1. INTRODUCTION

In this chapter we summarize the information contained in the national reports in accordance with the subjects of the research format. The content of the comparative analysis is as follows:

- General description of the judicial systems.
- Territorial and functional competences.
- Allocation of cases to courts.
- Instruments to enhance an efficient case assignment.
- Differences and similarities between the judicial organisations.

Our goal is mainly descriptive, but the results are a ‘tableau’ of policy instruments to enhance flexibility in case assignment. Therefore, we conclude this chapter with a reflection on these instruments and their capacity to improve the functioning of a judicial system from the point of view of flexibility and from the point of view of judicial integrity.

2. PROFILES OF THE JUDICIAL SYSTEMS

In this section of this chapter our goal is to provide a broad picture of the judicial systems considered in this study. We do this by describing the court systems in general.
2.1 Principles of court jurisdiction and court competence

2.1.1 *Ius de non evocando*

Equal access to justice for those seeking justice, judicial independence, the timeliness of proceedings and efficiency are basic values that ‘rule’ each court organisation. Next to that, there is the principle of the ‘*Ius de non evocando*’, which has a janus face. On the one side, it is a principle that elaborates the right of those seeking justice to an accessible court in relation to the demand that judges are independent (from the executive branch, from political officeholders and from societal entities like the press, pressure groups and large firms) and that they are impartial. Thus, it stresses that justice should be delivered equally and impersonally to all. This implies the normative point of view that it should not matter which specific judge investigates and decides a case. Therefore, judges in courts of the same level in a country should be able to deliver the same quality work (jurisprudence, hearings, management of cases). The other side concerns the legal position of judges as special public servants that should protect them from external interference with the way in which the case is heard – as an elaboration the demand of judicial impartiality. So, the principle of ‘*Ius de non evocando*’ states simply that no one may interfere with the process of handling a case because of a desired and intended outcome; not externally by ‘suddenly’ creating a special court, and also not internally by ‘administrative measures’ in order to have befriended or even bribed judges deal with the case, or by ‘relieving’ someone of the case and giving it to an inexperienced judge. This is why the principle of ‘*Ius de non evocando*’ is of eminent importance in any judicial organisation – no matter how different it may be operated.

2.1.2 Those seeking justice are entitled to have their case heard and decided by the ‘natural judge’

Some courts such as those of Austria, Italy, and Portugal have the principles of the ‘natural judge’ and ‘judges’ immovability’ laid down in the Constitution, as an elaboration of the ‘*Ius de non evocando*’. This means two things. This interpretation demands that case assignment within the courts takes place at random or with very detailed pre-established criteria so as to make it unpredictable which judge is assigned which case. It also means that if a case is assigned to a judge, he or she may not be withdrawn from a case, and it may not be assigned to another judge. Only Italy has extended the principle of ‘natural judge’ and ‘immovability’ up to and also including public prosecutors. The very strict interpretation of this constitutional principle by the Judicial Council in Italy has created a very rigid and bureaucratic system of judges’ allocation and case assignment. After having assigned judges to their units and divisions, it is then difficult to transfer them to the unit or division of the court where the caseload is greater. In the Anglo-Saxon countries, Norway and the Netherlands, this principle does not play a constitutionally significant role.

2.1.3 Judges may not be removed from office

In the Netherlands the Constitution (art. 17) refers generally to citizens’ access to an ‘independent court’, while article 117 Constitution states that judges are appointed for
life. This implies that judges cannot be dismissed except on certain grounds as foreseen by a specific statutory act. But this does not refer to the allocation of cases within a court; organising and regulating internal case allocation is considered to be the responsibility of the management board of a court. In England & Wales judges may also only be removed from office for incapacity or misbehaviour and via a special procedure. Some appointments are for a fixed term of 6 years (magistrates). It is interesting to note that in Norway the principle of immovability also applies to the two highest positions in the public prosecutors’ office – the same holds true for the procurators’ general office attached to the Dutch Supreme Court. The other countries investigated also adhere to this principle.

2.1.4 Comparison of the ways in which these principles are operated

In the countries that enjoy both principles of ‘immovability’ and the ‘natural judge’, generally speaking, judges cannot be moved to another position, even within their particular court, without their consent. This is the situation in Austria, Italy, and Portugal, even though in the last-mentioned country some exceptions are possible in civil and administrative courts. Some wider flexibility is granted in the Netherlands, where the judges are considered a ‘resource of the office’; the management board of the court can assign them to another unit or division, according to caseload needs. In Norway, the principle of immovability is laid down in the Constitution, but not the principle that those seeking justice are entitled to have their case heard by their ‘natural judge’.

In the Anglo-Saxon law systems, the most serious cases (according to the type of offence, the value of the claim) are dealt with by the courts that can operate on a national scale even though they are subject to geographical restrictions (regions or areas) in the first instance. Hence, their case management consists for the larger part not of the numerical allocation of cases, but of providing the appropriate judge at the specified court within their regional circuit. For the English High Court this may be a hearing location in different places throughout the entire country. This implies that the delivery of justice is not seen as being delivered by a single judge but on an equal footing by the court system as a whole.

From that perspective, it is considered normal for the Lord Chancellor to advise or make recommendations to the Queen on the appointment and allocation of professional judges to most courts. The Court Service provides support staff and the necessary facilities for most courts in a way that respects judicial independence. Efficiency, timeliness and prompt access to justice are the major criteria!

So, on the one hand, the *Ius de non evocando* functions as an organisational principle, keeping judges free from interference in their judgements and positions. On the other hand, the principle functions as a civil right: the right to have a fair trial from the perspective that judges should reason their judgements impartially. The realization of these different aspects in the operation of a court and a judicial organisation cannot remain in isolation of balancing this right against the public interests of timely and efficient justice. The effort to safeguard judges absolutely from internal organisational pressures by organisationally ‘allocating’ them to the specific units (chambers) of the courts is detrimental to organisational flexibility – see Italy and Portugal. This imbalance can also be interpreted as an elaboration of public distrust in the integrity and
independence of judges and their judicial managers; also authoritative figures within a court cannot withdraw a judge from a case.

However, the absence of external regulations relating to the allocation of cases within the courts in countries like the Netherlands, Norway, England & Wales and Québec is based on an almost blind faith in the integrity of the internal functioning of the courts. Austria seems to have found a workable compromise between the demands of flexibility and the demands of the *Ius de non evocando*. The checks and balances regarding internal case assignment are organised, in part, internally and, in part, externally, but always close to the ‘shop floor’ of the courts in the form of the so-called ‘Personal Senate’ of the judges’ own court and of the next higher court, to which, if need be, individual judges can appeal.

On the basis of this research project, however, it is not possible to give precise indications as to the boundaries between which a right balance between court efficiency and the *Ius de non evocando* should be kept. The reason is that opinions on this issue, as also expressed in the different organisational designs, differ widely.

2.2 Designs of existing judicial organisations

2.2.1 Judicial administration

The backgrounds of judicial administrations do differ. We can make a distinction between countries with a ministerial court service and countries with an autonomous court service. And we can also make a distinction between countries with and those without a council for the judiciary. For the countries with a council for the judiciary, we can distinguish between those with an autonomous court service and those with a council with personnel and disciplinary powers, which have a ministerial court service. This leads to the following matrix:

<table>
<thead>
<tr>
<th>Council for the Judiciary</th>
<th>Autonomous Court Service</th>
<th>Ministerial Court Service</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Netherlands</td>
<td>Italy, Portugal</td>
</tr>
<tr>
<td>No Council for the Judiciary</td>
<td>Norway</td>
<td>England &amp; Wales(^2), Austria, Québec</td>
</tr>
</tbody>
</table>

**Figure 1.**

It should be noted that the High Council for the Magistracy in Italy also has a role in case assignment within the courts. A peculiar situation exists in England & Wales.

\(^2\) We doubt if the English Court Service should not be placed in the quadrant together with Norway. However, after studying the English Report and the Court-Service website, we could not find an exclusion of political responsibility for the Court Service as in Norway.
where the court service has quite a degree of autonomy but is still part of the department for constitutional affairs.

The distinction between criminal, civil (trade and family) and administrative (general and taxation) jurisdictions is predominantly present everywhere, except for the administrative jurisdiction in Norway and, to a certain extent, in the Anglo-Saxon countries.

2.2.2 Judicial grouping in different courts
The countries considered in this study have, generally speaking, a two-tier structure plus the possibility to appeal to a Supreme Court – in continental countries a court of cassation. All of them have some form of courts of first instance with limited competence. For example, in Portugal and Italy there are ‘justices of the peace’ that have features of courts of limited competence. In Austria, the courts of limited competence are called ‘district courts’ (Bezirksgerichte), in the Netherlands, within the 19 first instance courts (rechtbanken), there are special divisions (sector kanton) with territorially detached hearing locations to deal with these cases, most of which are relatively simple. Norway does not have such courts of limited competence; while in England & Wales the peculiarity of the so-called ‘Magistrates’ is that they filter a very high percentage of criminal cases (~ 95%) before the next level court (the Crown court). Québec has justices of the peace who serve in the ‘Municipal Court’ with a limited competence in civil and criminal matters, mainly dealing with local laws and traffic offences. The latter is the only case reported of concurrent competence in criminal matters with the ‘Court of Québec’, generating a kind of ‘forum shopping’ by the police, since the police can choose to file a case at the ‘Court of Québec’ or at the ‘Municipal Courts’.

2.2.3 Size
Organisationally speaking, we should consider the size of the different judiciaries as a variable that can explain some of their complexity. Some specific data can be found in the comparative grid. Italy has more than 1500 office locations and about 9000 judges and prosecutors without counting more than 4000 justices of the peace (these are absolute numbers and not full-time equivalents -fte). Austria has about 160 courts and 1732 fte judges; there are similar numbers in the Netherlands (1810 fte judges, 25 Courts and about 90 hearing locations), and in Portugal there are a ± 350 courts with about 1400 judges. Norway has 94 courts (88 district courts and 4 courts of appeal) and about 600 judges. Québec has more than 400 justices of the peace in the ‘Municipal Courts’, 270 judges in the ‘Court of Québec’ and 144 in the ‘Superior Courts’. The last mentioned includes a maximum of so-called ‘supernumerary’ or ‘substitute’ judges who are retired judges called upon to serve as a ‘release valve’ when the caseload exceeds the court’s capacity. The cases are heard in 50 different localities but judges are based in 17 different regions (‘circuits’), therefore they travel from place to place according to the needs of the caseload. A similar, but more complicated system functions in England & Wales, with magistrates’ courts, organised in 42 regions, 218 county courts, the Crown Court for the more serious criminal and criminal appeal (from magistrates’ courts) cases, with the High Court and its 3 Divisions (Queens Bench,
We make a distinction between ‘jurisdiction’ and ‘competence’. The term ‘jurisdiction’ refers to specific areas of the law. The term ‘competence’ refers to the territorial and functional competences within a particular jurisdiction.

Both Divisions of the Court of appeal and finally, the House of Lords perform the role of appellate courts. Within this system approximately 28500 magistrates (they are mostly voluntary lay judges!) and ± 3400 career judges function. The large number of cases heard within the criminal courts of England & Wales depends heavily upon voluntary lay judges (magistrates’). During 2004 a massive reorganisation programme is supposed to be completed concerning the fusion of the Magistrates’ and Crown Courts.

We are not able to argue which kind of relationship there is between the size of the justice system and its organisational structure, or between the organisational structure and the centralized or decentralized structure of the State. Italy, the Netherlands, Norway and Portugal have a ‘centralized system’. Austria is a federation with a centralized court system; Québec is part of the Canadian federation, with separate court systems in the federal states. England & Wales have a very fragmented system, which bears the traits of supplemental courts being added to the system throughout the centuries, but it is certainly administered in a centralized way, especially the higher courts. The magistrates’ courts are administered locally by Magistrates’ Courts Committees (42), but nonetheless they are financially supported by the Lord Chancellor’s Department, nowadays a function fulfilled by the Department for Constitutional Affairs.

2.3 Existing jurisdictions

According to our glossary, jurisdiction refers to a specific area of law within which a court exercises its power or authority. So we can identify an ‘ordinary jurisdiction’ for civil and criminal matters, an ‘administrative jurisdiction’ for administrative cases, a ‘military jurisdiction’ for cases dealing with members of the armed forces. In many, but not all, judicial organisations, administrative jurisdiction functions in isolation of the ‘ordinary’ civil and criminal jurisdictions. Also, within administrative jurisdictions, if they exist, a further differentiation in jurisdiction sometimes occurs.

More in detail, Portugal has a common jurisdiction for administrative and fiscal matters, while there are separate courts in Austria, Italy and the Netherlands. The Netherlands, in 1994, partly transferred administrative jurisdiction of first instance to the ordinary courts, while administrative appeals are still heard by specialized administrative courts such as the so-called ‘Central Appeals Tribunal’ and the ‘Council of State’. All administrative cases in all administrative courts, however, are dealt with according to the rules of the General Administrative Law Act. Administrative matters are dealt with by the ordinary courts in Norway following civil rules of procedure, while Québec and England & Wales have several ‘specialized boards’ for administra-

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3 We make a distinction between ‘jurisdiction’ and ‘competence’. The term ‘jurisdiction’ refers to specific areas of the law. The term ‘competence’ refers to the territorial and functional competences within a particular jurisdiction.
tive matters (in England & Wales called ‘Tribunals’), which have competence in specific disputes between the State and those seeking justice. In England & Wales, a higher tribunal, the High Court or the Court of Appeal, may hear appeals against decisions of these ‘Tribunals’. Apart from that, Circuit judges are seconded to some of these administrative tribunals and High Court judges are appointed to the ‘Employment Appeal Tribunal’ and the ‘Immigration Appeal Tribunal’ – just to give an impression of the complexities on the other side of the Channel and the North Sea. In Québec administrative courts also have some peculiar arbitration competence in some specific cases (e.g. rental disputes), while a judicial review for the administration is granted by the ‘Superior Court’ that is part of the ordinary civil jurisdiction.

In the countries considered here, it is not possible to see a common trend towards court specialization related to different specific legal areas. However, we can safely observe a slight trend towards a unification process between courts with different jurisdictions, in an attempt to provide more flexibility to caseload management, as well as to cut administration costs by increased economy of scale. Examples are the merger of the district courts and the ‘kanton’ (sub-district) courts in the Netherlands in 2002, and the Pretura and the Tribunale in Italy in 1999. In England & Wales the Crown court and the magistrates’ courts for criminal matters are currently also involved in an organizational consolidation process.

It is worthwhile noting that the borderline between jurisdictions is subject to change. For example, in Italy a fairly recent reform process moved all disputes concerning public servants’ contracts from the administrative courts to the ordinary courts, thereby diminishing the caseload of the administrative courts and increasing, but not by the same volume, the caseload of the ordinary courts. In Portugal a very recent reform has an inverse trend, moving some disputes, like expropriations, from the ordinary to administrative courts. In the Netherlands, the introduction of administrative fines for traffic offences more than 10 years ago greatly diminished the criminal caseload of the (then) first instance ‘kanton’ courts.

This means that without an in-depth analysis it is impossible to compare the productivity and efficiency of the ordinary courts of different countries. It would be worthwhile investigating what kinds of cases are considered to be ‘administrative’ and ‘ordinary’ in the various countries. The borderlines between these jurisdictions is drawn differently in different countries, and these differences concern a large volume of cases.

2.4 Deciding conflicts of jurisdiction

Conflicts of jurisdiction – which according to our definition, mean conflicts between courts of two different areas of the law – are resolved by different procedures in the various countries. The simplest procedure is in Norway: since this country does not have different jurisdictions, conflicts are to be decided by the court in which the case was filed and, if necessary, by the appeal court. In Austria the Constitutional Court solves conflicts of jurisdiction. In Italy these kinds of conflicts are dealt with by the
‘Supreme Court’ and this is also true for Portugal, even though in the latter country there is also a peculiar ad hoc ‘Court of Conflicts’ that is charged with solving conflicts of jurisdiction arising from the courts of appeal. Such conflicts do not arise in England & Wales.

3. TERRITORIAL AND FUNCTIONAL COMPETENCES

Territorial competence relates to the territorial aspects of case allocation within a jurisdiction. Functional competence relates to specialisations (regarding the value, the severity of penalties and/or procedures) within the framework of territorial competence.

3.1 Allocation of cases between courts with the same jurisdiction but different competence

We describe jurisdiction and case allocation following the distinction between civil, criminal and administrative cases. We will not use this distinction for the allocation of cases within the courts.

3.1.1 Civil jurisdictions

In almost all the countries in our sample the allocation of civil cases follows the interplay between three variables: subject matter, value and territory. In Portugal, the subject matter criterion is integrated by a procedural one, meaning that either a court of general jurisdiction will be competent, or a specialized court dealing with a certain subject matter, or a special court for a certain procedure will be competent (if such a specialized or special court is competent in that specific territory); some of the specialized courts are competent in more than one county.

A general rule that does apply to the competence of civil courts in all countries is that the competence of the court is decided based on the domicile of the defendant. Several exceptions can apply in every country, however. More details can be found in the reports and partially in the comparative grid; generally speaking, the most common criteria are the following: the location of the property concerned, where the damage occurred, where the invoice was issued, or according to the agreement between the parties. In this respect, it is worth mentioning that, applying a European directive, consumer disputes cannot be diverted to a different court by party agreement.

The specific competent court is found according to the different national court structures. For example, in Norway all the cases go to the district court which competent for that specific territorial domain. In Italy, it depends on the subject matter and the value. The Justices of the Peace courts deal with subjects such as disputes between neighbour’s or motor vehicle accidents up to about 25000 euro. In Québec the code of civil procedure states that cases involving over $ CD 70000 (about 42680 euro) fall under the competence of the ‘Superior court’, while cases under this amount go to the ‘Court of Québec’. In Portugal, the interplay between subject matter and territory, value and procedure is very important since, depending on the region, it defines the kind of
CASE ASSIGNMENT: A COMPARATIVE ANALYSIS

In some regions the general competence of the county courts is replaced by several special (procedural) courts and specialized (subject-matter) courts, some of which are competent in more than one county. District courts (Bezirksgerichte) in Austria are courts of limited competence, which deal with cases involving up to 10000 euro and, in addition, they have exclusive competence in family law matters and real estate rental disputes. Regional courts (Landesgerichte) hear appeals from the ‘District court’, they are first instance courts for cases involving more than 10000 euro and they have exclusive competence in labour and social insurance disputes and in public liability. In the Netherlands the ‘district courts’, the so-called ‘Kanton Divisions’, have exclusive competence in labour contracts, rent and lease cases, and a general competence in cases involving up to 5000 euro.

3.1.2 Criminal jurisdictions

In the countries considered, criminal cases are allocated to the courts on the basis of territory and subject matter (the kind of crime). The most common criterion used is ‘the place where the crime was committed’. Exceptions are the connections between crimes, which can move a case to the place where the most serious offence was committed (e.g. Italy), or where the first case was filed (e.g. The Netherlands, Norway).

The subject matter criterion used to define courts’ competence in criminal cases is, generally speaking, related to the kind and the severity of the punishment. A more rational and simple case allocation system seems to be used in Norway, where all first instance cases are dealt with by the ‘District Courts’. All the other countries have at least a court of limited competence for misdemeanours and a court of general competence for first instance cases, with the exception of the Portuguese ‘special’ criminal trial courts and the criminal panel courts, and its ‘specialized’ courts for criminal investigation. However, what is considered as a ‘misdemeanour’ or a ‘crime’ in every country should be further investigated.

In Austria misdemeanours that entail a pecuniary fine or a maximum of one year imprisonment are dealt with by the ‘District Court’ with a single judge decision. All the other crimes move to the ‘Regional Court’ as a first instance criminal court. In Italy, since 2002, the Justices of the Peace courts deal with criminal cases that entail a maximum pecuniary fine of about 2500 euro, or 45 day’s home detention or a community service order for 6 months. All the other cases are dealt with by the Court of first instance of general competence (Tribunale). In Québec, the vast majority of criminal cases fall under the competence of ‘Municipal Courts’ (justices of the peace) or of the ‘Court of Québec’, even though for some criminal matters the police can choose to file the case before the ‘Municipal’ or the ‘Court of Québec’. For some criminal matters it is the accused that decides to file the case before the ‘Court of Québec’ (single judge decision) or before the ‘Superior Court’ that entails a jury trial. In Portugal, there are so-called ‘special’ and ‘specialized’ courts that deal with criminal cases depending on the crime. In addition, among the ‘specialized’ courts there is a ‘judgment execution court’, which deals specifically with all matters related to the enforcement of criminal sentences. In The Netherlands the ‘District Court’, kanton division, deals with criminal cases involving up to 3 months imprisonment or a fine up to 4500 euro. In addition, in
the criminal law division there are so-called ‘police judges’ (single judge units) who deal with criminal cases involving up to one year imprisonment. In England & Wales, no matter what kind of criminal case is involved, all cases first go through the so-called ‘Magistrates’ courts and then move on to the ‘Crown Court’ if they involve serious crimes or if the defendant wishes to be tried by a jury. The magistrates’ courts deal with 95% of all criminal cases.

As far as juvenile courts are concerned, from the reports it seems that only in Italy and Portugal are specialized courts to deal with both criminal and civil juvenile cases, while in the other countries considered in this study, juvenile cases are dealt with by the ‘ordinary courts’. In addition, none of them also have a specialized division within the court for juvenile matters. However, in Austria the court of Graz is the only court with a specific juvenile division. In the Netherlands, specialized units for family and juvenile cases also exist. The larger courts in the Netherlands also have family divisions.

Probably following this European trend, recently the Italian Ministry of Justice presented a Bill to Parliament to merge the juvenile courts with the court of first instance, establishing a specialized division within the courts of general competence. The Bill was rejected, however.

3.1.3 Administrative jurisdictions

Generally speaking, administrative cases are allocated on the basis of the place where the administrative decision took place (e.g. Italy, the Netherlands) and on the basis of specialized matters that in every country are considered to fall under the administrative law system. In the Netherlands there is an exception for decisions from central government, which are dealt with by the court of the claimant’s domicile.

As mentioned before, this is an area of the law in continuous development and some matters may move from administrative courts, or boards, to the ordinary courts and vice versa. Appeals from the administrative courts are heard by, usually, nationwide Administrative Courts such as the ‘Administrative Court’ in Austria, the ‘Supreme Administrative Court’ or one of the two ‘Regional Administrative Courts’ in Portugal, the ‘Council of State’ in Italy, the ‘Council of State’, the so-called ‘Central Appeals Tribunal’ and the ‘Industrial Relations Appeals Tribunal’ in the Netherlands. As already mentioned earlier, in Norway there are no administrative courts, in Austria ‘administrative boards’ are subject to the responsibility of the federal states, as Austria is a federation, and their decisions may be appealed to the Administrative Court which has nationwide competence. England & Wales have numerous ‘Administrative Boards’ called ‘Tribunals’ depending on the subject matter. A higher tribunal, the High Court or the Court of Appeal, may hear appeals against decisions of these ‘Tribunals’.

3.2 Conflicts of competence

Conflicts of competence between courts within the same kind of jurisdiction, as far as they do occur at all, are decided by the next superior court in Austria and the Netherlands, by the Corte di Cassazione in Italy and by the Supreme Court or the appeal
courts in Portugal. This kind of conflict does not exist in England & Wales and in Norway that really enjoys just a first instance court of general competence.

4. ALLOCATION OF CASES WITHIN COURTS

Within a court, not only legal rules but also court regulations play a role in the allocation of cases – for this exploratory study we focused on the legal rules, and only partially on the court rules. We received a relatively limited amount of information about the actual methods of case assignment within the courts.

Generally speaking, cases are assigned to judges or units within the court or court division, based on a random system such as the names of the claimants in alphabetical order, the number of the cases, in chronological order, postcodes, or sometimes the subject matter. For the internal organisation of the court, the functioning of the internal automatic assignment system is most important.

In England & Wales, following the ‘multi-track idea’ proposed in the Woolf-Report and implemented by the new Civil Procedure Rules – a ‘differentiated case-flow management’ is used. This is a system that changes the chronological concept of handling cases (first in, first out), taking into account the complexity of each case, and assigning it to a particular track and therefore procedure.

In Québec the system does not allocate cases to judges, but vice versa, judges are allocated to the various hearing locations on the basis of the caseload. This decision is made by the ‘coordinating judge’, using some automatic criteria and the current caseloads of the judges in a particular territory called a ‘circuit’. Judges’ specialization may be taken into account, but not necessarily so. It is also a peculiarity of Québec, along with the Netherlands, to have a kind of ‘informal adjustment’ of the allocation of cases between judges to improve the courts’ efficiency in dealing with the caseload. The work of judges who are burdened with a disproportionately heavy caseload can thus be transferred to judges with some time on their hands. Hence it is easier to realise an optimum use of capacity. In addition, in Québec, the code of civil procedure states that cases involving under $ CD 7000 (about 4270 euro) are dealt with by the ‘small claim divisions’ of the Court of Québec, which have a less complex and therefore faster procedure.

In the Netherlands, courts are organised internally based on the Judicial Organisation Act. It has set up divisions (sectors) and units (chambers). Apart from the legal obligation to have separate units for summary proceedings in all courts and military units in the Arnhem courts and the business unit in the Amsterdam Appeal Court, and to have a kanton division in all district courts, the internal organisation of adjudication in divisions and units is the responsibility of the management board of the court. However, the internal court regulations primarily attribute responsibilities and do not prescribe criteria for internal case assignment. The actual allocation of cases is based on ‘neutral’ criteria. It is the responsibility of the management board of the court, although the actual work will be done within the court divisions by the ‘scheduling judge’ with the aid of court staff. In addition, within the administrative sectors there is also some kind of differentiated case management, because the General Administrative
Law Act defines different kinds of normal proceedings (simple track – without a hearing, fast track – without a preliminary investigation, and normal track – involving both a preliminary investigation and a hearing), alongside special rules for summary proceedings leading to provisional judgements.

In Italy, the allocation of cases within a court follows a very rigid system called the ‘organisational scheme’, which is prepared every two years by the Head of the Court, and approved by the High Council of the Magistracy. This very detailed ‘organisational scheme’ determines not only the internal organisation of the courts, which can be divided into divisions and units depending on the size of the court, but it also identifies the judges who will be part of that division and unit, along with their possible substitutes. The process of approving this scheme is extremely time-consuming and rigid as is the scheme itself. In particular in small and medium-sized courts it is only partly used in practice. This rigid system has been designed to avoid any possible abuse by the Head of the Court in the allocation of cases to judges or by the Chief Prosecutor in the allocation of cases to prosecutors. Specialization can be recognized, thereby creating some specialized units within the courts, however, some specialized units are provided by law. For example, ‘labour and social assistance matters’ in the appeal courts; ‘judge for preliminary investigation’, ‘patent and intellectual property rights’ (this unit is only present in 12 out of 166 courts of first instance), are specialized units required by law. A similar ‘organisational scheme’ is applied in Austria but it seems to be much less rigid and problematic than its Italian counterpart. A local ‘Judicial Board’ (the so-called ‘Personnel Senate’) is in charge of the allocation of cases, advice on proposals for the appointment of judges, and some other administrative issues related to the ‘administration of judicial offices’. In the allocation of cases the Board has to follow a general rule of ‘equality’ among the different judges, and the initial proposal may be challenged by the judges at the next competent court. The pre-established organisational scheme which is used to allocate cases must be adapted by the 1st of February of each year. The allocation scheme can take into account some specific specialization of the judges (e.g. family, juvenile, labour etc.), thereby always assigning these cases to the same judges. The local Judicial Board must approve any exceptions to the pre-established criteria for case allocation.

In Portugal, a random system is applied for both civil and criminal cases within every county court, special and specialized court. The system does not take into consideration the caseload of each judge, although the complexity of the cases does play a role. According to a very recent reform of the administrative justice system, which entered into force on January 1 this year, cases are assigned to judges, not only randomly, but also taking into account the complexity of the case and the judge’s workload.

In Norway, cases are allocated randomly but some cases are more often allocated to ‘temporary judges’ (e.g. probate, insolvency cases) than to ‘ordinary’ ones. In addition, in the larger courts, such as the Oslo District Court, judges ‘rotate’ so as to deal with specific civil and criminal cases (e.g. custody hearings, bankruptcy etc.) thereby ensuring a more balanced caseload. However, the heads of court seem to have a discretionary role in the allocation of cases; it depends on their personal skills and
leadership style how they deal with the problem. In some courts they do rely upon common practices, in others they have a more proactive role.

5. TOOLS TO ENHANCE EFFICIENT AND EFFECTIVE CASE MANAGEMENT

Here we describe the instruments we found according to the following classification:

- The rules of procedure, including rules of jurisdiction and competence.
- The venues of the courts and the judicial offices.
- The design of the judicial organisation.
- The institutional relations within the judicial organisation, including accountability.
- The legal position of judges in the judicial organisation and in the courts.
- The rules of access to the courts.
- Training of judges and court staff.

5.1 The rules of procedure, including rules of jurisdiction and competence

In most of the countries investigated there has been an adaptation of the rules of procedure.

We differentiate between administrative, civil and criminal proceedings.

In some countries like Italy, the Netherlands and Portugal, the administrative jurisdiction has been enlarged, removing some of the tasks of the civil and criminal courts.

5.1.1 Differentiated case management

In England & Wales the Civil Procedure Rules entered into force in 1999, making a distinction between three kinds of tracks to be followed in judicial proceedings: small claims, fast track and normal track. This allows the courts to manage cases in a circuit (by a district judge) or in one of the national courts not only according to capacity, but also according to the desires of those seeking justice. It enables the courts to work faster. In Dutch administrative procedure a distinction is made between fast proceedings, simplified proceedings, normal proceedings and summary proceedings leading to a provisional judgement. In England & Wales and in Dutch administrative proceedings the type of proceeding is for the courts to decide (except for summary proceedings). In Portugal efforts have been made to introduce differentiated case management, but this intended change did not fit in with the practice and working methods of Portuguese judges.

5.1.2 Giving judges the responsibility for case management

In the Netherlands, the rules of civil procedure have been amended, giving explicit responsibility to the judge to monitor and enhance the speed of the proceedings, e.g. by giving him/her the competence to pressure on a party to prove his/her case in due time (or lose the case). The latter is also an element of the new judicial competence in England & Wales.
5.1.3 Changing the territorial aspects of case allocation between the courts
Generally speaking it is considered user-unfriendly to change the geographical rules for case allocation. The case must be heard within travelling distance for the defendant, unless the parties have agreed otherwise. However, hearing a case and the internal court work on a case may be geographically distinct as in England & Wales and in Québec. In the Netherlands, a central bureau distributes aliens cases among 22 hearing locations throughout the country. For large-scale and complicated criminal cases (for example, involving organized crime) a central distribution authority has also been set up, enabling the judiciary to allocate these cases to first instance courts throughout the country, according to where judicial capacity and hearing locations are available. This means that there is no geographical separation for preparing and hearing a case, except for the auxiliary hearing locations within the districts.

5.1.4 Enlarging the competence of single judge units
Changes in rules of procedure concern the allocation of cases to those judges that can deal with them most efficiently. So the trend we perceived is to redefine the weight of cases according to their value so that single judge units may deal with the bulk of cases involving up to €5,000-10,000. This is also a trend in criminal cases, although the maximum sentence which may be imposed varies widely from 6-12 months imprisonment in the Netherlands up to 10 years imprisonment in Italy.

5.1.5 Obliging the parties to resort to a joint expert
A special subject concerns the role of experts in causing delays. This was the case in England & Wales until the civil procedure rules were introduced, enabling the courts to make use of a ‘joint expert’. This has made cases somewhat more expeditions, but it has also resulted in parties employing their own experts to contradict the evidence of the joint expert. The other reports do not mention this aspect but we know that experts in Dutch administrative proceedings are often a cause of delays because they deliver their reports to the courts too late.

5.2 The venues of the courts and the judicial office-rooms

5.2.1 Court buildings should be adapted to new rules of procedure
However the judiciary is organised, courts cannot function without proper building facilities. Changes in the rules of competence, e.g. extending the competence of single judge units, may increase the quantitative capacity of a court. But this will also require a different use of the building facilities. Three-judge units can use one hearing room at a time. But three single judge units will need three hearing rooms in order to hear three cases at a time. It is essential that organisational measures and building capacities are coordinated. Simple as this may seem, in Italy court capacity could not be extended because of failings in the coordination of measures.

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4 As far as the case is not bound to a certain court district according to the criteria used for case distribution.
Furthermore, the exchange of information between judges is stimulated when they work in the same building. The practice that court office rooms are overcrowded and that judges flee to their study in their private homes is an obstacle to the optimal organisational functioning of judges.

5.2.2 Conditions relating to personnel policy
Another finding in our comparative analysis is that certain physical and organisational working conditions are also a precondition to attract adequate personnel. This is a major problem in some rural areas of Portugal and Italy. This makes it difficult to obtain adequate staff for the courts in rural areas. But, on the other hand, organisational conditions can also play a detrimental role: court clerks will not remain for long in an organisation that does not stimulate efforts to enhance production and quality. Another aspect is that leadership which is too directive in a court may result in judges opting for a post in another, less directive led court once the opportunity presents itself – see the differences between the district courts of Rotterdam and The Hague.

5.3 The design of the judicial organisation
Here we highlight the different approaches to using the court structure as a tool to manage the caseloads more effectively.

5.3.1 Advantages of scale: the merging of courts
In Austria, the possibility to merge the first instance courts of limited competence (150 district courts) with the 20 regional first instance courts of general competence is under scrutiny. This step has recently been taken by the Netherlands and by Italy. Italy has merged different first instance courts (Pretura and Tribunale) and enlarged the competence of single judge units in order to enhance productivity. Also in Italy, however, a new set of courts (‘justices of the peace’), whose members are temporary judges, were established to deal with both minor civil and minor criminal matters. In the Netherlands the sub-district (kanton) courts merged with the district courts. A merger is also being prepared in England & Wales as far as the organisation of the Crown Court, County Courts and the Magistrates’ Courts are concerned.5

5.3.2 Court specialisation versus omniscient judges
The distinction between civil, criminal and administrative cases is generally accepted, also in the organisation of the courts. If there is any specialisation of courts, it is a specialisation within this threefold distinction. It is striking that administrative law is more apt for specialisation compared to civil law or criminal law. However, in Anglo-Saxon countries specialisation seems self-evident for administrative tribunals, but this is not the case in Austria and Italy and neither is it in Norway. The Netherlands has a restricted number of specialised administrative courts, alongside a general administrative law jurisdiction for first instance courts.

5 According to the Courts Act 2003, the different juridical functions of these courts are maintained.
In Austria, due to the high volume of cases, in some large cities such as Vienna specific courts have been established to deal with special civil cases, like business and commercial matters, labour and social matters. In the rest of the country, the ‘ordinary’ courts of general competence deal with these specific issues. So, it appears that instead of increasing the size of the existing courts in Vienna, the Austrian authorities have preferred to establish special courts to deal with the caseload of a specific area.

A similar approach is used in Portugal, but on a larger scale. Depending on the caseload, there are courts of general competence that cover a certain territorial domain, alongside so-called ‘special’ (according to the procedure) and ‘specialized’ courts (according to subject matter) which are usually established in the largest counties. The Portuguese legislature creates new ‘special’ and ‘specialized’ courts when the caseload rises over a certain threshold, and this solution is preferred to the establishment of ‘specialized’ divisions or units within a court of general competence. Thus the Portuguese judicial system is rigidly compartmentalised.

In Italy and in the Netherlands, divisions and units according to subject matter have been created and are coordinated by presiding judges.

In Québec the courts of first instance are either the ‘Superior Court’ or the ‘Court of Québec’, depending on the subject matter and the value involved. For example, the ‘Superior Courts’ have exclusive competence in divorce and bankruptcy cases, while the ‘Court of Québec’ hears cases dealing with juvenile, criminal and ‘protection’ matters. Apart from the different tasks assigned to the different courts in Québec, Québécois judges are expected to be able to deal with all kinds of cases.

In Norway, the situation is completely different. There, the general trend is against specialization, and the district court judges have to deal with all different kinds of cases. Nonetheless, a specialized court does exist for collective labour agreements (Industrial Dispute Court).

From this exploratory investigation we cannot conclude that specialist courts lead to more efficient case management. The most common trend is still that judges are thought to be omniscient in the law. In many countries judges and policymakers seem to be aware that this is no longer a realistic point of departure. However, this awareness does not often lead to the establishment of specialist courts. A middle road between leaving everything as it is and establishing new courts is the organisation of specialised divisions and units within existing courts, and to encourage judges to specialise even if courts are not specialized.

5.4 Institutional relations within the judicial organisation, including accountability

5.4.1 Making judicial administrations autonomous

This study does not aim to provide a complete description of the institutional systems of judicial organisations. But some elements thereof are important for the allocation of cases and judges to the courts, especially the ways in which courts are financed and controlled. The introduction of a Council of the Judiciary as in the Netherlands, or a special autonomous Court Administration as in Norway, can be considered to be important conditions to enhance flexible working conditions in the future. In Portugal,
a similar separate construction for administrative jurisdiction has been set up, by
enlarging the competences of the High Council of Administrative and Tax Courts. The
idea is that, on the one hand, making judges responsible for the efficiency and effec-
tiveness of the courts reduces the vulnerability of a judicial administration for re-
proaches that they are steered by politicians and, hence, are not sufficiently inde-
pendent. On the other hand, such a construction presumably not only changes the
formal rules of distribution of scarce resources, but also the actual ways in which scarce
resources are negotiated and distributed. Even in England & Wales, the Court Service
has traits of a government agency placed at ‘an arm’s length’ of the Department of
Constitutional Affairs.6

5.4.2 Relating funding to productivity
In most countries, courts are funded according to estimates related to the cases they
deal with. The way and reliability of making such and estimate of e.g. court time spent
or of the amounts of cases is essential, and also the way the central court administration
reacts to the estimated amount. In most countries, there is a relation between the
productivity of the courts and the amount of funds allocated to them. The most flexible
systems so far seem to have been realised in Austria (where cases and productivity may
fluctuate between 90 and 110% of the standard) and the Netherlands, but they are still
only related to annual budget cycles of the courts and of central court administrations
– and even there, there are discussions about the reliability of such estimates. Trans-
parency and controllability depend on reliable measuring methods and on an adequate
presentation of the results. An essential outcome of this study is that courts are
primarily financed according to methods that measure data such as incoming cases,
decided cases, throughput time and the like in the past. In Austria and in the Nether-
lands ways to combine ex post financing with ex ante financing according to estimates
of expected changes in caseloads, are currently being developed.

5.4.3 Flexible deployment of personnel
Changing circumstances concern fluctuations in caseload and fluctuations in the
availability of personnel.

Some way of dealing with situations like a flu epidemic, a sudden rush of incoming
cases (like the drug traffickers at Haarlem District Court, the Netherlands, or the phone
company moving to Oeiras, Portugal, or a large company becoming bankrupt and its
executives being accused of fraud like Parmalat in Parma, Italy) or an earthquake
damaging a court building and rendering judges non-available, should be arranged. It
is not sufficient to consider these occurrences merely as isolated incidents. Typical
reactions from an incidental perspective are a president of a court informally asking a

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6 For an explanation of the terms ‘Quango’ and ‘Agency’ in a British context, see: Luc Verhey, British
Agencies, Surveying the Quango State; in: Tom Zwart & Luc Verhey (eds.), Agencies in European and
7 See Jos Blank, Martin van den Ende, Bart van Hulst, Rob Jagtenberg, Benchmarking in an International
Perspective, An international Comparison of the Mechanisms and Performance of The Judiciary System,
ECORYS Research no. 3, Rotterdam, April 2004, p. 57.
ministry of justice for more funding and capacity to redress a temporary situation, or a court administration taking initiatives for legislative measures to redress a particular situation (which takes too long to function as an effective tool for redress). If flexibility is continuously desired, a more permanent flexible solution is necessary. An example of such a solution is the system of having newly appointed judges working for the superior appeal courts (Oberlandesgerichte) in Austria. These judges can be temporarily assigned to the district courts and the regional courts within the territory of the superior appeal court when and where needed. Other attempts to increase flexibility are the establishment of a flying brigade (judges and/or court clerks) or making use of all kinds of ‘substitute judges’, as in the Netherlands, Italy and Portugal.

5.4.4 Not locking judges into one court, one division or one unit

The ability of courts and judges to meet such fluctuations in caseloads and fluctuations in the availability of personnel is dependent on the way in which they relate to other courts and judges. Only if the watertight compartments within and between the continental courts are made more pervious when it comes to assigning tasks to judges, will advantages of scale become available to the judicial organisation as a whole and to the general public. Thus possibilities may be created to bring capacity where it is needed.

5.5 The legal position of judges within the judicial organisation and in the courts

5.5.1 Legal position

The legal position of judges within the judicial organisation and in the courts is bound by the constitutional demands of independence and impartiality, and in some countries explicitly by the principle of the ‘natural judge’. The question is how these demands may influence the management of judicial deployment and in what ways may this deployment be made more flexible.

These demands have been translated in some countries by giving judges fixed positions, not only within a court, but also within a court division and within a unit. Combined with a fixed system for allocating cases this is a recipe for inflexibility when judges are not willing to move voluntarily to another court division or unit, or even need permission from the Council for the Judiciary to do so. This is the case in Italy and Portugal. In Portugal the allocation of a case to a specialized court may have as a consequence that judges from other counties have to hear the case.

In Austria, cases are allocated to judges by the courts’ personnel senate, supervised by the superior appeal court. This personnel senate may redirect cases to another judge in certain situations.

In the Netherlands, judges can be asked to change divisions in a court, e.g. from administrative to criminal, or from criminal to civil. The assignment of judges to a division is the responsibility of the management board of a court.

5.5.2 Substitute judges

In all countries courts have a reservoir of substitute judges. These are judges of a very different nature. They may be young judges without much working experience, sometimes they are judges in training (Austria), sometimes they are retired judges
(England & Wales) and sometimes they are solicitors/barristers (England & Wales), or lawyers in general (the Netherlands). Usually they are on a reserve list and they may be called to sit by the chief judge or the management board if s/he thinks that this is necessary. In the Netherlands, as of January 1, 2002, judges of a court are appointed by law as substitute judges in all the other courts at the same level (first instance courts or appeal courts). This provision is intended to create some degree of flexibility, e.g. when specific expertise is required somewhere in the country, or when a case has to be decided and it involves, for example, a court clerk, resorting to judges from another court will enable the court to deal with the case impartially.

5.5.3 Flying brigade
The idea of a flying brigade is used in most countries, but in different ways. In the Netherlands it consisted of a group of lawyers working as court clerks under the responsibility of judges of The Hague district court, preparing cases for courts with backlogs. In Austria 2% of the judges of the first instance courts within an area of an appeal court are made available for specific ‘situations’; these judges will generally work at a certain first instance court on a temporary basis. These judges are usually at the beginning of their career.

5.5.4 Accountability and the role of the head of court
Another issue is how judges can be held accountable for their work as members of the court organisation. In some countries the idea seems to be that judges are beyond criticism. But in Austria and in the Netherlands judges have annual discussions with the president or members of the court’s management board about their work, productivity included. These discussions are also used to plan ahead. Coordinating judges in Québec do have to answer to the president of the court for the number of judges, cases and hearing hours in their circuit. In Norway the position of the head of court is subject to debate, although in some courts the presidents already take an explicit lead in personnel management.

We think that an active role of the head of court in enhancing flexible internal allocation of cases and judges may make a difference as far as constitutional principles and rules of procedure allow it.

5.6 Regulating access to the courts
Access to justice is in principle unlimited. That is why in many countries policies are directed at how best to deal with this demand. On the one hand, these policies are about restricting access, but it may also involve increasing accessibility for larger groups in society.

5.6.1 Restricting the demand for justice
The accessibility of the courts is a basic value of the rule of law. This is not always considered as a blessing for the courts and the way they function. Hence, in many countries measures have been taken to reduce the demand for court services. This has been done most effectively in Québec, where the numbers of cases filed in the civil
courts have dropped by 20-30% in the last 10 years, due to a policy of considerably increasing court fees and by enhancing mediation efforts before a case can be filed in the court.

Pretrial mediation is also a measure for civil cases in the High Court in England & Wales. So far, it has not been very successful, however. Unfortunately, the reports do not provide enough information to understand the underlying causes of these differences.

5.6.2 Making access to the courts easier: Money Claim Online
In England & Wales initiatives have also been taken to make the first instance courts more accessible, first by the initiative of Money Claim Online. This makes it possible to claim up to £100,000 via the Internet. This has been found to be a most useful tool for small claims for which it would normally not be financially viable to go to court. The Dutch Council for the judiciary and the Ministry of Justice plan to follow the successful lead of England & Wales.

5.6.3 Alternatives: establishing centres for arbitration
In Portugal, arbitration centres for the resolution of consumer litigation have been established, and they are successful in granting access to justice to consumers who would otherwise have to wait too long to obtain a judgement.

Looking at the national reports, it becomes clear that enhancing the efficiency and effectiveness of justice does not only concern creating more public value for public money. It is also about ensuring justice to a wider public. In principle, first instance cases can be judged within an average period of 6 months, as the Austrian example shows. As far as such a target has not been reached, the judiciary and court services may be expected to further improve the functioning of their courts.

5.7 Training of judges and court staff
This final ‘measure’ is not explicitly present in the national reports that we analysed. It is nevertheless a very important subject from the point of view that judges should be involved in the organisational processes of a court, and from the point of view that measures to enhance efficient case management should be regarded as being interrelated in order to make them effective. This depends, however, on one’s view of a judge’s responsibility. In any event, someone has to be responsible for the organisational tasks in order to make a court function; there is a direct relation between judicial responsibilities in a case and the organisational functioning of a court. The described measures can only function if judges are willing to cooperate in the organisation. In order to do so they should at least understand what the organisation requires of them and understand how to cooperate. Therefore efforts to train judges and court managers in order to develop their organisational and (case-) managerial skills may be just as important as the structural and procedural measures we described above. However, we did not find many indications that the training of judges is considered as a sine qua non
for a successful policy to enhance case management. An explanation may be that we did not specifically ask this question – it just seems self-evident.

6. COMPARISON: GENERAL DIFFERENCES AND SIMILARITIES BETWEEN JUDICIAL ORGANISATIONS

Having analysed the seven national reports in order to make an inventory of tools to further the efficiency of judicial organisations and the timeliness8 of judicial proceedings, it springs to mind that, although judicial organisations and courts of different countries seem to do the same kind of work, there are large-scale differences between the judicial organisations on which we have focused. It is not just that these differences relate to different languages and different national cultures. They also relate more directly to how a national judicial organisation is organised, how responsibilities are assigned and distributed among different players (the legislature, ministry of justice, council for the judiciary, court management, judges), and, last but not least, to the organisational culture when it comes to courts and their interplay with the public prosecutions office, the ministry of justice, the council for the judiciary etc. We think that there is a connection between the way in which a judicial organisation is organised and the way in which e.g. courts, the public prosecutions service, the ministry of justice and the council of the judiciary, or the high council of the magistracy or an autonomous court service deal with each other.

The differences and similarities described below are based on the national reports; they are not intended to be exclusive.

6.1 Differences

6.1.1 Adjudication and politics

Some of these differences also relate to the political environment of a judiciary.9 That relationship is sometimes tense in Italy and Portugal, while in Norway and the Netherlands this seems to be less so. This is of importance, also because judicial organisations are publicly funded. Eventually, parliament will have to vote on a bill to set the budget. Given the tremendous societal and political changes which European countries are experiencing, the interplay between the political and the judicial domains regarding the allocation of resources and the implementation of legitimate measures to enhance the functioning of the courts is the first and most important background factor relating to the functioning of a judiciary.

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8 A major problem in Europe is that the causes of delays in courts have not yet been properly researched. See: Marco Fabri and Philip M. Langbroek, Delay in judicial proceedings: A preliminary inquiry into the relation between the demands of the reasonable time requirements of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains. Council of Europe, CEPEJ, November 10, 2003.

9 ‘Political environment’ relates to the work of elected and appointed holders of public offices in democratic state organisations belonging to the legislative and executive branches of government.
6.1.2 Administrative organisation

Based on this research we are not able to conclude what relationship exists between the size of a court system and its structure, or between the organisation of the state and the structure of the court system. Italy, the Netherlands, Norway and Portugal have a centralized state. Austria is a federal state with a centralized court system; Québec is a province within the Canadian federation, but has its own judicial organisation. England & Wales have a fragmented judicial organisation, with traits reflecting the complementarity and adjustment which have taken place throughout the ages. But it is centrally managed, especially the higher courts. The magistrates’ courts are locally managed by the Magistrates’ Courts Committees (there are 42 of these), but they are nonetheless financially supported by the Department for Constitutional Affairs.10

In Italy, Portugal, Austria, England & Wales and in Québec, the administrative organisation is part of a ministry. Italy and Portugal have a Council for the Magistracy without real controlling competence, but they do have competences regarding the legal position of judges. In the Netherlands and Norway administration has been made autonomous.

6.1.3 Flexibility

We think that imbalances in the allocation of caseloads between hearing locations in Anglo-Saxon legal systems can be more easily redressed than imbalances in caseloads in localized and compartmentalised continental courts, especially in Italy and Portugal. In a larger court with a larger number of judges it will be relatively easy to deal with local fluctuations in caseloads or unexpected events. On the other hand, it is also a matter of organisation and competence to change the allocation of cases if changing circumstances compel this. But, given a certain number of personnel, sending extra judges to a court in one part of the country may cause delays elsewhere, which would not otherwise have occurred. So, only the flexible deployment of personnel may not be enough, and it may be necessary to complete this by other measures in order to retain productivity elsewhere, for example by deploying substitute judges. However, judges are independent and any external interference in the courts’ case management is not allowed. Therefore especially this aspect of organising flexibility is typically to make judges responsive to organisational necessities and to make them, at least in part, responsible for the organisation of their court, as is the case in Austria, the Netherlands and Québec.

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10 The Courts Act 2003 arranges an abolition of the magistrates’ courts committees and replaces them by courts boards. These courts boards have some administrative competences regarding the Crown Court, Country Courts and Magistrate’s courts, which they share with the Lord Chancellor. The new organisational scheme will be operational in 2005.
6.2 Similarities

6.2.1 Judges do not like organisational changes
There is also an important common feature of all the judiciaries we explored. This feature is that judiciaries themselves do not seem to be at the forefront of organisational change and this is so in all the countries investigated. Their profession is a legal one, not an organisational or managerial one. This means that any changes in the functioning of the courts and judges are instigated by external stimuli (government, politicians, public opinion). It seems as if judges everywhere want to retain their legal culture and traditions, and are reluctant to function as executive functionaries of imposed organisational and procedural changes. They are the masters of the domain of judging and the organisational functioning of their courts is of secondary importance when it comes to the way they fulfil their tasks professionally. Of course, this feature is not the same everywhere. In Italy and Portugal, judges seem to be very rigid and inflexible when it comes to organisation. A more cooperative attitude can be found in Austria and the Netherlands. A mixed position can be discerned in the Anglo-Saxon legal systems of England & Wales and Québec, where important structural and organisational changes are planned and are (partly) being implemented by the Court Service. But judicial involvement in these changes is not very visible, except for the participation of prominent judges in the preparation of proposals for change.\(^\text{11}\) This also applies to Norway.

This common trait is important when it comes to developing tools that are to enhance an efficient case management in the courts and on a national scale. Judicial reluctance to act organisationally gives the national court administrations an important role to play in developing and implementing different tools for case management. In the normative context of constitutionally and legally secured judicial independence and impartiality, the tools to be developed may be expected also to have the form of statutory acts and regulations based thereon. Next to the point relating to constitutionality and legitimacy, another, practical reason for also shaping tools in the form of statutory acts and regulations may be that judges and court organisations can be expected to be more law abiding than ordinary citizens. For them, legal rules may be expected to have a greater steering capacity than for ordinary citizens – but their disadvantage over other tools is that legislative procedures, generally speaking, take a long time, making legal rules inflexible.

However that may be, the juridical environment of courts and judges make it inevitable that the regulation of judicial work has a firm base in rules stated in the constitution and in statutory acts.

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11 An example is the Woolf report in 1996. The Department of Constitutional Affairs makes an extensive use of consultation papers preparing change proposals, involving a wide range of stakeholders. This may, but not necessarily does, imply judges.
6.2.2 The complexity of judicial organisations necessitates the coordination of certain measures

Another major outcome of this exploratory study is that measures to enhance effectiveness and efficiency in case management cannot be effective if they do not take into consideration their relation to other measures. It may be a nice idea to create specialized courts (e.g. juvenile or family) to relieve the workload of the ordinary courts. But if that does not come together with a training programme to specialize the judges and court staff it is unlikely to be effective. The same holds true for creating extra positions for judges and for court clerks. They will need extra office space, and their work will also need additional courtroom availability. If these conditions are not created, it is unlikely that success in the form of reduced backlogs and increased final judgements will result. National and local circumstances are relevant in this respect. They concern the availability of adequately trained personnel, buildings, training facilities, ICT, and, in addition, properties such as organisational culture, flexibility in case allocation, dominant opinions on the desirability of generalist or specialist judges etc.

6.2.3 Organising flexibility in judicial organisations is problematic

Each situation demanding more efficient and more effective case management actually requires a reconsideration of the design of a judicial organisation and of the organisation of the courts, especially on the European continent. Attention should be paid to the rules of procedure, the institutional relations within the judicial organisation-accountability included, the internal organisation of the courts, the rules of access to the courts, the venues of the courts and the judicial offices, the cooperation between judges and court staff and last, but not least, the willingness of judges also to take organisational responsibility for their case management. The key word here is flexibility. This is the ability to react quickly to changing societal circumstances. This is more difficult when constitutional values are elaborated in more detail and are enforced, as in Italy and Portugal. But, on the other hand, in legal systems like those of England & Wales, Québec, the Netherlands and Norway, where organising flexibility seems to be less problematic, the organisation of accountability for judicial integrity in relation to case assignment receives strikingly little attention.

Next to the tension between the constitutional conditions for adjudication and the flexibility of judicial organisations, there is also tension between desirable organisation flexibility and the ability of persons to fulfil different roles in the organisation. A flexible organisation generally means that most of the people working there have multiple skills, and are able and willing to use them if necessary. The challenge is not only to organise this flexibility formally, but also to empower and motivate the participants to be flexible in their work. Given an organisational culture of flexible working relationships it will be much easier to implement formal changes in case management.
7. REFLECTIONS ON JUDICIAL ADMINISTRATION AND CASE ASSIGNMENT IN A COMPARATIVE PERSPECTIVE

The differences between the judicial systems of the countries considered make it impossible to provide one solution for insufficiencies concerning timeliness, efficiency and effectiveness in courts. So, we restrict ourselves to some themes that need different elaboration in different countries. These themes are:

- Organisational innovation.
- Flexibilisation of case allocation or flexibilisation of the allocation of judges?
- The ius de non evocando.
- Specialisation of courts and judges.
- Adjudication and mediation.
- Case allocation and ICT.

7.1 Organisational innovation

Enhancing efficiency in judicial organisations at a certain point leads to the question of how far one can go with piecemeal innovations without designing a new organisational framework. This question evolves naturally from efforts to gradually increase the allocation flexibility of cases and judges. There is a great organisational difference between organising adjudication within a jurisdiction with a number of territorially bound courts, and organising adjudication within a jurisdiction with one national court and a number of different hearing locations.

Both methods of organisation have to find an equilibrium between the demands for efficiency and therefore organisational flexibility on the one hand, and the constitutional demands for judicial independence & impartiality, transparency and accountability on the other.

For countries with a continental legal system, in order to increase the efficiency of existing court capacity it is inevitable to make the methods of allocation more flexible. The ways in which to do this are described in section 5. The question is how far this flexibilisation of case allocation and the allocation of judges can go without changing the formal organisation and making principled choices concerning organisation, transparency and accountability, judicial integrity included.

For countries with an Anglo-Saxon legal system, and for the Netherlands and Norway, the question should be considered whether the ways in which cases are distributed within the courts meet the demands of safeguarding judicial impartiality, transparency and accountability – or if current ways of internal case allocation suffice. Austria has somehow managed to stay ahead of questions concerning increasing the flexibility of case allocation by – typically – good court efficiency. Next to that, the enforcement of the *ius de non evocando* has been integrated into court administration and management.
7.2 Flexibilisation of case assignment or flexibilisation of the allocation of judges?

The increased efficiency of a continental judicial organisation requires that the territoriality principle is somehow loosened. The concept of organising the courts will change. Certain cases will have to be heard in the immediate vicinity of the interested parties, but other cases are quite indifferent to ‘location’, depending on the value and societal impact. So, certain cases can be distributed nationally amongst circuits or hearing locations, others have to be distributed locally. Judicial organisations would also have to require their judges to be flexible and to serve different hearing locations. So efficiency is best served if both case allocation and the allocation of judges is made more flexible.

7.3 Ius de non evocando

In England & Wales, Québec, Norway and the Netherlands, the elaboration of Ius de non evocando is generally speaking not considered to be a matter of principle. But in Italy, Portugal and Austria it is a right of those seeking justice to be able to resort to their ‘natural judge’. In these countries the principled opinion is that the safeguards for judicial independence and impartiality should also concern case assignment within the courts. In the Netherlands this is not primarily seen as a constitutional value, but an element of the policy directed at enhancing the transparency of internal working processes by means of quality insurance and enhancing quality management.

In ‘southern’ terms: the court organisation should meet the demands that internal case distribution is not biased – the other side of this principle being that it should not matter which judge deals with a case. We think the northern countries studied, except for Austria, do not live up to that demand from a formal point of view. We think that these countries should try to improve the way in which they organise the transparency of judicial integrity. This is not to say that judges in these countries are biased in any way, but that their organisations do not demonstrate how judicial integrity is guarded, especially concerning case allocation. Here also lies a point of criticism concerning the court organisations in Italy and Portugal. The inefficiency of the courts in these countries makes it worthwhile reconsidering the way the Ius de non evocando is operated. Effectively organising the transparency of internal case allocation – together with external judicial controls on internal case allocation – could replace the rigidly fixed and inflexible, current methods of case allocation. We consider such a change to be a possible solution to the delays in justice. The Austrian example shows that other solutions may work, but from the point of view of serving those seeking justice there is no reason why the Ius de non evocando should function as an obstacle to enhancing court efficiency.

7.4 Specialisation of courts and judges

The dominant attitude in all countries is that justice should be delivered equally to all, so that judges should be able to handle any case that comes before them. Nevertheless, specialisation on the part of judges and courts is an issue in almost all countries, with
different solutions. It is quite common for judges to specialize in certain types of cases either as a specialist or as a generalist within a court.

Especially concerning types of cases with an infrequent occurrence, a physical concentration of judicial expertise seems attractive from the point of view of enhancing juridical quality. In Portugal, however, such a thought has led to the far-reaching compartmentalisation of the courts. The content of the judgements of their ‘specialized’ and ‘special’ courts probably does meet juridical standards, but this is at the expense of the flexibility of the deployment of judges. In most countries, the problem of specialisation is scarcely addressed organisationally, e.g. by concentrating knowledge and skills in one court. Specialisation is almost absent in Norway, but it is especially present in the field of administrative law in England & Wales (tribunals), and in the Netherlands.

In cases of a relatively small demand for complex judicial expertise, the question is whether there should be a specialized court (a hearing location with offices), or alternatively a concentration of specialized judges in a ‘back office’, from where hearing locations are served in regions or even in the entire country. The answer to that question may depend on the kind of case, but also on the size of a country in terms of population and surface area. Intellectual property, for example, needs considerable expertise whereas the interests at stake are often so great that travelling substantial distances is not very important.

7.5 Adjudication and mediation

In all judicial systems we investigated, attempts have been made to relieve the courts or to enhance forms of alternative dispute resolution. This policy has primarily been successful primarily in Québec because of an increase in court fees and in Portugal in consumer cases. In the Netherlands serious attempts have been and are being made to develop forms of mediation as an alternative to judicial proceedings. The demand for adjudication is increasing almost everywhere. Should mediation be seen as an alternative to adjudication, as a supplement, or both? And who should pay for mediation? The government, litigants, or both? And: what would be the correct relationship between adjudication as a public service and as a basis for the collective memory of dealing with conflicts on the one hand, and mediation on the other? 12

7.6 Case allocation and ICT

Generally speaking, court organisations are not at the forefront in using ICT applications. This also holds true for remedies for bottlenecks in the allocation of cases. ICT is generally used. If this is done, it is primarily done to improve court services, e.g. Money Claim Online in England & Wales. We cannot point to a clear relationship

between the use of ICT and the speed of justice and court efficiency.\(^{13}\) This does not mean, however, that ICT tools could not play a greater role than they apparently do at present.

8. IN CONCLUSION

The general picture which has emerged in this exploratory international comparative study is that of different judicial organisations being challenged to meet the demands of society and political decision-makers. A firm part of this demand relates to deficiencies in dealing with criminal cases. Politicians almost everywhere complain that the courts are not able to deal with enough cases. These demands put judiciaries under pressure, and their administrators have been trying to invent measures to enhance the efficiency of courts and judges, in terms of productivity and timeliness of judgements. These measures generally require increased flexibility in the deployment of judges, and not all judges are prepared to cooperate. In most countries, measures to enhance flexibility concern the rules of procedure, judicial competences in case management, and a restructuring of the jurisdiction and competences of the courts and their units, for example the merger of first instance courts with different functional competences and enlarging the competences of single judge units. Next to that, in some countries measures are under way or already been implemented to make it possible that cases are allocated to the courts where the required capacity is available; on the other hand, measures are also being implemented or are being developed to make it possible for judges to be allocated to the court venue where a case should be heard, such as the deployment of a flying brigade. The rigid interpretation of the *Ius de non evocando* in southern countries generally functions as an obstacle to the exchange of judges between divisions and court units, and hence also to an easy exchange of judges between the courts and thus to efficient and timely adjudication. The allocation of cases within the courts in the Netherlands, Norway and the Anglo-Saxon countries is highly informal compared to Italy, Portugal and Austria.

Another aspect is that in some countries efforts are made to enhance the accessibility of the courts for larger groups, especially concerning 'small claims'.

Furthermore, it is a striking discovery of this study that the debate on the specialization of judges and courts in most European countries does not evolve around organizational conditions for juridical quality (cooperation of judges, the condition of court buildings, possible concentration of competences of scarce cases that need specialized knowledge), in combination with the furthering of efficiency and flexibility. Austria and the Netherlands seem to be an exception to that in this respect.

The flexible deployment of judges is the normal way of dealing with cases in countries with an Anglo-Saxon legal system. This does not necessarily mean that

Anglo-Saxon ‘circuit’ courts are timelier than continental courts. But their use of public resources seems likely to be more efficient than the continental courts with judges that are attached only to them.

Also concerning the allocation of cases to courts and to judges the question is how a balance can be struck between the demands for efficiency on the one hand and judicial independence and impartiality on the other, especially regarding the organisation of flexibility, transparency and effectuating accountability.