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EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE
(CEPEJ)

TERRITORIAL JURISDICTION

(This draft Report has been prepared at the request of the Delegation fo the Netherlands in the CEPEJ, as provided by Article 2.1d of the Statute of the CEPEJ).

I. GENERAL REMARKS

1. At the request of the Delegation of the Netherlands in the European Commission for the efficiency of justice (CEPEJ) and in accordance with Article 2.1.d of the Statute of the CEPEJ, three experts have been requested to present their countries' experience on questions relating to territorial jurisdiction, focusing in particular on the following questions :
 - a. Which mechanisms can be identified to allocate cases between courts ?
 - b. What is the optimal size of a court (for handling cases efficiently)?
 - c. What are the arguments in favour of and against creating specialised courts ?
 - d. What are the effects of selective forum shopping by parties on the functioning of the judicial system?
2. The following three experts have contributed to this Report :
 - a. Mr Denis Chemla, Lawyer at the Paris and New York Bars, President of the Association «Droit d'Urgence), Member of the French National Consultative Commission of Human Rights ;
 - b. Prof. Dr., Burkhard Hess, Professor of law, Law Faculty, University of Heidelberg, Germany ;
 - c. Mr Anders Lindgren, Deputy Director at the Ministry of Justice of Sweden, Department for procedural law and Court issues.
3. This Report contains, in Part II the contributions of these three experts, in Part III an abstract of the main conclusions and recommendations agreed during an expert meeting between the Council of Europe experts and Dutch experts in the Hague on 6 October 2003 and in Part IV the proposed follow up to be considered by the CEPEJ.

II. REPORTS BY THE CEPEJ EXPERTS

A. REPORT BY MR DENIS CHEMLA (France)

INTRODUCTION

Before dealing with these issues, I would like to clarify the notion of "territorial jurisdiction" as it is understood in France and as I think it should be used in the context of our seminar.

Territorial jurisdiction (also known as *compétence ratione loci*) is in France a purely "geographic" concept, which is quite similar to "venue" in the common-law system. Our Civil Procedure Code contains fairly precise provisions, which

regulate territorial jurisdiction and are used to direct cases to the court located in the appropriate area in the country.

The system is, as a matter of fact, similar to that laid out by Sections I and II of Chapter II (Jurisdiction) of EC Regulation n°44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

However, the French (and many other) conception of jurisdiction is also based on a second notion, subject-matter jurisdiction (*compétence ratione materiae*), which perhaps more importantly than territorial considerations, determines jurisdiction of certain courts over certain particular issues.

In order to answer the above mentioned questions, it seems to me that both concepts (territorial and subject matter) should be examined as they are both helpful and used when trying to organise the allocation of cases between courts.

This paper will focus exclusively on administrative and civil courts and will not deal with criminal justice (which has its own separate organisational issues which are quite different from those arising from territorial jurisdiction).

1. Which mechanisms can be identified to allocate cases between courts ?

Based on the experience in France, at least three criteria come to mind:

- a. the quality of the parties involved
- b. the subject matter of the dispute
- c. territorial considerations

a. Quality of the parties involved

This criterion is probably the most important one in the French system. The *summa divisio* in our court system is indeed based on the quality of the parties since it is made up of two separate and distinct branches: the judicial courts and administrative courts.

The administrative courts have general jurisdiction over all litigation in which one of the administrative organs of the French state is a party. This includes disputes between individuals and state operated hospitals, contractual disputes between companies and various governmental entities, and generally all disputes in which liability of the state or its various organs is alleged.

All other litigation must be brought before judicial courts.

The administrative and judicial courts have completely different organisations and even two different Supreme Courts at the top of each system. Of course, the line being sometimes not quite clear between both systems, conflicts of jurisdiction occur which are solved by a special Court called *Tribunal des conflits*.

Briefly summarised, each system's organisation is as follows:

Administrative system

Administrative Supreme Court
(*Conseil d'Etat*)

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Administrative Court of Appeal
(*Cour Administrative d'Appel*)

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Administrative Court
(*Tribunal Administratif*)

Appeals against decisions of the Administrative Courts are taken before the Administrative Courts of Appeal. The Administrative Supreme Court hears appeals against decisions of Administrative Courts of Appeal.

Judicial system

Supreme Court
(*Cour de cassation*)

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Court of Appeal
(*Cour d'appel*)

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Commercial Court¹ Employment Court² Civil Court³ County Court⁴ Social Security Cour

Even within the judicial system, the quality of the parties is an essential criterion, as commercial disputes between merchants (*commerçants*) must be brought before Commercial Courts. Again, this is the major division within the

¹ Tribunal de commerce

² Conseil de prud'hommes

³ Tribunal de Grande Instance

⁴ Tribunal d'Instance

⁵ Tribunal des Affaires de la Sécurité Sociale

judicial system which has caused much public debate recently as commercial courts have come under heavy criticism for, inter alia, their lack of professionalism (they are comprised of business people elected by their peers).

Therefore commercial justice, including bankruptcy, (at first instance) is administered by totally separate and specialised courts made up of judges with little or no legal training, elected by the local business community.

b. Subject matter of the dispute

Within the judicial system, cases are allocated between the different courts primarily on the basis of the subject matter of the dispute. France has quite a strict system of subject matter jurisdiction which can be summarised as follows:

As explained above, four main courts compose the first instance stage. The Civil Court has jurisdiction over any dispute concerning private interests unless the law has expressly conferred jurisdiction to another court. It also has exclusive jurisdiction over certain disputes such as real property, family matters or copyright, trademarks and patent cases. There are 175 Civil courts in France (usually one or two by *departement*.)

The County Court has jurisdiction over all civil matters up to ?7,600 and over certain specialised matters such as landlord and tenant disputes, elections, protections of minors and protected adults etc. There are 473 County Courts (one by *arrondissement*, the subdivision of the department). The County Court is the local court which is supposed to be closest to the general public.

As explained above, the Commercial Court has exclusive jurisdiction over commercial disputes and insolvency proceedings. There are 191 Commercial Courts in France

The Employment Court is also made up of elected judges (representatives of employers and employees). It has exclusive jurisdiction over all employment related disputes. There are currently 271 Employment courts in France.

Finally the Social Security Courts have exclusive jurisdiction over all disputes between individuals and the State Social Security system. There are 116 of them.

The Court of Appeal centralises all appeals against all of these courts' decisions. There are 35 Courts of Appeal (one or sometimes two by Administrative Region: Paris, Versailles, Douai, Reims, Rouen, Rennes, Aix en Provence, Nimes, Montpellier, etc.)

At the top of the pyramid is the *Cour de Cassation*, which is divided into three general civil sections, a commercial and financial section and an employment section. An appeal to the *Cour de cassation* is only possible on a point of law and it does not have jurisdiction to review findings of facts. If an appeal is successful the case is sent back to another *cour d'appel*.

c. Territorial considerations

Finally, purely geographic considerations are also taken into account in order to allocate cases between courts. In France, the Code of Civil procedure establishes precise rules of territorial jurisdiction (Chapter II – Territorial jurisdiction).

Having determined before which type of court has jurisdiction to hear his case, the plaintiff must determine before which particular court the case must be brought. In most cases, the plaintiff must sue before the court of the defendant's domicile (art. 42 NCPC).

In real property cases, however, suit must be brought in the court having territorial jurisdiction on the territory on which such real property is located (art. 44 NCPC).

In contracts cases, the plaintiff may sue either before the court of the defendant's domicile or where the contract-giving rise to the dispute is to be performed (art. 46 NCPC).

In torts cases, the plaintiff may sue in the court having territorial jurisdiction either on the defendant's domicile, or where the injury took place or where the consequences of the tort were felt (art. 46 NCPC).

One must also bear in mind that parties to a contract may choose to submit disputes arising therefrom to a court other than the one normally competent to hear such dispute, provided, however, that both parties entered into such contract in their capacity as business people (art. 48 NCPC).

These three elements –quality of the parties, subject matter and territoriality- appear to be the most commonly found criteria on which allocation of cases between courts is decided. However, based on the experience in France, such a method may give rise to lengthy litigation on jurisdictional issues, which a simpler system would probably prevent.

Indeed, these factors make accessibility of courts much more complex and it is not rare to see litigation going on for years on purely jurisdictional grounds. There is therefore much to be said for a simpler system, with fewer divisions and rules, in particular as regards disputes between individuals and the State.

2. What is the optimal size of a court (for handling cases efficiently)?

This question should be answered primarily by reference to the demographics and the business activities of the regions concerned. However, a fundamental issue in relation to the efficient handling of cases concerns the number of judges sitting on trial panels.

The general rule in France is that each case is heard by a panel of three judges (*principe de collégialité*). However, single judge panels tend to proliferate⁶. A 1970 statute provides that a president of a court may decide to adjudicate any particular case by a single judge to avoid court overload. Since this is an exception to the principle, the legislator excluded certain matters and provided for the benefit of the parties that they may request the transfer of the case before a three-judge panel.

However, apart from this case, there are many other single judge panels in France :

- *juge aux affaires familiales* (family judge), a specialized court within the *Tribunal de grande instance* that has jurisdiction over all issues related to family and persons law;
- *juge de l'exécution* (enforcement judge), established by in 1991 whose power cover all matters related to enforcement of court decisions;
- the Act on the improvement of the situation of victims of road accidents, adopted in 1985, provides that the *Tribunal de grande instance* generally hears such cases in single judge formation ;
- the County Court is also made up of a single judge.

In my experience, single judge panels are very helpful in order to handle cases more efficiently and, most importantly, more expeditiously. The resources of a court are heavily drawn upon when cases have to be judged by three judges.

By way of illustration, France has a population of 60 million and only 7,500 judges. Every year, over 13 million judgments are rendered. One can imagine how such a heavy workload could be better apportioned if most cases were heard by single judges.

As much as possible, single judges should be favoured. Three judge panels should be reserved to the most important cases. Although such a solution may be seen as concentrating too much power into the hands of a single person, it is also a guarantee for parties that their cases will proceed at greater speed the benefit of which, in the opinion of the undersigned, exceed the risk of abuse of power or of mistake.

3. What are the arguments in favour of and against creating specialised courts ?

First of all, it must be noted that French Law distinguishes between courts having general jurisdiction (*juridictions de droit commun*), which can hear any case on which jurisdiction has not been expressly transferred by law to

⁶ Doing this French legislator is trying to comply with sentences rendered by the European Court on Human rights in 2002, which considered that France violated the reasonable time provided by article 6 of the Convention because of length of proceedings.

another court, and special courts (*juridictions d'exception*, also named *juridictions spécialisées*, or specialized courts).

The trend in French Law favouring the use of specialised courts takes two forms: first, by establishing courts with a specific scope of jurisdiction and, second, by multiplying single judge courts.

Within the first category, certain courts are specialized because of their very composition:

- Commercial courts, which are composed of persons representing the commercial industry and having trader status. These persons are elected by their peers, which allow a better knowledge of commercial practice and customs.
- Employment Courts which are composed of elected judges. These courts are mixed courts, composed half of employers and half employees, elected respectively by a panel of employers and a panel of employees.
- Social Security Courts, which are composed of both professional and non-professional judges (a system called *échevinage* in France), more specifically of one civil judge, i. e. one of the judges from the *Tribunal de grande instance* having jurisdiction on the territory where the Social Security Matters Court seats, and two temporary judges, one representing the employees and the other representing employers and independent workers.

Finally, there are single judge courts having jurisdiction on specific matters, like Family Judges (*juges aux affaires familiales*), Children Judges (*juges pour enfants*), Sentence Implementation Judges (*juges de l'application des peines*) and Enforcement Judges (*juges de l'exécution*).

The reason of such diversity is the technicality of the matters involved (Enforcement Judges) or the necessity of a specific knowledge and approach (Family Judges, Children Judges).

In addition, one must point out that in recent years, a number of highly specialised courts or quasi-judiciary bodies have emerged, in particular in the wake of the economic "deregulation" which is transforming former welfare States such as France.

As utilities are being privatised, commissions, panels, and other boards are appearing with a remit to solve disputes in the area of electricity, water and other types of economic activities.

These new types of courts have joined other already existing autonomous quasi-judicial bodies, in particular the *Conseil de la concurrence* (Competition Council) and the *Commission des opérations de bourse* (Stock Exchange Commission), both located in Paris, which have considerable decision-making authority. For example, the Competition Council hears all matters concerning

anti-competitive practices and may directly render decisions and impose sanctions.

These bodies have their own rules of procedure and produce their own case-law, which, as always, becomes the reference for all practitioners. They form a separate (albeit not well defined) court system based entirely on specialisation.

Whether or not the creation of such specialised bodies –and of specialised courts generally- is desirable is a matter of considerable debate.

The arguments in favour of the creation of special courts revolve mostly around the complexity of the law. It is a well known fact that the law is more and more complex and that it is extremely difficult for judges and lawyers to remain general practitioners in their respective fields. For this reason, justice will be better served by specialised judges.

Similarly certain areas of the judicial activity demand other skills than purely legal. This is particularly the case for family or social matters where judges are requested to show social and psychological abilities. Clearly, given the financial impact of the necessary training to be received by judges, it is preferable to have specialised jurisdiction in order to maximise efficiency.

However, the multiplication of specialised courts creates numerous difficulties:

- it is felt by some (including the undersigned) that the emergence of autonomous quasi-judicial bodies is a way to exclude the traditional court system from important areas of economic law; given that the members of these specialised body are felt to be not always as independent as judges, their decisions may be criticised;
- specialised courts add to the complexity of the judicial system and for that reason alone should be kept at a minimum.

In fact, rather than creating more specialised courts and bodies, specialised sections of already existing courts should be created with specially trained judges and, participation of experts in the relevant field. The structure of the court system would remain intact, which is very important in order not to make jurisdictional aspects even more complex than they currently are. Yet, professionalism and specialism could still be ensured.

4. What are the effects of selective forum shopping by parties on the functioning of the judicial system?

With jurisdictional clauses, parties may derogate to general rules of jurisdiction. However, the effects of such clauses on the attribution of territorial jurisdiction is limited due to their limited scope.

Under French domestic law, such clauses are indeed valid only if they were agreed upon by parties contracting in their capacity of professionals, and provided also that these clauses have been very clearly specified in the agreement signed by the persons against whom it is invoked. Any clause that does not meet these requirements is declared invalid (art. 48 NCPC).

In international cases, the validity of such clauses is generally recognised, as best illustrated by article 17 of EC Regulation n° 44/01.

The effect of such forum selection is clearly to concentrate disputes in a certain number of courts where they would not otherwise always be heard. For example, in France, the Commercial Court in Paris hears probably more cases than most other Commercial courts in the country put together.

No statistics are currently available in France in order to measure the impact of such clauses on the allocation of cases.

However, given that this mechanism is a pure contractual creation, not much can be done at government level in order to regulate this flow, other than passing legislation which would restrict possibilities to enter into such agreements.

Such is not the trend currently followed. First of all, it would be impossible to pass legislation with an international reach which would be more restrictive than EC Regulation n° 44/01. Secondly, the French authorities feel probably comfortable with such clauses as most of them would designate well established, sizeable courts in important business centers which are probably best equipped to deal with these matters.

B. REPORT BY PROFESSOR, DR. BURKHARD HESS (Germany)

STRUCTURE

A. The Allocation of Cases between German Civil Courts

- I. The Organisation of the Civil Judiciary in Germany
- II. Subject Matter Jurisdiction
- III. The Role of Judicial Administrators (*Rechtspfleger*)
- IV. Territorial Competence

B. The Optimal Size of Courts

- I. Different Sizes of the Bench
- II. The Procedural Reform of 2002
- III. The Ongoing Discussion about the Organisation of the Judiciary

C. Specialised Courts and Courts/Divisions in Germany

- I. General Remarks

- II. Specialised Courts/Divisions in the First Instance
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- IV. The Allocation of Cases in The Federal Supreme Civil Court

D. Selective Forum-Shopping in German Courts

E. Concluding Remark

A. The Allocation of Cases between German Civil Courts

I. The Organisation of the Civil Judiciary in Germany

At present, the German court system is structured as a mixed three/four tier system: All lawsuits must be filed in the local or district courts as courts of first instance. Appeals are open to the courts of second instance (district courts and courts of appeal). A second appeal (which is restricted to a legal review of issues of general importance) is heard by the Federal Supreme Civil Court. The German judicial system relies on professional judges. Lay judges are only to be found in specialised courts (or departments of the courts) such as commercial chambers, patent courts and in the labour courts (which do not, as a matter of principle form part of the civil judiciary (see Art. 95 of the German Constitution)⁷.

The organisation of the German Court system is largely influenced by the federal system. The Federal States (*Bundesländer*) are responsible for the organisation and the financing of the district and appellate courts as well as for the remuneration of the judges and the other staff in the courts. Only the Supreme Civil Court (as well as the Supreme Courts in fiscal, administrative, social and labour matters) is maintained by the Federation. Therefore, any legal reform which encompasses the organisation of the courts is subject to the approval of the Federal States (in the Bundesrat, 2nd Chamber of Legislation). This is the main reason why reforms of the German judicial system have proved very difficult and protracted.⁸

All civil courts apply the proceedings of the German Procedural Code of 1877 which was originally inspired by the French "Code de Procédure Civile" of 1806. In 1877, the German Code was geared towards the principle of orality and immediacy, and it gave wide scope to liberal moral concepts. Today, it is largely accepted that the principal responsibility of the judge is to ensure an efficient and fair handling of any case in order to enable the parties access to justice and to give effect to their right to be heard (Art. 103 Basic Law, Art. 6 ECHR). In principle, the local and district courts (and the district and the appellate courts in the second instance) apply the same procedural rules. In small claim cases, the local courts can deviate from the procedural rules,

⁷ According to Art. 95 German Constitution (Basic Law of 8 May 1949) five different jurisdictions must be distinguished : The ordinary courts (dealing with civil and criminal matters), labour courts, administrative courts, fiscal courts and courts for social disputes.

⁸ See Gottwald, *Civil Procedure Reform in Germany*, 45 AJCL 753 (1995); the "conservative nature" of German legal culture is rightly stressed by Zuckermann, *Justice in Crisis: Comparative Dimension of Civil Procedure, Civil Justice in Crisis* (1999), pg. 3, 32.

structuring the proceedings according to the judge's discretion (sect. 495a Code of Civil Procedure).

In 2002, Germany enacted an important procedural reform⁹ which changed the appeal system¹⁰ and sought to reduce the case overload in the civil courts. Originally, the Federal Ministry of Justice also proposed to change the four-tier structure into a three tier judicial system (by integrating the district and local courts). This proposal met strong opposition from the Federal States, which were unwilling to reorganise their court systems by merging existing district and local courts¹¹. Strong opposition also came from the judiciary itself and from lawyers.¹² Judges complained of an "unwelcome economisation of the judiciary"¹³; lawyers (as well as politicians in small- and medium-sized cities) feared that the integration of local and district courts would diminish the importance of their home towns¹⁴. Further, the Federal States presented estimates, according to which the price of such a reform would amount to approximately DEM 1 billion (500 million ?)¹⁵. As a result, legislation was not aimed at the structural reform, but concentrated on simplifying the appeal proceedings.¹⁶ Some structural changes brought about by this reform, especially the allocation of most civil cases in the first and second instance to a single judge, will be addressed in this paper.

Statistics show that the ratio of judges to total population in Germany is very high compared to other European countries. In 1996, there were 706 local courts, with an average of 116.000 inhabitants per local court. Within the European Union, Germany has by far the highest number of judges per head of population, with one judge for every 3,600 inhabitants. Controlling for population, Germany has 27 times as many judges as the Netherlands. In 1995, 16,338 judges were employed in the courts of law under the auspices of the federal states and 262 were employed in the Federal Supreme Courts.¹⁷ Judges in "ordinary courts" deal with all civil issues, including proceedings with voluntary jurisdiction and all criminal trials. The total number of judges has been constant for years. Therefore, procedural reforms try to alleviate the

⁹ *Bundesgesetzblatt*. (Federal Statut Gazette) 2002 I 1887.

¹⁰ The principle of a full second instance in the appellate proceedings has been reduced to a limited review of the judgment in the first instance, see sec. 527 - 529 ZPO, Hess/Münzberg, *Die ZPO-Reform im europäischen Umfeld*, in: Hess, (ed.), *Wandel der Rechtsordnung* (2003), 159, 168 et seq.

¹¹ Statement of the Bundesrat, BT-Drs. 14/4722, Annex 2.

¹², "Die ZPO-Reform im europäischen Umfeld", in: Hess (ed.), *Wandel der Rechtsordnung* (2003), pg. 159 et seq.

¹³ Position Paper of the Deutscher Richterbund of March 1st, 2000, *Deutsche Richter Zeitung* (DRiZ) 2000, 88, *Musielak*, NJW 2000, 2769, Fn. 1 et seq.; *Renk*, DRiZ 2001, 45 et seq.

¹⁴ The draft was discussed at the 63. Meeting of German Lawyers (Deutscher Juristentag) in Leipzig (2000), *Verhandlungen DJT 63 II*, P 85 ff.; cf. Prütting, *Rechtsmittelreform 2000 oder: Der Staat spart und der Rechtsstaat leidet*, *Schriften der Kölner Juristischen Gesellschaft* 24 (2000); *Musielak*, NJW 2000, 2769 et seq.; *Hannich/Meyer-Seitz/Engers*, ZPO-Reform, pg. 37 - 119.

¹⁵ Statement of the Bundesrat, BT-Drs. 14/4722, Annex. 2.

¹⁶ It is still unclear whether the reform of the appeal system (which was also largely criticised by the legal profession) has proved to be successful.

¹⁷ The Federal Supreme Civil Court (*Bundesgerichtshof*) has 122 judges in 12 senates specialised in various aspects of civil and in 5 senates of criminal law. By contrast, the Dutch High Court comprises 25 judges, cf. Clark, "The Organisation of Lawyers and Judges", *IECL* 10 (2002), 3-139.

caselaw and to simplify the proceedings in order to reduce the judges' workload.

By contrast, the number of lawyers has grown considerably in recent years. In 1983, a total of 44,526 lawyers were admitted in the former West-Germany. In 1996, 78,810 lawyers were admitted throughout Germany (East and West). In 2000, more than 100,000 lawyers were practicing in Germany. Accordingly, the professional opportunities for young lawyers have been worsening.¹⁸ Compared with the Netherlands, the German society appears to be much more litigious. In 1990, Germans sued at more than double the rate of the Dutch in civil (including labour) matters. It seems that more lawyers in Germany create more litigation, while the legal tradition in the Netherlands is not as court-oriented as in Germany.¹⁹ As a result the performance of inkasso (collection)-proceedings by bailiffs, the acceptance for arbitration mediation proceedings, and conciliation services offered by insurance companies settle many cases which in Germany go to the civil courts.

II. SUBJECT MATTER JURISDICTION

"Subject Matter Jurisdiction" deals with the question of whether legal proceedings in a civil case are commenced before the local (*Amtsgericht*) or the district court (*Landgericht*). Subject Matter Competence is determined by sec .s 23, 23 a, 23 b and 71 GVG (*Gerichtsverfassungsgesetz* - Law on the Organisation of the Judiciary) and by certain special provisions of the German Code of Civil Procedure and other statutes.

1. Subject Matter Competence of the Local Courts

- According to sect. 23 GVG, local courts have general jurisdiction over pecuniary claims when the amount in dispute does not exceed ? 5,000²⁰. Additionally, certain matters are exclusively assigned to the local courts as courts of first instance without regard to the amount of dispute. The more important of these are:

- Disputes between land lord and tenant (*Mietstreitigkeiten*), under sec. 23 n 2a GVG.
- Family matters (*Familiensachen*), i.e. marital cases including divorce and the distribution of property²¹, sec. 23a n°4 GVG.
- Actions regarding parent-child relationships (*Kindschaftssachen*), sec. 23a n°1 GVG²².
- Maintenance claims, especially claims based on kinship or marriage relationship (*Unterhaltssachen*), sec. 23a n°2 GVG.
- The local courts are also competent for proceedings concerning enforcement and insolvency matters.

2. Subject Matter Jurisdiction of the District Court:

¹⁸ The economic situation of the legal profession has become a hotly discussed topic in Germany.

¹⁹ Cf. Clark, IECL 10-3 (2002), 3-80 et seq. ; Blankenburg in Gilles (ed.), *Anwaltsberuf und Richterberuf in der heutigen Gesellschaft* (1991); Zuckermann, *Civil Justice in Crisis* (1999), 3, 31 et seq.

²⁰ In calculating the amount in dispute only the aggregate principal amount of the claim is considered; interests and costs are not taken to account. If the return of an object is claimed, the value of the object is determinative.

²¹ These cases are tried by specialized family courts (*Familiengerichte*), which are special departments of the local courts exercising exclusive jurisdiction over family cases.

²² Sec. 640 (2) ZPO.

The district courts as courts of first instance exercise subject matter jurisdiction over all civil matters not assigned to the local courts. In particular, all pecuniary claims exceeding ? 5,000, as well on non-pecuniary claims, with the exception of actions regarding family and parent-child relationships, which fall under the exclusive jurisdiction of the local courts.

Regardless of the value of litigation, the district courts exercise exclusive subject matter jurisdiction in relation to some types of matters, the most important of which are:

- Actions against civil servants for violations of their duties which are directed either against the Federal Republic or one of the federal states for compensation of damages (*Amtspflichtverletzung*), sec. 72 GVG, 839 German Civil Code (BGB), art. 34 Basic Law (*Grundgesetz* or GG).
- Disputes concerning patents and antitrust matters (sec. 51 Patent Law, sec 87 et seq Antitrust Law).
- Actions for the annulment of certain resolutions under corporate laws (example: sect. 246 Law on Stock Corporations, sec. 61, 75 Law on Corporations with Limited Liability).

The latter disputes, which are expressly assigned to the district courts, are normally decided by specialized, commercial divisions of these courts, especially patent and antitrust matters.²³

III. The role of judicial administrators (*Rechtspfleger*)

1. Functional competence assigns responsibilities and judicial functions to single judges, chambers, senates, but also to bailiffs and courts clerks and to the judicial administrators (*Rechtspfleger*). The latter are very important for the functioning of the German judicial system in that most matters of less judicial importance are assigned to them (the assignment is effected by sect. 3 Law of the Judicial Administrators of 1969 (*Rechtspflegergesetz*). In civil matters, judicial administrators are competent for proceedings dealing with orders for payment (*Mahnverfahren*), enforcement matters²⁴ and insolvency proceedings.

2. In everyday practice, orders for payment (*Mahnverfahren*) are of utmost importance²⁵. These proceedings are open to any creditor who wishes to assert a pecuniary claim of any size. The creditor submits an application for a court order for payment of a debt (*gerichtlicher Mahnbescheid*) by filing in a form at the local court near to his or her place of residence. If the form is correctly filled out, the order is granted without any review of the validity of the claim. In most Federal States the proceedings are effected by electronic data processing. If the debtor does not pay within two weeks after the service of the court order, and does not raise any objection, the creditor may apply for a writ of execution to be issued. This writ may be executed against the debtor in the same way as a default judgment (sec. 699, 700 Code of Civil Procedure). In 1996, more than 8.1 million orders for payment were issued by the local

²³ These specialized divisions in the civil courts are explained below at C I 2.

²⁴ Judicial administrators are competent for the garnishment of debts, sec. 828 Code of Civil Procedure and for the seizure of non-moveables. Bailiffs are the competent organs for the seizure of chattels.

²⁵ A description is to be found by Coester-Waltjen, in Rechberger/Kodek (ed) *Orders for Payment in the European Union* (2002), 149-164.

courts. According to statistical research, only a little more than 10% of all cases are objected to by the debtors. If an objection is raised, the proceedings must be continued by the creditor in accordance with the general rules of civil procedure (sec. 696 ZPO). As a result, most civil cases are effected by claim forms on a computerized basis without any intervention of a judge.

IV. Territorial Competence

The territorial distribution of the civil courts corresponds in principle to the administrative structures in the Federal States. For historical reasons, court (or at least so-called *Außenstellen* – external departments) of local and district courts still exist in small municipalities. Therefore, sizes of local and district courts differ considerably. While in big cities (as Munich, Cologne, Stuttgart or Hamburg) district courts comprise 100 – 200 judges²⁶, small district courts in the countryside are composed of 12-15 judges sitting in 3 civil and 1 commercial chamber²⁷. Some distribution lists (*Geschäftsverteilungspläne*) showing the composition of different courts are annexed to this report.

B. The Optimal Size of the Courts

I. Different Sizes of the Bench

Traditionally, the bench of a district court in civil cases consists of three judges, while the jurisdiction of the local court is exercised by single judges. The bench in the appeal courts usually consists of three judges. The same number is necessary when the court of appeal decides whether leave to appeal should be granted. In the Supreme Federal Civil Court, each senate consists of seven judges, the bench decides in a composition of five judges.

The composition of the benches with several judges in the district courts and in the courts of appeal is not undisputed. During the 1990s, accounting firms evaluated the efficiency of the German judicial system and criticized the bench as over-staffed.²⁸ Seen from a purely legal perspective, local and district courts apply the same procedure. Before the procedural reform of 2002, proceedings in the local and regional courts did, in fact differ considerably, as a judge at the local court had a case load of roughly 570 cases a year whereas a judge in the regional court only had to cope with 140 cases a year²⁹.

Since 1981, the German legislature has taken steps towards strengthening the single-judge system.³⁰ On several occasions, sec. 23 n° 1 GVG has been amended in order to enlarge the subject matter competence of the local courts. As a result, the amount in dispute rose from 5.000 DEM (1983), 6.000 DEM

²⁶ Ex.: The Munich District Court (the biggest court in Bavaria) consists of 176 judges and a total staff of 446 persons. It is divided within 34 civil chambers, 17 commercial chambers and 30 chambers dealing with criminal proceedings, <http://www.justiz.bayern.de/lgmuenchen1/ueber/ueber.html>.

²⁷ Ex.: The Deggendorf District Court (located about 50 km from Munich), <http://www.degnet.de/behoerden/justiz-deggendorf/>

²⁸ Koetz/Frühau, "Organisation der Amtsgerichte", Sonderdruck *Bundesanzeigerv.* 2.2.1992.

²⁹ See Gottwald, "Civil Procedure Reform in Germany", 45 AJCL 753, 756 with further references.

³⁰ The adoption of the single-judge system has been discussed in the legal literature since 1931, Schilken, *Gerichtsverfassungsrecht* (3rd ed. 2003) n° 362; Wolf, *Gerichtsverfassungsrecht* (6th ed. 1987), S. 13 II.

(1991) to 10.000 DEM (1993). By assigning most of the caseload to the local courts, the German legislator changed to a large extent the collegiate approach into a single-judge system.

In the district courts, the conditions under which a case could be transferred from a bench to a single judge were also continuously extended. According to sec. 348 of the German Code of Civil Procedure (1977), the civil division of the regional court should (at its discretion) transfer cases to one of its members who sits as a single judge. In 1993, sec 348 of the German Code of Civil Procedure was amended and the transfer of cases to a single judge was formulated as a rule. Nevertheless, in the practice, the divisions only followed this rule to a varying degree. The figures showed that, on an average, at least 40% of all regional court business was dealt with by a single judge.³¹

II. The Procedural Reform of 2002: Introduction of the single-judge system for the first instance

By amending again sec. 348 of the Code of Civil Procedure, the German legislature introduced the single judge system in the district courts (as first instance courts) as a rule. But the legislation did not change the principal composition of the bench: Therefore, the judicial panels in the district courts are still organised as chambers (with three judges) or as senates in the appellate courts (also composed of three judges). This organisation is necessary because appellate proceedings are still regularly decided by the full bench.³²

According to the actual wording of sec. 348 (1) ZPO, the civil chamber in the district court regularly deals with cases by one of its members. The single judge transfers the case back to the bench only in exceptional circumstances, such as if the legal or factual issues are unusually complicated or of fundamental importance (sec. 348 (2) ZPO). If the distribution list of the court (*Geschäftsverteilungsplan*) transfers specific matters to a chamber (which are listed in the second paragraph³³) the cases are decided on the bench. According to sec. 348a ZPO, however, the chamber must transfer a case which falls under sec. 348 (2) ZPO to one of its members if the legal or factual issues are not complicated or of principal importance.

Appellate proceedings, however, are still regularly decided by the full bench. The hearing is prepared by a single judge (sec. 527) and the single judge also decides the case if the legal or factual issues are not complicated or of principal importance (sec. 526 ZPO). If the first instance decided the case as a bench, the appellate court also deals with the remedy as a bench (sec. 526 (1) n° 1 ZPO). The admission (leave) to appeal is, according to sec. 523 (1) ZPO, always decided by the full bench. As a result, one can say that the German reform of 2002 finally adopted a “mixed system” in that, while in the 1st

³¹ Gottwald, 45 AJCL, 753, 756.

³² The single judge system does not apply in the Federal Supreme Civil Court.

³³ These matters include, among others, media disputes, banking matters, medical malpractice, disputes arising out of constructions, professional liability of attorneys, notaries and accountants, commercial disputes, insurance matters, transportation intellectual property rights and disputes arising out of information technologies.

instance the single-judge system prevails, the appellate court regularly decides on bench as a bench.³⁴

III. The Ongoing Discussion about the Organisation of the Judiciary

The complicated system shows that the single judge system is still met with strong resistance from the judiciary³⁵. Numerous exceptions to the single judge system in 348 (2) ZPO were added during the legislative proceedings. The legislative intent of the reform remains, however, clear: In the first instance, each case is usually decided by a single judge. The main effect of the new provisions is to assimilate the caseload of local and district courts and to increase the capacity of the latter. The socio-political effect of the reform might even go further. If cases in the local and district courts are handled identically, an integration and centralization of both jurisdictions in order to create a comprehensive three-tier court structure might be effected in the future.³⁶

C. Specialised Courts in Germany

I. General Remarks

As explained above (A I), the principal structure of the German Court system of five separated jurisdictions and court hierarchies is based upon a specialisation within the judiciary (and also within the legal profession)³⁷. Normally, lawyers are specialised in one or two specific jurisdictions. The same situation applies to the judges: normally an administrative judge does not change to the criminal or to the labour courts. However, in the “ordinary courts” judges normally change from the criminal to the civil bench, sometimes on several occasions during their professional career.

Inside the civil courts, further specialisation is sometimes provided by express legal provisions: In the district courts, the establishment of commercial chambers is prescribed by law (sec. 349 ZPO). In the local courts, the establishment of “divisions for family matters” is mandatory according to sec. 23b GVG.³⁸ But apart from these express legal provisions, the courts themselves are free to organise their internal structure. This freedom is derived from the constitutional principle of the separation of powers. The distribution of the caseload is regulated by the so called “distribution list”

³⁴ Cf. Schilken, *Gerichtsverfassungsrecht* (3rd ed. 2003), n° 362.

³⁵ Constitutional arguments are put forward by Vosskuhle/Sydow, *Juristenzeitung* 2002, 673, 676 et seq.

³⁶ The present geographical decentralization of local and district courts is party-friendly, but its maintainance might be too expensive; the advantages of a “decentralized justice” might be counter-balanced by an easier access to justice by electronic media.

³⁷ At the law schools, however, young lawyers are educated and examined in all branches of the law as so-called „Einheitsrechtsjuristen“ (standard [universal?] lawyers). Specialisation mainly takes place during the professional practice of lawyers.

³⁸ Judgments of the family courts are reviewed by “senates for family matters” in the Court of Appeals (Oberlandesgerichte) according to sec. 116 (2), 119 (1) n°1 GVG.

(*Geschäftsverteilungsplan*) of the court (sec. 21e and 21g³⁹ GVG). This distribution list is established by the presiding committee of the court. It must allocate any case to a predetermined single judge (or division) of the court in a very precise way in order to meet the constitutional requirements of the “lawful judge” (art. 101 I 2 Basic Law).

In practice, the allocation of cases is effected in different ways. The traditional (and more often used) manner is to transfer all cases to the different judges (or chambers) according to the first letter of the name of the defendant. Some courts (especially appellate courts) distribute the cases by relying on the territoriality (specific chambers/senates are competent for the review of judgments coming from specific courts. During the last few decades, most courts changed the allocation of cases and introduced a system of distributing some cases according to the subject matter. This transfer shall enable specialized chambers to deal with complicated matters which require a specific experience or even technical knowledge of the bench. These matters are especially medical malpractice, construction disputes, media disputes, banking matters, professional liability of attorneys, notaries and accountants, commercial disputes, insurance matters, transportation, intellectual property rights and disputes arising out of information technologies⁴⁰.

II. Specialised Courts/Divisions in the First Instance

1. Specialisation in the local courts

The internal structure of the local courts is to some extent prescribed by the GVG: Local courts must provide for family divisions, divisions for non-contentious matters⁴¹ and for enforcement and insolvency proceedings. The organisation of the civil division depends mainly on the size of the court. In small local courts, the distribution list allocates cases among the (single) judges according to a rotational scheme, for example, by the first letter of the defendant’s name, the territorial distribution or similar criteria. Large local courts allocate some cases according to their subject matter, especially landlord and tenant disputes, maintenance disputes and non-contentious matters.

2. Specialisation in the district courts

The internal structure of the district courts is also to some extent prescribed by law: According to sec. 93 et seq. GVG they must establish one (or several) commercial chambers (*Kammer für Handelssachen*), in some district courts

³⁹ This provision deals with the distribution of cases inside the chambers and senates which must also be regulated in advance - a distribution of the cases by the presiding judge is not allowed.

⁴⁰ This kind of distribution was facilitated by legal provisions of the procedural court providing the transfer of commercial disputes to “commercial chambers” in the district courts, sec. 349 ZPO, sec. 93-113 GVG.. The bench of a commercial chamber (division) consists of one professional judge and two lay judges (merchants or like businessmen, sec. 109 GVG). It is up to the parties to apply for the transfer of a commercial case to the specialised chamber, sec. 96-102 GVG

⁴¹ The supervision of guardians, testamentary administrators, the maintenance of commercial register and land registers. Most non-contentious matters are effected by judicial administrators.

the Federal States established specialised panels for antitrust matters (sec. 91 Law against Unfair Competition) and for patent disputes. The distribution lists of most of the district courts allocate the cases partially according to the subject matter, the rest are distributed according to a rotational scheme (normally, according to the first letter name of the defendant). Most of the larger district courts have established specialised chambers competent for media disputes, medical malpractice, disputes arising out of constructions of buildings, for professional liability of attorneys, notaries and accountants, for disputes on intellectual property rights and for disputes arising out of information technology. The internal structure and the allocation of cases also depend on the different size of the district courts (see supra).

III. Specialisation in the Second Instance

The distribution of cases in the appellate courts is made in a similar way: Most courts adopted a mixed system, relying partially on the subject matter of the disputes and partially on a rotational scheme. Appellate proceedings are normally allocated according to a territorial scheme: some senates/chambers of the appellate/district courts are competent for remedies against the judgments of distinct local or district courts.⁴²

The procedural reform of 2002 introduced a new kind of specialisation of the court of appeals (*Oberlandesgerichte*): According to sec. 119 (2) n° 1 GVG (2002) these courts hear all remedies against first instance judgments (of the local and the district courts) if a party is located abroad or if the first instance court applied private international or foreign laws. The legislator based this specific competence of the court of appeals on the need to ensure a good quality of case law in international cases]. Some Courts of Appeal (especially the Courts of Appeal in Karlsruhe and Stuttgart) transfer these cases to one or two specialized senates.

IV. The Allocation of Cases within the Federal Supreme Civil Court

By contrast, in the Federal Supreme Civil Court all cases are distributed among the 13 senates (consisting of 7 judges) according to their subject matter. This distribution scheme can be explained by the fact that the Supreme Civil Court is to decide matters of principal importance and to interpret and to develop civil law in a consistent and uniform way.

D. Selective Forum-Shopping in German Courts

At the domestic level, selective forum shopping is not a major issue in Germany. As all cases are – in principle – open to a second appeal which is decided by the Federal Supreme Civil Court As a matter of principle, a uniform outcome of the litigation is guaranteed (regardless of the court where the case was initiated)⁴³.

⁴² According to sec. 100 GVG, senates for commercial matters also exist in the Courts of Appeal (*Oberlandesgerichte*).

⁴³ An exception to this situation is to be found in lawsuits dealing with unfair trade practices. These cases are regularly dealt as provisional measures. As provisional measures are not subject to a second appeal, a different case law exists to some limited extent between the different Court of Appeals. It has been reported that some plaintiffs tried to select a

In trans-border cases, the situation is quite different, because the choice of the court often determines the applicable law and therefore the outcome of the litigation. Moreover, due to the universally accepted “lex fori-principle”, the choice of a court also determines the applicable procedural law. Due to considerable differences between the procedural laws in the civil and common law countries, the incentives for forum shopping in trans-national litigation—even within the European Union – are still high⁴⁴.

To some extent, forum shopping also exists at the domestic level: Parties may conclude a forum selection agreement (sec. 38 – 40 ZPO) and choose a specific local or district court. According to the case law of the Federal Supreme Civil Court, which is approved of by the predominant legal literature, they are not free to select a specific division/chamber of a district court⁴⁵. Therefore, business will usually choose arbitration instead of general courts. In patent infringement proceedings, claimants often select the district and appellate courts in Düsseldorf, because its chambers are experienced in these issues.⁴⁶ A similar trend may be found in litigation pertaining to libel suits arising out of publications in the media. These cases are often dealt by the district and appellate courts in Hamburg and Munich. In these cases, plaintiffs are free to select a competent court, because the territorial jurisdiction is determined by the place of the wrong which according to sec. 32 ZPO⁴⁷ is anywhere where the newspaper was distributed or the broadcast was received.

Concluding Remarks

The current trend concerning the distribution of cases among the German civil courts seems to be an ongoing specialisation of the judiciary and the legal profession. This trend is due to the growing complexity of the legal system as a whole. Specialisation in the judiciary seems to be adequate, in order to guarantee the efficiency and good functioning of the judicial system as a whole. Specialisation can be achieved within the civil courts by allocating the cases to specialized divisions or single judges according to their subject matter. The danger of specialisation is a loss of knowledge about the legal system as a whole. This danger may be counter-balanced by a broad legal education at the university level covering all fields of law. Germany lacks, however, a comprehensive structural reform of the organisation of its court system.

C. REPORT BY MR ANDERS LINDGREN (Sweden)

GENERAL INTRODUCTION

The ongoing reforms of the Swedish judiciary

“favourable” District Court when seeking an injunction. The defendant may, however, always initiate the main proceedings (sec. 926 et seq. ZPO) and bring the case to the Federal Supreme Civil Court.

⁴⁴Hess, “Der Binnenmarktprozess”, *Juristenzeitung* 1998, 1021 et seq.

⁴⁵ Cf. Stein/Jonas/Bork, *Zivilprozeßordnung* (Commentary, 22nd ed. 2003), Sec. 38 para. 2 with further references.

⁴⁶ This choice may also be explained by the specialisation of lawfirms in Düsseldorf.

⁴⁷ This head of jurisdiction corresponds to art. 5 para. 3 Brussels’ Regulation (EC 44/01).

The reform of the judiciary is an ongoing task that probably never ends, as the demands of the judiciary should follow the development of the society. In 1999 the Government intensified the work to reform the judiciary. The reform program is carried out in a four way street model, the geographical or external organisation of the courts, the internal organisation, the purification of the courts assignment (relief of non-judicial tasks) and the procedural rules. The overall keyword for this reform program is "the citizens perspective". The main part of the work concerns the general courts.

The Government stated in an action plan, to sum up, the following regarding the organisation of the Courts⁴⁸. If the courts are to have any prospect of meeting the demands that will be placed upon them in the future, the judicial and administrative viability of the courts is a critical issue. The general principles or objectives underpinning the reform of the district courts include: accessibility, a stronger organisation to handle preparatory work, opportunities for further training on a regular basis, specialisation, good recruitment prospects, and opportunities for geographical coordination with other agencies in the judicial system. In organisational terms the solution should be to create larger court districts. There are a number of ways to go about this. It is however important to emphasise that the organisation of the district courts should be designed to suit the special conditions in each region.

The following concentrates on the situation in the courts in the first instance unless mentioned.

The organisation of the courts

The size of Sweden is about ten times the size of the Netherlands but has approx. half the population. The major part of the population lives in the south half and along the coastline to the Gulf of Bothnia. Sweden is divided in counties, which are divided in municipalities.

The judiciary contains of two parallel court systems. The general courts deals with civil and criminal cases (district courts, appeal courts and the Supreme Court). The proceedings are principally oral. The district court comprises at least one municipality. There are about 675 judges including non-ordinary judges (i.e. reporting clerks and associate judges). They receive about 130 000 cases/year and settle the corresponding number of cases. About 50 percent are criminal cases and 50 percent are civil cases.

The administrative courts deal with administrative cases (county administrative courts, administrative courts of appeal and the Supreme Administrative Court). The proceedings are usually in writing. The county administrative court comprises of one county. There are about 220 judges (including non ordinary judges). They receive about 90 000 cases/year and settle almost the corresponding amount. The largest number of cases regards social assistance, social insurance and taxation.

⁴⁸ Governmental writing (skriv.1999/2000:106) The reform of the Judiciary - An action plan. This action plan was followed up by Governmental writings skriv.2000/01:112 and skriv.2002/03:126 in which the Government presented the achieved results and forthcoming work.

Each court is divided into departments and/or divisions. A division usually consists of one judge, one or two court clerks and one secretary. Cases are usually distributed between departments/divisions by the type of cases (for example the department for family law) or by the division of a municipality or municipalities (for example the division for the municipality of Mora). In many ways a division functions as an individual independent court.

The district courts are spread very differently over the country. For example, within a radius of 100 km from the capital Stockholm there are twelve district courts while the District court in Lycksele⁴⁹ covers about 35 850 sq km with about 42 000 inhabitants.

Further information in English about the Swedish judiciary is available on the website <http://www.dom.se>.

WHICH MECHANISMS CAN BE IDENTIFIED TO ALLOCATE CASES BETWEEN COURTS?

The paper stresses that the problem is that the courts receive different numbers of cases. This leads to a situation where city courts are overloaded with cases while the provisional courts face a more manageable workload.

The current situation in Sweden

The situation in Sweden is rather divided when comparing the results courts of different sizes have achieved. There are two main mechanisms to allocate cases between courts, legislative and organizational. The Swedish procedural laws provide for a geographical allocation. There have however been organisational solutions that have had effect also on the allocating of cases. There are a lot of variables to consider when estimating the infrastructure of the judiciary. As mentioned above the situation in Sweden is such that regional considerations must be taken.

Organizational solutions

The geographical or the external organisation of the judiciary

The constitution provides for provisions concerning the functions of the courts relevant to the administration of justice, the principal features of their organisation, and court procedure shall be laid down in an act of law⁵⁰. This means that it is the Parliament who has the power to decide upon such issues. The Parliament has however delegated to the Government to decide upon the division of court circuits⁵¹. The Government however always notify the Parliament about forthcoming changes.

By the end of 1997 there were 92 district courts. 25 of those consisted of one or two judges and their staff. There is however no immediate connection

⁴⁹ Lycksele is in the County of Västerbotten, approx. 745 km north of Stockholm.

⁵⁰ The Instrument of Government, Chapter 11, Article 4.

⁵¹ The Code of Judicial Procedure, Chapter 1, The Administrative Court Procedure Act, Article 1, The Governmental decree (1982:996) on division of court circuits, The Governmental Decree (1977:937) on the competence of the administrative courts.

between the size of the court and efficiency. One way to avoid the obvious exposure of the small courts is to amalgamate smaller courts into larger courts. The decision about the number and location of courts is delegated by the Parliament to the Government. This instrument has, until recently, almost never been used unless specific circumstances existed.

Since 1999 30 district courts has been amalgamated into 12 courts. This has been done in mainly two ways. The first way was to simply amalgamate two or more courts, creating one large court. The other way was to create a large court circuit while keeping the courts in a common organisation (the so-called several places model). With this latter solution the geographical connection could be kept while using the advantages of a large court. One effect was that cases should be allocated (or re-allocated) quite smoothly between the courts.

The Swedish National Audit Office was assigned by the Government to review the reforms regarding the changes⁵². Regarding “the several places model” the advantage was that it kept the local connection, that the labour market in the municipalities concerned did not change and that the symbol or value of having a court was intact. However, the disadvantages were in majority. The flexibility aimed for in the use of resources was not achieved; the workload was at large to be unequal due to the fact that the distribution of cases still was based upon geographical division. The distribution of cases created a lot of unnecessary administrative work that might cause damage to the rule of law itself. Finally, there were also difficulties for the management to survey the organisation and the activities. The disadvantages could be eliminated if the collected resources could be used more efficiently by the management.

The Government also assigned a commissioner, with the starting point in the National Audit Office report, to evaluate the changes⁵³. A reference group consisting of representatives of the parties in the Parliament was connected to the commissioner. He recommended that the reform should continue but advised against the “the several places model”. Besides the fact that the local connection could be upheld, the disadvantages of the model outweigh the advantages. He specially notified the difficulties to take advantage of the flexibility, the difficulties to have an efficient management and the obvious risk for error and double work in the handling of cases between courts.

The Government has recently informed the Parliament about the conclusions drawn by the National Audit Office and the commissioner and has stated that the “several places model” will not be used unless special reasons in the region concerned motivates such solution⁵⁴.

One part of the reform program is the amalgamation of the administration of the district court and the county administrative court that resides in the same municipality. Such co-operation leads to exchange of capability between the judges and other staff but also efficient use of resources.

⁵² The National Audit Office report: District courts in changing (RRV 2002:9).

⁵³ The Committee on evaluation of the changes of the court report: Changes in the organisation of the district courts (SOU 2003:5).

⁵⁴ The Governmental writing The continuation of the reform for the district courts (skriv.2002/03:126).

The internal organisation of the courts

Appointing judges

It is the Government who appoints judges and has the final decision whether a vacancy should be replaced or whether a court should establish a new post as a judge. This is one way to direct resources. (The number of judges at a certain court is thus not fixed.) Due to the fact that judges are appointed for life this is however a rather blunt instrument.

Judges are appointed in accordance with the constitution and a special law⁵⁵. Judges are usually appointed to serve at a specific court. The provisions provide the judges their independence and that they cannot be removed from office. These provisions also provide an obligation for judges to serve in a higher position in his or her own court but also, that he or she is obliged to temporarily take part in another courts hearing of a case. It occurs from time to time that judges are appointed to serve in another court. When such situations occur the courts involved usually reach an agreement on the cases or number of cases that the court or the judges will receive. A judge has never been forced to serve in another court against his or hers will.

The number of judges in the bench

In civil cases the bench in the first instance usually consists of three judges or one judge. In criminal and administrative cases the bench usually consists of one judge and three lay assessors.

The bench in the appeal courts usually consists of three judges⁵⁶. The same number was necessary in e.g. hearings whether a leave to appeal should be granted. This was changed to two judges in the administrative courts of appeal. As a department consists of five or six divisions (judges) this change made it possible for a department to have parallel hearings.

Allocation of cases within a court

One way to avoid delays and backlogs is to find ways within the individual court for an optimal allocation of cases. The allocations of cases between the courts are laid down by law. The allocation between the individual judges is laid down in a Governmental decree⁵⁷ which rules that distribution should be hazardous but should at the same time respect the need for a fair workload. Cases connected should be distributed to the same division.

As mentioned above the division of a court functions very much as it own court. Within the reform program this issue called for a review of who was

⁵⁵ The Power of Attorney Employment Act (1994:261).

⁵⁶ In some cases with two lay assessors.

⁵⁷ The Governmental decree (1996:381) with instruction for the district courts, the Governmental decree (1996:382) with instruction for the county administrative courts.

doing what in the courts. More or less has judges, maybe by tradition, been involved in almost every moment of the handling of cases. Judges had been checking services of a writ and signatures of the parties, doing legal research, having direct contact with parties' legal representatives, prepared the hearings, hear the case and finally taking part in the proofreading of the judgements.

It was obvious that it was necessary to look for a different internal organisation and division of labour. A court in the Stockholm region started to realise those thoughts. A strong preparatory organisation but also a breach of the division borders was in focus. If two or more divisions could cooperate this would enable the cases to pass through the court without unwanted delays. An experimental work was carried out with "division-groups". Incoming cases, normally distributed between a couple of divisions, was literary put in a large pile from which pile the preparatory staff fetched and prepared the cases. When cases were ready for hearing they were brought before a judge. This way of working gave the sought-after result. The experiment was made possible by a specific Governmental decree that allowed the judges in some specified district courts to co-operate. Today a lot of district courts and county administrative courts but also appeal courts perform different forms of such co-operation. This experimental work has however not been finally evaluated yet. And there are legal issues that might have to be solved.

Specialized or special courts

One way of allocate cases in a certain direction is to establish special courts, detached or integrated. (See paragraphs 55-73.)

Re-organisation of authorities

The reorganisation of the authorities might affect the allocating of cases. Today are the governmental authorities usually organized in one large central administrative board (e.g. the National Tax Board) and independent regional authorities (e.g. the ten County Tax Authorities). The idea is to create a large Tax Authority, which would benefit from the possibility to efficiently make use of the resources without the borders between the individual authorities. Following the rules about competent court this reorganisation would lead to a situation where the County Administrative Court in Stockholm would be the only competent court in the country for taxation matters. This was an unwanted side-effect and the Government also put forward a solution that would allocate cases in the old way.

Legislative mechanisms – forum and allocation

Whether a court is competent or not to hear a case is a decision based upon the individual courts indiscretion. If a court finds that it is not competent it should hand over the case to the competent court.

The main rule regarding forum in civil cases is that the competent court is the court for the municipality where the defendant resides. Legal persons are considered to be resident where the board has its seat⁵⁸. In criminal cases the competent court is the court for the municipality where the offence was committed. If the suspect has committed two or more crimes, prosecution for all offences may be instituted in one of the competent courts⁵⁹.

There are no general possibilities for district courts to hand over cases to other district courts. In certain situations where cases could be joined in one case the Supreme Court can decide, upon application of one party or upon notice by a court, that cases should be joined in proceedings in one court.⁶⁰ Such decision presupposes that the solution has substantial advantages of the handling of the cases but no significantly inconvenience for the parties.

In administrative cases the competent court is the court in the county where the decision in the matter was taken in the first instance, usually where the (local) authority is seated⁶¹. Regarding the possibility to hand over cases the law is rather flexible. Cases, which are closely connected to one another, might be handed over to another court if this can be done without any substantial inconvenience for the parties. The law also states a general possibility for an administrative court to hand over cases to another administrative county court if there are special reasons and this can be done without any substantial inconvenience for any party⁶². The courts in question have to reach an agreement about the re-allocating of cases. Otherwise the question is dead. If cases are handed over the courts are obliged to notify the parties⁶³.

This possibility was introduced mainly by procedural-financial and flexibility reasons. Although the wording is quite open the intention was not to eliminate consequences of the competence rules or differences in the workload. Situations considered was e.g. cases regarding different fiscal years or where the individual party has moved.

Recommendations

My conclusion is that a united judiciary is to be preferred. The court circuits should follow the natural borders of a county or a municipality or if appropriate, counties or municipalities. The size of the courts should follow the specific needs of the court circuit, e.g. population. Rules on re-allocating of cases and cooperation between judges should be considered where appropriate. Some issues to consider in this context are

- Allocating or re-allocating cases?
- In what situations and for what reason should re-allocation be considered?
- Who should have the power to initiate re-allocating?
- How is the other court engaged during the hearing of this issue?
- Who should have the power to appeal a decision of re-allocating?

⁵⁸ The Code of Judicial Procedure, Chapter 10.

⁵⁹ The Code of Judicial Procedure, Chapter 19.

⁶⁰ The Code of Judicial Procedure, Chapter 14.

⁶¹ The Supreme Administrative Court Yearbook, Cases no R 1995:20 and R 1997:13.

⁶² The Administrative Court Act, Article 14.

⁶³ The Governmental Decree (1977:937) on the competence of the administrative courts, Article 8.

WHAT IS THE OPTIMAL SIZE OF A COURT (FOR HANDLING CASES EFFICIENTLY)?

The paper stresses whether there is an optimal size of a court. It also states that experience shows that large courts are less efficient and that small courts are vulnerable.

The current situation in Sweden

The problems mentioned are part of the motives for the ongoing reform program and especially for the external organisation of the courts. (See paragraphs 1-2.) This work is however not connected to a specific size of the “new” courts. This issue of size has however been discussed over the years.

The optimal size - a retrospective

During the 20th century, until 1969, the Swedish judiciary was divided into 122 “provincial-courts” and 29 “city-courts” The principle for the size of the courts was that no “provincial-court” should be larger than it could employ maximum one judge and a couple of court clerks and secretaries. The starting point for the “city-courts” was that they at least should employ minimum three judges.

The external organisation has since 1969 been the task for a number of different governmental committees and investigations. (The present organisation of the administrative courts was established in 1979 and has since then in principal corresponded to the counties.)

The latest Governmental committee on this issue was appointed in 1995. The instruction was, among other things, to propose where the courts should be placed in the future. Another issue was the connection between the district courts and the administrative courts. In 1998 the Government withdraw the committee but the chairman was instructed to compile and publish the unfinished work.⁶⁴

The committee had begun to compare district courts of different sizes from different points of view⁶⁵. Issues compared was

- The average cost for a case
- The cost for premises
- The average circulation time spent on a case
- The character and type of cases
- The number of non-ordinary judges (reporting clerks and associate judges) working in the courts
- The numbers of days´ judges spend on further education

⁶⁴ The Organisation of the Judiciary – a compilation of the ground-material from the Committee on the Judiciary (SOU 1998:135).

⁶⁵ The Committee compared district courts in groups with one or two, three or four, five or six, seven to nine and ten to fifteen judges. They also compared the three largest courts.

- The recruitment of judges
- The costs for administration

They found no remarkable differences between larger and smaller courts. The smaller courts had however slightly higher costs, more staff and a larger amount of non-ordinary judges but showed shorter circulation time. They had a lower number of applicants for vacancies.

The Committee draw the conclusion that the size of a court was the result of balancing a lot of factors. The Committee reviewed different factors and was on its way to some sort of general conclusion in accordance with the following.

Courts should have a reasonable judicial durability⁶⁶. But it was not enough to keep up with the legal demands (three judges in civil cases). It was also necessary to make it possible to manage large and complicated cases without interruption on other activities.

The courts should be large enough to have competence for the different types of case; specialization should be possible within the court. Smaller courts meant that the judges had to be specialists in all types of cases. But the number of cases would not be sufficient enough to make it possible to specialize. The appraisal was that a court with at least nine judges and about 2 000 incoming cases/year was appropriate for specialization.

Regarding the organisation for preparatory work, estimations made showed that a preparatory lawyer could support three divisions (or judges). To avoid a vulnerable organisation it was appropriate to have at least three preparatory lawyers. This also pointed towards nine divisions (or judges).

It is a general objective that the activities within the judiciary should be carried out by ordinary judges. The investigation had established that non-ordinary judges served in the smaller courts to a greater extent than in larger courts. The reason was that small courts where unable to meet variations and needed help during vacancies. This was also a fact that pointed towards the need of larger courts.

The investigation also showed that the average cost per case was lowest in the courts with nine to ten judges. Apparently a court of this size could be considered to be more cost-effective than a smaller court. This conclusion together with the assumption that a larger court meant more flexibility and efficient use of resources was also an argument for larger courts.

Another circumstance to consider was that it was necessary that a court was big enough to meet more or less temporary variations in the workload. The organisation should be able to meet a rise or fall about 15-20 percent the normal workload.

⁶⁶ One question that is often discussed in this context is the need also for administrative durability. The courts should be large enough to carry their own administration.

Taken together these considerations and assumptions pointed towards a size of about nine or ten judges. The Committee had also discussed whether there was a limit how large a court could be. The conclusion was that although bigger is not always better, it was not possible to fix a maximum size.

The ongoing reform

As mentioned above (see paragraph 14), 30 district courts have since 1999 been amalgamated into 12 courts. The average number of judges in the courts concerned was four before and 9.5 after the amalgamation. The amalgamations next in line will create two courts out of four and the new courts will have nine and six judges.

The National Audit Office and the Commissioner assigned to evaluate the amalgamation of the 30 courts both claimed that it was too early to make any secure statements about the result. But they called out that the prerequisites to achieve the objectives (accessibility, a stronger organisation to handle preparatory work, opportunities for further training on a regular basis, specialisation, good recruitment prospects, and opportunities for geographical coordination with other agencies in the judicial system) for the reform-program was very good.

The Governmental writing to the Parliament this spring informing on the ongoing reform-program refers to these conclusions and announces that the work with the organisation of the Judiciary will continue. The main landmark for this is to review the specific situation region by region. Further amalgamation of smaller courts is mentioned but also a new organisation for the courts in the Stockholm region.

Is it possible to estimate the workload?

The National Court Administration⁶⁷ has investigated the development of incoming cases and the workload in the lower instances in the general and the administrative courts between 1990 and 1999⁶⁸. The investigation showed that although the number of incoming cases in the first court instances had decreased during the years the workload had increased due to the fact that the cases had become more complicated. The number of and the average time of hearing a case had increased. There were also more petitions and procedural objections from the parties. The number of priority cases had increased. The expected outcome of changes in the law, which was expected to decrease the number of cases, was in some parts overturned in the opposite direction.

The National Courts Administration also began to explore a model to compare cases by evaluate and weighing different types of cases. The objective was to find an instrument that could help to estimate the courts. The instrument should be based upon different but easily measured factors, e.g. the time spent

⁶⁷ The National Courts Administration is an independent body that deals with common administrative matters.

⁶⁸ The National Courts Administration report: no. 2000:2 and 28 June 2001 file no. 952-2001.

on a case, the occurrence of a hearing and the time spend on this hearing but also the estimated degree of difficulty. When combining these factors some conclusions could be drawn. For example, the average taxation-case could be given index 1 while an average matter regarding drivers license could be given index 0.5. When recounting the number of incoming cases with such index the number of incoming cases had not decreased during the actual period. The development of such measure tools will continue in context with the development of a case management system.

Recommendations

My conclusion is that the size of the court should follow the specific needs within the court circuit or region. The objective should be a court-circuit large enough to employ at least ten judges (and probably not more then 20). Instruments to measure the workload should be considered.

WHAT ARE THE ARGUMENTS IN FAVOUR OF AND AGAINST CREATING SPECIALISED COURTS?

The paper stresses whether it is, due to the fact that lawyers specialize, necessary to promote specialized judges or courts.

The current situation in Sweden

The question and need of specialization in the courts reflects in different types of solutions within the Swedish Judiciary. The solutions vary from expert members in the bench to detached special courts.

It has been the Governments main line during the last decade that the judging activities should be carried out within the general courts or the general administrative courts rather than special courts. Questions at issue like recruitment, flexibility, vulnerability and efficiency points towards a solution with a united organisation. The Government and the Parliament has however stated that special courts are not excluded in the future⁶⁹.

The culmination of special courts was between 1960 and 1980 with six detached special courts. There are today three detached special courts, the Labour Court, The Market Court and the Patent Appeal Court.

There are also a number of "special courts" which more or less institutes an integral part of the general courts. These are the Land Tribunals, the Maritime Courts, the Environmental Courts and the Supreme Environmental court.

The assembly of the special courts, regardless they are detached or integrated, usually consists, besides ordinary judges, also of experts within different areas of the society. The proceedings either follow the general procedural laws or specific procedural laws adapted to the specific type of case.

⁶⁹ Governmental writing (skriv.1999/2000:106) The reform of the Judiciary - An action plan. The Parliamentary Standing Committee on Justice report: bet.1997/98:JuU24.

There are also different types of governmental boards that could be described as independent bodies with judicial tasks within a specific area of law. The chairmen of these boards are usually judges. The most well known boards are the Rent Tribunals and the Leasehold Tribunals (functions as the first instance), the National Board for Consumer Complaints (gives non-binding recommendations) and the Aliens Appeals Board (act as the final instance).

The future of the Aliens Appeal Board is at the moment on the agenda. The activities will probably be overtaken by the administrative courts or by a special court. The future of the Rent Tribunals and the Leasehold Tribunals and the Patent Appeals Court are also reviewed. The solutions discussed are to connect those organisations to the general courts.

Advantages and disadvantages with a special court

The considerations in Sweden during the last decade have revolved around issues like rapid proceedings, the need of specialization and expertise and the use of experts from different special interest organisations as lay assessors/members of the court. These and other issues might be considered as to be of advantage or the opposite, depending very much on who you ask.

Many of these issues are also valid when considering specialization within the general courts or whether the activities should be carried out by special courts or by independent boards.

The first issue to consider is whether there is an adequate and specified legal area that will generate a sufficient number of cases. A special court organisation might also be reduced to a one or two instance hierarchy. The court should be able to carry its own activities and administration.

It is also necessary to try to identify the competence of the special court in order to avoid a situation where different courts (on a horizontal level) have to apply the same material laws. It happens that different courts come to different conclusions when applying the same law. This might confuse not only the parties.

The judges and other staff in the special courts are given the opportunity to develop and achieve a very special competence that will ensure and contribute to a development of the rule of law but also end up in speedier proceedings. One experience achieved is however that if the field of competence is too narrow it might cause difficulties in recruiting and keeping the staff. Entice personnel might also demand special working conditions.

Special courts might thus open for adaptation of special compositions of the bench with experts or other types of competence. The procedural rules could also be adapted in accordance with the needs required.

A rather sensitive question in this context is the issue on how experts are nominated and appointed. Independence, impartiality and transparency are questions that are of most importance on this matter. For example, the bench

of the Labour Court consists also of members (lay assessors) nominated by the labour- and employers' organisations.

A court where the bench consists of experts and sometimes also members nominated by special interest organisations concerned by the specific legal field could be discussed from different points of view. One issue is the confidence in the courts. The support for the courts in the society might be stronger if the composition of the court includes also such expertise. On the other hand the courts independent, impartiality and transparency might be questioned⁷⁰. An expert is by definition an expert and not a judge. It is the parties' task to put forward the circumstances and the evidence before the court and the court is then expected to evaluate these factors and rule over the case in accordance with the law. The court is also obliged to communicate the petitions from the parties to their opponents. A situation where the public feel that the members of the bench use "insider" information that has not been made official or communicated with the parties might danger the confidence for the judiciary.

Regarding the Market Court the Parliament decided that it was inappropriate to have members of the court that could be considered to represent their organisations interest. The special interest organisation "members" was thus abolished⁷¹.

The General Courts and The General Administrative Courts are organised under the Ministry of Justice. The National Courts Administration, who also is organised under the Ministry of Justice, carry out the administration of the courts. The Labour Court and the Market Court are neither connected to the Minister of Justice nor the National Courts Administration. This means that the budget-work and the approbations regarding these special courts follow another track than the courts in general. They also have to carry their own administration, computerization etc. This is not optimal considering the efficient use of resources.

Recommendations

My conclusion is that special courts should be avoided unless there are a sufficient numbers of cases within a specific identified area within the law. The expected workload should employ more than ten judges as a special court might stand alone. For mass-matters or more routine based matters the establishment of boards should be considered.

⁷⁰ See the Human Rights Court Case no 11179/84, Langborger v. Sweden. This ruling led to certain changes in the composition of the Rent Tribunals and The Housing Court.

⁷¹ The Governmental Bill prop.1992/93:56 and the Parliamentary Standing Committee on Industry and Trade report: bet.1992/93:NU17.

WHAT ARE THE EFFECTS OF SELECTIVE FORUM-SHOPPING BY PARTIES ON THE FUNCTIONING OF THE JUDICIAL SYSTEM?

The paper stresses that the possibility to choose which courts, domestic or international, for settlements is a problem and that it is of interest to find the mechanisms and criteria used when selecting court and country.

The current situation in Sweden

The law accept written conditions of contract regarding the competent court in civil matters. In contrast to the previous subjects forum-shopping is however not a major issue on the Swedish agenda. Within other legal fields forum-shopping, or maybe more correctly law-shopping, has been discussed, for example taxation. One issue is domestic forum-shopping in the meaning that the business life usually chooses arbitration instead of general courts. It is claimed that this is unfortunate for the development of precedent cases.

For the individual citizen, in opposition to companies, forum-shopping might not be an natural part of daily considerations. So far, the most notified situations are related to family law and sometimes the surprising outcome of the applicable law in a divorce.

Mechanisms when choosing court

Forum-shopping demands a lot of time and resources and supply of expertise in international private law. The mechanisms used depend on how detailed the research in foreign legal systems should be. The general factors are geographical and linguistically. There are also other factors to that have to be clarified before making a move.

The first issue should be to review if there is someone else who could perform the activities. Is there an international or domestic authority or similar organisation that supervise or otherwise acts within the specific field of activity? Is it possible to turn to them instead of taking action in the court yourself?

Otherwise the first issue should be to clarify which law that will be applicable by the court. In this context it might be appropriate to review how the court consider its jurisdiction but also e.g. question like *lis pendens* and other procedural rules? The possibilities to precautionary measures are of interest.

The second issue should be the quality of the judiciary. Factors like the qualification and capability of judges, their independence and impartiality but also efficiency and management of cases are of interest. In this context also transparency in the courts should be considered.

The next issue should be the financial risks. Who has to pay the court costs and under what prerequisites. Is it possible to be granted legal aid? The

Swedish law provides for foreigners to leave a security for court costs when bringing legal action against Swedish citizens or other persons living in Sweden or Swedish legal persons. The security should consist of a pledge or a guarantee.

Another issue is enforcement. It is necessary to consider the quality, the independence and the impartiality and efficiency of the enforcement agencies. It is also necessary to review in which countries the judgement will be accepted and enforceable.

What are the effects of selective forum-shopping

So far there have been no official reports on statistics or the possible effects. And there is no specific debate on this issue either.

One apparent advantage with forum-shopping is the gathering of legal disputes within a specific field of activity should lead to a legal development and efficiency. On the other hand it might drain the legal development on a national level.

Recommendation

My conclusion is that the Governments or other responsible official bodies should intensify the information to the public that it should be aware of the advantages but also disadvantages of cross border actions in this respect.

III. MAIN CONCLUSIONS AND RECOMMENDATIONS AGREED DURING AN EXPERT MEETING BETWEEN COUNCIL OF EUROPE EXPERTS AND DUTCH EXPERTS IN THE HAGUE ON 6 OCTOBER 2003

I. Introduction

1. An expert meeting on territorial jurisdiction took place in the Hague on 6 October 2003. Participants included approximately 20 persons including ministry officials, judges, lawyers, university professors, researchers on justice issues, as well as two Council of Europe experts (Mr. Hess (Germany) and Mr Lindgren (Sweden)), who prepared the contributions contained in Part II of this Report, together with Mr Chemla (France), accompanied by a member of the Secretariat of the Council of Europe.
2. At the end of the meeting, the following conclusions have been reached:

II. Territorial access

3. The location of courts throughout the country is an important issue related mainly to access to justice and should be regularly reviewed by States. When doing so, the principle of access to justice as enshrined in Article 6 of the European Convention on Human Rights should be balanced with economic principles.

4. Electronic court filing and e-court should be introduced to reduce the number of courts throughout the country. However, when doing so, due regard should be taken to the type and nature of cases. Indeed, while electronic court filing and e-court is appropriate for written procedures, this may be more carefully considered for oral procedures, particularly to ensure respect of the right to be heard.
5. The introduction of a system of “justice-on-the-wheels”, where judges would, for instance in cases of road traffic accidents, go personally to the scene and decide on the spot, could also be considered.

III. Optimal size of courts

6. The optimal size of courts cannot be fixed in an abstract manner, but has to be weighted against the population concerned, the average number of cases to be handled, the complexity of the cases and the specialisation of judges.
7. The possibility should be considered, where this is not yet the case, to allow lawyers to plead throughout the country.
8. The size of courts could also be a flexible one and the possibility should be considered “to lend” judges from one court to another in case of need, with due respect for the right to “an independent and impartial tribunal established by law”, enshrined in Article 6 of the ECHR.
9. Wherever possible, to use of single judges should be preferred in first instance courts.

IV. Specialisation of judges

10. There is a clear need to promote specialisation of judges to cope with increasingly complex cases.
11. There is a need to develop specialisation of judges more particularly on European Community and International law, including the case-law of the European Court of Justice and of the European Court of Human Rights.

V. Trends

12. As regards territorial access, and bearing in mind that currently in the Netherlands about 65 % of the population is satisfied with the geographical access to courts, the majority of the participants considered that in 2020 the number of satisfied persons will remain the same.
13. As regards efficiency, the majority of the participants considered that, in order to have an effective and efficient judiciary in 2020, the number of independent courts will have decreased.

14. As regards the specialisation of courts, the majority of the participants considered that the number of specialised courts will have increased to deal with increasingly specialised cases.
15. The participants also stressed that the about was a rough estimation which was specific to the Netherlands, but that might, where appropriate, be considered a useful indication for other countries too.

IV. PROPOSED FOLLOW-UP

16. The meeting which took place in the Hague on 6 October 2003, has been extremely important to discuss an issue which many might consider very technical, but yet quite essential to guarantee effective access to justice and to the court for all, while respecting the ever changing needs of our societies.
17. The experts underlined during the meeting that in most countries issues relating to territorial jurisdiction followed traditions, cultures and historical reasons and that, as a consequence, in most countries, both the number of courts and their location remained the same throughout several decades.
18. For this reason, the experts invited all States, when carrying out law reforms, to undertake studies on the issue of territorial jurisdiction.
19. More particularly, the CEPEJ invited, at its meeting on 3-5 December 2003, all its members to report, by 15 May 2004, on the possibility and the appropriateness of reviewing their national legislation concerning territorial jurisdiction in the light of the proposals contained in Part III of this Report and, more specifically, whether there is the intention to do so and within which time frame.