defendant, plaintiff shall be called to allege all the evidences.

It would be useful, if national proceedings on uncontested claims could be harmonized in order to have a **European common model** of procedural rules for uncontested claims. The basis for the model could be taken from the EC Regulation No. 1896/2006.

The schema of such European common model is presented in Appendix 2: it is based on the model of "pure monitory proceedings". The plaintiff is not required to allege any evidence at the initial stage of the proceedings as well as the defendant does not need to allege any evidence to challenge the payment order. Only if the defendant challenges the payment order an ordinary proceedings shall start. If the defendant does not challenge the payment order, it becomes definitive and enforceable not only in the country where it was issued, but even in all the European Union Member States.

The key-issues in using the EC Regulation No. 1896/2006 as a basis for designing European common model are:

- Creditor is not required to file relevant documents together with the claim. At the same time, debtor can challenge the order for payment by a simple declaration. Therefore, such model is flexible and simple and allows parties an easy access to justice (especially in case of transnational claims).
- According to the regulation, legal assistance is not required. This helps to improve the access to justice and to avoid legal fees when the procedure is quite simple. However, the regulation strongly recommends national countries to provide effective information by a public institution (for instance, ad hoc offices within each National Court or an ad hoc web site and/or call center providing all the information needed for a citizen to easily and correctly file the claim).

This procedure is interesting also because it involves a very light intervention from the court, since no evidences are alleged with the claim. The court is basically called to check its jurisdiction and to issue (almost) automatically (e.g. money claim online in UK) the payment order which will be eventually challenged by the defendant.

2.3 Summary and ordinary proceedings

There is an important difference between ordinary and summary proceedings. Legal proceedings are regarded as summary proceedings when they are shorter and simpler than ordinary proceedings. These cases are usually decided within a shorter time frame because the nature of the problem requires a quick decision. In many countries, summary procedures are connected to an ordinary procedure. This connection to the ordinary procedure is not required in all legal systems. Therefore, in some countries the parties abide by the court's decision and do not start ordinary proceedings and do not appeal. The result is an extremely quick procedure that replaces the ordinary procedure. In many countries, however, the start of summary proceedings requires an 'urgent interest'. This is impractical, because it is possible that the parties prefer a quick handling of their case despite the absence of a legally valid 'urgent interest'. Non-urgent business cannot be decided in a quick procedure. It is equally impossible for a judge to transfer a case to the fast track when he considers that a case should be handled in an ordinary procedure. More flexibility in giving the filing party a choice for either a fast track or ordinary procedure could be beneficial to the functioning of the court system. All and all, summary proceedings should be more clearly disconnected from ordinary proceedings, should be made as simple as possible.

2.4 Settlements, Mediation and Conciliation procedures

2.4.1 Settlements

Early settlements have a strong impact on the caseload, therefore they increase the ability of courts to comply with the timeframes and avoid a resource and time consuming, for both parties and the court, of a court trial. Also the Consultative Council of European Judges (CCJE) has emphasized the importance of using as much as possible early settlements techniques by the judges. This implies, a proactive and innovative role of judges, who have to take the lead of case management.

Judges during the study of the case should identify those that have features that may ease a settlement. Among these features there are the subject of the case, the characteristics of the parties, the attitude and past experience of the advocates, the cost to be carried out (e.g. technical experts and witnesses), and the expected length of the procedure. A practice that has been found as very promising to try to accomplish a settlement is the participation of the parties and not only of the advocates to the ”settlement meeting or hearing”, where the judge can explain the costs and the risks for both parties if a settlement is not reached. Sharing of best practices and judges training for cases settlements are also highly recommended, as well as meetings with advocates to promote the settlement of cases.

Advocates fees also are a matter of attention to promote the early settlements of cases. Early settlement can be strongly affected by the way advocates are paid. If advocates are paid by ”court event attended or deed produces”, for them there is not any financial incentive to settle the case, so this issue should be carefully considered to promote early settlements, which are, due to the limited resources available, a must for effective case management.

Tax returns of the legal fees may be a good incentive to enhance settlements. It would be even better to envisage that court fees are immediately returned to parties if they settle the case. This solution is adopted by Estonia. In preliminary proceedings the court must identify whether it would be possible to solve the case by the conclusion of a compromise (Art 392 (1) of the Estonian Civil Procedure Code).

For example in Czech Republic, the court must always attempt to reach a settlement, but parties cannot be compelled to it. If a settlement has been reached, the parties usually also agree on the **reimbursement of costs**. Usually, each party bears its own costs. The court must not approve of a settlement if it is contrary to the statutory provisions. An approved settlement has the effects of a final judgment. However, the court is entitled to reject a settlement if it is invalid under a provision of substantive law. The court’s decision to approve of a settlement between parties sets an obstacle for further proceedings on the same subject matter (reiiudicata). 50% of court fee is returned to the claimant upon reaching a settlement and, similarly, when both parties give up the right for appeal before hearing the final verdict. (See more in Appendix 1, page 7)

In Slovenia, a fee policy is used to create an additional incentive for the claimant to reach a settlement: 2/3 of the court fee is returned to the claimant if the case ends with a settlement. Usually 15-20% of cases end with a settlement. A judge can propose a settlement to parties in any stage of the trial in a written way (CPA, Art. 307/4). When both parties sign the judge's settlement proposal, the settlement is done and the case is closed. (See more in Appendix 1, page 12)

2.4.2. Mediation and Conciliation

The court caseload and the limited resources have increased the introduction by law of alternative dispute resolution. There are quite a few different methods of dispute resolution. In this section we will briefly consider mediation and conciliation since they have been introduced in the law of civil procedure by several countries. Usually, mediation takes place outside the court, even though there are cases of mediation carried out by judges, while conciliation is often proposed by the judges within the court proceedings.

Mediation and conciliation have the potential to speed up court proceedings considerably. Justice can work efficiently only if the number of cases is sufficiently proportionate to the resources available, and the caseload should not be higher than the reasonable level of productivity, which is the ratio between output and units of personnel committed to accomplish that output. Therefore, a clear trend within the European justice systems has been the encouraging of using alternative methods of dispute resolution and a more active role of judges in settlements (please see next chapter). The aim is to reduce as far as possible specific categories of claims which, due to their nature, can be solved with different methods than a court trial.

The main ways to encourage mediation and conciliation are:

- Creating financial incentives
- Addressing the role and function of lawyers in mediation and conciliation
- Addressing the role and function of other parties (e.g., professionals and expert witnesses)
- Training

<u>Financial incentives</u>

Parties can or in some countries must try to solve a dispute through a mediator before filing the case to court. A mediator must have specific skills and competences. The mediator may but does not need to belong, to the judicial staff. Mediation can be encouraged by the State, for example through taxation benefits (if parties reach an agreement they can have a tax return of the mediator's fees, for example), in combination with a mandatory effort to do a preliminary attempt at mediation before going to court, and a possible sanction in the judgment for the party who exclusively blocked any effort to reach a mediated settlement. For instance, according to Italian law (Legislative Decree No. 28/2010 and following amendments), for specific kind of claims (i.e. insurance law, bank law, medical liability etc.), parties are required to attempt mediation. When parties reach an agreement within the mediation procedure, they can have some fiscal benefits. Moreover, if the mediation fails, and this due to one of the parties, then the court can take into due consideration such element in its final decision.

This type of alternative methods of dispute resolution may reduce the number of civil case filings and should be further encouraged in European countries. Different mediation methods should be applied to a larger number of cases and the legislators should even make them a necessary preliminary step that parties should take before filing a case to court. It can be recommended to enlarge the tax benefits in order to stimulate the use of alternative dispute resolution.

Professional co-operation in mediation

Mediation processes require sufficient knowledge of the mediator to be successful. The work of different professionals and experts participating in mediation processes can require a lot of coordination efforts.

A possible solution is that the mediation procedures are supported by representatives from different professions. This may involve for example a therapist, youth care and lawyers. Mediation must be carefully customized/tailored to the specific case to have good chances of success.

For example in Finland, court mediation of custody disputes a judge acquainted with family matters acts as a mediator. He/she is assisted by an expert who is specialized in parenting and child development matters (typically a psychologist or a social worker). The judge is typically responsible for managing the process. The judge confirms the settlement and is in charge of enforcement. The expert member of the working pair aims at ensuring that the essential questions regarding the best interest of the child are handled and that the settlement responds to the needs of the child. Working as a pair has enhanced the capabilities of judges to solve social issues as the expert member is typically acquainted to the communication in conflict situations and hence can also teach the judge. This kind of system of working as a pair provides support to the parents in both legal and psychological problems linked to the divorce situation. It also saves the resources of the courts and social security. Successful mediations reduce the number of judicial proceedings of custody disputes and also reduce the investigation work of social security.

2.4.3 Role and function of advocates in mediation and conciliation

Lawyers should be more inclined to bring the parties together. In order to decrease the number of cases brought to court, according to Italian law, for claims whose value is up to 50.000,00 Euro, parties must make a preliminary attempt of conciliation with the assistance of the respective advocates (Legislative Decree No. 132/2014). If such attempt fails within a deadline set by the law, then parties can file the case to court. If the agreement is reached, Italian law recognizes the possibility to partially have a tax return on the court fees that each party bore. Such alternative methods of dispute resolutions seem particularly useful for low value cases, in which the value of the case is not proportionate to the cost of a full proceeding in court, or for family and matrimonial matters. Parties can find it hard to find an agreement concerning the patrimonial matters or to live up to obligations on their own. Therefore, the legal assistance can be decisive in order for them to find an agreement and to avoid a costly and time consuming lawsuit. For this reason, the current trend is to strengthen the role of the lawyers, or family mediators, to settle as many cases as possible outside the courts. For instance, according to a recently approved Italian law (Legislative Decree No. 132/2014), people can divorce without going to court, but they can reach an agreement assisted by their advocates and then registered such agreement into the national registry.

2.5 Improving ordinary civil proceedings

Disclosure of evidence is one key issue in civil procedure when aiming at effectively organized and timely caseflow. It can be recommended that civil procedures should entail that the parties need to disclose their evidence as soon as possible. Several European countries aim at fast disclosure. For example in Slovenia and Czech Republic, parties are required to disclose their evidence in the first hearing (otherwise such evidence will be disregarded by the court). Also in Spain and Portugal, disclosure must take place in the initial stage of the proceedings. On the contrary, for example in Italy, parties can disclose their evidences also after the first hearing (up to 60 days after the first hearing). These rules can have a strong impact on the length of judicial proceedings.

Based on this research, a **common European approach** can be recommended in which parties should give all evidence in the initial claim or response. Supplementary evidence should be an exception and they should be admitted only if they are really necessary to challenge the other party's statements and evidence.

Admissibility of the evidence should also be quite strict. When referring to the disclosure of the evidence, the need for parties to indicate the means of proof they file or intend to file, is an important issue. This evidence requires a decision for admission by the court. Therefore, the admissibility of the evidence requires a specific assessment and a specific decision by the court. This type of assessment should be done at the initial stage of the proceedings. This would allow the procedures to move swiftly and effectively to the next stages: the examination of witnesses and the assessment of the given evidence.

For example in Italy, the court takes its decision on the admissibility of the evidence after the first hearing and possibly in an ad hoc second hearing. This appears clearly from the analysis of the schema of the Italian ordinary civil proceedings in Appendix 2. On the contrary, (see the Spanish schema in Appendix 2). Spain (art. 414 of the Spanish Law No. 1/2000) and Portugal (art. 591 of the Portuguese Law 41/2013) adopt an interesting model, based on a "preliminary hearing". During this hearing, the court examines the admissibility of the evidence requested by the parties and establishes when, where and how such evidence will be taken. In addition, in such a hearing, all the preliminary issues of the claim are discussed (i.e. international jurisdiction, territorial jurisdiction, lack of legitimation, and so on). This is a useful practice to improve the pace of litigation and resource utilization, since a claim can be dismissed for lack of jurisdiction at the beginning of the procedures. Moreover, the court/judge does not need an in-depth study of the case before the preliminary hearing (only a general reading is requested in order to make a decision on these preliminary issues). The preliminary hearing however, should not take the function of an extra hearing opportunity.

2.6 Reduction of the amount of cases in second and third instances

Many European countries grant an appeal after a first instance court decision to avoid possible mistakes and assure a good quality judgment and also a third level (cassation) law review of the case. In some countries, the access to the second and third instance is not limited in any way. However, this practice may severely overload the courts, leading to backlogs and excessive lengths of judicial proceedings. To address the problem, some European countries have introduced and implemented restrictions for applying to second and third instance courts in order to filter the number of incoming cases.

For example, Spanish law (article 455 of the Spanish Law No. 1/2000) establishes some important conditions for the appeal of the first instance decisions. Court decisions on claims whose value is under 3.000,00 Euro cannot be appealed. Therefore, such decisions are definitive since the first instance Court has issued them. Decisions on claims whose value is between 3.000 and 6.000 Euro can be appealed: however, the appeal is decided by just one judge instead of by three judges (which is the normally applicable rule). This reduces the resources needed for second instance cases. (See more in Appendix 1, page 14)

Portuguese law establishes some important conditions for the appeal of the first instance decisions. Only decisions on claims whose value is more than 30.000,00 Euro can be appealed to the second instance Court. Moreover, decisions of second instance can be appealed to the third instance only if the second instance Court's decision does not basically confirm the first instance Court's decision and further questions are raised before the third instance Court (art. 671 of the Portuguese Code of civil proceedings).

It can be noted, that Spanish and Portuguese legislators have tried to reach a compromise between the need to ensure the rights of the defense and the need to avoid the courts from being overloaded. They have established a filter based on the value of the claims. However, also other criteria could be used.

Techniques used by Italy and Estonia are based on a case assessment of the higher Court. These techniques are more expensive and time-consuming, but at the same time less restrictive.

Some restrictions to the filing of a case at the second and third instance have to be introduced to make certain that the superior courts have enough capacity to fulfil their roles as supervisor of the uniform development of the law.

In Estonia, the right of appeal is indirectly limited by Art 637, 2, of the Estonian Code of Civil Procedure which states that in cases which have been solved in simplified proceedings an appeal is accepted by the appeal court only if the court of first instance has clearly stated such right in its decision or if the court of first instance has clearly incorrectly applied the law or legal procedure or incorrectly evaluated the evidence and this may have significantly influenced the decision. When it comes to the right of appeal to the Supreme Court, there is an additional limitation in the form of a specialized board at the Supreme Court which decides whether to accept a case for cassation proceedings or not. Such decision (permission for or refusal from the proceedings) does not have to be motivated.

3. Judicial Case Management

This section deals with judicial case management and the possible roles of judges as case managers in civil procedures. Case management concerns the way the court and the judge organize the division of work in different handling stages, the exchange of information between the court and the parties, and how they manage court hearings and court experts.

Active judicial case management in civil proceedings presupposes a certain judicial willingness, an effective division of labor between court staff and the judges and also legislation to give the court and the judge clear-cut competences and tools for case management and to manage the participants in the process (e.g. witnesses). Furthermore, a certain division of labor in terms of different procedural

tracks, based both on differences in procedure and on different subjects may be helpful. The specialization of the courts can also improve judicial case management.

> ”Judges are the “third impartial player” in a conflict resolution process. They are the only ones able to set the pace of litigation independent of the parties’ interests. Therefore, they should have a pro-active role in case management in order to guarantee fair and timeliness case processing, accordingly to timeframes. It must also be noted that the jurisprudence of the ECHR says that “court inactivity”, “judicial inertia in producing evidence” and the “complete inaction by the judicial authorities” have been causes of violation of the reasonable time clause (CEPEJ(2006)15: para 29, 30, 36
>
> ”Case assignment is one of the core issues of court management and it affects the length of proceedings. To create a flexible case assignment system will help the court to better adapt to unforeseen changes in the caseload. In this respect, judges’ “task forces” or “flying squad” may be used. Also in countries in which the allocation of cases to single judge must be based on rules fixed in advance (principle of natural judge) it should be possible to create some flexibility in order to face unexpected changes in caseload or heavy caseloads. Furthermore it is possible to make more flexible the rules of territorial jurisdiction, but also subject matter and value criteria to pursue a more effective allocation of cases and face unexpected changes in caseload. Flexibility can also help to avoid unreasonable delays caused by transfer of judges (CEPEJ (2006)15, p. 30”

3.1 Speeding up sequences in ordinary proceedings

Within ordinary civil proceedings, timeliness can be enhanced by reducing all unnecessary waiting time and idle time after the case has been registered to the court. The ways to speed up the sequences in ordinary proceedings by appropriate division of work can be discerned according to the handling phases:

- Preliminary proceedings phase
- Handling phase
- The decision phase and the follow up.

3.1.1 Preliminary proceedings phase

Judges can spend a considerable amount of time on simple procedural issues, which could also be handled by court clerks or administrative staff (e.g. registration, payment of court fees and the decision on the admissibility of the party filing the case and the competence of the court). Cost-effectiveness and improved capacity and resource utilization can be achieved by altering the roles and division of work in preliminary proceedings. This requires that clerks and administrative personnel are allowed to deal with all aspects of preliminary handling of the case. It also requires clearly defined roles and good communication between the personnel.

A possible way to organize such a division of labor is to introduce preliminary proceedings as a separate work duty consisting of registration of the case, sending a receipt of the filing of the case to both parties, checking for the payment of the court fee and communicating the final term within which the court fee should be paid, informing the parties directly or via their representatives. Also checking for

the admissibility of the case and the jurisdiction of the court can be part of this working routine. This division of labor has the possibility to clearly improve the capabilities and work descriptions of court staff (judges may still supervise the procedures).

In complicated cases, a case management conference to set a clear schedule of events may be an effective tool to help settlements, avoid adjournments, concentrate hearings, and (then) maintain timeframes. The decisions taken during the meeting may be formalized in an intermediate judicial decision.

In Czech Republic, there has been a project from April 2012 to December 2015 in selected districts and regional courts called "Improvement of the efficiency of courts by strengthening of the administrative capacities" financed by the European Social Fund. For the specific period of time, new administrative personnel has been assigned to selected courts. 13 courts are involved in this project, 11 districts and 2 regional with the highest number of backlogs. Systematic strengthening the deployment of administrative personnel in courts help to resolve more cases, thus preventing an increasing number of backlogs or even reducing existing backlogs.

In Slovenia, a **triage-system** for the pre-handling of cases is used. Immediately after the submission of a claim a court clerk looks at the case and prepares the draft orders for the next procedural steps, e.g. the correction of mistakes in the claim, payment of the fee (if initially not paid), granting state legal aid or initiation of proceedings and sending the claim to the defendant for response. Court clerks can sign preliminary procedural documents while the draft orders are signed by a triage-judge (a special judge who only deals with cases in triage phase and does not deal with the cases at a later stage). After that a judge is appointed to a case who deals with the subsequent procedures. A case gets assigned to a judge only when procedural decisions have been issued and the case file has been prepared. Triage was invented by courts themselves due to necessity. Triage is usually suitable for larger courts. The existence of triage depends on the structure of cases. The cases of industrial property and insolvency are exempted from triage because these need the judge's attention from the very start.

In some countries, the public prosecutor may sometimes be obliged to participate in civil proceedings in the interest of the development of the law. In these cases, the court has to wait for the public prosecutor´s point of view before continuing the case. In Belgium, this type of procedure will be abolished, and the public prosecutor will be able to take an independent decision on his participation in civil proceedings. This will probably contribute to a higher speed of civil proceedings, because it is expected that the public prosecutor participate in civil proceedings only under exceptional circumstances.

3.1.2 Handling phase

For the handling-phase of a case, a division of labor between the judges and the court staff may also help to improve timeliness. An important starting point is that the parties deliver and exchange all their materials before the hearing is set, in a timeframe indicated by the judge (the court should not allow postponements of these deadlines easily, or could even set a fine if there are unnecessary delay).

Especially in simpler cases, judgments could be largely prepared by legally trained court staff, enabling judges to concentrate on more complicated cases. It is essential that the judges know how to make accurate distinctions between routine cases and cases that need special attention.

Also in the more complex cases, the clerks can provide the judges with a preliminary analysis of the case. The judge would still conduct the hearing and take the final decision, but the clerk can save resources and time by sharing ideas on the matter. It should also be noted that these types of co-operative procedures has an educational and learning value for the court staff.

For example in Netherlands, after the case has been filed and the court fee has been paid, the case is assigned to a team of court clerks and one or more judges. The clerk prepares the file, but the judge manages the case. Depending on the complexity of the case judicial involvement in the initial phase may be more or less intensive. The hearing is planned in consultation with the parties. In the courts' rules of procedure provisions are in place to set strict terms for filing documents, and strict rules for planning of hearings, and for delays.

In Estonia, in 2013, as a pilot project in one county court was started providing each judge with a personal assistant who had to have a master's degree in law and whose salary was increased to 50% of the judge's salary. As a result the judges could delegate more functions to those assistants, and the quality of support provided by their assistants increased. After the first year of the pilot, the average proceeding times in civil cases in that particular court dropped from 201 days to 160 days; after the second year the average proceeding times dropped further to 132 days. At present, the project has been introduced in many other courts as well.

3.1.3 The decision phase and the follow-up

In the concluding stage, the court clerk can also play an important role by drafting the judgment. This practice is already used in some European countries. However, in many countries, the judge writes the judgment without any help from support staff. This is not a cost-effective way, especially for the simpler cases. Nevertheless, also in the simple cases, the judge should audit and sign the decision document before sending to parties.

Often the writing of the decision takes more time than initially planned and allocated, leading to delays in other cases. The use of standard formats for judicial decisions is another possibility to decrease the time used for writing the decisions, but that also comes with some risks concerning the quality of the judgment. Even though procedures for speeding up the decision phase are used, they should never go at the detriment of the content and quality of the court decision.

Numerous adjournments of hearings, either of the court's own motion or at the parties' request, and excessive intervals between hearings have been considered causes for unreasonable delay by the ECHR (CEPEJ (2006), 36). Adjournments have to be allowed only if clearly justified, and if a date for the next event has been established. If a court allows many adjournments, it encourages advocates, not prepared for their cases, to ask for a new adjournment. In this way the judge's hearing time will be underused.

"A standard format and some flexible limits to the number of pages of court orders or judgments can be useful to meet the timeframes. In addition some experiences show that concise judgments help to address the key points and the judge reasoning"

3.2. Managing expert witnesses

Traditionally, in the common law system the parties appoint the expert witnesses, therefore named also "expert of the party", while in the civil law system the court selects the expert, called the "judicial expert" or "court expert" or "technical expert". In this section the focus is on the expert witnesses working for the court, rather than the parties.

Important areas in managing the expert witnesses are:

- Role, appointment and expectations
- Monitoring, collaboration and outcomes
- Compensation and incentives

3.2.1 Role, appointment and expectations

Expert witnesses can be appointed to provide technical or scientific information to a judge or a jury. This may be about, for example, psychological, technological or medical issues. With the advance of science and technology, the need of an expert's evaluation is becoming more and more frequent. In some cases, expert witnesses can be the cause of delays (e.g. it is difficult to find an adequate expert or because experts also have other responsibilities and deadlines set by their main professional activity). As good experts may be limited in number, the courts usually draft a list of reliable (in terms of readiness, timeliness and quality) experts.

Court experts are recruited mainly on an ad hoc basis, according to the specific needs of given proceeding, sometimes for a specific term of office (e.g. Austria). In some European countries the expert's activities may be performed both by a natural or a legal person (e.g. Czech Republic). At times, the judge may ask the parties to agree upon a single joint expert (e.g. Germany, Spain). Some nations (e.g. Estonia, Germany, and the Netherlands) also have "legal experts" who might be consulted by the judge on specific legal issues, particularly about foreign law. When various disciplines are involved, the contracting authority may establish more experts or authorize the expert to pay a consultant. For example, in the Czech Republic the legislation directly imposes, in some cases, the obligation to appoint two experts who have to draw up a joint opinion.

In many European countries (e.g. Austria, Czech Republic, Italy), the judicial expert has to be enrolled in an official register (exceptions are allowed) and the title of judicial expert is acknowledged and protected. In other countries (e.g. Belgium) neither the list nor the title exists. Where the list does not exist, the adversarial nature of the proceeding acts as a scrutiny on the competence of the expert: the parties may question the competence, the independence, and the impartiality of the expert who can be recused. Recusal is possible also for judicial experts enrolled in a list, if they have some interest in the trial or fail to be independent, and they have not renounced the mission on their own initiative. They must also notify when a question or issue falls outside their area of competence. In both systems, with or without an official register, the judicial experts usually have to swear an oath and/or sign a statement that they comply with a code of conduct.

The assignment is usually given to the judicial expert as a set of questions. The judge, at his own initiative or at the parties' request, may reduce or extend this request. The expert is expected to deliver a) clear, complete, and well-argued contribution, b) in due time, c) at a reasonable cost, d) respecting

the national procedure and the applicable laws. The report can be requested in writing and/or orally and/or electronically. The law can impose a maximum time limit (e.g. Portugal 30 days, Italy from 10 to 60 days) or the judge can fix it. In some circumstances the term can be prolonged. The expert has to be familiar with the trial procedure. In some European countries (e.g. France, Luxembourg, Italy), expert reports can be set aside if the expert failed to comply with essential procedural rules such as the right of the parties to be heard in the expert proceedings (adversarial principle) or the availability of the expert's evidence to all the parties (equality of arms).

The expert witness may expect to: a) get directions in writing from the judge; b) get access to available information and material; c) participate, when appropriate, in investigations carried out by the judge and in court hearings; d) receive a fair payment; e) be free to work within the European Union on the basis of the European freedom to provide services. The last is not fulfilled yet: restrictions hampering the activity of judicial experts in other Member States still exist. Furthermore, most of national legislations depart from another understandable expectation: if the experts, during the mission, realize that additional measures would be useful/necessary to solve the case or further questions should be asked, they would like to provide the judge with these suggestions. Currently they cannot go beyond the questions raised by the judge (e.g. Italy, Spain, and Portugal).

Based on the procedures applied in different European countries, four lines of improvement connected to the appointment of expert witnesses can be identified:

- A **single European register of expert witnesses** should be established, because a) even the biggest countries experience a lack of experts in some fields; b) the national experts available may be linked to the party; c) in cross-border litigations it may be necessary to do an investigation in another Member State, even if language barriers have to be taken into account.
  It must be emphasized that a common European list is completely useless if registered experts do not know the judicial procedure in the country where they are asked to operate. Therefore a set of transnational procedural rules regarding the expertise has to be defined at the European level. At first this list could be based on the current national lists, but, as a second step, general guidelines on criteria for the qualification of the experts have to be agreed within the EU. Structuring the list according to the individual disciplines (such as economics), further divided by sector (e.g. prices and estimates) and specialization (e.g. the valuation of enterprises), like in the Czech Republic's current registration, would be helpful to foster the quality of the expertise.

- For complex proceedings, involving various disciplines, a legal person, for instance a University or a Research Centre, could be appointed. In fact, the experts of the same institution can have a closer and faster cooperation than independent professionals, each with their own responsibilities and job engagements. Moreover these institutions/organizations can directly provide the instruments, software and laboratories for possible analyses.

- The expert witness could provide support to the court in various and distinct steps of the procedure, especially when the case is deeply based on technical issues. Examples of these steps are the pre-trial exam of the documents provided by the parties or the preliminary appreciation of the efficacy and duration of technical investigations.

- Finally, providing the expert witness with the findings of similar instances may be relevant and even determining to solve some cases, e.g., repeated malfunctions of the same machines/equipment.

3.2.2 Monitoring, collaboration and outcomes

Efficient choice, monitoring and control of expert witnesses would require a system with a list of judicial experts, quality standards for experts, and implementing tools enabling the experts to enhance the standard of their job.

Monitoring of expert witnesses includes:

- Evaluation before the enrolment of the experts on the official register or before the appointment
- Controlling the performance in carrying out the expert tasks
- Verification after the completion of the task
- Periodical reassessment

The list of judicial experts may have categories and subcategories with restrictions to the registration in more than one division. People enrolled in the list are usually obliged to accept possible assignments (e.g. Czech Republic, Italy), unless they have serious grounds to renounce (e.g. the Netherlands)

Monitoring before the appointments concerns the quality and the current workload of the experts. In Austria, for example, statistics are produced once a week, showing the experts who already have open cases, to allow a better allocation of the tasks. In Czech Republic the caseload of a single expert can be checked in the electronic information system of particular courts. In Slovenia, where there is not an official monitoring system, the expert who already has assignments may refuse to take an additional one.

Some European countries have provisions to ensure that designations are evenly allotted among the experts. In Italy the President of the Tribunal has to monitor the distribution of cases: nobody can get more than 10% of the appointments. In Spain, yearly, in January, the sequence of experts to be appointed is drawn by lot at the presence of the registrar. The judge is usually in charge of controlling an expert's ongoing progress; for example in Slovenia, if the quality of expert's opinion is problematic, an additional or repeated expertise may be required.

Currently no state in the European Union has a well-structured national monitoring system to check assignments ex post facto or to score the judicial experts, but good practices are in place in some courts. Most of the countries record just the negative performance, resulting in sanctions. The periodical reassessment varies widely: from a periodical check of the initial requirements (e.g. Italy, every four years) to a full renewal of the application (e.g. Germany, every five years).

The collaboration between the experts and the courts could be extended to include for example:

- Conducting preliminary analysis of the case (prior to the formulation of questions for expert)
- Providing an opinion on the possibility of mediation and/or a settlement
- Providing an estimation about the cost and effectiveness of technical investigations

The expert's opinion is usually given in court hearing and/or as a written report (sometimes also a preliminary report is required). The opinion has to be: understandable, correct, exhaustive and reviewable. As a minimum, it has to include: the assignment, the list of evidences and supporting documents, the method and reasoning followed, the conclusion, also addressing possible objections

raised by the parties. It has to comply with a specific legal form and with the procedure for its submission.

3.2.3 Compensation and incentives

Late, insufficient or unreliable expert opinions may delay the proceedings considerably. Therefore, it is important to address the expert witnesses' compensation and incentive system.

The expert may be asked to estimate the cost and may receive a down payment. The amount and the binding tariff are determined by law and/or by the judges or by other public authorities. Reimbursement schemes exist for other expenditures directly associated to the expertise (e.g. travel expenses, lost wages for time spent in court, payment of a laboratory or of a consultant).

Usually compensation depends on:

- Duration of the work
- Value of the dispute
- Qualitative parameters (e.g. complexity, urgency).

There are certain challenges connected to these criteria. A time-based fee could encourage late filing, whereas, penalties for delays or bonuses for early conclusion could cause quality problems. Furthermore, the expert's payment based on the value of the dispute can be problematic if the expert is asked to assess the value. Lastly, an assessment of the qualitative parameters can vary from judge to judge.

In European countries the trend has been to use more sanctions than incentives. Examples of the sanctions are: a reduction of remuneration, the imposition of a disciplinary fine and dismissal. The court can also demand compensation for damage caused. Experts who do not respect the rules of good conduct or who do not fulfil their assignment properly will face disciplinary proceedings up to the point of suspension or withdrawal from the official register of judicial experts.

However, financial incentives also exist. For example in Italy, fixed and variable fees can be increased up to 20%, if the judge marks the case as urgent. If the requirements for the experts are well defined, a bonus for fast completion of the task helps to speed up the proceedings. Belgium has an interesting practice to speed up proceedings. In construction cases, mini expert-inquires may be demanded, in order to reduce both time and cost. After the preliminary conclusion of the expert, the parts are allowed to negotiate and they can find an agreement without the need of a full inquiry. These types of practices for a simplified procedures for the expert's opinion should be extended to other proceedings.

In Belgium, the court aims at speeding up proceeding and at reducing the cost by ordering mini expert inquiries. This means that an expert goes on-site and gives a preliminary conclusion. The parties are then allowed to negotiate about this. If they cannot find an agreement the report is completed and sent to court and proceedings go on. For small construction cases the costs of an expert are relatively high. The parties need to advance these costs and many people are not able to do this. The mini research could avoid the full report, which is far more expensive. To limit possible delays, terms for the hearing of the expert are set and checked. (See more in Appendix 1, page 16)

4. Performance management

This section describes issues related to performance management in courts. Performance management includes actions related to setting targets and making sure that activities, resources and efforts contribute to the achievement of these targets.

This section also addresses organizational improvement and change initiatives. The methods and practices for organizing and arranging effective improvement projects are reviewed.

4.1 Target setting and monitoring procedures

In court organizations there are some distinct features that pose challenges to performance management. These characteristics need to be incorporated in target setting and monitoring procedures. The features and the way they affect target setting and monitoring are:

- Multiplicity of stakeholders
    - Different roles in target setting need to be addressed and designed in order to make the target setting appropriate and effective.
- Diversity of goals for operations
    - Targets need to incorporate and balance all important areas of performance (quality, timeliness and productivity).
- Nature of autonomous professional work
    - Employees need to be incorporated in the target setting process. The set targets need to be approved of and understood by the employees.
- Performance decision based on real-time data
    - Performance need to be controlled and production need to be planned based on accurate and online monitoring data.

4.1.1 Roles in target setting

As important as the targets themselves, is the process by which the targets are defined and set. The multiplicity of stakeholders in courts raises the questions of: who should select the measures and set the targets to them, and what should be the role of different stakeholders in this procedure? Especially the appropriate roles of the *state-, court- (court division/team) and individual-level* in target setting procedures need to be addressed and designed.

Clear and agreed roles and responsibilities in target setting, as well as continuity and consistency in the procedures, make target setting more effective in the long-term and help to generate consent of stakeholders and effective implementation of the targets. Target effectiveness can be increased by bringing the responsibility of performance as close to the actual operations as possible. When

individual courts and judges have more influence on the precise targets, it improves the commitment to achieving them.

The main role of state-level court administration should be in setting the overall mission, vision and target areas. State level court administration should also provide a general performance framework and coordinate the budgets and resources for the courts. State-level court administration should focus on following the overall outcomes of judicial system and compare the situation in court organizations as a whole.

The determination of precise targets should be the responsibility of the functional management of a given court. This way the court has freedom to set realistic targets based on their actual situation and possibilities. Even though the main responsibility concerning control of performance would be in the court-level, the court management should have performance accountability towards state-level authorities. As the court performance relies heavily on individuals, judges and other court staff should be engaged and have a role in target setting procedures.

For example in Sweden, the National Court Administration set standard time-frames (percentage of cases to be solved in a certain amount of time) for all the courts. As an addition, each court set yearly more specific and context depended objectives based on the format and structure provided by the National Court Administration. (See more in Appendix 1, page 39)

4.1.2 Timeliness in target setting

Courts have at least three important performance areas: quality of court decisions, productivity, and timeliness. It is challenging to strike a good balance between these areas.

Although the quality of judgments (equality, fairness and integrity) can be a difficult area to set precise targets for, those values are usually internalized by all court personnel –judges and staff- and are also integrated in the performance management and the control systems of courts.

For productivity it is fairly easy to set targets and monitor them. Usually the targets for productivity are set as the number of solved cases per unit of personnel or as a target for clearance rate. The problem with overemphasizing simple productivity measures (without weighting the cases solved), is that they can distort the effective operations in the long-term. The measure can direct to produce output as much as possible, making it feasible to solve too many simple cases. This can lead to a situation where a court can have a positive clearance rate but part of the cases still is delayed. Therefore, setting time-frames which take into consideration the age of the pending cases and the backlogs to be addressed, is highly recommended.

The length of the proceedings is recognized as a priority within the objectives of the Council of Europe relating to human rights and the rule of law. As a consequence, courts are increasingly implementing time-frames for proceedings. Many judiciaries have already set time-frames for different case groups and for procedural steps. Challenging is the enforcement and compliance of the set time-frames, and there still exist large variations across countries and within countries in handling achieved average times and backlogs.

Prevention of delays and active time management needs to have a greater role in performance management. This calls for attention on old cases and clear targets for maximum pending times. The compliance of time-frames needs to be highlighted over productivity measures in order to standardize handling times. The cultural perception that there exists a contradiction between quality and timeliness needs to be addressed, as the major part of the case handling time consists of passive waiting time of the case file, and is thus not directly related to quality.

The timeframes and definitions for "old pending cases" differ between judiciaries. Even though also the proceedings, backlog situation and the judicial resources differ between countries, possibilities to equalize timeframes and lead-times at the European level should be further examined. A guide towards more harmonized European timeframes is being conducted at the moment by the European Commission for the Efficiency of Justice (CEPEJ, Draft: *Towards European Timeframes for Judicial Proceedings - Implementation Guide).*

For example in Estonia, all cases which have been pending for more than 3 years are considered "old" cases. There is a reporting system for these cases. In the beginning of each year all judges get a list of "old" cases and they need to provide explanations about why there is no final judgement yet. In following quarter the judges have to describe how the listed cases have proceeded since their previous reporting. Thanks to the system, the number of "old" cases has decreased nearly 10 times in 2014. In 2015 the definition of an old case was amended – all cases which have been pending for more than 2 years are now considered "old".

In Austria an "**error case checklist**" is used by court clerks to identify delays, old cases and backlogs (e.g. no work done on the case for several months or no verdict produced within 6 months). Case should not be in the check list more than once and its appearance in the list requires a reaction. There is also self-reporting expected: by 1st October each year judges must declare the cases which take longer to solve than normal. (See more on Appendix 1, page 26)

4.1.3 Follow-up of time-frames

Targets need to have an impact and guide operations on a day-to-day basis. The underlying premise in target setting is that "you get what you measure". This truth is to be highlighted in professional work settings. People and organization with specific targets for their task perform usually better than those with vague targets.

It is possible that timeframes do not concretize in everyday operative work or guide operation decisions effectively. Timeframes should be easy to measure and monitor, encourage to perform regular follow-up actions and enable early warning signals for problems. To increase the ability to forecast and know whether or not the time-frames are achievable, they can be transferred as an "optimum level" of pending cases. The targets can be transformed by using actual, empirical and/or observation data. Setting targets based on actual, empirical data enables targets to be realistic and achievable.

For example in Swedish system, the **balanced pending case inventory** refers the number of pending cases which is "normal" and still allows the court to meet the time-frames. If a court has a pending case inventory level higher than balanced level the situation is in "overbalance" and it is expected that time-frames cannot be met. The term '**balanced inventory ratio'** refers to the ratio of balanced pending case inventory to the number of incoming cases per year. The method is based on empirical evidence that there is a linear relation between the throughput time and the inventory ratio. If a time-frame target has been set, a corresponding balanced inventory ratio can be calculated by using a linear regression model. For example, 5 months' time-frame target will give 0, 36 as the corresponding balanced inventory ratio. And further on, if a certain court has for example 8 000 incoming cases per year, the balanced pending case inventory should be 0, 36 x 8 000 = 2 880 cases for that court. (See more on Appendix 1, page 37)

4.1.4 Monitoring systems and procedures

To be useful, targets should be monitored by real-time performance information to facilitate process control, improve decision making and enable online reactions to performance changes or problems. Usually monitoring is based on information about the past performance, typically previous year (what was produced and how fast), but often there is no system to monitor what is the current situation with cases inside the court - what is the actual status and age of pending cases.

Annual monitoring of past performance has its purpose: to get information about the overall performance levels and the use of resources. But operational decisions should not be based purely on past performance data. In order for the courts to be able to direct and influence the achievement of the targets, it is important that the monitoring and performance data are based more on accurate and real-time performance data.

Judiciaries which use court information systems for the registration and processing of court cases usually have the data necessary for the online evaluation of court performance. However, it is often problematic how to display those data in a manner that enables an all-encompassing and easily understandable overview. Online monitoring systems should give attention to complex cases in greatest danger of getting delayed and enable that attention will be paid already in the early stages of the process. As an addition, online monitoring systems should enable management to intervene in problem situations and be used also in personal work planning and scheduling. For example, in Italy the deployment of an effective case management for all the civil court and the development and implementation of a powerful nationwide data warehouse has increased dramatically the quality and reliability of data as well as the production of “real-time” reports on the functioning of courts.

In Finland, **a timeframe alarm system** has been established in several courts to advance personal work planning, to reduce backlogs and to eliminate delays. The system helps to pay attention to delays which are happening already in preliminary proceedings so that interventions still can be effective. If a case has exceeded a set time-frame in some procedural stage, alarm system symbols appear to the case listings of the person responsible for the next handling phase. Alarm case listings get updated daily. Time-frames and alarm-levels are designed in a way that no cases should be pending over 12 months. The listings of pending cases and alarms are available for the whole court, departments, persons, subject groups, complexity, priorities and decision divisions which helps managers to monitor the overall situation of cases online. (See more on Appendix 1, page 31)

In Slovenia, a tool called **President’s Dashboard** is available, showing court performance in real-time. The dashboard statistics are divided into different areas: human resources, backlogs, efficiency, and quality of decisions. Information presented on the Dashboard is used e.g. to make decisions regarding resource allocation and to monitor average proceeding times. (See more on Appendix 1, page 35)

4.2 Balancing and allocating resources

Court processes are unpredictable in terms of demand, processing times and progression of the process. Ideally, capacity would fit this unpredictable volume and timing of demand. This brings pressures to capacity management - making the ideal court organization flexible in terms of size and type of expertise resources available in different times. Capacity management improvement in courts is connected to:

- Identifying and avoiding capacity bottlenecks

- Finding ways to better estimate and compare caseloads across courts and court divisions/teams.

4.2.1 Managing capacity bottlenecks

Throughput of any production system is determined by its bottlenecks. To increase the throughput, focus must be on identifying and avoiding the bottlenecks.

Traditionally cases are distributed evenly among individual judges in courts. However, the capacity to process cases varies between individuals due to for example differences in working methods, skills and other personal characteristics. This causes bottlenecks to the process and leads to delays and backlogs for some individuals. In manufacturing environments, the capacity of a production cell is an obvious factor in distributing work. The problem in court environments is that production cells are not machines but highly autonomous professionals. Thus, the arsenal to increase the capacity of the bottlenecks is also more limited than in case of automated manufacturing. It is obvious that the problem is not solved by distributing cases even though the person cannot produce them. The solutions should be in renewing case distribution practices (e.g. joint case inventories and re-distribution of old cases) and increasing co-operation between judges and court personnel

The production capacity varies also between courts. Some courts are struggling with backlogs and delays more severely than others. Unexpected changes in the flow of incoming cases or long illnesses of a judge (or other reasons for being away) may cause increases in the workload of a court. The resource and budget allocation processes do not effectively take into account sudden changes in capacity. Co-operation procedures between courts are needed in order to reduce impractical sub-optimization in the judicial system. Co-operation needs to be increased also with other stakeholder groups.

In the Netherlands, by law, each judge is a substitute judge at all the other courts at the same level. So with their consent, judges can be deployed temporarily at another court. The Minister of Security and Justice can transfer cases from one court to another for max 3 years (art 46a judicial organisation act). By changing the Judicial Map the size of the courts is such that they should be able to handle fluctuations in cases.

In Sweden, **a pool of reinforcement judges** coordinated by the Swedish National Courts Administration to balance resources in situations where courts have temporary capacity problems (such as long sick leave, long retraining programs, international visitations, exceptional complex cases, etc.). Reinforcement judges are sign a contract for two years to work as reinforcement judges. Working as reinforcement judge is done on a voluntary basis, with modest compensation. The pool of reinforcement judges contained at first eight judges, but the number has increased to seventeen. Using the pool of reinforcement judges has improved the efficiency of the total judicial system by increasing capacity flexibility.

4.2.2. Estimating and weighting caseload

Caseload may vary between different courts within a court system, presenting systemic inequalities in the work of judges in the same court system and respectively inefficient use of resources. In the case of specialization it can be difficult to determine the appropriate allocation of cases between judges who want to keep the caseload as equal as possible. Therefore, the number of allocated cases per

judge according to the rules of specialization may have to be different. One solution is a measuring system of the caseload, of judges and the respective re-allocation of vacancies within a court system.

Another problem may be that the caseload and time needed to dispose of a case can vary considerable between case groups and case types. This makes it difficult to measure performance and compare productivity and resource utilization. The large variations in the work of different types of cases can cause delays and backlogs for more time-consuming cases and cause additional costs arising from improperly allocated resources. As a solution, different types of weighted caseload systems are designed. Applying weighted caseload approaches enables estimation and evaluation of the caseload that is caused by a certain type of cases and provide the relevant court or court division with necessary resources. It is important that practitioners are involved in the designing of weighted caseload systems, and that opportunities to give guidelines and feedback are provided throughout the designing process. This will improve the system and the approval of it. Weighted caseload systems give new opportunities to analyze the court´s productivity and backlog situation in closer details. Especially it provides opportunities to compare the productivity and resource utilization of different courts more reliably and detailed. Weighted caseload system helps performance management in courts by providing more accurate data for goal setting and resource allocation.

In Estonia, the caseload of courts and judges is measured by the **periodic calculation of workload points**. For every proceeding type and court level there is the categorization of cases which helps determine the respective workload in terms of case "portfolio" of a particular judge or a court. Each category carries a certain predefined value in time (working hours). The value set for the category of cases depends on the level of their complexity and the related estimated working hours. The values of all cases handled by a judge/a court are summed to calculate total working time per certain period. After the calculation, the work load points are compared against the predefined normal working time of an average judge (1600 hours per annum) and on this basis the work load level of a particular judge or a court can be established.

In Finland, the estimation of workload of courts is measured through a **weighted caseload system** which aims to make different cases with varying workloads comparable. In this system the existing case categories (coercive, crime, summary, civil, land court, petitionary and insolvency cases) are divided in different complexity categories based on the approximate time they need for being handled. (See more in Appendix 1, page 30)

In the Swedish court system the budget allocation process includes a tool called a **resource allocation model**. This model is used as a part of budget process in order to allocate the resources equitably between courts. The basis for each court's budget is the court's average number of filed cases during the past two years. Case categories which require more resources are valued to a higher budget amount per case. The valuation of the different case categories is based on the result from a time recording system. Every employee at the courts report their time at least two months per year to the time recording system. Data from the time recording system is used e.g. for giving different type of cases different weights, calculating cost per case and helping operational planning at the courts. (See more in Appendix 1, page 38)

4.3 Improvement work

Implementation of change efforts is virtually impossible in professional organizations if there is not commitment towards change. This makes bottom-up approaches to change an inherent need and requirement. Two important areas in facilitating change in professional organizations are:

- Creating commitment to change
- Role of leadership in creating change
- Getting new perspectives for improvement

4.3.1 Creating commitment to change and improvement

Communication and participation are the key issues in creating commitment to change. In the beginning of an improvement project it is important to communicate the initial motivation for change and get judges and court staff to understand the reason, scope and scale of the change needed.

In the planning of change efforts, court personnel should participate as widely as possible. Also visible involvement and support of top management is important. This way people are not only more committed but also all relevant information can be integrated to the change plan.

All improvement efforts should be carefully designed to include systematic step-by-step approaches emphasizing participation and commitment at all steps of the project. Changes should be introduced incrementally to give enough time to adopt and internalize them.

In March 2015 in Belgium, the Belgian Minister of Justice presented a new plan to reform the judiciary by means of a so-called triple jump. The first hop took place with the reorganisation of the judicial landscape. The second phase is aiming for a more efficient and fairer justice system. The third phase of the reform will imply fundamental reform of legislation. The point of departure of the reform is the equilibrium between affordability and quality. The project involves participation of all actors in the judiciary and implies both short term measures and profound reforms that have a favourable impact on workload and efficiency. The general aim is to enhance the efficiency of proceedings. (See more in Appendix 1, page 27)

Several Finnish courts have undertaken systematic caseflow management improvement projects in order to find novel improvement solutions to the court system operations and processes. The **judicial process improvement and delay reduction projects**, were formed and planned to enhance three important aspects of improvement work: utilizing external expertise in improvement work, taking a systematic approach to project management, as well as highlighting the importance of participation and commitment of court personnel. In the project the court system processes are viewed and analysed with cross-disciplinary perspectives by melting knowledge and ideas from operations management and law. The Finnish approach to court caseflow management improvement projects were one of the finalist and achieved special mention in the Crystal Scale of Justice Competition 2010. (See more in Appendix 1, page 29)

In Sweden, a method called **internal and external dialogue** aims to overcome the difficulties faced during improving the quality of court functions. In the internal dialogue judges and other staff are interviewed in order to take advantage of the expertise and knowledge the staff has about the functioning of the court. The most important goal of the internal dialogue is to have an internal perspective on the most urgent improvement needs and also to gain some ideas about how to measure the improvement of functions. After the internal dialogue, the dialogue is widened to get an external perspective for the functioning of the courts. In external dialogues lawyers, prosecutors and court users are interviewed about the improvement suggestions. These suggestions are reviewed internally by the whole staff. The staff then make their further suggestions based on these external suggestions about the measures which aim to improve the functioning of the court to the manager. The manager makes the decisions and informs the external side which measures has been selected. After evaluation of these measures, lawyers, prosecutors and court users are invited to assess the result and to give further suggestions for

improvement. By using this internal dialogue, judges feel that their professional know-how is acknowledged and that their opinion matters in advising the management. (See more in Appendix 1, page 38)

4.3.2 Role of leadership in creating change

Leadership style and method has a crucial role in creating flexible, adaptive and innovative organizational culture and in decreasing the resistance to change. Good leadership is not only crucial at the top-management level, but should include all individual and team management levels and situations.

Leaders can influence the successfulness of change in many ways: e.g. communicating and building shared vision and targets; directing attention to critical matters; role modelling and facilitating change; rewarding and designing system and facilities, as well as by questioning old assumptions and creating development culture. Good change leading skills include also networking, high-trust relationship in the organization and empowerment of personnel.

Good leaders also improves their personal qualities: being honest and consistent, acting with integrity, as well as being decisive and inspiring.

4.3.3 Searching for novel improvement ideas

In improvement work it can be beneficial to get outside facilitation and support (e.g. from universities) in order to be able to analyze the processes and improvement needs without being too tied up with the existing working methods. Utilization of external expertise and new improvement methods may produce innovative solutions to existing problems.

Also benchmarking practices within courts, between courts and between countries should be made more systematic and effective. Next to legal requirements there are often no “soft means” (best practices, court administration recommendations) to assist courts in improving their work and preventing them from “re-inventing the wheel”. Even though differences in working habits, cultures and systems make benchmarking of exact methods challenging, it is always possible to benchmark improvement ideas and initiatives.

For example, in Slovenia there is a tradition of the **Conference of Good Practices** organized by courts themselves. This is an annual event where courts present and explain the “soft” measures they have taken and developed to improve their procedures. The major objectives of this conference are the inter-court exchange of best practices and the spreading of positive developments in the field of justice

5. Use of ICT in court proceedings

This section describes the use of information and communications technology (ICT) in European countries aiming to increase the efficiency and effectiveness of judiciaries. The focus is on case management systems (electronic registration and handling of cases), practices for electronic delivery and submission of documents, as well as other electronic solutions for improved use of ICT.

ICT is a broad term including software-based tools, use of hardware and the combination of these. The rapid development in the field of information technology has created numerous new opportunities and possibilities for the improvement of court administration. Efficiency, timeliness, transparency and access to justice can all be improved by redesigning the processes and procedures through use of ICT. The availability of electronic generation, delivery and management of court documents, and the use of web-based systems are examples of such solutions.

It is important to notice that the field of justice is not only highly regulated, but also that different countries in Europe have different legal and institutional backgrounds. These affect the solutions implemented in the different countries – for example, the regulation regarding delivery of documents prescribes which kind of ICT tools can be used for making it more efficient. Therefore, there are certain challenges in straightforwardly benchmarking and implementing different ICT tools in different contexts. However, it is possible to learn from the various experiences and adjust the solutions to match the existing institutional and legal structures at both national and pan-European levels.

5.1 Case management systems

The use of an electronic case management system is a precondition for an efficient, effective and transparent judiciary in modern legal environment. The basic aim of the systems is to enable overview of pending cases, their process status and next procedural actions needed.

The functions of case management systems usually include at least case registration, management of case documents, possibility for searches and queries and reporting based on the data entered into the system.

Some of the main differences between systems used in Europe are connected to the types of cases the system can handle (just one type, e.g. only civil, or only criminal; or several types – civil, criminal, administrative and other) and whether or not the system provides online access to the databases for advocates and other parties of proceedings. The possibility to access case data online (mainly documents, but also information about upcoming procedural events) saves time from information exchange between parties and court staff (e.g. phone calls, delivering files). In addition, this feature increases the transparency of court proceedings for the participants.

Important issues in the development work of case management systems are:

- Introduction of case management systems should begin with business processes which are most capacity consuming (e.g. focusing on the proceedings with the largest number of cases like uncontested small-claims or focusing on certain labor-intensive steps of several proceedings which can be easily automated like generation of court summonses).

- Development and implementation of court information systems should be undertaken in close co-operation with the representatives of the end-users (clerks and judges).

- Step by step implementation and piloting should be used. This way it is possible to improve the system based on the feedback of the first users before the full-scale launch.

- Total overhauls of case management systems are rare and tend to be less successful than step by step redesign and modernization of the existing system. A case management system is

never complete, continuous improvement is necessary to be able to provide the best support to the courts and participants of proceedings.

For example Austria has a nationwide case management system (VJ) for all 54 court procedures (civil, family, criminal, insolvency, inheritance, public prosecution etc.). Its functions include case registration, calculation and collection of court fees, mass generation of documents as well as integrated text processing, it enables queries and provides statistics. The system was developed in the 1980s and a redesign was made in 2001. The focus during development was on mass proceedings (money claim or payment order, enforcement). Since 2004 the VJ has been providing direct access to the civil and enforcement cases for the parties and their representatives. A new Justice 3.0. project is being developed which creates the complete digital file (all contents of the case will be available in digital form), enable work from any location, support searching, processing and sorting of the electronic contents of the file and thereby provide more useful functionalities to judges and other decision-makers in the judiciary.

In Estonia, the 2nd generation court information system called KIS2 was implemented in all courts gradually from September 2013 until June 2014. All court cases (including all civil, criminal, administrative, misdemeanour, constitutional review cases from all three court instances) are registered in the same system. All information about the case has to be registered in the system - the registration date, the classification of the case, the name of the judge or judges dealing with the case, the status of the case, all documents (as well as data about their dispatch and delivery), hearings and participants. KIS2 is also connected to the financial information system used by the Ministry of Finance and the Tax and Customs Board so that the payment of court fees and other court costs as well as payments made to the experts are all managed through KIS2 (which sends the data automatically to the financial information systems). KIS2 is linked to the E-File web-portal designed for electronic communication with the parties and the information systems of the bailiffs as well as the information systems of the police, prosecutors and the prisons. (See more on Appendix 1, page 44)

5.2 Electronic communication

Timely, fair and cost-efficient communication between the court and the parties – and between the parties themselves – is an important aspect in effective case administration. ICT can be used to make these exchanges of information a lot faster and cost-efficient compared to paper-based communication. Electronic delivery and submission of documents can also reduce postal costs and the time it takes to reach the recipient. As an addition, electronic communication enables to register the exact time of delivery as acknowledgment of receipt of court correspondence. This is a necessity for the procedural deadlines to take effect in several European judiciaries.

Electronic submission of documents to the court decreases the time needed for registering documents and enables the court clerks to focus on other, more substantial, areas of work. Electronic submission of documents is also a precondition towards the use of the totally digitalized case files in courts.

Digital communication can enhance and increase the information exchange between parties. Parties can directly notify each other of documents related to the case and submitted to the court. This has the potential to reduce informing duties carried out by the court personnel.

Important issues in the development of electronic communication systems are:

- Whatever the preferred solution for the e-delivery of court documents, it should not allow avoidance of receipt. In some countries, the confirmation of receipt is automatic after a certain

number of days have passed since transmission, others require the recipient to confirm delivery with an action

- The court should take advantage of existing infrastructure for electronic communication and utilize similar solutions used by other state authorities. This simplifies electronic communication for parties and increases their receptivity towards using ICT tools, while also decreasing the cost of managing the digital authentication tools (passwords, PIN-codes etc.) for the provider of the service.

- With regard to the electronic submission of court documents, the easiest option for individual users is sending documents to the court by e-mail. However, even if e-mails are automatically drawn into the case management system used by the courts, the clerks still have to attach necessary meta-data for registering the submitted documents by themselves. Also, limits do apply regarding the maximum size of the submitted files. A more advanced option – which can be used by the advocates as professional and frequent clients of the court – is submitting documents through a web-portal with already some of the metadata entered by the sender. Some countries have used incentives like lower state-fees to make such action more attractive to the users of court's services; others have made such form of electronic submission mandatory for certain groups like barristers, state agencies etc. (see more Appendix 1 p 48, the example of Austria on Electronic Legal Communication). Another possibility – used for the submission of large quantities of data – is to develop e-services, which can transfer data about applications and claims from the databases of companies (providing electricity, gas, mobile services etc.) to the database used by the court. Whatever the measure, the submitter usually receives an automatic confirmation of a successful submission, but it is still the court clerk, who performs the manual check before the next steps in the proceedings are undertaken.

5.2.1 Electronic delivery of documents

During the proceedings, the court is required to serve documents against confirmation of delivery. Obtaining paper-based delivery receipts is not only time-consuming, but also involves higher costs. A promising alternative is the possibility to implement e-delivery systems for judicial communication.

Different countries in Europe use different means for delivering documents electronically depending on their level of ICT infrastructure. If a country has a state-provided solution for digital authentication (e.g. an ID-card equipped with a chip and personal PIN-codes, or a Mobile ID), recipients of documents can be asked to authenticate themselves by logging on to a web-portal to retrieve documents and confirm delivery. In the absence of such state-provided infrastructure, privately provided authentication services can be used to access personal secure e-mailboxes intended for official communication with the state authorities.

For example in Slovenia, electronic delivery through **secure electronic mailboxes** is used. The secure electronic mailboxes are rendered by external service providers to the end-users. The external contractors receive a set fee for each successful delivery from the sender, the use of the mailbox itself is currently free of charge. E-delivery is used in communication between notaries, lawyers, judicial officers, State Attorneys and courts. It is obligatory in cases of Land Register, insolvency and enforcement cases. In 2014, about 13% of court writs were served through e-delivery. A special system (EVIP) is handling all electronic correspondence of the courts, along with information about the incoming and outgoing

electronic communication (documents, submissions), including all the statuses of correspondence. Delivery of a submission to the court (i.e. filing) is registered in the case management system by importing and accepting the relevant metadata from the EVIP by the CMS (e.g. timestamp, type of submission, document information, etc.) (See more in Appendix 1, page 52)

A similar system is used in Italy with the application called "Processo civile telematico" (PCT) Trial online.

5.2.2 Electronic submission of documents

Registering, maintaining and transferring paper-based documents is time- and space-consuming. Overall management and handling of the documents can be made considerably more efficient if the documents are submitted electronically to the court. This also helps to increase the accessibility of justice. There are different possibilities to use electronic submission: starting from simply setting up official e-mail addresses for the courts, to the creation of e-services enabling bulk filing (used in payment order proceedings for initiating hundreds and thousands of cases).

For example in Italy, the Stability Law2013 provides that the filing of pleadings and documents have to be made only through the so called **"Civil trial online"** (PCT). To provide the e-filing of judicial documents, it is necessary to create them" according to specific technical requirements and send them electronically in an "envelope", accordingly to specific technical requirements. The e-filed documents are then managed by two robust electronic case management systems SIECIC (Information System for individual and insolvency Civil Executions) and SICID (Information System District Civil Litigation). (See more in Appendix 1, page 47)

In Slovenia, an electronic filing system for individual and bulk filing is used. Individual e-filing is implemented through a web-portal. Most of the procedures require a valid qualified digital certificate. In bulk filing, the use of prescribed XML format for submissions is mandatory (it is publicly available through web-portal), along with the use of a valid qualified digital certificate for signing the packet submissions. In 2014 about 57% of submissions were received in electronic form. The e-filing system supports structured data, whereas the structure is only exposed in bulk filing (in form of prescribed XML), in individual cases (where the e-filing is performed by using the steps, provided by the web-portal) the structure of submissions is internal to the system.

5.3 Other ICT tools and devices

The use of ICT tools and devices aims to simplify and speed up proceedings. Automation can decrease the number of errors compared to manual processes, thereby enabling also higher quality of services. In addition, different tools can help reduce labor-intensive steps in the process or decrease the time spent on performing them. Good examples of such tools are: automated scheduling of hearings, the use of electronic templates and automatic generation of documents, as well as audio- and video-recording of hearings.

Important issues in the development and implementation of ICT tools and devices are:

- The costs and benefits of ICT tools and solutions have to be analyzed prior to the decision regarding their implementation. Implementing ICT in courts is not an aim in itself, instead the actual business benefits have to be identified (e.g. decrease in cost or increase in quality).

- The legal framework has to enable the use of ICT tools and support the achievement of the main benefits. For example, the benefits involved with audio-recording are significantly smaller if a full written transcript of the court hearing still needs to be made according to the law.

- In order to develop automatically generated court documents and templates the data most commonly used on court documents has to be identified (starting from the most numerous documents). Secondly, the case management system needs to enable the entry of the necessary data, so that it can be utilized for automatic generation of documents. Thirdly, the possibilities for creating similar templates for several judges and clerks need to be investigated, because the management of such templates is less time-consuming compared to managing individual templates.

5.3.1 Scheduling of hearings

Agreements on the scheduling court hearings require the coordination between several internal actors and facilities (e.g. judges, secretaries, clerks, interpreters, courtrooms). Coordinating timetables of all individuals and finding suitable time for all involved is not only time-consuming, but can cause delays and overlapping work duties. A simple and straightforward improvement possibility is to utilize joint e-calendars among all court personnel.

For example in Sweden, theVERA-case management system provides a feature of **joint calendars,** which is used for appointing hearings (booking rooms and scheduling judges' time). Calendars of all personnel and each courtroom are available for everyone in the system to see; the system does not allow access to calendars of barristers. The courts can book two hearings in the same room at the same time, but when making the second booking the user will be warned that there already is a hearing assigned to that room. All the bookings in Vera can be altered, so if there is wish to switch to another courtroom the clerk will have to use the calendar and find another room. After appointment of the hearing, the summons to the hearing can also be generated in Vera. Subsequently the summons can be sent out by secure e-mail or by traditional mail.

5.3.2 Electronic templates and forms

Several court documents (e.g. orders for initiating proceedings and summonses) contain mostly standard text where only the names and personal data of the parties need to be added. For these type of documents, the automatic generation should be applied in order to save both time and costs.

The automatic generation of documents can utilize the data available from the applied case management system (e.g. case number, name of the judge, case title, name and personal data of parties, data about the time of hearings and invites) and automatically transfer those data to predetermined templates. This system enables the creation of several documents in a short period of time. Depending on the type of the document, the templates used can be similar for the whole judiciary (like summonses) or they can be personalized depending on the preferences of the individual judges and clerks.

For example the KIS2 system in Estonia can be used for **automatic generation of documents**. All court summonses are automatically generated by the case management information system. The template for court summonses is centralized, but each clerk can add warnings and explanations (which are also standardized) in addition to unstandardized and "free" text to summons according to relevance (depending on the type of the hearing and the role of the recipient). In addition to summonses each clerk can produce personal or general (can be used by all users of the case management system) templates for automatic generation of other court documents – basic court orders, side-letters or even preambles of substantial court decisions. In order to prepare the template, data-fields for automatic transferal of data are copied and pasted to appropriate places on the template between fixed parts of the text. Depending on the court up to 40% of standardized court orders are automatically generated by the case management information system and the proportion is increasing as the variety of existing templates grows.

5.3.3 Audio-recording of hearings

Preparing a written full transcript of the court hearing is a time-consuming task. In addition, parties may have the right to suggest corrections to the version of the written transcript. Both transcribing and correcting the transcription prolongs proceedings and require time and effort from the court personnel.

An alternative is that hearings are audio-recorded. The recording can be an addition to the written transcript replacing it partly or even entirely. Court clerk can add bookmarks to the audio file during the recording process by simply pressing a button on the keyboard. These bookmarks can be used to quickly identify the relevant part in the recording for playback and the bookmarks can be transferred to a text file, which accompanies the recording (and replaces the written full transcript). The recording can also be made available to parties and the higher courts for example on a CD, by uploading it to the case management system, or through a web-portal.

For example Portugal has adopted many years ago a system of audio recording of all the hearings (both civil and criminal cases). This system allows to record each element of the hearing and is particularly appreciated by the Courts. There is no written transcription of the recording nor is any other written document prepared, only an electronic audio-file of the hearing exists. The recording is kept normally on a CD. There is a plan to start video recording hearings in the future. Judges state that an important benefit is that they can carefully exam each part of the hearing and remember all its details.

6. EU Cross-border disputes

This section describes aspects related to EU cross-border disputes and introduce solutions aiming to improve the quality and access to the justice in cross-border claims. It is worth mentioning that during the field research the information collected have been limited because cross-border disputes and the use of European regulations appears to be still somewhat neglected.

Cross-border disputes are becoming more and more frequent in European Union, due to the free circulation of people, goods, services and capital. Disputes crossing borders have specific characteristics and critical points which require also specific approaches and solutions.

6.1 The European instruments on cross-border disputes

The European Union has adopted many instruments aiming to improve the quality and access of justice in cross-border claims. Two examples of such instruments are European Regulation No. 1896/2006 on the European order for payment and the European Regulation No. 861/2007 on the small claims procedure. (Please note that EC Regulations No. 1896/2006 and No. 861/2007 were amended on the 24th of December 2015 by Regulation No. 2421/2015 that will come into effect on July 14th 2017).

The instruments are not very widely spread among the European Union countries, even though they entered into force various years ago. Citizens and practitioners usually are not aware of the existence of the instruments, which ultimate aim is to simplify the transnational access to justice for transnational claims. Moreover, it is challenging to form a clear picture of the implementation of the instruments within the national courts. One reason for this is that there are no national mechanisms to "flag" the cases falling within the scope of these regulations. Therefore, for example in Italy, Spain and Portugal, the approximate number of European order for payment cases ruled each year in each of the main courts is between 50 and 100 cases. The number should be higher, considering that such European regulations have adopted interesting solutions applicable to cross-border disputes. For examples as described in section 1, both Regulation No. 1896/2006 and Regulation No. 861/2007 are based on a simplified model of proceedings aiming to allow citizens to seize a foreign court and handle a foreign judicial procedure without being domiciled in the country where the proceedings are brought or without legal assistance.

In order to improve the number of the applications under these European instruments on civil proceedings, European Union countries should implement a **common policy** aiming to encourage citizens and practitioners to apply them. Such a policy should include a detailed plan of dissemination activities through the important association of citizens (e.g. consumers associations) and practitioners (e.g. BARS).

Also the court fees for cases falling within the scope of the regulations could be reduced. This would encourage citizens and practitioners to apply. The reduction of court fees should be in line with the nature of European proceedings, which entail a reduced application of the jurisdictional function. For example in the European order for payment, in case of no-opposition, the court is not called to examine the case deeply, since the decision is issued on the simple declaration of the claimant.

6.2 The specialization of courts on cross-border disputes

International (civil) law is complex and requires specific preparation and training. Nowadays, within the national judicial systems, there is not an internal system of distributing cross-border cases to specialized courts or judges. This can lead to a situation, where the quality of the decisions issued on cross-border claims is not as high as possible. In many European countries there is no systems for systematically preparing and training court personnel to the special characteristics of cross-border issues. It would be important to include, for example, international law, European Union law, comparative law and private international law in the training programs of judges and clerks.

An effective solution could also be to concentrate the jurisdictional competence related to cross-border cases with some specialized national court. Centralized competence may be easier to

implement in a smaller country with less international and cross-border cases, however, it would be beneficial that there is a court in specific areas and regions concentrating on the cross-border issues.

> For example, Estonian Civil Procedure Code provides for the exceptional jurisdiction of one particular court - Harju County Court – in international matters. More precisely, if, pursuant to general provisions, a matter does not belong under the jurisdiction of an Estonian court or such jurisdiction cannot be determined and an international agreement or the law does not provide otherwise, the matter shall be adjudicated by Harju County Court if: (i) the case must be adjudicated in the Republic of Estonia pursuant to an international agreement; (ii) the petitioner is a citizen of the Republic of Estonia or has a residence in Estonia, and the petitioner has no possibility to defend his or her rights in a foreign state or the petitioner cannot be expected to do so; (iii) the matter concerns Estonia to a significant extent due to another reason and the petitioner has no possibility to defend his or her rights in a foreign state or the petitioner cannot be expected to do so. (Art 72 of the Estonian Code of Civil procedure).

Estonian law established an internal notion and criteria of “international matters” in order to determine whether the centralized court is competent. In the future, it could be beneficial to establish a European common notion of “international matter” (for example based on the already existing European instruments on international jurisdiction (i.e. EU Regulation No. 44/2001 or EU Regulation No. 2201/2003).

6.3 Electronic communication in cross-border disputes

In cross-border claims, normally at least one of the parties is domiciled in a country other than the country of the seized court, making access to justice more difficult. When a party is called to exchange communications with the court, send a claim or a response or any other judicial document, they are likely to appoint a lawyer or other professional from the country in question. This makes cross-border court proceedings more expensive than necessary.

National electronic communication systems or electronic delivery of documents have been built from the standpoint and perspective of national users and not for foreigners. For example, in Spain, Portugal and Italy, in order to access the national electronic communication system, a person must be a citizen or a local lawyer. Foreign citizens or lawyer cannot access the systems. This is a real problem, needing solution.

National systems of electronic delivery of documents and communication should be easily accessible also for foreign parties. In order for this to be possible, the systems need to be harmonized as far as possible (e.g. the mechanisms of electronic identification). In this task, the European Union has an important role. There is a large-scale project (e-Codex– e-Justice Communication via online data exchange) co-funded by the European Commission, which aims to create a European common platform for transmission of judicial documents and communication.

E-Codex is now being tested on the European Regulations on small claims and on order for payment. The possibility to electronically send a claim or to receive a communication from a foreign court play essential role in these cases. However, e-Codex has had juridical and technical challenges due to the fact that national systems of identification are based on different criteria. For example, in many European countries systems of identification are based on an advanced electronic signature, that is to

say an electronic signature which matches some specific technical conditions. While in other countries, the systems of identification are based on a simple model of pre-identification of the user.

In the future, European Union should adopt clearer rules on this issue. Electronic exchange of judicial documents is already a reality in many European countries, improving the quality and the efficiency of the systems. This should be also the case in cross-border claims.

References and further reading

- Alimo-Metcalfe Beverly, Alban-Metcalfe John. More (good) leaders for the public sector. International Journal of Public Sector Management, Vol. 19, No. 4, 2006
- Barry Turner "Civil Judicial Experts in Cross-Border Litigation: the Common Law Perspective" in Policy Department on Citizen's Rights and Constitutional Affairs, Workshop on Civil Judicial Experts in the EU for the Committee on Legal Affairs, 17 June 2015.
- Bass Bernard M and Riggio Ronald E.: Transformational Leadership, Routledge 2006
- Gee D.J. "The Expert Witness in the Criminal Trial" [1987] Criminal Law Review 307.
- Luboš Dörfl "Civil Judicial Experts in Cross-Border Litigation: towards the European Judicial Expert" in Policy Department on Citizen's Rights and Constitutional Affairs, Workshop on Civil Judicial Experts in the EU for the Committee on Legal Affairs, 17 June 2015.
- Bourne M., Kennerley M., Franco-Santos M. Managing through measures: a study of impact on performance. Journal of Manufacturing Technology Management, Vol. 16, No. 4, 2005.
- European Commission for the Efficiency of Justice (CEPEJ). Towards European Timeframes for Judicial Proceedings - Implementation Guide. (Work-in-process)
- European Commission for the Efficiency of Justice (CEPEJ). Compendium of "best practices" on time management of judicial proceedings. Strasbourg, 8 December, 2008.
- Frank H.M. Verbeeten. Performance management practices in public sector organizations. Accounting, Auditing & Accountability Journal, Vol. 21 Is. 3, 2008.
- Green, L. Capacity Planning and Management in Hospitals. International Series in Operations Research & Management Science Volume 70, 2004.
- Hammergren Linn. Diagnosing Judicial Performance: toward a tool to help guide judicial reform programs. Working draft, prepared for Transparency International. 2001
- Hassan, D. Measuring performance in the healthcare field: a multiple stakeholders' perspective. Total Quality Management, 16 (8-9), 2005.
- Hagsgård, M. Internal and External Dialogue: A Swedish Approach to Quality Work in Courts. Oñati Socio-Legal Series, Vol. 4, No. 5, 2014.
- Holbeche Linda: Understanding Change, Theory, Implementation and Succes, Jordan Hill, Oxford 2006
- Kanter, R. M. Managing the human side of change. The principles and practices of change. 2009
- Mahesh C. Gupta Lynn H. Boyd. Theory of constraints: a theory for operations management. International Journal of Operations & Production Management, Vol. 28 Is. 10, 2008.
- McAdam, R., Hazlett, S-A., Casey, C. (2005). Performance management in the UK public sector: Addressing multiple stakeholder complexity. International Journal of Public Sector Management, 18 (3), 256-273.
- NCSC (National Center for State Courts). Kansas District Court Judicial and Clerk staff weighted caseload study. 2011
- O`Mahony Mary, Stevens Philip, Stokes Lucy. Public services productivity: new approaches to performance measurement in health sectors. Managing to Improve Public Services. Edited by

Jean Hartley, Cam Donaldson, Chris Skelcher and Mike Wallace, Cambridge University Press, Cambridge. 2008.

- Ukko J., Tenhunen J., Rantanen H. A framework to support performance measurement at the operative level of an organization. International Journal of Business Performance Measurement, Vol. 11, No. 4, 2009.
- van Thiel Sandra and Leeuw Frans L. The performance paradox in the public sector. Public Performance & Management Review, Vol. 25, No. 3. 2002.
- O`Brien Geraldine. Participation as the key to successful change – a public sector case study. Leadership & Organization Development Journal, Vol. 23, No. 8, 2002.
- Okkonen, J. The Use of Performance Measurement in Knowledge Work. 2004
- Parry Ken W., Proctor-Thompson Sarah B. Leadership, culture and performance: The case of the New Zealand public sector. Journal of Change Management, Vol.3, No. 4, 2003.
- Paton Robert A. and Mc Calman James: Change Management, A guide to effective implementation. Sage Publications London 2004
- Pekkanen P. Delay reduction in courts of justice – possibilities and challenges of process improvement in professional public organizations. 2011.
- Radnor Zoe and Walley Paul. Learning to Walk Before We Try to Run: Adapting Lean for the Public Sector. Public Money & Management, vol. 28, No.1, 2008.
- Schein E.H. Process Consultation Revisited – Building the Helping Relationship. 1999.