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Economic value of the judiciary

**A pilot study for five countries on volume, value
and duration of large commercial cases**

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Summary

The legal system and the judiciary that applies and enforces it have a wide ranging impact on economic behaviour and thereby on the performance of the economy of nations, as the economic literature shows. Still, little is known about the underlying mechanisms and the size of effects. As a result, the recommendations from this literature are often of a general nature, stressing the importance of the independence and efficiency of the judiciary. In this report, unique data is presented about the value at stake in commercial litigation for five countries from different parts of Europe. Estimates of the economic effects of civil litigation for the parties are derived from the data for the different judicial environments that these five countries offer. For the five countries best practices are established, and the costs are estimated of procedures that do not conform to the best practice. In addition for each country a number (6-8) of first instance and second instance commercial cases with financial claims between EUR 1 million and EUR 5 million have been described and analysed to provide a basic insight in commercial procedures in these countries, to check the plausibility of the quantitative analysis and to analyse the causes of differences in performance. The report focusses on the volume of cases, their duration and the use of appeal. The countries studied are Ireland, Italy, Lithuania, the Netherlands and Norway. These countries were selected to represent different judicial systems, but also the limited availability of data from case registration systems of the courts had to be taken into account. The most comprehensive comparison is possible for commercial cases with financial claims of EUR 1 million and higher. The ENCJ in co-operation with the University of Utrecht undertook this pilot study to explore the role of the judiciary in the economy and the need to improve the performance of the judiciary from this perspective in Europe. While the study was confined to five countries, it is of wider relevance as the selected countries come from different traditions, and other countries that belong to these traditions can learn from the outcomes.

The main findings are the following.

1. The value at stake in commercial litigation at the courts of the five countries is substantial, relative to GDP as measure of activity in the economy, irrespective of the judicial system and its performance, making the judiciary directly relevant for the economy. The total value of the claims in commercial cases above EUR 1 million is between 0.7% to 1.2% of GDP. It should be noted that this is only one category of litigation that is relevant for the economy. For instance, insolvency cases were not included.
2. The performance of the five judiciaries differs very much with regard to volume and duration of commercial litigation and - to a lesser extent - the use of appeal. This allows to estimate the costs of civil litigation relative to best practice. The analysis shows that there are large gains to be made by moving towards best practice, even within only the five countries studied. All five judiciaries can make progress, but to a different degree, with Italy (volume, duration), Lithuania (volume) and the Netherlands (duration) having much to gain. The order of magnitude of the costs of long duration above the benchmark is estimated for Italy at EUR 1.9 billion and for the Netherlands at EUR 420 million annually. A strong business case can be made to move towards the best practice. The cases that are described show in detail that divergence from best practice has to do with court resources and with the underlying principles of procedures and their practical application. For instance, the strong emphasis in Ireland and Norway on strict case management is not present in the other countries, and reflects different priorities of judges but also lawyers.
3. A fairly sharp distinction exists between systems that focus in the procedure on one (sometimes long) hearing and steer all efforts towards that hearing, and systems that allow cases to evolve ("free form") during the procedure, leaving much room to the parties, for instance, to bring new evidence.

Other things being equal, the hearing-oriented systems are faster than the “free-form” systems, but may miss sometimes opportunities to shed new light on cases. In the trade-off between, what may be called, certainty and timeliness different choices can be justified, as long as timeliness is recognized as an essential part of justice as well.

4. In all countries appeal rates are high, generally 40-50% for large cases. It is difficult to identify a best practice in this respect. For parties costs are a secondary consideration in the large cases studied here, and they often appeal for tactical reasons to delay execution or to hinder the other party. In the countries studied a clear distinction exists between appeal as review and appeal as (de facto) retrial. Other things being equal, retrial takes longer and sometimes much longer than review. As in the previous point, there is trade-off between certainty and timeliness.

5. From a methodological point of view, it is important to note that court cases are so different that care has to be taken when using aggregate data. Differentiation on the basis of the size of disputes (here operationalized by the value of financial claims) is necessary to get a reliable description of the work of the courts, and provides the link with economic effects.

Some general conclusions can be derived from these findings. In the **first** place, the comparison of judiciaries from the perspective of the (economic) impact on society is useful. Optimization of procedures and ways of working within national confines misses opportunities to make large gains. The comparison also helps to clarify the underlying orientations and priorities in judicial systems, and their benefits and costs for society. In the **second** place, the current pilot study was confined to five countries. It would be important to extend the study to all countries of the EU. This would require an adaptation of case registration systems. In the meantime it would be possible to classify the judiciaries of the EU by their similarities with the five countries of the pilot. In the **third** place EU-wide investment plans to improve commercial litigation would yield a high rate of return for society, and it would improve the competitiveness of the EU.

1. Introduction

The courts are an essential part of the legal infrastructure of society and its economy. In this report we assess the importance of the courts for economic life by focusing on one main category of court cases, commercial litigation, and we examine the costs for society of current commercial litigation in different judicial systems. Criminal and administrative law are equally important, but commercial litigation provides a useful starting point. The resolution of commercial cases has an impact on the parties in the litigation themselves, but also on other economic actors in similar circumstances who can learn from the court decisions, and on the economy as a whole as the sum of all micro behaviours. In this report we will address the impact on the parties themselves. Much research has been done about economy wide effects by means of international comparison at the macro level. This research will be discussed here briefly to provide necessary background. Much less attention has been given to the micro level of court cases and parties. While the micro approach misses the (large) synergy effects that are captured by the macro studies, this approach is less abstract, less subject to problems of attribution (such as distinguishing between court performance and public sector governance in general) and provides a concrete “business case” for improvement.

To demarcate the subject matter further, Art. 6 ECHR states that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The different requirements that are expressed in this article, are relevant for the economy as well. In the words of the European Commission, “(A)n attractive business environment needs effective justice systems: independent, efficient, high-quality and trustworthy justice systems reduce costs for companies and attract investment” (Reding 2013). The ENCJ is devoting much effort to the independence of the judiciary (ENCJ 2018). While the independence of the judiciary has been shown to be relevant for the economy (i.a. Feld and Voigt 2003), this report deals exclusively with the efficiency and in particular timeliness of court procedures. In this regard, the perspective of this study is that the commercial procedures of these five countries all provide the necessary legal safeguards for a fair procedure. The short description of commercial procedure in the five countries in Annex 1 as well as the case descriptions of Annex 2 illustrate this. In essence these procedures fulfil the same job but they do this with different levels of efficiency in terms of volume and duration of cases and use of appeal. Given the equivalence as to the conformity to legal standards, best practices that can be derived from the data with regard to efficiency can be meaningfully applied to assess the costs of divergence from these standards. Whether it is possible to move towards the best practice depends on many factors.

In the first part of the report (sections 3-7), we compare data on commercial cases from five jurisdictions in the EU with regard to volume and value to get a measure of significance for the economy. We also present data on the adjudication of these cases in terms of duration and appeal rate. As the availability of data is an issue, the jurisdictions were selected with care, to represent different legal traditions, but also from the perspective of data availability. The countries examined are: Ireland, Italy, Lithuania, the Netherlands and Norway. Still, the data are not complete for all jurisdictions. The most complete comparison is possible for cases with claims above EUR 1 million. The data are then used to derive best practices, and to estimate the costs of not conforming to these practices. In the second part of the report (sections 8-10), we examine for each jurisdiction the procedure that was followed in 6-8 cases. This provides a rough check of the validity of the quantitative data and an analysis of the phases of the procedure in which problems occur, in particular with regard to delay, and their causes. Section 11 concludes the report.

2. Economic literature on courts and economic performance

Besides the direct costs faced by the parties and the judicial system for sustaining courts, the economy faces indirect costs depending on how efficient the judicial system is in resolving disputes in terms of predictability, timeliness and costs. Not only are the costs of going to court for each party important, which also depend on the length of each case, but also the costs associated with its (un)predictability. That is, the lack of predictability of a case creates financial constraints to firms and individuals. These constraints may hinder consumption and investment. Firms and individuals need to make provisions to be spent on courts' and lawyers' fees and possible claims to be paid to the winning side. In the next sections we will explore these effects in the different conditions that exist in the five countries.

Apart from these direct costs for the parties, other, indirect costs exist. A large literature in economics has tried to understand how the functioning of courts affects economic decisions. In general, the literature finds that a more efficient judicial system promotes economic growth through a wide variety of channels.

First, a more efficient system leads to more market competition. The intuition behind it is the following: an inefficient system decreases contract enforcement. If contracts are not enforceable (by authorities), consumers and firms place a higher weight on reputation when engaging in commercial relations. That is, the trustworthiness of a firm plays a more crucial role in commercial relations if one side cannot rely on the judicial system to resolve disputes. Thus, the buyer will only take part in the transaction if the seller has an established reputation. This creates barriers to entry, new firms lack the reputation that old firms in the market might have and customers stick to the firms that are already in their supply chains and miss emerging, better opportunities. As a result the market becomes more concentrated. A concentrated market is worse for customers since prices are usually higher and the quality of products is worse. Johnson et al. (2002) use evidence from post-communist countries to support this theory. Well-functioning courts raise the level of confidence that customers (producers as well as consumers) can place in new firms when engaging in new commercial relationships, as the new firms cannot get away with non-performance. This leads firms and consumers to try out new suppliers.

Second, an inefficient judicial system decreases firm size and investment. Poor contract enforceability, caused by the inefficiency, increases the risk faced when investing. Firms might not honour their contracts, so a firm might be reluctant when deciding to invest. This reduces the investment rate. Thus, less investment also means that firms will not grow as much as they could. Besides that, the pace of growth would be slower, as building the necessary reputation in countries with inefficient systems takes time. Chemin (2012) studies a court reform in India that aimed to speed up court cases. The evidence shows that the reform led to fewer breaches of contract, encouraging investment. Laeven and Woodruff (2007) show that Mexican states with more efficient legal systems have larger firms. Also using Mexican data, Dougherty (2012) finds that this effect is more pronounced in capital-intensive industries. Evidence for European countries also exists. Kumar et al. (2001) use a sample of 15 European countries and find that countries with efficient legal systems have larger firms and Giacomelli and Menon (2012) estimate that halving the volume of civil procedures in Italy would increase firms' average size by 8-12 percent. They argue that better judicial efficiency has positive effects on firms' investment decisions, their willingness to engage in relationships with new trading partners and on the cost and availability of external financing. Moreover, judicial inefficiency hinders the growth rate of firms rather than the entry rate of new firms. As presented here, most studies point out in this direction. However, there is also some evidence that an inefficient judicial system might lead firms to grow. As explained, in an inefficient judicial system, firms rely on suppliers' reputation to engage in commercial relations. As reputation is fragile, firms prefer to verticalize their production chains, i.e. owning firms that produce in different stages of the supply chain. Messick (1999) finds

evidence that firms verticalize their production chains in inefficient systems surveying studies on judicial reforms. As argued by Giacomelli and Menon (2013), such verticalization increases the average size of firms in the economy. Since one firm owns more stages of the production chain, fewer small firms owning each one of the steps exist. This decreases the level of specialization of firms, affecting their efficiency.

Third, judicial efficiency enhances credit markets. Efficient judicial systems promote contract enforcement, including debt enforcement. Thus, if the risk associated with lending is lower, it is expected that credit suppliers will be willing to loan more and at a lower rate. Therefore, inefficiency creates credit constraints for both consumers and firms. As expected, an inefficient system also decreases the supply of external financing, as external credit suppliers would rather lend to firms in countries where they expect to get their loan back. Using data from 48 countries, Bae and Goyal (2009) show that poor contract enforceability leads banks to reduce their loan amounts, shorten their loan maturities and increase their loan spread. With similar conclusions, Qian and Strahan (2007) find that better credit protection reduces interest rates and extends loan maturities and Laeven and Majnoni (2003) show that better judicial efficiency reduces interest rate spreads.

Finally, more efficiency in courts reduces transaction costs also in other ways than the direct costs described at the start of this section. In a non-functioning judicial system, firms need to spend money and time to gather information about suppliers' reputation. Thus, if customers need to spend more time and/or money when engaging in transactions new transaction costs emerge in the economy. North (1992) explains the role of institutions, including the judicial system, in minimizing transaction costs.

Besides that, there are other economic decisions affected by the functioning of courts. Messick (1999) reports that long-term contracts are more prevalent in a well-functioning judicial system than short-term contracts. Courts' efficiency also affects the functioning of the rental housing market. Casas-Arce and Saiz (2010) show that in a country with an inefficient judicial system, people prefer to own the houses they live in than rent them. Thus, the inefficiency hampers the development of a rental housing market. Using data from Spanish provinces, Mora-Sanguinetti (2012) proves that judicial inefficiency increases the share of people that own the house where they live in.

These approaches focus on system wide effects, and generally do not consider the actual role courts play in civil dispute resolution. In the next section we examine the available data on civil litigation and its costs, focussing on the five countries of this pilot study.

3. Existing data on civil litigation

Data on the economics of court cases are scarce. In Europe the European Commission for the Efficiency of Justice (Cepej) of the Council of Europe is systematically collecting data on the legal systems of Europe. This includes the volume and duration of cases. Relevant data are given in table 1 for the five countries that are part of the pilot.

Table 1. Number and disposition time of incoming civil and commercial litigious cases in 2016, according to Cepej

	Number of cases per 100 inhabitants	Disposition time in days of first instance cases	Disposition time in days of appeal cases
Ireland	2.7 (1.6)	NA	NA
Italy	2.6 (2.9)	514	993
Lithuania	4.4 (4.3)	88	103
Netherlands	0.9 (0.9)	121	NA
Norway	0.4 (0.4)	161	NA

Source: Cepej 2018, Figure 5.1, Table 5.8 and Table 5.17.

While Cepej has also gathered some data at a more detailed level for commercial cases (employment dismissal and insolvency cases), data are generally on an aggregate level, if available at all. As will be shown below, this level of aggregation sometimes leads to misleading outcomes, in particular due to differences between legal systems. The data do not give insight in the economic interests involved. Table 1 shows that civil litigation is less frequent in Norway and the Netherlands than in the other countries. This is supported only partly by the data presented in the next sections. More problematic are the data on the duration of cases. Our more detailed figures show for instance that litigation takes much more time in the Netherlands than in Norway, while the Cepej data suggest the opposite.

A very different approach is taken by the World Bank Doing Business indicator system that measures, what the World Bank calls, business regulations in a wide variety of countries, and focuses exclusively on economic effects.¹ It includes an indicator on the ease of enforcing contracts. The indicator is based on a questionnaire among experts about the quality of judicial processes and on an assessment of the resolution of a standardized commercial dispute at a specific first instance court in each country by these experts. The assessment concerns the duration and cost of litigation of this case. The case description specifies the dispute, the size of the dispute (200% of income per capita to take differences among countries in welfare level into account) and the issues that need to be sorted out in the procedure (f.i. hearing of expert witness). See table 2 for the outcomes for the five countries.

Table 2. Estimated duration and costs of a standardized commercial dispute about equivalent claims in five countries, according to World Bank

	Size of equivalent claim in EUR	Duration of court procedure in days	Costs as percentage of claim incl. court fees
Ireland	100,689	560 (90)	26.9% (2.3%)
Italy	57,010	850 (270)	27.6% (3.9%)
Lithuania	28,628	280 (90)	23.6% (6%)
Netherlands	85,091	452 (62)	23.9% (5%)
Norway	140,528	340 (60)	9.9% (1,3%)

Third column: in brackets duration of enforcement.

Fourth column: in brackets court fee.

Source: e.g., <https://www.doingbusiness.org/en/data/exploreconomies/ireland#>

These data have inherent limitations, as they concern one type of conflict and one type of procedure as well as expert opinion instead of measurement, while the weighing by income per capita leads to large differences in claims that may not be (entirely) relevant for commercial litigation. The estimates for duration come closer to our detailed figures than the data of Cepej. However, an estimate of total

¹ See www.doingbusiness.org

economic impact cannot be derived from these figures. To get a better understanding of civil litigation, the data of the court administrations of the five countries (See Box 1) will be analysed.

4. Volume and value of all commercial cases in Netherlands and Norway

To assess the role of civil litigation in an economy and the economic interests involved, an overview of the cases - from very small to very large - that come before the courts is required. The size of a case is defined here by its initial financial claim, if any, and cases are classified according to the size of the claims. Such data are fully available for Norway and the Netherlands in the administrative systems of the courts, and partly for Italy with respect to volume of cases. The data for Norway and the Netherlands are presented in Table 3, and include some summary statistics. Figure 1 gives the available data on volume of commercial cases for the five countries. Data are three-year averages, as the volume of high value cases is small, and the financial claims in this category of cases fluctuate widely. Therefore, the claims in aggregate fluctuate over the years. The cases concerned are commercial cases, but insolvency cases were excluded, as these follow different procedures. In four panels the volume, duration, aggregate of financial claims and average financial claim per case are given for categories of value of claims and in total. Also, the volume of cases that do not have an explicit financial claim and their duration are given. The difference in size of the Netherlands and Norway economies needs to be kept in mind when examining the figures: GDP of the Netherlands is roughly 2.1 times that of Norway.² The classes of claims are kept the same for both countries. As GDP per capita is higher in Norway than in the Netherlands, it might be expected, following the World Bank approach discussed in the previous section that there are more large claims in Norway than in the Netherlands.

Box 1. Source and reliability of the data

Volume, value and duration of cases per category of claim value: the data derive from the case registration systems of the courts, for Ireland and Lithuania, in combination with case files, and are aggregates of the data on individual cases. The reliability of the data depends on the registration errors in the administrative systems. This method differs from that of Cepej which only uses aggregate data from the administrative systems, and which calculates, for instance, the duration of cases by dividing the total number of resolved cases in a period by the total number of incoming cases in that period (times 356, Cepej 2018 p238). In this report duration is calculated as the average of the actual duration of individual cases. For definitions see table 3.

Costs of court procedures per case per category of claim value: data on the costs of the courts per case per value category are not available from the court administrations. Some estimates are available for the Netherlands. Based on these estimates, assumptions were made for all countries. Estimates of the costs of the cases for parties such as lawyers fees are generally unavailable, and assumptions were made. The presented estimates of costs provide insight in the order of magnitude.

There are striking differences and similarities between Norway and the Netherlands.

Volume of cases (Panel 1): most strikingly, small claims hardly reach the courts in Norway. These cases go to tribunals that are not part of the court system. In the judicial system of the Netherlands, which is more representative of the (not-common law) legal systems of Europe, the distribution of cases is extremely asymmetric with very many small cases and few large cases.

² All GDP figures in this report are three-year average 2016, 2017 and 2018 of GDP at market prices/current prices: Eurostat. https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en

As to the claims above EUR 100,000 and below EUR 100 million, the number of cases is similar in both countries, taking into account the different size of the economy. The volume of cases in the Netherlands is roughly twice that of Norway, in line with the difference in size of the economies. Above claims of EUR 5 million the data become more erratic. Very large claims above EUR 100 million are, however, much more frequent in the Netherlands than in Norway in the years studied.

Total value of claims (Panel 3): in particular, as a result of the very large claims (above EUR 100 million), the total value of claims is much higher in the Netherlands than in Norway. In the Netherlands the 11 cases per year, as average over three years, account for 53% of the total value of claims at first instance courts. The total value of first instance cases is 1.2% of GDP in the Netherlands and 0.6% of GDP in Norway. Disregarding the very large claims and the small claims that generally do not go to court in Norway, total value is similar (0.33% in the Netherlands and 0.39% of GDP in Norway). It should be noted that, as follows from the Netherlands data, small claims (below EUR 1,000) are negligible in financial value, when compared with the aggregate value of all claims.

Value per case (panel 4): the average value per claim per class of value above EUR 100,000 is very similar in Norway and the Netherlands, and is always below a third of the upper limit of a class of value. Only for very large claims above EUR 100 million the differences are large.

Duration of cases (panel 2): in the Netherlands the higher the claim, the longer it takes to adjudicate. In Norway this is also the case except for the largest cases, but the differences are much smaller, due to the absence of vast amounts of small cases. In the small claim classes the data are not comparable, as in Norway only specific small cases go to court. From claims of EUR 100,000 upwards, the duration is much shorter in Norway than in the Netherlands. For appeal this is the case, irrespective of claim size. A comparison of averages for all claims is meaningless, and it is particularly misleading for these two countries. The average duration of first instance cases is 38 days in the Netherlands and 167 days in Norway, while when only similar cases are compared it can only be concluded that adjudication is much faster in Norway than in the Netherlands. The data of Cepej as given in Table 1, while using different definitions, suffers from this problem.

Table 3. Commercial litigation at the courts in the Netherlands and Norway (average over 2016, 2017 and 2018).

Panel 1. Number of cases				Panel 2. Mean duration of cases				
	Netherlands		Norway		Netherlands		Norway	
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
0 < c < 1,000	268,500 (71%)	33 (1%)	106 (2%)	10 (1%)	20	386	122	56
1,000 ≤ c < 10,000	86,450 (23%)	746 (24%)	739 (16%)	89 (8%)	52	432	126	64
10,000 ≤ c < 100,000	17,360 (5%)	1,510 (48%)	2330 (50%)	485 (46%)	166	501	164	185
100,000 ≤ c < 1,000,000	2,869 (1%)	688 (22%)	1304 (28%)	377 (36%)	346	592	190	223
1,000,000 ≤ c < 5,000,000	388 (0%)	141 (4%)	176 (4%)	71 (7%)	513	661	226	266
5,000,000 ≤ c < 10,000,000	65 (0%)	20 (1%)	26 (1%)	8 (1%)	527	601	240	286
10,000,000 ≤ c < 20,000,000	27 (0%)	12 (0%)	18 (0%)	8 (1%)	478	557	260	299
20,000,000 ≤ c < 100,000,000	25 (0%)	10 (0%)	16 (0%)	7 (1%)	667	629	191	319
c ≥ 100,000,000	11 (0%)	2 (0%)	2 (0%)	2 (0%)	731	764	194	178
Total financial claims	375,694 (100%)	3,162 (100%)	4,717 (100%)	1,057 (100%)	38	515	167	195
Number of cases without explicit financial claim	21,994	1,946	1,921	599	168	408	116	158
Total number of commercial cases	397,688	5,107	6,638	1,656	45	474	152	182
Per 10,000 inhabitants	230.8	3.0	12.5	3.1				
Per GDP in B EUR	537.3	6.9	18.6	4.6				

Panel 3. Total value of claims in M EUR				Panel 4. Mean value of claim per case in EUR				
	Netherlands		Norway		Netherlands		Norway	
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
0 < c < 1,000	68 (1%)	0.02 (0%)	0.06 (0%)	0.006 (0%)	253	642	535	559
1,000 ≤ c < 10,000	258 (3%)	4 (0%)	4 (0%)	0.5 (0%)	2,987	5,198	4,866	5,562
10,000 ≤ c < 100,000	472 (6%)	54 (3%)	88 (4%)	18 (2%)	27,168	36,004	37,647	37,542
100,000 ≤ c < 1,000,000	801 (9%)	210 (13%)	365 (18%)	111 (11%)	279,080	305,834	279,678	294,388
1,000,000 ≤ c < 5,000,000	767 (9%)	293 (18%)	340 (17%)	135 (13%)	1,978,040	2,070,280	1,932,682	1,904,711
5,000,000 ≤ c < 10,000,000	425 (5%)	132 (8%)	178 (9%)	59 (6%)	6,571,118	6,707,150	6,859,185	7,375,834
10,000,000 ≤ c < 20,000,000	348 (4%)	163 (10%)	232 (11%)	109 (11%)	12,741,681	14,004,257	12,892,701	13,564,931
20,000,000 ≤ c < 100,000,000	878 (10%)	382 (24%)	629 (31%)	292 (28%)	34,666,200	37,006,329	39,287,413	41,691,279
c ≥ 100,000,000	4,534 (53%)	363 (23%)	213 (10%)	304 (30%)	425,103,991	217,629,718	106,250,244	152,056,054
Total financial claims	8,551 (100%)	1,602 (100%)	2,048 (100%)	1,028 (100%)	22,761	506,591	434,117	972,947
As percentage of GDP	1.2	0.2	0.6	0.3				

Definitions:

1. All commercial cases that have been discharged in a year, either by judgment, settlement, withdrawal or otherwise.
2. Commercial cases are defined as all civil cases, not being family cases and not being insolvency, debt restructuring or bankruptcy cases.
3. All cases whether contested or not (with or without hearing).
4. Value of case is the (initial) claim with which the procedure was initiated.
5. Processing time in days: from the initiation of the procedure at the court to the date of withdrawal of the case or the date of the judgment.

Notes:

1. For the Netherlands six cases with exceedingly high claims of USD 50 billion were excluded (review of arbitral awards, involving Yukos and the state of Russia).
2. In the Netherlands the lower boundary for appeal is EUR 1750, which explains the small number of appeals at the lowest range of claim value.

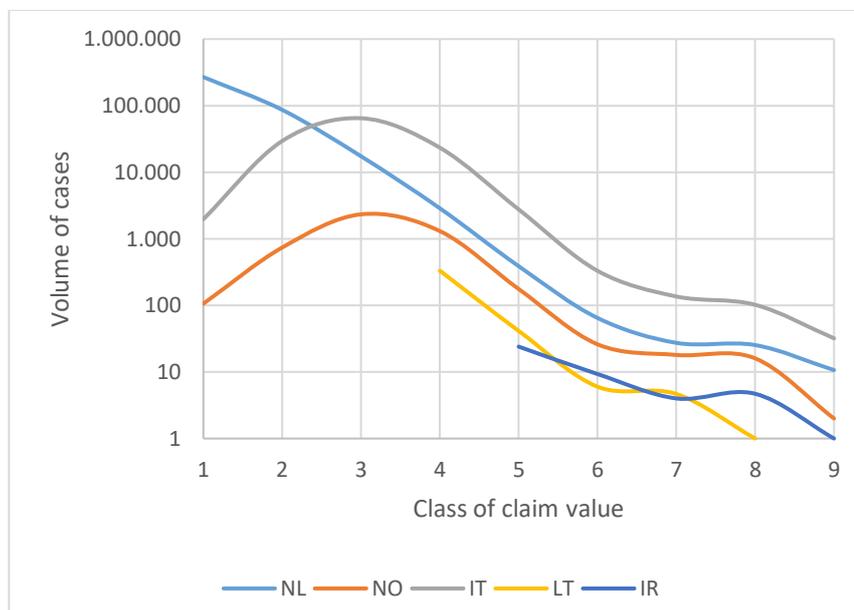
While the comparison of the Netherlands and Norway is interesting as such, it gives also some generally applicable insights. While outcomes are in many respects similar, we note big differences due to:

- Differences between legal systems that render some comparisons meaningless. These differences concern small claims in particular. The role of the courts is much more similar when it comes to the resolution of large claims (see also Figure 1). For these disputes access to courts is not precluded by the design of the legal system, although alternative mechanisms such as arbitration exist, and their relative attractiveness may cause less or more cases to go to court. When comparing court systems, a meaningful comparison is easier to achieve for the large(r) cases. Still a check of the differences between systems is always necessary.

- Differences in economic structure between countries cause differences. Differences in GDP per capita as such seem at least within the range of the Netherlands and Norway to be less relevant than differences in economic structure. The Netherlands has large companies, but also hosts the headquarters of many companies whose main activities take place elsewhere. This is likely to explain the relatively high number of very large cases.³

Of the two countries, the data for the Netherlands give the broadest insight in civil litigation in a high-income economy, as disputes of all sizes are channelled through the courts, although it might be to some extent an anomaly with its relatively high number of very high value cases. Figure 1 visualizes the available data on volume of cases by class of claim value. It should be noted that the logarithmic scale compresses the differences between countries with respect to small cases with financial claims. The pattern for Italy is very similar to that of Norway, and reflects how small claims procedures work there. In addition, in Italy plaintiffs in small commercial cases can go to court, but that is generally not a viable option due to the long duration of cases. Given the systemic differences with regard to small cases, and the small percentage these cases constitute of total value (only 63 million EUR on a total of 8.5 billion EUR, see table 3 for the Netherlands), we will focus further on large cases.

Figure 1. Volume of first instance commercial court cases by class of claim value (average over 2016, 2017 and 2018).



Note: classes are as in table 3, ranging from $0 < c \leq$ EUR 1,000 (class 1) to $c \geq$ EUR 100 million (class 9). Histogram represented by smoothed lines. For Lithuania only data for claims higher than EUR 100,000 and for Ireland larger than EUR 1 million are available. Figures are absolute numbers and are not relative to size of the economy.

5. Volume and value of commercial cases in Lithuania and the Netherlands

While the Netherlands and Norway have similar economies and differences follow in particular but not only from differences in judicial systems, a comparison between two more different economies is

³ The frequency of such cases has recently led to the establishment of a Netherlands Commercial Court specifically for large commercial cases with international aspects.

necessary before we can go to a broader comparison. For Lithuania data are available for cases with claims of EUR 100,000 and higher. See Table 4. The four panels are the same as before.

Volume of cases: the number of cases relative to economic activity as measured by GDP is twice as high in Lithuania than in the Netherlands. Expressed as percentage of population, the volume is smaller in Lithuania than in the Netherlands, but this measure is not very meaningful for the commercial cases concerned. In Lithuania there is more litigation going on at the courts. As to the composition of the claims, there were no cases in the class of very high claims above EUR 100 million in the three years considered here. The distribution of cases across the other classes is very similar.

Total value of cases: the difference between the two countries is roughly the same as for the number of cases, excluding the very large claims above EUR 100 million that did not occur in Lithuania in the period studied. Relative to GDP, total claim value is higher in Lithuania than in the Netherlands. Apart from the very large cases, the composition is again similar. Only the share of claims in the highest bracket (EUR 20 million – EUR 100 million) falls below that for the Netherlands.

Value per claim: the average value per claim in first instance is similar in both countries, with the exception of the cases between EUR 20 million and EUR 100 million for which the claim per case is higher in Lithuania than in the Netherlands.

Table 4. Commercial litigation at the courts in the Netherlands and Lithuania about claims larger than EUR 100,000 (average over 2016, 2017 and 2018)

Panel 1. Number of cases				Panel 2. Mean duration of cases				
Class of financial claims in EUR	Netherlands		Lithuania		Netherlands		Lithuania	
	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
100,000 ≤ c < 1,000,000	2,869 (85%)	688 (79%)	332 (86%)	123 (86%)	346	592	190	223
1,000,000 ≤ c < 5,000,000	388 (11%)	141 (16%)	41 (11%)	16 (11%)	513	661	226	266
5,000,000 ≤ c < 10,000,000	65 (2%)	20 (2%)	6 (2%)	2 (1%)	527	601	240	286
10,000,000 ≤ c < 20,000,000	27 (1%)	12 (1%)	5 (1%)	2 (2%)	478	557	260	299
20,000,000 ≤ c < 100,000,000	25 (1%)	10 (1%)	1 (0,3%)	0,3 (0,2%)	667	629	191	319
Total financial claims	3,374 (100%)	871 (100%)	385 (100%)	143 (100%)	372	603	196	230
Per 10,000 inhabitants	2.0	0.5	1.4	0.5				
Per GDP in B Euro	4.6	1.2	9.1	3.4				

Panel 3. Total value of claims in M EUR				Panel 4. Mean value of claim per case				
Range of financial claims in EUR	Netherlands		Lithuania		Netherlands		Lithuania	
	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
100,000 ≤ c < 1,000,000	801 (25%)	210 (18%)	93 (29%)	36 (29%)	279,080	305,834	279,130	292,908
1,000,000 ≤ c < 5,000,000	767 (24%)	293 (25%)	84 (26%)	33 (26%)	1,978,040	2,070,280	2,026,493	2,103,077
5,000,000 ≤ c < 10,000,000	425 (13%)	132 (11%)	39 (12%)	15 (12%)	6,571,118	6,707,150	6,419,382	7,283,558
10,000,000 ≤ c < 20,000,000	348 (11%)	163 (14%)	61 (19%)	32 (26%)	12,741,681	14,004,257	13,019,068	13,908,473
20,000,000 ≤ c < 100,000,000	878 (27%)	382 (32%)	47 (15%)	9 (7%)	34,666,200	37,006,329	46,877,585	26,133,524
Total financial claims	3,219 (100%)	1,181 (100%)	322 (100%)	125 (100%)	954,035	1,355,571	838,361	870,051
As percentage of GDP	0.4	0.2	0.8	0.3	22.2	31.6	55.4	57.5

Note: last row: mean value of claim per case per GDP/capita

The duration of cases is shorter in Lithuania than in the Netherlands. This will be discussed below further.

To conclude, while a complete overview of commercial cases is not available, by having data about claims from EUR 100,000 and higher a broad insight in large commercial litigation in Lithuania is possible. Despite a large difference in GDP per capita which has not been compensated for in the classes of value of claims, the composition of claims is similar in both countries, with the exception of the very large claims. Differences in welfare levels in the magnitude of these countries do not seem to affect inter-company litigation except for the highest claims. Methodologically, there is no reason to adjust the value classes, for instance in the manner of Doing Business. In addition, the main finding is that commercial litigation is more frequent in Lithuania than in the Netherlands.

6. Volume and value of commercial cases above EUR 1 million for five countries

Turning now to the comparison of all five countries: Ireland and Italy in addition to Lithuania, the Netherlands and Norway. For Ireland and Italy the administrative systems of the courts do not provide the data in full. For Ireland only the cases on the commercial list could be made available. These cases have an claim value of 1 million EUR and higher. The commercial list is likely to capture a very high proportion of all commercial cases with a value of EUR 1 million or more, but it is not possible to verify this by reference to the data. As a consequence, the data for Ireland give a lower boundary of the volume of cases. For Italy the data are in principle available in its data warehouse, but the required connections between data cannot be made without extensive work by the Ministry of Justice, which was not possible for this project. As a consequence, only the volume of cases per class of claim value is known. The other variables had to be estimated. This was done by applying the data about claim value presented in Table 5. The figures for the other four countries are similar, but to err on the safe side the lower figures were used.⁴ As to the duration of commercial cases in Italy, the case study for Doing Business (see the introduction) was used for first instance cases, and the EU Justice Scoreboard was used for appeal. Probably by co-incidence these figures are very similar. The cases that were described for Italy provide a check (see section 8, table 9). While the first instance cases of the court of Florence are consistent with these figures, other first instance cases as well as the appeal cases took much longer. The data from Doing Business and Scoreboard seem to set a lower boundary for duration. All basic data are given in Table 5.

Apart from data availability, the countries were selected from different parts of Europe, different legal systems and traditions and different levels of performance. Given these criteria, it was unavoidable that the selected countries differ very much in size and in economic structure. Again, GDP is used as measure of size for comparison.⁵

We examine first the volume and total value of cases with claims equal to or larger than EUR 1 million. The duration of these cases is discussed in a subsequent section.

Volume of cases: the differences among systems are large. As discussed already, the Netherlands and Norway have roughly equivalent numbers, taking the size of the economy into account. In Lithuania there are twice as many cases (in absolute terms low numbers) and in Italy thrice as many as in the Netherlands and Norway, relative to GDP. The volume of cases is very low in Ireland, but the data do not allow a firm conclusion, as a high, but unknown part of the cases is included. In Italy and Lithuania many more cases go to court, relative to GDP.

Total value of cases: the differences in the total value of claims among countries are smaller than in volume. In Italy the estimated total value of claims is large, due to the high number of cases. Also, in the Netherlands the total value is high, but that is caused by a relatively high number of very large cases (EUR 100 million and larger). The presence of such large cases at the courts requires an economy in which such large commercial interests regularly occur, and thus conflicts about these interests can arise.

Overall, commercial litigation at the courts amounts to 0.7 – 1.25% of GDP. While GDP measures added value, and not the total transactions in an economy, these percentages do not reflect the part of transactions to go so wrong that they reach the courts. The percentages do reflect the litigation that happens in the production and distribution processes that generate GDP. It should be emphasized that this is the impact of only one, albeit important category of court cases.

⁴ It is assumed that mean value per case equals that for the Netherlands for all value classes, except for > EUR 100 million, and equals that for Norway for > EUR 100 million.

⁵ See footnote 2.

Table 5. Commercial litigation at the courts about financial claims larger than EUR 1 million in five countries, three year average 2016, 2017 and 2018, administrative data in black, estimates in red.

Panel 1. Number of cases										
	Netherlands		Norway		Lithuania		Ireland		Italy	
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
1,000,000 ≤ c < 5,000,000	388 (75%)	141 (76%)	176 (74%)	71 (74%)	41 (77%)	16 (80%)	24 (56%)	3.3 (32%)	2,762 (82%)	676 (80%)
5,000,000 ≤ c < 10,000,000	65 (13%)	20 (11%)	26 (11%)	8 (8%)	6 (11%)	2 (10%)	9 (21%)	1.7 (17%)	330 (10%)	84 (10%)
10,000,000 ≤ c < 20,000,000	27 (5%)	12 (6%)	18 (8%)	8 (8%)	5 (9%)	2 (10%)	4 (9%)	2 (19%)	136 (4%)	38 (5%)
20,000,000 ≤ c < 100,000,000	25 (5%)	10 (5%)	16 (7%)	7 (7%)	1 (2%)	0.3 (1%)	5 (12%)	2.3 (22%)	102 (3%)	33 (4%)
c ≥ 100,000,000	11 (2%)	2 (1%)	2 (1%)	2 (2%)	0	0	1 (2%)	1 (10%)	32 (1%)	11 (1%)
All cases with financial claims	516 (100%)	185 (100%)	238 (100%)	96 (100%)	53 (100%)	20 (100%)	43 (100%)	10 (100%)	3,362 (100%)	842 (100%)
Per GDP in B euro	0.70	0.25	0.67	0.27	1.26	0.48	0.14	0.03	1.94	0.49
Per 10,000 inhabitants	0.30	0.11	0.45	0.18	0.19	0.07	0.09	0.02	0.56	0.14

Panel 2. Total value of claims in M EUR

	Netherlands		Norway		Lithuania		Ireland		Italy	
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
1,000,000 ≤ c < 5,000,000	767 (11%)	293 (22%)	340 (21%)	135 (15%)	84 (36%)	33 (37%)	57 (10%)	8 (0%)	5,463 (33%)	1,399 (26%)
5,000,000 ≤ c < 10,000,000	425 (6%)	132 (10%)	178 (11%)	59 (7%)	39 (17%)	15 (16%)	68 (12%)	12 (1%)	2,171 (13%)	566 (11%)
10,000,000 ≤ c < 20,000,000	348 (5%)	163 (12%)	232 (15%)	109 (12%)	61 (26%)	32 (37%)	56 (10%)	27 (1%)	1,733 (11%)	537 (10%)
20,000,000 ≤ c < 100,000,000	878 (13%)	382 (29%)	629 (39%)	292 (32%)	47 (20%)	9 (10%)	173 (31%)	98 (5%)	3,536 (22%)	1,234 (23%)
c ≥ 100,000,000	4,534 (65%)	363 (27%)	213 (13%)	304 (34%)	0	0	207 (37%)	2,004 (93%)	3,435 (21%)	1,622 (30%)
Total financial claims	6,953 (100%)	1,333 (100%)	1,592 (100%)	899 (100%)	230 (100%)	89 (100%)	561 (100%)	2,149 (100%)	16,338 (100%)	5,357 (100%)
Total financial claims as percentage of GDP	0.94%	0.18%	0.45%	0.25%	0.54%	0.21%	0.19%	0.72%	0.94%	0.31%

Panel 3. Mean value of claim per case in EUR

	Netherlands		Norway		Lithuania		Ireland		Italy	
Range of financial claims in Euro	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal	First instance	Appeal
1,000,000 ≤ c < 5,000,000	1,978,040	2,070,280	1,932,682	1,904,711	2,026,493	2,103,077	2,377,434	2,437,449	1,978,040	2,070,280
5,000,000 ≤ c < 10,000,000	6,571,118	6,707,150	6,859,185	7,375,834	6,419,382	7,283,558	7,258,742	7,001,881	6,571,118	6,707,150
10,000,000 ≤ c < 20,000,000	12,741,681	14,004,257	12,892,701	13,564,931	13,019,068	13,908,473	13,974,441	13,743,549	12,741,681	14,004,257
20,000,000 ≤ c < 100,000,000	34,666,200	37,006,329	39,287,413	41,691,279	46,877,585	26,133,524	36,841,679	41,837,719	34,666,200	37,006,329
c ≥ 100,000,000	425,103,991	217,629,718	106,250,244	152,056,054			207,000,000	2,004,145,023	106,250,244	152,056,054
All cases with financial claims	13,482,892	7,218,438	6,687,641	9,361,580	4,337,948	4,361,292	13,037,637	207,972,397	4,859,486	6,361,949

Panel 4. Mean duration of cases

	Netherlands		Norway		Lithuania		Ireland		Italy	
Range of financial claims in Euro	First instance	Appeal								
1,000,000 ≤ c < 5,000,000	513	661	226	266	371	260	277	459	840	880
5,000,000 ≤ c < 10,000,000	527	601	240	286	566	621	287	596	840	880
10,000,000 ≤ c < 20,000,000	478	557	260	299	226	221	303	577	840	880
20,000,000 ≤ c < 100,000,000	667	629	191	319	531	224	332	545	840	880
c ≥ 100,000,000	731	764	194	178			429	400	840	880
All cases with financial claims	525	647	227	272	383	290	291	517	840	880

7. Costs of high volume of litigation

A high volume of cases imposes costs on the courts, on the parties and on society. Italy and Lithuania have a substantially higher volume of cases than the Netherlands and Norway. To establish whether this difference leads to sizeable economic costs, we examine the case of Italy which has by far the most cases relative to GDP (1.94 vs 1.26 in Lithuania with a similar mean value per case, see table 5). It should be emphasized that a high volume of cases may stem from a range of factors, including at least the structure of the economy, business practices, the legal/judicial system and the culture of dispute resolution. These factors are likely to be deeply ingrained and fundamental to a society, and therefore not easily amenable for change. In section 2 we saw, on the other hand, that the economic structure is influenced by the judicial system, implying that there are levers for change. At least, it is of interest to know what the costs are of a high level of litigation, relative to

Box 2. Costs of court procedures for parties due to delay

Bringing cases to court has generally business implications for the parties. Depending on the nature of the conflict, the commercial activities under dispute have to be halted, and/or uncertainty arises about legal positions (see section 2). The costs of the postponement of activities, the uncertainty and the associated financial reserves that have to be withdrawn from other productive purposes can be approximated at the macro-level by multiplying the average time the court cases take with the total value of financial claims and a measure of the rate of return (for activities/projects temporarily halted during the court cases) and the cost of capital (for financial provisions in relation to court cases). See Van Dijk (2014) and Van Dijk and Teijl (1998). The rate of return on capital or – the other side of the coin – the cost of capital is difficult to choose in the current conditions. It should be noted that access to capital is often restricted for firms that are embroiled in legal disputes, and, if capital is available at all, it is more expensive for these firms, in particular if their survival is at stake. A conservative approximation of the rate of return would be to use a discount rate used by government. For instance, Norwegian regulations state that initiatives where the government is in competition with private actors a discount rate corresponding to the market in which private enterprises operate, and for other government initiatives, a discount rate of 4% is to be used for an investment horizon up to 40 years. Disregarding that the rate of return is likely to differ among countries, a uniform rate of 4% seems an acceptable, conservative average from different perspectives.

the benchmark formed by Norway and the Netherlands. In Italy a staggering 2,200 first instance cases and 400 second instance cases with claims above EUR 1 million come on top of the volume that would result if litigation was at the level of the Netherlands and Norway relative to GDP. The costs involved in the adjudication of these cases can be roughly estimated. To do this, we use the reliable data presented so far, but this data has to be combined with the scraps of information that are available about the costs of procedures. The reliability of outcomes is from a different (lesser) order than the data on volume, value and duration of procedures, and should be used with caution.

Public sector costs: Data about these costs was not available for all five countries. In the Netherlands the costs for the judiciary of large commercial cases have been estimated at EUR 20,000 per case⁶.

⁶ Based on an estimate made for the business case of the Netherlands Commercial Court: the integral cost price of large commercial disputes that are suitable for the NCC (with an average claim value per case of EUR 7 million) is estimated at EUR 21,316. To apply these data to other countries it has to be assumed that diverging levels of salaries across countries are compensated by divergence in productivity.

Applying this estimate to Italy, the costs would be in the order of EUR 52 million. Part of these costs are covered by court fees, paid by the parties, but these fees lead to redistribution of resources and can therefore be left out of consideration when assessing the welfare effects of an inefficient volume of litigation.

Costs for the parties: the costs of these cases for the parties depend partly on the way the cases would have been resolved without taking recourse to the courts. Assuming that going to court does not avoid other costs, only the costs of going to court need to be considered. Apart from the - here irrelevant - court fees as already mentioned, the parties spend money on lawyers and time of own staff⁷, as well as incur costs due to the delay of their business activities during the court case and due to the uncertainty about the outcome of the court case.

- Lawyers' and own staff costs: again data is not available for most countries and particularly not for ranges of claim value.⁸ We have adopted the assumption that these costs amount to EUR 100,000 per party per case, while recognising that there will be many cases where the costs are considerably higher. The direct costs would be EUR 520 million under this assumption.
- Losses due to delay, caused by court procedures: applying the method described in Box 2 for calculating the costs of court delay, the benefits depend on the total duration of court cases, but also on the nature and importance of the cases for the parties. Approximating the latter by the value of the claims, the total value of the issues at stake in first instance courts would be EUR 8.5 billion and in appeal EUR 1.8 billion, leaving out the claims larger than EUR 100 million that will go to court anyway. Applying the rate of return of 4% (Box 2) and the duration of court cases in Italy as in Table 5, the costs of delay are in the order of EUR 780 million in first instance and EUR 175 million in appeal.

The costs for parties of conducting more cases than the benchmark set by Norway and the Netherlands would amount to EUR 1.5 billion in total. As percentage of GDP, this is 0.09% for the parties in disputes and society as a whole. These costs are particularly high due to the combination of a high volume of court cases and a long duration to adjudicate these cases.

⁷ See also Washington Economics Group, Inc. (WEG, 2009)

⁸ Following up on footnote 5, for the NCC lawyer costs have been estimated at EUR 600,000 for both parties together for the cases considered. The costs in common law, Anglo-Saxon countries were thought to be five times as high. For the range of claim value of EUR 1-5 million these estimates would be out of proportion.

7. Performance of commercial procedures

Part of the performance of the adjudication of court cases is measurable. This part concerns in particular the duration of cases and appeal rates. Quality aspects such as the consistent and uniform application of the law and predictability in general are difficult to measure directly, but may be related to volume of cases and, more indirectly, duration. Also, a relation with appeal rates suggests itself, although appeals are frequently brought as a matter of tactics rather than as a reflection of the uncertainty of the outcome. “No-hope” appeals are brought to delay enforcement of a judgment which a defendant knows is due or to force a plaintiff who cannot wait for the appeal to be processed to settle for a lesser sum than has been found to be due to it/him.

In this section we will examine quantitatively best practices for the duration and for appeal rates in the five pilot judiciaries, and estimate the costs of performance below best practice.

7.1 Duration of commercial cases with claims of EUR 1 million and higher

Table 5, panel 4 provides data about the duration of commercial cases. The number of large commercial cases is relatively small in all countries, even in Italy and Lithuania, but the financial value of these cases is very high. These cases require much time and resources per case, and are complicated to manage for the judge(s), leading in several of the judicial systems studied here to long duration. Other judiciaries, in particular Norway, struggle much less with these issues. Norway is the best performer in first instance and in appeal on average and for most value classes, followed by Lithuania which is much less consistent across value classes than Norway. Ireland is fast in first instance and slow in appeal in the period studied. Italy and, to a lesser degree, the Netherlands have long duration in first and second instance. Irrespective of their size, these cases take only 7.5 months on average with a spread of 6 to 8.5 months across value classes (average per class) in Norway. The benchmark is set at 8 months. Second instance cases take 9 months, with a spread of 6 to 10.5 months. While it is counter intuitive from a procedural point of view that appeal takes longer than first instance, this is also the case in Norway. A reason might be that appeal cases are more complex on average than first instance cases. Still, 8 months will be used as the best practice for appeal as well. It should be noted that, while, within the availability of data, the comparability of cases has been maximized by uniform classes of claim value, there still is the possibility that the complexity of cases differs among countries.

In second instance, differences in appeal systems play an important role. In particular, a distinction must be made between (1) systems which allow full rehearing on appeal with additional evidence adduced which was not presented in the court of first instance and (2) systems where the appeal is a review and where (normally) no new evidence is admitted, and there is no need to allow time for this in resolving the appeal. It is not surprising that appeal cases take longer in Italy and the Netherlands than in IR, Lithuania and Norway, where appeal is review and not retrial.

Estimate of the costs of long procedures

Table 6 gives estimates of the costs caused by the difference between the actual duration of cases and the best practice (8 months in first instance and in appeal). The costs for the parties of the delay of economic activities and uncertainty is estimated by using the method described in Box 2. The costs of activities that have to wait longer, the prolonging of uncertainty and the associated financial reserves that have to be withdrawn from other productive purposes can be approximated by multiplying the difference between the mean duration of cases in the country concerned and the benchmark, with as before the total value of financial claims and a measure of the rate of return/cost of capital. In addition, an increase of the costs of lawyers the longer a case takes is taken into account (see table 6, note 2).

Table 6. Estimates of the costs of longer duration of commercial cases than the best practice

	Netherlands		Norway		Lithuania	
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal	First instance	Appeal
$1,000,000 \leq c < 5,000,000$	40,046,193	23,143,314	best practice	586,378	2,040,668	0
$5,000,000 \leq c < 10,000,000$	16,235,656	6,325,403	best practice	327,592	1,681,150	727,508
$10,000,000 \leq c < 20,000,000$	9,969,449	6,208,902	best practice	727,423	0	0
$20,000,000 \leq c < 100,000,000$	42,539,187	16,801,361	best practice	2,486,176	1,522,230	0
$c \geq 100,000,000$	242,534,519	20,830,310	best practice	best practice	0	0
All cases with financial claims	351,325,004	73,309,290		4,127,570	5,244,048	727,508
As percentage of GDP	0.0475%	0.0099%		0.0001%	0.0124%	0.0017%
	Ireland		Italy			
Range of financial claims in EUR	First instance	Appeal	First instance	Appeal		
$1,000,000 \leq c < 5,000,000$	340,014	311,023	631,154,515	169,151,788		
$5,000,000 \leq c < 10,000,000$	382,205	547,633	174,556,757	48,328,078		
$10,000,000 \leq c < 20,000,000$	398,824	1,112,418	126,691,768	41,444,304		
$20,000,000 \leq c < 100,000,000$	1,745,849	3,332,471	241,082,974	89,474,347		
$c \geq 100,000,000$	4,235,163	34,215,377	227,563,656	114,212,386		
All cases with financial claims	7,102,056	39,518,923	1,401,049,670	462,610,903		
As percentage of GDP	0.0024%	0.0133%	0.0809%	0.0267%		

Notes:

1. Discount rate: 4% (see Box 2)
2. Extra costs of lawyers: on top of minimum of EUR 100,000 per party, EUR 50,000 for Italy per party per case. For other judiciaries proportional with length of procedures.

The costs for Italy and the Netherlands of longer duration than the best practice in first instance and appeal procedures are large and amount annually to 0.11% of GDP for Italy and 0.06% for the Netherlands. For Lithuania and Ireland the costs are much smaller but still sizeable and amount to 0,01%, while for Norway the costs are of course dwindling. It should be noted that these costs relate to part of the commercial cases, as only claims of EUR 1 million and larger are examined. In addition, large economic interests are involved in bankruptcy cases that are not included here.

The question arises whether it would actually be possible to reduce the duration of procedures to the best practice in the countries concerned, and what it would cost to achieve this. The answer requires a diagnosis of the causes of court delay in each country. In the next chapter we will attempt to do this by means of a detailed analysis of representative cases. At this stage, we can conclude that, even if speeding up of procedures were solely a matter of structural court resources (which it is not), the rate of return on extra expenditure for this purpose would be very high and, more tentatively, higher than on most other government expenditure.⁹ However, it should also be recognized that different choices about the balance between timeliness and justice/certainty of judgments in the sense of the

⁹ If production capacity would be doubled structurally in Italy, this would cost EUR 84 million per year (if costs per case are EUR 20,000, as assumed). This should be compared with the direct benefits for the parties of EUR 2.2 billion. For the Netherlands the difference between the extra costs for the public sector (EUR 14 million) and the benefits for the parties (EUR 529 million) would also be huge. Obviously, these figures are only illustrative, as reducing the duration of procedures also requires procedural reform and change of culture in the legal professions. This, on the one hand, reduces the need for capacity increase and associated costs, but on the other hand causes reduction of delay to be much more difficult to achieve than if it were solely a financial matter.

possibilities to bring evidence at any stage and to hear cases again in appeal fully can be made, as the brief discussion of appeal systems exemplifies. In a broader sense justice also encompasses timeliness.

7.2 Appeal rates of commercial cases with claims of EUR 1 million and higher

Table 7 provides estimates of appeal rates for the classes of financial claims. The appeal rates are calculated simply by dividing the number of appeal cases by the number of first instance cases, using the three year averages presented in table 5. The appeal rates in these large cases are around 40%, except for Ireland where there is a stepwise increase of the appeal rate from 18 to 50% and Italy where the appeal rate is lower, probably caused by the long duration of law suits. It is not obvious what the best practice would be. The Irish system might be the best candidate, as appeal is selective and focusses on the largest cases. Still, an appeal rate as high as 40 or 50% suggests that appeal is primarily used to give one's case another try. The Italian appeal rates are across the board lower, but probably for the wrong reason.

Table 7. Appeal rates for claims between EUR 1 million and EUR 100 million

Range of financial claims in EUR	Netherlands	Norway	Lithuania	Ireland	Italy
$1,000,000 \leq c < 5,000,000$	36%	40%	38%	14%	24%
$5,000,000 \leq c < 10,000,000$	30%	31%	33%	18%	25%
$10,000,000 \leq c < 20,000,000$	43%	44%	50%	50%	28%
$20,000,000 \leq c < 100,000,000$	41%	44%	33%	50%	32%
Total financial claims	36%	40%	38%	24%	25%

Note: as to very large cases (> EUR 100 million) the volume is very low and fluctuates over the years. Appeal rates calculated by dividing second instance by first instance volumes of cases do not provide a meaningful approximation. These cases need to be analysed individually.

It might well be that among these countries no best practice can be found. To examine the financial consequences of high appeal rates, we nonetheless use Ireland as best practice, as far as the two lowest classes of claims are concerned.

Costs of high appeal rates

A higher appeal rate than the benchmark leads obviously to more appeal cases than if the benchmark would apply. Using the same approach as in section 3 (including Box 2), the costs for the parties of these extra cases can be calculated. These costs would be in the order of EUR 14 million for parties in Norway, EUR 40 million in the Netherlands, EUR 3.5 million in Lithuania and EUR 150 million in Italy. The costs for the judiciary itself would be relatively small, for instance EUR 6.2 million for Italy and EUR 1.9 million for the Netherlands.

7.3 Interaction of the volume of court cases and their duration

The interaction of volume of cases and duration of cases is of interest. Considering first instance cases, Italy has a large number of cases and also long duration (see Table 2). Norway at the other extreme has few cases and short duration. the Netherlands has low volume and relatively long duration. Lithuania has many cases and short duration, while Ireland has few cases and short duration (first instance). Tentatively, one gets the impression that duration as rationing device (Gravell 1990) is not strongly present. The experience of Italy suggests even that long duration is a reason to go to court.

This has been suggested by others as well (Lorizio and Gurrieri 2013). In appeal this is less discernible in our data. Of course, these outcomes do not provide conclusive insights.

7.4 Conclusions from descriptive data

In this analysis we have focussed on the volume and value of commercial cases, their duration and the use of appeal at the courts of five countries. The data gathered about commercial litigation make the following clear.

1. Court cases are so different that care has to be taken when using aggregate data such as those – very usefully - gathered by Cepej. Differentiation on the basis of the size of disputes (here operationalized by the value of financial claims) is necessary to get a reliable description of the work of the courts, and provides the link with economic effects.
2. The direct interests of parties at stake in commercial litigation at the courts are substantial, relative to a measure of activity in an economy such as GDP, irrespective of the judicial system and its performance, making the judiciary directly relevant for the economy.
3. The performance of the five judiciaries differ much with regard to volume and duration and - to a lesser extent - the use of appeal. This allows to estimate costs relative to best practice. The analysis suggests that there are large gains to be made by moving towards best practice, even within the five countries studied.

Before drawing more firm conclusions it is necessary to validate the outcomes qualitatively by examining court cases in detail. This should also clarify how judiciaries can move to best practice. In the next chapters this analysis will be presented.

8. Comparison of commercial procedures in detail

To get a better understanding of commercial procedure in the five countries, a number of cases of varying procedural complexity and duration were selected, described and analysed for each country. We examine, in particular, what causes differences in duration within systems and between systems. All are commercial cases with financial claims between EUR 1 and 5 million. In each judiciary there are large differences between cases. We examine 6-8 cases per country that have been resolved in the years 2016, 2017 and 2018: at a minimum three first instance and three appeal cases. Table 9 summarizes the selected cases. The appeal cases can be the follow-up of the first instance cases, but only if both the first and second instance case have been decided in the years 2016, 2017 and 2018 and data are available. In selecting the cases the distribution of the duration was taken into account, as far as possible. See table 8 for IE and the Netherlands. To provide necessary background about commercial procedures in the five countries, short descriptions are enclosed in Annex 1. Annex 2 gives the case descriptions. It should be emphasized that, while the case descriptions make clear how commercial cases of similar size are processed in the courts of the five countries, within and across countries the cases differ in content and, for instance, party composition. As a consequence, the case descriptions do not by themselves present a representative overview of commercial litigation.

Table 8. Distribution of the duration of commercial court cases about claims between EUR 1 million and EUR 5 million, ended in 2016-2018, number of cases as percentage of total

a. First instance courts			b. Appeal courts		
Duration in days	Ireland	Netherlands	Duration in days	Ireland	Netherlands
0 – 180	41%	22%	0 – 180	0%	15%
180 - 360	35%	26%	180 - 360	36%	10%
360 - 540	13%	19%	360 - 540	9%	21%
540 - 720	8%	11%	540 - 720	55%	18%
720 - 900	1%	7%	720 - 900	0%	12%
900 – 1,080	0%	4%	900 – 1,080	0%	8%
1,080 – 1,260	0%	3%	1,080 – 1,260	0%	6%
1,260 – 1,440	1%	2%	1,260 – 1,440	0%	4%
1,440 – 1,620	0%	1%	1,440 – 1,620	0%	2%
1,620 – 1,800	0%	1%	1,620 – 1,800	0%	1%
1,800 – 1,980	0%	1%	1,800 – 1,980	0%	1%
> 1,980	0%	4%	> 1,980	0%	2%
	100%	100%		100%	100%
Average in days	276	544	Average in days	472	660
Median in days	228	385	Median in days	563	560
Number 2016, 2017, 2018	71	1,018	Number 2016, 2017, 2018	11	426

Table 8 shows that extreme long duration occurs and forms a substantial category in the Netherlands (and probably everywhere). Such a case was included. The data show that litigation is a much more controlled process in Ireland than in the Netherlands.

All cases selected ended in a judgment. Duration is shorter, if parties reach at some stage a settlement. Settlement may have other advantages as well, and judges may actively pursue settlement. It should be noted that in Ireland the procedures were established to facilitate speedy resolution of the disputes by either a decision of the court or preferably by agreement of the parties. Still, to be able to compare all phases of procedures within and across jurisdictions, cases that were settled were left out.

Table 9. Selected and analysed commercial cases with claims EUR 1 million – EUR 5 million

a. First instance cases

	Claim in EUR	Dates and duration of first instance cases
Ireland		
IR-1	2,213,603	18-07-2017 – 30-11-2017: 135 days
IR-2	4,566,895	11-10-2017 – 02-05-2018: 203 days
IR-3	1,470,000	27-04-2018 – 21-12-2018: 241 days
IR-4	3,958,536	03-08-2016 – 20-06-2018: 686 days
Italy		
IT-1	2,000,000	11-11-2016 – 14-12-2018: 870 days
IT-2	2,000,000	12-06-2014 – 14-04-2017: 850 days
IT-3	2,000,000	17-03-2016 – 29-07-2017: 499 days
IT-4	1,650,000	28-03-2014 – 06-28-2016: 823 days
Lithuania		
LI-1	1,013,670	10-06-2016 – 13-02-2017 130 days
LI-2	1,477,299	18-02-2016 – 09-03-2017 385 days
LI-3	1,030,523	22-05-2015 – 05-02-2018 990 days
The Netherlands		
NL-1	2,900,000	30-10-2017 – 17-10-2018: 352 days
NL-2	1,200,000	21-09-2015 – 13-07-2016: 296 days
NL-3	3,500,000	03-08-2011 – 04-11-2017: 2.254 days
NL-4	2,200,000	24-12-2015 – 10-01-2018: 748 days
Norway		Not yet received

b. Appeal cases including data about the first-instance precursors

	Claim in EUR	Dates and duration first instance	Dates and duration second instance	Total
Ireland				
IR-5	2,295,000	19-05-2014 – 23-01-2015 (25-02-2015) 280 days	24-03-2015 – 12-10-2016 568 days	848
IR-6	2,131,000	24-04-2014 – 31-07-2015 (31-07-2015) 463 days	07-10-2015 – 12-05-2017 583 days	1,046
IR-7	2,500,000	09-07-2014 – 27-01-2015 202 days	18-03-2015 – 01-05-2017 714 days	916
Italy				
IT-5	5,000,000	18-01-2011 – 13-03-2015 1515 days	15-06-2015 – 01-02-2018 962 days	2,477
IT-6	1,300,000	14-03-2005 – 13-08-2013 3074 days	22-10-2013 – 28-11-2016 1,133 days	4,207
IT-7	1,000,000	07-05-2013 – 17-10-2015 863 days	12-03-2016 – 02-10-2018 934 days	1,797
IT-8	1,000,000	26-09-2008 – 25-04-2013 1702 days	25-09-2013 – 10-11-2017 1,507 days	3,209
Lithuania				
LI-1	1,030,523	22-05-2015 – 05-02-2018 991 days See F.I.	07-03-2018 – 04-03-2019 333 days	1,324
LI-2	1,013,670	06-10-2016 – 13-02-2017 131 days See F.I.	14-03-2017 – 19-12-2017 251 days	279
LI-3	1,477,299	18-02-2016 – 09-03-2017 385 days See F.I.	10-04-2017 – 24-01-2018 262 days	647
LI-4	4,529,287	03-05-2015 – 10-09-2015 190 days	08-10-2015 – 19-01-2017 442 days	632
LI-5	1,058,569	08-10-2014 – 12-10-2015 370 days	12-11-2015 – 07-06-2016 148 days	518
LI-6	3,073,731	29-10-2013 – 18-05-2015 567 days	18-06-2015 – 21-04-2016 252 days	819
Netherlands				
NL-5	1,683,000	04-06-2014 – 16-9-2015 469 days	16-12-2015 – 07-08-2018 965 days	1,434
NL-6	3,750,000	05-02-2014 – 02-03-2016 756 days	02-06-2016 – 31-10-2017 516 days	1,272
NL-7	4,051,337	16-04-2012 – 30-04-2014 744 days	15-12-2014 – 07-02-2017 785 days	1,529
Norway				
		Not yet received		

Note 1: in bold the cases that have been described (see Annex 2 for the case descriptions).

Note 2: the first instance cases for Italy are from the Court of Florence. The appeal cases are from the Appeal court of Venice. Three of the four precursor first instance cases took longer than the cases of the Florence court, pointing to substantial differences between courts¹⁰.

¹⁰ Data from Doing Business show, however, that the Court of Florence does not perform well compared with the courts of most other areas in Italy, and performs at the same level as the court of Padua which is one of the

9. Analysis of the case descriptions per jurisdiction

Content of cases

The cases concern a wide variety of economic disputes. The the Netherlands and Lithuania cases concern, in particular, the interpretation and breach of business contracts. Some cases are among large companies, but others involve small business ventures of which the survival depends on the rapid resolution of the case. Access to capital for those small firms is an issue to tide over the time to judgment, and the case descriptions show that during the court cases several have gone bankrupt (NL-1 and NL-7). In Italy most cases are about financial issues and mismanagement of companies, related to bankruptcy. In Ireland financial issues, in particular non-payment of loans concerning property, are prevalent.

Commercial procedure in practice

We examine the procedures in these cases, in particular with regard to timeliness. The cases must be seen as concrete examples of how civil procedures work in practice. While the numbers are too small to allow quantitative conclusions, they give qualitative insights in the way civil litigation takes place. See Annex 2 for the case descriptions.

There are common aspects that take time in each system, but these work out differently in judiciaries. Also system specific aspects occur. In addition, we address the role played by court resources. We examine first the case descriptions per country, and start with examining the judiciaries that have (relatively) long procedures. In section 10 we examine the main differences between jurisdictions.

Netherlands

First instance

Civil procedure is very flexible, and leaves much room to the parties to shape the procedure and let it evolve according to need. There is not a concentrated trial phase, and different types of hearings are possible but not mandatory. Two cases (NL-1 and NL-2) taking 352 and 296 days show a streamlined procedure. Long duration of cases (in the examples 748 (NL-4) and 2254 days (NL-3)) has several causes:

- Repeated exchange of written statements takes time. Frequent use of counter claims that increase the complexity of the case and augment the submitted statements: exchange of written statements can take 1.5 year, as the examples show (16 and 17 months).
- Involvement of many parties (such as impleader procedures and joinder of claims and/or parties), requiring interim judgments on motions. In the example this takes 4 months (NL-3).
- Planning of hearings can take long: 7 and 8 months in the examples.
- Taking of evidence: witnesses and in particular expert witness involvement can take a lot of time. In the example the appointment of an expert took 13 months (NL-3). The report itself took 21 months, while the written submissions of the parties about the report then followed quickly in 2 months.

Appeal

courts that handled the described cases that were appealed.
<https://www.doingbusiness.org/en/reports/subnational-reports/italy>

On appeal the procedure is again flexible with the possibility of a hearing right at the start of the procedure in particular to try to settle the case, even before the grounds of appeal have been submitted. Even a clean case without complications (such as NL-6) can take 516 days. Duration depends much on the behaviour of the parties. Causes of delay are the following.

- Long duration of the submission of the statement of grievances. The summons can be blank, and three months are in any case given for the grounds of appeal to be submitted, but more is possible. In the examples this took 5, 6 and 8 months. In all three cases a preliminary hearing took place before the submission of the grievances for case management and to try to settle the case, in these cases with no effect.
- Planning of a hearing: in one of the cases (NL-5) it took 11 months from the request of a hearing to the hearing itself. This happened at a court that is known to suffer from lack of capacity.
- Examination of witnesses costs time: in the example of NL-6 8 months. Although the Dutch legal system requires grievances in appeal, in fact a full *de novo* review may be achieved by submitting grievances on every aspect of the judgment given in first instance. There are no or hardly any restrictions to adduce new arguments, facts and evidence on appeal. In case NL-6 witnesses were heard in first instance and in appeal.

While legal system and tradition are dominant, insufficient court resources play a role, clearly when it comes to the waiting time between the moment the case is ready to be tried and the actual hearing (see above appeal case NL-5). The judge has the authority to contain the procedure, but this requires strong case management which is regularly not exhibited. Resources affect also the available time for case management in a judiciary like that of the Netherlands that is not used to it. In the longer run strict case management is likely to be more efficient, but at the start it will consume resources.

Italy

First instance

The described procedures are similar to those in the Netherlands, but the steps tend to take much longer. A straightforward first instance case without complications can take 28 months at the court of Florence (IT-1, IT-2 and IT-4). In case IT-1 the preparatory phase took close to a year, while the waiting time for the two hearings that took place formed a further major component of total duration. Case IT-3 proceeded faster (16 months), but case IT-4 took 26 months to arrive at the court deciding that it was not competent. Case IT-2 included a decision to involve a third party which led to delay, but still contained the duration within 28 months. As noted, the first instance cases that preceded the appeal cases that are described took much longer (see Table 9). While little information is available about these procedures, it is documented that in these cases respectively 8, 12, 3 and 8 hearings took place, where the procedure with 3 hearings was concluded in 28 months and the other cases took between 50 and 100 months. These cases are likely to have been more complex than the cases of the Florence court, but especially these hearings lead to extreme long duration.

Appeal

The cases were relatively straightforward. In all four cases no preliminary investigation took place. In two of them preliminary decisions were taken on a stay of the enforceability of the first instance judgments. In one case the parties requested time to attempt to settle the case which added to the duration of the procedure (49 months). The other cases required 2 or 3 hearings and took approximately 30 months, again pointing to long waiting times between steps.

The legislature recognised that the appeal process can constitute an obstacle to the “reasonable duration” of a civil case, and it introduced a law 83/2012 which limits the rights of parties to pursue an appeal. At the first hearing of the appeal the appeal judge can strike out the appeal on the grounds that the appellant has not made out a prima facie ground of appeal.

In first and second instance, court resources including administrative support are a major factor in Italy.

Ireland

First instance

The procedure is different from that in the Netherlands and Italy with a focus on working towards one hearing that may take several days. The preparation for the hearing may take a long time, as can be seen in the first case where discovery and witness statements took a year (IR-1). Also the planning of a hearing may take a relatively long time (6 months), again in IR-1. The other cases show that even with some complications such as a procedural appeal to the appeal court the procedures are short. The cases show strong, hands-on case management, which provides a good practice. In contrast to the other judicial systems, hearings can take several days: 7 days in IR-5, while in the other cases 2 days is the rule. Seven days is not particularly long in Irish court cases.¹¹

Relative long duration of cases has several causes:

- Discovery
- Delivery of witness statements
- Interim motions
- Unsuccessful attempts to serve parties

Appeal

On appeal the duration is longer than in first instance. Case management is again very hands-on and strict (see in particular IR-7). Causes of delay are in particular:

- Delivery of the judgment after the hearing: 8.5 months in case IR-5 and 5 months in case IR-6. This was caused by lack of capacity. There was a substantial backlog of cases on appeal when the Court of Appeal was first established in 2014. The Court was very under resourced and judges had to take on a great workload, essentially sitting every day. Finding and setting a court date under these circumstances was a major cause behind the delays.
- In addition to the above, for lengthy appeals the only feasible time for writing judgments was during court vacations. Therefore, after a case was heard delays arose where it was not possible to write during Term Sittings. In more recent years, the delays have gradually decreased and with the addition of six new judges to the panel of the court, this will decrease delays further.
- Many appeals are taken by lay litigants who are not professionally represented during the proceedings. As such, the court is required to give unusually specific directions and greater leeway to the litigant to comply with the directions, in particular in regards to written submissions, extending time for such to be lodged and interim motions.

¹¹ The Schrems/ Facebook case requesting a reference to the CJEU took 5 weeks of very intense oral argument and evidence of the relevant laws of the US.

Case A3 concerns parties that are engaged in virtually endless litigation, and strict case management, for instance, dismissal of motions to adduce new evidence, is applied.

To conclude, delays occurred in particular in appeal and were primarily caused by lack of resources.

Lithuania

The cases show that the courts work quickly in first instance as well as in appeal, in particular but not only when procedures are straightforward (see LI-2, and specifically for appeal LI-4, after correction for delay due to an interfering procedure, and LI-5). As in the other jurisdictions, involvement of experts causes delay. In LI-1 delay was 1.5 year, as a second expert report was deemed necessary. Also, involvement of many parties costs time. Unforeseen events seem to occur regularly, and strict case planning and case management seem not to be difficult. Also, it seems difficult to reach final closure of cases, as parties (and others) often exhaust all procedural possibilities. Three of the case descriptions illustrate the difficulties. In LI-1 a third party also appealed the first instance decision, involving another party as well. In LI-3 a motion for interim measures was introduced by a municipality that was not involved in the case so far but apparently had an interest. And after appeal and cassation, a third party that claimed it held the contested rights, asked for a renewal of the procedure (retrial), and appealed after renewal was denied. In LI-6 the procedure as such was straightforward. However, after the Court of Cassation reversed the judgment of the appeal court and referred the case back to the appeal court that in turn annulled the first instance judgment, the parties decided to refer the dispute to arbitration. Unlike in the other judiciaries, the authority of the courts appears sometimes to be an issue. Court resources do not seem to be a limiting factor in Lithuania. Court management plays an important role in maintaining speed in procedures, for instance, by allocating resources.

10. Analysis of the case descriptions across jurisdictions

Straightforward cases: first instance cases without complications, in particular with regard to evidence, move relatively quickly through the courts and take less than a year, except in Italy where these cases take two years. In appeal the spread in the duration is larger and court resources play a large role. This is manifest in waiting time for hearings (the Netherlands, Italy, Ireland) and time between hearing and judgment (Ireland), where the situation in Ireland has improved markedly since.

Complicated cases: this is the stress test for systems. Focusing on first instance cases, a common cause of delay is expert evidence. In Ireland the delay is incurred upfront in the pre-trial phase. In other systems the need for expert opinion arises during the procedure. An extreme example is given in an the Netherlands case where the appointment of an expert took 13 months and the expert report 21 months. In a case in Lithuania 1.5 years was spent on an expert report and a second to validate the first. Witness evidence, in general, is a cause for delay in all systems. As shown for Italy, complications lead to many hearings in a case, and with scarce resources this is major cause for delay. Another source of complications are disputes about party composition. These issues are generally handled upfront, but in LT interventions of third parties seem to occur frequently during the procedure or even in appeal and later on.

Appeal system: whether there is appeal by way of review or (de facto) full retrial has a huge impact on appeal procedures, as was noted before. In Ireland and Lithuania the appeal is a review of the decision of the court at first instance. This is not the case in the Netherlands and Italy. In the Netherlands witnesses are heard in first instance, but can also be heard in appeal. Only in Lithuania

appeal takes less time than first instance (table 5). The case descriptions for Lithuania support this finding.

Streamlining of procedures: the exchange of documents is often a cumbersome and time consuming affair, in particular when claims lead to counterclaims. Systems differ in their priorities, including the importance they attach to speed. For instance, in the Netherlands the notice of appeal can be blank, and the grounds for appeal can be submitted later, leading to at least a delay of three months and often more. In other systems, the grievances are part of the notice of appeal. This issue extends to evidence in general that in the Netherlands does not need to be supplied at the start of proceedings.

Case management: a major difference is case management. Especially in IE the emphasis is on speed and hands-on case management. Once one goes to court, the court takes over the planning and strict deadlines are set. Attempts to prolong procedures and complicate matters are generally disallowed. Note: in Ireland complications arise if parties are not represented by lawyers. In other systems the role of the judge is less active if not passive. While in all judiciaries full consideration of facts and arguments is essential, systems differ in the extent they allow new evidence to be brought in during the proceedings and in appeal. In judiciaries like the Netherlands much importance is attached to hearing all the facts and arguments, even if these were initially forgotten or their relevance comes to light later on, and even if this allows strategic withholding of arguments initially. This means that the balance between two aspects of justice, “certainty” and “timeliness” may be different among judiciaries.

Court resources: limited resources play a role in four of the five judiciaries, and reduce the effectiveness of the courts, in particular by delaying proceedings. Limited resources lead to courts not having enough judges, but also to lack of administrative support staff as a result of which judges cannot work efficiently.

11. Discussion

Based on current economic research section 2 summarized a wide range of economic effects of a more or less efficient legal and judicial system. An efficient system leads to higher economic growth than an inefficient system through more competition, more investment, lower risk and larger availability of capital. The benefits of investing in the judicial system are potentially huge but difficult to quantify as these benefits follow from a complex chain of causal relations. To simplify matters, in this study we focused on the economic impact of the performance of the courts on the parties in large commercial cases, differentiated by size of financial claims. We examined volume of commercial litigation, the duration thereof and the use of appeal in five judiciaries. It was shown that the value of the claims in commercial cases above EUR 1 million is between 0.7% to 1.2% of GDP. It should be noted that this is only one category of litigation that is relevant for the economy. For instance, insolvency cases were not included. The implication is that a substantial part of the activities in these economies is subject to litigation.

It was also established that the performance of the five judiciaries differs very much with regard to volume and duration of commercial litigation and - to a lesser extent - the use of appeal. As a substantial part of economic activity is litigated, it can be expected that the differences in judicial performance lead to large economic effects. The quantitative analysis shows that there are indeed large gains to be made by moving towards best practice, even within the five countries studied. All five judiciaries can make progress, but to a different degree, with Italy (volume, duration), Lithuania (volume) and the Netherlands (duration) having much to gain. The order of magnitude of the costs of long duration above the benchmark is estimated for Italy at EUR 1.9 billion and for the Netherlands at

EUR 420 million annually. A strong business case can be made to move towards the best practice. The cases that were described show in detail that divergence from best practice has to do with court resources and with procedures and their application. For instance, the strong emphasis in Ireland and Norway on strict case management is not present in the other countries, and reflects different priorities of judges but also lawyers. However, lack of resources can extinguish any advantages thereof, as is shown by the data of Ireland on appeal.

The case descriptions show a fairly sharp distinction between systems that focus in the procedure on one (sometimes long) hearing and steer all efforts towards that hearing, and systems that allow cases to evolve (“free form”) during the procedure, leaving much room to the parties, for instance, to bring new evidence. Other things being equal, the hearing-oriented systems are faster than the “free-form” systems, but may miss sometimes opportunities to shed new light on cases. Allowing new information to emerge during the trial may lead to higher certainty in the ultimate decision and a stronger conviction that justice has been done. But this comes at the cost of time and thus at the cost of justice as well. It also opens possibilities for tactical manoeuvring by withholding information at the start of the procedures. This dilemma can be seen as a the trade-off between, what may be called, certainty and timeliness, both aspects being essential to justice.

In all countries appeal rates are high, generally 40-50% for large cases. It is difficult to identify a best practice in this respect. For parties costs are a secondary consideration in the large cases studied here, and they often appeal for tactical reasons to delay execution or to obstruct the other party. In the countries studied a clear distinction exists between appeal as review and appeal as (de facto) retrial. Other things being equal, retrial takes (much) longer than review. As in the previous point, there is a trade-off between certainty and timeliness.

The quantitative data together with the cases descriptions show that large benefits can be achieved by moving towards best practice, and that this is feasible, in particular with regard to the duration of cases. While a reduction of the volume of cases cannot be directly achieved, timeliness can be addressed directly, and is likely to have substantial indirect effects by reducing the benefits for parties to litigate just to gain time. It requires sufficient resources to be devoted to the judiciary and the willingness and means to address procedures and working practices.

Some general conclusions can be derived from these findings. In the **first** place, the comparison of judiciaries from the perspective of the (economic) impact on society is useful. Optimization of procedures and ways of working within national confines misses opportunities to make large gains. The comparison also helps to clarify the underlying orientations and priorities in judicial systems, and their benefits and costs for society. In the **second** place, the current pilot study was confined to five countries. It would be important to extend the study to all countries of the EU. This would require an adaptation of case registration systems in many countries. In the meantime it would be possible to classify all judiciaries of the EU by their similarities with the five countries of the pilot. In the **third** place, EU-wide investment plans to improve commercial litigation would yield a high rate of return for society, and it would improve the competitiveness of the EU.

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