

SUMMARY

This report is the result of a comparative study of lawyers' fees regulations in memberstates of the European Union in respect of the legal possibility to charge an outcome related fee. The research was conducted by a professor and assistant-professor of the Faculty of Law of the University of Maastricht in collaboration with several members of their staff. The report was commissioned by the Research and Documentation Centre (WODC) of the Ministry of Justice.

The report aims at answering the question whether other countries prohibit (some kinds of) outcome related lawyers' fees, just as the Netherlands do, or for what reasons and under what conditions they decided to permit those fees. If these outcome related fees are permitted, it is endeavoured to establish what kind of regulations have been chosen, what lawyers' fee regulations are otherwise in vigour, who is addressed by those regulations, in what way the position of lawyers is regulated, if there is a relation with legal aid, in what way legal aid and legal costs affect the decision to start a procedure and what effect these outcome related fees have had on the legal assistance market in general (number of cases, party costs, fee rates, competition of lawyers with other providers of legal assistance, lawyers' deontology).

The research had to be limited to a *quick scan*. Therefore the report is solely based on data gathered by other researchers and as far as those data were made available. In addition, the possibility to interview experts and parties was very limited and other sources could only be taken in account as far as they were easily accessible (e.g. published on websites). Supplemental information was derived from the response to a questionnaire (annex 1), that was filled in by most of the law societies of the countries concerned (annex 2).

The report concentrates on the lawyers' fees regulations of Belgium, Denmark, Germany, England&Wales (in short: England), France, Greece, Ireland and Hong Kong. The first seven countries were selected because they are member states of the European Union and promised to offer a varied image of possible options in this matter. During the research the administrative zone of Hong Kong was added to the list on basis of its experiments with a Supplementary Legal Aid System, that aims at using the advantages of *contingency fees* while avoiding its disadvantages.

Definitions

The research is concerned with lawyers' fees, i.e. fees charged by persons with a more or less exclusive right to represent parties in court proceedings (solicitors, barristers, *avocats*, *Anwälte*, *advocaten*, *dikigori*, *advokater*). It turned out that in most countries as far as outcome related fees are concerned the same terms were used. Unfortunately, the exact meaning of these terms is not the same in all jurisdictions. Moreover, to describe the differences and similarities between the countries distinctions were needed that sometimes did not exist in the respective legal vocabularies. Therefore some strict definitions were introduced that are maintained throughout the report, but do not always coincide with the meaning of these terms in all countries examined.

Firstly, the expression 'no cure no pay' is used for the agreement between lawyer and client whereby it is stipulated that no fee is due if the outcome of the case is negative. A 'no cure no pay' agreement in this sense is therefore not concerned with the fee that can be charged if the outcome is positive. Accordingly, this agreement has to be supplemented by provisions providing for the fee that should be paid if the case is won. This could be anything between a normal fee and some kind of uplift. It proved useful to define these uplifts independent of the 'no cure no pay'-agreement, since it is possible and not uncommon to stipulate a normal fee if the case is lost and an uplift if the case is won.

Uplifts are therefore distinguished in two categories, the *success fees* and the 'quota pars litis' agreement (*pactum de quota litis*). By the former every agreement is meant that provides for a bonus (e.g. a percentage of the usual hourly fee) that is not a percentage of the sum that will be recovered. 'Quota pars litis' is reserved for all agreements that give the lawyer a claim to a percentage of the sum that will be recovered.

A 'conditional fee agreement' (CFA) is defined as the combination of 'no cure no pay' with a *success fee*. The expression 'contingency fee' is restricted to the combination of 'no cure no pay' and 'quota pars litis'.

Lawyers' fees and the legal assistance market

This research was commissioned as a result of the debate in Dutch parliament about the experiment envisaged by the Dutch law society (*Nederlandse Orde van Advocaten*) to permit contingency fees in personal injury cases and in civil proceedings for damages arising from the death of a person. Part of this debate concentrated on conjectures about what effects were to be expected in the legal assistance market (in the broadest sense) as a result of this experiment.

It followed that an attempt should be made to relate these conjectures to scientific research in this matter. Nevertheless, a short survey of publications in this field made clear that no reliable predictions can be made of the effects of allowing contingency fees. These effects appear to depend upon factors that cannot be foreseen (like the moral behavior of the parties concerned). Accordingly, nothing can be said in advance about the

increase or decrease of lawyers' fees, the number of cases that will go court and the time needed to reach a settlement. It only appears to be certain that the quality of the cases taken to court improves.

The outcome of this library search is confirmed by the findings in this report. It proved to be impossible to establish a fixed relation between the legal assistance market in a given country and its regulations of lawyers' fees. This was not related to the position of lawyers in general, since all countries a) provide for a privileged position of lawyers as legal representatives in court with exclusion of all others and b) stipulate in some way or another that they have obligations to justice and therefore c) should perform their tasks in strict independence with due regard to the interests of their clients. Another common feature was found in the fact that in all countries only lawyers' fees were regulated; everywhere the fees of other legal assistance providers were free of restrictions. The question what effect can be expected of allowing contingency fees therefore remains unanswered.

A strange phenomenon in Ireland deserves special attention. Although in that country contingency fees are prohibited, a detailed analysis of personal injury cases has shown that the actual fees charged by solicitors in those cases can only be explained as the result of a fixed fee (flat fee) raised with a percentage of 15 % of the outcome. This could be an indication that allowing 'no cure no pay' (which is permitted in Ireland) could possibly engender unintended 'quota pars litis'-charging in practice. On the other hand it is not excluded that the existing prohibition of contingency fees is willingly ignored.

Remarks on Hong Kong

Hong Kong was included to take into account its Supplementary Legal Aid Scheme (SLAS). According to this scheme for some kinds of cases (like personal injury cases and industrial accidents) the 'sandwich class' - those who do not qualify for legal aid but cannot afford the costs of civil proceedings - can apply for legal aid under SLAS. After a means and merits test the case is taken on by the Supplementary Legal Aid Fund *on a contingency fee basis* (SLAF). The SLAF pays all the costs (disbursements and lawyers' fees). The contracts with lawyers are concluded *according to the existing rules* (hourly rate).

This scheme turns out to function satisfactorily. The costs are covered by the small contributions to be paid by the applicants and the revenues of the cases that are won. Only the costs of the fund itself (housing, staff) are paid by the government. The applicants pay only a maximum of 12 % of the outcome of the case, which will be decreased to 10 % the coming year. This seems to justify the conclusion that SLAS succeeds in profiting from the advantages of contingency fees (access to justice) while avoiding its disadvantages (effects on the legal assistance market) without paying the cost of a large sacrifice from the part of the winning party.

Overview of regulations

A first table shows in what way lawyers' fees have been subjected to rules in the selected countries. A distinction is made between acts of parliament, delegated rules, codes of conduct of law societies and judge-made law. The distinction is important in an European context, since rules of the first two categories are not subjected to judicial review in the light of the competition law of the European treaties.

Country/Source	Act of parliament	Delegated rules	Codes of conduct	Judge-made law
Belgium	+	-	+	-
Denmark	+	-	+	-
Germany	+	-	-	-
England & Wales	+	+	+	-
France	+	-	-	-
Greece	+	-	-	-
Ireland	+	-	+	-
Hong Kong	+	-	+	-
Netherlands	-	-	+	+

Table 1 Overview of sources of regulations per country

It is to be noted that only the Netherlands do not provide for a basis of lawyers' fees regulations in an act of parliament. Moreover, since its regulations are all emanating from the law society (albeit partly in the form of an ordinance on a statutory basis) and some rules are only to be found in court decisions, it can be said that the Netherlands find themselves in an exceptional position.

The findings of this research in relation to the content of lawyers' fees regulations can be summarized in a table of features. The features are explained in a legend. If it is stated that a certain mode of outcome related fees

is allowed, it should be understood that this may possibly be subjected to more or less strict conditions. These details are elaborated in the report itself.

In addition to these features it is indicated in four supplementary columns a) whether cost orders include outcome related fees, b) whether the country provides for legal aid, c) whether outcome related fees are meant to supplement a formerly existing legal aid scheme for judiciary proceedings and d) whether legal aid insurance is common in the country concerned. These features are added to illustrate that no intrinsic relation could be established between the lawyers' fees regulations and the legal assistance market.

For some countries (France, England, Ireland and Hong Kong) a distinction had to be made between contentious (proceedings in general, sometimes with exclusion of the work before tribunals and arbitration boards) and non-contentious activities, since the rules differ on that point.

Country/Feature	NCNP	SF	QPL	NCNP + SF	NCNP + QPL	CST	LA	LACF	LAI
Belgium	-	+	-	-	-	-	+	na	-
Denmark	+	+	-	+	-	-	+	na	+
Germany	-	+	-	-	-	-	+	na	+
England&Wales	+/+	+/+	+/-	+/+	+/-	+	+	+	+
France	+/-	+/+	+/+	+/-	+/-	-	+	na	+
Greece	+	+	+	+	+	-	-	na	+
Ireland	+/+	+/+	+/-	+/+	+/-	?	-	na	-
Hong Kong	+/-	+/-	+/-	+/-	+/-	na	+	na	-
Netherlands	-	+	+	-	-	-	+	na	+

Table 2 Overview features outcome related fees per country (in the case of two signs the first one relates to non-contentious business and the second one to contentious business).

Legend: *NCNP*: 'no cure no pay' is allowed; *SF*: success fees are allowed; *QPL*: 'quota pars litis' is allowed; *NCNP+SF*: the combination of 'no cure no pay' and success fees is allowed; *NCNP+QPL*: the combination of 'no cure no pay' and 'quota pars litis' is allowed; *CST*: cost orders include outcome related fees; *LA*: the country provides for legal aid; *LACF*: contingency fees have been introduced to replace a pre-existing legal aid scheme; *LAI*: legal aid insurance is common in the country concerned; na: not applicable.

The table shows that the rules vary enormously. Only the pairs Belgium/Germany and England/Ireland seem to be similar, but in fact they differ in theory and in practice. Germany is known for its detailed and fixed rules of lawyers' fees, whereas Belgium does not have any fixed rate at all. Ireland permits to agree on a success fee, but in practice no lawyer ever uses this possibility.

Nevertheless it can be concluded that contingency fees in relation to contentious activities are generally considered to be undesirable. Only Greece permits them, but in this case the percentage to be charged is limited to 20 %, disbursements cannot be included and some charges have to be paid anyway.

Only in three countries recent changes have been introduced (France, Germany, England). In France and England these changes were at least partly motivated by the desire to provide for access to justice in this way.

Bullet points

The results of the research can be summarized in the following bullet points:

- The position of lawyers (legal representatives in court proceedings) in the countries concerned was identical in respect of their privileged position, their obligations to justice and their independence.
- Nevertheless the lawyers' fees regulations concerning outcome related fees varied enormously.
- Only in the Netherlands these rules haven't been anchored in an act of parliament.
- In all countries legal assistance provided by other players in the market than lawyers is free of fee restrictions.
- Success fees are generally permitted with the exception of Hong Kong, where a prohibition applies for contentious activities only.
- A general prohibition of 'quota pars litis' is only to be found in Belgium, Denmark and Germany. In England, Ireland and Hong Kong a similar prohibition applies to contentious activities only.
- A general prohibition of 'no cure no pay' is to be found in Belgium, Germany and the Netherlands only. In France and Hong Kong a similar prohibition applies to contentious activities only.
- No country can be found that permits 'no cure no pay' but prohibits its combination with success fees.
- The combination of 'no cure no pay' with 'quota pars litis' (contingency fees) for *contentious* activities is prohibited in all countries with the exception of Greece.

- The combination of ‘no cure no pay’ with ‘quota pars litis’ (contingency fees) for *non-contentious* activities is allowed in England, France, Greece, Ireland and Hong Kong.
- On basis of the information that could be taken into account in this research nothing can be said of the possible effects of allowing contingency fees for the legal assistance market, including the effect on the number of cases.
- Some data indicate that allowing ‘no cure no pay’ could engender unintended charging of ‘quota pars litis’ fees.
- Allowing a certain form of outcome related fees does not imply that this possibility will be used in practice.
- Only in England and France outcome related fees have been introduced partly in order to provide for legal aid.
- It is possible to establish a self-supporting legal aid scheme that provides for a publicly funded institution that takes on selected cases on a contingency fee basis with a maximum of 12 % of the outcome and pays for all the costs of the procedure, if the government is accountable for the costs of the institution itself (housing, staff).