

# Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?

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*“Article 6 ECHR guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme constitutes one of those means but there are others such as, for example, a simplification of procedure.” (ECHR Airey v. Ireland, 1979)*

# Legal Notice

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# Executive Summary

## Executive Summary

### Aim of this research

The research institute of the Dutch Ministry of Security and Justice (WODC) commissioned comparative research about legal aid in nine countries: France, Germany, Belgium, England & Wales, Scotland, Ireland, Poland, the Netherlands and Finland. This report addresses two questions: 1) How are state-financed legal aid systems organised in these countries? 2) Which minimum requirements for state-financed legal aid can be deduced from the European Convention of Human Rights (ECHR) and from case law of the European Court of Human Rights (ECtHR)?

### Methodology

Data collection was done by desk research based on a questionnaire, which was validated by the board of advisors for this research established by the WODC and to key members of the International Legal Aid Group. Reports available on the internet were used from all countries in native languages. Interviews were conducted with national experts from legal aid boards (Netherlands, Finland, Germany, Belgium, Ireland) or from academia (Belgium, Germany, Poland). These specialists also verified information collected through desk research. For France, Scotland and England & Wales, recent reports and public sources provided sufficient information.

### Organisation, expenditure and services

England & Wales, Scotland, Ireland, Finland and the Netherlands have centralised legal aid systems. France, Germany, Belgium and Poland have more decentralised systems. Scotland, Ireland and the Netherlands have independent legal aid boards. In France and Belgium legal aid councils situated at the courts decide on legal aid entitlements. In Germany and Poland the courts decide. The costs of legal aid systems are born by the central government, except in Germany where the 16 *Länder*/States are responsible for the costs.

We found large variations in expenditure, and even higher variability in expenditures for specific problems. Legal aid expenditure per capita is highest in England & Wales (€39), followed by Scotland, the Netherlands (€29), Ireland, Finland, Belgium, Germany (€7), France and Poland (€ 0,6). France and Belgium have closed budgets (and Ireland for civil legal aid). All other countries have mostly open ended budgets. Criminal law takes up to 50% of the legal aid budget in many countries. In some countries, complex criminal cases are still paid by the hour, and not by way of fixed fee. This is usually connected to high levels of expenditure for such cases. For family law, England & Wales spends 15 times as much per capita in 2012 than Belgium. Differences in the complexity of procedures may be the explanation. These, and other data, suggest that there may be huge gains available from zooming in on the supply chain around common and frequent legal problems.

Legal aid is typically available for all areas of law relevant for individuals. All countries apply financial and merits criteria for legal aid eligibility. Recently, England & Wales has excluded entire areas of law such as divorce, personal injury, clinical negligence, employment and housing, but offers (tribunal) procedures for some of these areas that are more easy to navigate without a lawyer.

There is typically a broad range of state-subsidised services for information and advice. All countries have many other sources of legal information and advice outside the 'public' legal aid system. For negotiation and interaction with the other party, there tend to be (subsidiised) services from lawyers and from mediators (low usage). Procedural assistance by a lawyer during litigation at courts and tribunals is available everywhere.

In France, Germany, England & Wales, Scotland and Finland, it is obligatory to use other means of legal assistance

before receiving legal aid. Legal expenses insurances are most prominent in Germany, followed by the Netherlands, Belgium, France, Finland and Poland.

There are no data which allow comparison between countries as to the quality of legal assistance. Comparative data on the quality of (access to) justice suggest that Germany and Finland achieve the same quality as England & Wales for a fraction of spending. Belgium and France may have to step up their access to justice efforts. Their access to justice can be improved whereas they spend little on legal aid.

### **Minimum requirements of Article 6 of the European Convention of Human Rights**

Legal aid is only one way to guarantee access to justice. The ECtHR is open to alternatives, such as simplification of procedures. Methods to achieve this include help by social workers, paralegals, court forms, court directions and guidance from judges during the procedure. When the procedures mandates representation from a lawyer, a lawyer must be made available by the state (if the applicant cannot afford one and the case has sufficient merit).

In civil proceedings, the right to legal aid is not absolute and may be subject to legitimate and proportional limitations. Determining factors are the interests at stake, the complexity of the procedures, complicated issues of law and fact, and the emotional involvement of the applicant. Categorical exclusion of civil justice problems is allowed, if self-representation is a realistic option.

Legal aid has to be provided when a defendant faces incarceration. Determining factors are the seriousness of the offence, the severity of the expected sentence and the complexity of the case. Access to assistance by a lawyer must be guaranteed before and during police station interrogations.

### **International trends in legal aid reform**

All countries in this research are working on legal aid reform. Most changes are incremental and oriented on cost savings, not improving the quality of access to justice. Countries are introducing tighter eligibility criteria. A clear trend in reforms is to make litigants pay higher contributions. Except Scotland, the countries studied appear to have difficulties in formulating a broader access to justice strategy.

The following nine variables may have a (major) positive impact on costs and/or quality: 1) Reducing complexity of procedural routings for problem categories; 2) Further developing specialised procedures for frequent and urgent problems; 3) Services integrating legal analysis with other disciplines; 4) Reducing the services that are a monopoly of the legal profession; 5) Improving legal information/advice; 6) Fixed fees instead of hourly fees for legal aid lawyers; 7) Fixed fees on the market for legal services; 8) Closed budget; 9) Rates paid to lawyers.

Five variables seem to have little impact on budgets, and varying impacts on quality: 1) Availability of legal expenses insurance; 2) Preventing justiciable problems; 3) Mediation; 4) Raising own contributions and income level for eligibility; 5) Recovering legal aid money from applicants, defendants or other funding sources.

Variables with uncertain impact on costs and quality that deserve further study are: 1) Products and incentives for negotiation and settlement; 2) Reducing the types of problems for which legal aid is available.

In conclusion, the procedural setting and the availability of legal services on the market are among the main variables that policy makers can influence in order to guarantee access to justice. The data in this report, and the examples set by neighbouring countries, suggest how systems can be innovated in a more substantial and holistic way by improving the interaction with other elements of the justice system so that access to justice becomes less costly for citizens and governments, and leads to better outcomes for citizens.

# Dutch Summary



## Uitgebreide samenvatting

In dit rapport worden de stelsels van rechtsbijstand van negen Europese landen vergeleken. Naast Nederland, zijn dat de omliggende landen België, Frankrijk, Duitsland en Engeland & Wales. Daarnaast werden Schotland, Ierland, Finland en Polen bekeken, omdat voor die landen via het netwerk van de Nederlandse Raad voor Rechtsbijstand goede informatie kon worden verkregen. Ook bieden deze landen nog meer inzicht in beleidsopties. Deze uitbreiding van het aantal landen maakte het ook mogelijk om zicht te krijgen op bredere Europese trends.

De achtergrond van het onderzoek is dat het beschikbare budget voor rechtsbijstand in Nederland afneemt (in Nederland waren de kosten in 2012 €495 mln. en 2018 is €334 mln. gebudgetteerd). Tegelijkertijd moet het stelsel de toegang tot het recht blijven waarborgen. In het bijzonder moet het stelsel blijven voldoen aan de vereisten die grondrechten, onder meer neergelegd in het EVRM, stellen. De andere landen in dit onderzoek staan voor vergelijkbare opgaven. Doel van dit onderzoek is om beleidsmakers te informeren over opties om een goede balans tussen kwaliteit en kosten te realiseren.

Dit rapport is in de Engelse taal geschreven, omdat uitwisseling van gegevens heeft plaatsgevonden op voorwaarde van het delen van de resultaten en om internationale validatie van de gegevens te faciliteren. Deze uitgebreide samenvatting is met name een vertaling van het samenvattende slothoofdstuk.

### 1. Bevindingen

#### De rol van gesubsidieerde rechtsbijstand in het rechtstelsel

Gesubsidieerde rechtsbijstand is relevant voor personen die toegang tot het recht zoeken voor problemen zoals vrijheidsontneming, strafzaken en familiezaken (voornamelijk gerelateerd aan echtscheidingen). In Nederland, en elders in Europa, kunnen rechtzoekenden ook een beroep doen op deze voorzieningen als zij te maken krijgen met consumentenklachten, vluchtelingen- en immigratiezaken, arbeidszaken, schuldenproblematiek, letselschade, huisvesting of sociale zekerheidskwesties.

Uit eerder onderzoek is bekend dat cliënten een proces van drie fasen doorlopen om toegang tot het recht te verkrijgen. Eerst proberen ze (juridische) informatie en advies in te winnen. Ze zoeken informatie over de te volgen procedures, inhoudelijke regels en werkwijzen van professionals. Verder zoeken ze naar uitkomsten die te verwachten zijn en die worden gezien als eerlijk en effectief.

Dan, in de tweede fase, proberen rechtzoekenden de andere partij te benaderen om tot een eerlijke oplossing te komen. De meeste problemen worden op deze manier opgelost. Dit gebeurt ook, en in toenemende mate in strafzaken. Verdachten en hun vertegenwoordigers worden betrokken in interacties met de politie en OM waar tenlasteleggingen of sancties worden overwogen en besproken. Tijdens deze interacties houden beide partijen de 'dreiging' van een rechtszaak achter de hand. Ze vragen een uitspraak van een rechter (of een andere neutrale beslisser) als ze niet tevreden zijn met het in onderhandelingen aangeboden resultaat.

In de derde fase, wanneer rechtzoekenden daadwerkelijk een zaak bij een beslissende instantie starten, leggen zij hun geschil voor aan een rechtbank, geschillencommissie of andere beslisser. Terwijl ze de procedure doorlopen blijven ze vaak onderhandelen met de andere partij. Soms is tussenkomst van deze derde partij verplicht om tot een afronding te komen, zoals in strafzaken of echtscheidingsprocedures. De rechter is dan (ook) toezichthouder op door partijen gemaakte afspraken. Deze fase van toegang tot de rechter heeft invloed op de onderhandelingsfase. Een partij die geen effectieve toegang tot de rechter heeft, zal over het algemeen met een

minder goed onderhandelingsresultaat genoeg moeten nemen, en dat kan tot onrechtvaardige uitkomsten leiden.

In elk van deze drie fasen kan een rechtzoekende hulp nodig hebben. Die wordt ook aangeboden op de markt voor juridische dienstverlening. Sommige mensen hebben niet de middelen om deze juridische hulp te betalen. Gesubsidieerde rechtsbijstand kan dan nodig zijn. De gesubsidieerde rechtsbijstand kan dus betrekking hebben op juridische informatie en advies, op hulp bij het onderhandelen over een uitkomst, of op vertegenwoordiging in rechte dan wel in een procedure bij een andere beslissende instantie.

### **Kwaliteit en kosten van (rechtsbijstand) diensten**

Voor kwaliteit van de toegang tot het recht die zo ontstaat, zijn meerdere perspectieven mogelijk. Een eerste benadering is de kwaliteit van de juridische bijstand die daadwerkelijk wordt gegeven aan personen die recht hebben op gesubsidieerde rechtsbijstand. Is de geleverde dienst van de advocaat voldoende? Is het probleem op een eerlijke manier opgelost als gevolg van deze dienst? Was de klant tevreden met de dienst?

Een ander kwaliteitsperspectief is dat van toegang tot het recht in bredere zin. Dan gaat het erom of de rechtzoekende een eerlijke procedure en uitkomst heeft gekregen. Dan gaat het niet alleen om de persoonlijke hulp die is geleverd, maar ook naar de kwaliteit van andere elementen van het proces van toegang tot het recht. De kwaliteit van de procedure bij de rechter en de wetten die uitkomsten beïnvloeden zijn bijvoorbeeld ook inbegrepen. De twee perspectieven kunnen tot verschillende resultaten leiden. Een rechtzoekende kan door een zeer bekwame advocaat worden geholpen, maar toch tien jaar vastzitten in een zeer ingewikkelde procedure, worstelen met vele onbegrijpelijke wetten en een vrij slechte uitkomst krijgen. Anderzijds kan een rechtzoekende met een middelmatige advocaat een goed resultaat krijgen via een korte, makkelijk te begrijpen procedure met behulp van een rechter die over uitstekende vaardigheden beschikt om een conflict op te lossen.

Beide perspectieven zijn waardevol. In dit onderzoek, en in de rechtspraak over grondrechten, staat het tweede perspectief voorop. Rechtsbijstand, al dan niet via gesubsidieerde advocaten, is een middel om effectieve toegang tot het recht te krijgen. Voor sommige situaties is deze persoonlijke en (juridisch) deskundige begeleiding een onmisbaar element van toegang tot het recht; voor andere gevallen zijn goede alternatieven beschikbaar of denkbaar.

Voor burgers zijn de totale kosten van toegang tot het recht belangrijk. Om de drie fasen succesvol te doorlopen, moet een individu mogelijk geld en waardevolle tijd besteden om juridische informatie en advies en hulp tijdens onderhandelingen of bemiddelingen te verkrijgen. Als er uit de onderhandelingen geen eerlijke regeling komt, moeten kosten worden gemaakt voor een rechtszaak. Deze proceskosten kunnen bestaan uit griffierechten, kosten van experts, reiskosten en de kosten om door een advocaat te worden vertegenwoordigd.

Gesubsidieerde rechtsbijstand, dat wil zeggen een subsidie voor juridische diensten, is noodzakelijk wanneer deze diensten nodig zijn om een eerlijke uitkomst te bereiken, maar te duur zijn voor de persoon die een geschil heeft. Gesubsidieerde rechtsbijstand is traditioneel het meest gericht op de derde fase van geschilbeslechting. Een advocaat die een cliënt begeleidt in een procedure bij de rechter kan daaraan veel werk hebben en dus kostbaar zijn om in te schakelen. Door de staat gefinancierde juridische diensten kunnen ook worden aangeboden tijdens de eerste fase (informatie zoeken) en de tweede fase (onderhandeling). Aanvullende reden voor een dergelijk beleid kan zijn dat vroegtijdige tussenkomst in deze fase kan leiden tot betere uitkomsten tussen partijen, met meer kans van slagen, en lagere kosten voor gesubsidieerde rechtsbijstand in de derde fase (rechtszaak).

Over het algemeen gaan de kosten van gesubsidieerde rechtsbijstand omlaag als meer mensen, zonder intensieve persoonlijke begeleiding eerlijke uitkomsten bereiken. Bijvoorbeeld omdat duizenden mensen de kans krijgen om voor zichzelf een eerlijke uitkomst te regelen via informatie op een website. Kosten van gesubsidieerde rechtsbijstand gaan ook omlaag als de prijzen van juridische diensten die nodig zijn om een probleem op te lossen dalen. In dat geval hoeven minder mensen subsidie te krijgen en hoeft per zaak minder subsidie te worden uitgekeerd. Als alle andere factoren constant blijven, gaan de kosten voor gesubsidieerde rechtsbijstand omhoog als juridische dienstverleners beter betaald krijgen, bijvoorbeeld om een hogere kwaliteit te bereiken.

### **1. De institutionele en professionele inrichting**

In Engeland & Wales, Schotland, Ierland, Finland en Nederland is het systeem van gesubsidieerde rechtsbijstand gecentraliseerd op nationaal niveau. In Schotland, Ierland en Nederland is er een onafhankelijke raad voor de rechtsbijstand, terwijl in Engeland & Wales en Finland het ministerie van justitie het rechtsbijstandssysteem controleert. In civiele zaken in Ierland gaat de raad voor rechtsbijstand over de administratie van de gesubsidieerde rechtsbijstand en het toekennen van rechtsbijstand aan degenen die daar recht op hebben. In strafzaken regelt het ministerie van justitie de administratie van de gesubsidieerde rechtsbijstand en besluiten de rechtbanken wie recht heeft op rechtsbijstand (Par. 2.1).

Frankrijk, Duitsland, België en Polen hebben elk verschillende, meer gedecentraliseerde systemen. In Frankrijk en België wordt de beslissing om gesubsidieerde rechtsbijstand te verlenen genomen door lokale bureaus voor rechtsbijstand die zich bij de rechtbanken bevinden. De nationale raad voor de rechtsbijstand in Frankrijk is slechts een adviesorgaan. In België worden de lokale bureaus gecontroleerd door de regionale balies (organisaties van de advocatuur). Duitsland en Polen hebben geen centrale organen. De rechtbank beslist daar op basis van de wettelijke regeling over de concrete aanspraken op gesubsidieerde rechtsbijstand (Par. 2.1).

De kosten van gesubsidieerde rechtsbijstandssystemen worden gedragen door de centrale overheden, behalve in Duitsland, waar de 16 deelstaten verantwoordelijk zijn voor de kosten. Gesubsidieerde rechtsbijstand kan de vorm hebben van een overheidssubsidie voor het gebruik van een advocaat, of kan in natura door de overheid worden verstrekt door juristen ter beschikking te stellen voor verdediging in strafzaken, of door het in stand houden van juridische adviescentra, websites of telefoondiensten. Er zijn nog geen voorbeelden van systemen die breed gebruik maken van publiek/private samenwerking, zoals het uitbesteden van bepaalde rechtsbijstandstaken aan private organisaties, of bijvoorbeeld financiering via zogenaamde *social impact bonds*.

### **2. Het budget voor gefinancierde rechtsbijstand**

Tussen de landen zijn grote variaties in de uitgaven te zien. In verhouding tot hun Bruto Nationaal Product (BNP) besteden Engeland & Wales en Schotland het meest. Beide landen besteden ongeveer vijf keer zoveel als Duitsland, België en Frankrijk en 13 keer zoveel als Polen. Nederland en Ierland geven in verhouding tot het BNP ongeveer drie keer zoveel uit als Duitsland, België en Frankrijk. Polen geeft het minst uit van alle landen.

Per hoofd van de bevolking zijn de uitgaven aan gesubsidieerde bijstand het hoogst zijn in Engeland & Wales, gevolgd door Schotland, Nederland en Ierland, variërend van €40 tot €20. De uitgaven per hoofd van de bevolking in Finland zijn €12, gevolgd door België, Duitsland en Frankrijk, waar de uitgaven variëren van €7 tot €5 per persoon. Polen geeft het minst uit per hoofd van de bevolking, minder dan €1.

Frankrijk en België hebben een gesloten budget voor de meeste vormen van gesubsidieerde rechtsbijstand. Aan elk rechtsbijstandsproduct wordt een aantal punten toegekend en aan het eind van het jaar wordt het budget gedeeld door het totaal aantal punten dat door advocaten is gerealiseerd. Elke advocaat wordt dan uitbetaald op

basis van dit tarief per punt. Ierland heeft een gesloten budget voor gesubsidieerde rechtsbijstand in civiele zaken. Alle andere landen hebben open budgetten. Administratiekosten liggen meestal tussen 5 en 8% van het totale budget voor rechtsbijstand (Par. 3.5-6).

Alle landen behalve Finland zoeken ook financiering door gebruikers van gesubsidieerde rechtsbijstand geld terug te laten betalen in succesvolle rechtszaken of als achteraf blijkt dat de zaak geen rechtsbijstand waard was. Bedragen die op deze manier worden teruggevorderd zijn meestal klein, hoogstens 2% van rechtsbijstandsbegrotingen, zie ook par. 3 van deze samenvatting.

Rechtsbijstandsverzekeringen kunnen een grote invloed hebben op de beschikbaarheid van betaalbare juridische dienstverlening en ook op het budget voor gesubsidieerde rechtsbijstand. Rechtsbijstandsverzekeringen zijn het meest prominent in Duitsland, gevolgd door Nederland, België, Frankrijk, Finland en Polen. Er waren geen gegevens beschikbaar voor Engeland & Wales, Schotland en Ierland (Par. 3.6-7).

### **3. Toepassingsgebieden, beperkingen en uitsluitingen**

Rechtsbijstand is gewoonlijk beschikbaar voor alle rechtsgebieden die van belang zijn voor individuele burgers. Frankrijk, Duitsland, België en Polen sluiten geen soorten problemen of procedures uit van het toepassingsgebied van gesubsidieerde rechtsbijstand. Ierland, Nederland en Finland sluiten bepaalde kleine of simpele soorten problemen uit. Engeland & Wales valt op, omdat het recent hele rechtsgebieden heeft uitgesloten van gesubsidieerde rechtsbijstand. Het gaat hier bijvoorbeeld om scheidingszaken (tenzij er aanwijzingen zijn van huiselijk geweld of kindermisbruik), letselschadezaken, of betalingsproblemenzaken tenzij er gevaar is dat iemand daardoor dakloos wordt (Par. 2.1-2).

Alle landen passen zowel inkomens- als inhoudelijke criteria toe om personen en zaken te selecteren voor gesubsidieerde rechtsbijstand. Bijstand in strafzaken en eerstelijnsdiensten voor informatie en advies zijn meestal breed toegankelijk, zonder financiële of inhoudelijke toetsing. Par. 2.2 geeft meer details over de financiële drempels, eigen bijdragen, inhoudelijke criteria, uitgesloten en vrijgestelde groepen en soorten problemen. Hoofdstuk 4 bevat gedetailleerde informatie over verschillende regelingen en uitgaven per type probleem.

### **4. Voorzieningen**

Er is meestal een breed scala van door de overheid gesubsidieerde diensten voor informatie en advies (fase 1). Advies wordt traditioneel verleend door advocaten, maar in toenemende mate ook door gespecialiseerde juridische centra zoals in Nederland de Juridische Loketten en via websites. Sommige landen hebben minder uitgebreide door de overheid gefinancierde adviesdiensten, of helemaal geen in het geval van Polen. Maar alle landen kennen vele andere bronnen van juridische informatie en advies buiten het 'publieke' rechtsbijstandssysteem. Zowel de private als de publieke sector zijn innovatieve manieren aan het ontwikkelen om informatie en advies te verstrekken. Alleen Engeland & Wales heeft een verplichte voorafgaande dienst, de telefonische toegangspoort (Par. 2.3.1, Hoofdstuk 5).

Advocaten helpen rechtzoekenden ook bij het onderhandelen en communiceren met de andere partij (fase 2). Daar plegen subsidies voor beschikbaar te zijn. Nieuwere vormen van hulp bij het onderhandelen worden ook gedekt door gesubsidieerde rechtsbijstandssystemen, behalve in Polen en Duitsland. De meest voorkomende vorm is mediation. Het gebruik van deze diensten wordt aangemoedigd, maar is niet verplicht. De omvang van het gebruik lijkt nog zeer beperkt te zijn (Par. 2.3.2).

Bijstand van een advocaat tijdens een procedure bij rechtbanken of geschillencommissies (fase 3) is overal beschikbaar. Het is meestal de duurste dienst die nodig is om tot een rechtvaardige oplossing te komen, waar het grootste deel van het budget heen gaat. In alle landen, behalve Polen, is de rechtsbijstandsgebruiker vrij om een eigen advocaat te kiezen die dan subsidie ontvangt (Par. 2.3.3).

In Frankrijk, Duitsland, Engeland & Wales, Schotland en Finland is het verplicht om eerst andere bronnen van juridische bijstand te gebruiken om in aanmerking te komen voor gesubsidieerde rechtsbijstand. Polen en Nederland hebben zo'n verplichting niet. De meest voorkomende andere bronnen van juridische bijstand die eerst moeten worden gebruikt zijn rechtsbijstandsverzekering en lidmaatschap van een vakbond (Par. 2.2.4).

### **5. Effecten op minder draagkrachtige burgers en op geschiloplossing**

Over de effecten van systemen van gesubsidieerde rechtsbijstand op minder draagkrachtige burgers, toegang tot het recht en geschillenbeslechting is weinig bekend. Er zijn geen gegevens die een vergelijking tussen landen mogelijk maken met betrekking tot de kwaliteit van de juridische bijstand. Verschillen in uitgaven kunnen worden verklaard door een voorkeur voor hogere kwaliteit en meer gelijke toegang tot het recht, maar ook door inefficiënties, zoals complexe procedures of monopolies die de ontwikkeling van juridische dienstverlening op de markt beperken.

Par. 3.9 bevat recente data over de kwaliteit van civiele, strafrechtelijke en bestuursrechtelijke rechtspleging zoals die wordt ervaren door de bevolking in de onderzochte landen. De gegevens zijn indicaties dat de kwaliteit van toegang tot het recht het hoogst is in Nederland en Finland, op de voet gevolgd door het Verenigd Koninkrijk en Duitsland. België en Frankrijk blijven enigszins achter. Polen scoort beter voor strafrecht dan voor civiel recht en presteert toereikend voor het niveau van het nationaal inkomen.

Als we deze indicaties over de kwaliteit (met alle voorzichtigheid die daarbij is geboden) combineren met niveaus van uitgaven, dan lijken Finland en Duitsland de meeste waarde te halen uit elke Euro die zij uitgeven aan gesubsidieerde rechtsbijstand. Het Verenigd Koninkrijk geeft vijf keer zoveel uit om iets betere resultaten te halen dan Frankrijk en België. Engeland & Wales wordt duidelijk voorbijgestreefd door het zeer efficiënte Finland, en Duitsland haalt zeer vergelijkbare resultaten met slechts een fractie van de kosten. In Engeland & Wales kan de neiging om advocaten per uur te betalen een deel van het probleem zijn, evenals de complexiteit van bepaalde procedures bij rechtbanken.

Een andere indicator van de kwaliteit is het totaal aantal schendingen van het recht tot toegang tot de rechter zoals dat sinds 1959 wordt beschermd door artikel 6 van het Europees Verdrag voor de Rechten van de Mens (EVRM) en gehandhaafd door het Europees Hof voor de Rechten van de Mens (EHRM). Tabel 3.10 in par. 3.9 laat voor elk land het aantal overtredingen per hoofd van de bevolking zien. Het patroon is vergelijkbaar met wat blijkt uit bevolkingsonderzoek: Duitsland en het Verenigd Koninkrijk presteren het best (laagste aantal overtredingen per inwoner), gevolgd door Nederland en Ierland. Daarna komen België en Frankrijk die veel meer schendingen hebben, en Polen als de meest frequente overtreder. Finland is een uitzondering, omdat het goed scoort op andere indicatoren van toegang tot het recht, maar slecht op het (hoge) aantal schendingen van art. 6 van het verdrag.

Wat zijn de implicaties van één ander? Nederland bereikt een hoog niveau van kwaliteit van het recht, maar kan mogelijk geld verstandiger besteden door voorbeelden te volgen van Finland en Duitsland. In die landen wordt drie keer minder uitgegeven voor een iets lagere kwaliteit. België en Frankrijk zouden hun inzet voor toegang tot het

recht kunnen vergroten, omdat hun kwaliteit nog te wensen over laat, terwijl ze relatief weinig besteden aan gesubsidieerde rechtsbijstand.

## **6. Voorgenomen of ingezette hervormingen, strategieën, trends en innovaties**

Alle landen in dit onderzoek werken aan hervormingen. De meeste veranderingen zijn stapsgewijs en gericht op kostenbesparingen. Het verhogen van de kwaliteit lijkt minder op de voorgrond te staan (Par. 5.2). Publieke percepties van gesubsidieerde rechtsbijstand worden niet systematisch gemeten en het debat over rechtsbijstand is beperkt. Het debat wordt vaak gedomineerd door de juridische beroepsgroep, en heeft veelal meer kenmerken van een protest tegen bezuinigingen, en minder van een publieke discussie over het effectief realiseren van toegang tot het recht voor burgers.

Behalve Schotland, lijken de bestudeerde landen moeite te hebben met het formuleren van een bredere strategie voor toegang tot het recht. Er zijn maar een paar voorbeelden van procedurele hervormingen die zijn ondernomen als onderdeel van het beleid voor gesubsidieerde rechtsbijstand, terwijl de duur en de complexiteit van procedures een belangrijke kostenverhogende factor kan zijn. Het zelfde geldt voor hervormingen elders in het systeem die invloed kunnen hebben op de omvang van te subsidiëren rechtsbijstand. Er is wel een tendens om het aantal procedures te verminderen waarbij vertegenwoordiging door een advocaat nodig is (zie par. 5.2).

Landen proberen de efficiëntie van de organisatie en het beheer van gesubsidieerde rechtsbijstandssystemen te verhogen. De focus ligt meestal op kleine aanpassingen in vergoedingen, eigen bijdragen, inkomensgrenzen en het terugvorderen van geld dat is betaald aan rechtsbijstandsgebruikers. Een duidelijke trend in de hervormingen is dat procespartijen en rechtsbijstandsgebruikers meer zelf moeten betalen. Hervormingen in Engeland & Wales en voorstellen in Nederland zijn of waren gericht op het uitsluiten van categorieën van problemen van het toepassingsgebied van gesubsidieerde rechtsbijstand. Er zijn geen plannen in andere landen om deze route te volgen. Landen introduceren strengere criteria voor toelating tot gesubsidieerde rechtsbijstand en passen al bestaande criteria ook strenger toe. De vraag of de financiële voordelen van deze strengere toelatingscriteria opwegen tegen de kosten voor de toegang van het recht, kan op basis van de gegevens in dit onderzoek niet worden beantwoord.

Par. 5.1 noemt vijf trends in innovatie op het gebied van toegang tot het recht, die naar voren zijn gekomen uit eerder onderzoek. Deze paragraaf geeft daarvan voorbeelden uit de landen die in dit onderzoek worden behandeld.

1) Burgers worden beter in staat gesteld om hun verhouding met juridische dienstverleners vorm te geven en problemen op te lossen in een vroeg stadium als juridische informatie gemakkelijk toegankelijk is. In alle landen komen er bijvoorbeeld steeds meer websites met bruikbare juridische informatie en advies.

2) Hybride diensten combineren tegenwoordig vaak elementen van traditionele rollen van advocaten, mediators en rechters. Deze diensten proberen een brug te bouwen tussen de partijen door middel van verbeterde communicatie, om zo tot een redelijk rechtvaardige en neutrale uitkomst te komen.

3) *Best practices* en protocollen worden ontwikkeld om vaak terugkerende kwesties te behandelen, zoals een scheiding, een ontslag of een schuldprobleem. Deze normen kunnen tot kostenbesparingen leiden, en ook tot betere en meer transparante kwaliteit.

4) Innovaties richten zich ook op vereenvoudigde procedures bij rechtbanken en tribunalen, gespecialiseerd voor specifieke soorten geschillen die veel voorkomen zoals huurzaken, consumentenproblemen of migratiezaken (zie ook Hoofdstuk 4 en paragraaf 2 van deze uitgebreide samenvatting). Deze procedures zijn gericht op een vroege schikking, vereisen een beperkte hoeveelheid bewijs, en kunnen meestal zonder advocaat worden doorlopen.

5) De vijfde trend is om online platforms te ontwikkelen die geschillenbeslechting en toegang tot het recht in strafzaken bieden.

Deze trends worden door deskundigen gezien als veelbelovend, omdat ze de kosten van toegang tot het recht kunnen verminderen en de kwaliteit verbeteren. Voor zover bekend is er geen land dat systematisch beoordeelt of zulke trends beleidsmatig kunnen worden ondersteund om daarmee ook de uitgaven aan gesubsidieerde rechtsbijstand te verlagen. De verzamelde gegevens over innovaties laten wel zien dat veel landen op ten minste enkele van deze ontwikkelingen proberen voort te bouwen.

### **Minimumvereisten van artikel 6 EVRM**

Dit onderzoek brengt ook de eisen in kaart die voortvloeien uit het grondrecht op toegang tot het recht als bedoeld in artikel 6 van het Europees Verdrag voor de Rechten van de Mens.

### **7. Relevante regelgeving en jurisprudentie**

Hoofdstuk 6 geeft een gedetailleerd overzicht en analyse van EVRM-jurisprudentie. Het Europees Hof voor de Rechten van de Mens past brede open geformuleerde criteria toe en sluit specifieke manieren om gesubsidieerde rechtsbijstandssystemen te organiseren niet categorisch uit. Het hof laat de aangesloten staten veel vrijheid.

### **8. Minimumvereisten die uit art. 6 EVRM voortvloeien**

In civiele procedures is er bijvoorbeeld geen automatisch recht op gesubsidieerde rechtsbijstand. Het is vaste rechtspraak dat het recht op gesubsidieerde rechtsbijstand en op toegang tot een rechter niet absoluut is en dat het kan worden onderworpen aan legitieme en evenredige beperkingen. Beslissende factoren waar het EHRM naar kijkt in civiele zaken zijn de belangen die op het spel staan, de complexiteit van de procedures, ingewikkelde juridische en feitelijke kwesties, en de emotionele betrokkenheid van de aanvrager. Het verlenen van rechtsbijstand en een vereenvoudiging van procedures zijn allebei manieren om het recht op toegang tot het recht te waarborgen.

Afhankelijk van deze factoren kan toegang tot het recht ook gewaarborgd zijn als een partij zelf, zonder rechtshulp, de procedure bij de rechter voert. Dat is met name zo als de begeleiding door hanteerbare procedurele regels en richtlijnen van de rechtbanken goed is, eventueel aangevuld met (laagdrempelige) toegang tot juridisch advies en hulp. In procedures waar procesvertegenwoordiging verplicht is, en als er voldoende belang is, moet gesubsidieerde juridische bijstand van een advocaat beschikbaar zijn voor zij die niet de financiële middelen hebben om zelf een advocaat te betalen.

Terugvordering en terugbetalingsmechanismen zijn toegestaan voor zowel civiele als strafzaken. Financiële bijdragen van rechtsbijstandsgebruikers zijn toegestaan als ze niet arbitrair en onredelijk zijn en de rechtzoekende voldoende middelen heeft om te betalen.

Uitsluiting van bepaalde typen zaken is toegestaan, mits er een hardheidsclausule is om gesubsidieerde rechtsbijstand te verlenen in uitzonderlijke gevallen. Uitsluiting van gesubsidieerde rechtsbijstand moet niet leiden

tot een ongelijkheid tussen de partijen. Als een partij in staat is om veel betere advocaten in te huren en de andere partij slechts beperkte toegang heeft tot hulp van een advocaat, mogen de ontstane verschillen in het niveau van juridische bijstand niet tot onbillijkheid leiden.

Landen hebben voor strafrechtelijke procedures minder vrijheid om het systeem in te richten. In het algemeen is gesubsidieerde rechtsbijstand nodig wanneer een verdachte wordt geconfronteerd met mogelijke detentie of al gedetineerd is. De ernst van de overtreding, de ernst van de te verwachten straf en de complexiteit van de zaak zijn doorslaggevende factoren. Wanneer de procedure vertegenwoordiging door een advocaat verplicht stelt, en het belang voldoende is, moet de staat er voor zorgen dat een advocaat beschikbaar is.

Voor rechtsbijstand tijdens hechtenis en politieverhoren zal de zogenaamde Salduz-jurisprudentie van invloed blijven. Toegang tot bijstand van een advocaat moet zijn gewaarborgd voor en tijdens verhoren op het politiebureau, zoals duidelijk blijkt uit de laatste beslissing van het EHRM over deze kwestie in de zaak *Navone v. Monaco*. Sommige landen hebben nieuwe wetgeving aangenomen om dit te kunnen waarborgen. In hoeverre en op welke manier bijstand tijdens politieverhoren ook moet worden gesubsidieerd door de staat is nog ongewis. Lidstaten hebben waarschijnlijk de nodige vrijheid om tot een effectief systeem te komen, gegeven de doelen die het EHRM stelt.

#### **9. Benaderingen waarmee recente beleidswijzigingen zijn getoetst en aangepast aan de vereisten van het EVRM**

Er zijn geen voorbeelden gevonden van een systematische aanpak in lidstaten om hervormingsvoorstellen te toetsen en aan te passen aan de vereisten van het EVRM. Beleidswijzigingen worden aangedragen in overeenstemming met de wetgevings- en beleidsvormingstradities in de landen. Een systematische benadering kan ook moeilijk zijn vanwege de open normen en criteria die het EHRM hanteert. In Engeland & Wales heeft een gemengde commissie van de *House of Lords* en de *House of Commons* kritiek geuit op enkele elementen van recente overheidsvoorstellen (verblijfstoets, uitsluiting van gesubsidieerde rechtsbijstand voor klachten over behandeling in de gevangenis). Ze zouden een schending van het fundamentele recht op een effectieve toegang tot de rechter opleveren (Par. 5.3).

#### **10. Elementen van gefinancierde rechtsbijstandsstelsels die niet voldoen aan de minimumvereisten van artikel 6 EVRM**

Het EHRM toetst niet de systemen als zodanig, maar kijkt in individuele gevallen naar het recht op een toegankelijke oplossing van juridische problemen. Het EHRM heeft nog geen van de gebruikelijke elementen van een rechtsbijstandsstelsel (zie hiervoor onder 3) systematisch in de ban gedaan. Par. 6.1.3 geeft een overzicht van de omstandigheden waar voor juridische vertegenwoordiging moet worden gezorgd.

#### **11. Een case beschrijving van het Turner v. Rogers arrest**

De zaak-Turner van het Amerikaanse Hooggerechtshof geeft een indicatie van de internationale rechtsvorming op het gebied van gefinancierde rechtsbijstand. Het ging hier over recht op een advocaat, dat Turner niet werd gegeven tijdens zijn verhoor over *contempt of court* (gebrek aan respect voor de rechtbank) omdat hij zijn kinderalimentatie niet betaalde. Deze procedure kon leiden tot detentie voor Turner. Het *Supreme Court* vond dat de rechten van Turner op een eerlijk proces waren geschonden, omdat Turner noch advies van een advocaat had gekregen noch had kunnen profiteren van alternatieve manieren om zijn toegang tot een eerlijk proces te waarborgen. Deze uitspraak is vooral richtinggevend, omdat het Hof uitvoerig die alternatieven beschrijft.



Het Hof laat zien dat “vervangende procedurele waarborgen” indien tezamen gebruikt, het risico van een onterechte vrijheidsberoving belangrijk kunnen verminderen en daarmee voldoende rechtsbescherming kunnen opleveren. Voorbeelden die het Hof noemt zijn:

- kennisgeving aan de verdachte dat zijn “vermogen om te betalen” het punt is waar de procedure om draait;
- het gebruik van een formulier (of iets soortgelijks) om de relevante financiële informatie van hem te verkrijgen;
- een mogelijkheid voor hem om te reageren op verklaringen en vragen over zijn financiële status (zodat hem duidelijk wordt dat het hierom draait);
- een uitdrukkelijke vaststelling door de rechtbank dat de verdachte de mogelijkheid heeft om te betalen (waarop hij kan inspelen);

Het Hof geeft ook aan dat “soms andere bijstand dan puur juridische bijstand ook grondwettelijk afdoende kan blijken”, zoals bijstand door een sociaal werker. Het Hof neemt ook mee dat toevoeging van een advocaat in een procedure nadelen kan hebben. Voor de tegenpartij (de echtgenote van Turner) kan dit immers het karakter van de procedure veranderen, deze formeler maken en tot vertraging leiden.

## **12. Instrumenten, waarmee een effectieve toegang tot de rechter anders dan via een procesvertegenwoordiger kan worden gewaarborgd en vormgegeven, die invloed zullen hebben op de toekomstige interpretatie van het EVRM**

Ook het EHRM staat open voor alternatieven voor gesubsidieerde rechtsbijstand door een advocaat. Toegang tot het recht is het doel en om dit te bereiken zijn er verschillende varianten van juridische bijstand. De zaak-Turner is in lijn met de jurisprudentie van het EHRM, dat vereenvoudiging van procedures noemt als een alternatief voor gesubsidieerde rechtsbijstand door een advocaat. Een rechtzoekende kan “zichzelf vertegenwoordigen” wanneer begeleiding wordt geleverd door middel van procedurele regels en richtlijnen van de rechtbanken, in combinatie met enige toegang tot juridisch advies en hulp.

Uitsluiting van gesubsidieerde rechtsbijstand voor bepaalde soorten problemen kan toegestaan zijn als de procedures voldoende eenvoudig zijn. Alternatieven met minder ingewikkelde procedures, zoals gespecialiseerde rechtbanken, *tribunals* of geschillencommissies, kunnen dus aan de EVRM-vereisten voldoen zonder dat subsidies voor bijstand van een advocaat noodzakelijk zijn. Landen kunnen toegang tot het recht voor rechtzoekenden dus verbeteren en de noodzaak tot bijstand van een advocaat verminderen door procedures te vereenvoudigen. Beter formulieren en voldoende informatie aan rechtzoekenden kan ook bijdragen, in combinatie met beter advies en begeleiding rondom de procedure, bijvoorbeeld via een helpdesk in de rechtbank. Zulke informatie en advies kan door anderen dan advocaten worden gegeven, bijvoorbeeld door *paralegals*. Ook andere deskundigen dan advocaten kunnen rechtzoekenden vertegenwoordigen in de rechtbank, zoals in veel landen nu al gebeurt in arbeidszaken.

## **13. De mogelijke betekenis van internationale trends voor het Nederlandse stelsel.**

Par. 3 van deze samenvatting beschrijft in detail de internationale trends die in dit rapport zijn gevonden en noemt enkele hypothesen over factoren die de kwaliteit en kosten van rechtsbijstandssystemen het meeste beïnvloeden.

## **2. Beleidsmogelijkheden voor de belangrijkste probleemgebieden**

Hoofdstuk 4 laat zien dat elk probleemgebied zeer verschillend is wat betreft het soort probleem, de hulp die nodig is, de opzet van procedures, alternatieve manieren om juridische bijstand te verlenen en bronnen van

financiering. De markt voor juridische dienstverlening ontwikkelt ook geheel verschillende producten en innovaties voor ieder soort probleem.

De verschillen in rechtsbijstandsuitgaven per type probleem zijn opmerkelijk. Ze kunnen in het ene land tien keer zo groot zijn als in een ander land. Komt dat doordat echtscheidingen of berovingen meer complex zijn in bepaalde landen? Het is aannemelijker dat de variatie in de kosten wordt veroorzaakt door verschillen in procedures en werkwijzen in de aanbodketen van de toegang tot het recht. Uitgaven per type probleem lijken vooral samen te hangen met de aard en complexiteit van de procedure. In Engeland & Wales zijn bijvoorbeeld de kosten voor gesubsidieerde rechtsbijstand verhoudingsgewijs veel lager voor zaken die worden behandeld door gespecialiseerde tribunalen. In vergelijking met andere landen zijn de kosten daar veel hoger als ze bij gewone gerechten worden behandeld.

Dit doet vermoeden dat een ketenbenadering grote voordelen kan hebben. Beleidsmakers gaan steeds vaker naar specifieke probleemgebieden kijken, daarbij voortbouwend op de innovatietrends die hiervoor zijn genoemd. Schotland baseert de bredere strategie voor het justitiebeleid op deze ketenbenadering en vormt zo ook het beleid voor rechtsbijstand. Wat zijn nu de internationale trends per keten?

### **Strafrecht**

In strafrechtelijke procedures is gesubsidieerde rechtsbijstand door een advocaat vaak onmisbaar en, afhankelijk van de ernst van de mogelijke sanctie, verplicht. In 2008 oordeelde het EHRM dus dat het noodzakelijk is om toegang tot een advocaat mogelijk te maken vanaf het eerste verhoor van een verdachte door de politie. Daardoor stegen de kosten voor juridische bijstand tijdens detentie op politiebureaus en voorlopige hechtenis. De uitgaven zijn bijvoorbeeld toegenomen in Frankrijk en België, die al wetgeving hebben doorgevoerd om aan de Saldz-jurisprudentie te voldoen. Innovatie van bijstand op politiebureaus is dus nodig en gebeurt ook. Landen werken of experimenteren met *public defenders* (verdediging door juristen in dienst bij de overheid), telefonische adviesdiensten voor verdachten, *videoconferencing*, zowel in de rechtbank als tijdens politieverhoor, en het opnemen van politieverhoren. Verstrekken van meer uitgebreide informatie aan verdachten, door middel van folders, online of andere nieuwe media, is een nog weinig ontwikkelde route.

Strafrecht neemt in veel landen tot 50% van het rechtsbijstandsbudget in beslag. Innovatie van strafrechtelijke procedures kan dus tot aanzienlijke besparingen leiden. Kleine strafrechtelijke overtredingen kunnen worden afgehandeld door het openbaar ministerie, onder toezicht van een rechter. Frankrijk biedt bijvoorbeeld een bemiddelingsprocedure. In Nederland kan een boete worden opgelegd zonder tussenkomst van een rechter. Het is minder waarschijnlijk dat alternatieve financieringsvormen, zoals rechtsbijstandsverzekering, hier kunnen werken.

In enkele landen, waaronder Nederland, wordt voor complexe strafzaken nog steeds per uur betaald en niet door middel van een vaste vergoeding. Dit lijkt samen te gaan met relatief hoge niveaus van uitgaven.

### **Familierecht**

In alle onderzochte landen leidt familierecht tot veel rechtszaken. De meeste van deze problemen hebben te maken met echtscheidingen of samenwonenden die uit elkaar gaan. Familierecht wordt traditioneel niet gedekt door een rechtsbijstandsverzekering en het neemt een groot deel van de begrotingen voor gesubsidieerde rechtsbijstand in beslag (17 tot 37% in de landen waar wij gegevens over hebben). De gemiddelde kosten per product en de uitgaven per hoofd van de bevolking variëren enorm. Engeland & Wales gaf in 2012 meer dan 15 keer zoveel uit als België. In sommige landen komen mensen met familieproblemen eerder in aanmerking voor rechtsbijstand. Maar de complexiteit van de rechtsgang is waarschijnlijk de hoofdoorzaak van de verschillen in

uitgaven. Landen proberen scheiding op gemeenschappelijk verzoek te bevorderen en bemiddeling wordt aangemoedigd, maar de invloed daarvan op de kosten lijkt beperkt. De belangrijkste manier om kosten voor familierechtelijke problemen in de hand te houden lijkt vereenvoudiging van procedures en vermindering van het aantal (vervolg)procedures die uit één scheiding voortkomen.

### **Consumentenproblemen met goederen of diensten**

Veel juridische problemen hebben te maken met het (ver)kopen van goederen of diensten, maar gegevens over uitgaven van gesubsidieerde rechtsbijstand op dit gebied zijn beperkt beschikbaar. Overheden zijn terughoudend om rechtsbijstand voor deze problemen te subsidiëren omdat het om grote aantallen kan gaan. Soms zijn deze problemen in het geheel van rechtsbijstand uitgesloten. Het gaat vaak om kleine geldbedragen en van consumenten wordt verwacht dat ze veel van deze problemen zelf op kunnen lossen. Er is een duidelijke trend richting gespecialiseerde en vereenvoudigde gerechtelijke procedures en het gebruik van geschillencommissies als alternatief voor een gerechtelijke procedures in consumentenzaken waarbij rechtshulp door advocaten wordt geleverd. Rechtsbijstandsverzekeringen, rechtshulp via consumentenorganisaties, collectieve acties namens groepen van consumenten en advocaten/adviesdiensten voor een vast bedrag zijn in veel landen beschikbaar op de particuliere markt.

### **Vluchtelingen- en immigratierecht**

Dit is ook een omvangrijke groep van problemen, zowel qua aandeel in het budget als qua uitgaven per product. Het aantal vluchtelingen- en immigratiezaken wordt sterk beïnvloed door immigratiepatronen en vluchtelingenstromen. Deze zaken worden meestal behandeld door gespecialiseerde *tribunals*. In Engeland & Wales, dat zulke gespecialiseerde rechtbanken heeft opgericht, zijn de gemiddelde rechtsbijstandskosten voor deze zaken duidelijk lager dan voor andere typen problemen. Nederland geeft relatief het meeste uit aan deze zaken in vergelijking met de andere landen.

### **Arbeidszaken**

Arbeidszaken nemen gewoonlijk 3 tot 5% van de begrotingen voor gesubsidieerde rechtsbijstand in beslag. Er zijn veel van deze zaken, maar er is een grote verscheidenheid aan leveranciers van gespecialiseerde diensten. Daarnaast zijn er veel alternatieven voor juridische bijstand door een advocaat. Rechtsbijstandsverzekeraars en vakbonden zijn belangrijk op dit gebied. Gespecialiseerde rechtbanken kunnen efficiënte en vereenvoudigde procedures aanbieden die geen vertegenwoordiging door een advocaat vereisen. België heeft bijvoorbeeld het pleitmonopolie van advocaten afgeschaft voor arbeidszaken. Ook in Frankrijk en Nederland is procesvertegenwoordiging niet verplicht.

### **Schuldproblemen**

Schuldproblemen gaan vaak samen met andere soorten problemen, zoals scheiding of ontslag. Schuldproblemen kunnen ook tot nieuwe problemen leiden, zoals huur- of huisvestingskwesties. Een ketenbenadering, die zich richt op de onderliggende oorzaken en niet alleen op de juridische vragen die aan de orde zijn, kan leiden tot een vermindering van het aantal zaken waarvoor gesubsidieerde rechtsbijstand nodig is. Schuldsanering wordt in veel landen aangeboden aan burgers om ze te helpen hun schulden onder controle te krijgen en om verdere problemen, zoals dakloos worden, te voorkomen.

### **Letselschade**

Procedures in letselschadezaken kunnen langdurig en kostbaar zijn, mede vanwege de kosten voor expertise. Voor burgers kunnen deze procedures behoorlijk stressvol zijn. Omdat omvangrijke schadeclaims lastig te beoordelen zijn, kunnen onderhandelingen over een schikking met verzekeringsmaatschappijen duur en tijdrovend worden. De

trend in de onderzochte landen is echter om juridische bijstand te financieren door middel van alternatieven voor gefinancierde rechtsbijstand. Het gaat dan om *no cure no pay*-arrangementen met advocaten, of om wetgeving en afspraken die kosten verschuiven naar de verweerders (en hun verzekeraars). Ook rechtsbijstandsverzekeringen spelen hier een belangrijke rol.

### Huisvesting

Huisvestingsproblemen kunnen verbonden zijn met andere problemen, zoals schulden. Gespecialiseerde rechtbanken en rechtsbijstandsverzekeringen kunnen alternatieven voor bijstand door advocaten zijn. Problemen tussen een huurder en een verhuurder die niet ingewikkeld zijn, zoals onderhoudsproblemen, kunnen efficiënt worden opgelost buiten de rechtbank door middel van (lokale) geschillencommissies.

### Sociale zekerheid

De gang naar de rechtbank is mogelijk niet de meest efficiënte manier om geschillen rondom sociale zekerheid af te handelen. Met Nederland als uitzondering, lijken uitgaven voor gesubsidieerde rechtsbijstand op dit gebied relatief gering te zijn. Sociale zekerheidssystemen hebben meestal hun eigen beroepsprocedure met gespecialiseerde rechtsgangen of *tribunals*. Vereenvoudigde en klantvriendelijke procedures, die goed te begrijpen zijn voor leken, lijken dus een effectieve manier te zijn om problemen op te lossen die te maken hebben met sociale zekerheid.

## 3. Factoren die invloed hebben op kwaliteit en kosten

In deze paragraaf onderzoeken we wat de gegevens zeggen over de belangrijkste factoren die invloed hebben op de kwaliteit en kosten van toegang tot het recht, zoals dat wordt gegarandeerd door gefinancierde rechtsbijstand. Eerst behandelen we negen variabelen die waarschijnlijk een grote invloed hebben op de kwaliteit en kosten. Omdat dit rapport is gebaseerd op beperkte gegevens over een beperkt aantal landen, moet het navolgende worden beschouwd als plausibele hypothesen over factoren die invloed hebben op kosten en kwaliteit, en niet meer dan dat.

- 1. Vermindering van de complexiteit van procedurele routes voor probleemcategorieën** In het algemeen zullen de kosten van gefinancierde rechtsbijstand waarschijnlijk hoger zijn als gerechtelijke procedures complex zijn. Hetzelfde geldt als twee of meer procedures nodig zijn, in plaats van één, om een conflict in een bepaalde relatie op te lossen. In deze situaties zullen meer mensen juridische bijstand nodig hebben en zal juridische bijstand duurder worden, omdat het meer moeite kost de procedure te doorlopen. Hoofdstuk 4 (zie paragraaf 2 van deze samenvatting) geeft een aantal aanwijzingen van die sterke relatie tussen uitgaven voor rechtsbijstand en de complexiteit van procedures. Als in Engeland & Wales de uitgaven per hoofd van de bevolking voor echtscheidingszaken drie keer zo hoog zijn als in Nederland en 14 keer zo hoog als in België, dan kan dat niet worden verklaard door verschillen in het aantal echtscheidingen. Complexe procedures kunnen ook een belemmering vormen voor kwaliteit van toegang tot recht. Het vereenvoudigen van procedures wordt vaak aanbevolen in literatuur over hervorming van rechtbanken en verbetering van toegang tot het recht.
- 2. Ontwikkeling van gespecialiseerde procedures voor de meest voorkomende en urgente problemen** Veel landen kennen gespecialiseerde rechtsgangen voor arbeidszaken, sociale zekerheid, familierecht, consumentenzaken, vluchtelingen en immigratiezaken en huurkwesties. Deze procedures zijn vaak minder complex, eenvoudiger en toegankelijker voor burgers. Hoewel het aantal zaken bij deze instanties behoorlijk hoog kan zijn, geeft hoofdstuk 4 geen voorbeeld van een gespecialiseerde procedure die leidt tot relatief hoge kosten van rechtsbijstand. Integendeel, zulke procedures lijken te leiden tot lagere

uitgaven per zaak dan algemene procedures voor civiele of bestuursrechtelijke zaken. Dit is bijvoorbeeld het geval in Duitsland en Engeland & Wales. Specialisatie, zowel voor diensten die rechtsbijstand leveren als voor rechtbanken, wordt algemeen aanbevolen als een manier om kwaliteit te verbeteren. Het lijkt dus een tamelijk veelbelovende manier om kosten te besparen en de kwaliteit te handhaven of zelfs te verhogen.

- 3. Diensten die juridische analyse integreren met andere disciplines** In gebieden zoals schuldsanering en familiegeschillen wordt juridische bijstand geïntegreerd in meer holistische diensten op basis van een interdisciplinaire aanpak. Deze dienstverlening verbetert waarschijnlijk de uitkomst voor cliënten. Het effect op de kosten is onzeker. Als integratie betekent dat meer professionals per zaak moeten worden betrokken, dan is het waarschijnlijk dat de kosten stijgen. Als één persoon de noodzakelijke vaardigheden en kennisgebieden kan combineren zullen kosten lager zijn (Par. 4.4, 4.8).
- 4. Vermindering van de diensten waarvoor een monopolie van de advocatuur geldt** Een monopolie voor de advocatuur op vertegenwoordiging in rechtbanken verhoogt waarschijnlijk de kosten van gesubsidieerde rechtsbijstand. Landen zijn dan volgens jurisprudentie van het EHRM verplicht om rechtsbijstand te verzorgen voor minder draagkrachtige burgers en voor rechtsproblemen met voldoende belang. Bovendien zet een dergelijk monopolie een rem op innovatie van juridische diensten. In Finland bestaat geen monopolie voor de advocatuur, terwijl Finland een hoog kwaliteitsniveau lijkt te halen tegen lage kosten. De trend in alle landen is om geleidelijk het aantal procedures te verminderen waar vertegenwoordiging begrensd is en om nieuwe vormen van vertegenwoordiging mogelijk te maken. Dit geeft mogelijk aan dat dit beleid de toegang tot het recht verbetert en de kosten omlaag brengt. Duitsland is uitzonderlijk. Het professionele monopolie geldt daar ook voor juridische informatie en advies, terwijl in alle andere landen een scala van markt- en overheidsdiensten is ontwikkeld die deze behoefte vervult (Par. 2.3 en 5.1)
- 5. Verbetering van juridische informatie en advies** Deze dienstverlening is nodig voor veel mensen en vrij eenvoudig te standaardiseren. Eenmaal opgesteld in de vorm van handleidingen, richtlijnen of webtekst, kan informatie en advies tegen lage marginale kosten worden geleverd aan elke extra gebruiker. Leveringsmodellen omvatten websites, telefonische hulplijnen, advies door *paralegals*, advocaten, maatschappelijk werkers, vakbonden, consumentenorganisaties of ambtenaren, en ook over-de-toonbank diensten bij centra voor informatie en advies. Kosten per klant voor informatie en advies zijn laag, in de orde van grootte van €30 tot €300, en de uitgaven voor deze eerste vorm van rechtsbijstand zijn vaak niet meer dan 10% van het totale budget voor rechtsbijstand (Par. 3.1). Het is aannemelijk dat de beschikbaarheid van betrouwbare juridische informatie het eenvoudiger maakt voor burgers om problemen samen op te lossen, maar ook om op een eerlijke manier tot een uitspraak in een procedure te komen. Het is echter moeilijk een goed bedrijfsmodel te vinden voor informatie en advies, dus overheidssubsidies blijken vaak nodig (Par. 2.3.1-2 en 5.1).
- 6. Vaste vergoedingen in plaats van uurtarieven voor rechtsbijstandsadvocaten** De meeste gesubsidieerde rechtsbijstandssystemen betalen een vaste vergoeding aan advocaten voor elk rechtsbijstandsproduct dat ze leveren, ongeacht de werkelijk bestede tijd. Engeland & Wales en Nederland (voor zaken waar meer dan drie keer het aantal vooraf bepaalde uren nodig is) hebben hier belangrijke uitzonderingen op en betalen dan een vergoeding per uur dat de advocaat besteedt. Het is moeilijk voor een externe controleur om na te gaan of het aantal besteedde uren redelijk is. Ook heeft dit systeem voor de hand liggende prikkels voor advocaten om extra werk te doen, zelfs als dit van weinig toegevoegde waarde voor de cliënt is. Uitgaven voor deze regelingen hebben de neiging om snel uit de hand te lopen en zijn inderdaad aanzienlijk in beide landen. Daarom zouden deze regelingen goed bekeken moeten worden. Een mogelijkheid is om aanvullende categorieën met vaste vergoedingen in te richten (bijvoorbeeld voor doodslagzaken, grote fraudekwesies en andere vrij veel voorkomende complexe zaken). Een andere

mogelijkheid is om in complexe zaken vooraf een passende vaste vergoeding te laten vaststellen door (onafhankelijke) instanties (Par. 3.6).

7. **Vaste vergoedingen op de markt voor juridische dienstverlening** Duitsland kent een traditie waarbij advocaten een vaste vergoeding krijgen die gekoppeld is aan de omvang van het belang dat op het spel staat. Cliënten met beperkte middelen die zaken hebben met een belang van €500 tot €10.000 kunnen juridische bijstand inclusief vertegenwoordiging bij de rechtbank krijgen voor vooraf duidelijke prijzen in de orde van grootte van €100 tot €2.000. In veel zaken zal worden geschikt voordat dit bedrag is bereikt. Deze traditie kan een van de verklaringen zijn waarom Duitsland (hoewel het een sterk monopolie voor advocaten heeft dat de kosten voor juridische bijstand opdrijft) lage uitgaven voor rechtsbijstand heeft. Dit lijkt te gebeuren zonder dat dit ten koste gaat van de kwaliteit. Vaste vergoedingen voor advocaten betekenen bijvoorbeeld dat zij belang hebben bij kwaliteitsverbetering via standaardisatie. Het is moeilijk dit Duitse systeem ergens anders te implementeren, omdat het een vergaande tariefregulering vereist. Echter, soortgelijke effecten kunnen worden bereikt als juridische dienstverleners beginnen te werken tegen een vaste prijs, zoals ze nu in veel landen gaan doen, en als overheden dit stimuleren (Par. 3.6, 3.9 en 5.2).
8. **Gesloten budget** België en Frankrijk hebben beide een gesloten budget en ook lage kosten van rechtsbijstand als percentage van het BNP. In een gesloten budget wordt extra vraag naar gesubsidieerde juridische diensten opgevangen door het verlagen van de prijs per product. Het is mogelijk dat dit systeem uiteindelijk leidt tot kwaliteitsproblemen. In Frankrijk en België lijken rechtsbijstandsdiensten te worden verleend door advocaten met minder jaren werkervaring dan in andere landen. Bovendien scoren deze landen lager op een aantal indicatoren voor toegang tot het recht (Par. 3.6 en 3.9).
9. **Hoogte van vergoedingen voor rechtsbijstandverleners** De hoogte van de vergoeding die advocaten ontvangen per rechtsbijstandsproduct is zeer verschillend per land. Op basis van de beschikbare data is het moeilijk vast te stellen welk deel van dit verschil kan worden toegeschreven aan de hoogte van de vergoedingen voor advocaten en welk deel te maken heeft met de complexiteit van de te verrichten procedurele handelingen. Er zijn echter aanwijzingen dat de effectieve vergoeding per gewerkt uur aanzienlijk lager is in Frankrijk en België dan in het Verenigd Koninkrijk en Nederland (zie Par. 3.6).

De volgende vijf variabelen lijken minder invloed te hebben op de kosten, en weinig positieve of negatieve invloed op kwaliteit.

1. **Beschikbaarheid van rechtsbijstandsverzekering** De beschikbaarheid van rechtsbijstandsverzekeringen lijkt van beperkte relevantie voor de totale kosten van rechtsbijstand. Rechtsbijstandsverzekeringen dragen vooral bij aan het betaalbaar maken van toegang tot het recht voor de middenklasse. Een dergelijke verzekering dekt waarschijnlijk niet verdediging in strafzaken of bijstand tijdens hechtenis. Werk dat te maken heeft met echtscheidingen worden meestal ook niet gedekt. Een goed functionerende markt voor rechtsbijstandsverzekeringen kan wel bevorderlijk zijn voor de kosten en kwaliteit van diensten die te maken hebben met consumentenzaken, bestuursrechtelijke procedures, sociale zekerheid, arbeidszaken en letselschade. Rechtsbijstandsverzekeringen komen vaker voor in continentaal Europa dan in Engeland & Wales, Schotland en Ierland. Uitgaven aan verzekeringen per hoofd van de bevolking zijn het hoogst in Nederland en Duitsland (Par. 3.7). Een mogelijke verklaring is dat de kosten van het verlenen van juridische diensten meer voorspelbaar zijn in deze landen (met name in Duitsland) en dat verzekeraars rechtshulpverleners in dienst mogen nemen en dus zelf kunnen aansturen (Nederland).
2. **Vermindering van het aantal juridische problemen** Hoewel in deze studie weinig gegevens over dit onderwerp zijn verkregen (zie hoofdstuk 4), is het onwaarschijnlijk dat het aantal problemen zeer

verschillend is in de onderzochte landen. Bovendien kunnen de aantallen misdrijven, echtscheidingen, ontslagen, de migratiepatronen en de schuldenniveaus, die de belangrijkste oorzaken zijn van de vraag naar rechtsbijstand, niet echt worden beïnvloed door beleid op het gebied van rechtsbijstand.

3. **Mediation** Er zijn geen aanwijzingen gevonden dat het aanbieden van mediation of bemiddeling als een aparte dienst een wezenlijke impact heeft op de begrotingen van rechtsbijstand. Zelfs in familierecht wordt er weinig gebruik van (subsidies voor) mediation gemaakt (Par. 4.4). Wel kan het bijdragen aan oplossingen die meer duurzaam en effectief zijn. Bovendien kan integratie van kennis over conflictbemiddeling in andere juridische diensten helpen om het repertoire te vergroten en daarmee de kwaliteit van procedures en resultaten te verhogen.
4. **Verhoging van eigen bijdragen en inkomensniveau om in aanmerking te komen voor rechtsbijstand** Hoewel dit duidelijk strategieën zijn die kosten besparen en ze eenvoudig zijn te implementeren, behoren ze niet (meer) tot de grote hervormingen die worden overwogen in de landen waar hier verslag over wordt gedaan. Dit doet vermoeden dat er weinig (meer) te besparen valt met deze maatregelen zonder dat een bedreiging ontstaat voor de kwaliteit van de toegang tot het recht of dat sterke politieke weerstand optreedt.
5. **Terughalen van kosten voor rechtsbijstand bij gebruikers, tegenpartijen, of andere financieringsbronnen** Landen proberen uit de opbrengst van een gewonnen procedure de kosten van rechtsbijstand terug te halen, rechtsbijstand in onterecht ingestelde procedures te verhalen, of de verliezende tegenpartij te laten betalen. Het is moeilijk de effecten van deze maatregelen vast te stellen, maar ze lijken weinig geld op te brengen. In de meeste landen waarover gegevens bestaan gaat het om 1 tot 2% van het totale budget. Zelfs met meer en efficiëntere handhaving van deze regels zal de opbrengst waarschijnlijk laag blijven, omdat het nu eenmaal vaak gaat om bijstand in strafzaken, familieproblemen, immigratiekwesties of consumentenproblemen. Er zijn geen of geringe financiële belangen en niet heel veel procedures die achteraf objectief gezien kansloos zijn. De mogelijkheden van verhaal zijn meestal beperkt, ook als dat in termijnen zou geschieden (een leenstelsel, dat alleen in Duitsland bestaat, maar daar weinig wordt toegepast).

Variabelen met een onzekere invloed op de kosten en kwaliteit, en die nader onderzoek verdienen zijn de volgende:

1. **Producten en prikkels voor onderhandeling en schikking** Op de markt voor juridische dienstverlening zijn nieuwe producten ontstaan waarbij de cliënt eerst betaalt voor juridische informatie en advies, dan voor een poging om het conflict bij te leggen, en vervolgens voor procesvertegenwoordiging. Deze aanpak wordt gekopieerd in sommige rechtsbijstandssystemen. In deze opzet is er meer ruimte voor interactie gericht op minnelijke oplossingen en dus besparingen, omdat minder zaken uitmonden in kostbare rechtszaken. Gegevens over geschillen die worden geschikt zonder tussenkomst van een rechter, dus door diensten die helpen om te onderhandelen en communiceren met de andere partij, zijn beperkt. Maar er lijkt ruimte voor verbetering op dit gebied. Een systeem waarbij de rechtzoekende (en de overheid die steunt) betaalt voor een oplossing, in plaats van voor procedures, is het overwegen waard. Het biedt een stimulans om snel een oplossing te zoeken.
2. **Vermindering van de soorten problemen waarvoor gesubsidieerde rechtsbijstand beschikbaar is** In Engeland & Wales is rechtsbijstand niet meer beschikbaar voor een aantal van de meest voorkomende civiel- en bestuursrechtelijke geschillen. Voor deze zaken bestaan wel gespecialiseerde *tribunals* met vrij eenvoudige procedures waarbij juridische bijstand niet noodzakelijk is of beschikbaar is lage kosten. De Nederlandse overheid is ook van plan om consumentenzaken en verhuurder/huurderproblemen uit te

sluiten van gesubsidieerde rechtsbijstand. Deze uitsluitingen worden echter bekritiseerd door de advocatuur in beide landen, omdat ze kunnen resulteren in lagere kwaliteit van toegang tot het recht. Het is ook mogelijk dat kosten van onopgeloste problemen worden verschoven naar burgers of andere organisaties die te maken hebben met deze problemen. Bovendien moeten staten gesubsidieerde rechtsbijstand verlenen voor strafzaken waarin vrijheidsbeneming een mogelijke uitkomst is, of voor zaken waar juridische bijstand of vertegenwoordiging is verplicht. Beperking van de soorten problemen waarvoor gesubsidieerde rechtsbijstand beschikbaar is, is dus alleen mogelijk voor kleinere strafzaken, en voor procedures waarvoor juridische bijstand niet verplicht is en die toegankelijk zijn voor een onervaren persoon die toegang het recht zoekt. Daarom ligt het voor de hand deze strategie te overwegen in combinatie met een analyse van de manier waarop deze problemen kunnen worden opgelost zonder gesubsidieerde rechtsbijstand, en als dat nodig is, worden uitgevoerd in combinatie met het ontwikkelen van vereenvoudigde en gespecialiseerde procedures voor dit soort problemen.

#### **4 Conclusies**

Het Europese Hof voor de Rechten van de Mens is zeer consistent geweest in het vormen van een argumentatielijn die ook de belangrijkste uitkomst is van deze vergelijkende studie. Het gaat om toegang tot het recht, en gesubsidieerde rechtsbijstand door advocaten is één van meerdere manieren om die toegang te verwezenlijken. Wat er nodig is voor toegang tot het recht, en onder welke omstandigheden landen moeten bijspringen met subsidies, hangt af van het soort probleem en van de context waarbinnen de kwestie moet worden opgelost. De procedurele omgeving en de beschikbaarheid van (innovatieve) juridische diensten op de markt horen bij de belangrijkste variabelen die beleidsmakers kunnen beïnvloeden om de toegang tot het recht te waarborgen.

Wanneer de systemen van de negen landen met elkaar worden vergeleken, komen enorme verschillen naar voren in de manier waarop procedures zijn opgezet voor de meest voorkomende en urgente problemen van burgers. Niettemin zijn deze problemen vaak vergelijkbaar, ook wat betreft hun frequentie. Landen hebben ook nogal verschillende tradities voor de regulering van advocaten en andere aanbieders van (juridische) diensten die betrokken zijn bij het oplossen van deze kwesties. Procedures en regulering van juridische diensten lijken ook een belangrijke verklaring te zijn voor de verschillen in uitgaven.

Wat ontbreekt is een betrouwbare maatstaf voor de kwaliteit van toegang tot het recht en dus voor de effectiviteit van het geld dat wordt uitgegeven aan gesubsidieerde rechtsbijstand. De indicatoren van kwaliteit die beschikbaar zijn, doen vermoeden dat de landen ook aanzienlijk verschillen in de hoeveelheid (toegang tot het) recht die ze weten te creëren per Euro, Pond of Zloty die wordt uitgegeven aan gesubsidieerde rechtsbijstand.

Rechtsbijstandssystemen kunnen worden verbeterd, en de kosten kunnen in de hand worden gehouden, door te werken aan de hoogte van subsidies en door de vergoedingen aan advocaten aan te passen. De gegevens in dit rapport, en de voorbeelden die worden gegeven door de omliggende landen, laten zien hoe systemen kunnen worden geïnnoveerd op een meer inhoudelijke en holistische manier. Vooral door de samenhang met andere elementen van het rechtssysteem te verbeteren, zodat toegang tot het recht minder kostbaar wordt voor burgers en overheden en leidt tot betere uitkomsten voor burgers.



# English Report

# 1. Comparing legal aid systems

In this report, we compare legal aid systems of nine countries and assess how they perform within the framework of the fundamental right to access to justice protected by Article 6 European Convention on Human Rights (ECHR). Besides describing the systems, the goal is to identify trends in these systems, in relation to the costs of services, alternative ways of delivering legal assistance and the effectiveness of services provided.

## 1.1 Needs for access to justice

Legal aid is provided by states in order to assist people who cannot afford legal assistance but require it in order to obtain access to justice. Legal needs surveys have been conducted in many countries and they show a consistent pattern of how people seek access to justice and for which problems. The most frequent justiciable problems include consumer problems, problems between neighbours, family problems, employment problems, issues regarding tenure, eviction and property rights on land and housing, as well as debt problems and personal injury cases. People may also become the victim of crime, or become suspected of committing a crime. A final category of legal problems creating a need for access to justice is issues in relation to government, such as conflicts about social security, migration problems or problems related to government permits.<sup>1</sup>

Many problems with the highest impact tend to come up in key relationships between people living or working together for a long time and investing much in these relationships. These are family issues (divorce, inheritance), employment (termination), land and housing issues (property rights, tenure, eviction) and neighbour problems.<sup>2</sup> Another high impact issue which requires access to justice is being held in (pre-trial) detention, and subsequently, the criminal justice procedure.

## 1.2 Role of legal services

When people are faced with legal problems they first tend to look for information and advice. After obtaining information and advice, the individual will typically try again to solve the issue in cooperation with the other party, and may need assistance for this. During criminal investigation, the suspect, the prosecution and possibly the victims, engage in an interaction that may lead to agreed sanctions, or agreements on scope of the procedure. If negotiation fails, or is not possible, the problem can be brought before a court, or another third party decision maker.

Research shows that resolution through agreement by the parties is the normal way to solve disputes, adjudication by a court or another third party is the exception.<sup>3</sup> Even in criminal matters, an interaction aimed at reaching some type of agreement with the police, the prosecutor or the victim is becoming an important part of the access to justice process.

Therefore, it makes sense to distinguish three types of legal assistance, according to three phases of dealing with a justiciable problem. These phases require services differing in character, availability and price. The first category consists of services for information and advice. These are generally known as pre-trial, 'first line' or 'frontline' services. The second category comprises services that help to negotiate and interact with the other party. It is the stage between information and advice and a possible procedure in front of a judge. It includes, for instance,

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<sup>1</sup> Hiil Innovating Justice, *Hiil Trend Report - Part 1: Towards Basic Justice Care for Everyone. Challenges and Promising Approaches*, (2012) 47, available at <<http://www.hiil.org/publication/basic-justice-care>>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

alternative dispute resolution (ADR) services aimed at settlement, such as mediation, conciliation and lawyer assisted negotiation. It also includes plea bargaining and sanctions suggested by the prosecution under supervision of a judge. The third category consists of adjudication, litigation and procedural assistance, also known in the legal aid literature as 'second line' services. This is assistance in the procedure in front of a judge or another adjudicator. It may include representation by an attorney, but increasingly also the coaching of so-called self-represented litigants by helpdesks at courts or providers of legal advice.

### 1.3 Required services and lawyer monopolies

For some legal services, and in some countries, assistance by a qualified lawyer is mandatory. In order to guarantee access to justice in such cases for people with limited means, it is often necessary that citizens have recourse to state funded legal aid in these areas.<sup>4</sup>

In Germany, legal information and advice about a specific case can only be given by an attorney and a limited group of other legal experts.<sup>5</sup> The other countries in this study do not regulate the market for legal information and advice.

Most countries allow people to bring cases before specialised tribunals (employment, social security) without being represented by a lawyer. Many restrictions exist, however, in respect to procedures at courts. Germany has *Anwaltszwang* in procedures before courts of civil jurisdiction, except in small claims cases. The use of a qualified lawyer in these courts is also mandatory in Belgium and the Netherlands, but the Netherlands raised the limit of small claims cases to €25,000 and also requires no representation by a lawyer in employment, tenancy and consumer cases.

The same necessity to use a lawyer exists in Germany for criminal proceedings, except in minor cases. The Belgian and Dutch courts of criminal jurisdiction also require the use of a lawyer, but some possibilities exist to defend the case in person, which are rarely used. Mandatory representation is seen in civil proceedings as well. In France, representation is not generally needed before the courts of first instance, but there are exceptions and an important one is divorce proceedings.

In England & Wales, Ireland, Scotland and Poland self-representation is generally allowed, but clients can only be represented by a lawyer (solicitor), and may need a barrister in some procedures in common law countries as well. England & Wales have introduced the possibility of coaching (but not representation) by another lay person, however (so called McKenzie friends). Finland has no restrictions at all.

Generally, access to higher courts (appeal, supreme courts) can only be obtained with the assistance of a lawyer.

### 1.4 Role of legal aid

Legal aid, assistance by lawyers provided by the state, is a means to achieve access to justice. It can have the form of a government subsidy for the use of a lawyer, or be provided in kind by the government, through public defenders, legal advice centres, websites or telephone services.

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<sup>4</sup> See for comparative data the European Commission for the Efficiency of Justice (CEPEJ), *Evaluation of European Judicial Systems. Edition 2012 (2010 data)*, (2012), 315-316.

<sup>5</sup> See Bundesministerium der Justiz, *Rechtsdienstleistungsgesetz 2008*, available at <<http://www.gesetze-im-internet.de/bundesrecht/rdg/gesamt.pdf>>.

Legal aid builds on the services already provided by the private sector, and complements these services in various ways. Representation in court procedures is provided by law firms. Governments are subsidising such services for the poor. If free or quite affordable services of acceptable quality are available, there is less need for the state to provide legal aid. As we will see, information and advice is more broadly available for citizens with limited means than representation in procedures before courts, so more subsidies go to representation. An additional reason for this is that representation may be obligatory in some procedures.

Governments need to strike a balance between financial restraints and guaranteeing access to justice. Making the legal aid system too broad would risk generating amounts of applications for legal aid impossible to fund, and crowding out useful private sector services. On the other hand, narrowing the scope of state funded legal aid could result in excluding too many justiciable problems from adequate and fair solutions.

## 1.5 Research questions

The research institute of the Dutch Ministry of Security and Justice (WODC) commissioned an international comparative research on the expenditure of state-financed legal aid in relation to the ECHR requirements. This research compares the state-financed legal aid systems of nine countries: France, Germany, Belgium, England & Wales, Scotland, Ireland, Poland, the Netherlands and Finland. Two main research questions are addressed:

1. How are the state-financed legal aid systems organised in these countries?
2. Which minimum requirements for state-financed legal aid can be deduced from the European Convention of Human Rights and from the case law of the European Court of Human Rights (ECtHR)?

To answer the two main research questions, the research focuses on thirteen issues, which are dealt with in the following chapters.

1. Core information on the institutional and professional setting. What are the eligibility criteria, financial thresholds, own contributions, merits criteria, excluded and exempted groups and types of problems? (Chapters 2-3)
2. What are the budgets of state-financed legal aid and if available the different contributions per contributor? Considered are total expenditures, repayment mechanisms, loan systems and compensation mechanism for lawyers. (Chapter 3)
3. What is the scope of the legal aid services, and what are limitations and exclusions? (Chapters 2, 4).
4. Which (preliminary, mandatory) services are available? (Chapter 5)
5. What are the effects of legal aid systems on the quality of access to justice and the effects on people with limited means and on conflict resolution? (Chapter 3)
6. What are proposed or initiated reforms, strategies, trends and innovations? (Chapter 5)
7. What is relevant legislation and case law in which (elements of) state-financed legal aid systems were evaluated in light of art. 6 ECHR requirements? (Chapter 6)
8. What are the minimum requirements that flow from Art. 6 ECHR? (Chapter 6)
9. Which recent policy changes were evaluated and adjusted to the requirements of the ECHR? (Chapter 6)
10. Which (elements of) state-financed legal aid systems do not meet the minimum requirements of Art. 6 ECHR in practice? (Chapter 6)
11. The recent leading case from the United States Supreme Court, *Turner v. Rogers* (2011), which gives an indication of possible future development. What are the relevant issues in this case and how could it influence the case law of the ECtHR? (Chapter 6)

12. Which means and instruments other than legal representation can guarantee effective access to court and will influence future interpretation of the ECHR? (Chapters 6-7)
13. What is the possible influence of international trends on the Dutch system? (Chapter 7)

## **1.6 Methodology**

This research has been commissioned by the WODC in a tender procedure. The thirteen research questions as formulated in the contract (see Section 1.5) were the starting point of the research. From these main research questions, we first derived subquestions and themes for discussion with experts. A draft questionnaire was presented to the board of advisors for this research established by the WODC, and also to key members of the International Legal Aid Group (ILAG) who suggested some additional questions.

Data collection was done by desk research based on this questionnaire, using sources publicly available in the national languages (except for Finland, for which we had to rely on experts) and reports written in the English language. The answers to questions that remained unanswered were retrieved from phone interviews with experts for the Netherlands, Poland, Finland, Germany, Belgium and Ireland. The interviews were conducted with national experts from legal aid boards, or from academia (Belgium, Germany). These specialists also verified the information that was collected through desk research. For France and England & Wales, recent reports and public sources provided all information needed. We also participated in a conference in Paris regarding the most recent report on legal aid reform on November 29, 2013, organised by the national bar association which is responsible for running the legal aid system. The English and Dutch debate on legal aid reform was followed by us through the (social) media.

Comparability of data is an issue. Every country collects their data in different manners, using categories that are specific to their legal system or to the way they fund legal aid. In order to make comparison most useful, but also to prevent deceiving comparisons, we have included elaborate explanatory notes that give insight on what exactly is included in the numbers. All the data presented in this report are sourced in the bibliography which can be found in the appendix.

## 2. Components of the legal aid system

### 2.1 Legal and institutional setting

This part of the report provides an introduction into the way legal aid systems are organised within the countries under consideration. The table below contains the information about the main legislation applicable to the legal aid and central institutions responsible for the management and supervision of the legal aid systems.

2.1	Legislation	Supervision & management bodies
<b>Fra.</b>	<ul style="list-style-type: none"> <li>- Legal Aid Act n° 91-647 (1991)</li> <li>- Decree n° 91-1266 (1991)</li> <li>- Decree n° 91-1369 (1991)</li> </ul>	<ul style="list-style-type: none"> <li>- <i>Conseil national de l'aide juridique</i> (CNAJ) - advisory body at the Ministry of Justice (MoJ)</li> <li>- <i>Service de l'accès au droit et à la justice et de l'aide aux victimes</i> (SADJAV) - policy making body at the MoJ</li> <li>- <i>Conseil National des Barreaux</i> (CNB) - supervision</li> </ul>
<b>Ger.</b>	<ul style="list-style-type: none"> <li>- Art. 3, Art. 20 Grundgesetz</li> <li>- Art. 1, Art. 3 Beratungshilfegesetz (1980)</li> <li>- Artt. 140-142, 364a, 364b Strafprozessordnung (1950)</li> <li>- Artt. 114-127a Zivilprozessordnung (1950)</li> </ul>	None
<b>Bel.</b>	<ul style="list-style-type: none"> <li>- Art. 23 (3) sub 3 Constitution</li> <li>- Legal assistance act (1998)</li> <li>- Artt. 446bis, 508/1-23, 664-699 <i>Gerechtelijk Wetboek</i> (1967)</li> <li>- <i>Wetboek Registratierechten</i> (1939)</li> </ul>	Regional bar associations (OVB & OBFV) - supervision & administration
<b>Eng. &amp; W.</b>	<ul style="list-style-type: none"> <li>- Legal Aid, Sentencing and Punishment of Offenders Act (2012) (LASPO)</li> <li>- Subsequent Regulations (2012-13)</li> </ul>	Legal Aid Agency (LAA) - supervision & administration
<b>Scot.</b>	<ul style="list-style-type: none"> <li>- Legal Service Act (2010)</li> <li>- Legal Aid Act (1986)</li> </ul>	Scottish Legal Aid Board (SLAB) - supervision & administration of civil and criminal legal aid
<b>Ire.</b>	<ul style="list-style-type: none"> <li>- Mental Health Act (2001)</li> <li>- Children Act (1997)</li> <li>- Civil Legal Aid Regulations (1995; 2002)</li> <li>- Civil Legal Aid Act (1995)</li> <li>- Criminal Justice Legal Aid Act (1962)</li> </ul>	<ul style="list-style-type: none"> <li>- Department of Justice and Equality - civil &amp; criminal policy &amp; criteria</li> <li>- Mental Health Commission - supervision &amp; administration of mental health cases</li> <li>- Legal Aid Board (LAB) - administration &amp; supervision of civil legal aid; management of some of the criminal legal aid schemes</li> </ul>
<b>Pol.</b>	<ul style="list-style-type: none"> <li>- Art. 42(2) Constitution</li> <li>- Artt. 243-263 of the Act on Procedure before the Administrative Courts (2002)</li> <li>- Artt. 71-89 Code of Criminal Procedure (1997)</li> <li>- Artt. 117-124 Code of Civil Procedure (1964)</li> </ul>	None
<b>Neth.</b>	<ul style="list-style-type: none"> <li>- Art. 18 Constitution</li> <li>- <i>Wet op de Rechtsbijstand</i> (1993)</li> </ul>	<i>Raad voor Rechtsbijstand</i> (RvR; LAB) - administration & supervision
<b>Fin.</b>	<ul style="list-style-type: none"> <li>- Legal Aid Act (257/2002)</li> <li>- Act on the Public Legal Aid Offices (258/2002)</li> <li>- Government Decrees: on Legal Aid (388/2002) and on Legal Aid Fee Criteria (290/2008)</li> <li>- Ministry of Justice Decree 819/2009 on legal districts.</li> </ul>	Ministry of Justice - policy, management & supervision

England & Wales, Scotland, Ireland, Finland and the Netherlands have their legal aid systems centralised at the country level. In Scotland, Ireland and the Netherlands there is an independent legal aid board, whereas in England

& Wales and Finland the Ministry of Justice controls the legal aid system. In Ireland the Department of Justice and Equality only administers the delivery of legal aid in criminal cases, as it is for the courts to decide on entitlements.

France, Germany, Belgium and Poland have different, decentralised systems. In France and Belgium the decision to provide legal aid is made by the legal aid councils situated at the courts. The legal aid board in France is an advisory body only. In Belgium the legal aid councils are controlled by regional bar associations. Germany and Poland do not have central governing bodies. The court decides on legal aid entitlements.

The following tables provide information about problem areas for which legal aid is not available and indicate the bodies that make the decision whether or not to grant legal aid in individual cases. England & Wales are special in that they exclude far more areas from legal aid than other countries, due to recent legislation that came into force on April 1, 2013 (LASPO).

2.2	Problems/procedures excluded from legal aid
Fra.	Specific types of detention cases in front of prosecutor ( <i>déferrement, audition libre</i> )
Ger.	None
Bel.	None
Eng. & W.	<ul style="list-style-type: none"> <li>- Private family law (divorce and custody), unless evidence of domestic violence or child abuse and child abduction cases</li> <li>- Personal injury</li> <li>- Clinical negligence cases, except for cases involving infants</li> <li>- Employment cases, with exception of equal treatment and human trafficking issues</li> <li>- Housing cases, unless serious disrepair or homelessness and possession procedures</li> <li>- Most education cases</li> <li>- Debt cases, unless immediate risk to the home</li> <li>- Social benefits except for appeals</li> <li>- Immigration cases where the person is not detained</li> </ul>
Scot.	- Civil: defamation proceedings, simplified divorce proceedings, small claim processes at first instance, petitions by a debtor for his own sequestration <sup>6</sup>
Ire.	<ul style="list-style-type: none"> <li>- Proceedings before most administrative tribunals</li> <li>- Civil: defamation, disputes concerning rights and interests in or over land (except those explicitly allowed by the Civil Legal Aid Act), civil matters within the jurisdiction of the District Court (Small Claims Procedure), licensing and conveyancing (not connected to matters for which legal aid may be provided), elections petitions, applications made in a representative, fiduciary or official capacity, group actions</li> <li>- Criminal: extradition proceedings, most judicial review proceedings</li> </ul>
Pol.	None
Neth.	<ul style="list-style-type: none"> <li>Excluded from second line legal aid</li> <li>- Administrative review in tax cases</li> <li>- Simple, administrative court proceedings in family matters</li> <li>- Cases with financial interest below €500 (see table 2.12)</li> <li>- Minor criminal offenses</li> </ul>
Fin.	<ul style="list-style-type: none"> <li>- Simple petitionary matters, such as uncontested divorces</li> <li>- Criminal matters where only a fine is anticipated, and other clear matters, such as drunken driving</li> <li>- Matters pertaining to taxes or public charges</li> <li>- Matters where the claim is based on residency in a given municipality</li> </ul>

<sup>6</sup> Scottish Legal Aid Board (SLAB), 'Civil Legal Assistance Handbook. December 2013', Part IV, Chapter 1, par. 1.2, available at <<http://www.slab.org.uk/handbooks/Civil%20handbook/wwhelp/wwhimpl/js/html/wwhelp.htm>>.

<b>2.3</b>	<b>Body responsible for deciding on granting the application for legal aid</b>
<b>Fra.</b>	Legal aid offices ( <i>Bureaux d'aide juridictionelle</i> (BAJ)) at the courts
<b>Ger.</b>	Courts
<b>Bel.</b>	- <i>Commissies voor Juridische Bijstand</i> (CJB) - advice & assistance - <i>Bureaus voor Juridische Bijstand</i> (BJB) - procedural assistance - Courts
<b>Eng. &amp; W.</b>	Director Legal Casework of LAA
<b>Scot.</b>	SLAB
<b>Ire.</b>	- LAB (civil) - Courts (criminal) - Mental Health Commission (mental health cases)
<b>Pol.</b>	Courts
<b>Neth.</b>	- LAB - procedural assistance - Advice & assistance for free at Legal Services Counters ( <i>Juridisch Loket</i> )
<b>Fin.</b>	- Public legal aid offices - Courts (new application can be made to the court, if the entitlement is not granted by the public legal aid office)

## 2.2 Eligibility criteria

This part of the report informs about the criteria used by the legal aid boards, legal aid offices or courts in deciding whether a particular applicant would receive legal aid. Financial eligibility, merits test, residency test and exhaustion of other means are all taken into account when deciding on a grant of legal aid. To make the data more easy to compare, a distinction has been made in this section between legal advice and assistance (A&A - primary legal aid or first line services) and procedural assistance (PA - secondary legal aid or second line services).

### 2.2.1 Financial thresholds

Table 2.4 includes an overview of the maximum income and/or capital allowing for the receipt of legal aid not subject to any financial contribution. This is a situation, where the beneficiary of legal aid receives services fully funded by the state. The thresholds are difficult to compare, because each country tends to use different income definitions and other factors that are taken into account.

Unified rules on the income and capital thresholds for the legal aid eligibility are not available in Germany and Poland. In Germany, the states are responsible for the system and may or may not give the courts guidelines for this. In Poland the courts are solely responsible for assessing the financial eligibility of the applicants, guided by the principle to provide legal aid to those with insufficient means.



The legal aid system of the Netherlands does not provide for full coverage of legal aid by the state in principle. Every applicant has to pay an own contribution. However, there is a list of categories of applicants exempted from the obligation to pay contribution based on income (see p. 35). This list includes defendants in criminal cases who are detained. The Dutch legal services counters provide free services for information and advice regardless of financial or merits criteria. Ireland makes the applicants with the lowest disposable income pay only a minimum contribution.

2.4	Income and/or capital factors taken into account	Max. income and/or capital for a full coverage
Fra. <sup>7</sup>	Monthly income	€929
Ger.	Not applicable	Not applicable
Bel. <sup>8</sup>	Monthly net income	- Single applicant: €942 - Married applicant/single applicant with children: €1,210
Eng. & W. <sup>9</sup>	- Monthly gross income (MGI) - Monthly disposable income (MDI) - Disposable capital (DC)	- A&A: £2,657 (MGI) & £733 (MDI) - PA: £2,657 (MGI) & £315 (MDI) & £3,000 (DC)
Scot. <sup>10</sup>	- Weekly disposable income (WDI) - Annual disposable income (ADI) - Disposable capital (DC)	A&A: >£105 (WDI) & >£1,716 (DC) PA: >£3,521 (ADI) & >£7,853 (DC)
Ire. <sup>11</sup>	Disposable capital (only for PA)	€4,000
Pol.	Not applicable	Not applicable
Neth. <sup>12</sup>	Not applicable	Not applicable
Fin. <sup>13</sup>	- Monthly income (MI) - Assets (A)	- Single applicant: €600 (MI) & €5,000 (A) - Couple per person: €1,100 (MI) & €5,000 (A)

<sup>7</sup> Service-Public.fr, 'Aide juridictionnelle', (5 August 2013), available at <<http://vosdroits.service-public.fr/particuliers/F18074.xhtml>>.

<sup>8</sup> Portaal belgium.be, 'Rechtsbijstand. Kosten', available at <<http://www.belgium.be/nl/justitie/slachtoffer/rechtsbijstand/kosten/>>; L'OBFG, *Aide juridique. Statistiques. Statistiques comparatives des BAJ et BJB de Belgique dans le cadre de l'aide juridique de 1ère et 2ème ligne*, (June 2013).

<sup>9</sup> LAA, *Keycard 49. April 2013*, available at <<http://www.justice.gov.uk/downloads/legal-aid/eligibility/eligibility-keycard-49.pdf>>.

<sup>10</sup> SLAB, *Advice and assistance and civil legal aid. Keycard 2013*, (8 April 2013), available at <<http://www.slab.org.uk/common/documents/profession/documents/KeyCard.pdf>>.

<sup>11</sup> Citizens Information, 'Civil Legal Advice and Legal Aid', available at <[http://www.citizensinformation.ie/en/justice/legal\\_aid\\_and\\_advice/civil\\_legal\\_advice\\_and\\_legal\\_aid.html](http://www.citizensinformation.ie/en/justice/legal_aid_and_advice/civil_legal_advice_and_legal_aid.html)>.

<sup>12</sup> RvR, 'Inkomen, vermogen en eigen bijdrage: normen 2013', (2 December 2013), available at <[http://www.rvr.org/nl/subhome\\_rz/rechtsbijstandverlener,Inkomensgrenzen.html](http://www.rvr.org/nl/subhome_rz/rechtsbijstandverlener,Inkomensgrenzen.html)>.

<sup>13</sup> Ministry of Justice, 'Means-Testing', 'Costs of Legal Aid', (1 October 2012), available at <<http://www.oikeus.fi/20618.htm>> and <<http://www.oikeus.fi/20619.htm>>.

Table 2.5 and table 2.6 give more details for the situation where the beneficiary of legal aid receives only a partial subsidy of his or her legal aid expenses, having to pay a financial contribution calculated on the basis of income or capital. The tables indicate the type of income or capital which is taken into account when calculating the contribution. They also indicate the maximum limits of income or capital above which the applicant will not be granted legal aid (even the partial one). The range of the contributions the applicant might be asked for, depending on his or her place within a sliding income or capital scale, is indicated as well. Persons exceeding the maximum income and/or capital limits are excluded from legal aid on the basis of the financial criteria.

2.5	Income and/or capital	Max. income and/or capital in case of partial subsidy
Fra. <sup>14</sup>	Monthly income	€1,393
Ger. <sup>15</sup>	Not applicable	Not applicable
Bel. <sup>16</sup>	Monthly net income	Single applicant: €1,210 Married applicant/single applicant with children: €1,477
Eng. & W. <sup>17</sup>	- Monthly gross income (MGI) - Monthly disposable income (MDI) - Disposable capital (DC)	PA: £2,657 (MGI) & £315-733 (MDI) & £8,000 (DC)
Scot. <sup>18</sup>	- Weekly disposable income (WDI) - Annual Disposable Income (ADI) - Disposable capital (DC)	A&A: >£245 (WDI) & >£1,716 (DC) PA: >£26,239 (ADI) & >£13,017 (DC)
Ire. <sup>19</sup>	- Annual disposable income (ADI) - Annual Disposable Capital (ADC)	ADI: €18,000 ADC: €100,000
Pol.	Not applicable	Not applicable
Neth. <sup>20</sup>	- Annual income (AI) - Capital (C)	Single applicant: - €25,200 (AI) - €20,785 (C) Household with children/partners: - €35,600 (AI) - €20,785 (C)
Fin. <sup>21</sup>	- Monthly income (MI) - Assets (A)	Single applicant: - €1,300 (MI) Couple combined: €2,400

<sup>14</sup> Service-Public.fr, 'Aide juridictionnelle'.

<sup>15</sup> M. Kilian, *ILAG National Report: Legal Aid in Germany*, (27 May 2011), 11.

<sup>16</sup> Portaal belgium.be, 'Rechtsbijstand. Kosten'.

<sup>17</sup> LAA, *Keycard 49. April 2013*.

<sup>18</sup> SLAB, *Keycard 2013*.

<sup>19</sup> Citizens Information, 'Civil Legal Advice and Legal Aid'.

<sup>20</sup> RvR, 'Inkomen, vermogen en eigen bijdrage: normen 2013'.

<sup>21</sup> Ministry of Justice, 'Means-Testing', 'Costs of Legal Aid'.

<b>2.6<sup>22</sup></b>	<b>Financial contribution by beneficiary</b>
<b>Fra.</b>	- 15%-85% of the cost of the lawyer Additional administrative fee of €13 is paid to the lawyer for starting the proceedings in court
<b>Ger.</b>	A&A: €10 PA: €0-300
<b>Bel.</b>	Reasonable own contribution to the lawyer, decided by the local bar association. Practices per bar can be different.
<b>Eng. &amp; W.</b>	35-70% of monthly disposable income that exceeds £315
<b>Scot.</b>	Income contribution A&A: £7 -£135 PA: 33%-100% (% of income in the income range according to a sliding scale) Capital contribution: PA: difference between DC of the applicant and £7,853 (up to a max. DC)
<b>Ire.</b>	Income contribution: A&A: €30 - €150 PA: €130 - €130 plus ¼ of the difference between ADI and €11,500 Capital contribution (PA): - 2,5% of the difference between €4,000 and ADC (if ADC<€54,000) - €1,250 plus 5% of the difference between €54,000 and ADC (if ADC>€54,000 and <max. ADC)
<b>Pol.</b>	Not applicable
<b>Neth.</b>	PA: >€193 and <€811
<b>Fin.</b>	Income contribution: >20% and <75% of the costs of legal aid depending on the income scale Capital contribution for the applicants with A>€5,000: 50% of the assets of the applicant >€5,000 Additional administrative fee of €70 is paid in case of a partial coverage

The legal aid systems of some countries have lower contributions for certain services. For example Scotland has a different scale for calculating income contribution for the so-called ‘diagnostic’ advice and assistance, aimed at verifying whether the applicant should receive legal aid or be referred to another body or procedure. Moreover, Scotland has more lenient financial tests for the suspects being questioned by police at the police stations. In the Netherlands there is a separate income contribution for mediation, which is lower in comparison to the income contribution for second line legal aid (first 4 hours of mediation ‘for only €52’). In Finland the legal aid offices can also provide legal information *via* telephone. Such information is available for free to everyone.

In addition to income contribution, England & Wales, Scotland, Ireland and Finland have a separate capital contribution. In Scotland and Ireland capital contribution is collected only in legal aid cases, that is where legal representation is provided in court. Scotland (advice and assistance) and the Netherlands do not collect contribution based on capital, but the amount of capital the applicant has matters as a pre-condition to receive legal aid. All countries take dependants, such as children, into account when determining financial eligibility.

Table 2.7 informs about the body collecting the financial contribution, which can be the provider of the legal services, the legal aid board or the (local) legal aid office. In Germany and the Netherlands, the lawyers collecting

<sup>22</sup> For sources see tables 2.4 and 2.5.

income contribution have the right to waive it. A study conducted in Germany has indicated that only 23% of the lawyers collect the contribution in every single case.<sup>23</sup>

2.7	Body collecting own contribution
Fra.	Lawyer
Ger.	Lawyer
Bel.	Lawyer
Eng. & W.	Ministry of Justice
Scot.	- Solicitors (criminal ABWOR cases, summary criminal cases) - SLAB (solemn criminal cases, criminal appeal cases)
Ire.	LAB
Pol.	Not applicable
Neth.	Lawyer / Mediator
Fin.	Legal aid offices

Then there may be specific thresholds for the legal aid eligibility in criminal cases. This is the case in England & Wales, Scotland and Ireland. The other countries, namely France, Germany, Belgium, Poland, the Netherlands and Finland apply the same or very similar (Poland) financial eligibility criteria for legal aid in both civil and criminal cases.

2.8	Financial thresholds for legal aid in criminal cases
Eng. & W. <sup>24</sup>	Option 1: Max. weighted gross annual income (WGA) £12,475 Option 2: WGA >£12,475 and <£22,325 and annual disposable income <£3,398 Option 3: No max. income for legal aid before Crown Courts
Scot. <sup>25</sup>	Summary proceedings: Weekly disposable income <£222 and disposable capital <£1,716 Solemn proceedings: Court decides on financial hardship
Ire. <sup>26</sup>	Court decides whether the means of the applicant are enough to pay for legal aid

Some categories of applicants are exempted from the financial thresholds. These applicants receive legal aid regardless of their income or capital. Many countries give legal aid to any person detained, or at risk of detention, irrespective of income level. Automatic eligibility may also apply to persons on welfare benefits. In Belgium, about 70% of legal aid applicants fall under one of the exempted categories.

<sup>23</sup> M. Kilian, Annual Professional Regulation Survey.

<sup>24</sup> The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, 2013 No. 480, Part 2, Chapter 1, Regulation 7-8, available at <[http://www.legislation.gov.uk/ukxi/2013/480/pdfs/ukxi\\_20130480\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/480/pdfs/ukxi_20130480_en.pdf)>.

<sup>25</sup> SLAB, 'Q&A on the introduction of contributions in criminal legal aid', available at <<http://www.slab.org.uk/providers/reforms/criminal/Contributions/CriminalContributionsQandA.html>>.

<sup>26</sup> Citizens Advice, 'Criminal Legal Aid', available at <[http://www.citizensinformation.ie/en/justice/legal\\_aid\\_and\\_advice/criminal\\_legal\\_aid.html](http://www.citizensinformation.ie/en/justice/legal_aid_and_advice/criminal_legal_aid.html)>.

<b>2.9</b>	<b>Applicants exempted from financial thresholds</b>
<b>Fra.</b>	Welfare beneficiaries
<b>Ger.</b>	NAP
<b>Bel.</b>	<ul style="list-style-type: none"> <li>- Certain groups of welfare beneficiaries (incl. the elderly, handicapped, parents/custodians, tenants)</li> <li>- Minors</li> <li>- Asylum seekers</li> <li>- Indebted applicants</li> <li>- Detained applicants</li> <li>- Defendants in special accelerated criminal proceedings</li> <li>- People with mental illness</li> </ul>
<b>Eng. &amp; W.</b>	<ul style="list-style-type: none"> <li>- Welfare beneficiaries</li> <li>- Minors</li> </ul>
<b>Scot.</b>	<ul style="list-style-type: none"> <li>- Applicants with job seeker allowance</li> <li>- Applicants with employment and support allowance</li> <li>- Applicants with income support</li> </ul>
<b>Ire.</b>	NAP
<b>Pol.</b>	<ul style="list-style-type: none"> <li>- Applicants having procedural assistance granted by the court because the presence of a lawyer was found necessary in view of the circumstances that may hamper the defence</li> <li>- Applicants charged with a felony (at least 3 years of imprisonment) or deprived of liberty (detained or serving term for another offence), if the proceedings are pending in first instance before a regional court</li> <li>- Applicants who are juvenile, deaf, blind or mute</li> <li>- Applicants having problems with sanity</li> <li>- Applicants bringing a private indictment</li> <li>- Applicants appealing to the Court of Appeal, if the judgement was made by the regional court as a court of first instance</li> <li>- Applicants bringing cassation to the Supreme Court</li> <li>- Applicants filing a motion for the reinstatement of procedure</li> <li>- Applicants adjudicated in the form of expedited criminal proceedings ('48 hours courts')</li> </ul>
<b>Neth.</b>	<ul style="list-style-type: none"> <li>- Applicants with court-ordered lawyer (applicants in custody during trial)</li> <li>- Asylum seekers</li> <li>- Applicants claiming self-defence in criminal case</li> <li>- Psychiatric patients</li> <li>- Victims of sexual violence or violent crime</li> <li>- Minors with a special trustee</li> </ul>
<b>Fin.</b>	<ul style="list-style-type: none"> <li>- Applicants charged with an aggravated offence (punishment of at least 4 months of imprisonment)</li> <li>- Arrested or detained person</li> <li>- Person under 18 years of age (criminal law)</li> <li>- Person incapable of seeing his or her own defence</li> <li>- Victim of a sexual offence</li> <li>- Victim of violence caused by a close related person</li> <li>- Victim of a serious life or health threatening violent crime or a victim of a serious property offence</li> </ul>

Table 2.10 below provides a rough estimation by the experts consulted of the percentage of the population eligible for legal aid based on income. We also tried to collect indications on how often people appear in courts without a lawyer, but only got an estimate about this from Poland. England & Wales already reports a considerable number of self-represented litigants or litigants in person. This number is expected to rise, because the recent LASPO Act excludes many categories of cases from legal aid.

2.10	% of the population eligible for legal aid	Number or % of self-represented litigants
Fra.	+/- 20-25% or +/- 40% <sup>27</sup>	Not available
Ger.	Not available	Not available
Bel.	10-20% <sup>28</sup>	Not available
Eng. & W.	Not available	Not available
Scot.	70% (2011) <sup>29</sup>	Not available
Ire.	49,9% (2009) <sup>30</sup>	Not available
Pol.	Not available	90% <sup>31</sup>
Neth.	36,9% <sup>32</sup>	Not available
Fin.	Not available	Not available

### 2.2.2 Merits test

Table 2.11 presents the standards for assessing whether the merits of the case at hand would make it legitimate for the body deciding on the application to grant legal aid for defending or pursuing a particular claim. It informs as well whether the appeal stage would require the filing of a new application. It also indicates the minimum amount of money at stake required upon receiving legal aid in certain civil cases.

In Poland and Finland procedural assistance granted in the first instance extends to the other stages of the proceedings. Other countries require a new application and they re-assess the merits of the case.

In Scotland and the Netherlands second line legal aid is given for defending or pursuing civil claims exceeding a certain minimum value. In England & Wales and Ireland the amount of money at stake is considered part of the merits test, but there is no fixed value required. In Germany there is a belief that there should not be a disincentive to bring a low value case. There is no minimum amount of money that has to be at stake.

<sup>27</sup> 20-25% of the population is eligible to have all expenses covered. About 40% is eligible when the population that is eligible only when an own contribution is paid is taken into account, but this happens only in 10% of all cases.

<sup>28</sup> Interview with local expert. 10% is eligible to have all expenses covered. 20% is eligible when the population that may have to pay an own contribution is taken into account, but this happens only in 5% of all cases.

<sup>29</sup> The Scottish Government, *A Suitable Future for Legal Aid*, (2011) 2, available at <<http://www.scotland.gov.uk/Resource/Doc/359686/0121521.pdf>>.

<sup>30</sup> Interview with local expert.

<sup>31</sup> Estimate made by local expert during an interview.

<sup>32</sup> RvR, 'Legal, Aid in the Netherlands. A broad outline. 2013', in: ILAG, *Legal Aid in Difficult Times. Conference Booklet. 12th-14th June 2013, The Hague, The Netherlands*, (2013).

2.11	Standard for the merits test	Re-assessment of merits at the appeals stage	Minimum amount of money at stake in civil cases
Fra.	<ul style="list-style-type: none"> <li>- Manifest inadmissibility</li> <li>- Unfoundedness</li> </ul>	<ul style="list-style-type: none"> <li>- New application</li> <li>- Re-assessment of merits</li> <li>- The same criteria</li> </ul>	Not applicable
Ger.	<ul style="list-style-type: none"> <li>- Reasonable prospect of successful outcome</li> <li>- Subsidiarity</li> </ul>	<ul style="list-style-type: none"> <li>- New application</li> <li>- Re-assessment of merits</li> </ul>	Not applicable
Bel.	<ul style="list-style-type: none"> <li>- Manifestly unfounded (marginal test)</li> </ul>	<ul style="list-style-type: none"> <li>- New application at BJB</li> </ul>	Not applicable
Eng. & W. <sup>33</sup>	<ul style="list-style-type: none"> <li>- Prospects of success</li> <li>- Public interest</li> <li>- Reasonable private paying individual test</li> <li>- Proportionality (likely damages / likely costs)</li> <li>- Interests of Justice (in criminal cases)</li> </ul>	No information obtained	Merits test includes a cost-benefit analysis
Scot.	<ul style="list-style-type: none"> <li>- Reasonableness of using public funds</li> <li>- Probable cause</li> </ul>	Yes	£3,000 <sup>34</sup>
Ire.	<ul style="list-style-type: none"> <li>- Reasonability of taking or defending the case (prospect of success, availability of any other procedure or legal aid outside the public legal aid system)</li> <li>- Seriousness of the charge or offence</li> </ul>	<ul style="list-style-type: none"> <li>- New application</li> <li>- Re-assessment of merits</li> </ul>	Not applicable
Pol.	Necessity of professional assistance in civil case found by the court (can be caused by the complexity of the case, helplessness of the applicant or inequality of arms)	Not applicable	Not applicable
Neth.	<ul style="list-style-type: none"> <li>- Negative necessity criterion</li> <li>- Problem must be legal</li> <li>- Financial weight</li> </ul>	<ul style="list-style-type: none"> <li>- New application</li> <li>- Re-assessment of merits</li> </ul>	Minor advice by a lawyer: €250 First instance: €500 Appeal or cassation: €1,000
Fin.	<ul style="list-style-type: none"> <li>- Little importance of the matter to the applicant</li> <li>- Pursuing the matter would be pointless in proportion to the benefits by the applicant</li> <li>- Pursuing the matter would be an abuse of the process</li> <li>- Matter is based on an assigned right and there is reason to believe that the purpose of the assignment was the obtainment of legal aid</li> </ul>	Not applicable	Not applicable

<sup>33</sup> LAA, HM Courts & Tribunals Service, *Guidance on the Consideration of Defence Representation Order Applications*, (August 2013).

<sup>34</sup> Unless claim involves personal injury SLAB, *A guide to civil legal aid – information for applicants*, (July 2011), 9.

Table 2.12 outlines the problems excluded from the merits test and informs about the categories of the applicants exempted from the merits test. These are the situations in which legal aid will be granted due to the nature of the problem brought by the applicant or because of special circumstances concerning the applicant.

<b>2.12</b>	<b>Problems excluded from the merits test</b>	<b>Categories of applicants exempted from the merits test</b>
<b>Fra.</b>	Cases with special subject matter interest	Applicants who are victims of grave crime
<b>Ger.</b>	Not applicable	Not applicable
<b>Bel.</b>	Not applicable	See section 2.2.1
<b>Eng. &amp; W.</b>	-	-
<b>Scot.</b>	Not available	Not available
<b>Ire.</b>	- Murder - Appeal from the Court of Criminal Appeal to the Supreme Court	Criminal case: - Applicants who are ill - Applicants who are immature - Applicants who lack formal education - Applicants who are emotionally disturbed or lack mental capacity to understand the process
<b>Pol.</b>	Not applicable	Not applicable
<b>Neth.</b>	- Person and family law - Court-ordered lawyer	See table 2.10
<b>Fin.</b>	Not applicable	Not applicable



### 2.2.3 Residency test

The information whether the right to legal aid is linked to a certain duration of stay within a given country is found in the table below.

The residency test is not applicable to the EU citizens bringing a ‘cross-border’ civil dispute. This is because the Council Directive 2003/8/EC of 27 January 2003<sup>35</sup> established minimum common rules relating to legal aid in such cases. Some of the countries like Ireland or Finland allow a non-resident to apply for legal aid if they have a dispute or proceedings falling under the jurisdiction of the courts of that state.

France, Belgium and Finland have a general residency test in their legislation. In France, the applicant has to be actually and legally resident. Belgium prescribes habitual residence. Germany maintains a residency test only for non-EU corporate bodies.

2.13	Residency test	Criteria
Fra.	Yes	Actually and legally resident
Ger.	No	Not applicable
Bel.	Yes	Habitually resident
Eng. & W.	No	Not applicable
Scot.	-	-
Ire.	No	Not applicable
Pol.	No	Not applicable
Neth.	No	Not applicable
Fin.	Yes	Residency

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<sup>35</sup> Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. L 26/41.

### 2.2.4 Exhaustion of other means

Table 2.14 informs about means that need to be used by the applicant before applying for legal aid in some of the countries.

The obligation to use other means of obtaining legal assistance before receiving legal aid is strict in France, Germany, England & Wales, Scotland and Finland. In Ireland it is taken into account as a part of the merits test. Poland and the Netherlands are the only countries that do not make the exhaustion of other means a pre-condition to receive legal aid. Legal expenses insurance and trade union membership are the most common means to be exhausted. Only in England & Wales there is a mandatory telephone gateway service for special education needs, discrimination and debt cases.

2.14	Obligation to exhaust other means	Means to be exhausted
<b>Fra.</b>	Yes	Legal expenses insurance
<b>Ger.</b>	Yes	- Legal expenses insurance - Trade union
<b>Bel.</b>	No	Not applicable
<b>Eng. &amp; W.</b>	Yes	Telephone gateway for certain cases
<b>Scot.</b>	Yes	- Legal expenses insurance - Trade union
<b>Ire.</b>	Not applicable, but considered under the merits test	- Trade union - National Consumer Agency
<b>Pol.</b>	Not applicable	Not applicable
<b>Neth.</b>	Not applicable	Not applicable
<b>Fin.</b>	Yes	Legal expenses insurance

## 2.3 Available legal aid services

We now turn to the types of legal aid services available in each of the countries. They were divided into: services aimed at providing legal information and advice, services helping to negotiate and interact with the other party and services aimed at assisting the legally aided party during adjudication proceedings.

### 2.3.1 Information and advice

This table outlines the services for information and advice available under the legal aid systems and informs about the main providers of these services. The table suggests that there is now a broad range of such subsidised services available under most legal aid systems. Information and advice is provided by lawyers, but increasingly also by specialised law centres.

2.15	Primary legal aid services	Providers
<b>Fra.</b>	<ul style="list-style-type: none"> <li>- Information, advice and assistance aimed at out-of-court conflict resolution</li> <li>- Assistance with drafting legal documents</li> <li>- Referral</li> </ul>	Courthouses, Conseils Départemental d'Accès au Droit (CDAD), Points d'accès au droit (PAD), Maisons de Justice et du Droit (MJD), lawyers
<b>Ger.</b>	<ul style="list-style-type: none"> <li>- Advice</li> <li>- Judicial support</li> <li>- Out of court representation</li> </ul>	Lawyers (upon a decision made by the judge)
<b>Bel.</b>	<ul style="list-style-type: none"> <li>- Practical and legal information and advice</li> <li>- Referral</li> </ul>	CJB, OCMW, <i>Justitiehuizen</i> , Courthouses ( <i>Vrederegerechten</i> ), <i>Wetswinkels</i>
<b>Eng. &amp; W.</b>	<ul style="list-style-type: none"> <li>- Specialist advice for debt, education, employment, family, housing and welfare benefits</li> <li>- Letters and interventions on behalf of the applicant</li> <li>- Assistance in preparing other documents</li> <li>- Assistance with negotiations</li> <li>- Mandatory telephone gateway</li> </ul>	CLA, Law Centres
<b>Scot.</b>	<ul style="list-style-type: none"> <li>- Negotiations on behalf of the applicant</li> <li>- Assistance in writing letters and retrieving of reports</li> <li>- Advice on whether to take case forward and apply for procedural assistance</li> </ul>	Lawyers from criminal and civil legal assistance register
<b>Ire.</b>	<ul style="list-style-type: none"> <li>- Legal information and advice</li> <li>- Assistance in preparing letters on behalf of the client</li> <li>- Negotiations with the other party</li> <li>- Telephone information and referral line</li> </ul>	Solicitors (criminal cases), solicitors employed in the law centres of the LAB, panels of private solicitors and external barristers (civil cases)
<b>Pol.</b>	Not applicable	Not applicable
<b>Neth.</b>	<ul style="list-style-type: none"> <li>- Advice for problem-solving</li> <li>- Practical tips and information</li> <li>- Referral to legal professionals</li> </ul>	Rechtwijzer, Legal Services Counters
<b>Fin.</b>	<ul style="list-style-type: none"> <li>- Advice</li> <li>- Assistance in drafting legal documents</li> </ul>	Attorneys employed by legal aid offices, "external" advocates or licensed attorneys

The next table informs about sources of legal information and advice outside of the ‘public’ legal aid system. This is an interesting option for the applicants to whom legal aid was refused on the basis of the eligibility criteria or for the applicants in countries in which the first line services are not available (Poland) or might be less comprehensive. The private sector, as well as the public sector, is also developing innovative ways to provide information and advice, through websites or otherwise (see Chapter 5).

<b>2.16</b>	<b>Providers of primary services outside of the legal aid system</b>
<b>Fra.</b>	Local bar associations, charities, trade unions, consumer associations, tenants’ associations , local communities
<b>Ger.</b>	Legal Expenses Insurance (LEI), trade unions
<b>Bel.</b>	Local bar association, trade unions, Health Centres, Centres for General Welfare, non-for-profit organisations (nfp’s), welfare organisations, employee organisations, consumer associations, tenants’ associations, ombudsman
<b>Eng. &amp; W.</b>	Law centres (nfp’s), trade unions
<b>Scot.</b>	Law centres, trade unions, legal expenses insurers, NGOs (Shelter Scotland or Citizens Advice Scotland)
<b>Ire.</b>	Free Legal Advice Centres (FLAC), Community law centres (Ballymun, Northside, Limerick and the Mercy Sisters) ,Irish Traveller Movement Law Centre, Irish Refugee Council and the Immigrant Council of Ireland, lawyers working on no fee basis or <i>pro bono</i>
<b>Pol.</b>	Ombudsman, clients desks in courts (information), Labour Inspection, Consumer Representatives, Social Welfare Centres, network of Victim Support Centres, tax offices and tax information hotline, specialised ombudsman (for children, patients, insured), public prosecution offices, network of 25 university law clinics, network of 30 independent Citizen Advice Bureaus, NGOs not aligned with any network
<b>Neth.</b>	Rechts- & wetswinkels, social counsellors, lawyers (small advice or open office hours), Rechtwijzer, LEI, ConsuWijzer, consumer associations, home owner associations
<b>Fin.</b>	Legal expenses insurers, trade unions, NGOs providing assistance to victims of crimes

All countries, apart from Poland, thus offer primary legal aid services under their legal aid systems. In Poland primary legal aid services are available only for the cross-border disputes based on the Council Directive 2003/8/EC of 27 January 2003. However, Poland has an extensive network of public and private providers of legal advice and assistance, who operate outside of the legal aid system. In Germany, the legal expenses insurers cover with their products the majority of the applicants, significantly reducing the need for primary legal aid offered by the legal aid system.

Only in England & Wales for certain types of problems there is a mandatory telephone gateway via which the applicant can receive primary legal aid.

Most of the NGOs or nfp’s in France, Ireland, Poland and the Netherlands receive public grants for offering legal advice and assistance outside of the legal aid system. These usually do not come from the legal aid budget.

### 2.3.2 Services helping to negotiate and interact

The services helping to negotiate and interact with the other party offered by the legal aid systems are outlined in the table below. This table informs about their categories, nature (voluntary or mandatory) and estimated scale of usage.

In all countries, apart from Poland and Germany, services provided by others than lawyers helping to negotiate and interact with the other party may be covered by the legal aid system. The most common form of these services is mediation. In Ireland mediation in family cases has a special place. It is administered by the Legal Aid Board and is not subject to the general financial eligibility criteria. As a result, the applicant is not subjected to any contribution in order to be able to use mediation. In the Netherlands the contribution for mediation is lower than that for the other legal aid services (see p. 33).

Primary legal aid services available in France, Germany, England & Wales, Scotland, Ireland and Finland allow for more extensive representation of the applicant by means of writing letters or assisting in the negotiations with the other party. In Belgium and the Netherlands the applicant may count only on receiving legal information, advice and referral to another institution.

In Belgium, the law strictly distinguishes between and defines first line and second line legal aid. The focus in practice is on legal problems and social problems are quickly referred to the legal sector. Due to this strict distinction and legal framework, there appears to be little space to develop services that help parties to negotiate and interact.

2.17	Services helping to negotiate and interact	Nature	Estimated scale of usage
<b>Fra.</b>	- Mediation - Conciliation	Voluntary	Not available
<b>Ger.</b>	Not applicable	Not applicable	Not applicable
<b>Bel.</b>	- Mediation - Arbitration - Conciliation	Voluntary	Not available
<b>Eng. &amp; W.</b>	- Mediation (family) - Arbitration	Voluntary	15,357 family mediation started in 2011 (9,804 agreements reached): 1.9% of total volume of civil legal aid <sup>36</sup>
<b>Scot.</b>	Mediation	Voluntary	Not available
<b>Ire.</b>	- Structured negotiations - Collaborative law services - Mediation services	Voluntary	Not available
<b>Pol.</b>	Not applicable	Not applicable	Not applicable
<b>Neth.</b>	Mediation	Voluntary	1,8% of total legal aid certificates <sup>37</sup>
<b>Fin.</b>	- Mediation (available for civil and commercial cases, family cases and employment dismissals) - Legal advice in criminal conciliation cases (but not the procedural assistance in the conciliation proceedings)	Voluntary	Not available

<sup>36</sup> Legal Services Commission (LSC), *Legal Aid Statistics in England and Wales. 2012-13*, (25 June 2013), 13-14; 15,357 / 732,115.

<sup>37</sup> RvR, *Monitor Gesubsidieerde Rechtsbijstand 2011*, (2012), 45-46; 7,341 certificates out of 414,007, both parties to a case can receive a grant, so this does not represent the total number of cases.

### 2.3.3 Assistance in adjudication proceedings

This table informs about the different categories of the services available to the beneficiary of legal aid during the adjudication stage. Procedural assistance by a lawyer, which usually is the most costly service needed in order to access a court procedure, is available everywhere. For court fees, expert fees, translation, travel and serving documents there may be also subsidies.

<b>2.18</b>	<b>Court costs</b>	<b>Procedural assistance</b>	<b>Expert fees</b>	<b>Translation</b>	<b>Travel costs</b>	<b>Other</b>
<b>Fra.</b>	No	Yes	Yes	Yes	No information	Bailiff
<b>Ger.</b>	Yes	Yes	No information	No information	No information	No information
<b>Bel.</b>	No	Yes	No	No	No	No
<b>Eng. &amp; W.</b>	No information	Yes	Yes	Yes	No	No information
<b>Scot.</b>	No information	Yes	Yes	No information	No information	Preparation to the trial
<b>Ire.</b>	No information	Yes	Yes	Yes	No information	Preparation to the trial
<b>Pol.</b>	Yes	Yes	Yes	No information	Yes	No information
<b>Neth.</b>	No	Yes	Yes	Yes	Yes	Bailiff
<b>Fin.</b>	Yes	Yes	Yes	Yes	Yes	No information

The information whether or not the beneficiary of legal aid can indicate a particular lawyer to represent him at the adjudication stage is found in the table below. In all countries, apart from Poland, the beneficiary of legal aid can have a particular person appointed as his legal aid lawyer. In Finland the beneficiary of legal aid may additionally choose between the lawyers working in the legal aid offices, advocates (members of the bar association) and licensed attorneys.

2.19	Free choice of the legal aid lawyer
Fra.	Yes
Ger.	Yes
Bel.	Yes
Eng. & W.	Yes
Scot.	Yes
Ire.	Yes, in certain circumstances
Pol.	Only in proceedings before the administrative courts
Neth.	Yes
Fin.	Yes

Legal aid systems have various mechanisms aimed at ensuring the quality of the legal aid services. The table below informs about the body responsible for the quality check, presents the criteria for the lawyers willing to do legal aid cases and provides some of the procedures for the quality control.

In France, Germany, Belgium and Poland there is no separate control of the quality of legal aid services. In these countries the bar associations are in charge of the general quality of legal services and are responsible for handling complaints for breaches of professional conduct.

In England & Wales, Ireland and the Netherlands, the authorities responsible for legal aid grants set additional quality criteria. However, in the Netherlands disciplinary measures against the lawyers are taken by the bar association, as the legal aid board can only remove the lawyer from the list of legal aid lawyers in case of grave misconduct. Scotland has both: a separate mechanism of assessing the performance of the legal aid board staff in processing the requests for legal aid, as well as a general complaint mechanism for the performance of solicitors and barristers in legal aid cases. Scotland also pioneered a peer review system for legal aid lawyers.

In order to be able to take on legal aid cases the lawyers need to either apply for registration (France, Scotland, Ireland and the Netherlands), receive a contract of employment (Ireland and Finland) or a licence (Finland), or simply become a member of the bar association (Germany, Poland and Finland). Scotland has a dual registration obligation, both the individual lawyer and the practice he or she works for needs to be registered with the legal aid board in order to apply for legal aid on behalf of a client.

2.20	Body responsible for the quality of legal aid services	Entry requirements for legal aid lawyers	Procedures for the quality control in the legal aid cases
<b>Fra.</b>	Bar association	- Registered lawyers - Specialised training for specific fields of law	Not available
<b>Ger.</b>	Bar association	- Any lawyer can take on a legal aid case	- No specialised mechanism to ensure the quality of the services in legal aid cases - Bar association ensures the general quality of the services provided by its members
<b>Bel.</b>	Bar associations	Not available	Disciplinary system of bar associations
<b>Eng. &amp; W.</b>	LAA	- Specialist Quality Mark - Mediation Quality Mark - Quality Assurance Scheme	- Complaints procedure at LAA - Peer review - Solicitors Regulation Authority - Legal Ombudsman
<b>Scot.</b>	- SLAB - Scottish Legal Complaints Commission	-Both solicitor and firm have to be registered	Complaint mechanism at the Scottish Legal Complaints Commission and SLAB
<b>Ire.</b>	LAB	- Solicitors employed by the LAB - Solicitors and barristers registered as members of the private panels maintained by the LAB	Specialised quality control procedures of the LAB including the use of best practice guidelines, file reviews with reference to the guidelines and a complaint mechanism
<b>Pol.</b>	Bar association	Members of the relevant bar association	- No specialised mechanism to ensure the quality of the services in legal aid cases - Bar association ensures the general quality of the services provided by its members - In criminal cases the court may inform the bar about the manifest breach of professional duties by the lawyer, demanding measures to be taken within a specified time
<b>Neth.</b>	- Bar association - LAB	Lawyers have to be registered at and meet the requirements of the LAB	- Complaint mechanism at and requirements by the LAB - Complaint procedure at local bar, disciplinary courts - Bar association ensures the general quality of the services provided by lawyers
<b>Fin.</b>	- Legal aid offices - bar association	- Lawyers employed at the legal aid offices - Advocates members of the bar association - Attorneys upon receiving a license from the Licensed Attorneys Board (mandatory as of 1 January 2014)	- Courts can reduce the amount of hours declared as needed or actually spent by the lawyers for the preparation and conduct of the case, this is binding for calculating the compensation - Bar association ensures the general quality of the services provided by advocates and licensed attorneys



The complaints procedures for the beneficiaries of legal aid are summarised in the table below. On top of this, bar associations tend to operate their own complaint systems.

<b>2.21</b>	<b>Complaints procedure for the quality of legal aid services</b>
<b>Fra.</b>	General complaints procedure before courts or the bar association (ethical misconduct)
<b>Ger.</b>	- General complaints procedure with the bar association for the violation of professional rules - Contractual responsibility of a legal aid lawyer for malpractice
<b>Bel.</b>	Disciplinary system of the bar associations
<b>Eng. &amp; W.</b>	Complaints procedure at LAA
<b>Scot.</b>	- Complaint mechanism at the SLAB - services provided by SLAB staff - General complaint procedure at the Scottish Legal Complaints Commission (independent semi-public body assessing the performance of all legal professions) - complaints about solicitors or barristers
<b>Ire.</b>	- Specialised complaints procedure to the Customer Liaison Officer of the LAB - General complaints procedure with the relevant bar association for the violation of professional rules
<b>Pol.</b>	- General complaint procedure with the relevant regional bar association for the violation of professional rules - General civil responsibility of a lawyer on the basis of a contract and malpractice insurance
<b>Neth.</b>	- General complaint procedure at the LAB, bar associations and disciplinary courts - Specialised complaints commission for legal aid in asylum (detention) cases ( <i>KRAV</i> )
<b>Fin.</b>	Not available

### 3. Costs and financing of legal aid

#### 3.1 Overview of the expenditure

The following tables represent the total expenditure on legal aid, that has been accounted for in public sources or sources provided by our experts.

Total annual expenditure (million euros)		Total expenditure per capita (euros) <sup>38</sup>	
1. England & Wales	2,489 (2012-13) <sup>39</sup>	1. England & Wales	39.37
2. Germany	533 (2012) <sup>40</sup>	2. Scotland	34.28
3. Netherlands	484.7 <sup>41</sup>	3. Netherlands	29.11
4. France	351 <sup>42</sup>	4. Ireland	21.18
5. Scotland	182 <sup>43</sup>	5. Finland	12
6. Ireland	97.41 <sup>44</sup>	6. Belgium	6.96
7. Belgium	76.6 <sup>45</sup>	7. Germany	6.52
8. Finland	67.70 <sup>46</sup>	8. France	5.40
9. Poland	22.86 <sup>47</sup>	9. Poland	0.59

In some countries, parts of the budget such as primary legal aid, administration costs or legal aid granted at specialised courts cannot be verified. For Germany, the total annual expenditure includes the primary civil legal advice and secondary civil legal aid at courts of general jurisdiction. This number is estimated by our expert to represent 80% of all legal aid expenditures. There may be additional expenditures in for example the social security courts and employment courts, but no data are available on this. So the German expenditure per head may actually be in the range of €8 instead of €6.5.

The budgets of some countries may not reveal hidden costs. Hidden costs are state expenses for financed legal aid which are not included in the overall budget, such as administration or overhead costs. In the Netherlands, for

<sup>38</sup> See appendix. Population numbers taken from Eurostat, population on 1 January. For Scotland, England & Wales, national data was used: Scotland.org, 'Population of Scotland', available at <<http://www.scotland.org/about-scotland/the-scottish-people/population-of-scotland>>; Office for National Statistics (OSN), 'Annual Mid-year Population Estimates, 2011 and 2012', (8 August 2013); OSN, 'Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Population Estimates Timeseries 1971 to Current Year', (21 December 2011).

<sup>39</sup> Legal Services Commission (LSC), *Annual Report and Accounts. 2012-13*, (June 2013), 15.

<sup>40</sup> Deutscher Anwalt Verlag, *Statistical Yearbook for the Lawyer's Profession 2013/2014*.

<sup>41</sup> RvR, *Monitor Rechtsbijstand 2011*, 105, 109. RvR, *Jaarverslag 2011*, (2012), 41; Included in the total budget are subsidies for legal services counters (*Juridisch Loket*), overhead costs, mediation, automation projects and asylum. Excluded are costs for debt relief and interpreters.

<sup>42</sup> CNAJ, *Rapport triennal du Conseil national de l'aide juridique*, (2013); Ministère de la Justice, *Annuaire statistique de la Justice. Édition 2011-2012*, (2012); Ministère de la Justice, *Les chiffres-clés de la Justice. 2012*, (2012).

<sup>43</sup> SLAB, *Annual Report. 2011 - 2012*, (November 2012), Appendix 1: Key Statistics, 3.

<sup>44</sup> Source: interview with local expert.

<sup>45</sup> The Belgian federal government does not provide a systematic analysis of comparable data, most information resides with the respective bar associations. L'OBFG, *Aide juridique. Statistiques. Statistiques comparatives des BAJ et BJB de Belgique dans le cadre de l'aide juridique de 1ère et 2ème ligne*, (June 2013); OVB, *Statistieken juridische tweedelijnsbijstand* (May 2013); 2010-11 data available via Nationaal Instituut voor Criminalistiek en Criminologie (NICC), Université de Liège, *Recherche relative au système de rémunération de l'aide juridique de deuxième ligne*, Collection des rapports et notes de recherche n° 30, (September 2012).

<sup>46</sup> Telephone interview with Kirta Heine, expert from Ministry of Justice of Finland.

<sup>47</sup> Average exchange rate 1 EUR = 4,09 PLN; this is expenditure for legal aid before the court; there is a separate scheme for legal aid in preliminary criminal proceedings; the only figure given by the ILAG report was 815,000 PLN in 2012 which is about €199,266.

example, all expenses are administered by the central legal aid board and registered in detail within the overall legal aid budget. In Germany, which does not have a central legal aid budget, costs for administration are not represented in the overall expenditure figures.

For Scotland, the total annual expenditure includes both primary legal aid and secondary legal aid. The number is also corrected for any legal assistance income received. This can be money recovered from damages awarded, own contribution payments and payments of opposing parties. It also includes the administration costs. The total expenditure in the Netherlands, includes subsidies for frontline services (Legal Services Counters), overhead costs, mediation, automation projects and asylum. Excluded for the total annual budget in the Netherlands are the debt relief services and services of interpreters. In England & Wales the number includes Civil Legal Help, Civil Representation, Criminal Defence Services (CDS) and Legal Services Commission administration costs. Civil representation covers all areas where a solicitor or barrister is required to represent the applicant. Legal Help covers the initial advice and help. It also includes funding for immigration, asylum and nationality issues. In Poland, the number only includes the total compensation of the lawyers in the procedural stage. Poland has no primary legal aid under the state-funded legal aid scheme. In France, the number for total expenditure includes the payments to lawyers, bailiffs and experts.

In Belgium, the number includes secondary legal aid and administration costs. In Ireland, the number includes legal advice and representation at court by employees and solicitors at the state funded law centres, as well as payments to private sector lawyers for legal aid in court procedures and advice. The costs of administration are also included.

Where available, we also compiled the figures for primary and secondary legal aid.

<b>Total expenditure primary legal aid (million euros)</b>		<b>Expenditure primary legal aid per capita (euros)</b>	
1. England & Wales	212 <sup>48</sup>	1.Scotland	4.05
2. Germany	73 <sup>49</sup>	2. England & Wales	3.78
3. Netherlands	22 <sup>50</sup>	3. Netherlands	1.33
4. Scotland	21 <sup>51</sup>	4. Germany	0.90
5. Poland	0 <sup>52</sup>	5. Poland	0
6. Belgium	not available	6. Belgium	not available
7. Finland	not available	7. Finland	not available
8. France	not available	8. France	not available
9. Ireland	not available	9. Ireland	not available

<sup>48</sup> LSC, *Annual Report and Accounts. 2012-13*, 15, 'Legal Help'.

<sup>49</sup> Deutscher Anwalt Verlag, *Statistical Yearbook 2013/2014*, 179

<sup>50</sup> RvR, *Monitor Rechtsbijstand 2011*, 105, 109; RvR, *Jaarverslag 2011*, 41; Costs for legal services counters, excludes small advice by lawyers.

<sup>51</sup> SLAB, *Annual Report. 2011 - 2012*, Appendix 1: Key Statistics, 5.

<sup>52</sup> Telephone interview with Lukasz Bojarski, legal aid expert in Poland

Total expenditure secondary legal aid (million euros)		Expenditure secondary legal aid per capita (euros)	
1. England & Wales	1,996 <sup>53</sup>	1. England & Wales	35.59
2. Germany	460 <sup>54</sup>	2. Scotland	28.81
3. Netherlands	415 <sup>55</sup>	3. Netherlands	24.85
4. France	280 (2012) <sup>56</sup>	4. Belgium	6.44
5. Scotland	154 <sup>57</sup>	5. Germany	5.62
6. Belgium	70.8 <sup>58</sup>	6. France	4.25
7. Poland	23 <sup>59</sup>	7. Poland	0.59
8. Finland	not available	8. Finland	not available
9. Ireland	not available	9. Ireland	not available

The best way to compare budgets is perhaps relating them to GDP, because this reflects the general income level and the size of the economy that has to generate the subsidies. On this basis, England & Wales and Scotland are the highest spenders across all categories. Both spend roughly five times as much as Germany, Belgium and France. The Netherlands and Ireland spend roughly triple the amount of their GDP on legal aid compared to Germany, Belgium and France. Poland spends the least across all the categories. England & Wales and Scotland spend 13 times as much on legal aid from their GDP compared to Poland.

#### Total expenditure as % of GDP<sup>60</sup>

1. England & Wales	0.13%
2. Scotland	0.13%
3. Netherlands	0.08%
4. Ireland	0.06%
5. Finland	0.03%
6. Germany	0.02%
7. Belgium	0.02%
8. France	0.02%
9. Poland	0.01%

### 3.2 Average expenditure per case

It is difficult to compare expenditure per case. Every country has its own way of defining legal aid products for which payments are made. Data reporting follows this system. So what we report in the table below is the average price of legal aid products as defined and administered by the national systems. The general trend seems to be that one category of products consists of assistance in one procedure at a court or tribunal, including advice and settlement negotiations. Generally, an additional procedure, or an appeal procedure, will trigger the purchase of a

<sup>53</sup> LSC, *Annual Report and Accounts. 2012-13*, 15; Civil Representation and CDS total (net).

<sup>54</sup> Deutscher Anwalt Verlag, *Statistical Yearbook 2013/2014*, 185

<sup>55</sup> RvR, *Jaarverslag 2011*, 41; Certificates and pre-trial detention (*piket*).

<sup>56</sup> 'Aide Juridique' in the strict sense plus 'garde à vue', Inspection Générale des Services Judiciaires (IGSJ), *Modernisation de l'action publique (MAP). Evaluation de la gestion de l'aide juridictionnelle. Rapport de diagnostic*, (November 2013), 10, 38, Annexe 4.2, 3; CNAJ, *Rapport triennal du Conseil national de l'aide juridique*, (2013); Ministère de la Justice, *Annuaire statistique de la Justice. Édition 2011-2012*, (2012); Ministère de la Justice, *Les chiffres-clés de la Justice. 2012*, (2012).

<sup>57</sup> SLAB, *Annual Report. 2011 - 2012*, Appendix 1: Key Statistics, 5.

<sup>58</sup> OVB, *Statistieken juridische tweedelijnsbijstand*, 11.

<sup>59</sup> Lukasz Bojarski, Jan Winczorek, *ILAG National report: Poland*, (12 June 2013) 13.

<sup>60</sup> Eurostat: GDP at current market prices in €1,000 million

new product. Advice (first line assistance) is another category, which may or may not include negotiation with the other party out of court.

What can be seen from table 3.1, comparing it to the rankings in paragraph 3.1, is that countries with higher levels of spending in relation to GDP (England & Wales, Scotland, Netherlands) tend to pay two or three times as much per product as countries with lower budgets (Belgium, France). In the first category of countries, the products cost from €1,000 to €1,500 on average, in the second category products typically cost between €300 and €500. For advice services (primary legal aid) the costs are in the range of €30 to €300 per product in all countries.

3.1	Expenditure per case	Expenditure for advice (primary legal aid)
Bel. <sup>61</sup>	€365	Not available
Fin. <sup>62</sup>	€809	Not available
Scot. <sup>63</sup>	- Civil legal aid: £3,057 - Civil tribunals (ABWOR): £1,122 - Criminal tribunals ABWOR): £506 - Criminal legal aid (summary): £632 - Criminal legal aid for jury cases (solemn): £3,454 - Appeals: £2,290 - Children's legal aid: £1,075	- Civil advice and assistance: £243 - Criminal advice and assistance: £60 - Children's advice and assistance: £113
	<b>Expenditure per granted application</b>	
Fra. <sup>64</sup>	€398	Not available
	<b>Expenditure per act of assistance</b>	<b>Expenditure per act of assistance in primary legal aid line</b>
Eng. & W. <sup>65</sup>	- Total: £1,154 - Civil Representation: £5,272 - Criminal Representation: £718	Legal Help: £235
	<b>Expenditure per certificate</b>	<b>Expenditure per act of assistance in primary legal aid line</b>
Neth. <sup>66</sup>	€963	€28.7 per customer contact at Legal Services Counters

England & Wales calculate the average expenditure per act of assistance. The Netherlands calculate the average costs per certificate. There can be several acts of assistance and certificates in one problem for which the lawyer is consulted, in particular if different issues in one conflict require separate proceedings. It is therefore not possible to trace what the average costs are per case in the Netherlands and England & Wales. For Germany and Ireland there is no data available on the matter.

<sup>61</sup> OVB, *Statistieken juridische tweedelijnsbijstand*, 11; €70,789,000 ('Budget vergoedingen advocaten') / 193,776 ('aantal afgesloten zaken').

<sup>62</sup> Telephone interview with Kirta Heine, expert from Ministry of Justice of Finland.

<sup>63</sup> SLAB, *Annual Report. 2011 - 2012*, Appendix 1: Key Statistics, 6.

<sup>64</sup> Ministère de la Justice, *Les chiffres clés de la Justice 2012*, 5-6; €351,100,000 / 882,608 ('Admissions à l'aide juridictionnelle').

<sup>65</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-13*, (25 June 2013), 39; Civil representation costs are based on solicitors' profit costs, disbursements and counsel's fees. Total = £1,732.7m (Civil Repr. (net) + CDS total (net)) / 1,501,400 Acts of Assistance. Civil Representation = £757.6m (Civil Repr. (net)) / 143,700 Acts of Assistance 143,700. Criminal Representation = £975.1m (CDS total (net)) / 1,357,700 Acts of Assistance. Legal Help = £184m / 781,500 Acts of Assistance (781,500).

<sup>66</sup> RvR, *Monitor Rechtsbijstand 2011*, 107.

### 3.3 Grants and refusals

The number of legal aid grants (legal aid products) is listed in the table below. Per capita, England & Wales and Scotland also have far more legal aid products than other countries.

The refusal rates are in the order of 15% (France, Netherlands) up to 27% or 48% for specific categories of problems in England & Wales and Poland.

3.2	Total number of grants	Per capita	Total number of refusals (% or estimate)	Most common grounds for refusal
<b>Fra.</b> <sup>67</sup> <b>(2010-11)</b>	912,191 admissions	0.014	161,150 (15%)	- Financial (42,607) - Inadmissible or unfounded (11,494) - Absence of supporting documents (10,382) - Other (18,050)
<b>Ger.</b>	Not available	Not available	Not available	Not available
<b>Bel.</b> <sup>68</sup>	193,776 closed cases (260,366 <i>désignations</i> , new cases)	0.018	Not available	Not available
<b>Eng. &amp; W.</b> <sup>69</sup>	- 2.283m acts of assistance (including Legal Help) - 190,250 ( Civil Representation)	0.041	Civil: 27%	Not available
<b>Scot.</b>	263,022 <sup>70</sup>	0.05	Not available	Not available
<b>Ire.</b>	71,825 <sup>71</sup>	0.016	Not available	Not available
<b>Pol.</b> <sup>72</sup>	- Criminal: 61,057 (2011) - Civil 10,753 (2012) - Administrative: 3,488 (2011)	0.002	3,110 (48%) refusals for administrative cases	Not available
<b>Neth.</b> <sup>73</sup>	414,007 certificates 772.031 interactions with clients at Legal Services Counters	0.025	62,499 (12,9%) certificates	- Financial (29,488) - Merits (28.855) - Other (4.156)
<b>Fin.</b> <sup>74</sup>	+/- 77.000 cases (2012)	0.014	Not available	Not available

<sup>67</sup> Ministère de la Justice, *Annuaire statistique de la Justice. 2011-2012*, 293-295.

<sup>68</sup> L'OBFG, *Aide juridique. Statistiques*; OVB, *Statistieken Juridische Tweedelijnsbijstand. 2013*.

<sup>69</sup> 'Volumes of work dealt with are usually called an act of assistance and this is a measure of when a case starts. Although used as a proxy to show the number of people helped, they do not equate exactly as some clients may have received more than one act of assistance during the year and some acts of assistance may help more than one person.'; LSC, *Legal Aid Statistics in England and Wales. 2012-2013*, 34, 39, 46.

<sup>70</sup> SLAB, *Annual Report. 2011 - 2012*, Appendix 1: Key Statistics, 2.

<sup>71</sup> Excludes Refugee Legal Services.

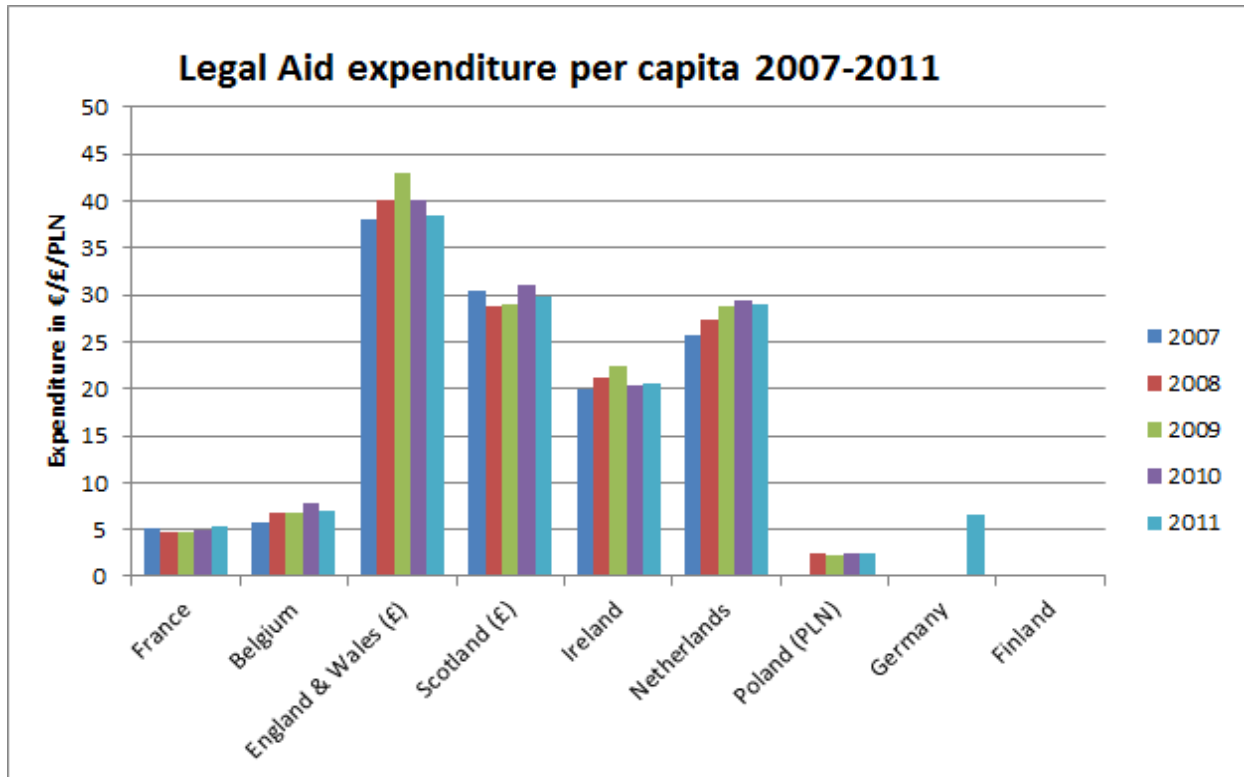
<sup>72</sup> ILAG National Report Poland 2013, 11; numbers for 2012 reflect ongoing cases in which legal aid was provided on that year.

<sup>73</sup> RvR, *Monitor rechtsbijstand 2011*, 67, 105, 156; Certificates, including advice and mediation, excluding pre-trial detention; RvR, *Jaarverslag 2011*, 39.

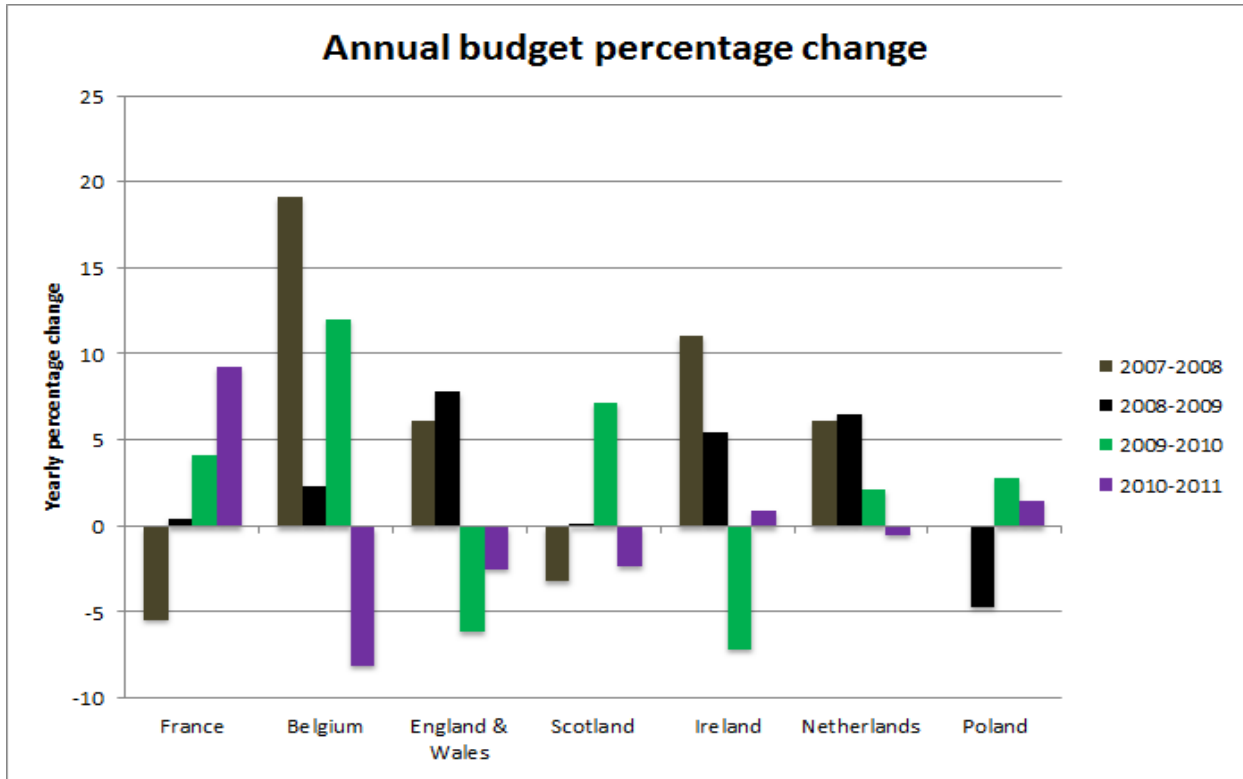
<sup>74</sup> Merja Muilu, *ILAG National Report: Finland*, (20 May 2013), 2-3.

### 3.4 Legal aid expenditure per capita

The first graph below shows the developments of the total legal aid expenditure per capita between 2007 and 2011 per country. When converting the pound and zloty to the euro, the graph would depict a decrease in expenditure of both England & Wales and Poland while in reality, their spending increased. To avoid a distorted graph, the expenditure is kept in their domestic currencies, respectively the zloty (PLN), pound (£) and euro (€).



The second graph below zooms in on the percentage change of the legal aid budget of the countries up to 2011. There is no clear trend across countries. The impact of legal aid reforms, however, can be clearly seen in this graph. The England & Wales cuts will have an impact as of 2013, which is not yet shown in the graph.



### 3.5 Administration costs

Overhead and administration costs are the costs to run the system for the government. These are typically between 5 and 8% of the total legal aid budget. Only Scotland has a separate budget for administration costs. In Germany and Poland there is no information available on the administration costs because the legal aid scheme is embedded in the budget of the courts. In Finland, the costs are also partially hidden in the administration costs of the Ministry of Justice and the private practitioners.

#### Percentage of legal aid budget for administration

1. Ireland 8.8%
2. Belgium 7.6%
3. France 7.5%
4. England & Wales 5.5%
5. Netherlands 5.5%
6. Finland not available
7. Germany not available
8. Poland not available
9. Scotland separate budget



3.3	Annual expenditure (millions)	Average cost per product	Incentives to use overhead funds sparingly
Fra. <sup>75</sup>	€30 (2012)	€32,8	Not available.
Ger.	Not applicable, falls under the budget of the courts.	Not available.	Not applicable.
Bel. <sup>76</sup>	€5.8	€30.1	Not available.
Eng. & W. <sup>77</sup>	£111.2	£48.7	- Annual audit by National Audit Office (NAO) - Financial Stewardship Programme
Scot. <sup>78</sup>	£12,5	£48	Capped administrative budget
Ire.	Not available.	Not available.	Not available.
Po.	Not applicable, falls under the general budget of the justice sector	Not available.	Not applicable.
Neth. <sup>79</sup>	€23	€55,6	- High Trust working method between LAB and legal aid providers - Centralisation of LAB in 2009 - Standard government oversight
Fin.	Not available.	Not available.	Not available.

### 3.6 Financing scheme

In a closed budget, used in France and in Belgium, the total annual expenditure on legal aid is limited to an amount that is determined by the government at the beginning of the year. England & Wales, Scotland, Poland and the Netherlands use an open end budget. Ireland has an open budget for criminal legal aid and a closed budget for civil legal aid. Scotland has an open budget, but a closed budget for the administration of the system.

The remuneration per unit of legal aid for each individual lawyer in France and Belgium depends on the amount of units claimed by all lawyers. Legal aid lawyers hear after the year ended how much they have earned per unit. The more hours claimed by the lawyers, the less they get per unit. In both countries the value of a unit, which is linked to an hour's work, has been declining in recent years. From 2010 onwards, the Belgian government tries to guarantee a minimum value for each unit, however. The consequence is that Belgium is now effectively moving towards an open budget.

Ireland has a mixed delivery model, where the LAB hires lawyers directly and pays their salary. These lawyers are occasionally assisted by private solicitors and barristers, who work on a fixed fee basis. Germany, Scotland, the Netherlands and Finland work with fixed fees for the legal aid providers. In England & Wales, the remuneration is more based on hourly fees, but there are exceptions.

<sup>75</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 10; 915,563 admissions.

<sup>76</sup> OVB, *Statistieken juridische tweedelijnsbijstand*, 11; Average costs calculated on the basis of the number of closed cases.

<sup>77</sup> LSC, *Annual Report and Accounts. 2012-13*, 15, 82-83; For England & Wales these costs are per 'acts of assistance' rather than per case or certificate.

<sup>78</sup> SLAB, *Annual Report. 2011 - 2012*, Appendix 1: Key Statistics, 3; £12,500,000/ 263,000 = £48.

<sup>79</sup> RvR, *Jaarverslag 2011*, 41, 'Beheer'. Average cost calculated on the basis of certificates.

Hourly remuneration of lawyers is different per country. This can have a significant impact on overall spending. In multiple countries lawyers heavily oppose proposed reductions to their fees (see section 5.3). The differences in hourly remuneration are substantial. In England & Wales, hourly fees for civil legal aid barristers range from £112.50 to £225.<sup>80</sup> For solicitors, hourly rates for controlled work range from £50-£90 an hour. Hourly fees for criminal legal aid range from £50-£145, depending on the type of work and court. In the Netherlands, the fixed fees are calculated on the basis on an hourly rate of €104. Lawyers in France and Belgium do not receive an hourly fee, but their remuneration appears to be significantly lower. They receive about €25 per procedural act (see also chapter 4).

3.4	Type of budget	Compensation system for providing assistance
<b>Fra.</b>	- Closed - Open for pre-trial detention	- Fixed fee per procedural act - Fixed fee for pre-trial detention cases
<b>Ger.</b>	Open	Fixed fee (sliding scale of importance case)
<b>Bel.</b>	Closed, but in practice moving towards open (fees are retrofitted)	Fixed fee per procedural act
<b>Eng. &amp; W.</b>	Open	Complicated fee schedules, mostly hourly rates in the order of £45-70, more fixed fees in family cases, but depending on the number of complications
<b>Scot.</b>	Open for legal aid budget Closed for separate administrative budget	Fixed fee
<b>Ire.</b>	- Open for criminal - Closed for civil	- Salary for solicitors employed by the LAB - Fixed fee per case for solicitors in private panels ( family cases) and barristers (criminal cases)
<b>Pol.</b>	Open	The court may award up to 150% of the minimum fees
<b>Neth.</b> <sup>81</sup>	- Open - Closed for Legal Services Counters	- Fixed fee - Hourly fee of €104 for complex cases where more than three times the predetermined number of hours are spent
<b>Fin.</b>	Open	- Salary for solicitors employed by the LAB - Fixed fee per case for solicitors in private panels ( family cases) and barristers (criminal cases)

There are three different ways to recover money spend on legal aid. It is possible to retrieve money from the opposing party who has lost the case, from the damages awarded to the legal aid beneficiary or from the beneficiary if the case was abusive (unreasonable claims, or with very low probability of success). The third category is likely to be very small if there is a merits test. The table indicates which mechanisms are in place in the respective countries.

<sup>80</sup> The Civil Legal Aid (Remuneration) Regulations 2013, 2013 No. 422, Schedule 1-3, available at <[http://www.legislation.gov.uk/ukxi/2013/422/pdfs/ukxi\\_20130422\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/422/pdfs/ukxi_20130422_en.pdf)>; The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013, 2013 No. 2803, available at <[http://www.legislation.gov.uk/ukxi/2013/2803/pdfs/ukxi\\_20132803\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/2803/pdfs/ukxi_20132803_en.pdf)>

<sup>81</sup> RvR, *Monitor Gesubsidieerde Rechtsbijstand 2012*, (2013), 195.

<b>3.5</b>	<b>Obligation to repay legal aid (including from damages awarded), if the case is won by the legally-aided applicant.</b>
<b>Fra.</b> <sup>82</sup>	- Yes (hardly enforced in practice) - A lawyer can request a losing party, instead of the State, to pay his costs that would normally be paid by legal aid (not enforced in practice) - If the judge thinks the action is dilatory, abusive, or if the applicant benefits financially from a judgment (not enforced in practice) - A losing party that is not a legal aid beneficiary can be ordered to repay the legal aid of the winning party (poorly enforced in practice)
<b>Ger.</b>	If you win the case there will not be any expenditure on the state because the opponent will have to pay the court fees and the fees of your lawyer. However, in family law proceedings there is no cost shifting.
<b>Bel.</b>	Yes.
<b>Eng. &amp; W.</b>	Yes, statutory charge (civil and criminal).
<b>Scot.</b>	Yes (in some cases, but not always).
<b>Ire.</b>	Yes (medical negligence, personal injury, etc.)
<b>Pol.</b>	- Civil: no obligation to repay legal aid, the losing party pays the costs of the proceedings awarded by the court (including the legal aid costs of the winning party). - Criminal: no obligation.
<b>Neth.</b>	- No, but LAB can re-check an applicant's income and reclaim legal aid grants that were too high ( <i>Resultaatsbeoordeling, Inning en restitutie, Peiljaarverlegging</i> ). - Losing party can be ordered to pay the legal costs of legal aid. This amount is deducted from the total amount granted by legal aid
<b>Fin.</b>	No.

According to the available data, the amounts recovered in this way tend to be small (in the order of 2% of the legal aid budget at most).

<b>3.7</b>	<b>Clawback/repayment amounts</b>
<b>Fra.</b>	€4m (costs recovered from losing party that does not benefit from legal aid) <sup>83</sup>
<b>Bel.</b>	€282,280 <sup>84</sup> (2011-12; costs recovered from losing party that does not benefit from legal aid)
<b>Eng. &amp; W.</b>	£32,5 (recoveries from damages and statutory charge) <sup>85</sup> Statutory charge is the obligatory repayment if the result of the case is that you kept or gained property or money
<b>Ire.</b>	€974,331 <sup>86</sup> (2011; cost recovered from the other party or from the legally aided person out of monies or property received)
<b>Neth.</b>	€2,531,047 (2012) <sup>87</sup>

<sup>82</sup> IGSJ, *Evaluation de gestion de l'aide juridictionnelle*, 18.

<sup>83</sup> Ibid.

<sup>84</sup> OVB, *Statistieken juridische tweedelijnsbijstand*, 23, 'Rechtplegingsvergoeding'; Figure is for Flanders only.

<sup>85</sup> LSC, *Annual Report. 2012-13*, 66.

<sup>86</sup> LAB, *Annual Report 2011*, 38.

<sup>87</sup> RvR, *Jaarverslag 2012, (2013)*, 45, 'Inning en restitutie'.

In Germany, Belgium, England & Wales and Scotland there is a loan system available for legal aid applicants that need to pay own contribution. Repayment can be done in instalments. In Ireland, Poland, Finland and the Netherlands however, there is no possibility of a loan under state funded legal aid.

3.6	Availability of a loan system
Fra.	Unknown
Ger.	Yes
Bel.	Yes
Eng. & W.	Yes, repayment in installments
Scot.	Yes.Repayment in installments. If contribution is based on capital then lump sum repayment.
Ire.	No
Pol.	No
Neth.	No. There is a possibility for some injury cases. 8 such loans were awarded in 2012
Fin.	No

### 3.7 Impact of (before the event) legal expenses insurance on the legal aid budget

Legal expenses insurance are an alternative way to fund legal services that is usually available for employment, personal injury, housing and administrative cases, but not for divorce and criminal defence. The role of legal expenses insurance (LEI) in Germany is very prominent. The premium income of Germany exceeds the combined premium income of France, Belgium, Poland, the Netherlands and Finland. The numbers below include legal protection insurance bought by companies and other organisations, however, so caution is needed when they are compared with legal aid budgets.

The significant role of LEI in Germany can be explained by the traditional way attorney fees have been regulated (fixed fee based on value at stake). This makes it easier for insurance companies to calculate their risks and offer attractive premiums. Another explanation for the popularity of LEI in Germany is the cost shifting mechanism. Even if you have been granted legal aid, you are not guaranteed to be free of financial risk. If you lose the case, you have to pay 100% of your opponent’s lawyer costs and court fees. LEI, also covering these risks, offers a broader scope of protection compared to state legal aid.

**Premium income of legal expenses insurance (in million euros)<sup>88</sup>**

1. Germany	3,014
2. France	920
3. Netherlands	800
4. Poland	434
5. Belgium	369
6. Finland	70
7. Scotland	not available
8. Ireland	not available
9. England & Wales	not available

The premium income of legal expenses insurance per capita is highest in the Netherlands. This is the only indicator we have for market penetration (% of population being insured). In the Netherlands procedures and costs are rather transparent which makes it doable for insurance companies to forecast their costs. Also, the market for legal aid is not monopolised by lawyers like in Germany. Therefore, insurance companies can process the legal problems in-house rather than having to outsource them to lawyers, which gives them again more control over costs.

In Finland, LEI comes as an add on to home insurance, which is why close to 85% of the population is covered by LEI. The LEI, however, is more limited in scope and excludes many cases for which legal aid can be granted.

**Premium income of legal expenses insurance per capita (in euros)**

1. Netherlands	47.90
2. Germany	36.65
3. Belgium	33.55
4. France	14.15
5. Finland	12.96
6. Poland	11.27
7. Scotland	not available
8. Ireland	not available
9. England & Wales	not available

On 7 November 2013, the European Court of Justice reconfirmed the right to a free choice of lawyer for those with a LEI.<sup>89</sup> This may have consequences for the in-house lawyers delivery model, but insurers are likely to respond by developing policies which give clients more choice, but adding financial incentives to influence the choice.

**3.8 Very High Cost Cases (1% most expensive cases)**

We have not been able to identify any patterns in very high cost cases because of a lack of data. The exception is England & Wales. Because most countries work with fixed fee systems, we expect that high costs of such exceptional cases are borne by lawyers, but we have not been able to systematically confirm this.

In the Netherlands, expenditure on high cost criminal cases (cases requiring more than 24 hours) increased from €28 million in 2007 to €41 million in 2012, 8% of the total budget for legal aid.<sup>90</sup> This 75% increase cannot be

<sup>88</sup> Deutscher Anwalt Verlag, *Statistical Yearbook*, 177.

<sup>89</sup> ECJ, 7 November 2013, C-442/12 (X/DAS Rechtsbijstand).

explained by an increase in crime. Almost half of the expenditure on criminal cases involving suspects now goes to high cost criminal cases. This is one of the reasons why a cut in the rate paid for such cases is being considered. Another option would be to develop fixed fee schedules for these more complex cases.

3.8	Number (civil/criminal)	Annual expenditure (million)	Expenditure as % of annual budget
Eng. & W. <sup>91</sup>	20 (Criminal)	£68	0.04%
Neth. <sup>92</sup>		€40.5	8%

### 3.9 Possible explanations for different levels of expenditure

As levels of expenditure per case, per capita and as percentage of GDP are so different among countries close to each other, although they have comparable cultures, economies and histories, it is interesting to speculate about the causes for these differences. For instance, the differences could be explained by a preference for higher quality and more equal access to justice. Or they could be an artefact of rather ineffective procedures at courts or in legal practice, requiring a lot of effort from lawyers to make them work for their clients. Finally, they may be caused by the way lawyers are remunerated. Fixed fees are likely to stimulate business models in which legal aid lawyers process a high number of legal aid products efficiently. Hourly fees stimulate models in which procedures are expanded and complexities are welcomed.

Recently, some interesting comparative data have become available about the quality of civil, criminal and administrative justice as perceived by the population. These data may be seen as proxies for what legal aid achieves in combination with other factors that influence access to justice, such as the quality of courts and their procedures, as well as the services provided by the market that are affordable for the population. These data, which should thus be used with caution, suggest a quality ranking with the Netherlands and Finland slightly better, closely followed by the United Kingdom (UK) and Germany with Belgium and France somewhat behind, whilst Poland gets better results for criminal justice than for civil justice and performs adequately for its level of income.

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<sup>90</sup> RvR, *Monitor rechtsbijstand 2012*, 196.

<sup>91</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-2013*, 8-10.

<sup>92</sup> RvR, *Monitor rechtsbijstand 2012*, 196.

3.9	% of population saying Fairness of civil justice judgments is good or very good <sup>93</sup>	People can access and afford civil justice <sup>94</sup>	Due process of law and rights of the accused <sup>95</sup>	Overall civil justice and criminal justice ranking out of 29 high income countries	
Fra.	58	0.66	0.74	17	21
Ger.	56	0.71	0.77	3	9
Bel.	69	0.65	0.76	18	18
UK	63	0.66	0.82	11	11
Scot.	Not available	Not available	Not available	Not available	Not available
Ire.	62	Not available	Not available	Not available	Not available
Pol.	41	0.62	0.86	22	16
Neth.	76	0.73	0.89	2	6
Fin.	66	0.69	0.91	5	2

Combined with the data on the budget in earlier sections, these indicators of quality suggest that Finland and Germany get most value out of every Euro spent on legal aid. The UK spends five times as much on achieving slightly better results than France and Belgium. England & Wales is clearly outperformed by very efficient Finland, and Germany achieves very similar results with a fraction of the money spent. The tendency to work with hourly fees may be part of the problem.

The Netherlands achieve a high level of quality but may be able to spend money more wisely by following examples set by Finland and Germany, who spend three times less for a slightly lower quality. Belgium and France may have to step up their access to justice efforts, because their access to justice can be improved whereas they spend little on legal aid.

<sup>93</sup> TNS Political & Social, *Flash Eurobarometer: Justice in the EU*, (November 2013), 34.

<sup>94</sup> The World Justice Project (WJP), *Rule of Law Index. 2012-2013.*, (2013), 174, factor 7.1.

<sup>95</sup> *Ibid*, 177, factor 8.7.

As another indicator of quality of access to justice in a country we took the number of violations of the right to access to justice protected by article 6 European Convention of Human Rights as established by the European Court of Human Rights since 1959. Table 3.10 shows the number of violations per capita. Here a similar pattern is found: Germany and the UK are the best performers (lowest number of violations), followed by the Netherlands and Ireland, then Belgium and France who have many more violations, and Poland as the most frequent offender. Finland is an exception, because it scores well on other indicators of access to justice, but very poor on the (high) number of violations of the convention.

3.10	Number of Art. 6 ECHR violations (2012; Right to fair trial, Length of proceedings) <sup>96</sup>	Art. 6 Violations 1959-2012 (% of total violations)	Art. 6. Violations (1959-2012) per 100.000 inhabitants (2012)
Fra.	6	538 (73)	0.83
Ger.	2	120 (61)	0.15
Bel.	2	104 (67)	0.95
UK	2	118 (24)	0.19
Scot.	Not available	Not available	Not available
Ire.	2	15 (46)	0.33
Pol.	15	519 (53)	1.35
Neth.	3	43 (33)	0.26
Fin.	0	96 (66)	1.8

In the next chapter, when we discuss specific problem areas, we will go deeper into the possible causes of differences in spending levels, focusing on the complexity of procedural routings for these problem categories.

<sup>96</sup> ECHR, 'Violations by Article and by respondent State (2012)', available at <[http://www.echr.coe.int/Documents/Stats\\_violation\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_2012_ENG.pdf)>; ECHR, 'Violations by Article and by respondent State (1959-2012)', available at <[http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf)>; ECHR, 'Statistics 1959-2010. Statistics on judgments by State', available at <[http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2010_ENG.pdf)>.



## 4. Legal aid per type of problem

### 4.1 Frequency and expenditure per type of problem

This chapter investigates the legal aid situation for nine problem areas, on the basis of the information available, which is more comprehensive for England & Wales, Netherlands and Scotland, and rather limited for Belgium, France and Germany.

Each problem category requires different types of services, often highly specialised ones. Legal aid systems have many specific rules for each of these areas. The markets for services that are substitutes for legal aid by qualified lawyers are also very different, as are the most promising avenues for innovation that lead to better access to justice and lower costs. With the possible exception of legal aid for criminal defence, countries have developed very different approaches to these areas, leading to huge variations in budgets spent on them per capita.

This even suggests that legal aid systems are not the best unit of analysis. Policymakers are likely to find it more illuminating to look at the justice supply chain for each problem category, which is related to different causes, services, innovations and roles for lawyers and courts, and thus requires different approaches to the quality and costs of subsidised services.

Criminal law is typically the problem category on which most legal aid money is spent, sometimes more than half of the budget. Ireland and Scotland, for instance, spend more on criminal than on non-criminal cases. England & Wales spends almost the same on both categories. More money is spent on non-criminal than on criminal legal aid in France, Belgium and the Netherlands. Figures for criminal legal aid in the Netherlands include forced hospitalisation of psychiatric patients and detention in asylum and immigration cases. Family law problems, such as divorce or separation proceedings, are the most or second most common and expensive type of problem. Refugee and immigration cases are common and rather costly in all countries. Debt related cases are also frequent in most countries, but are less costly for governments.

This chapter also goes into the average amount spent per legal aid product in each of the case types. There is no detailed data on this for France. On average, civil cases in France consume more resources than criminal cases.<sup>97</sup> This is due to the average value (number of points) allocated per procedure.<sup>98</sup> This value may reflect the complexity of procedures, rather than the value of the interests at stake. For example, forced hospitalisation in mental health cases is allocated four units of value, but fifty are allocated for a lawyer defending two spouses in a divorce by mutual consent.

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<sup>97</sup> 6,411,112 points for civil cases, 2,283,883 for criminal. The number of 'missions' is almost equal, 395,635 for civil, 341,336 for criminal; Jean-Charles Krebs, 'La gestion des fonds: par l'état, par la profession. Données chiffrées et statistiques. Propositions', presentation at CNB, *États Généraux de l'accès au droit*, 29 November 2013.

<sup>98</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 32.

4.1 (1/2)	Top 10 of most common types of cases (as % of budget)	Top 10 of most common types of cases (as % of total grants)
Fra. <sup>99</sup>	2012: 1. Family (30) 2. Criminal (24) 3. Detention (14) 4. Education (5)	2010: - Criminal (43) - Divorce (12) - Family other (12) - Administrative (4) - Refugee & Immigration (4) - Educational assistance (4) - Labour (3) - Civil other (18)
Ger.	Not available	Not available
Bel. <sup>100</sup>	1. Criminal (26) 2. Refugee and Immigration (17) 3. Family (17) 4. Juvenile (criminal) (13) 5. Other civil and commercial (11) 6. Administrative (6) 7. Social affairs (2) 8. Parentage (<1) 9. Fiscal law (<1)	1. Criminal (25) 2. Refugee & Immigration (22) 3. Juvenile (18) 4. Family (13) 5. Debt and consumer credit (6) 6. Goods (4) 7. Mentally ill (4) 8. Social affairs (3) 9. Civil liability (2) 10. Commercial (2)
Eng. & W. <sup>101</sup>	1. Criminal (50.9) 2. Family (36.9) 3. Housing (1.3) 4. Clinical negligence (<1) 5. Refugee & Immigration (0.24) 6. Consumer (0.07) 7. Personal Injury (0.06) 8. Debt (0.05) 9. Social security (0.01) 10. Labour (0.008)	1. Criminal 2. Family (85) 3. Housing (7) 4. Immigration (2) 5. Clinical Negligence (2) 6. Public Law (1) 7. Actions against the police etc. (<1) 8. Community care (<1) 9. Mental Health (<1) 10. Debt (<1)
Scot. <sup>102</sup>	1. Assault (15.4) 2. Contact/Parentage (8.2) 3. Drugs (8.2) 4. Offensive weapons/vandalism (8.1) 5. Theft (7.9) 6. Murder (4.5) 7. Road traffic (4) 8. Children (3.2) 9. Divorce/Separation (3.2) 10. Immigration/Asylum (3.1)	Not available

<sup>99</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 1; Ministère de la Justice, *Annuaire statistique de la Justice. Édition 2011-2012*, 293-295.

<sup>100</sup> OVB, *Statistieken juridische tweedelijnsbijstand*. 2013, 65, 80-84. Percentage of budget calculated on the basis of points assigned per category. The categories for budget and total grants are different.

<sup>101</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-2013*, 34, 39; These figures concern civil representation, the costs for legal help are not accounted for. Percentages of total grants concerns the applications granted for civil representation.

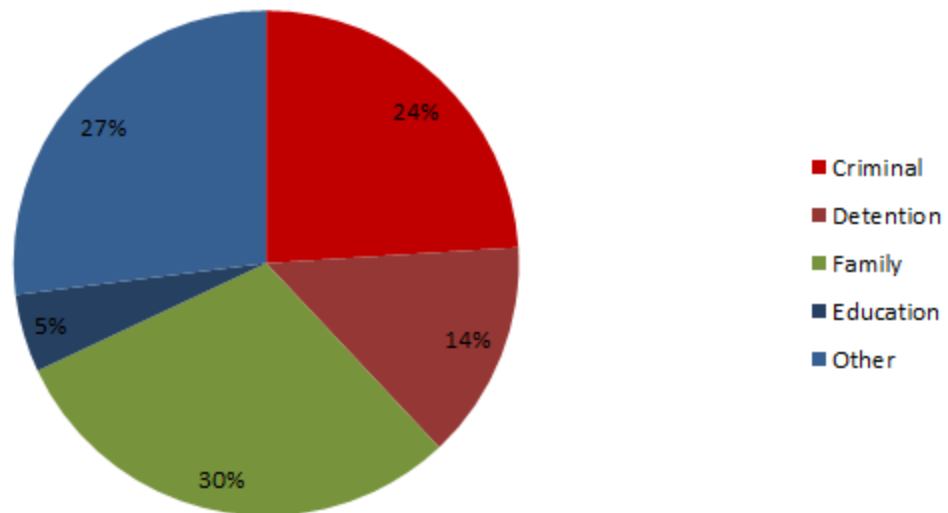
<sup>102</sup> SLAB, *Annual Report. 2010 - 2011*, Appendix 7: Analysis of Payments, 2.

4.1 (2/2)	Top 10 of most common types of cases (as % of budget)	Top 10 of most common types of cases (as % of total grants)
Ire.	<ol style="list-style-type: none"> <li>1. Criminal law</li> <li>2. Divorce</li> <li>3. Separation</li> <li>4. Childcare</li> <li>5. Custody</li> <li>6. Asylum</li> <li>7. Maintenance</li> <li>8. Domestic violence</li> <li>9. Other family law</li> <li>10. Other non-family law</li> <li>11. Recognising/enforcing foreign orders</li> </ol>	<ol style="list-style-type: none"> <li>1. Criminal law</li> <li>2. Separation</li> <li>3. Divorce</li> <li>4. Asylum</li> <li>5. Other non-family law</li> <li>6. Custody/ access/ guardianship</li> <li>7. Maintenance</li> <li>8. Conveyancing</li> <li>9. Other family law</li> <li>10. Debt</li> <li>11. Childcare</li> </ol>
Pol.	Not available	Not available
Neth. <sup>103</sup>	<ol style="list-style-type: none"> <li>1. Criminal (40; suspects + other)</li> <li>2. Family (23)</li> <li>3. Asylum (8)</li> <li>4. Contract law (8)</li> <li>5. Immigration(5)</li> <li>6. Social benefits (5)</li> <li>7. Labour (3)</li> <li>8. Social insurances (3)</li> <li>9. Tenancy (2)</li> <li>10. Administrative (2)</li> </ol>	<ol style="list-style-type: none"> <li>1. Criminal (35; court-ordered representation + other)</li> <li>2. Family (26)</li> <li>3. Contract law (8)</li> <li>4. Asylum (7)</li> <li>5. Immigration (6)</li> <li>6. Social benefits (5)</li> <li>7. Labour (4)</li> <li>8. Social insurances (3)</li> <li>9. Tenancy (2)</li> <li>10. Administrative (2)</li> </ol>
Fin. (2012) <sup>104</sup>	Not available	<p>Public legal aid offices (60% of all legal aid cases; separate from private practitioners):</p> <ol style="list-style-type: none"> <li>1. Marriage and family (25)</li> <li>2. Inheritance (24)</li> <li>3. Criminal (16)</li> <li>4. Other (11)</li> <li>5. Debt (6)</li> <li>6. Pension and other social benefits (4)</li> <li>7. Rent (4)</li> <li>8. Real estate/real property (4)</li> <li>9. Indemnity (3)</li> <li>10. Employment and equality (2)</li> </ol> <p>Private practitioners:</p> <ol style="list-style-type: none"> <li>1. Crime (61)</li> <li>2. Marriage and family (14)</li> <li>3. Debt (3)</li> <li>4. Rent (1)</li> <li>5. Employment and equality (1)</li> <li>6. Indemnity</li> </ol>

<sup>103</sup> RvR, *Monitor rechtsbijstand 2011*, 105, 156; RvR, *Jaarverslag 2011*, 37; based on the number of certificates.

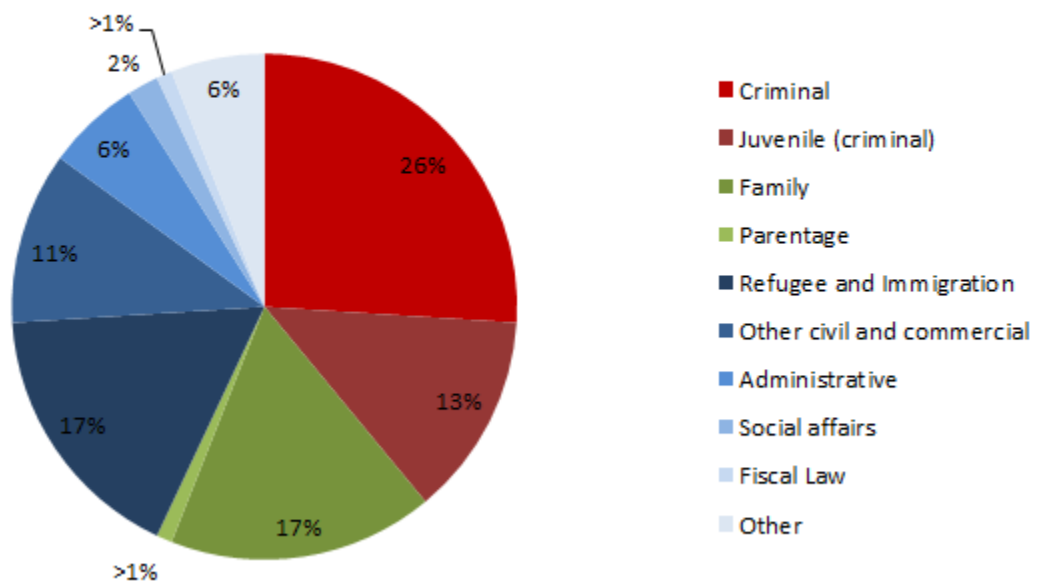
<sup>104</sup> ILAG National Report Finland 2013, 2-3. Legal aid is offered by both public legal aid offices and private lawyers. Private lawyers predominantly deal with criminal cases, which was 81% of their workload in 2012.

### France: Expenditure per type of problem (2012)

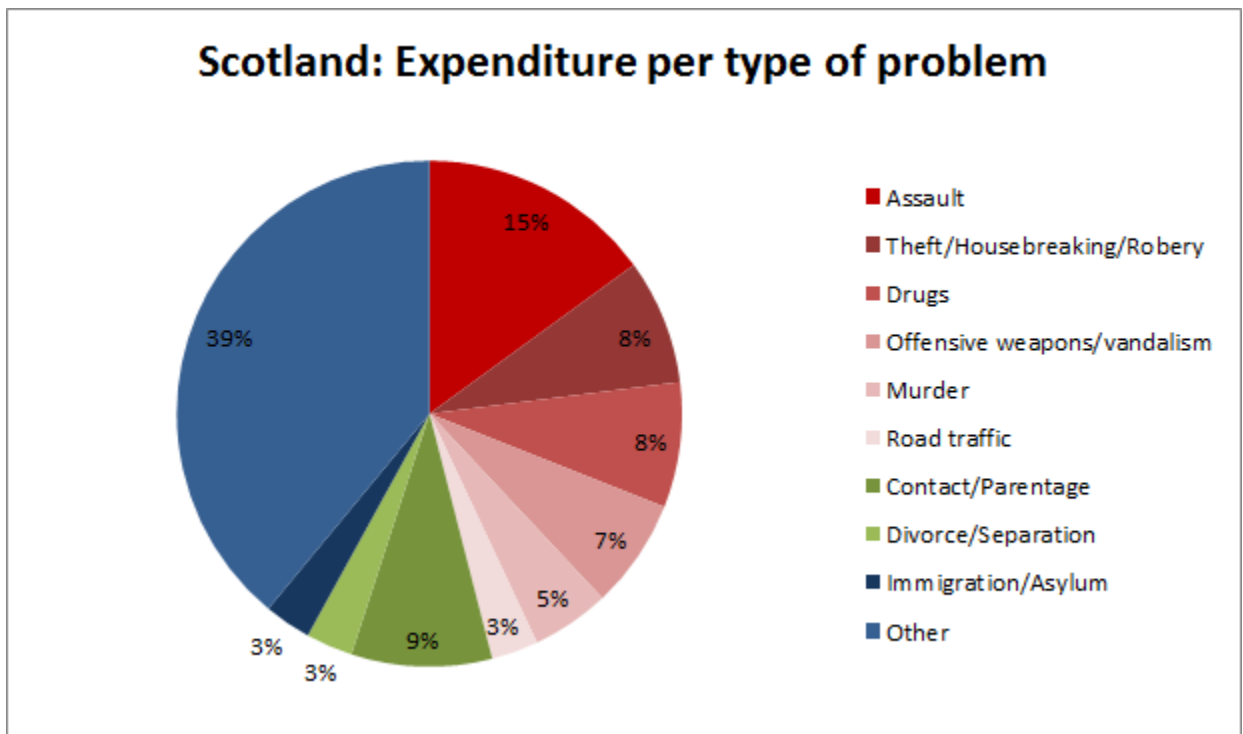
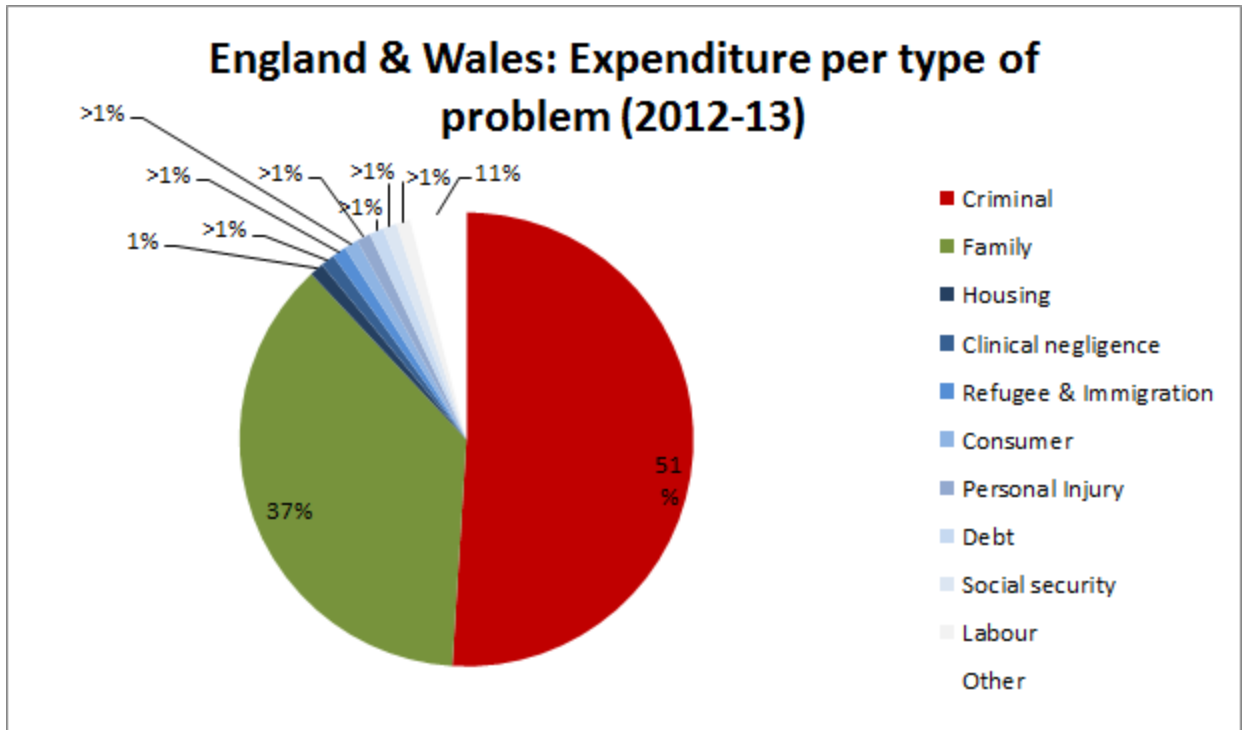


French public sources do not provide detailed statistics of expenditure per type of problem. The total number of cases per type of problem is available.<sup>105</sup> Of all legal aid cases, 49% were civil cases, 43% criminal cases, 4% administrative cases and 4% refugee and immigration cases. 24% of all legal aid cases are about family law problems.

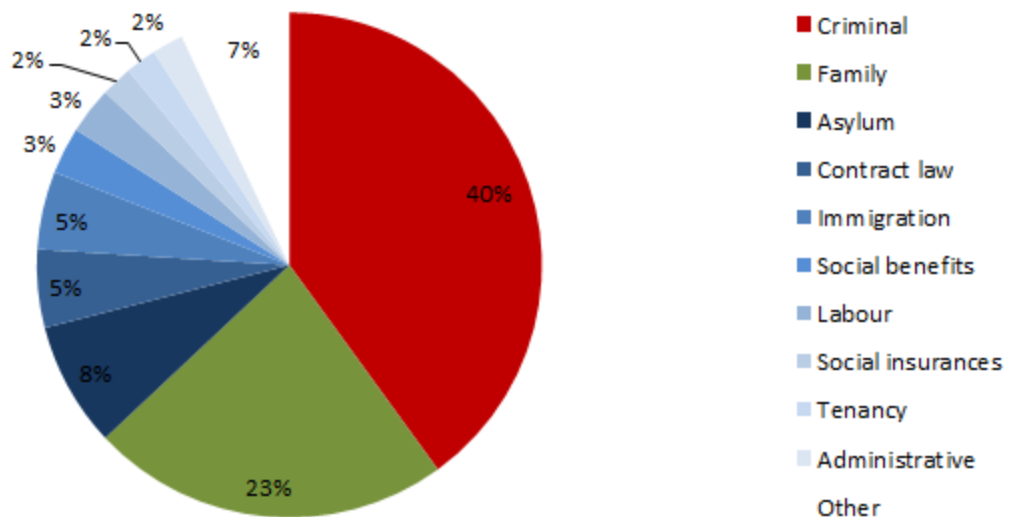
### Belgium: Expenditure per type of problem



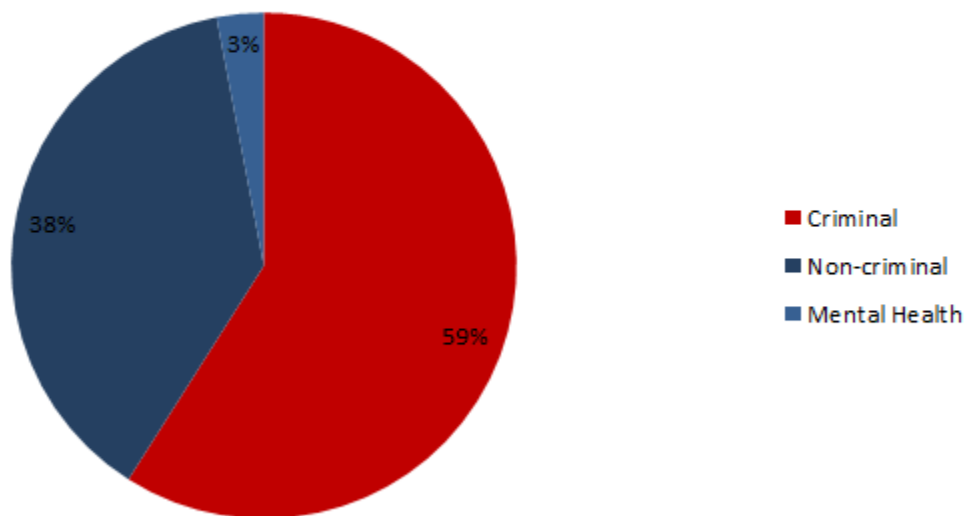
<sup>105</sup> Ministère de la Justice, *Annuaire statistique de la Justice*. 2011-12, 293.



### Netherlands: Expenditure per type of problem



### Ireland: Expenditure per type of problem



Statistics for most countries are from 2011, but for England & Wales we relied on statistics from 2012-13. For Germany and Poland statistical data per type of problem is not available. Average costs for England & Wales are based on civil representation costs for cases that were completed within the financial year 2012-13. These costs are based on solicitors' profit costs, disbursements and counsel's fees. For Belgium, the information per type of problem relies on recent statistics published by the regional bar association from Flanders (OVB). These statistics

represent roughly half of the cases in Belgium and we established that the Wallonian figures are not very different. The expenditure for Belgium is based on the number of closed cases. In most countries all types of problems are covered by legal aid, except for England & Wales, where entire types of problems were removed from the scope of legal aid in 2013.

These statistics rely on the distinctions per type of problem each country uses. Some countries collect more detailed information than others, such as Scotland. The pie charts show the percentage of the annual legal aid budget spent on different types of cases based on these national distinctions. The shades of red represent criminal law cases, the shades of green family law problems and the shades of blue other types of cases.

## 4.2 Custody at police stations and pre-trial detention

Legal assistance is first needed during custody and interrogation at police stations. England & Wales spent £160 million in 2012-13 on legal aid funding for suspects that have not been charged, and the average cost per case was £218.<sup>106</sup> In the Netherlands, registered legal aid lawyers have to be on standby duty, to ensure a lawyer is available within the first few hours after someone is put into detention. The Netherlands spent €29.6 million on this service in 2011 and the average cost was €247.9.<sup>107</sup> The average cost in England & Wales, the Netherlands and France is around €250-300. Poland has a separate financing scheme for legal aid in preliminary criminal proceedings. However, the amounts spent for the last ten years have been minimal. For example in 2012 it was below €200.000. Likewise, in Ireland there is a separate legal aid scheme to enable a person detained in a police station to consult a solicitor. The expenditure has been decreasing from 2010 onwards, to reach the level of €887,451 in 2012.

Expenditure on this type of legal aid is expected to increase in many countries following the Salduz line of case law of the ECtHR.<sup>108</sup> The European Union is preparing the implementation of a directive issued late 2013 that expands the right to have a subsidised lawyer present during police interrogation.<sup>109</sup> In France and Belgium, this form of legal aid has been reformed in 2011. In France, lawyers now get a fixed fee of €300 for the first 24 hours of detention. Total costs rose from €24 million in 2011, to €39 million in 2012. Average costs per intervention rose from €150 to €247.<sup>110</sup>

There is a trend of developing innovative ways to provide these services. England & Wales and Scotland provide public defenders on a salary paid by the state, and also developed telephone advice services for suspects. In Finland, videoconferencing is used for these services, as an option. The Netherlands is experimenting with projects where the lawyer could be present during the interrogation at a police station through a video connection as well. Compared to other problem areas, such as family law and consumer issues, the option of providing leaflets or information online is underdeveloped, and may be an area for more innovation. A future trend may be that interrogation of suspects is more often recorded, so that suspects are better protected against inappropriate interrogation methods and admitting crimes that they have not committed.

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<sup>106</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-13*, 29.

<sup>107</sup> RvR, *Jaarverslag 2011*, 38, 41, costs pre-detention (*piket*) divided by number of paid pre-detention acts of assistance.

<sup>108</sup> See Chapter 6, page 90.

<sup>109</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest', 8 June 2011, COM(2011) 326 final.

<sup>110</sup> Union Nationale des Carpa (UNCA), 'Aide à l'intervention de l'avocat au cours de la garde à vue ou de la retenue douanière. 2012', (5 February 2013).

### 4.3 Criminal defence

On legal aid for suspects that have been charged, England & Wales and Scotland spend about 10 times as much per capita as France and Belgium, with Netherlands and Ireland in between. For minor crimes England and Wales spent £227 million in 2012-13 and the average cost per case was £453. For legal representation in the Crown Court and above this was £640 million, and the average cost was £2,481.<sup>111</sup> In France and Belgium the average expenditure per case is around €300 per case. The average expenditure per grant for criminal cases in the Netherlands is much higher at €1,350. €41 million (25% of the budget for criminal cases) is spent on complex criminal cases in which a lawyer works more than three times the predetermined number of hours (8 hours in most criminal cases) and is entitled to a €104 hourly fee for the hours above that level (24 in these cases), but no compensation for the hours in between (hour 9 to 24 in these cases).

Alternatives or innovations can save time and costs and lead to more efficient criminal proceedings. Germany, England & Wales and Finland have developed public defender services. In Belgium a reform has been proposed that introduces an own contribution for defendants in criminal cases, but this proposal has been rejected. Some countries, including France, have a mediation procedure for minor infractions (*médiation pénale*). A mediator (a police officer or a representative of the public prosecutor) can try to bring parties to an agreement on damages paid to the victim.

Expenditure <sup>112</sup>	Fra. (2010)	Bel.	Eng. & W.	Scot.	Ire.	Neth.
<b>Total (million)</b>	€119	€12,9	£975	£98.8	€59,7	€168.1
<b>Per capita</b>	€1.8	€2.1	£17.2	£19	€13	€9.3
<b>Average cost</b>	€302	€401	- £453 (Crime Lower) - £2,481 (Crime Higher) - £766 (Overall)	- £632 (Summary) - £3.454 (Solemn)		(+/-) €1,350
<b>% of legal aid budget</b>	33	38	50.9	62.6	59.2	34.7

### 4.4 Family law problems

In all countries, family law is an important source of justiciable problems. Most such problems are related to couples splitting up, generating divorce (separation) proceedings, but also processes to deal with domestic violence, child care and custody matters, adoption or family mediation. Family law tends to be the second biggest category in terms of legal aid budget, in Germany it is even the biggest one according to our expert.

Many countries have special eligibility criteria for family law matters. England & Wales do not have a means or merits test in child care proceedings and for domestic abuse there is no upper limit to a victim's income or capital, but they may have to pay an own contribution. The Netherlands does not have a merits test in family law cases. Ireland does not apply the merits or financial eligibility criteria in cases where the proceedings concern the welfare of a child.

<sup>111</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-13*, 30, 32.

<sup>112</sup> Excludes detention at police stations. Netherlands: 'Straf- en ambtshalve toevoegingen'.



Exclusion of certain types of family problems is also possible. Finland excludes legal aid for divorce with mutual consent. Current reforms in the Netherlands propose the same measure. In France, the maximum income limit for legal aid eligibility in family cases is easily exceeded, because the income of all individual family members is taken together.

Expenditure	Fra. <sup>113</sup>	Bel.	Eng. & W.	Scot.	Neth.
Per capita	Not available	€0.9	£12.5	Not available	€5.1
Average cost	- €724 (divorce by mutual consent) - €820 (other divorce proceedings) - €386 (non-divorce family problems)	€435	£5,956	£3,516	€850
% of legal aid budget	Not available	17	36.9	Not available	23

Although the number of divorces per capita is similar in all countries (between 2 and 3 per 1000, less for Poland and Ireland), legal aid spending per capita shows a huge variation, so it is likely that the complexity of the procedure is the main cause of different spending levels. In England & Wales, civil representation costs for cases that were completed within 2012-13 were 37% of the total annual expenditure on legal aid, roughly 75% of the budget for civil legal aid. Costs per legal aid product are extreme (in the order of €8,000) in comparison to what we see elsewhere, which may explain the huge spending per capita, three times as much as any other country in the study. Experts mention the lengthy and complicated procedures at courts for issues involving children as the main causes for these high costs.

In the Netherlands, 23% of the expenditure on legal aid grants went to family law, which is roughly 18% of the total legal aid budget. Here the high number of legal aid products (procedures) per divorce seems to be the main driver of the costs as compared to other countries. France and Belgium spend far less per capita. The same is true for Scotland, which has a system where do it yourself divorce is possible for couples without children under the age of 16 and where consensual divorce is stimulated for couples with children as well.

Simplifying procedures seems to be the main way to control costs in this area. Traditionally, family law has not been covered by legal expenses insurance, so that is hardly an option here. Mediation in family law is encouraged in France, England & Wales and Netherlands, and it contributes to consensual solutions, but it does not seem to have a major impact on legal aid budgets. In 2012-13 there were 13,571 mediation starts for family law in England & Wales, which led to 9,087 agreements (67%).<sup>114</sup> Mediation cases in England & Wales were 1.9% of the total volume of civil legal aid. In the Netherlands, 98% of the legal aid grants for mediation are aimed at family law types of problems, but numbers are quite low. In France and Poland, an attempt at conciliation is obligatory for divorce proceedings. Legal aid for mediation is not available in Germany and pilot-projects with judge-mediators have been discontinued, against a background of legislation and practice which is geared towards settlement in the early stages of court procedures.

<sup>113</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 89, Annexe 4.4; Remuneration of lawyers, based on the relative value of the procedure which is set out in legislation.

<sup>114</sup> LSC, *Legal Aid Statistics in England and Wales. 2012-13*, 13-14.

#### 4.5 Consumer problems with goods or services

Legal needs surveys typically find huge numbers of justiciable problems related to buying goods and services. We do not have data on the spending on legal aid in these cases. Usually, they are registered under civil law or contract law, a category which may also comprise personal injury cases, neighbour disputes and issues regarding debts, insurance or financial services. If family law is excluded, civil law or contract law represents a small proportion of budgets, with Belgium as an exception at the high end (22%).

Consumer law problems often revolve around limited amounts of money, so states hesitate to subsidise legal aid for these problems. Consumers are also seen as able to solve their own problems in relations with suppliers who will be inclined to preserve a reputation for good customer service. Countries tend to provide services for information and advice, as well as adjudication services such as small claims tribunals (Ireland) or consumer dispute resolution committees (Netherlands, England & Wales). This category is thus another example of how more simple and specialised procedures can be a substitute for providing legal assistance in court proceedings.

Many market initiatives exist for consumer law problems as well. Legal expenses insurance, consumer associations, class actions on behalf of groups of consumers and fixed fee legal services are available in many countries.

This may explain why some countries exclude consumer problems from legal aid wholesale. England & Wales did this in April 2013, and a proposal by the Dutch government aims to exclude consumer and other civil law problems such as personal injury from the scope of legal aid.

#### 4.6 Refugee and immigration cases

Refugee and immigration problems are usually covered by administrative law and dealt with before specialised tribunals. The number of cases is determined by immigration patterns and refugee streams, which may be highly volatile from year to year. The proportion of the legal aid budget spent on these cases is now highest in Belgium (17%) and the Netherlands (13%), and lower in Ireland (7%) and Scotland (3.1%) and England & Wales (2%). The average costs per case are in the range of €1000 per case in all countries, with England & Wales being at the low end this time, most likely because these cases are litigated before specialised tribunals and not before the courts.

In Ireland, the merits test is generally not applicable for these types of problems. In asylum cases applicants are not required to provide proof of identity, means or assets which would normally be required and a lower own contribution of €10 applies in these cases.

Ireland spent €6,8 million on refugee and immigration problems in 2011, 7% of total legal aid expenditure. Irish expenditure in this area has reduced significantly in the past two years, because the number of people seeking asylum in Ireland has decreased. Separate legal services for refugees (Refugee Legal Service Units) are slowly being integrated into the Law Centres, which leads to greater efficiencies.

Expenditure	Bel.	Eng. & W.	Scot.	Ire.	Neth.
Per capita	€0.93	£0.74	£0.93	€1.1	€2.95
Average cost	NA	£644	£1,470	Not available	€940
% of legal aid budget	17	1.9	3.1	Not available	13

## 4.7 Employment matters

Employment matters are another major category in legal needs studies. Many citizens experience issues with their employer about dismissal, labour conditions, accidents at work or pay by the employer. In legal aid budgets, employment matters tend to be responsible for 3-5% of expenditure.

The reasons for this may be that these cases are served by a variety of suppliers, such as trade unions and legal expenses insurers. Moreover, England & Wales, France and Germany are among the many countries that have specialised court or tribunal procedures for these cases. In France, legal representation is not mandatory for these labour courts. In Belgium, lawyers also no longer enjoy a monopoly on legal representation in labour cases. Finally, people with a job are less likely to pass the financial eligibility tests.

In France, an attempt to conciliation in labour cases is obligatory. The administrative fee applicants owe to their lawyer (*droit de plaidoirie*) is not required for labour courts, except for certain appeal cases.

## 4.8 Debt problems and restructuring

Debt problems can be an overwhelming issue for people with limited means. The financial crisis of the past years has led to an increase of their number. Debt problems are known to be connected to other problem categories, because the financial problem may be triggered by divorce or dismissal.

Debt restructuring is a specialised service, which may or may not fall under the legal aid budget of states, and which may or may not be provided by members of the legal profession.

We did not succeed in finding useful comparative data on the budgets for subsidised services for coping with debt problems. In Belgium, Finland and France they seem to represent around 5% of the legal aid cases. In the Netherlands, these specialised services are covered by a separate scheme.

Expenditure	Eng. & W.	Scot.	Neth.
Per capita	£0,02	£0.18 <sup>115</sup>	€0.3
Average cost	£5,067	£1,501 <sup>116</sup>	€1,150
% of legal aid budget	0.05	0.61	1

## 4.9 Personal injury

Personal injury problems are reported frequently in legal needs surveys. These also show that personal injury disputes can lead to substantial distress for victims. Procedures can be lengthy and costly, both at courts and in the settlement negotiations with insurance companies.

Legal assistance is needed and used by most victims. However, these cases do not tend to be financed by legal aid. In the data about legal aid budgets we collected, these cases are hardly visible at all. Alternative systems for financing include no cure no pay arrangements, legislation/practices aimed at cost shifting to defendants and legal expenses insurance.

<sup>115</sup> SLAB, *Annual Report. 2010 - 2011*, Appendix 7: Analysis of payments, 2; 951,000 / 5,200,000 (population Scotland, sourced in appendix).

<sup>116</sup> *Ibid.*, Appendix 3: Civil Legal Assistance.

The need to use costly experts can be an issue in personal injury cases. In the Netherlands there is a loan system for high expert costs in personal injury cases, but only very few of such loans have been awarded.

#### 4.10 Housing

Housing problems are often related to debt issues. Housing problems can be very serious in nature when there is a risk of homelessness. These problems also include disrepair issues, mostly between a tenant and a landlord. Effective alternatives to legal assistance may be available, because such problems are usually covered by legal expenses insurance or can be solved at a specialised tribunal.

After family law, housing is the second most common type of civil justice problem in England & Wales. 7% of the cases completed within the financial year 2012-13 concerned housing problems. The average cost in England & Wales for housing problems is twice as low as for family law problems. The expenditure per capita is roughly equal in England & Wales and the Netherlands. The average cost in England & Wales is higher than in Scotland and the Netherlands, which are roughly the same. In the Netherlands, the government has proposed to exclude housing and tenancy problems from the scope of legal aid. Because litigants may be able to solve their disputes without the intervention of a lawyer, the Dutch government wants to promote the already existing use of dispute resolution committees for these kinds of problems.

Expenditure	Fra. <sup>117</sup>	Eng. & W.	Scot. <sup>118</sup>	Neth.
Per capita	Not available	£0.45	£0.26	€0.5
Average cost	€507	£2,819	£521	€820
% of legal aid budget	Not available	1.3	0.89	2

#### 4.11 Social security

Social security issues are in most countries dealt with by specialised procedures. Most countries therefore exclude them from legal aid, or hardly grant any applications in this field. This seems to be an area where simplified procedures, accessible for lay people, can provide effective access to justice. In Belgium, lawyers no longer enjoy a monopoly on legal representation for social security proceedings.

The Irish LAB estimates very few to none applications for legal aid were made in this area, because the social welfare system includes its own appeals mechanism. Court proceedings would not be the most satisfactory means by which the result sought by the applicant may be achieved.

In the Netherlands social security is a relatively large problem area. 8% of the expenditure on legal aid grants goes to problems relating to social security or social insurances.<sup>119</sup> The Netherlands spends €1.7 per capita and the average cost per certificate is €818, which is roughly the same as for other types of problems in the Netherlands.

<sup>117</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 89, Annexe 4.4; Remuneration of lawyers, based on the relative value of the procedure which is set out in legislation.

<sup>118</sup> SLAB, *Annual Report 2010-2011*, Appendix 3: Civil Legal Assistance, 12; £1,403,000 (costs housing) / 5,300,000 (population); £1,403,000 / 1,577,000 (1% of total LA budget) = 0.89.

<sup>119</sup> RvR, *Monitor rechtsbijstand 2011*, 105; 'Sociale voorzieningen', 'sociale verzekeringen'.

## 5. General trends in innovation and reforms

### 5.1 Innovations

Legal aid reform takes place against the background of the provision of legal services to individuals in general. On the basis of a 2012 report, Hiil and its network of experts on access to justice identified five innovation trends in the delivery of “basic justice care”.<sup>120</sup> In the questionnaire, the respondents were asked to inform us about innovative approaches in their countries for each of these trends.

First, citizens are empowered in their relationship to legal service providers and more able to solve problems at an early stage if **legal information** is easily accessible. According to the literature summarised in the Hiil report *Towards Basic Justice Care for Everyone*, legal information is most useful if it is understandable, tailored to the problem at hand, and arrives just in time. Ideally, it is sufficient to cope with the problem, it offers limited options, and it is easy to put into practice. The report also sets out that people need assurance from a help desk or a support group when they work with information. Criteria for fair solutions, such as schedules for compensation, child support guidelines and standards for sanctions, are very helpful tools for settling zero sum issues.

Supply of information over the internet or through telephone helplines is a low-cost solution that can easily reach many legal aid users. In all countries, websites with legal information and advice are now proliferating. Consumer authorities, consumer associations, trade unions, legal expenses insurers and law firms are among the providers. In Germany, the monopoly of attorneys on providing legal information and advice is a barrier to the development of such services by other providers.

Websites with high quality legal information and advice are notoriously difficult to fund on a commercial basis. Most commercial providers use their websites primarily to sell or to support other services. Many legal information sites live from referrals to lawyers or are an avenue for lawyers to advertise their services to people with urgent legal problems, by giving them some initial advice. So governments have stepped in with subsidies, or developed their own services.

In the UK, [advicenow.org.uk](http://advicenow.org.uk) offers comprehensive online information and advice to citizens. It is funded by charities. In other countries, these online services developed from first line legal aid offices. The Netherlands has legal services counters (*Juridisch Loket*), which provide information and advice online, by telephone, by email and from 30 offices in major cities. A similar role is fulfilled by French houses of justice (*Maisons de justice et du droit*) in 130 cities and towns. Like France, Belgium has houses of justice (*Justitiehuizen*), but they are not that much used for obtaining information and advice (see section 5.3). Finland also invested in leaflets and information promoting self-help, and in Ireland these describe the services available.

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<sup>120</sup> Hiil, *Towards Basic Justice Care for Everyone*.

As far as we know, there is no country that systematically reviews whether adequate information is publicly available for the most frequent and urgent problems. Using the criteria for effective delivery of legal information established in the research literature, a more comprehensive legal information policy can perhaps be developed, leading to improved access to justice and lower costs of delivery.

A second trend in access to justice is the development of **hybrid, problem solving services**. Specialised lawyers, social workers, paralegals and legal expenses insurers now often combine elements of the traditional roles of lawyers, mediators and judges. They are at the front line of developments where lawyers and judges increasingly use mediation skills, whereas mediators focus more on fair outcomes. Instead of waiting until both parties are ready to consult a mediator, these legal service providers primarily work for the client who seeks access to justice in the first place. But instead of starting an adversarial process, in which the other party needs legal assistance as well, they try to build a communication bridge to the other party, offering both parties a reasonably fair and neutral outcome. Because these processes are geared towards problem solving rather than adversarial, the risk of high cost escalation is reduced, so these services can be offered for fixed fees or on the basis of an annual fee (insurance).

Triggered by broad acceptance of mediation methods as a preferred way to deal with many types of disputes, the trend is now led in France, the Netherlands, the UK and elsewhere by legal expenses insurers, family lawyers and specialised services for employment, debt or consumer problems. Mediation, in the stand alone form, is being offered in every country, but usage rates tend to be low (see section 2.3.2).

Increasingly, these hybrid processes also enter the field of state funded legal aid and adjudication, moving beyond initial attempts to offer stand-alone mediation as an additional form of legal aid. For instance, Finland experimented in 2011 and 2012 with a new mediation procedure in child custody cases. The judge was assisted by a psychologist and a social worker. Such an approach focuses not only on the legal problems of a litigant, but on the social problems that may cause the legal problem as well. Such innovations may perhaps be expected to occur in France, because of the complaint that for many legal aid beneficiaries the social problems are much more important than the legal issues.

Perhaps the biggest movers in this area will continue to be legal expenses insurers, who offer services to their policyholders but increasingly also to customers who are not yet insured. In section 2.2.5 we mentioned the data on how legal aid systems require applicants to use their insurance before they apply for legal aid.

5.1	Supply of information	Hybrid services
<b>Fra.</b>	- Improved online information on ministry websites - Free telephone advice line (proposed)	
<b>Ger.</b>	None	None
<b>Bel.</b>	- Private social parties develop information websites (e.g. General Welfare Centres) - Social Infopoints (Antwerp)	
<b>Eng. &amp; W.</b>	- www.advicenow.org.uk - Mandatory telephone gateway	
<b>Scot.</b>		
<b>Ire.</b>	- Online information leaflets - Printed information leaflets Law Centres or offices of the Citizens Information Board - Online applications with Legal Case Management Computer System (EOS; 2014)	Mediation services provided by the Family Mediation Service now under the LAB
<b>Pol.</b>	NA	- Mediation (not funded by legal aid) - Public Council on ARD Methods and Measures for Disputes and Litigations - focuses on standards, quality and possible reform of mediation services
<b>Neth.</b>	- Rechtwijzer - Diagnosis and Triage - Legal Services Counters - ConsuWijzer - Website of the Immigration and Naturalisation Service (ind.nl) - Encouragement of informal contact between administrative government bodies and citizens ( <i>Prettig contact met de overheid</i> )	Paralegals hired by Legal Services Counters
<b>Fin.</b>	- Free telephone hotline: Legal information provided by lawyers from Legal Aid Offices	- Experiment with new mediation procedure in child custody cases: Judge assisted by psychologist and social worker in the mediation process (2011, 2012) - Licensed paralegals

A third innovation trend is the development of **standardised ways to cope with recurring issues**. As we have seen in health care, services can reach a higher level of quality if information about the best treatments is made available to general practitioners working in a local context. Like health care, conflict resolution is becoming more evidence based.

For domestic violence, mental health law and in the field of corrections, global standards of practice are emerging. Many disciplines provide knowledge on what works in negotiation between spouses in divorce situations and in bargaining about zero sum issues in personal injury matters, on mediation techniques and on effectiveness of third party interventions. Gradually, this knowledge is beginning to find its way into legal processes and the new discipline of dispute system design. Within the next decade, this knowledge may develop into evidence based protocols for solving the most frequent justiciable problems.

Protocols and guidelines can also be a way to promote the quality of services provided under legal aid schemes. England & Wales is perhaps the country where most guidelines and protocols are available, sometimes developed by providers of legal information and advice, sometimes by the Ministry of Justice as an annex to a statute. In

many countries, authorities responsible for legal aid have at least developed guidelines for the processes related to legal aid decisions.

Offering **simplified procedures**, specialised for specific types of disputes, is the fourth trend. Nowadays, these procedures often aim at early settlement, require a limited amount of evidence, and can be addressed without a lawyer. The UK and Germany have specialised procedures for employment cases and for social security issues, for instance, and in Chapter 4 we established that there seems to be a clear indication that specialised procedures are related to lower spending on the problem type in question.

Although the need for legal representation and the costs thereof are clearly linked to the accessibility of the procedure at courts and tribunals, we see few examples of procedural reform as part of legal aid policy. One example may be the reform of the family justice system in England & Wales, which was partly triggered by the huge proportion of the legal aid budget going to these cases.

5.2	Standardising practices and protocols	Simplifying adjudication procedures
Fra.	- Improved processing/organisation/communication of applications	
Ger.	- No examples	- No examples
Bel.	- No, but possibly by private suppliers of legal services - Only pilots by judiciary and justice department	- Following the far reaching federal structure, many specialised lower tribunals for administrative law on construction and permits, environment, education (e.g. <i>Raad voor Vreemdelingenbetwistingen</i> ) - Plans for specialised family tribunals - Lawyers follow this specialisation trend (e.g. specialised juvenile lawyers)
Eng. & W.	- Advice now guides - Code of practice for victims of crime - Code of practice for mental capacity cases - Pre action protocols for various types of claims, such as housing disrepair cases and personal injury claims	- Specialised tribunals for social security, immigration and refugee cases, employment and disability needs - Proposal for the reform of family justice system <sup>121</sup>
Scot.		
Ire.	- EOS: new legal case management system for the LAB - Research and Documentation Centre available for Law Centres staff and private panels. Assists with gathering precedent information (used as evidence)	
Pol.	NA	Simplified e-court procedure for cash benefits (2010)
Neth.	- Child Maintenance Calculator ( <i>Kinder Alimentatie RekenTool</i> ) - High Trust - Centralisation of LAB (2009) - LAB communicates directly with tax authority	- Increased speed in processing of criminal cases - Fine in criminal proceedings without intervention of a judge ( <i>strafbeschikking</i> )
Fin.	- Simplification of the application form - Possibility to apply online via Romeo - Legal Aid Office communicates directly with tax authority: No need to provide documents if monthly income is below €600	

<sup>121</sup> Judiciary of England and Wales, Mr Justice Ryder, *Judicial proposals for the modernisation of family justice*, (July 2012), available at <[http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj\\_recommendations\\_final.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf)>.



The fifth and last innovation trend is to provide **online services for dispute resolution and for criminal justice**. The market for legal documents (wills, employment contracts, separation agreements) is rapidly shifting to document assembly providers, who lead their clients through an online form with a series of questions, and then provide the clients with a document, with advice per chat or online. These providers do not stop at national borders, but have found ways to standardise and customise their services for different jurisdictions. Online dispute resolution platforms are being developed and courts all over Europe are moving online as well. Videoconferencing is a way to bring down travel costs, both for clients and for legal aid providers.

Online services present interesting opportunities for improving legal aid systems. The Dutch legal aid board, in cooperation with colleagues from Ireland, Scotland and Finland, is developing a second generation platform supporting separation processes. By sharing and organising information online, clients, legal services providers and courts can provide more quality for less money. Costs of intake, drafting documents and submitting or viewing evidence can be saved or shared more easily. Processes can be redesigned so that they provide better quality outcomes.

Again, most legal aid authorities have started to provide online solutions for their own application procedures. But increasingly they see that legal aid is a product offered to many clients, so that it can be standardised, facilitated or reorganised with the help of online platforms.

<b>5.3</b>	<b>IT tools/platforms</b>
<b>Fra.</b>	Project 'Portalis': Improved communication in administration of cases
<b>Ger.</b>	None
<b>Bel.</b>	<ul style="list-style-type: none"> <li>- Bar associations in preliminary talks about monitoring system of administrative and judicial status of a case</li> <li>- Large collective digitisation efforts have failed</li> <li>- Courts are experimenting individually (e.g. Court of Appeals in Antwerp)</li> </ul>
<b>Eng. &amp; W.</b>	
<b>Scot.</b>	<ul style="list-style-type: none"> <li>- Increase use of video conferencing</li> <li>- Expansion online legal aid applications and accounts</li> </ul>
<b>Ire.</b>	IT is not used by the LAB for dispute resolution
<b>Pol.</b>	<ul style="list-style-type: none"> <li>- Database of (anonymised) judgements ; so far only of the highest courts, to be expanded to all jurisdictions</li> <li>- Efforts to introduce court management information system and hearings recording system</li> </ul>
<b>Neth.</b>	<ul style="list-style-type: none"> <li>- Signpost to Justice (<i>Rechtwijzer</i>) offering support in divorce and consumer cases; second generation platform being developed</li> <li>- MijnRvR.org (80% of legal aid applications by lawyers is digital)</li> <li>- Website of the Immigration and Naturalisation Service (ind.nl)</li> <li>- Limited ODR</li> <li>- Experiments with video hearings</li> </ul>
<b>Fin.</b>	<ul style="list-style-type: none"> <li>- Legal Aid Offices use video links</li> <li>- Online application forms</li> <li>- Lawyers can use online system to send bills for legal aid work</li> <li>- Plans to create electronic appointment system with the employees of the legal aid office</li> <li>- Plans to use remote services of another legal aid office or Citizen's Office to:</li> <li>- Represent clients in case the nearest office represents the opponent; or</li> <li>- If the client only speaks a certain language</li> </ul>

## 5.2 Reforms implemented or suggested over the last 5 years

Most countries faced with budgetary restraints look for alternative or complementary sources of finance for their legal aid systems. A clear trend is that litigants and legal aid beneficiaries have to pay higher contributions. Financial eligibility requirements have been changed in France, Belgium, England & Wales, Scotland and Ireland. France, England & Wales, Scotland and Ireland have increased the levels of own contribution.

Finland is the only country that went against this trend and increased the fees for legal aid cases to keep up with the market rate for legal services. In France and Belgium, the closed budget has led to a de facto reduction of fees. Other countries are considering reductions in fees, in particular for more complex criminal cases (England & Wales, Netherlands).

France does not have a system of court fees for civil and administrative cases. In France, a controversial €35 fee for court procedures by all litigants who do not receive legal aid has existed since 2011, but it was abolished in 2013, leaving a budgetary deficit of €60 million. The Belgian government has proposed to introduce a court fee (*remgeld*) of €25, so that the parties are encouraged to use alternative means to settle disputes.

To reduce costs, England & Wales skips categories of problems for which people can use legal aid. It has removed most divorce cases, personal injury, employment matters, immigration (where the person is not detained), debt, housing and benefit issues from the scope of legal aid. Netherlands follows this lead with plans to exclude consumer and housing cases. In contrast, France continues to offer assistance for all types of problems and has slightly expanded the coverage of legal aid and there are no plans in other countries to follow the route of England & Wales, which has a rather special position in many respects: high spending, high costs per product for court assistance, hourly fee remuneration and many rules on who can represent clients in courts.

On the other hand, exclusion from legal aid for broad problem areas in England & Wales can be understood from the perspective of broad availability of legal information and advice and specialised tribunals which are perhaps more accessible for litigants in person than courts in some other countries. Improved procedures at courts, or at alternative adjudication systems, may be combined with changes in the legal aid system in such a way that access to justice is still acceptable, or even improved.

Another, and related, outcome is that the countries studied appear to have difficulties in formulating a broader access to justice strategy. In France, a key report on the functioning of legal aid was recently published. It said that the legal aid system should connect to reforms in civil and criminal law.<sup>122</sup> There have been many reports and proposals on legal aid reform since 2007, but the state has not yet formulated a coherent overall project.<sup>123</sup> An exception, and a possible example for other countries, is Scotland. The Scottish Government adopted a Making Justice Work programme, with a comprehensive improvement strategy for courts, tribunals, access to justice, procedures, case management and supporting IT and data collection systems. In such a strategy, simplification and specialisation in procedures could be combined with new methods to support litigants, including better court forms, online interfaces, judges who are assisting people to focus on the most relevant issues and ask them questions which help them to explain their case. In the next chapter, we will see that such a strategy is actually supported by US and European case law on the fundamental right to access to justice.

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<sup>122</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 10.

<sup>123</sup> *Ibid.*

Until now, reforms elsewhere in the system that could have an impact on legal aid have been limited in other countries. There is a tendency, however, to diminish the number of procedures in which representation (or even double representation) is required, with Belgium and Ireland in the lead.

5.4 (1/2)	Implemented legal aid reforms	Justice sector reforms
Fra. <sup>124</sup>	<ul style="list-style-type: none"> <li>- Cancelled €35 procedural fee for non legal aid beneficiaries (2013)</li> <li>- Fixed fees for lawyers for pre-trial detention cases (2011; Salduz)</li> <li>- Subsidiarity principle for LEI (2007; not enforced in practice)</li> <li>- Raised administrative fee (<i>droit de plaidoirie</i>) by legal aid beneficiaries to their lawyer from €8,84 to €13</li> <li>- Expansion of legal aid to:               <ol style="list-style-type: none"> <li>1) Amiable conflict resolution (<i>procedure participative</i>)</li> <li>2) Forced hospitalisation</li> <li>3) Mandatory representation before Court of Appeals</li> </ol> </li> </ul>	Merging legal professions ( <i>avoué</i> and <i>avocat</i> ; 2012)
Ger.	<ul style="list-style-type: none"> <li>- Clarification of the criteria for the grant of subsequent Prozesskostenhilfe<sup>125</sup> (implemented from 1 January 2014)</li> </ul>	Hike in fixed fees of lawyers
Bel. <sup>126</sup>	<ul style="list-style-type: none"> <li>- Salduz Act (13 August 2011)</li> <li>- Lump sum own contribution (<i>remgeld</i>; adjusted)</li> <li>- Improved quality control by BJB over lawyers</li> <li>- Presumption of financial inability refutable</li> <li>- New income and capital test</li> <li>- Repayment from damages awarded</li> </ul>	<ul style="list-style-type: none"> <li>- Pro bono system (special label for law firms)</li> <li>- Lawyers will have to pay VAT (2014)</li> <li>- First line services and <i>Justitiehuizen</i> will be transferred from the federation to the communities</li> </ul>
Eng. & W.	<ul style="list-style-type: none"> <li>LASPO 2012</li> <li>- More mediation in family cases</li> <li>- Mandatory telephone gateway service</li> <li>- Scope limitations (see section 2.1)</li> <li>- Eligibility changes:               <ol style="list-style-type: none"> <li>1) Always means test</li> <li>2) Amount of capital</li> <li>3) Increased own contribution to up to 30% of disposable income</li> </ol> </li> <li>- Alternative funding (e.g. Conditional Fee Arrangement)</li> </ul>	
Scot.	<ul style="list-style-type: none"> <li>- Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, changes to:               <ul style="list-style-type: none"> <li>- Financial eligibility in criminal legal assistance</li> <li>- Financial contributions in criminal legal aid</li> <li>- Making justice work programme</li> </ul> </li> </ul>	
Ire.	<ul style="list-style-type: none"> <li>- Centralisation under the LAB of:               <ol style="list-style-type: none"> <li>1) Different criminal legal aid schemes</li> <li>2) Family Mediation Service</li> </ol> </li> <li>- Triage System: Legal advice at the earliest possible opportunity</li> <li>- Maximum disposable income raised (€13,000 to €18,000; 2006)</li> <li>- Maximum disposable capital lowered (€320,000 to €100,000; September 2013)</li> <li>- Increased own contributions (September 2013):               <ol style="list-style-type: none"> <li>1) Legal advice from €10 to €30</li> <li>2) Legal aid from €50 to €130</li> </ol> </li> </ul>	

<sup>124</sup> Secrétariat Général pour la modernisation de l'action publique, *Synthèses par évaluation*, (17 July 2013); Secrétariat Général pour la modernisation de l'action publique, *Resumé des évaluations de politiques publiques*, (17 July 2013), 15-18; CNAJ, *Rapport triennal du Conseil national de l'aide juridique* (2013).

<sup>125</sup> Deutscher Bundestag, Druksache 17/13538, (15 May 2013), 2.

<sup>126</sup> Federale Overheidsdienst (FOD) Justitie, 'Hervorming van de juridische rechtsbijstand', (3 May 2013), <[http://justitie.belgium.be/nl/nieuws/persberichten/news\\_pers\\_2013-05-03.jsp](http://justitie.belgium.be/nl/nieuws/persberichten/news_pers_2013-05-03.jsp)>; Steven Gibens, Bernard Hubeau, *ILAG National report: Belgium*, (12 June 2013); NICC, *Recherche relative au système de rémunération de l'aide juridique deuxième ligne*, 116-134.

5.4 (2/2)	Implemented legal aid reforms	Justice sector reforms
<b>Pol.</b>	<ul style="list-style-type: none"> <li>- Extended competence of legal advisors to represent clients in criminal cases. Number of potential legal aid providers in criminal cases increased almost three times. Could be seen as a step towards merging the legal professions</li> </ul>	<ul style="list-style-type: none"> <li>- Adversarial elements in criminal procedures</li> <li>- MoJ organises entry exams for bar associations (opens up legal profession)</li> <li>- Reorganisation of the 79 district courts into branches of the other courts</li> </ul>
<b>Neth.</b>	<ul style="list-style-type: none"> <li>- Rechtwijzer</li> <li>- High Trust</li> <li>- Diagnosis and Triage</li> <li>- Salduz legislation</li> <li>- Legal Services Counters</li> <li>- Centralisation of LAB</li> <li>- Recovering costs from financial profit of applicant</li> </ul>	
<b>Fin.</b>	<ul style="list-style-type: none"> <li>- Reorganisation of the legal aid offices network:               <ul style="list-style-type: none"> <li>- Decreased from 60 to 27 offices in 2014 (flat structure)</li> </ul> </li> <li>- Paralegals: Licensed lawyers outside legal aid offices or not member of bar can represent clients in legal aid cases (2013-14). Relatively low entry requirements for licence: one year work experience after graduation. Quality of legal service providers ensured by bar association.</li> <li>- Increase of fees for legal aid cases to keep up with the market rate for legal services. Basic fee is now €100 and will be €110 as from next year.</li> </ul>	<ul style="list-style-type: none"> <li>- From 51 to 27 District Courts (2010)</li> </ul>

Many reform proposals are still debated, or have been introduced, and then cancelled. In France, the very controversial €35 tax, or court fee, for all litigants that do not benefit from legal aid has been cancelled in 2013.

In Poland, as in other countries, the reorganisation of district courts into branches of bigger courts has been heavily criticised. Competitive tendering or contracting approaches are being considered, but do not seem to have a major impact. Subsidiarity of legal aid in relation to legal expenses insurance is discussed as well.

5.5 (1/2)	Debated reforms	Involvement of legal aid providers in reform processes
<b>Fra.</b> <sup>127</sup>	<ul style="list-style-type: none"> <li>- €35 tax, or court fee, for every litigant not eligible to legal aid (cancelled)</li> <li>- Tax on legal acts and turnover of lawyers</li> <li>- Lower compensation for lawyers</li> <li>- Raise income ceilings</li> <li>- More economic management of the legal aid system by lawyers</li> <li>- Integration of civil legal aid cases in IT-system 'Portalis'</li> <li>- Improve availability online information</li> <li>- Budgetary efficiency:               <ol style="list-style-type: none"> <li>1) Enhance and enforce subsidiarity of legal aid (LEI, clawback/repayment of legal aid, fixed fee)</li> <li>2) Fixed fee to simplify mechanism of recovering advance sums paid by State during police custody</li> </ol> </li> <li>- Performance               <ol style="list-style-type: none"> <li>1) Improving processing of applications</li> <li>2) Redesign partial legal aid</li> <li>3) Improve recovery rate of advance costs</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>- CNAJ</li> <li>- CNB</li> </ul>
<b>Ger.</b>	<ul style="list-style-type: none"> <li>- Debated reforms that have been cancelled</li> <li>- Extend paying back period from 48 to 72 months<sup>128</sup></li> <li>- Scope limitations for family law problems</li> </ul>	<ul style="list-style-type: none"> <li>- Lobby efforts of lawyers</li> </ul>

<sup>127</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 22. Secrétariat Général pour la modernisation de l'action publique, *Synthèses par évaluation*, (17 July 2013); Secrétariat Général pour la modernisation de l'action publique, *Resumé des évaluations de politiques publiques*, (17 July 2013), 15-18.

<sup>128</sup> Deutscher Bundestag, Druksache 17/13538 (15 May 2013), 2.

5.5 (2/2)	Debated reforms	Involvement of legal aid providers in reform processes
Bel. <sup>129</sup>	<ul style="list-style-type: none"> <li>- Trial with contracted lawyers instead of payment per act of assistance within a procedure</li> <li>- Reform remuneration system for lawyers</li> <li>- Scope limitations second line legal aid</li> <li>- Encourage alternatives (e.g. plea bargaining)</li> <li>- Increase own contribution</li> <li>- Generate new financial resources (e.g. <i>mutualisering</i>)</li> </ul>	Legal aid itself is administered by the bar associations
Eng. & W.	<ul style="list-style-type: none"> <li>- Price competitive tendering for criminal defence services (cancelled)</li> <li>- Limit scope for prison law</li> <li>- Financial eligibility threshold in Crown Court</li> <li>- Residence test</li> <li>- Civil merits test</li> <li>- Reform fees in civil and criminal law</li> </ul>	Consultation papers
Scot.	<ul style="list-style-type: none"> <li>- Contracting with criminal legal aid providers</li> </ul>	Consultation papers
Ire.	<ul style="list-style-type: none"> <li>- Merging legal professions under the LSRA</li> <li>- Bringing more transparency and consistency in costs of legal services</li> <li>- New (unified) procedure for professional misconduct</li> </ul>	External Consultative Panel established by the LAB to allow for the exchange of views
Pol.	2 draft laws (2005, 2007) tried to start services for pre-trial information and advice (both cancelled)	NGOs are involved as of first discussions in 2005
Neth.	<ul style="list-style-type: none"> <li>- Repayment of costs of court-ordered lawyer when a criminal case is lost<sup>130</sup></li> <li>- Government control of legal profession</li> <li>- Strong decentral merits test</li> <li>- Scope limitations:               <ol style="list-style-type: none"> <li>1) Exclusion of contract and tenancy law, certain divorce cases</li> </ol> </li> <li>- Redefinition of income ceilings</li> <li>- Adjustment of own contribution</li> <li>- Lower hourly fee in time-consuming cases</li> <li>- Automatic assistance from a lawyer only when in detention, rather than when in custody</li> <li>- No annual indexing of fees, own contributions, income ceilings</li> <li>- No compensation administrative costs advocacy</li> <li>- Fee regulation</li> </ul>	
Fin.	<ul style="list-style-type: none"> <li>- Legal Protection Programme (2013-15):</li> <li>- Improve supervision of advocacy and legal aid</li> <li>- Examine coverage and allocation of costs of legal aid, use of e-services and remote services</li> <li>- Explore options for administrative reform of legal aid offices</li> <li>- There are plans to increase the role of the courts in ensuring the quality of legal representation</li> <li>- Centralisation of legal aid board is considered</li> <li>- Possible change in structure of the Court of Appeal and Administrative Court network</li> <li>- Plans to develop a network of the district enforcement offices. The number will be the same (22), but their service bureaux will be reduced from 178 to 62</li> </ul>	<ul style="list-style-type: none"> <li>- Bar associations</li> <li>- in April 2008 the Ministry of Justice appointed a committee for the development of quality assessment for public legal aid, which included representatives of public legal aid attorneys, advocates and district court judges</li> </ul>

### 5.3 Public perceptions of legal aid

This section focuses on presenting the public perceptions regarding legal aid as indicated by our respondents. It deals with the perspectives of the legal aid beneficiaries, members of the legal professions and other service providers. Public perceptions are difficult to establish, however. No comprehensive surveys on legal aid are being done, and justiciable events surveys do not tend to distinguish between subsidised or unsubsidised services when

<sup>129</sup> Federale Overheidsdienst Justitie, 'Hervorming van de juridische rechtsbijstand', (3 May 2013), <[http://justitie.belgium.be/nl/nieuws/persberichten/news\\_pers\\_2013-05-03.jsp](http://justitie.belgium.be/nl/nieuws/persberichten/news_pers_2013-05-03.jsp)>, visited on 25-9-2013; ILAG National Report: Belgium; NICC, *Recherche relative au système de rémunération de l'aide juridique deuxième ligne*, 116-134.

<sup>130</sup> RvR, *Jaarverslag 2012*, 153.

they follow how people deal with problems and how satisfied they are with solutions. So we had to rely on reports by the experts consulted, whereas for France and England & Wales we relied on reports and media to give an impression of the issues debated.

### France<sup>131</sup>

Legal aid in France is part of a wider polemic regarding austerity measures. In 2013 the controversial €35 tax on litigants was cancelled. This led to a budget deficit of €60 million. The French government is now looking for complementary sources of finance. Lawyers are upset by this and unhappy with some of the reforms the government is looking into. It appears that more than in the other countries, lawyers are affected by budgetary constraints. The government is looking to recover advance sums paid to litigants and legal aid beneficiaries, but has also proposed to tax the legal profession to cover the gap in the legal aid budget. Another proposal is to effectively lower the remuneration lawyers receive. In October 2013, several local bar associations went on strike to protest against these proposals. As in other countries, lawyers argue that they can no longer afford to take on legal aid work, because their income will become too low. French lawyers claim they already receive relatively little remuneration for their services. Due to the closed budget, their remuneration is determined at the end of the year and depends on the amount of hours claimed by all lawyers. Many legal aid lawyers are young professionals that take on legal aid casework to build a clientele. In 2007, 64% of legal aid cases were handled by 9% of all lawyers. If lawyers are taxed and receive increasingly less money for their work, they fear that access to justice will no longer be available for those with the least means.

Since 2007, legal aid has often been reviewed and all reports called for an overhaul of the system. All reports focused on big issues, such as the scope, the role of legal aid in access to justice, the amount of legal aid, income ceilings, sources of finance and the organisation of the system. Most reports said the budget for legal aid needed to be doubled, in spite of financial austerity policies of the government. In 2013, a central review on legal aid reform was published. It calls for a simplification of financial eligibility criteria for all social benefits, including legal aid.

### Germany

Legal aid is not a high profile issue in Germany, perhaps because it is embedded in the court system and is seen as a part of this. There have not been significant legal aid reforms in the past 5 years. The main problem is the expenditure on legal aid. The states (*Länder*) have to meet the costs, because it is a state issue, whereas the laws are made by the federal government. So there is always a tendency that states want to cut back on costs. The federal government on the other hand, stresses that there needs to be access to justice. States have to lobby the federal government to make changes to the legal aid system. In 2004 there was a reform in which the lawyer fees were increased. There was an expectation that legal aid expenditure would increase by 18-20% because the general fees were increased by that percentage. The interesting thing was that the overall expenditure on legal aid did not increase. To the contrary, the number of cases that came into the court system decreased. Family law did see a slight increase and it is the biggest component of the legal aid budget.

Fee regulation complements the traditional legal aid system. Fees are usually calculated on the basis of the value at stake. Because poor people tend to have lower value cases, they benefit from the sliding scale fee system, although their cases may be quite complex from a legal point of view.

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<sup>131</sup> IGSJ, *Evaluation de la gestion de l'aide juridictionnelle*, 8, 15.

## Belgium

Discussion in Belgium revolves around the relatively low amount of money Belgium spends on legal aid. Expenditure per capita is indeed low compared to the other countries in this research. Roughly 10-20% of the Belgian population is theoretically eligible for legal aid. Discussion over budget cuts and expansion of legal aid appear to stifle innovation, unless innovations are proven cost-savers. It can be challenging to find cost-reducing innovations, because expenditure in Belgium is already relatively low. One of the most controversial reform proposals is the introduction of an administrative fee for all litigants, including legal aid beneficiaries. The government also proposed that trainee-lawyers will be obliged to take on at least 5 legal aid (pro bono) cases, but this has been cancelled after criticism from the Belgian *Raad van State*.

Lawyers and their remuneration system are another part of the discussion. The discussion is similar to the one in France. Belgian lawyers only know at the end of the year how much money they will receive for the legal aid cases they worked on. They are unhappy with the average amount of money they receive for their work. They claim they do not receive enough compensation and do not have enough time to do the necessary administrative work. As a consequence, the quality of their services is said to suffer. From 2010 onwards, the federal government compensates lawyers if the average amount of money they receive at the end of the year is considered too low. In 2012, the Salduz Act reformed legal aid for pre-trial detention cases, which is a budgetary problem for the government, but creates work for lawyers.

Belgium has a far-reaching federal structure, which creates a certain competition between local (Regions and Communities) and federal authorities. Local authorities create specialised tribunals, which can be beneficial for citizens. The large diversity in administrative judicature can lead to centralising counter movements, but much depends on the performance of these specialised bodies.

Another criticism is that first line services at the Houses of Justice (*Justitiehuizen*) have been neglected. In practice they do not offer many services for information and advice. A constitutional reform will transfer the organisation of first line services from the federation to the communities. It is hoped that this will spark renewed interest in the role of the Houses of Justice in services for information and advice.

## England & Wales

Creating new legislation on legal aid can be a politically difficult process. Legal aid reform in England & Wales has been far reaching under the LASPO Act of 2012. Under the LASPO Act, important parts of the legal aid scheme, such as financial eligibility or merits criteria, can be decided by regulation rather than by acts of Parliament. Legal aid reform is a very controversial issue for many stakeholders, including legal aid beneficiaries, legal professionals and policy makers. The government claims the legal aid costs are unsustainable and implemented far-reaching scope limitations.

Legal aid beneficiaries are likely to be affected by the scope limitations. For many problems they no longer receive legal aid, unless they have very serious debt problems. The reform has come into action in April 2013 and the number of self-represented litigants is expected to rise. There are concerns that this increase will lead to inefficient, slower and more costly trials.

Not-for-profit organisations provide many legal help services for information and advice. These organisations are also worried by the scope limitations, because they will have to deny many applicants access to their services. Similar to France, Belgium and the Netherlands, legal aid lawyers are opposing proposed reduction in their fees. Criminal legal aid barristers have threatened to go on strike against this.

Concerns from the legal profession are matched by heavy criticism from Members of Parliament. A recent report from cross-party parliamentary committee is critical of the legal aid reforms and the consequences on the fundamental common law right of effective access to justice. However, the criticism focuses on the residence test, prison law and borderline cases. It does not deal with the most controversial part of legal aid reform in England & Wales, the wholesale exclusion of areas of law from the scope of legal aid.<sup>132</sup> A high level expert group (the Low Commission) recently called for simplification of procedures and specialisation, as well as improving the infrastructure for obtaining legal advice and information when needed.

## Ireland

There appears to be an acceptance that the merits test and excluded matters are reasonable and represent a strong point of the legal aid system. However, the criteria for eligibility are an issue, as many applicants who are found to be financially ineligible for legal aid consider that they do not have the means to pay a private solicitor to take their case, particularly in the higher courts. Non-legally aided defendants sometimes complain that the legally aided opponents take them to court for frequent re-entry of the same matter, for example in a District Court access or maintenance case. Some private lawyers offering legal aid services consider that the payment they receive is inadequate, however the Legal Aid Board considers the fees aid to private lawyers to be reasonable. An important dilemma of the policy makers is how to reduce the costs and increase income, while maximising the throughput of cases and keeping waiting times to a minimum. Indeed, some of the applicants complain about the waiting times for the appointment with a lawyer. The Triage legal advice initiative was introduced to enable clients to have an early appointment with a lawyer. One of the ways that the Legal Aid Board ensures that the priority cases get representation without any delay is by referring these cases to private panels, and doing so does not generate additional costs to the beneficiaries of legal aid.

## Poland

Poland lacks a serious debate about legal aid and there have been no significant legal aid reforms over the past 5 years. Only the out of court legal advice and assistance was discussed during the last years. There were as well some changes to the code of criminal procedure introducing a more adversarial system, which may have an impact on legal aid. Although the ECtHR judgement in the Salduz case received attention, it was not followed by any changes in legislation. In general in Poland it is very difficult to demonstrate the necessity for the cuts or changes within the legal aid budget as it is not one lump-sum administered by one entity. Additionally, legal aid is under-researched and there is not enough data available. Lawyers complain about their compensation, whereas the users thus far have not enough representation in the process of reform.

## The Netherlands

Our respondents answering to this part of the questionnaire referred us to the satisfaction surveys of legal aid users and lawyers taken by the LAB. According to a survey in 2012, users of legal services counters (*Juridisch Loket*) have been very satisfied with the services.<sup>133</sup> A new survey taken with the applicants who received legal aid grants to pay for their lawyer is forthcoming. The results were not available for this report.

Public perceptions of the way legal aid is organised in the Netherlands appear to be rather positive. However, the Dutch government has proposed reforms. Following the lead of England & Wales, the Dutch government wants to

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<sup>132</sup> Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013-14, HL Paper 100, HC 766, (13 December 2013), available at <<http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>>.

<sup>133</sup> RvR, *Het Juridisch Loket: de klant aan het woord*. 2012, (2012), 2-3, 17-22.



limit the scope of legal aid for certain types of problems. However, public debate revolves around cuts in the hourly fees for lawyers.

In November 2013, Dutch criminal legal aid lawyers went on strike to protest against the budget cuts. Their protest focused on the reduction in the hourly fee for complicated cases of €104 to €70. They claim this hourly fee cannot cover their business costs and they warn that not enough lawyers will be able to take on legal aid work. According to our respondents, despite recent protests of the criminal legal aid lawyers against the cuts to their remuneration, there is no shortage of lawyers willing to take on legal aid cases. Other government proposals, such as the scope limitations or stricter eligibility criteria, appear less controversial in comparison with the remuneration cuts.

## Finland

The legal aid system in Finland is undergoing major structural changes. This is partly caused by increased migrations from the rural areas to the cities and partly by the desire to make the system work even more effectively. Although the number of the legal aid offices has dropped last years and will be reduced to 27 in 2014, most of them will be reorganised into branches of the remaining offices. The courts structure awaits a similar change. However, this is not without disadvantages. One legal aid office may only represent one party to the dispute. The other beneficiary of legal aid may find it hard to find another office or private professional in a reasonable proximity to take up the case. Rural areas are not attractive places to live for young lawyers and the current pool of legal aid professionals starts suffering from aging. One of the Finish challenges is thus how to provide legal aid services in more remote areas.

The bar association and private attorneys still do not find the fees satisfactory and are demanding €130-150 per hour as a basis for fees. As from 1 January 2014 private attorneys not being members of the bar will have to receive a special permit to provide legal aid. So far Finland has not had a strong entry requirements for the legal aid lawyers and it is not supposed to be difficult to get a license after 1 January 2014. The number of cases dealt with by the legal aid offices is decreasing, despite the fact that they have a *de facto* monopoly on out of court advice and assistance. Long waiting lists within the legal aid offices tend to cause complaints. There is no satisfaction survey or any other statistics regarding the overall functioning of the legal aid system.

## 6. ECHR Case Law

This chapter offers an overview of the minimum requirements that can be derived from the case law regarding Art. 6 ECHR. The analysis focuses on the following issues: scope of legal aid system, eligibility criteria, right to review, quality of legal aid services and alternatives to lawyers as forms of legal aid allowed by the ECHR. We also include an analysis of the leading US case on the topic, which gives an indication of possible future developments.

### 6.1 Scope of the legal aid system

#### 6.1.1 Exclusion of areas of law

- The right of access to court is not absolute in nature. It may be subject to limitations provided that they do not impair the essence of the right, they pursue a legitimate aim and there is reasonable relationship of proportionality between the means employed and the aims sought to be achieved (*Ashingdane v. the UK* (1985)).<sup>134</sup>
- Certain types of problems are simple enough so that an applicant does not need legal assistance. The exclusion of defamation proceedings from the scope of legal aid was upheld. The applicant was a well-educated and experienced journalist who would have been capable of formulating a cogent argument, in contrast to the situation in *Airey* (*McVicar v. the UK* (2002)).<sup>135</sup>
- Statutory exclusion from the legal aid scheme can be allowed if the ‘disparity between the respective levels of legal assistance’ does not lead to unfairness. The State does not have ‘to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary’ (*Steel and Morris v the UK* (2005)).<sup>136</sup>

#### 6.1.2 Circumstances where legal representation may not be needed

- The right to benefit from the assistance of a lawyer at the initial stages of police interrogation may be subject to restriction for good cause, if it does not deprive the accused of a fair hearing: “To deny access to a lawyer for the first 48 hours or police questioning, (...) where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with [Art. 6].” (*John Murray v. the UK* (1996)).<sup>137</sup>
- Self-representation may not stand in the way of the right of access to justice, when there is guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance: “[T]he possibility of appearing (...) in person (...), the guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance, may be sufficient to provide an applicant with an effective opportunity to put his or her case” (*A v. the UK* (2002)).<sup>138</sup>
- Refusal of legal aid is allowed when the amount at stake is limited and the procedure is ‘simple’ (*Gutfreund v. France* (2003)).<sup>139</sup>
- Refusal of legal aid is allowed, because it was not a complex factual and legal matter and the applicants’ financial position allowed them to pay the amount claimed - a tax surcharge - without significant consequences (*Barsom and Varli v. Sweden* (2007)).<sup>140</sup>

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<sup>134</sup> Appl. no. 8225/78, para. 57.

<sup>135</sup> Appl. no. 46311/99, para. 52-55; 61-62.

<sup>136</sup> Appl. no. 68416/01, para. 62, 69.

<sup>137</sup> Appl. no. 18731/91, para. 63-66.

<sup>138</sup> Appl. no. 35373/97, para. 97.

<sup>139</sup> Appl. no. 45681/99, para. 33, 40.

<sup>140</sup> Appl. nos. 40766/06 and 40831/06.

- In the ‘absence of indications of negligence or arbitrariness’ by the legal aid lawyer, the State is not obliged to ensure assistance by successive legal-aid lawyers for pursuing legal remedies that were already found not to offer reasonable prospects of success (*Kulikowski v. Poland* (2009)).<sup>141</sup>

### 6.1.3 Circumstances calling for legal representation

- When the procedure or case is very complex or when legal representation is compulsory, the State may be compelled to provide for assistance from a lawyer to ensure effective access to court. Relevant factors are: (1) the complexity of the procedure, (2) the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, (3) and the degree of emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court (*Airey v. Ireland* (1979)).<sup>142</sup>
- The complexity of a procedure or issues of facts and law are assessed on a case by case basis. Possible complicating factors are appeal procedures, evidence gathering in criminal cases, or the use of complicated legal standards, such as ‘culpable negligence’.
- The right to free legal assistance must be practical and effective. It is not satisfied by the formal appointment of a lawyer, but the “state must take ‘positive action’ to ensure that the applicant effectively enjoys his or her right to free legal assistance.” If a lawyer does not or is unable to fulfil their duties, ‘the authorities must either replace him or cause him to fulfil his obligations.’ (*Artico v. Italy* (1980))<sup>143</sup>
- “[A] ‘person charged with a criminal offence’ who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing” (*Pakelli v. Germany* (1983)).<sup>144</sup>
- However, the right to be defended by counsel of an own choosing is not absolute and is subject to limitations. “[I]t is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defense counsel, the courts must certainly have regard to the accused’s wishes, but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.” (*Croissant v. Germany* (1992)).<sup>145</sup>
- It is not ‘unreasonable, in view of the general desirability of limiting the total costs of legal aid, that national authorities take a restrictive approach to requests to replace legal aid lawyers once they have been assigned to a case and have undertaken certain activities in such a case.’ (*Van Ulden v. the Netherlands* (1997)).<sup>146</sup>
- If the case is complex and the sentence severe (*in casu* 5-8 years imprisonment), free legal aid should be provided on appeal (*Boner v. the UK* (1994)).<sup>147</sup>
- For criminal cases, Art. 6(3)(c) does not provide that the suspect has the right to choose his own lawyer (*Franquesa Freixas v. Spain* (2000)).<sup>148</sup>
- ‘There is no automatic right (...) for legal aid or legal representation’ in proceedings which determine civil rights. Two circumstances do call for legal aid or representation: 1) indispensability of assistance (due to compulsory legal representation or the complexity of the procedure) or 2) fairness in light of what is at stake (*P., C. and S. v. the UK* (2002)).<sup>149</sup>

<sup>141</sup> Appl. no. 18353/03, para. 68.

<sup>142</sup> Appl. no. 6289/73, para. 26.

<sup>143</sup> Appl. no. 6694/74, para. 33; Open Society Justice Initiative, Public Interest Law institute, *European Court of Human Rights Jurisprudence on the Right to Legal Aid*, (6 December 2006), 3-4

<sup>144</sup> Appl. no. 8398/78, para. 31.

<sup>145</sup> Appl. no. 13611/88, para. 29; Open Society Justice Initiative, *ECtHR Jurisprudence on the Right to Legal Aid*, 11.

<sup>146</sup> Appl. No. 24588/94, Commission admissibility decision.

<sup>147</sup> Appl. no. 18711/91, para. 43-44

<sup>148</sup> Appl. no. 53590/99, para. 1.

<sup>149</sup> Appl. no. 56547/00, para. 88-91; ECtHR, *Annual Report 2002*, (Strasbourg 2003), 77.

- It is necessary ‘to provide access to a lawyer from the first interview of a suspect by the police,’ unless there are particular circumstances and compelling reasons to restrict this right (*Salduz v. Turkey* (2008)).<sup>150</sup>
- Suspect, a minor, was not informed of his right to access to a lawyer before or during police questioning. Authorities must proactively ‘furnish the applicant with the necessary information enabling him access to legal representation.’ Art. 6 applies to pre-trial proceedings, which means a suspect has the right to legal assistance from a lawyer both before and during police interrogation: “[T]he concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation” (*Panovits v. Cyprus* (2009)).<sup>151</sup>
- Knowing and intelligent waiver standard: a waiver of the right to a lawyer must be explicit, voluntary, in unequivocal manner, and a knowing and intelligent relinquishment of a right, which means a suspect ‘could reasonably have foreseen what the consequences of his conduct would be.’ Even though the suspect was reminded of the right to silence, waiver could not be implied from merely replying to the investigator. Moreover, a suspect who has asked for counsel, cannot continue to be interrogated, unless the suspect ‘has spoken to counsel or re-initiates contact with the police’ (*Pishchalnikov v. Russia* (2009)).<sup>152</sup>
- The right to a lawyer ‘arises at the point that the person’s position is significantly affected, even if he is not formally taken into custody as a suspect.’ A position is ‘significantly affected as soon as the suspicion against him [is] seriously investigated and the prosecution’s case compiled.’ (*Shabelnik v. Ukraine* (2009)).<sup>153</sup>
- Given the applicant’s particular vulnerability (alcoholism), a pre-printed declaration form signed by the applicant acknowledging that she had been reminded of her right to silence or to a lawyer could not be considered reliable’ for the waiver of the right to a lawyer (*Plonka v. Poland* (2009)).<sup>154</sup>
- Assistance by a lawyer should also be possible during police interrogations, not only before these interrogations start (*Navone and others v. Monaco* (2013)).<sup>155</sup> To what extent this also implies a right to legal aid during police interrogations has not yet been decided.

## 6.2 Eligibility criteria

The ECtHR maintains two cumulative conditions to the right to free legal assistance:

1. Lack of sufficient means to pay for legal assistance;
2. The interests of justice must require that such assistance be given free.

### 6.2.1 “Sufficient means to pay for legal assistance”: Financial test

“It is for domestic authorities to define the financial threshold triggering the right to free legal assistance and to apply the means test. The court assesses only whether the decision on financial eligibility for legal aid is based on law and not made in an arbitrary manner.”<sup>156</sup>

- It is not necessary to prove ‘beyond all doubt’ that the applicant is indigent. It suffices to prove a ‘lack of means’ ‘in the absence of clear indications to the contrary’ (*Pakelli v. Germany* (1983)).<sup>157</sup>

<sup>150</sup> Appl. no. 36391/02; ECtHR, *Annual Report 2008*, (Strasbourg 2009), 72.

<sup>151</sup> Appl. no. 4268/04, para. 64-73.

<sup>152</sup> Open Society Justice Initiative, *Case Digests: European Standards on Criminal Defence Rights: ECtHR Jurisprudence*, (April 2013), 25; Appl. no. 7025/40, para. 70-80.

<sup>153</sup> Open Society Justice Initiative, *European Standards on Criminal Defence Rights*, 16; Appl. no. 16404/03, para. 53, 57.

<sup>154</sup> Open Society Justice Initiative, *European Standards on Criminal Defence Rights*, 7, 16; Appl. no. 20310/02, para. 40.

<sup>155</sup> Appl. Nos. 62880/11, 62892/11, 62899/11.

<sup>156</sup> Open Society Justice Initiative, Public Interest Law institute, *ECtHR Jurisprudence on the Right to Legal Aid*.

- “[T]he burden of proving lack of sufficient means should be borne by the person who pleads it.” (*Croissant v. Germany* (1992)).<sup>158</sup>
- Previous representation by a court-appointed counsel or by a counsel from a humanitarian organisation may suggest that the applicant is indigent and requires legal aid on account of financial means (*Twalib v. Greece* (1998)).<sup>159</sup>
- The ECtHR does not assess an applicant’s financial situation. It only reviews the power of appreciation in respect of the assessment of evidence’, whether it is in accordance with Art. 6(1) (*R.D. v. Poland* (2001)).<sup>160</sup>
- Refusal to grant legal aid is allowed when it is based on the law and not arbitrary (*Santambrogio v. Italy* (2004)).<sup>161</sup>

### 6.2.2 “Interest of justice”: Merits test

- The right of access to court is not absolute in nature. See *Ashingdane v. UK* above at “Exclusion of areas of law”.
- Discouragement of unmeritorious criminal appeals: An automatic grant of legal aid is not required ‘whenever a convicted person, with no objective likelihood of success, wishes to appeal’ (*Monnell and Morris v. the UK* (1987)).<sup>162</sup>
- Interest of justice requires a lawyer to be officially assigned to the case, where the proceedings are ‘clearly fraught with consequences for the applicant’ or the issues are too complex for the applicant to develop appropriate arguments himself, ‘for example by trying to persuade the Court of Cassation to depart from its case-law in the field under consideration’ (*Pham Hoang v. France* (1992)).<sup>163</sup>
- Where professional legal representation is mandatory before a court, it is ‘not for the Legal Aid Board to assess the proposed appeal’s prospects of success’, but for the court (*in casu* these were cassation proceedings) (*Aerts v. Belgium* (1998)).<sup>164</sup>
- When assessing whether someone should be granted legal aid, ‘the seriousness of the offence’, ‘the severity of the sentence’, the ‘complexity of the case’ and the personal situation of the accused should be taken into account. (*Quaranta v. Switzerland* (1991); *Perks and others v. the UK* (1999)).<sup>165</sup>
- Not all claims for legal aid in cassation proceedings have to be granted, even though legal representation may be required in order to bring the appeal: “A Legal Aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it.” It is a ‘legitimate concern that public money should be made available only to applicants for legal aid whose appeals (...) have a reasonable prospect of success.’ This case concerned a cassation appeal and the applicant was able to put forward a case at first instance and on appeal. There were sufficient guarantees against arbitrariness of the decision. (*Del Sol v. France* (2002)).<sup>166</sup>

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<sup>157</sup> Appl. no. 8398/78, para. 34.

<sup>158</sup> Appl. no. 13611/88, para. 37.

<sup>159</sup> Appl. no. 24294/94, para. 51

<sup>160</sup> Appl. nos. 29692/96, 34612/97, para. 45-46.

<sup>161</sup> Appl. no. 61945/00, para. 53.

<sup>162</sup> Appl. no. 9562/81, para. 67.

<sup>163</sup> Appl. no. 13191/97, para. 40.

<sup>164</sup> Appl. 25357/94, para. 60; In response, new legislation was adopted where a judge would sit in the Legal Aid Board, and the system was subsequently upheld in *Debeffe v. Belgium*, appl. no. 64612/01 (2002).

<sup>165</sup> Appl. no. 12744/87, para. 33-34; Appl. no. 25277/94, para. 76.

<sup>166</sup> Appl. no. 46800/99, para. 23; Open Society Justice Initiative, Public Interest Law institute, *ECTHR Jurisprudence on the Right to Legal Aid*, 33.

- “Where deprivation of liberty is at stake, the interest of justice in principle calls for legal representation” (*Benham v. the UK* (1996); *Hooper v. the UK* (2004)).<sup>167</sup>

### 6.2.3 Residency test

- In criminal proceedings legal aid must be available for illegal immigrants without residency papers. In this case, the applicant did not speak the native language (*Biba v. Greece* (2000)).<sup>168</sup>
- When serious family law issues are at stake, which affect not only the applicant - for example when contesting child paternity - only particularly compelling reasons would justify the difference in treatment between lawful and unlawful residents. Also, Belgian rules on access to legal aid did not envisage the standard of legal residency (*Anakomba Yula v Belgium* (2009)).<sup>169</sup>
- Different treatment of natural and legal persons is justified by the necessity to control the use of public funds; legal aid to (foreign) legal persons may be subjected to reciprocity (*Granos Organics Nacionais S.A. v. Germany* (2012)).<sup>170</sup>

### 6.2.4 Financial contribution

- There is no guarantee for a definitive exemption from legal costs. Reimbursement may be required after the trial if the person concerned has the means to meet the costs (*X. v. Germany* (1982)).<sup>171</sup>
- Repayment of fees and disbursements of legal aid lawyers by a convicted person is in accordance with Art. 6 (*Croissant v. Germany* (1992)).<sup>172</sup>
- An own contribution is not in itself ‘arbitrary or unreasonable’, when the applicant has sufficient means to pay (*Morris v. the UK* (2002)).<sup>173</sup>
- Reimbursement of counsel’s fees is not contrary to the ECHR (*Gennadiy Medvedev v. Russia* (2012)).<sup>174</sup>
- Financial limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (*Kreuz v. Poland (No. 1)* (2001)).<sup>175</sup>
- A financial barrier that protects the other party against irrecoverable legal costs and protects the system of justice against unmeritorious appeal is allowed. Financial restriction cannot be of a purely financial nature and must be related to the merits of an appeal or its prospects of success (*Podbielski and PPU Polpure v. Poland* (2005)).<sup>176</sup>
- The financial situation of an applicant must be based on facts supplied, not on a hypothetical earning capacity (*Jedamski and Jedamska v. Poland* (2005)).<sup>177</sup>

## 6.3 Right to have the decision refusing legal aid reviewed

- If circumstances become very complex during the proceedings, a refusal of legal aid must be able to be subjected to review: “[S]ome means should have been available to the competent authorities (...) to have the refusal of legal aid reconsidered.” (*Granger v. the UK* (1990)).<sup>178</sup>

<sup>167</sup> Appl. no. 19380/92, para. 61; Appl. 42317/98, para. 20.

<sup>168</sup> Appl. no. 33170/96, para. 29.

<sup>169</sup> Appl. no.: 45413/07, para. 37-38.

<sup>170</sup> Appl. no. 19508/07, para. 49-53.

<sup>171</sup> Appl. no. 9365/81.

<sup>172</sup> Appl. no. 13611/88, para. 35-36.

<sup>173</sup> Appl. no. 38784/97, para. 88-89.

<sup>174</sup> Appl. no. 34184/03, para. 39-40.

<sup>175</sup> Appl. no. 28249/95, para. 54, also in *Podbielski and PPU Polpure v. Poland*.

<sup>176</sup> Appl. no. 39199/98, para. 65-67.

<sup>177</sup> Appl. no. 73547/01, para. 63, 66.

- A failure to deliver a formal decision to a request for free legal assistance violates Art. (6)(1), because as a consequence, the applicant could not challenge any decision before a higher court (*A.B. v. Slovakia* (2003)).<sup>179</sup>

#### 6.4 Quality of legal aid services

- The right to free legal assistance is not satisfied by the formal appointment of a lawyer: this right must be practical and effective (see *Artico v. Italy* above at “Circumstances calling for legal representation”)
- The court needs to take measures of a positive nature to permit the officially appointed lawyer to fulfil his obligations ‘in the best possible conditions’, such as the adjournment of a hearing or the suspension of a sitting to allow for studying of the case file (*Goddi v. Italy* (1984)).<sup>180</sup>
- “[C]ompetent national authorities are required (...) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way” (*Kamasinski v. Austria* (1989)).<sup>181</sup>

#### 6.5 Other ways to achieve access to courts

- The State has a free choice of means to guarantee litigants an effective right of access to the court. This can be achieved through the legal aid scheme, but also by other means, such as a ‘simplification of procedure’ (*Airey v. Ireland* (1979)).<sup>182</sup>
- A video-link enabling the applicant to follow the hearing, or make oral remarks and put questions to the participants, does ensure effective participation in the proceedings (*Gennadiy Medvedev v. Russia* (2012)).<sup>183</sup>
- If national legislation provides for electronic filing, a refusal to accept such filing might impose disproportionate limitation on the applicant. In this case the courts refused to register the applicant’s actions recorded on DVDs having more than forty million pages (*Lawyer Partners, a.s. v. Slovakia* (2009)).<sup>184</sup>

#### 6.6 Turner v. Rogers

The provision of legal aid in the United States is decentralised. The organisation is not unlike the one in Poland or Germany. States and private foundations are the main players. The national Legal Services Corporation funds local legal aid programmes. Its annual budget is very small in comparison to the US population (about \$1 per citizen). Research shows that access to civil legal assistance is fragmented per state, which can lead to inequalities.<sup>185</sup> Because of the high costs of using a lawyer in court procedures, many people appear in court without representation. This is the setting for the case law of the Supreme Court on due process, a concept comparable to the right of access to justice of Art. 6 ECHR. In the recent leading case *Turner v. Rogers* (2011), the Supreme Court looked at the right to counsel and alternatives for the self-represented. The case is generally seen as an improvement in due process for persons who cannot afford a lawyer.

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<sup>178</sup> Appl. no. 11932/86, para. 47.

<sup>179</sup> Appl. no. 41784/98, para. 61

<sup>180</sup> Appl. no. 8966/80, para. 31.

<sup>181</sup> Appl. no. 9783/82, para. 65.

<sup>182</sup> Appl. no. 6289/73, para. 26.

<sup>183</sup> Appl. no. 34184/03, para. 37-38.

<sup>184</sup> Appl. nos. 54252/07, 3274/08, 3377/08, 3505/08, 3526/08, 3741/08, 3786/08, 3807/08, 3824/08, 15055/08, 29548/08, 29551/08, 29552/08, 29555/08, 229557/08, para. 44-46

<sup>185</sup> Rebecca L. Sandefur and Aaron C. Smyth, *Access Across America. First Report of the Civil Justice Infrastructure Mapping Project*, (7 October 2011), v.

The Turner case is about the right to counsel, which Turner was not given at his contempt hearing for failure to pay child support which could lead to incarceration. The US Supreme Court found that Turner’s rights to due process were violated because “Turner received neither counsel nor the benefit of alternative procedures like those we have described.”<sup>186</sup>

The *Turner v. Rogers* ruling is important because the US Supreme Court acknowledged that alternative procedures could be constitutionally sufficient in safeguarding access to justice. The Court held that an available set of “substitute procedural safeguards, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty”.<sup>187</sup> As substitute procedural safeguards it listed “(1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay” as alternatives.<sup>188</sup> However, the Court “does not claim that they are the only possible alternatives, and [the Supreme Court’s] cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient.”<sup>189</sup>

## 6.7 Summary

The second main research question of this project is: What requirements does the ECHR and/or subsequent case law of the ECtHR set for a system of state-financed legal aid? Which minimum requirements in the ECHR for state-financed legal aid can be deduced from the case law of the ECtHR or other judicial bodies, from the history of the ECHR, or from literature?

The ECtHR looks at access to justice for a citizen in a particular procedure. It does not evaluate legal aid systems as such. Because the ECtHR applies broad and open ended tests for access to justice and does this on a case by case basis, there are no clear minimum criteria. In general, legal aid must be available when both the applicant has insufficient means and the interests of justice require free or subsidised legal assistance to people with limited means who have valuable issues at stake and their case survives a merits test. Whether the interests of justice require state funded legal aid, may depend on the complexity of the procedure for the issues and the issues of law and fact, and the emotional involvement of the applicant.

The following research questions can therefore not be answered in any definite way, but only by showing which approach the court is likely to follow if it has to decide on such a case:

- For which areas of law a state should always offer facilities for state-financed legal aid?
- What are the minimum requirements that such a facility should have?
- In which cases does limited state-financed legal aid stand in the way of access to a court of article 6 ECHR?
- Which minimum criteria can be deduced from the ECHR and the case law of the European Court of Human Rights or literature (e.g. in relation to access to a court, level of own contribution, income thresholds, exclusion of areas of law, the matter at stake, mandatory representation)?
- Which criteria can be used to determine the eligibility of a legal aid applicant and what procedural safeguards have to be in place when evaluating whether to grant or refuse an application for legal aid?

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<sup>186</sup> 564 U.S. *Turner v. Rogers*, Opinion of the Court 16 (2011).

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*



- Are there any maximum limits of own contributions a state can set to be eligible for state-financed legal aid?

For civil proceedings, no cases have been found in which the ECtHR has explicitly stated that legal aid was necessary for a specific area of law. The necessity of legal aid depends on the general criteria set out in the *Airey*-case: the complexity of the procedure, complicated issues of law and fact, and the emotional involvement of the applicant. As a rule, countries are required to provide some form of legal assistance to people with limited means when legal representation is compulsory (assuming sufficient interests are at stake and the case has sufficient merits). Access to justice is still the overall perspective, so the affordability and availability of legal services is also relevant here.

Legal assistance must be available in criminal proceedings where deprivation of liberty is at stake. In the *Salduz* line of cases, the ECtHR decided that suspects in custody have a right to access to a lawyer both before and during the interrogation. Special attention must be had for the vulnerability of minors.

The ECtHR applies an open ended multi factor test in other situations. The determining factors in criminal cases are the seriousness of the offence, the severity of the expected sentence and the complexity of the case.

The ECtHR does not look at financial eligibility criteria in legal aid schemes as such, but rather at access to courts as a whole. The ECtHR mostly reviews how the decision making authorities exercise their discretion and appears to take a more procedural rather than a substantive approach. The ECtHR assesses 'whether the decision of financial eligibility for legal aid is based on law and not made in an arbitrary manner.'

States have considerable freedom how to organise effective access to justice. The right to legal aid and of access to court is not absolute and may be subject to legitimate and proportional limitations. The ECtHR only assesses whether there has been an effective and practical right of access to court. This means that countries have broad discretion to set income levels, the level of individual contributions and eligibility requirements. There is no maximum limit to the own contribution of legal aid applicants, but it must not be arbitrary or unreasonable, and it must pursue a legitimate aim and be proportional to that aim.

Exclusion of certain types of problems from the scope of legal aid is allowed, in particular if the procedure is simple, for example in defamation proceedings. Depending on the interests at stake, the complexity of the procedure, complicated issues of law and fact, and the emotional involvement of the applicant, self-representation is allowed. The limited access to legal assistance must not lead to an inequality of arms between the parties.

In regards to procedural safeguards, the ECtHR said that a refusal of legal aid must be able to be subjected to review. A rejection of a legal aid application must be a formal decision which can be appealed.

This report also looks at alternatives to and innovations in state-financed legal aid. The relevant subquestions are:

- To what extent can alternative – not offered by the state – facilities in areas of law for which access to a judge is necessary, contribute to a system of state-financed legal aid that is allowed within the framework of the ECHR?
- What are permitted alternatives to state-financed legal aid, such as simplification of procedures (so that representation will no longer have to be mandatory)?

Legal assistance by a professional lawyer is not the only way to provide sufficient assistance to litigants. From the first decision on legal aid by the ECtHR (*Airey*), simplifying procedures and assistance by a lawyer have been the

two major alternatives for enabling access to justice for individuals with limited means. Countries that seek to reduce expenditure on legal aid can consider alternatives, such as offering procedures that are more simple to use for self-representing litigants (*Airey*). A trend towards taking into consideration alternative ways to guarantee access to justice can be seen in US case law, which tends to influence the case law of the ECtHR over time. In *Turner v. Rogers*, the US Supreme Court indicates that information and advice can be given by others than lawyers, for example by social workers. Better court forms, court directions and guidance from judges during the procedure, including asking questions about the most relevant issues, can also contribute to an effective right of access to justice. Alternatives include simplification of procedures, because the complexity of procedure is a key reason to require legal aid.

## 7. Findings and trends

### 7.1 Findings

#### **The role of legal aid in the justice system**

Legal aid is relevant for individuals who seek access to justice for justiciable problems such as being held in custody, criminal defence and family problems (mainly divorce related). They also may have to cope with consumer problems, refugee and immigration matters, employment matters, debt problems, personal injury, housing or social security issues.

In order to obtain access to justice, research suggests clients tend to follow a three phase process. First they try to obtain (legal) information and advice. They seek information about procedures to follow, substantive rules, good practices and the range of outcomes that are seen as fair and effective and can be expected. Then, in a second phase, they try to reach out to the other party in order to obtain a fair solution. This is the way most problems are resolved, increasingly also in criminal justice matters during interactions with the police and prosecutors where charges or sanctions are contemplated and discussed. During these interactions and negotiations, both parties use the “threat” of litigation and a decision by an adjudicator as an exit option. When the parties enter into the third phase and a litigation process is started, they present their case to the court, tribunal or other adjudicator, moving through the steps of the procedure, but also tend to continue to negotiate with the other party. Sometimes this third party intervention is mandatory, as in criminal trials or in divorce proceedings.

In each of these three phases, assistance may be needed. Some people lack the means to pay for such assistance as provided on the market for legal services, so they may need state funded legal aid. Legal aid may cover legal information and advice, help with negotiating an outcome, or representation in adjudication proceedings before a court or tribunal.

#### **Quality and costs of (legal aid) services**

For quality, two perspectives are common. The first one is to focus on the quality of legal assistance actually given to the individuals entitled to legal aid. Is the service obtained from a lawyer adequate? Was the problem solved in a fair way because of this service? Was the client satisfied with the service? The second perspective is that of access to justice more broadly. Did the client obtain a fair procedure and a fair outcome? This perspective also looks at the quality of other elements of the access to justice process than the personal assistance obtained. It includes the quality of the adjudication process and the laws that determine outcomes, for instance. The two perspectives may lead to different results. A client may be helped by a very skilful lawyer, but spend ten years in a very complicated procedure struggling with many incomprehensible laws and obtaining a rather poor outcome. Likewise, a client with a mediocre lawyer may be able to obtain a good result from a tribunal that offers a procedure that is easy to understand with a judge using excellent conflict resolution skills.

Important to citizens are the total costs of access. In order to move through all three phases successfully if needed, an individual may have to spend money and valuable time on obtaining legal information and advice and assistance during negotiation or mediation. If no fair settlement is offered, the costs of litigation have to be incurred. Litigation costs may include court fees, expert fees, travel costs and costs of lawyer representation.

Legal aid, that is a subsidy for those obtaining legal services, is necessary when these services are both needed in order to achieve a fair outcome and too expensive for the individual in question. Traditionally, legal aid focused on the third phase of litigation, which can be a costly and time-consuming affair for which legal assistance is

indispensable. But state funded legal services can also be rendered during the first (information seeking) phase and the second (negotiation) phase. Additional motives for such a policy may be that assistance in these phases can lead to better outcomes that are more likely to work between the parties and that early intervention reduces the money to be spent on legal aid in the third (litigation) phase.

Generally, the costs of legal aid will go down if more people can achieve fair outcomes without personalised assistance, for instance because thousands of people are empowered to achieve fair solutions themselves through the use of information on a website. Costs of legal aid will also be reduced if the prices of legal services needed to solve a problem go down, or if less people experience justiciable problems. All else being equal, costs will be higher if providers of legal aid services get better pay.

### **1. Description of the state-financed legal aid scheme in the selected countries.**

England & Wales, Scotland, Ireland, Finland and the Netherlands have their legal aid systems centralised at the country level. In Scotland, Ireland and the Netherlands there is an independent legal aid board, whereas in England & Wales and Finland the Ministry of Justice controls the legal aid system. In Ireland the Legal Aid Board administers the delivery of civil legal aid and also decides on entitlements in civil cases whereas in criminal cases the Department of Justice and Equality administers the delivery of legal aid and it is for the courts to decide on entitlements (Section 2.1).

France, Germany, Belgium and Poland each have different, more decentralised systems. In France and Belgium the decision to provide legal aid is made by the legal aid councils situated at the courts. The legal aid board in France is an advisory body only. In Belgium the legal aid councils are controlled by regional bar associations. Germany and Poland do not have central governing bodies. The court decides on legal aid entitlements (Section 2.1).

The costs of legal aid systems are born by the central government, except in Germany where the 16 *Länder*/States are responsible for the costs. Legal aid can have the form of a government subsidy for the use of a lawyer, or be provided in kind by the government, through public defenders, legal advice centres, websites or telephone services. There are no examples of systems using public/private cooperation yet.

### **2. Validated descriptions of the budget of state-financed legal aid**

Countries show large variations in expenditure. In relation to GDP, England & Wales and Scotland are the biggest spenders. Both spend about five times as much as Germany, Belgium and France and 13 times as much as Poland. The Netherlands and Ireland spend about three times as much in relation to GDP as Germany, Belgium and France. Poland spends the least of all countries. Sections 3.1 and 3.4 show that legal aid expenditure per capita is the highest in England & Wales, followed by Scotland, the Netherlands and Ireland, ranging from €40-€20. Expenditure per capita in Finland is €12, followed by Belgium, Germany and France, which range from €7-€5. Poland spends the least per capita, less than €1.

France and Belgium have a closed budget for most forms of legal aid. Each legal aid product has a number of points allocated to it, and at the end of the year the budget is divided by the total number of points delivered by lawyers and each lawyer is paid on the basis of this rate per point. Ireland has a closed budget for civil legal aid. All other countries have open ended budgets. Administration costs are typically between 5 and 8% of the total legal aid budget (Sections 3.5-6).

All countries except Finland also seek some financing from recovering payments from legal aid users. Amounts recovered in this way tend to be small, 2% of legal aid budgets at most, see also section 7.3 below. Legal expenses

insurances can have a bigger impact on the availability of affordable legal services and also on the legal aid budget. LEI are most prominent in Germany, followed by the Netherlands, Belgium, France, Finland and Poland. No data was available for England & Wales, Scotland and Ireland. (Sections 3.6-7)

### **3. Overview of applicable areas, limitations and exclusions**

Legal aid is typically available for all areas of law that are relevant for individuals. France, Germany, Belgium and Poland do not exclude any types of problems or procedures from the scope of legal aid. Scotland, Ireland, the Netherlands and Finland tend to exclude specific minor and simple types of problems. England & Wales stands out because it has recently excluded entire areas of law from the scope of legal aid (Sections 2.1-2).

All countries apply financial and merits criteria for legal aid eligibility. Assistance in criminal proceedings and frontline services for information and advice are typically accessible regardless of financial or merits criteria. Section 2.2 provides more detail on financial thresholds, own contributions, merits criteria, excluded and exempted groups and types of problems. Chapter 4 provides detailed information on different regimes and expenditures per type of problem. A detailed summary can be found in section 7.2 of this chapter.

### **4. Overview of (preliminary, mandatory) services**

There is typically a broad range of state-subsidised services for information and advice (phase 1). It is traditionally provided by lawyers, but increasingly also by specialised law centres and websites. Some countries have less comprehensive state-financed services, or none at all in the case of Poland, but all countries have many other sources of legal information and advice outside the 'public' legal aid system. Both the private and public sector are developing innovative ways to provide information and advice. Only England & Wales has a mandatory preliminary service, the telephone gateway (Section 2.3.1, Chapter 5).

Specialised services other than lawyers that help to negotiate and interact with the other party (phase 2) are covered by the legal aid systems, except in Poland and Germany. The most common form is mediation. Usage of these services is encouraged, but voluntary. The scale of usage appears to be very small (Section 2.3.2).

Procedural assistance by a lawyer during litigation at courts and tribunals (phase 3) is available everywhere. It is usually the most costly service needed in order to obtain access to justice. In all countries, apart from Poland, the legal aid beneficiary is free to choose their own legal aid lawyer (Section 2.3.3).

In France, Germany, England & Wales, Scotland and Finland it is obligatory to use other means of legal assistance before receiving subsidised legal aid. Poland and the Netherlands do not have such an obligation. Legal expenses insurance and trade union membership are the most common alternative sources of legal assistance that need to be used first (Section 2.2.4).

### **5. Descriptive analysis of the quality of access to justice and the effects on people with limited means and conflict resolution**

Little is known about the effects of legal aid regimes on people with limited means, access to justice and conflict resolution in general. There are no data which allow comparison between countries as to the quality of legal assistance. Differences in spending could be explained by a preference for higher quality and more equal access to justice, but also by inefficiencies such as complex procedures or monopolies that restrain the development of legal services on the market. Section 3.9 sets out recent data about the quality of civil, criminal and administrative justice as perceived by the population in the countries. The data suggest that quality of access to justice is highest in the Netherlands and Finland, closely followed by the UK and Germany. Belgium and France are somewhat

behind. Poland scores better for criminal justice than for civil justice and performs adequately for its level of income.

If we combine the bits of information on quality with levels of spending, data in Chapter 3 suggest that Finland and Germany get most value out of every Euro spent on legal aid. They spend their money more efficiently on access to justice. The UK spends five times as much on achieving slightly better results than France and Belgium. England & Wales is clearly outperformed by very efficient Finland, and Germany achieves very similar results with a fraction of the money spent. The tendency to work with hourly fees may be part of the problem in England & Wales as can be the complexity of certain procedures at courts (see below, Section 7.2 and 7.3).

As another indicator of quality of access to justice in a country we took the number of violations of the right to access to justice protected by article 6 European Convention of Human Rights as established by the European Court of Human Rights since 1959. Table 3.10 in section 3.9 shows the number of violations per capita. Here a similar pattern is found: Germany and the UK are the best performers (lowest number of violations), followed by the Netherlands and Ireland, then Belgium and France who have many more violations, and Poland as the most frequent offender. Finland is an exception, because it scores well on other indicators of access to justice, but very poor on the (high) number of violations of the convention.

Differences in spending could have further implications. The Netherlands achieve a high level of quality but may be able to spend money more wisely by following examples set by Finland and Germany, who spend three times less for a slightly lower quality. Belgium and France may have to step up their access to justice efforts, because their access to justice can be improved whereas they spend little on legal aid.

## **6. Overview of proposed and initiated reforms, strategies, trends and innovations**

All countries in this research are working on legal aid reform. Most changes are incremental and oriented on cost savings, for example by limiting the scope of legal aid or by increasing the amount paid by users. Providing better quality of services appears to be a secondary or subsidiary motive (Section 5.2). Public perceptions about legal aid are not measured systematically and debate about legal aid is limited. Debate tends to be dominated by the legal profession, and has the nature of protesting cuts, rather than a public discussion about how to achieve access to justice to citizens (see Section 5.3).

Many different groups of stakeholders are involved in legal aid (beneficiaries, lawyers admitted to the bar, other providers of legal services, courts who may rely on lawyers being available in complex procedures or who want to avoid complexity added by lawyers, different government agencies). Legal assistance is also just one element of a system supplying access to justice that also consists of legislation and other rules, procedures at courts or tribunals and a range of different services.

Except for Scotland, the countries studied appear to have difficulties in formulating a broader access to justice strategy. There are a few examples of procedural reform undertaken as part of legal aid policy. Reforms elsewhere in the system that could have an impact on legal aid have been limited, but there is a tendency to diminish the number of procedures in which representation is required. See section 5.2 and section 7.3 of this chapter for more detailed information.

Countries are trying to increase the efficiency of the organisation and administration of legal aid systems. Mostly, focus is on minor changes in fees, own contributions, income thresholds and the recovery of money paid by legal aid beneficiaries. A clear trend in reforms is that litigants and legal aid beneficiaries have to pay higher

contributions. Reforms in England & Wales and reform proposals the Netherlands aim at excluding categories of problems from the scope of legal aid. There are no plans in other countries to follow this route. Countries are introducing tighter eligibility criteria and are applying them more strictly. The question is whether the financial benefits of these tighter eligibility criteria outweigh the costs to access to justice.

Section 5.1 mentions five trends in innovation in the field of access to justice that have been identified in earlier research and mentions many examples from the countries covered by this study.

1) Citizens are empowered in their relationship to legal service providers and more able to solve problems at an early stage if legal information is easily accessible. In all countries, websites with legal information and advice are now proliferating.

2) Hybrid services now often combine elements of traditional roles of lawyers, mediators and judges. These services try to build a communication bridge between parties, and move towards a reasonably fair and neutral outcome.

3) Best practices and protocols are developed to cope with recurring issues such as a divorce, a dismissal or a debt problem. These standards can lead to cost savings and to improved quality.

4) Innovations also focus on simplified procedures at courts and tribunals, specialised for specific types of disputes (see also chapter 4 and section 7.2). These procedures aim at an early settlement, require a limited amount of evidence, and can be addressed without a lawyer.

5) The fifth trend is to provide online platforms supporting dispute resolution and access to justice.

These trends are seen as promising by experts because they can reduce costs of access to justice and improve quality. As far as we know, there is no country that systematically reviews how such trends can be reinforced by policies in order to improve access to justice and reduce the money spent on legal aid. Our data show how many countries try to build on at least some of these trends, however.

### **Minimum requirements of Art. 6 ECHR**

This research also identified the requirements of the fundamental right to access to justice as specified in article 6 European Convention on Human Rights.

### **7. Relevant legislation, regulations and case law**

Chapter 6 provides a detailed overview and analysis of ECHR case law. The European Court of Human Rights applies broad open-ended tests and does not categorically exclude specific ways of organising legal aid systems. It leaves considerable freedom to countries.

### **8. Detailed description of the minimum requirements that flow from Art. 6 ECHR**

In civil proceedings, there is no automatic right to legal aid. It is established case law that the right to legal aid and of access to a court is not absolute and may be subject to legitimate and proportional limitations. Determining factors the ECtHR looks at in civil cases are the interests at stake, the complexity of the procedures, complicated issues of law and fact, and the emotional involvement of the applicant. Granting legal aid and simplification of procedures are alternative ways to guarantee the right of access to justice.

Depending on these factors, self-representation may be allowed, in particular when there is guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance. In procedures with mandatory representation, subsidised legal assistance from a lawyer must be available for those without the financial means to pay for a lawyer themselves.

Clawback and repayment mechanisms are allowed for both civil and criminal cases. Financial contributions by legal aid beneficiaries are allowed, provided they are not arbitrary and unreasonable and the applicant has sufficient means to pay.

Scope limitations for civil justice problems are allowed, provided there is a hardship clause that can provide legal aid in exceptional cases. Exclusion from legal aid must not result in inequality of arms between the parties. If one party is able to hire much better lawyers and the other party has limited access to assistance from a lawyer, the resulting differences in the level of legal assistance must not lead to unfairness.

Countries have less discretion in criminal proceedings. In general, legal aid is needed when a defendant faces possible incarceration. The seriousness of the offence, the severity of the expected sentence and the complexity of the case are determining factors. When the procedures mandates representation from a lawyer, a lawyer must be made available by the state.

For pre-trial detention proceedings and police station interrogations, the Salduz line of cases will continue to influence state-subsidised legal aid. Access to assistance by a lawyer must be guaranteed before and during police station interrogations, as is now clear from the latest decision by the ECtHR on this issue in the case *Navone v. Monaco*. Some countries have adopted new legislation in order to guarantee this. To what extent this continuing assistance during police interrogations must also be subsidized by the state remains to be seen, however.

### **9. Overview of approaches to test and adjust recent policy changes to ECHR requirements**

No evidence was found of systematic approaches to test and adjust reform proposals to ECHR requirements. Policy changes are proposed in accordance with the regulatory policy making rules and traditions in the various countries, and do not tend to be very explicitly and exhaustively tested against ECHR requirements. Such a systematic approach may be rather difficult to create due to the broad and open-ended tests and criteria applied by the ECtHR. In England & Wales, a House of Lords and House of Commons Joint Committee criticised some isolated elements of government reform proposals (residence test, exclusion of prison law complaints from legal aid) in regard to the fundamental common law right of effective access to justice (Section 5.3).

### **10. Overview of (elements) of state-financed legal aid systems that were found incompatible in practice with the minimum requirements of Art. 6 ECHR**

The ECtHR does not consider the compatibility of systems as such, but rather looks at violation of rights in individual cases. It applies broad and open-ended tests in this respect. Section 6.1.3 gives an overview of circumstances calling for legal representation. See also section 8 above.

### **11. Case description of *Turner v. Rogers***

The Turner case is about the right to counsel, which Turner was not given at his contempt hearing for failure to pay child support which could lead to incarceration. The US Supreme Court found that Turner's rights to due process were violated because "Turner received neither counsel nor the benefit of alternative procedures like those we have described."



The *Turner v. Rogers* ruling is important because the US Supreme Court acknowledged that alternative procedures could be constitutionally sufficient in safeguarding access to justice. The Court held that an available set of “substitute procedural safeguards, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty”. As substitute procedural safeguards it listed “(1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay” as alternatives. However, the Court “does not claim that they are the only possible alternatives” as “sometimes assistance other than purely legal assistance can prove constitutionally sufficient.” The Court also explains that introducing a lawyer in a procedure between individuals can change the character of the proceeding, making them more complex and leading to delay.

## **12. Overview of possible means and instruments other than legal representation that can guarantee effective access to court and that will influence future interpretation of the ECHR**

The ECtHR is open towards alternatives to legal aid provided by a lawyer. Access to justice is the goal, and to achieve this there are various means of legal assistance. The *Turner* case is broadly in line with ECHR case law, which mentions simplification of procedures as an alternative to providing legal aid by a lawyers. Moreover, self-representation may not stand in the way of the right of access to justice, when there is guidance provided by the procedural rules and court directions, together with some access to legal advice and assistance.

Exclusion of legal aid for certain types of problems may be allowed if procedures are sufficiently simple. Alternatives to traditional courts that offer less complex procedures, such as specialised tribunals or dispute resolution committees, can thus meet ECHR standards without the need for free assistance from a lawyer.

If procedures, laws or a case are too complex, legal assistance from a lawyer is still required. Countries can improve access to justice for litigants and reduce the need for assistance a lawyer by simplification of procedures, better court forms, adequate information to litigants, together with better advice and guidance on the procedure. Such information and advice can be given by others than lawyers, for example by paralegals. Other professionals than lawyers can also be allowed to represent litigants in court, as is already happening in employment cases in many countries.

## **13. Analysis of the possible influence of international trends on the Dutch system**

Section 7.3 of this chapter sets out in detail the international trends that were found in this report and provides hypotheses on which factors drive quality and costs of legal aid systems.

## **7.2 Legal aid policy-options for most important problem areas**

Chapter 4 shows each problem area is very different in terms of type of problem, assistance required, procedural set ups, alternative ways of providing legal assistance, and sources of financing. The market also offers different products and innovations for different procedures and problem types.

Differences in the spending per type of problem are remarkable. They can be 10 times as high in one country compared to another country. Are divorce or robbery cases more complex in some countries? It is more likely that differences in procedures and working methods in the access to justice supply chain lead to differences in expenditure. The expenditure per type of problem appears related to the nature and complexity of the procedure.

In England & Wales, for instance, legal aid costs tends to be much lower for cases that are dealt with by specialised tribunals, rather than by traditional courts.

This suggests that there may be huge gains from a supply chain approach. Policy makers now tend to look at specific problem areas more closely, building on the trends in innovation mentioned in Section 7.1 under 6. Scotland is basing its strategy on this holistic supply chain approach.

### **Criminal justice**

In criminal defence proceedings, legal assistance from a lawyer is often indispensable and, depending on the severity of the possible sentence, mandatory. In 2008 the ECtHR ruled that it is necessary to provide access to a lawyer from the first interview of a suspect by the police. Consequently, costs for legal assistance during custody at police stations and pre-trial detention are going up. Expenditure has increased in France and Belgium, which have already implemented legislation to meet the Salduz case law. Innovation for police station assistance is needed. Countries work or experiment with salaried public defenders, telephone advice services for suspects, videoconferencing, both at court and during interrogation, and recording of police interrogation. Provision of information, either through leaflets or online, is underdeveloped compared to problem areas in civil or administrative law.

Criminal law takes up to 50% of the legal aid budget in many countries. Alternatives or innovations in criminal procedures can thus lead to savings in time and cost. Minor criminal infractions can be dealt with by the prosecution, under the supervision of a judge. France, for example, offers a mediation procedure for minor infractions and in the Netherlands a fine can be imposed without the intervention of a judge. Alternative financing methods such as legal expenses insurance, however, are unlikely to be helpful in this area.

In some countries, complex criminal cases are still paid by the hour, and not by way of fixed fee. This is usually connected to high levels of expenditure for such cases.

### **Family law**

Family law leads to many justiciable problems in all countries. Most of these problems relate to divorce or separation proceedings. Family law has traditionally not been covered by legal expenses insurance and it takes up a large part of legal aid budgets in all countries (17-37% in the countries on which we have data). Countries show an enormous variation in average costs per product and spending per capita, however, with England & Wales spending 15 times as much per capita in 2012 than Belgium. Some countries have special eligibility criteria and do not apply a means or merits test for certain types of family problems, but the complexity of procedures is likely to be the main cause of differences in spending. Countries try to stimulate consensual divorce and mediation is encouraged, but the impact on the legal aid budget seems limited. The main way to control costs for family law problems appears to be to simplify procedures and to reduce the number of procedures.

### **Consumer problems with goods or services**

Many justiciable problems relate to buying goods and services, but specific data on legal aid expenditure in this area is limited. States may be hesitant to subsidise legal aid for these problems and they are sometimes excluded from legal aid entirely. Problems often are related to limited amounts of money and consumers are considered to be able to solve many of these problems themselves. As an alternative to legal assistance in court, there is a trend in specialised and simplified adjudication services, such as small claims tribunals or dispute resolution committees. Legal expenses insurance, consumer associations, class actions on behalf of groups of consumers and legal services for a fixed fee are available on the private market in many countries.

### **Refugee and migration law**

This is also a considerable category of cases with considerable spending per case as well. The number of refugee and immigration cases is influenced by immigration patterns and refugee streams. These cases are usually dealt with by specialised tribunals. In England & Wales, which use such specialised tribunals, the average cost is significantly lower than for other types of problems. The Netherlands spends relatively a higher percentage of its legal aid budget on these cases compared to the other countries.

### **Employment matters**

Employment matters typically take up 3-5% of legal aid budgets. There is a large variety of suppliers that offer specialised services and there are many alternatives to legal assistance by a lawyer. Legal expenses insurers provide specialised services, but especially trade unions are important in this field. Specialised tribunals can provide efficient and simplified procedures that do not require representation by a lawyer. Belgium, for example, has abolished the monopoly of lawyers to plead in court for labour cases and in France and the Netherlands legal representation is not mandatory.

### **Debt problems**

Debt problems are often connected to other types of problems, such as divorce or dismissal. Debt problems can also lead to new problems, such as rent or housing issues. A supply chain approach, that focuses on underlying causes and not on only the legal issues at stake, can lead to a reduction in the number of cases that require legal aid. Debt restructuring is a service that can help citizens take control of their debts and prevent further problems, such as homelessness.

### **Personal injury**

Procedures in personal injury can be lengthy and costly. For citizens, they can be rather expensive and stressful. Because claims for damages are difficult to assess, settlement negotiations with insurance companies can also be costly and time consuming. The trend, however, is to fund legal assistance through alternatives for legal aid. They include no cure no pay arrangements with lawyers and legislation and practices that shift costs to defendants, as well as legal expenses insurance.

### **Housing**

Housing problems can be related to other problems, such as debt issues. Specialised tribunals and legal expenses insurance can provide effective alternatives to legal assistance. Problems between a tenant and a landlord that are not complex, such as disrepair issues, may be efficiently solved outside of courts through dispute resolution committees.

### **Social security**

Going to court may not be the most efficient means of redress for social security problems. Except for the Netherlands, legal aid expenditure in this area appears to be small. Social security or social welfare systems sometimes have their own appeals mechanism with specialised procedures or tribunals. Simplified procedures that are accessible for lay people can be an effective way of solving problems that relate to social security.

## **7.3 Drivers of quality and costs**

In this section, we explore what the comparative data suggest about the most important drivers of quality and costs of access to justice as supported by legal aid. The following is a list of variables that are likely to have a major

impact on quality and costs. Because this report is based on limited data about a limited number of countries, these comments should be seen as plausible hypothesis about drivers of costs and quality derived from qualitative research, rather than evidence supporting these hypotheses.

The following nine variables may have a (major) positive impact on costs and/or quality:

### **1. Reducing complexity of procedural routings for problem categories**

All else being equal, the costs of legal aid are likely to be higher if court procedures are more complex. The same will be true if two or more procedures are needed in order to resolve a conflict in a certain relationship instead of one. In these situations, more people will need legal assistance, and legal assistance will be more costly, because more effort has to be spent to navigate the procedure. We found some indications of a rather strong relationship between legal aid spending and complexity of procedures in Chapter 4. In England & Wales, spending per capita on divorce is 3 times as high as in the Netherlands and 14 times as high as in Belgium. This cannot be explained by differences in divorce rates. Complex procedures can also be an impediment to quality. Simplifying procedures is often recommended in the literature on court reform and access to justice.

### **2. Further developing specialised procedures for frequent and urgent problems**

Specialised procedures before courts or tribunals may exist for employment matters, social security, family matters, consumer cases, refugee and immigration and housing. These procedures are often less complex, more straightforward and more easy to use for citizens. Although the number of cases before these tribunals can be quite substantial, Chapter 4 offers no example of a specialised procedure leading to high costs of legal aid. To the contrary, such procedures seem to lead to lower spending per case than procedures for civil or administrative cases in general. This is true for Germany and England & Wales, for instance. Specialisation, both for legal aid services and for courts, is generally recommended as a way to enhance quality, so it seems to be a rather promising way to save costs and maintaining, or even increasing quality.

### **3. Services integrating legal analysis with other disciplines**

In fields such as debt restructuring and family disputes, legal assistance is being integrated into more holistic services based on interdisciplinary approaches. These are likely to improve quality of the outcomes for clients. The effect on costs is uncertain. If integration means involving more professionals per case, then it is likely to increase costs. If one person combines the necessary skills and fields of knowledge, costs will be lower (Sections 4.4, 4.8).

### **4. Reducing the services that are a monopoly of the legal profession**

A monopoly for the legal profession on representation in procedures at courts is likely to increase the costs of legal aid. States are then obliged to provide legal aid under ECHR case law for citizens with limited means and justiciable problems of sufficient importance. Moreover, such a monopoly is a restraint on innovation of legal services. In Finland, no monopoly for the legal profession exists, whereas Finland seems to achieve a high level of quality at low costs. The trend in all countries is to gradually decrease the number of procedures for which representation is restricted and to allow new forms of representation. This may be an indication that this is a policy which improves access to justice and decreases costs. Germany is exceptional. Here, the professional monopoly also covers legal information and advice, whereas in other countries a range of market and government services have developed covering this need (Sections 2.3 and 5.1).

### **5. Improving legal information/advice which is a low cost service and facilitates negotiation and representation**

Legal information and advice is available from a range of different sources. It is needed by many people and rather easy to standardise. Once produced in the forms of manuals, guidelines or web text, it can be delivered at low

marginal cost to each additional user. So models of delivery include websites, telephone helplines, advice by paralegals, lawyers, social workers, trade unions, consumer organisations or state officials, as well as over the counter services at community justice centres. Costs per client served with information or advice are low, that is in the range of €30 up to €300, and spending on this primary form of legal aid tends to be 10% of the overall legal aid budget (Section 3.1). There is reason to believe that availability of trustworthy legal information and advice makes it easier to settle and adjudicate cases in a fair way as well. It is difficult to find good business models for information and advice, however, so government subsidies may be needed here (Sections 2.3.1-2 and 5.1).

#### **6. Fixed fees instead of hourly fees for legal aid lawyers**

Most state legal aid systems pay fixed fees to lawyers for each legal aid product they deliver. England & Wales and the Netherlands (for cases requiring more than three times the number of predetermined number of hours) have important exceptions to this and then pay a fee per hour spent by the lawyer. It is difficult for an external auditor to establish whether the number of hours spent is reasonable, and this system has rather obvious incentives for lawyers to do extra work, even if this is not adding much value for clients. Spending under such schemes has a tendency to spin out of control quickly and is indeed substantial in both countries. This suggests states should consider to change these schemes. One option is to design additional fixed fee categories for homicide, major fraud and other rather frequent complex cases. Another option is to let an appropriate fixed fee in complex cases be established beforehand by (independent) legal aid authorities (Section 3.6).

#### **7. Fixed fees on market for legal services**

In Germany, there is a tradition of lawyers charging fixed fees related to value at stake. So clients with limited means and a value at stake in the range of €500 to €10,000 can obtain legal assistance up to representation in court for fees in the range of €100 to €2,000. Many cases will settle before this fee level is reached. This may be one of the explanations why Germany (although it has a strong monopoly for lawyers which drives up the costs of legal assistance) has low spending on legal aid whereas there are no indications of poor quality procedures and outcomes. This German system is difficult to implement elsewhere because it requires extensive fee regulation. But the effects can be replicated if suppliers of legal services start offering fixed fee services, as they now do in many countries, and governments stimulate this (Sections 3.6, 3.9 and 5.2).

#### **8. Closed budget**

Belgium and France both have a closed budget and also low costs of legal aid as a percentage of GDP. In practice, Belgium has an open budget, because the fees of lawyers are retrofitted to make sure they receive a minimum fee. Under a closed budget, additional demand for legal services subsidised by the state is met by lowering the price per product paid to lawyers. There are some reasons to believe that this system may eventually lead to quality problems. In France and Belgium, legal aid services seem to be provided by lawyers with a lower number of years of experience than in other countries. Moreover, these countries have lower scores on some indicators for access to justice (Sections 3.6 and 3.9).

#### **9. Compensation levels**

The amount of compensation lawyers receive per legal aid product is very different per country. Based on the available data, it is hard to establish which proportion of this difference can be attributed to the amount of work that has to be done and which proportion can be attributed to the level of compensation paid to lawyers. There are indications, however, that effective remuneration per hour worked is substantially lower in France and Belgium than in the UK and the Netherlands (see section 3.6). This being said, the compensation levels can have an influence on the quality of those lawyers that provide legal aid services. In Belgium and France for example, there are more signals that legal aid is supplied by inexperienced lawyers.

The following five variables seem to have little impact on costs, and varying impacts on quality.

### **1. Availability of legal expenses insurance**

The availability of legal expenses insurance seems to be of limited relevance for the costs of legal aid. Legal expenses insurance contributes to making access to justice affordable for the middle class. Such insurance is unlikely to cover criminal defence or assistance during custody. Divorce related work is also unlikely to be covered. A well-functioning market for legal expenses insurance can be helpful, however, for the costs and quality of services related to consumer problems, administrative procedures, social security issues, employment and personal injury. Legal expenses insurance is more prevalent on the continent than in England & Wales, Scotland and Ireland. The Netherlands and Germany spend most on it per capita (Section 3.7). A possible explanation for this is that costs of providing legal services are more predictable in these countries (in particular in Germany) and that insurers are allowed to employ lawyers (The Netherlands).

### **2. Preventing justiciable problems**

Although little data on this have been obtained in this study (see Chapter 4), it is unlikely that the number of justiciable problems is very different in the countries we studied. Moreover, crime levels, divorce rates, migration patterns and debt levels which are the main triggers of demand for legal aid, cannot be influenced by legal aid policies.

### **3. Mediation**

We found no indication that offering mediation as a separate service has a substantive impact on legal aid budgets. Even in family law, it is used infrequently (Section 4.4). It may contribute to solutions that are more sustainable and effective, though. Moreover, integration of conflict resolution know how in other legal services is helping to improve the repertoire and thus the quality of procedures and outcomes.

### **4. Raising own contributions and income level for eligibility**

Although these are strategies that clearly save costs and are rather easy to implement, they are not among the major reforms considered in the countries on which we report during recent years. This suggests that there is now little to gain from these measures without a threat to the quality of access to justice or strong political opposition.

### **5. Recovering legal aid money from applicants, defendants or other funding sources**

Countries are looking to retrieve profits a user may have from a legal procedure, or the losing party could be ordered to pay the legal aid costs of the winning party. It is difficult to measure the effects of increased own contributions in this research, but these measures do not appear to bring in a lot of money. In most countries, we see that the money gained from repayment or clawback systems is around 1-2% of the total budget. Even with increased and more efficient enforcement, the financial benefit to the legal aid budget will remain relatively low.

Variables with uncertain impact on costs and quality that deserve further study are the following ones:

### **1. Products and incentives for negotiation and settlement**

On the market for legal services, new products have emerged in which clients pay first for legal information and advice, then for an attempt to settle the conflict, and then for representation in court or before a tribunal. This approach is mimicked in some legal aid systems. In this set up, there may be more settlement and thus cost savings because less cases move to the more costly stage of litigation. Data on disputes that are settled without

the intervention of a judge, by services that help to negotiate and to interact with the other party, is limited, but there is much room for improvement in this area. These services help parties to solve their problems themselves at an early stage. It reduces the need to go to court and the need for costly assistance from a lawyer in adjudication proceedings. These services are partly covered by services for information and advice and by mediation.

A system in which the user pays for a solution, rather than paying for procedures, facilitates and provides an incentive looking for a solution quickly. Many countries look to encourage alternatives forms of dispute resolution. The impact of mediation is limited and does not appear to lead to lower costs, however. There is still a gap in the market for services that help to negotiate with the other party. A legal aid applicant goes from services for information and advice almost directly to assistance in adjudication proceedings. Due to this gap, lawyers are encouraged to start expensive adjudication proceedings that can stand in the way of a cheap and easy solution to a problem. Creating or stimulating a market between these services can facilitate cheaper ways of solving problems. IT systems can play an important facilitating role for developing efficient procedures.

The problem solving capacity of people is also raised by providing easily accessible information or by increasing the use of services that bring parties closer to each other. Paralegals can provide non-official mediation services for a fixed fee, for example through an intake with one party and then call the other party to see if there is a quick solution at hand for to resolve the dispute. Products of legal expenses insurers look like this. For instance, for €200 the applicant is given a piece of information or advice. A solution outside legal or adjudication procedures will be sought for €3-400 and a procedure in front of a judge will cost €800-1,000.

## **2. Reducing the types of problems for which legal aid is available**

In England & Wales, legal aid is not available anymore for some of the most common civil justice and administrative justice issues. For these issues, specialised tribunals tend to exist with rather simple proceedings for which legal assistance may not be needed, or can be obtained at low cost. In the Netherlands, the government had plans to exclude consumer and landlord/tenant problems from legal aid services. These exclusions have been heavily criticised by the legal profession in both countries, however, because poor quality access to justice may be the result. Costs of unresolved problems may be shifted to citizens or to other organisations that have to cope with the problems. Moreover, states need to provide legal aid for criminal cases where incarceration is at stake, or issues for which legal assistance is obligatory. So limiting the scope of problems for which legal aid is available is only possible for minor criminal justice issues and for procedures for which legal representation is not obligatory and that are rather simple to operate for an inexperienced person seeking access to justice. Thus, this strategy should be considered in combination with a thorough analysis of how this particular category of problems can be resolved without legal assistance sponsored by the state and, if necessary, be combined with creating simplified and specialised procedures for this category of problems.

## **7.4 Concluding remarks**

The ECtHR has been very consistent in driving home a point that is also the major finding in this report. It is about access to justice, and legal aid is one of multiple ways to guarantee access to justice. What access to justice requires, and under what circumstances states have to step in with subsidies, depends on the issue at hand and the context in which the issue has to be resolved. The procedural setting and the availability of legal services on the market are among the main variables that policy makers can influence in order to guarantee access to justice.

When the systems of nine countries are compared, there are huge differences in the way in which procedures are set up for the most frequent and urgent problems of their citizens. This is true, although these problems tend to be similar in each of these European countries and their frequency appears to be rather similar as well. Countries also

have rather different practices about allowing lawyers and other providers of (legal) services to be involved in resolving these issues. Procedures and regulation of legal services, appearing in many different national variations for each of these problem categories, seem to explain levels of spending as well.

What lacks, is a reliable measure of quality of access to justice, and thus of the effectiveness of money spent on legal aid. The indicators of quality that are available, suggest that countries also differ considerably in the amount of (access to) justice they create per Euro, Pound or Zloty spent on legal aid.

Legal aid systems can be managed, and costs can be controlled to some extent, by working on levels of subsidies and by calibrating the generosity of compensation paid to lawyers. The data in this report, and the examples set by neighbouring countries, suggest how systems can be innovated in a more substantial and holistic way by improving the interaction with other elements of the justice system so that access to justice becomes less costly for citizens and governments, and leads to better outcomes for citizens.



## Appendix

Annual expenditure (millions)	Fra. <sup>190</sup>	Ger. <sup>191</sup>	Bel.	Eng. & W. <sup>192</sup>	Scot.	Ire. <sup>193</sup>	Pol. <sup>194</sup>	Neth. <sup>195</sup>	Fin.
2007	€324.1	-	€60.9	£2,059	£155.1	€86.2	NA	€421.1	-
2008	€306.8	-	€72.6	£2,186	£150.2	€95.7	€23	€447	-
2009	€308.4	-	€74.3	£2,358	£150.5	€101	€22	€476.5	-
2010	€321.2	-	€83.3	£2,214	£161.4	€93.9	€23	€486.9	-
2011	€351.1	€533.3	€76.6	£2,160	£157.7	€94.8	€23	€484.7	-

Population (millions) <sup>196</sup>	Fra.	Ger.	Bel.	Eng. & W.	Scot.	Ire.	Pol.	Neth.	Fin.
2007	63.6	82.3	10.6	54	5.1	4.3	38,1	16.4	5.3
2008	64	82.2	10.7	54.5	5.2	4.5	38,1	16.4	5.3
2009	64.3	82	10.8	54.8	5.2	4.5	38,1	16.5	5.3
2010	64.6	81.8	10.8	55.2	5.2	4.6	38,2	16.6	5.4
2011	65	81.8	11	56.1	5.3	4.6	38,5	16.7	5.4

Expenditure per capita	Fra.	Ger.	Bel.	Eng. & W.	Scot.	Ire.	Pol.	Neth.	Fin.
2007	€5.1	-	€5.3	£36	£30.4	€20	NA	€21.3	-
2008	€4.8	-	€6.3	£37.8	£28.9	€21.3	€0.6	€27.3	-
2009	€4.8	-	€6.3	£40.8	£28.9	€22.4	€0.6	€28.9	-
2010	€5	-	€7.2	£38.3	£31	€20.4	€0.6	€29.4	-
2011	€5.4	5.62	€6.4	£37	£29.8	€20.6	€0.6	€29.1	-

<sup>190</sup> CNAJ, *Rapport triennal du Conseil national de l'aide juridique*, (2013); Ministère de la Justice, *Annuaire statistique de la Justice. Édition 2011-2012*, (2012); Ministère de la Justice, *Les chiffres-clés de la Justice. 2012*, (2012).

<sup>191</sup> Deutscher Anwalt Verlag, *Statistical Yearbook 2013/2014*.

<sup>192</sup> LAA, LSC, 'Statistical tables. Volumes and expenditure', available at <<http://www.justice.gov.uk/publications/corporate-reports/legal-services-commission>>.

<sup>193</sup> Number provided by the contact person; contains total State expenditure on civil, criminal and mental health legal aid.

<sup>194</sup> For conversion rate of Zloty-Euro see note 47.

<sup>195</sup> See note 41; Annual reports 2007-11.

<sup>196</sup> Source: Eurostat, Population on 1 January. England & Wales: Office for National Statistics (OSN), 'Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Population Estimates Timeseries 1971 to Current Year', (21 December 2011); OSN, 'Annual Mid-year Population Estimates, 2011 and 2012', (8 August 2013); Scotland: SLAB, *Annual Report 2011-2012*; Scotland.org, 'Population of Scotland', <<http://www.scotland.org/about-scotland/the-scottish-people/population-of-scotland>>.

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