Cost of Judicial Barriers for Consumers in the Single Market

Kosten der rechtlichen Schranken für die Verbraucher im Binnenmarkt

Hanno von Freyhold, Volkmar Gessner, Enzo L. Vial, Helmut Wagner (Eds.)

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Contact:

Hanno von Freyhold
Prof. Dr. Volkmar Gessner
Enzo L. Vial

Zentrum f. Europäische Rechtspolitik
an der Universität Bremen (ZERP)
Universitätsallee, GW 1
D-28359 Bremen
Tel.: +49.421.218-2247
Fax.: +49.421.218-3403

Prof. Dr. Helmut Wagner

Fernuniversität Hagen
Lehrstuhl für Makroökonomik
Feithstr. 140
D-58084 Hagen
Tel.: +49.2331.987-2640

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Summary of Contents

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I. The Cost of Judicial Barriers in the Single Market

A Research Project initiated by the European Commission

The *Zentrum für Europäische Rechtspolitik* at the University of Bremen (Germany) has carried out this study on behalf of the European Commission (DG XXIV) analysing the legal, practical and economical effects of judicial barriers in the Single Market. The study is a means of responding to the call for specific measures both in the Sutherland Report[1] and the Green Paper of the Commission on Consumer Access to Justice in the Single Market.[2]

Research Team

The legal research team was composed of lawyers and legal sociologists who are based at the *Zentrum für Europäische Rechtspolitik.* The team cooperated with law firms, institutions, ministries and other legal practitioners and scholars in all Member States of the European Union. The legal research team has been engaged in Prof. Gessner's larger project on "Global Legal Interaction" from which additional empirical data have been drawn for the study.[3]

The economic research team consisted of a group of economists working with Prof. Helmut Wagner from the *Fernuniversität Hagen.*

Main Research Interest

Cross-border interactions are increasing as a result of globalization and the integration process within the Single European Market. They are occurring not only in trade relations but also in tourism, family relations and in consumer interactions. They take place in a legally and

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1 „Sutherland-Report", cf. Mitteilung der Kommission an den Rat und das Europäische Parlament: Der Binnenmarkt der Gemeinschaft nach 1992, Folgemaßnahmen zum Sutherland-Bericht vom 2. Dezember 1992, SEK(92)2277 endg.

2 Greenbook on Consumer Access to Justice of November 16, 1993, COM(93) 576 final.

3 Volkmar Gessner (ed.) *Foreign Courts*: Civil Litigation in Foreign Legal Cultures (Aldershot: Dartmouth, forthcoming)

culturally diversified environment. Inevitably, some transactions will run into problems which may result in legal disputes.

Individual actors are faced particularly with specific obstacles when such a dispute arises. Judicial barriers consist of and cause procedural and other costs (necessitating at least two lawyers, translation costs, and cultural differences). Surprisingly little empirical research exists which could form a basis for further understanding and prospective measures by legislators, practitioners or the European Commission.

One of the central hypotheses of political economy research on the transformation of Eastern Europe and Development Studies is that, legal insecurity is an obstacle to development and stability of national economies. Unfortunately, research on the European integration process has given little attention to this aspect. A macro-economic analysis of the costs of judicial barriers for the economy of the Single Market is long overdue.

Working Programme

In accordance with the European Commissions' working schedule and the division of labour within the project team, the study consists of two parts:

The micro-economic part largely consists of an analysis of the civil procedure (in practice rather than theory) of all EU Member States with regard to the costs and obstacles related to cross-border disputes. Apart from the necessary theoretical research, the practical aspects have been mainly gathered through the cooperation of knowledgeable practicioners (largely law firms) who received specific questions on the handling of such cases in the respective country. Sample case situations were utilized. The legal research team has previously gathered empirical data on the processing of cross-border disputes in national courts within the "Global Legal Interaction" project, the results of which are brought into perspective.

The macro-economic part is new in concept. The work is grounded on the New Growth Theory, the New Trade- and Competition Theory, the New Institution Economics, the Dynamic or Time Inconsistency Theory of Optimal Economic Policy and the Options Theory.

An attempt is made to apply these theories to examine the problem of the Costs of Judicial Barriers in the Single Market under the aspect of the lack of legal security for the consumers. The empirical data for a model of macro-economic cost factors are drawn in part from the results of the micro-economic analysis, in part from existing statistics and surveys (*e.g.*, EUROBAROMETER).

The Volume

The Research Project has resulted to the present volume which consists of two main parts, the micro-economic analysis (Part II) and the macro-economic analysis (Part III). A summary of the results is provided with Part IV.

Bremen, October 1995

Hanno von Freyhold
Volkmar Gessner
Enzo L. Vial
Helmut Wagner

II. Micro-Economic Study on the Cost of Judicial Barriers in the Single Market

A. Consumers in the Single Market - A Legal Sociological Approach -

(Volkmar Gessner)

1. Basic assumptions

The theme of our study on "The Costs of Judicial Barriers" may be reformulated as "The Costs of Legal Uncertainty" or "The Costs of Non-Europe in Litigation". If Europe has not achieved a single legal market, economic interaction in the area is severely hampered. Transaction costs either increase the price level of exchanges of goods and services or - more dangerous - hinder economic actors to take advantage of markets in all Member States. Economic actors - providers of goods and services as well as consumers - refrain from contracts in foreign legal systems if the costs of information (about the law, about administrative procedures, about competent legal advice) and/or the costs of enforcement (by way of litigation or alternative forms of dispute resolution) seem too high or unpredictable.

The economic success of the EC apparently contradicts this statement. The single market is indeed an opportunity for larger enterprises which are able to reduce legal transaction costs by establishing stable relationships across European borders. The risks of breaking contracts are small in this kind of repeated exchange. The situation is different in anonymous markets with small enterprises and consumers. They need institutions to defend and protect their property rights. The European Single Market has been conquered by these actors only to a limited degree due to a deficient institutional infrastructure of law enforcement.

In the absense of "European" institutions (the European Court of Justice is not accessible for civil litigation) enforcement of cross-border contract claims can only be sought in the legal infrastructure of the Member States, *i.e.*, in fifteen different substantive and procedural normative orders, in fifteen court cultures, in fifteen legal professions.

Our study tries to describe the effectivity and eventually the weaknesses of this infrastructure in situations of minor everyday cross-border disputes. The typical everday dispute is a consumer claim but some observations also apply for small claims between firms, particularly small firms, or between firms as claimants and the consumer.

2. Methods of Research

Law is a basic instrument of European integration. Like all legal systems the European legal system also has a problem of effectiveness: there is a gap between the law in the books and the law in action. The measurement of this gap in Europe is a particularly complex undertaking because effectiveness is problematic on at least six levels of implementation of law:[4] (1) the application of Community regulations by the Member States; (2) the transposition of Community directives into national law; (3) the implementation of Community secondary legislation by the national civil service; (4) the use of Community law by economic undertakings and individuals; (5) recourse to litigation in a national court based on Community law; (6) the enforcement of Community law by national courts. Most studies on the implementation of Community law remain on the first two levels whereas most difficulties and most differences between Member States arise within the following phases. A realistic picture of the European legal system therefore is far from being available.

Our study by contrast clearly emphazises the action level of the European legal system. We use file analyses, interviews, questionnaires and statistical material in order to describe legal behaviour: the actual use of courts in cross-border claims and the behaviour of lawyers, judges and institutions like the Central Authorities which intervene in case of foreign service of process.

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4 Francis Snyder, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, Modern Law Review 56 (1993).

3. Units of research

The focus on law enforcement ("judicial barriers") leads to courts as the main institution for civil litigation (leaving aside alternative forms of conflict resolution) and law offices as the main support structure for representing clients' interests (leaving aside consumer organizations and other potential institutions offering legal advice).

3.1. Court Studies

A court file analysis which had been made as part of a different project formed the backbone of this study. The court studies evaluated files of international cases in the district courts of two major German cities (Bremen and Hamburg) and a similar court in Milan, Italy. For the purpose of this project, a special data calculation and analysis was carried out in order to determine whether the Brussels Convention and other attempts to facilitate cross-border legal activities within Europe have fulfilled their purposes. In addition to the file analyses, special country reports have been prepared for Austria, Italy and Greece. They intend to give a complex picture of international litigation in three legal cultures.

In Germany, our analysis of all international cases in the district courts of Bremen and Hamburg (filed in 1988) attempts to find out whether the Brussels Convention and legal assistance conventions have been able to create something like a "single litigation market" in Europe. For the purpose of this study, we have tested the database for a number of possible hypotheses about access to courts, type of cases, amount of claim, duration and outcome of procedure, and recognition and enforcement of foreign judgments, in order to find significant differences between "European cases" (which involve resident of the European Community) and "Non-European cases" (between German residents and parties with residence outside the EC). As regards the service of process , it is interesting to know whether, on the average, this legal assistance is more efficient in Europe than in the rest of the world. The fact that in a comparison between EC- and non-EC-residents as parties to a law-suit the former are far more visible as businesspeople than as private individuals will be interpreted as a result of the marginal position which the EC-structures (including legal institutions and in particular courts) offer to private individuals. The data show only four international consumer cases in the

district courts of Bremen and Hamburg. It follows that consumers either are not economic actors in the European market or refrain from pursuing their claims. Both alternatives can be related to legal uncertainty. All additional information gathered in the course of the present study indicate that, in spite of an increase in cross-border consumer purchases in the Single Market, the consumer cases in court remain today as infrequent as in 1988.

In Italy, the main barrier for all foreign parties are to be found in particularities of Italian courts, civil procedures and the legal profession which require a deep cultural understanding in order to be able to act adequately in persuing a claim. Hence, few foreign parties and even less consumers opt for an Italian forum. Quite similar to the German study, the Italian data and observations are analysed as to any visible advantage of intra-EC-litigation as opposed to cases where plaintiffs or defendants of non-EC-countries are involved. Service of process, number of hearings and delays in decision making follow similar patters in both groups of international cases. As in Germany, the knowledge of foreign law is limited with the consequence that international cases are in practice decided only on the basis of Italian law.

As regards Greece, the situation is in many aspects surprisingly similar to the Italian one.

Both studies give evidence of a general weakness of court structures in international matters. This explains why in general state courts are considered by lawyers as inaccessible and ineffective institutions for the resolution of cross-border claims. But as regards the European Community, state courts do not seem to offer any special advantage for European residents - not for business actors who use the courts and less so for private actors (mainly consumers). If cross-border legal interactions suffer in general from legal uncertainty the same is true for legal interactions across European borders.

3.2. Experts survey on the Costs of Judicial Proceedings in the European Union

The aim of this part of the study is to establish a basis for the calculation of the costs actually involved in a cross-border court dispute within the EU. Mainly, in order to achieve a most practical approach, this study was based on answers received from lawyers and consumer

associations which responded quickly and with considerable care to specific questions presented.

Our evaluation tries to give a comprehensive picture of all the various steps necessary for international litigation and debt enforcement, and estimates the threshold value for international legal action. While on the surface only covering the cost issue, **this threshold value also defines the field of economic interaction in which economic activities in the EU suffer most from legal uncertainty.** Economic analysis will be able to make use of it in order to estimate the costs of legal uncertainty in the Single Market.

3.3. Ministries of Justice and Central Authorities

As it turned out that the Brussels Convention had little effect on actual court practice we decided to verify our results by reports asked from the Ministries of Justice of the Member States. A different type of questionnaire was sent to all Central Authorities of the Member States in order to collect additional information and data on problems with the Hague Service Convention.

Not all of these institutions responded in time and the answers we received were of different quality. But the main reason for the only limited value of this material lies in structural circumstances. The Ministries of Justice are distant from actual court practice and lack any statistical information about international matters in civil litigation. Their frequent statement of the absence of any problems with the Brussels and Hague Conventions therefore had to be read with caution. As regards the Central Authorities their information was limited due to the fact that according to the Hague Service Convention they handle only incoming petitions. But obviously the outgoing petitions are those which cause most problems of delay and ineffectiveness. Some Central Authorities which enquired about outgoing petitions mentioned difficulties with delays in Member States. This information matches with the interviews conducted with court clarks in Germany.

The information collected in Ministries of Justice and Central Authorities has been integrated into the country reports.

3.4. EUROBAROMETER

The European Commission has included a number of questions about consumer purchases in other EU countries in the most recent EUROBAROMETER and has kindly provided us with the first results of that study. The EUROBAROMETER results show a relationship between the value of the purchase and the complaint rate and indicate that the market for durable goods suffers most from legal uncertainty. Hence the effects of the inability to pursue a claim can be localized in certain groups of consumers.

The EUROBAROMETER data are crucial for defining empirically the problem of the research: consumers are willing to use foreign markets as long as the risks are limited. And in case of dissatisfaction some try to recover damages. If institutions offer support more consumers would try. This expectation at least is supported by a preliminary evaluation of some regional offices for handling cross-border consumer claims which were created recently by the EU Commission.

4. Consumer-Behaviour in the Single Market

The dimension of the problem of legal uncertainty for consumers in the European Union depends on behavioural patterns of two hypothetical groups of consumers: those who buy in other Member States and experience some disadvantage and those who do not buy because they are afraid of not being able to claim eventual damages.

1. Recent data from an EUROBAROMETER survey[5] indicate at first sight a relative frequent cross-border consumption in Europe. According to the study, 24,04% of all European consumers had bought some goods or services in another EU Member State in the last 12 months.[6] The largest share of these goods and services consist of purchases of clothes, shoes and other leather goods, followed by travel related services (hotel, car rentals). These items

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5 EUROBAROMETER 43,0 of 17 May 1995. The research team is grateful for having been given the opportunity to insert its own questions into the survey.

6 As to the basis of this calculation cf. part III 6.1.1.

indicate that, purchases are effectuated mainly during holiday excursions or business trips. Other forms of consumption, in particular of durable goods, have a marginal position: less than 10% of the purchases (3,2% of the sample) concern TV's, washing machines, fridges, cars *etc.*

56,7% of the consumers who had bought goods in another EU country only had spent 500 ECU or less, 31,2% had spent between 500 and 2.000 ECU and 12,1% more than 2.000 ECU.

These numbers tell us that one out of four EU consumers have in 1994 effectuated purchases in other EU countries and that 87,9% of these purchases remain below a value of 2.000 ECU.

In order to roughly estimate the total value of annual consumer purchases in the Single Market the economists of our research team have made calculations on the basis of estimated average values of those goods and services which have been mentioned in the EUROBAROMETER survey.[7] As an approximate result they calculate a value of more than 100 billion ECU of cross-border consumer purchases.[8]

A different approach of estimating the role of consumers in the Single Market is chosen by looking at the balances of payments of the Member States insofar as they refer to payments connected with inner EU tourism. Albeit the Deutsche Bundesbank which has kindly provided us with information[9] includes in these statistics also capital transfers in DM notes, the data indicate the value of purchases effectuated by German consumers in other EU Member States (including Finland, Austria and Sweden): Germans have spent 33 bill.DM (17.6 bill.ECU) on the purchase and sale of banknotes, 6 bill.DM (3,3 bill ECU) in money transfer and 15,6 bill. (8,3 bill. ECU) in cheque and creditcard payments abroad. The total of these payments amounts to 29,2 bill ECU. The money spent by foreign EU residents in Germany is calculated in a similar way and amounts to 9,6 bill. ECU (all numbers refer to the year 1994). In a projection on the entire number of inner EU payments (*i.e.* between all EU Member States) using the statistical data provided by EUROSTAT on consumer purchases of private

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7 Cf.part III 6.1.1.Tab.1

8 Cf. part III 6.1.1. Fig.1

9 Deutsche Zahlungsbilanzstatistik 1994 (unpublished), kindly provided to us by Deutsche Bundesbank with letter of June 9th, 1995.

households in 1992[10] as the basis for calculation, such payments would amount to more than 130 bill. ECU. This amount exceeds the value of 100 bill. ECU calculated by the economical research team of this study. However, it keeps within the estimated range from 39 to 191 bill. ECU.[11]

Thus with estimated values over 100 bill ECU annually, the EUROBAROMETER data as well as the Bundesbank data give sufficient evidence of the importance of consumer purchases in the Single Market.

In order to desribe the legal relevance of these purchases more information is needed as to potential cross-border consumer claims in the Single Market. Again the EUROBAROMETER survey provides some relevant data. The group of cross-border consumers was asked whether they were satisfied with their purchases: 90% were and 10% were not.[12]

We further learn from these data that about one third of the unsatisfied consumers successfully complained - the steps taken on this behalf are not specified. Two thirds either complained unsuccessfully or didn't complain at all. In order to put these responses into context, it is important to note that almost 90% of the respondents had bought goods for less than 2000 ECU. As the following table shows, this value of 2.000 ECU is a threshold value for consumers who become much more active when more money is at stake:

"I didn't do anything about it"	
purchase less than 500 ECU	59%
purchase 500-1999 ECU	35%
purchase 2000-5000 ECU	3%
purchase more than 5000 ECU	1%

10 Source: Statistical Office of the European Communities (Ed.), Basic Statistics of the European Union, (Luxembourg/Brussels: vol 32, 1995 and vol. 31, 1994), combined categories 2.8 and 3.1 et seq.

11 cf. part III, 6.1.1, Abb.3.

12 For more details cf. part III 6.1.2. tab. 2 and 3.

The higher the value of the purchase the more frequent are steps to recover damages. If purchases remain below 2.000 ECU consumers are rather passiv whereas this happens only rarely above this threshold.

Similar observations have been made in a report on first experiences with a recently created pilot project which aims at resolving cross-border consumer disputes.[13] The so-called *Action de cooperation transfrontalière pour l'accès des consommateurs au droit et au règlement des litiges* had between December 1994 until June 1995 dealt with 1.660 consumer disputes with a total value of 26 million ECU. A number of 444 disputes were based on sale of goods, the average value ranging from 26.543 ECU (real estate) to 1.266 ECU (TV, Hifi, electronical equipment). Quite surprisingly most disputes resulted from the service area, namely 1.216 cases. A number of 343 consumers had claims against banks (average value 46.000 ECU) and more than 200 consumers, each, were unsatisfied with real estate businesses (average value 26.843 ECU) and insurance agents (average value 56.000 ECU). Less frequent were disputes with public services (51 cases) and with medical and legal professions (24 cases) the average value of these cases being below 5.500 ECU. The data provides information on the level of problems involved and which are presented to the pilot project for assitance. Due to the short time period involved, the number of cases which have gone or will go to court dispute settlement is not yet known.

These data not only confirm the observation on more frequent consumer reactions in cases of more valuable claims but also point to the fact that services have an important share in cross-border disputes. The annual report 1993/94 of the *Deutsch-Französische Beratungsstelle für Verbraucher*[14] clearly supports this picture: consumer cases more and more concern the service sector and these cases lead to increasing values in dispute.[15]

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13 Action de coopération transfrontalière pour l'accès des consommateurs au droit et au règlement des litiges: Données statistiques, 1er rapport trimestriel, Décembre 1994/June 1995.

14 *Deutsch-Französische Informations- und Beratungsstelle für Verbraucher*: EURO-Info, Jahresbericht 1993/94, p.4 and 11.

15 ibid.p.21

An assumption of a positive relationship between complaint rate and socio-economic status is not clearly supported by the EUROBAROMETER data. The decision to complain of somebody with a relatively high socio-economic status may be positively influenced by knowledge of languages and support institutions but negatively by low values at stake in relation to one's income level. The opposite is true for a manual worker.

2. The second group of consumers potentially affected by legal uncertainty consists of those who do not buy abroad for being afraid of the inconveniences and unpredictabilities of a foreign country. As outlined in part III, 6.3.2. it is difficult to isolate the fear of the unknown legal system from other barriers like language and culture. But the legal aspect may be a decisive element the more expensive the goods are. When buying a car a consumer necessarily takes his eventual rights to claim for warranties into account. There is empirical evidence for this statement in a study carried out by the German *Institut für angewandte Verbraucherforschung*: consumers refrain from buying products in a foreign country if these products tend to cause service problems. In the case they have bought a defective product, however, they usually do not complain as they would to as if they had bought the same product at home.[16]

The EUROBAROMETER data indicate that this group of potential Single Market consumers is very large. If it is estimated that every adult at least once a year buys a durable consumer good the 3,2% share of Single Market durable goods purchases is very low. Every step towards effective legal certainty would most likely enlarge this share.

16 *Institut für angewandte Verbraucherforschung e.V.*, Furcht und Hoffnung im Binnenmarkt. Neue Aufgaben für die Verbraucherforschung. Ergebnisse einer empirischen Untersuchung bei Besuchern in der Verbraucherberatung im Auftrag der Arbeitsgemeinschaft der Verbraucherverbände e.V.; Bonn, Köln 1992, Vol.1,p.15.

B. Report on the Cost of Judicial Proceedings in the European Union

(Hanno von Freyhold and Enzo L. Vial)

1. Introduction

The following report was achieved mainly by written and other questions presented to lawyers, consumer associations, Ministries of Justice and Central Authorities in all member states. The prime objective of the questions was to receive a picture of the costs related to a cross-border consumer claim. Attention is drawn to the fact that when dealing with fees we have considered a standard proceeding (neither counterclaim nor any other extraordinary occurrences were taken into account), appeals also being excluded.[17]

Estimating legal fees for a hypothetical case matter is rather difficult indeed in most countries. Lawyers fees in particular, are often calculated by hourly rates and are also subject to additional discretion by the handling attorney. Furthermore, particular intricacies of any real-life case are, again, very difficult to consider.

Nevertheless, our corresponding experts, based on their experience and judgment have tried to give their best estimate with regard to both the most realistic cost and the duration of cross-border disputes of the anticipated kind. The research team applied its own additional judgment in order to bring slightly differing opinions in order for the report and to summarize the different cost aspects for the totals. For all items of cost and duration, a reasonable minimum figure, as further confirmed with the experts, has been chosen. All currency conversions herein, where applied by the project team, are as of May 17, 1995.[18]

We further felt that certain other issues such as the court structure and the possibilities of recovery of cost by the winning party play a role in the assessment of the overall picture

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17 In the following overview, certain aspects which may be of interest, such as the precise threshold values of certain courts as well as the capabilities of consumer associations to sue, please refer to the Greenbook on Consumer Access to Justice of November 16, 1993, COM(93) 576 final.

18 OJ 95/C 121/01.

involved. The same applies to simplified debt collection procedures even if in practice, it is rather used by the sellers than by the consumers. Nevertheless, depending on the case, they may help to reduce both cost and duration, where applicable. As regards affidavits, this issue was relevant as in certain cases they may simplify a procedure and reduce costs and duration if foreign witnesses and parties need not appear in person.

As regards the cost and duration in the text as well as in the summary tables at the end of this chapter, it should be noted that they attempt a summary at the best of our and our experts' judgment for the case scenario presented.

Of course, the duration, for example, may differ from the official statistics which take into account a mix of cases of different types and may be longer or shorter than the estimate for the scenario of a cross-border consumer claim presented. In particular, all estimates are based on the assumption that no expert witnesses or other lengthy evidentiary hearings are employed. Furthermore, it is assumed that the lawyers dealing with the matter have a certain degree of expertise, such as our correspondent experts, so that in practice, further delays may occur if some steps are not taken in an efficient manner by the lawyers engaged.

The same, of course, would apply for the costs. The values and costs have generally been estimated for a reasonable minimum. In practice, therefore, in most cases and where not legally prescribed by statute, the costs could be rather higher than lower.

A very specific difficulty in the comparison of the data between the countries is posed, once again, in the different standards for recovery of costs between the various member states. It does make a significant difference, as in some member states the stated fees can be taken at their face value while in other member states the fees are either (almost) nil or the double of the amount stated, depending on whether the plaintiff succeeds or not. Where such two countries with different systems come together in the actual case and different standards are applied for different steps in the judicial resolution of the matter, the issue is more complicated. Therefore, the practical value of the summary tables is limited and provides the best comparison one can make, rather than a practical guide-line for parties involved in litigation (or, as a matter of fact, their attorneys).

The same applies for the VAT, which has been excluded in the tables because of the difficulties involved: the VAT rate for legal services varies significantly among the member states and ranges between 15% (Germany) and 22% (Sweden). Luxembourg currently applies a reduced rate of 12% on legal services and Belgium and Greece do not apply VAT on legal services. However, these latter two member states will presumably have to change their system in the near future to comply with European law. In addition, it should be noted that, in all member states businesses may recover VAT whereas consumers may not, and for services to foreign companies within the EU no VAT is levied if the client supplies a tax registration number.

Member State	VAT on lawyer fees
Belgium	0%
Denmark	25%
Germany	15%
Greece	0%
Spain	16%
France	20.6%
Ireland	21%
Italy	19%

Member State	VAT on lawyer fees
Luxembourg	12%
Netherlands	17.5%
Austria	20%
Portugal	17%
Finland	22%
Sweden	25%
U.K.	17.5%

As another item, throughout the EU, with the notable exception of Greece and Austria, translations costs are at a minimum of ECU 50 to ECU 60 per page. Therefore, for a four page complaint, judgment or other document, for each transmission, of which usually at least two are necessary, costs of ECU 200 to 240 arise as translations are required in most

circumstances. These costs are not included in the summaries and in the table, since they do not apply in all combinations (*e.g.* France/Belgium). For most other cases, a minimum of ECU 500 need to be added for translations. In comparison, bank transaction costs of ECU 10-20 for each transmission (usually at least one for the proceeds and one for lawyer's fees) are almost negligible but need to be added as well.

For the purpose of the table and as a basis of comparison, a matter value of approximately ECU 2.000 was selected, assuming that this value would be a typical amount for a cross-border consumer claim (not for court dispute, as will be seen).

In fact, as further outlined in the previous chapter A, the data show on the one hand that more than 85% of the consumers who bought in or ordered goods and services from another EU-Member state spent less than ECU 2.000.[19] On the other hand, the data also show that if the value is significantly lower, consumers tend not to complain. In fact, the share of dissatisfied consumers who do complain rises from 33,3% of those consumers whose most important problem had a value of less than ECU 500 to 56,7% of those consumers whose problem had a value of ECU 500 to ECU 1999. Of those consumers whose problem item had a value of ECU 2.000 and more, more than 90% complained! It is reasonable to assume that only consumers who do complain may dispute if the complain is not successful. Therefore, our selection of a value of ECU 2.000 as the basis for comparison is justified in light of the actual behaviour of the target consumers.

One note should be made with regard to some items of duration noted in the table. In some instances, not all duration items needed by the lawyers for preparatory work for the preparation of service of process, a proceeding or an enforcement or the additional time necessary for a foreign client was specifically stated by the attorneys and, accordingly, such durations have not been taken into account in the respective chapters of the country reports. However, for the purpose of the summary tables, these durations were needed. In comparison

19 These summary calculations are based on Q.10 of the EUROBAROMETER 43.0, other answers excluded.

with the results obtained from other member states, it was felt that, an absolute minimum of one month should be taken into account. This time was not only consistent with the reports from the other member states but were also in line with the lawyer fees, which were stated for these items. A much longer duration would lead to more fees in most cases (at least when hourly rates are applied). Nevertheless, since costs were assessed by attorneys from all member states for these items, a consumption of some time must necessarily be involved.

2. Country Reports

2.1 BELGIUM

2.1.1 Civil Proceedings

Actions concerning civil or commercial matters are dealt with by a justice of the peace (lower judge), provided the matter of litigation is below a certain value. Values exceeding this are dealt with by the Courts of First Instance, unless it is a commercial matter which is dealt with by Commercial Courts or an employment matter by Labour Courts. The current threshold value is approximately ECU 1.950, so that a case with the value of ECU 2.000 would not fall within the jurisdiction of the justice of the peace. Nevertheless, as most domestic consumer disputes would fall within a lower value and thus, the jurisdiction of the lower judge, we decided to base the following analysis on a procedure before the justice of the peace rather than the civil court.

With regard to an appellate action, the Supreme Court only deals with appeals on judgment if the question concerns infringement of law or the lack of motivation of opinion.

Affidavits as such do not exist under Belgian law. However a Belgian lawyer may sign a Certificat de Coutume (Declaration as to Custom) in a country which requires the application of Belgian law. Belgian lawyers are permitted to send letters rogatory to a foreign court who may require them. If a request issued by a foreign court requires to be executed then this must be permitted by the Minister of Justice. This is achieved through the diplomatic channels but in some cases there may be private transmission by a lawyer.

Belgium offers a summary debt collection procedure (art. 1338-1343 code judiciaire). This procedure may also be used against foreign debtors in the E.U. but it may not be used (as against Belgian debtors) if the claim is within the competence of the justice of the peace, and the claim is below ECU 1.950. A judgment rendered in a simplified debt collection proceeding in another EU-Member state is enforceable in Belgium.

Belgium is a Member State of the Hague Convention[20]. A translation of the document to be served is required. The duration for the return of process requests, as reported by other Member States, is 2 to 4 months. Belgium, as an exception, charges fees for service under the Hague Convention, accordingly, some other countries do the same on a reciprocity basis for requests from Belgium.

2.1.2 Recognition and Enforcement

Belgium has not yet ratified the 1989 amendment of the Brussels Convention[21] or the Lugano Convention but ratification is under preparation by the Foreign Office.[22]

In the case of a foreign judgment and unless a relevant convention or treaty applies, the court will generally re-examine both facts and law, and only after such procedure is undertaken will the judgment be rendered executory. In the process of this, the court will examine firstly if the decision is not contrary to public policy, if adequate defences were given, if the jurisdiction was not purely on the basis of the plaintiff's nationality, if the copy of the judgment is an official one and if the judgment is final.

The procedure requires an attorney (artt. 1026 and 1027). These attorneys have to be Belgium lawyers or foreign lawyers registered in Belgium. The request may not be filed by the judgment creditors themselves.

In the procedure court fees arise (tax according to article 268 following of the Code de droits d'enregistrement, hypothèque et de greffe) and, in addition another tax on the judgment (article

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20 Unless otherwise indicated, references are to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters of 15 November 1965, 658 U.N.T.S. 163

21 For purposes of convenience, references are to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 as amended by the San Sebastian Accession Convention of 26 May 1989 ("Brussels Convention") and to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 ("Lugano Convention"). Unless otherwise indicated, both the Brussels Convention as amended 1989 and the Lugano Convention are in force in the respective Member State.

22 The application procedure for enforcement of foreign judgments is regulated by articles 1025 - 1034 in the introduction to the judicial code of 1967.

142 following) and, third, an indemnity for the procedure (article 1022, code judiciaire). There are no further administrative costs, but, additional lawyers' costs may arise (there is no maximum tariff). The court costs are recoverable but not the lawyer's costs. Normally, the judges require a translation of judgments written in other languages than the three national languages. The court fees amount to ECU 80 plus service of process, to be estimated at about ECU 200. Lawyers' fees would amount to at least ECU 250. Accordingly, such a procedure would cost at least ECU 350 for lawyers' fees, court fees and the like and would bear additional expenses for translations and for service of process.

The application of the Brussels Convention is daily experienced in Belgium and takes about a month. The courts have never indicated any difficulties.

The enforcement itself usually commences with a request to pay served by the bailiff at costs between ECU 80 and ECU 240 and would take 3 to 4 months to be completed. Including a short involvement of an attorney, the minimum costs should be at least ECU 100. Where payment cannot be obtained upon the request to pay, the costs rise and it takes more time. For example, the bailiff's visit to the premises for the seizure of movable assets costs between ECU 150 and ECU 400. All bailiff's costs are recoverable and have statutory preference.

For the preparation of an enforcement abroad, approximately the same costs and duration would apply as the estimated additional costs (and duration) for a foreign client, possibly a little less. The Belgian lawyer would usually only have to obtain the documents and send the same to a foreign co-counsel. Nevertheless, inclusive of postage and telephone costs, at least ECU 100 would have to be paid which would not be recoverable.

2.1.3 Recommendation of Forum

Belgian lawyers would recommend to commence the action at the defendant's place of residence in order to avoid complications with regard to service of process and the enforcement of the judgment after it is rendered.

2.1.4 Costs

The general principle on lawyer's fees is contained in article 459 of the Belgian Code of Civil Procedure and the Belgian National Bar recommendation of June 24, 1991, which have been incorporated in most local bar guide-lines. According to these guide-lines, lawyers may calculate their fees on hourly rates, on percentage values of the claim or on flat fees for specific procedures.

A percentage of 15% of the value is likely to be applied for simple cases with values up to ECU 6.600, thus the fees would be in the range of ECU 300 for a value of ECU 2.000, or less for lower values. For a value of ECU 50.000, a Lehman-formula would probably apply, 15% for the first ECU 6.600, and 10% for any additional amount. Thus, the lawyers fees would amount to approximately ECU 5.300 for such value.

For very simple matters or, when the claim is not fully recovered, the fees may be reduced by up to 50%. On the other hand, expenses are additional and may add up to 50% of the lawyers fees. Accordingly, for a claim of ECU 2.000, an amount of ECU 400, inclusive of costs but excluding correspondence counsel fees or travel expenses, appears to be a reasonable minimum if the percentage rate is applied.

In case an hourly rate is applied the same differs from firm to firm. A standard hourly rate, exclusive of costs, would be ECU 80, but various parameters such as the financial value of the case, the experience of the lawyer, the urgency, the complexity of the matter and the result achieved may be considered, and the hourly rate would vary accordingly.

In Belgium all members of the Bar may represent clients in all state courts throughout Belgium. In case the matter is handled in a different city, the fees and costs as aforesaid will in principle only be increased for travelling expenses. In case a corresponding lawyer mentioned is called upon, a minimum indemnity of ECU 52 plus costs is to be paid so that a minimum amount of ECU 60 would be appropriate in the comparative table.

If action is commenced abroad for a claim of approximately 2.000 ECU, the lawyers advise that the client corresponds directly with the lawyer abroad. For being helpful in selecting a

lawyer at the place where the case is to be brought in court or other assistance, it is likely that services will be calculated at the applicable hourly rate. Estimates have a wide range at a total between ECU 50 and ECU 300, plus expenses. An amount of ECU 50 seemed rather unreasonable, if an hourly rate is applied, since less than an hour of work would be quite unusual to give the client advice, searching for correspondent counsel and transmitting the documents. Following a percentage rate of 10%, as an alternative basis advised, the fees would range at about ECU 200 for a case value of ECU 2.000. Therefore, a total of ECU 250 inclusive of expenses can be reasonably assumed as a minimum amount for the purpose of the table.

No different costs are generally anticipated for foreign clients. However, the lawyers somehow preferred an hourly rate for foreign clients rather than the percentage, without reasons given. In consequence, this would lead to additional fees of at least ECU 100.

Contingency fees are prohibited for Belgian lawyers.

When a voluntary appearance in court is made, *i.e.* no writ of summons is served, the amount due to the court is:

- ECU 40 in case of proceedings before the Justice of the Peace,
- ECU 80 in all other cases before the Commercial Court and the Court of First Instance, and
- ECU 75 in the case of summary proceedings.

If the judgment contains a condemnation to payment of an amount in excess of ECU 13.045, 3 % registration taxes on the amount of the judgments are due.

The copy of the judgment constituting the enforceable title costs ECU 1,60 per page at the Justice of the Peace and ECU 4 per page in the Court of First Instance.

The bailiff's fees for service of process will comprise the costs for introduction of the case. For a claim in the amount of 2.000 ECU, the bailiff's fees will, depending on the number of pages,

the indemnification for the travelling distance, *etc.* vary between ECU 65 and ECU 250, costs for mandatory translations not included.

Translator's fees ranging from ECU 1 to 2 per line are customary but not mandatory. An apostille or certification is charged at ECU 5.

As a minimum, therefore, the preparation of foreign service of process or transmissal for a short complaint to be brought abroad should be at least ECU 100 plus the bailiff and translations.

2.1.5 Cost Recovery

The loosing party will be condemned by the court to reimbursement of all court expenses, to be increased with fees paid to experts provided experts were appointed by the court, and to an additional "judicial indemnity" or fixed amount in lieu of legal fees to be paid to the other party. The amount of the judicial indemnity is established (and adapted) by Royal Decree. Such indemnity depends on the value of the judgment and ranges between ECU 100 and ECU 300 for values between ECU 500 and ECU 50.000. The indemnity for a condemnation to payment of 2.000 ECU is ECU 150.

In Belgium each party bears in principle its own lawyer's fees. The court will not condemn the loosing party to reimbursement of the winning party's lawyer's fees. In a specific exceptional case the Belgian Supreme Court decided that the loosing party was to be condemned to reimbursement of the winning party's lawyer's fees. In principle, foreign lawyer's fees are not recoverable in the event the plaintiff wins. However, there exists some rare case law which decided that, when the foreign lawyer's fees are established by law, reimbursement of such fees can be obtained.

2.1.6 Duration

If the defendant is represented in court it may take between 5 and 12 months to obtain an enforceable judgment in the first instance, and it cannot be excluded that it may take more than 12 months, *i.e.*, between 12 and 24 months. Default judgments are rendered at the date of

introduction and an enforceable title is available, depending on the court, after a few days or at a maximum of 1 month.

2.1.7 Summary and Advice

If the claim is properly documented and if the party who should pay is a solvent debtor, the lawyers' recommendation will be to send a dunning letter, and, if the dunning letter remains without reply, to commence proceedings. An advance payment for fees and bailiff's costs will be asked; it would be wise to make an agreement with the lawyer on the maximum of fees to be incurred, or, as the case goes on, to evaluate whether continuation of the proceedings are still justified.

The amount of fees one receives are not the only element to be taken into account when it is to be decided whether the case is taken on or not. It certainly is an important element, but not the only one, and in some cases not a decisive one. One may decide to take on a case because justice should be done or because other considerations exist.

In order to adequately advise the client and before taking any steps, the lawyers advise that information should be obtained on the financial status of the foreign debtor. Moreover, the professional quality of the corresponding lawyer in the other country will be extremely important. In case professional links (partnership, organisational ties of any sort) exist, one will feel more confident to start proceedings abroad. However, their experience shows that occasional correspondents abroad may do a very good job, or occasionally, may not provide the standard of professional diligence one would like to obtain. One should not conceal that the value of the claim is an important element in deciding on the efforts a case may justify, but it is not the only nor the single decisive element considered by Belgian attorneys. Assuming the claim is ECU 2.000 it will have to be examined whether it is a clear-cut case or not.

2.2 DENMARK

2.2.1 Civil Proceedings

The court system in Denmark primarily consists of city courts which are in all towns. Two appeal courts are in Copenhagen which has the competent jurisdiction for east Denmark and the other is in Viborg which is for west Denmark. The Supreme Court which sits in Copenhagen is for the whole country. In cases with a value in excess of approximately ECU 70.000, each party may request a proceeding before the District Court.

Depositions in Denmark must be made through diplomatic channels to the Danish Ministry of Justice who will send it to the appropriate court. Any sworn statement made out of court is inadmissible.

The Hague Convention is in force in Denmark. Generally, there is no translation of the documents required but the recipient of the served document may refuse to accept service if the document has not been translated. The duration for the return of process requests, as reported by other Member States, is 1 to 2 months.

2.2.2 Recognition and Enforcement

Denmark has so far approved only the 1982 amendment of the Brussels Convention. Denmark has not yet ratified the 1989 amendment of the Brussels Convention or the Lugano Convention. Nevertheless, a Danish court may also render a foreign judgment not falling under the conventions enforceable after appropriate examination of the judgment. However, under the Convention, the procedure usually takes at least 3 months, otherwise about 6 months, if special difficulties arise in either event, more.

It is not compulsory in Denmark to have a lawyer for the recognition proceeding, although the court may sometimes direct that a party be represented by a lawyer on an appeal. According to the "lawyers' fee guide-lines", the lawyers' fees for such a matter would be approximately ECU 200, plus court fees of ECU 50.

The costs for the enforcement itself will be approximately ECU 250. In general, not all the costs will be recoverable even though the defendant will be ordered to pay some costs. The estimated duration will be three to six months, four months being a reasonable minimum duration. If special difficulties arise, it may take more time.

As with the preparation of a proceeding abroad, preparation costs for the enforcement of a Danish judgment abroad would be billed by the hour plus expenses. Estimates range between ECU 200 and ECU 500. Including expenses but without translations the cost should amount to at least ECU 400.

2.2.3 Recommendation of Forum

Danish lawyers would recommend a client to commence action at home since it is their experience that the costs in a domestic case would be much lower than the costs connected to a case abroad. Further, the procedural rules and the court system will be well known.

2.2.4 Costs

Lawyer's fees in Danish court cases are regulated by the Danish lawyer's fees guide-lines issued by the Danish Bar. The lawyers follow these guide-lines unless a special agreement with the client has been made. The court fees are regulated by the Danish Act on Court Fees.

The estimated costs and fees for a first instance proceeding with a value of ECU 2.000 will be ECU 703 in lawyer's fees according to section I of the lawyer's fees guide-lines, and ECU 95 in court fees according to section 1 of the Act on Court Fees. Whether other costs will incur such as costs related to correspondence, research of a party's address, translations, certifications *etc.* will depend on the actual case, but will, if necessary, be added to the court fees and the lawyer's fees. Accordingly, a total of ECU 850 must be reckoned with, exclusive of translations.

No additional fees are charged for service of process in Denmark. There is currently an on-going discussion in Denmark to privatize this sector of court work which may change the

situation, particularly when the request for service of process comes from abroad so that it cannot be included in the Danish court fees.

The fees would be the same, regardless of whether the party resides in Denmark or abroad. For a foreign party, additional certification and translation costs may occur, including translation of testimonies given in court. Without translations, a reasonable minimum would amount to ECU 50. Foreign counsel fees would be additional.

Correspondent lawyer fees a generally billed by the hour, with a minimum of ECU 100 to be taken into account.

There are no special Danish fees connected to commencing an action abroad. The lawyer's fees guide-lines do not apply to cases abroad. Hence the lawyer's fees will be based on an hourly basis and the costs therefore depending on the amount of working hours. A rough estimate could be in the range of ECU 500.

Contingency based fee arrangements are not made in Denmark.

2.2.5 Cost Recovery

Generally, not all the costs and fees are recoverable from the other party in a successful case. The court orders the losing party to pay costs on the basis of the value of the case. In other words, not all costs are recoverable even though the defendant is ordered to pay some costs. Foreign counsel fees would generally not be recoverable. The same applies in proceedings for recognition of foreign judgments.

2.2.6 Duration

The estimated duration before receiving an enforceable judgment in first instance differs depending on whether any procedural problems arise or whether expert guidance is necessary. However, the duration will seldom be less than six to eight months and in many cases between one and two years, eight months being a reasonable minimum.

The duration for incoming requests for service of process is about 6 weeks.

2.2.7 Summary and Advice

In light of the relatively moderate fees, Danish lawyers would recommend their client to commence actions at home for all cases but not abroad. Also, executions of foreign judgments would be taken on as well as the execution of Danish judgments abroad.

As a caveat, however, in the cases where the lawyer's fees guide-lines apply, the lawyers would enter into an agreement with their client that these were only to apply if the case is straight forward and if no special difficulties arise. In so far, cases with values under ECU 2.000 might not be taken on, if such an agreement cannot be made or where the result makes the case unfeasible for the client.

2.3 GERMANY

2.3.1 Civil Proceedings

The court system in Germany is a single system whereby the scope of the jurisdiction depends on the matter at stake.[23] The lowest court is the Amtsgericht (Lower Court) which has jurisdiction for matters under a threshold value and where the hearings are conducted before a single judge. Lawyer representation is not generally required in the lower court.

The Landgericht (District Court) hears appeals from the Amtsgericht on reason of fact or law as well as first instance matters above the threshold value of currently ECU 4.500. This may be heard before three judges unless it is believed that one suffices. Representation at this level must be taken by a lawyer. Further appeal may then be taken to the Oberlandesgericht (Court of Appeal) with further appellate action to the Bundesgerichtshof (Federal Supreme Court) in Karlsruhe if the matter started at the District Court level. Appeals at this level may only be taken on questions of law only. The District courts have a division in civil and commercial chambers. It should be noted that while the assignment of judges or civil chambers generally follow alphabetic principles, certain types of cases, *e.g.*, road traffic liability, may be assigned to designated chambers. At the Hamburg District Court, uniquely in Germany, a special designation to three chambers has been instituted for international matters.

Affidavits as such are unknown in Germany. However a written statement (eidesstattliche Versicherung) may be executed and can be admitted for evidence. In practice, such affidavits are only used for injunction proceedings. Statements from abroad should be sworn before a notary and be annexed with an apostille or sworn before a German consul. A formal affidavit may be sworn to in Germany for use in other countries depending on the requirements under the respective law.

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23 Please refer to the separate chapter on Germany for further information.

Letters rogatory will be executed by German Courts. The procedure for such is via diplomatic channels. This is further governed by the provisions of the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters March 18 1970.

The German Civil Procedural law provides for a summary procedure ("Mahnverfahren", §§ 688 *et. seq.* Zivilprozeßordnung), which is permissible against debtors in other EU-Member States, except Austria.

A foreign judgment rendered in a summary or simplified debt collection procedure can be executed in Germany if it meets the conditions of article 25 of the Brussels or Lugano Convention.

A further requirement is that foreign parties must engage a lawyer (or at least any other agent for service of process) at the place of jurisdiction in order participate in a German proceeding even if, for German parties, lawyer representation is not required in the lower courts. Generally, translations of the relevant documents are required for all German Court activities.

A special note should be made for the comparatively short statutory limitation period of only six months from the date of delivery of a product for most warranty matters which may be difficult to observe for a foreign consumer.

In addition to the Hague Convention, Germany has concluded several bilateral treaties which allow direct transmissions between German courts and courts from other EU-Member States. A translation of the document to be served in Germany is required. The duration for the return of process requests, as reported by other Member States, is 1 to 2 months.

2.3.2 Recognition and Enforcement

Other than in cases covered by the conventions or bilateral treaties, a court in Germany will generally recognise a foreign judgment under the proviso of reciprocity. However, if under the provisions of German law, the court would not have jurisdiction, or where the judgment is contrary to German public policy, the defendant in Germany was not served through the German authorities, then the judgment is often not enforceable.

The Lugano Convention is in force since March, 1995. The provisions of the Conventions are complemented by a "law regarding the performance of international conventions of recognition and enforcement in civil and commercial matters" ("Gesetz zur Ausführung zwischenstaatlicher Anerkennungs- und Vollstreckungsverträge in Zivil- und Handelssachen, AVAG").[24] This law establishes certain conditions which the applications for enforcement have to meet.

The proceeding prescribed by the AVAG does not require an attorney on principle.[25] Only if an appeal is lodged by any of the parties the proceeding may lead into an oral hearing which in certain cases requires a local lawyer. Nevertheless, the applications are normally filed by local lawyers.

In the proceeding, court fees as well as lawyers fees may arise.[26] While court fees are lower than or a full proceeding, according to the applicable statutory provisions the lawyers are entitled to the full fee as for a first instance proceeding. Since oral evidentiary hearings can be generally avoided in this type of proceeding the fees would be slightly lower with a total of ECU 350 to be reckoned with. The costs are recoverable from the debtor. The duration is about four to six weeks.

Attorney fees, court fees and bailiff fees for the enforcement itself are about a third of the fees which apply for a full fledged proceeding, approximately ECU 200 in total. If a lawyer has been engaged for the case previously, his fees may to some extent be covered by those previously earned. All costs which are within the framework of the statute are recoverable. The preparation of documents, service of process and the activities of the bailiff for visiting the debtor, attachment of movable assets or income, *etc.*, would generally take about 4 months.

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24 Anerkennungs- und Vollstreckungsausführungsgesetz - AVAG, of May 30th, 1988 (BGBl. I, page 662).

25 § 5 II AVAG.

26 Application: ECU 75 (Anlage 1 Gerichtskostengesetz [GKG], Teil I, IV, " b, Nr. 1426). Beschwerdeverfahren gegen die Entscheidung über die Zulassung zur Zwangsvollstreckung: ECU 110 (Anlage 1 Gerichtskostengesetz [GKG], Teil I. IX, Nr. 1901). Rechtsbeschwerdeverfahren: ECU 150 (Anlage 1 GKG, Teil 1, IX, Nr. 1903). Attorney's fees are calculated as a full proceeding pursuant to the relevant statutory provision of § 47 BRAGO.

If a domestic client asks for the execution of a domestic judgment abroad, pursuant to Section 118 of the Federal Attorneys' Fees Act, German lawyers would charge a general fee for out-of-court work. Given a value in dispute of ECU 2.000 ECU, this could be up to ECU 160. Of course, additional expenses for translations, *etc.* have to be added. At least a month should be taken into account for the preparation. If the value is ECU 500, the general fee for out-of-court work could be up to ECU 80 and up to ECU 1.800 if the value in dispute was 50.000 ECU.

2.3.3 Recommendation of Forum

As will be further stated below, the German legal system is exceptional in that it allows for (almost) full recovery of all costs by the successful party. This makes a proceeding in Germany highly recommendable when the chances of success are estimated to be very high. However, the rule necessarily also doubles the cost risk if the plaintiff does not succeed and this must be taken into account when there are even a few doubts about the success. The same, in fact, applies for the court fees and the consumers own lawyers fees in the event of success when the enforcement of the judgment against the defendant fails for whatever reason.

Other than that, German lawyers would, however, rather prefer to bring a suit in Germany. There are several reasons for this assessment. Commencing legal proceedings abroad would mean retaining foreign correspondent counsel and would result in additional costs, which the client would have to bear if there is no possibility to recover all of these costs if he wins.

Secondly, bringing a suit in a foreign country also produces additional costs from the German lawyer and is likely to result in time delays due to the necessary translations.

Third, a German lawyer stated that, if he were to commence the action at home, he would remain in control of all the proceedings and attorney-client communication would probably go smoother.

2.3.4 Costs

As a matter of precaution, it should be stated that international lawyers will try to agree with the clients on charging an hourly fee if the matter might be difficult or time-consuming and the statutory fee would not cover the necessary work. However, the following figures refer to the statutory fee which is binding unless otherwise agreed in writing.

To file suit, the plaintiff has to pay court fees in advance, the amount of which depends on the value in dispute. Given that the plaintiff purchased an item with a value of approximately 2.000 ECU, the value in dispute would be 2.000 ECU. According to the German Court Fees Act, the court fees to be paid by the plaintiff would amount to approximately ECU 240 in this case. In addition to that, the plaintiff, of course, also has to pay the fees for his attorney. In Germany, the attorneys fees are regulated by the Federal Attorney's Fees Act. Given a disputed value of 2.000 ECU, the attorneys fees pursuant to Section 31 of this Act would total approximately ECU 500. The total costs would therefore be ECU 740.

If the action has to be commenced in another EU- Member State according to Section 52 of the Federal Attorney's Fees Act, a German lawyer would charge as the domestic counsel the same fee as a correspondent counsel. With a value in dispute of 2.000 ECU, this would be approximately ECU 160. Expenses related to translations and certifications would be charged directly to the client.

If a foreign client asks a German lawyer to be represented in an action against a defendant in Germany, the court and statutory lawyers' fees will be the same as if a domestic client would do so. Therefore, the same fees as described above will be incurred. Additional costs for transmissions and other expenses can be charged by the attorneys and should be at least ECU 30.

Court fees and attorneys fees will be influenced by the value in dispute. Under the scenario described above, court fees will amount to ECU 100 if the value of the purchased item was 500 ECU, and ECU 1.500 if the value in dispute was 50.000 ECU. With these values in dispute, the attorneys fees would be approximately ECU 190 and ECU 3.450 for each party.

2.3.5 Cost recovery

Due to Section 91 of the German Code of Civil Procedure, all the court fees and attorneys fees according to the Federal Attorneys Fees Act are fully recoverable from the losing party. Lawyers fees billed on an hourly rate are only recoverable up to the amount provided for by the Attorneys' Fees Act. Additional fees have to be borne by the client.

The additional costs of a correspondent counsel in Germany are usually recoverable in the event that the plaintiff wins and for good reason shown for the engagement of counsel in a different place. As to the foreign lawyers' fees, the law is not quite clear. It seems that the majority opinion is that foreign attorneys fees can be recovered up to the amount of the fees of a correspondent counsel, *i.e.*, in the case described above case up to ECU 160. Recent decisions, however, have been more reluctant to allow the winning plaintiff recovery of foreign lawyers' fees. It has been argued that at least individuals and corporations who do some significant business in Germany and are to some extent familiar with the German business and legal environment do not need foreign lawyers' advice in every case. From the court's perspective, those foreign individuals and corporations are in smaller and relatively easy cases required to directly retain a German lawyer. Consequently, the courts hold that under these circumstances foreign lawyers' fees cannot be recovered (see, *e.g.*, OLG Hamburg, Jur Büro 88, 1031).

2.3.6 Duration

The duration of a civil suit varies locally and within divisions of a court. On average, it would take between 6 and 12 months for a cross-border consumer complaint to receive an enforceable judgment in the first instance, with 8 months being a reasonable minimum time frame, exclusive of the time of about one months needed for service of process and defendants first response.

The service of process to a foreign country might take more time than domestic service. Since most periods in court only begin to run upon service to the other party, time delays may occur.

In Germany, an additional month has to be taken into account and the procedural rules generally awards foreign defendants a longer time to respond to a complaint.

The duration of the procedures and the difficulties arising will not be influenced by the value in dispute.

2.3.7 Summary and Advice

One lawyer stated that, if he was very sure to win the case, he would not hesitate to recommend to commence the legal action in Germany. If, however, the outcome of a lawsuit was unpredictable or if there was any chance of losing the case, the financial risk of losing the case had to be weighed against the value in dispute. Since usually other factors have to be considered as well, there is no general guide-line as to when to commence legal action and when not.

Generally speaking, the higher the value in dispute, the higher the attorneys fees according to the Federal Attorneys Fees Act, and the more attractive the case. However, the decision whether to take on a case can also be influenced by other considerations.

Since the attorneys fees according to the Federal Attorneys Fees Act depend on the value in dispute, cases that require little legal work can result in high fees. Under such circumstances, one lawyer thinks it to be appropriate to reach an agreement with the client based on the lawyer's time actually worked on the case and other case-related costs.

As for the lower values, for cases with an international aspects, the lawyers would prefer an hourly rate agreement, making the case potentially more profitable for the lawyer but less feasible for the client.

2.4 GREECE

2.4.1 Civil Proceedings

In Greece, there are no special commercial courts, cases are dealt with by the lower courts called the courts of peace.[27] Appeals to the Supreme Court are on questions of law only.

Affidavits are not generally accepted as strict evidence. Where foreign evidence is not taken in a court, it is advised to have the evidence sworn before a Greek consular officer. If they are to be taken abroad then a Greek consular officer must sign them. This is provided for in Law Decree 105/1969 1599/1986 as a form of simplified form of sworn statement. In Greece, a deposition may be made before a notary public or Justice of the Peace.

Greece is Member State of the Hague Convention. The Central Authority does not charge fees for its assistance. A translation of the documents to be served is required. The Central Authority estimates the duration for the handling of incoming requests for service of process to be about 6 weeks. The duration for the return of process requests, as reported by other Member States, is 2 to 4 months.

2.4.2 Recognition and Enforcement

If a decision from a foreign court has previously been declared executable by a decision of a proper Greek court then under the Code of Civil Procedure Art. 905, a foreign civil judgment will be enforced by a Greek court.

The Brussels Convention is in force in Greece but not the Lugano Convention. Other than where a convention or bilateral treaty applies, the judgment will only be enforced if the following conditions are satisfied.

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27 Please refer to the separate chapter on Greece for further information.

Firstly, the judgment must be enforceable by the court which issued it. Secondly, it must not be contrary to good morals or public policy according to Greek law. Thirdly, according to the terms and provisions of the law of Greece, the court which issued the judgment must have had the competence to do so. Fourthly, that the concerned party must have been given an appropriate right of defence for if he was denied such a right then this denial must be equally applicable to the nationals of that state. Finally the judgment must not be contrary to a previous judgment of a Greek court. Any application for enforcement requires a lawyer in Greece.

In order to have a foreign court order enforceable in Greece, a local court order is needed. The lawyer's time needed for such a proceeding was estimated at approximately 20 - 30 hours for simple cases, plus expenses, which could lead to costs in the range of a total of ECU 200-300 and would cover the handling until the issuance of a local court order ratifying the foreign court order. According to other accounts, the costs for the recognition and enforcement of a foreign judgment were estimated to be 20% more than the costs of a first instance proceeding brought entirely in Greece (see, below). According to this figure, a minimum of ECU 300 must be taken into account.

The duration would be about the same as for the issuance of a domestic court order, as it usually takes approximately another 6-12 months for the issuance of the local court order of enforcement. However, if the defendant does not wish to comply, the whole recognition procedure may last up to 2 years. Therefore, at least a year and a half should be taken into account, and the costs not recoverable at all.

The enforcement itself, whether from a domestic or recognized foreign judgment, generally is relatively expensive and extremely time consuming. Several service attempts (at least 5) have to be made, each generating costs and delays. It is estimated that the entire enforcement may easily cost up to ECU 500. The minimum duration is about 2 months, but it may take much longer and one should consider at least a year.

For a judgment which is to be enforced abroad, in Greece, at least ten to twelve months would be needed until the judgment is delivered, typed, certified by the judge, published by the secretariate, served abroad and expiration of remedies.

The Greek portion of any action or activity to be brought abroad was estimated at ECU 85 in lawyers' fees and an additional ECU 10-20 per page for translation and other expenses, with a total of ECU 100 exclusive of translations and the time needed would be about 2 months, including delays occurring for the translations.

2.4.3 Recommendation of Forum

If it is jurisdictionally possible, Greek lawyers recommend bringing the action at home mainly for expense purposes and because of their better knowledge of the local judicial system.

In fact, as further outlined, below, the cost of legal actions taken in Greece are relatively much lower than those of the EU- Member States. Among the contributing factors mentioned (other than a different price and wage structure) were the low overhead costs borne by Greek lawyers, most of whom do not employ a secretary and that part of the routine job is covered by trainee lawyers who do not claim any or little payment. Also, competition among lawyers was cited to be extremely high. A large number of lawyers qualify every year. For example, the Law Society of Thessaloniki, a city of 1.000.000 people, has more than 5.000 registered lawyers.

2.4.4 Costs

Court fees are relatively moderate. If the demand in the lawsuit is simply the recognition of the plaintiffs' claim there are no costs involved other than a standard stamp duty which varies from ECU 2 - 10. If the demand in the lawsuit is that the plaintiff obtains an enforceable court order against defendant, then the court fees are approximately 1% on the amount claimed/disputed and should be prepaid. The stamp duty mentioned is less than ECU 0,20 per page. The complaint itself must carry additional stamp duty in the range of ECU 1 to 4 in courts of first instance. An additional duty (dikastiko ensimo) of 0,6% is applied on the claim amount. For a claimed amount of ECU 2.000 this would therefore be in the range of ECU 12.

In addition, there are fees for service of process which, where the same is made in town of the court or in the suburbs thereof, the fees of the court bailiff vary from ECU 10 to 20, whilst for services in other parts of the country they charge additional fees depending on the distance involved. An amount of ECU 20 should therefore be seen as the necessary minimum.

The costs for translations may be agreed to be a part of the legal work or as an independent cost. The usual fee for translations made by independent translators is ECU 10 - 20 per page. Official translations which are acceptable to the Greek courts are those only of Greek lawyers and of the Ministry of Foreign Affairs. The costs for these range between ECU 7,50 per page for lawyers' translations and ECU 5 per page for regular service and ECU 8,30 per page for urgent requests to the Ministry of Foreign Affairs.

The approximate cost for an apostille are ECU 2-3. Certain other authentications by lawyers, notary publics and police stations range between ECU 1 for a signature authenticated at the police department to ECU 7,50 per page for a copies authenticated by a lawyer (plus ECU 1,30 additionally for stamp duty per document).

Courier costs for Europe would be ECU 17 for a simple document.

With regard to attorney fees, an official minimum attorney's fee table issued by the tax officer and the bar exists which provides for fees in the range of 2% of the value at stake, but is rarely applied. According to the existing practice in Greece, there are three main methods for a client (foreign or domestic) to agree the fees payable to his attorney for the handling of his case by the latter, *i.e.*:

(a) an agreement on the fees and/or the expenses on a "lump-sum" basis for one or more cases or for one or more stages of the same case. A reasonable amount for a first instance proceeding in the presented case scenario was estimated at ECU 130 to ECU 330.

(b) an agreement on the fees on a contingency basis, in most of such cases, the payment of the attorney's fees is conditional to the favourable outcome of the respective case. A usually applicable contingency fee is 25 % on the amount disputed or to be awarded by the court. However, there are no standards on this and the parties are free to agree to a contingency fee

lower or higher than 25 %. In such cases, it is also usual that the client may agree an advance payment of a "lump-sum" amount to his attorney to cover the expenses involved which is not refundable and which subsequently may be off-set with the final contingency fee (depending on the outcome of the case). The parties may also provide in their agreement whether the costs shall be or shall not be included in the said contingency fee.

(c) an agreement on the fees on an hourly basis, plus expenses. The hourly rates vary from firm to firm and from client to client, and are estimated at between ECU 25 and ECU 35 per hour.

In light of the above, the costs do not change dramatically in case of variation of the amounts of the claims involved.

The minimum legal fee for representation in court is ECU 30 to 35.[28] Taking into account these calculations, a reasonable minimum amount for a first instance proceeding of the type presented would be about ECU 250.

If the action is brought to a court outside the lawyer's jurisdiction then he has to represent his client together with a lawyer appointed by that Court. Consequently, the representation expenses of ECU 30-35 will be doubled (as correspondent counsel fees).

It should be noted that, private individuals do not pay VAT for legal services.

For foreign clients, the lawyers would charge an increased fee by 30%, *i.e.*, ECU 75-80, to cover additional work that may be involved.

2.4.5 Cost Recovery

The court has the option to either set-off the court expenses due to a "reasonable doubt" the defeated party may have for the outcome of the case or award the court expenses in favour of the winning party. In practice, the costs are not totally recoverable because the courts usually order the payment of the expenses at the minimum rates which do not reflect the actual amount

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28 10% of the amount will be withheld by the Bar Association.

paid. Actually, the courts generally entitle the winning party to no more than ECU 65 which is customarily withheld by the lawyer as a supplement to his fees.

The expenses incurred for the fees of a foreign lawyer will generally not be recoverable following the court order, even if the plaintiff wins since the ECU 65 limitation applies.

2.4.6 Duration

The estimated duration for obtaining a first instance court order varies from 1 to 2 years depending on the subject of the case and the jurisdiction it is subjected to. Another 1-2 years are needed for the issuance of a final court order. Such limits are greatly depending on the tactics of the defendant (*i.e.* whether or not he exhausts all remedies granted to him by law). Accordingly, one should allow for at least 2 years, in aggregate.

2.4.7 Summary and Advice

Greece seems to be the one country with an extremely reasonable fee structure for all items involved. The duration is above average but still not the longest in comparison. Therefore, the advice given by the attorneys to litigate in Greece, where possible, does make sense.

However, if the value of a particular case is 500 ECU, they would still advise that the plaintiff not initiate court proceedings. Rather, they would advise to attempt one or two dunning letters for which the lawyer would charge ECU 50. If unsuccessful, they would recommend not to proceed any further.

If the value was ECU 50.000, the case would be heard to the Court of First Instance sitting in 3 members. It would take almost 3 years to reach a decision and the fees would increase to ECU 670.

2.5 SPAIN

2.5.1 Civil Proceedings

For judicial purposes the State is divided into territories, municipalities and autonomous communities. The courts are divided into the following sections: the Justices of the Peace, (District) Courts of First Instance and Instruction, Litigious Administrative, Social Courts, Penitentiary Supervision and Minor Courts, Provincial Courts, Higher Courts of Justice of Autonomous Communities. The National Court and the Supreme Court exercise judicial power over the whole territory. The Supreme Court is the final court for all matters except those of a constitutional matter which are dealt with by the Constitutional Court. This is governed by the Organic law 6/1985 July 1. The case type presented would likely fall within the jurisdiction of the (District) Courts of first instance. A lawyer would generally not be necessary if the value of the case is below approximately ECU 5.000, but a procurator must be used, if the case value exceeds ECU 500. A simplified procedure does exist.

Depositions in Spain must be made before judges or tribunals. Letters rogatory may be sent through the Ministers of Justice to the foreign tribunals. If the deponent lives in distant place then the judge sends the inquiry together with a letter rogatory to the place of enquiry. Article 300 Law of Civil Procedure provides it necessary to abide the principle of reciprocity. Certain treaties exist for the free performance of such letters but the general rule is that the interested party must apply for it.

Spain is a Member State of the Hague Convention. The Central Authority does not by law require a translation of the documents to be served. There have been complains from other Member States that service in Spain under the Hague Convention is particularly slow takes at least 12 months and may easily take up to 18 or 24 months, or more and is apparently dealt with at complete random. Often, applications for service of process in Spain are returned after a year without delivery or do not get returned at all and get lost, somehow. It has been recommended by some officers from other Member States to ask a lawyer in Spain for assistance in "convincing" the Central Authority and the following institutions to handle the

particular matter. Another alternative practiced is to employ other methods of service as may be available under the procedural laws of the country of origin, such as registered mail, consular officers and service by publication, if there is no response after some time. Accordingly, in contrast to the other countries, for which no expenses were noted for this procedural step, an amount of ECU 200 was provided for in the table.

2.5.2 Recognition and Enforcement

Other than convention cases, judicial decisions of a foreign country may be enforced in Spain under the principle of reciprocity or when the judgment is in accordance with that of a Spanish one.

All procedures of application for recognition and enforcement require an attorney. The fees for an application and the procedure for recognition and enforcement under the Brussels/Lugano conventions are a little lower than those for a full proceeding, approximately ECU 500 in total for the lawyer and the *procurador*, inclusive of costs but without translations. The enforcement itself would cost at least another ECU 200.

For the preparation of any proceeding to be brought abroad, the Bar Association fee schedules remain silent. If an hourly basis is not used, a contingency agreement for 25% of the foreign proceeds was held to be reasonable. The same would apply for the preparation of the enforcement of a Spanish judgment abroad. Accordingly, one should account for ECU 500 for a case value of ECU 2.000.

2.5.3 Recommendation of Forum

In the majority of the cases it is recommended to raise the action at the place of residence of the debtor as an eventual execution can then be enforced faster and with lower costs. On the basis of certain differences in the material and procedural law, for some matters, one of the lawyers would prefer to commence a proceeding in Germany rather than in Spain. Particularly the strong formalisation of the Spanish procedure which is almost entirely in writing and the lack of the possibility to negotiate a settlement in court is mentioned as a specific disadvantage in Spain.

The same lawyer would also prefer, if possible, to force the proceeding to take place in Germany if he were to represent a Spanish defendant, as he recognizes particular difficulties in the enforcement stage which would benefit the client.

2.5.4 Costs

In Spain, each Bar Association releases an own schedule of fees for its own range. Nevertheless, in general, all these schedules of fees are classified rather similarly and move in a similar fee's level. The lawyer's payments depend on the value in dispute and on the nature of the activity to be pursued. Time payments are approved. Quota-litis-agreements are not admitted in principle but are apparently used for procedures abroad. The payment's rates provided by the several schedules of charges are minimum rates which can be increased by the lawyer if the particular difficulty of the affair requires an increase. A lower fee is only allowed in reasonable exceptional cases. If there is disagreement on the bill, the client has the possibility to apply to the corresponding Bar Association directly to ask for an examination of the invoice. Lately, the admissibility of the schedule of charges issued by the Bar Associations is contested, with reference to the law against restraints of trade, and there are some efforts to force the Bar Association to remove the schedule of charges. To avoid discrepancies between client and lawyer several Bar Associations have created blank form contracts which are used frequently, in particular in extensive proceedings.

In addition to the lawyer's fees charges for the *procurador*, or barrister, will be due. In contrast to the lawyer's fees these charges are settled uniform by legal regulation which is valid over the entire Spanish territory. The charges of the *procurador* also depend on the value in dispute and on the kind of the chosen proceeding.

In the case of an action with a value in dispute amounting to ECU 2.000 the lawyer's fees are approximately ECU 500 and the fees for the *procurador* approximately ECU 100.

In principle, each lawyer authorized by a Spanish Bar Association can also act in each other district but he has to advise his activities to the Bar Associations there and has to pay a corresponding fee to this Association (habilitation). In case of a proceeding involving

ECU 2.000, the habilitation costs will amount to approximately ECU 80 and which would be the equivalent to correspondent counsel fees. For oral hearings, travel expenses may have to be added (but have not been considered).

Additional charges for foreign clients are not anticipated but, additional expenses in the range of ECU 50 should be considered, exclusive of translations as may be necessary.

The administration of justice is in principle free of charge.

2.5.5 Cost Recovery

Regarding the distribution of the costs there is no set rule. The Spanish code of civil procedure simply advises that the loosing party also has to bear the costs of the opposite party. Ultimately, the decision on the distribution of the costs is in the discretion of the judge. In principle, execution costs as well as the costs for recognition and enforcement also have to be borne by the losing party.

2.5.6 Duration

In principle, for a first instance action a time period of about 12 to 16 months can be estimated, though considerable differences are possible depending on the individual affair. For the purpose of the table, the minimum of 12 months has been selected. Service of process in Spain takes about one month.

The duration for the recognition of a foreign judgment would be about 6 weeks. The enforcement itself would take another 6 months or more.

2.5.7 Summary and Advice

For the client, the fees seem quite reasonable, at about 25% of the value. However, another 25% would have to be added for the execution abroad, raising the total to 50%. Some of it may be recoverable, the contingency agreement for the enforcement having the advantage that it is risk-free for the client.

Not surprisingly, the lawyers themselves would rather not take on a case for a value of ECU 2.000 or less under such an agreement. Rather, they would ask for special rates which would change the calculation. For a claim of ECU 50.000, the lawyers would apply the official fee schedule. ECU 2.000 seems to be about the threshold value.

2.6 FRANCE

2.6.1 Civil Proceedings

The French Court System is fundamentally divided into two, the judicial and the administrative courts. Where a problem arises as to the jurisdiction then this is decided by the Tribunal des Conflits.

As regards courts of first instance in civil matters, the Tribunal d'Instance has jurisdiction for claims up to the amount of approximately ECU 4.500 and some other matters regardless of the amount. For higher amounts, the Tribunal de Grande Instance is the competent court. The Cour d'Appel hears appeals from the Tribunal de Grande Instance. A decision may be reversed on both points of law and fact. The Cour de Cassation sits in Paris and may quash or refer a decision back to another court. Advice may be sought from the Cour de Cassation where the area of law is seemingly problematic. This opinion, although not binding on the court who referred, it must be communicated to the parties.

Through the provisions of the Convention on Taking Evidence Abroad in Civil or Commercial Matters 1975, letters rogatory may be submitted to the Ministère de Justice who will then pass them onto the competent authorities. Non-signatories to the Convention may pass letters rogatory through the appropriate diplomatic channels and unless otherwise provided, depositions are executed in accordance with French procedure. Foreign depositions may be used in France provided they do not violate French public policy. Appraisal of such depositions is left to the discretion of the court.

In accordance with the provisions of French law there is no analogous instrument to an affidavit. A non-notarised declaration of honour "declaration sur l'honneur" may be used in civil proceedings. Letters rogatory may be submitted by countries signatory to the Convention on Taking Evidence Abroad in Civil or Commercial Matters to Ministère de la Justice in France which will then communicate them to the relevant authority. Non-signatories to the Convention may follow this via diplomatic channels.

French law offers a summary debt collection procedure. The proceedure is not permissible against debtors in other EU-Member States: According to article 1406 NCPC the procedure has to be filed in the court where the debtor resides. Notwithstanding, the court of justice has decided that a decision in a summary debt collection proceeding has to be considered as a decision in the sense of the article 25 of the Brussels Convention.[29] An order made under a simplified debt collection procedure from another Member State is enforceable in France.[30]

The Hague Convention is enforced since 1972, but in addition there are bilateral treaties which allow direct transmissions between French courts and courts from Germany, Belgium, Italy and Luxembourg. The procedure is free of charge with the exception of the activities of the bailiff who charges a fee. Generally, there is no translation of the documents required but the recipient of the served document may refuse to accept service if the document has not been translated. The duration for the return of process requests, as reported by other Member States, is 2 to 3 months.

In 1994, the French Central authority has received a total of 804 applications for service of process from: Austria 84, Spain 230, Finland 5, Greece 96, Norway 109, Netherlands 198, U.K. 73, Sweden 9. According to French law service applications are sent by the Central authority to the competent courts who proceed sending them to the police. The Central authority needs two days and the following steps between 2 and 3 months. The procedure is free of charge with the exception of the activities of the bailiff who charges ECU 40.

2.6.2 Recognition and Enforcement

If a foreign judgment does not fall under a Convention or bilateral treaty, the Cour de Cassation will grant recognition and not review the facts of the case but the jurisdiction of the court, the conformity to French international policy and the right of defence, the consistency of

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29 case Klomps c/ Michel of 16. June 1981 (aff. 166/80).

30 The Cour d'appel de Paris (arrêt of 23. February 1990 , D. 1990 inf. rap. 99) has decided that a German Mahnbescheid may be executed in France.

the judgment in relation to public law and the absence of fraud. Enforcement is possible when the decision is in accordance with French law.

For convention cases, according to article 311-11 Code de l'Organisation Judiciaire, the tribunale de grande instance is competent for enforcement applications. No lien attaches until recognition is granted.

All application have to be filed by a lawyer (articles 812 and 813 Nouveau Code de Procedure Civile). Notwithstanding the EC directives regulating the liberalization of legal professions in the EC, these lawyers have to be French lawyers. A translation of the most important documents is generally required.

The procedure is free of charge, but there may be attorney's fees. The judge may decide that costs are recoverable (article 700 NCPC) taking into account issues of fairness and the economic situation of the loosing party.

Requests for recognition and enforcement mainly come from Germany, Belgium and Italy. These requests mainly concern transnational commercial matters (unpaid bills, delivery of goods, rent operations). The procedure is often a summary debt collection procedure mainly in German cases. Most judgments are judgments of commercial courts or first instance courts which rarely give the reasons of the judgments.

Applications are rarely rejected, *i.e.* in 10 % of the cases (mostly in cases of lack of jurisdiction). In around 8% of the cases, the enforcement decisions are appealed. In 1994 the Tribunale de Grande Instance de Paris has rendered 99 decisions concerning **enforcement applications**: In 1990: 58, in 1991: 81, in 1992: 59, in 1993: 105.

The lawyers agree that fees related to recognition and enforcement of a foreign judgments are about the same as for a full proceeding within France, albeit a simple one. Therefore they need to be estimated in the range of ECU 300 to ECU 750 for a recognition under the Brussels Convention where the amount is low and there is no dispute. Otherwise the costs are equivalent to a full proceeding and may be up to ECU 3.500 or more. In relation thereto, court

fees, if any, are negligible. Taken this extremely wide range, an amount of at least ECU 500, inclusive of court fees, has to be seen as the absolute minimum.

The enforcement itself, regardless whether a French or recognized foreign judgment is concerned, might cost about ECU 300.

The foreign costs for the enforcement of a French judgment abroad are dealt with under the respective country. In France itself, lawyers fees could occur with respect to the preparation of transmittal of the request to the foreign jurisdiction in one way or the other. These costs would range between ECU 650 up to ECU 3.500, depending on the difficulties. The consumer association estimates the costs to be at least ECU 2.500 (finding a foreign lawyer, translations, correspondence, phone calls *etc.*). Nevertheless, for the purpose of the table, the stated minimum of ECU 650 has been chosen as the basis.

2.6.3 Recommendation of Forum

The French lawyers make their preference of where to commence an action dependant on the ease or difficulty of enforcement in the particular case. Second place takes the preference to choose the courts that are likely to apply their own law, application of foreign law and jurisprudence having proved to be complicated and somewhat perilous. Third place takes the likely outcome of the procedure. Only where enforcement is ensured and the law not an issue, the preferred place for the consumer to commence action would be in France. It is conceded though that actual forum shopping is rare.

2.6.4 Costs

French lawyers appear to have no specific mode of calculation for their fees. Almost any agreement can be made and it is advisable for the client to negotiate the fees in advance.[31] One of the lawyers phrased it as follows:

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31 In the case of excessive billing, there exists a possibility to contest before the Lawyer's Order Counsel, and that appeal of its decision might be brought before the Tribunal de Grande Instance.

"Virtually a lawyer might ask for any amount of provisions or fees he likes. It is therefore highly recommended for any client to negotiate costs and fees from the first conversation."

Hourly rates are common and recommended by local bar counsels. Apparently, the chances of success also play a role in the fee calculation. Thus, the fees in France are not calculated according to a statutory scheme. Contingency fees are not allowed, but other agreements are possible, including a scale containing a minimum and a maximum fee, depending on the difficulty and the time spent at the end.

Most of the costs arise directly from advocate's fees since French court fees are relatively modest. In the Paris area, the recommended hourly billing rate of lawyers range between ECU 100 and ECU 300. As the clients are invoiced on a variable hourly rate (depending on many factors, including the nature of the matter), it is difficult to estimate the fees beforehand.

Fixum fees are also common and for a claim of about ECU 2.000, which appears fairly simple in law and fact, a fixum between ECU 750 to ECU 1.500 might be agreed to which would include general office expenses but not court fees, correspondent counsel, certifications or translations. Again, the necessity of translations and certifications would increase these costs significantly.

Depending on the court and the procedure itself, court fees, including the fees for service of process in France would vary between ECU 20 and ECU 75, depending on the case and the court, with a reasonable average minimum of ECU 40 to be expected. Certification is rarely necessary, can be done by the plaintiff himself in some cases and, for foreign countries there is no special fee for the apostille.

In summary, while taken the conflicting advice it seems difficult to assess all different costs under consideration, an amount of ECU 1.000 as the realistical minimum has been confirmed, inclusive all costs and fees except translations. Nevertheless, an additional amount of ECU 150 should be considered for a foreign client.

In addition, in cases before the commercial court, while the legal requirement has been abolished, it is recommended to resort to a specialist for the trial itself, who would bill

ECU 300 to ECU 450 for their services.[32] The same costs would apply with regard to correspondent counsel, if the proceeding has to be brought in a different court district within France. Taking into account the possibility, that a "specialist" is needed in some cases, an amount of ECU 400, in average, for the correspondent counsel seemed reasonable.

When the procedure is to be commenced in abroad, the fixum for costs and expenses would also be in the range of ECU 750 to ECU 1.500 exclusive of research expenses for the foreign parties address. Accordingly, an amount of ECU 750 would be the absolute minimum to be reconned with. For service abroad, usher fees arise in the range of ECU 80, following a very complicated calculation depending on the claim amount, the work prepared by the lawyer, the number of pages, *etc.* lined out in decree no.18 of 5 January 1967. An additional ECU 120 must be added for the preparation by the lawyer totalling these costs to ECU 200.

For a higher amount at stake, *e.g.*, ECU 50.000, the lawyers would increase the fees and, for example, would set the fixum for a scenario of sending the case to a foreign lawyer for the initial advice and finding of foreign counsel at perhaps up to ECU 3.000 to ECU 6.000. The work would include the translation of documents, maintain correspondence with the foreign counsel, and, potentially, the French lawyers' own legal assessment of the action, which the lower amount would not. A similar raise would take place for procedures in France.

2.6.5 Cost Recovery

Court fees and travel expenses for the parties are generally recoverable by the winning party (Art. 696 of the Nouveau Code de Procedure Civile and Decree of December 27th, 1920), either fully or to a large degree. The lawyers' estimates from their practice range between 2/3 and 99%. The Code further provides in Art. 700 that reasonable lawyers fees would be recoverable from the loosing party as well. In practice, the lawyers have advised, the recovery fixed by the court almost never covers all costs and in any event would not cover the fees of a

32 In simple matters where a "referé" (simplified procedure, could be used, it would not be necessary to have such a specialist intervene.

foreign lawyers who might have been involved. Here the estimates range between 25% and 75%.

2.6.6 Duration

The estimated duration before receiving enforceable judgment is about one year, sometimes two years.

The duration for the recognition is about 3-4 weeks but the enforcement itself may take about 4 months.

2.6.7 Summary and Advice

The French lawyers themselves estimate the additional costs for a cross-border matter in general at between 70-90%, minimum, in comparison to a purely domestic case and this amount conforms with the detailed information on costs set forth above. In fact, in most cases the cross-border aspect would almost duplicate the costs, if the foreign country had the same fee and cost structure as France itself.

In light of these costs it comes at no surprise that, all experts agree that in the light of the costs which would exceed the value of the case, one should not proceed for any amounts in the range of ECU 2.000, unless the matter was so simple that a rapid and not expensive procedure, such as summary proceedings, injunction to pay, can be instituted in France itself. However, it must be pointed out that the procedural costs would very quickly represent about half or more of the ECU 2.000 which are claimed.

In the event the amount is much lower, *e.g.*, ECU 500, a procedure before the *Tribunale d'instance* could be considered for a domestic consumer as lawyers representation is not required in that court. For a foreign consumer this would be unrealistic.

If the amounts were much higher, *e.g.*, ECU 50.000, the lawyers would generally recommend to commence any of the possible proceedings, yet even then such advice would be with caution.

2.7 IRELAND

2.7.1 Civil Proceedings

The Courts (Establishment and Constitution) Act 1961, the Courts (Supplemental Provisions) Act 1961 to 1988 and the Courts Act 1991 establish the system of the Courts of Justice in Ireland. The lowest court is the District Court followed by the Circuit Court, the High Court and the Supreme Court. The threshold value for the District Court is approximately ECU 6.000. A small claims court system and procedure has been created specifically for consumer complaints for amounts under ECU 600.

Affidavits may be sworn before the Officers of the Supreme Court of Justice and be used in foreign courts of law. A court in Ireland will on application by a duly authorised tribunal make a necessary order for the obtaining of evidence of a witness. This application may be made in terms of the Foreign Tribunal Act 1856 and may be obtained from the master in civil matters. It is however a matter of practice for the court itself to appoint one of its own examiners for such a purpose. It is however unlikely for a deposition to be given without the consent of a party unless the deponent is dead, beyond jurisdiction, or through sickness or infirmity unable to attend.

In Ireland there does not exist a summary or simplified debt collection procedure as such but, as mentioned, a small claims procedure has been recently created specifically for consumer complaints.

Notwithstanding, in Ireland a judgment from another EU-Member State which has been rendered in a summary or simplified debt collection procedure is enforceable under the Brussels/Lugano Convention, unless it comes within the terms of article 27 or 28 of the Convention.

Ireland is Member State of the Hague Convention. However the Convention has only been in operation since June 4th, 1994. The Central Authority does not charge fees for its services. Annually, there are about 300 to 350 incoming requests for service of process from other EU-

Member States. The duration for the handling of such requests, as estimated by the Irish Central Authority, is about 2 months. Due to the limited time of the Hague Convention being in force in Ireland, so far, estimates from the central authorities of other Member States could not be obtained.

All documents to be served from Ireland to other countries pursuant to the Hague Service Convention must be sent via the Master of the High Court. This formal process of service increases the costs involved and requires attendance before the High Court. The costs involved are in the order of at least ECU 400, plus translation costs and the indemnity for costs which may arise in the receiving country.

2.7.2 Recognition and Enforcement

But for Convention cases, in order for a foreign judgment to be enforced it is sued upon and an authenticated copy of the document or a certificate must be submitted. Applications for recognition and enforcement of authentic instruments and court settlements (articles 51 and 52 of the Conventions) must to be made to the High Court itself.

Under article 32 of the Brussels and Lugano Conventions applications for enforcement should also be submitted to the High Court. However, in order to expedite applications, a special applications procedure provides that applications for recognition should be made to the Master of the High Court and be determined by him.[33]

All applications must be accompanied by an affidavit which sets out the basis of the application. The procedure does not require an attorney. Nevertheless, foreign applicants invariably engage an Irish attorney.

There are no administrative costs but court fees apply. The cost of an attorney must be borne by the foreign applicant. An applicant who has been legally aided in his or her own country is

33 The Master of the High Court is an officer of the High Court who exercises quasi-judicial functions conferred on him by rules of the superior courts and by statute.

entitled to benefit from legal aid in Ireland as well. All costs, other than attorney fees, which have been paid or advanced by the applicant are recoverable at the discretion of the court.

Documents that are not in either the Irish language or the English language should be translated. This is not a mandatory requirement but the court may nevertheless require a translation which is certified by a person qualified to do so in any one of the Contracting States. The competence of the translator must and may be verified by affidavit.

Lawyers fees for such an application would be in the region between ECU 740 and ECU 1.200 together with fees of ECU 500 for counsel on the brief and ECU 60 in court stamp duty. Accordingly, the costs would be at least ECU 1.300.

In view of the fact that execution of a foreign judgment is being sought, the Irish lawyers advise that legal costs would rise very considerably if they were asked to apply for injunctions freezing the defendant's assets in Ireland pending the execution of the judgment, in the range of ECU 1.800 or so.

As regards the recognition of an Irish judgment abroad, the costs in Ireland would involve supplying a copy of the domestic judgment to foreign counsel with whatever additional documentation *i.e.*, proof of service of the original proceedings *etc.* may be necessary. The whole exercise should not cost more than ECU 450 and approximately ECU 70 for any court stamp duty on taking up orders *etc.*, so that ECU 500 should be considered at the minimum.

2.7.3 Recommendation of Forum

The Irish lawyers agree in that they prefer commencing action in Ireland. A particular reason mentioned for the preference were the clients familiarity with counsel as opposed to the foreign counsel with whom he would have had no experience in dealing. Language issues were mentioned as well as the fact that, rightly or wrongly, there is a perceived local advantage to suing in the courts of your own country as opposed to being a litigant in a foreign court. Fee arrangements would not be on a contingency basis.

2.7.4 Costs

In Ireland, attorney fees are not regulated by statute and all are negotiated as between lawyer and client. The professional fee is gauged by reference to the experience of the outcome of similar cases and what the local taxing master (an independent arbitrator on costs) would award in similar cases. As in all Member States in which the fee is not statutory, the amount is difficult to assess.[34]

The legal fee charged for obtaining judgment in an undisputed case would already be approximately ECU 500 together with miscellaneous expenses of ECU 60, a procedure which would be equivalent to a summary procedure in other Member States. If disputed, counsel's fees for initial consultation, preparing and attending at the District Court for one day can be anything up to ECU 600, plus expenses, by one attorney's account and up to ECU 1.800 as instruction fee for counsel and ECU 900 for junior counsel of the brief for a full defended trial in Ireland by another.

There is a court stamp duty and additional cost of service of proceedings out of the jurisdiction. In addition, an estimated ECU 125 would have to be added for other expenses. Taken the wide range of estimates, an average minimum of ECU 1.000 for a first instance proceeding has been decided for the purpose of the table.

Preparation fees in Ireland for a case which is to be commenced abroad have been estimated at between ECU 60 and ECU 600 instruction fee, for which the Irish counsel would put together a brief for the foreign lawyer, having taken the client's instructions. According to other accounts, a minimum of ECU 500 should be considered for this work.

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34 The estimates provided by the Irish experts have a wide range and remained within this wide range even after further enquiry. In contrast to the calculation made for other Member States, for the costs of a first instance proceeding it was decided not to utilize the lowest amounts given, but a value which was a medium value as stated by some experts and the minimum as stated by others. Particularly one account was more detailed and convincing and more in line with these results.

For a foreign client, an additional ECU 185 were estimated in attorney fees and additional communications charges for telephone and fax of ECU 150 so that a minimum of approximately ECU 300 should be considered for this category.

If the defendant resides in a different city, estimated between ECU 40 to ECU 120 and up to ECU 600 would have to be added to the local agent's fees. In comparison with the other fees presented, an amount of ECU 300 has been decided for the purpose of the table for the category of correspondent counsel fees but could not be confirmed. Personal service of process costs about ECU 50, in some cases, however, service of process may also be effected by registered mail which would reduce this item.

The attorney fee varies in connection with the value in that a matter of ECU 500 would cost about a third in attorney fees.

If the value of the claim were 50.000 ECU, the costs would be increased significantly due to the fact that the claim would now be made in the High Court. There would be more documentation involved as the High Court requires evidence to be given in writing in the form of affidavits whereas the District Court allows oral evidence on oath. Counsels fees for attending in the High Court are in excess of ECU 500 and stamp duty on documents is doubled. Accordingly, solicitors' and counsels' fees in a ECU 50.000 case for a full trial in Ireland would be of the order of ECU 15.000 that is approximately ECU 12.500 for the solicitors instruction fee and ECU 2.500 for counsel on a full trial basis, plus court and stamp duty, *etc.*

In Ireland, all parties will be required to attend at the District Court for a full hearing, a foreign party would have to travel to attend the hearing. Such travel costs have not been considered for the table. In this connection, a particular problem in Ireland is that parties, attorneys and witnesses called for a hearing may have to wait the entire day to be called and, in some cases may have come in vain when there is no judge available on that day or when a trial which is earlier on the docket takes too long so that the calendar has to be rolled over to another day. Particularly for parties and witnesses who have to travel from abroad this can be more than a

nuisance. According to one lawyer's account there is an acute shortage of judges in Ireland in relation to the amount of court business, leading to considerable delay.

2.7.5 Cost Recovery

If judgment is obtained, the winning plaintiff can recover some of the costs of the proceedings as determined in accordance with Statutory Instrument No. 67 of 1990 ("statutory costs"). In the case of a claim for an undisputed debt of ECU 2.000, the statutory costs recoverable would be ECU 300. The same relation applies to other claims. Any costs incurred in excess of this amount are not recoverable. Foreign lawyer's fees should be recoverable in the event of a win.

2.7.6 Duration

The estimated duration before receiving an enforceable judgment would be two years for a value of ECU 2.000 as the case would be taken in a Circuit Court which at the moment have a lengthy waiting list of cases.

A claim of ECU 500 would proceed in a different court (District Court) where there is less delay and could be disposed in four months.

The procedure for recognition and enforcement in Ireland would take about three to six months with five months being a reasonable minimum expectation. The preparation for the enforcement of an Irish judgment abroad should also take about 2-3 months, the formal procedure of application for service of process in another country under the Hague Convention should also take about 3 months, including preparation time. An enforcement in Ireland itself would take about 4 months, all inclusive.

2.7.7 Summary and Advice

Irish lawyers would be happy to take on the case in most circumstances. They would however discourage their clients from taking on any cases with a value of less than ECU 2.000 as this would not be of any net benefit to the client due to costs likely to be involved. In most circumstances, a debtor's search at about ECU 90 is recommended to establish if it is wortwhile to proceed as the debtor may be impecunious.

2.8 ITALY

2.8.1 Civil Proceedings

The courts in Italy are divided into the following groups. Firstly, there is the Giudice di Pace (Justice of Peace) which has civil jurisdiction for small sums and certain special proceedings.[35] This is followed by the Pretura (Inferior Court), Civil Tribunals and then the Court of Appeal. The Court of Cassation (Corte di Cassazione) is the supreme judicial court of final resort. Its jurisdiction is confined to matters of law. Constitutional matters are dealt with by the Corte Costituzionale (Constitutional Court).

Affidavits as such are not usual in Italy and are generally only used in matters of personal status. Such affidavits are sworn before a notary public or before a magistrate and constitute full evidence of the allegations contained therein.

Letters rogatory may be sent through the Foreign Ministry to the Italian Consulate of the place or of the place where the witness is living. Where the witness is an Italian citizen the statement is taken before the Italian Consulate Officer. Where the witness is a foreigner the testimony is then transmitted by the Consulate to the proper authority in the foreign state.

Italian law provides a summary procedure ("decreto ingiuntivo di pagamento") which is only permissible against debtors who have a residence or a domicile in Italy.

Italy has ratified the Hague Convention. Within the E.U. the Central Authority charges fees on a basis of reciprocity only for requests from Belgium. A translation of the document to be served is required. Annually, there are about 3.200 incoming requests for service of process. The duration in Rome is about 2 months, for other cities there is no information available.

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35 Please refer to the separate chapter on Italy for further information.

2.8.2 Recognition and Enforcement

Other than in cases in which the Brussels or Lugano Convention applies, Italy will recognise a foreign judgment and the Court of Appeal will give full executive force providing the following conditions are met; first, that in accordance with Italian principles of law the Court which gave the judgment had the competent jurisdiction to do so; second, that reasonable notice was given for the defendant to enter an appearance, third, that when the parties appeared before the court, it was in conformity with the foreign law, fourth, that the judgment is final and an appeal is not pending, fifth, that the judgment is not contrary to Italian principles of public policy.

For all recognition and enforcement applications it is compulsory to have a lawyer who files the same. The procedure for recognition and enforcement under the Brussels and Lugano Conventions costs about ECU 550 in lawyer and court fees, at the very least. For other recognition procedures, the cost (and duration) of a full trial would apply (see below). It is noted that a notary seal and Apostille are absolutely required for the power of attorney issued by the client residing abroad.

Regarding the enforcement itself, assuming that the required execution has to be performed on movable assets, the estimated fees for such a proceeding would be around ECU 300 as a minimum, and ECU 350, as a maximum, to be increased with the costs, amounting approximately to ECU 150 so that a minimum would be ECU 450. Such fees and costs should be entirely recoverable from the other party, unless it is not possible to attach a number of assets of the debtor whose value is equivalent to the whole credit of the plaintiff, comprehensive of the costs of the executive proceeding.

If a client asked an Italian lawyer to assist him in order to enforce an executory judgment in a different EU Member State, he would always ask for the assistance of a colleague from the other state. Therefore, his fees should be limited to the activity necessary in order to contact such a colleague and to provide him with all the necessary documents and data to perform the enforcement. The amount of such fees should be about ECU 200.

2.8.3 Recommendation of Forum

Italian lawyers take different approaches regarding the choice of forum. One lawyer recommends starting the action at home for several reasons, such as the lower entity of the fees and of the costs and the more incisive "control" over the legal proceeding both by the lawyer and the client.

Other Italian lawyers make their choice of forum dependent on the ease or difficulty of enforcement. One lawyer generally prefers commencing a law suit in the defendant's country for this reason.

On the other hand, better knowledge of the local judicial system and of the language is cited as an advantage of commencing a law suit in Italy.

Another reason mentioned for the preference of suing abroad is the long duration of civil law-suits in Italy.

Therefore, a lawyer who has knowledge of the law and the language of the defendant's country is likely to commence the action abroad.

2.8.4 Costs

In Italy the lawyers professional fees are determined and updated according to the Law as implemented by Ministerial Decrees periodically issued (decreto 14.2.1992, n. 238). The fees vary from a minimum to a maximum, depending on the value of the case and on the actually performed activity.

As the exact costs depend from the duration of the law-suit, the number of hearings, of the activities of the lawyer, the number of witnesses to be heard, *etc.*, they may differ significantly from case to case.

Considering as a basis for the estimate the value of approximately ECU 2.000, the lawyer's fees would range between ECU 450 and ECU 1.000. If witnesses have to be heard and three or four hearings have to be held the estimated costs can increase to about ECU 1.800. Each

activity provided by the lawyer increases the fees. A consultation with the client will arise at ECU 28 (minimum) to ECU 61 (maximum). The fees for providing a hearing at the court will range between ECU 12 and ECU 26, each memorandum written by the lawyer will cost between ECU 102 and ECU 235, the study of a memorandum written by the counterpart will cost ECU 16.

Such professional fees must be increased with the costs of the proceeding, whose amount should be about ECU 100 and includes service of process. In total, a minimum of ECU 1.000 should be considered. When service has to be made on a party residing abroad, an additional application is necessary for which the lawyer would charge at least ECU 200.

If the action is to be commenced abroad, the fees and costs mentioned above should be increased with the fees of the foreign counsel, the costs for the drafting of the power of attorney, for the legalization of the signature of the client by the consul or by a public notary and, only in this second case, if necessary, to provide the power of attorney with the "Apostille", the costs for the translation of the relevant documents and all the other costs such as mail, telephone, telefax and similar. On the other hand, court attendance would not be required by the Italian attorney, thus reducing the fees. In summary, the preparation of a foreign proceeding would cost at least ECU 400, exclusive of translation costs.

A translation can be made by the lawyer himself, in that case his fees will be increased with the respective amount.

The additional professional fees and the costs of the proceeding would be exactly the same of that mentioned above, if a foreign client or a colleague asks a Italian lawyer to represent him in an action against a defendant in Italy.

In Italy a lawyer may appear only before courts which are in the district of the superior court he is registered at. Therefore, in cases in which the litigation takes place at a different location in Italy than the place of the office of the lawyer selected by the client there will be necessity of a second lawyer. In this case the lawyer's costs, which would be proportionally reduced, should be increased with the professional fees of the correspondent and with the costs sustained by

such lawyer. One lawyer estimated the additional laywer's fees at about ECU 230 to ECU 450, so the aggregate cost would be at least ECU 300.

2.8.5 Cost recovery

As a basic rule Art.2 decreto 14.2.1992 n.238 states that each party is obliged to pay the fees and costs of its lawyer. Under Art.91 c.p.c. the judge will sentence the losing party to the reimbursement in favour of the winner party.

Though, the losing party is obliged only in the amount indicated in the judgment. That is why fees that exceed this amount are not recoverable.

Although the judges value the duration and the difficulty of the individual case, in most cases the winning party does not recover all its costs.

2.8.6 Duration

The complexity of the proceedings and the charge of cases of the competent court determines the duration of the proceedings before obtaining a provisionally enforceable judgment, in first instance. In any case, to obtain provisionally enforceable judgment in a proceeding a minimum period of one or two years is estimated. Each additional hearing will prolong the hearing for 4-8 months. If the claim is more complicated, it can take five or six years. Accordingly, and as cross-border claims do necessarily include at least some complication, the minimum duration to be reasonably expected is 3 years.

If one party lodges an appeal the proceeding will take eight or ten years!

The change of value would not substantially modify the duration of the proceeding (assuming, obviously, that the counterpart's position remains the same).

The domestic enforcement takes about 6 months, for all other activities, at least 2 months have to be taken into account.

The recognition of a foreign judgment under the Brussels and Lugano Conventions is comparatively speedy, for Italian standards. Since the oral hearings as described in the separate chapter on Italy, below, do not take place and since it is not handled by the regular court structure, it takes only about 2 months.

2.8.7 Summary and Advice

The advice to the client to proceed or not in the light of the cost and the duration of the proceeding, depends on the grounds of his action and on the estimate of the possibilities to recover the amount due. In any case, in consideration of a value in dispute of ECU 2.000 an Italian lawyer would probably try to obtain the payment of the amount due out of Court.

However, in the individual case, the decision may likely depend on the relationship with the client and on the importance of the case, rather than on the amount of the fees and the expenses.

The change of value would cause a substantial change of fees and expenses. Accordingly, the advice to the client on the suitability of the case would be different, too:

None of the lawyers would advise the client to sue if the value of the case were of ECU 500.

If the value of the case were of ECU 50.000, lawyers would probably advise the client in the sense of starting the proceedings and enforcing his rights.

Other reasons that may influence the advice to the client are the solvency of the opposite party and the chances to win the process.

2.9 LUXEMBOURG

2.9.1 Civil Proceedings

The district court has full and common jurisdiction. The district court is further divided into specialised sections. For matters under the threshold value of approximately ECU 5.200, the Justice de Paix is competent and would therefore handle most consumer complaints. Lawyer representation is not required before the Justice de Paix.

Affidavits as such do not exist under Luxembourg law and there is no general document analogous to it. However, under certain conditions written declarations from third parties may by submitted providing that the writer of the declaration had personal involvement or knowledge of the matter.

There are a number of simplified procedures available in certain cases.

Under the relevant treaties the public prosecutors office sends and receives letters rogatory through the various diplomatic channels. In certain circumstances Luxembourg's banking secrecy rules may act as a block to letters rogatory. Indeed employees of a financial institution may not part with information unless the law specifically authorises them to do so.

Luxembourg is Member State of the Hague Convention. The Central Authority does not charge any fees. Costs that may occur by the work of the bailiff are paid by the State of Luxembourg. A translation of the document to be served is required. Estimates from other countries range at about 1 to 2 months for the return of a request under the Hague Convention.

2.9.2 Recognition and Enforcement

Other than under the Brussels or Lugano Convention, bilateral treaties signed with other countries such as Austria also allow for a simplified method of recognition. Applications are made to the Presiding Judge of the District Court. All requests for recognition and

enforcement of a foreign judgment (under a convention or otherwise) must be filed by a lawyer.

The procedure for recognition and enforcement of a foreign judgment under the Brussels Convention does not involve an overrun of fees. The enforced decision will have to be served by bailiff. The expenses should not exceed ECU 260. The same would apply for the enforcement itself.

2.9.3 Recommendation of Forum

Luxembourg lawyers would choose to commence the action at home, if possible, particularly if Luxembourg law is to be applied.

2.9.4 Costs

There is no tariffing system for lawyers in Luxembourg. Thus, the firms have their own tariffs and there are no fixed rules concerning the calculation of fees. Depending on the firm the fees may be calculated on a certain percentage of the litigation value, an estimated amount or on an hourly basis. If the customer is charged on an hourly basis, the average fee per hour for an associate ranges from ECU 80 to ECU 160 and for a partner from ECU 160 to ECU 320. Besides, the Luxembourg Bar has suggested a minimum fee for certain cases. The principle of contingency fees is accepted under Luxembourg professional rules. For a cross-border consumer case with the value of ECU 2.000, an amount of ECU 800, inclusive of court costs, must be expected. Due to the special situation of Luxembourg, correspondent lawyer fees for a proceeding at a different court are hardly necessary.

No difference is expected for foreign clients. The same hourly rate applies so that for the additional work and loss of time involved, and amount of at least ECU 100 can be reasonably assessed. For the preparation for an action abroad and transmittal to foreign counsel, the same rules apply, the minimum for such a case would be in the range of ECU 250.

The preparation of service abroad or the recognition and enforcement of a Luxembourg judgment in another Member State would, in Luxembourg practice only involve the intake

meeting with the client and the transmittal of the file to the foreign correspondent. Detailed information could not be obtained but such an activity should take an associate a little more than an hour, maybe less for a partner. Inclusive of telephone, fax and postage costs, an amount of ECU 200 would be reasonable to assume for such an activity.

In Luxembourg, generally, the value of the case has very little influence on the cost or duration of a matter, unless a contingency fee is agreed.

2.9.5 Cost Recovery

Art. 131 para 1 of the New Code of Civil Procedure provides that, in certain special circumstances, the loosing party may be sanctioned with all or part of the costs, in the discretion of the court. However, the general rule is that each side bears its own costs except for court fees which the looser has to pay.

In addition to the legal aid scheme, in many consumer cases, the Luxembourg Consumer Association undertakes to pay some or all of the consumer's lawyers fees. Whether this is also available to foreign consumers having a case in Luxembourg or to Luxembourg consumers with a claim abroad could not be confirmed but is doubted.

2.9.6 Duration

Concerning the duration between the date of service of the writ of summons and a final and enforceable judgment in first instance, one must wait from 14 to 16 months in civil matters and approximately 12 months in commercial matters.

The procedure for recognition and enforcement takes about 1 month, the enforcement itself about 4 months if the debtor is unwilling to pay. Specific information as to other items could not be obtained, so that, taken the size of the country and the relatively modest fees charged for the same, a duration of one month seemed reasonable for these.

2.9.7 Summary and Advice

No specific advice could be obtained from Luxembourg.

2.10 NETHERLANDS

2.10.1 Civil Proceedings

The body of courts in the Netherlands consist of three instances. Proceedings in the First Instance are distributed between 62 cantonal courts (Kantongerecht) and nineteen district courts (Arrondissementsrechtbank) where parties may present their own cases without an attorney.

The courts of second instance consist of appeal on points of fact or law and they are either handled by the district court, one of the five courts of appeal (Gerechtshof) or in exceptional cases the Netherlands Supreme Court.

The third instance concerns appeals in law only and is dealt with by the Supreme Court of the Netherlands.

There is also a series of specialised courts and if these courts are competent then the matter is not dealt with by the general system of courts. Through the provisions of the Benelux Economic Union Treaty 1958 the signatories commit themselves to introduce into their systems uniform provisions or uniform systems in Belgium, the Netherlands and Luxembourg. Questions of interpretation are submitted to special Benelux courts which may be initiated by the parties or by the court itself.

The law of the Netherlands does not provide for affidavits. Foreign affidavits may be accepted in evidence by Dutch courts if taken by letters rogatory or by a consular officer. A foreign court may accept administered oaths taken by a Dutch notary.

Dutch law does not provide for depositions. At the discretion of a court a foreign deposition may be accepted in evidence. Letters rogatory may be transmitted to a foreign court through the various diplomatic channels or to consul in a foreign country.

The Netherlands are signatory of the Hague Service Convention.[36] No fees are charged. There is no translation of the documents to be served required. The duration for the handling of incoming request is about 3-4 months under art. 5 of the Hague Convention and one month under art. 10 b or c.

2.10.2 Recognition and Enforcement

But for convention cases, generally speaking, foreign judgments are not enforceable in a Dutch court but the facts contained therein may be used as evidence. Bilateral agreements exist with various countries providing for reciprocal recognition and enforcement.

It is compulsory to have a lawyer for some, but not all, applications for recognition and enforcement.

For an enforcement of a foreign judgment in the Netherlands, court fees are estimated at ECU 50, counsel fees at two hours (see, below), only the court fees are recoverable. Accordingly ECU 250 should be taken into account. The same applies, recovery depending on the foreign system, for enforcements abroad, less court fees.

2.10.3 Recommendation of Forum

Dutch lawyers would normally recommend to commence the action in the Netherlands as it is easier to estimate the costs of such a procedure than to estimate the costs involved with an action commenced in a foreign state. The possibility that a procedure in another Member State will involve less costs than an action at home, is not decisive for the recommendation.

36 Notably, there is much case law on article 15 of the Convention in the Netherlands. Its tendency is to the effect that the Convention prevails over domestic law.

2.10.4 Costs

Dutch lawyers generally bill by hourly rates, which are set by the Bar Association. The basic hourly rate is currently set at about ECU 135, but the rate actually billed is calculated by a complicated formula.

According to this formula, the basic hourly rate is multiplied by the number of hours spent and by certain special factors, which include (a) the nature of the case, *i.e.*, the value, necessary specialized knowledge and the urgency, (b) the experience of the lawyer and, (c) the client's ability to pay. For a dispute value up to ECU 3.600, the multiplication factor would be 0,7. Specialized knowledge is rated at 1,5, for clients who have less financial means, a factor of 0,7 applies. For attorneys with experience of less than 5 years, a reduction by a factor of 0,6 to 0,8 is calculated. Thus, assuming that an experienced attorney is handling the case, that the international character of the matter needs special expertise, that the dispute involves ECU 2.000, and that the client, a consumer, has less financial means, the actual hourly rate charged would be in the range of ECU 100 (135x0,7x1,5x0,7x1).

The factor calculation also provides a first insight into the additional fees applicable, as basis, for cross-border conflicts, *i.e*, 30%. Additional hours necessary could further increase the bill.

For simple "collection" matters, the definition of which is somewhat difficult, a percentage of 15% (for the values of interest, here) might be applied instead of the hourly rates. For values in excess of approximately ECU 3.000, a Lehman-formula (10%, 8%, 5% and so on, on each certain additional amount) may be applied, as fixed by the bar association guide-lines.

In practice, when the action is commenced in the Netherlands, the following estimated costs will be involved:

a) Bailiff fees	ECU 50
b) Court duties	ECU 100
c) Lawyer Fees	ECU 250 up to ECU 750

The amount of ECU 250 in lawyer fees would nevertheless be illusory for a full cross-border first instance matter and a minimum of ECU 600. In summary, inclusive of court fees and additional costs, an amount of ECU 700 is a realistical minimum.

For a foreign client, Dutch lawyers estimate additional time and costs being involved in order to explain Dutch legal procedures and for translations in the order of ECU 100 at the very least.

Because of the limited value of a potential consumer action that is commenced, the case will be brought for the Cantonal Court. It is not mandatory to be domiciled in the district in which the court exercises its jurisdiction to commence such procedure. So a correspondent lawyer will not be needed when the defendant resides in a different city. Nevertheless, in case the action is commenced in another city, some additional costs of maybe ECU 100 or more will occur.

With respect to the small amount of the action involved, the lawyers would attempt to restrict the costs involved with an action to be brought abroad to a minimum. For a simple case, the estimate of time spent on the transmission to foreign correspondent counsel *etc.*, is said to be limited to two hours, *i.e.*, ECU 250, inclusive of costs, such as telephone, fax, postage, courier and apostille but without translations. While these expenses do not change significantly, the preparation of a proceeding abroad involving something less than a full first instance proceeding, *e.g.*, a recognition and enforcement proceeding or service, would take a less time and cost about ECU 200.

2.10.5 Cost Recovery

Bailiff and court fees are recoverable, lawyer fees only in part. Correspondent counsel fees and the foreign lawyers fees are recoverable in the amount to which they can be labelled as reasonably made extra-judicial costs.

2.10.6 Duration

Approximately six months after the action is commenced, the court will reach an enforceable judgment. The enforcement of a decision, however, is estimated to potentially cause some difficulties and may take 4 months or more. Recognition of a foreign judgment can usually be obtained within a month or two.

2.10.7 Summary and Advice

Dutch lawyers, billing on an hourly rate, would take on any case. But they would not advise a client to take on a first instance case for a value of up to ECU 2.000. As to enforcements, they would recommend to proceed, as to a foreign procedure, advice would depend on foreign counsel's advice. Their own preparation would be regarded as worthwhile to invest. A lower value, *e.g.*, ECU 500, is held to be prohibitive under all circumstances.

2.11 AUSTRIA

2.11.1 Civil Proceedings

In Austrian law, District Courts (Bezirksgerichte) have general jurisdiction over civil matters.[37] If the amount exceeds the current threshold value of approximately ECU 7.600, then the Landesgerichte (High Courts) have the competent jurisdiction in the form of the Court of First Instance.

With regard to courts of appellate action, the High Court is superior to the District Court and the Court of Appeal is superior to the High Court. Where the value in litigation exceeds a certain value, the Oberster Gerichtshof (Supreme Court) in Vienna acts as third instance. This is on the premise that an important question of law requires answering. This may include an issue which must be decided in order to afford legal consistency, security or development, if the jurisdiction of the Supreme Court is absent or if the legal approach of the High Court differs from that of the Supreme Court. An attorney must be present in cases held in the High Court, Courts of Appeal and the Supreme Court. The Supreme Constitutional Court deals with matters of a constitutional matters.

Within the provisions of Austrian law, the submission of substitute evidence by the act of submitting affidavits either in court proceedings or before administrative agencies and authorities is not permitted. This is however subject to one exception, that is, proceedings for interlocutory injunction.

Through the request of a consular official or the provisions of a legal aid convention, Austrian Courts will examine witnesses at the request of a foreign court. It is admissible for proofs to be taken abroad provided they are in accordance with the laws of that country.

In Austria a summary proceeding exists ("Mahnverfahren") which is also permissible against debtors residing in other EU-Member States. Foreign judgments that have been rendered in

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37 Please refer to the separate chapter on Austria for further information.

summary or simplified debt collection procedures can be enforced in Austria if they meet the conditions of the relevant bilateral treaties.

Austria has not yet ratified the Hague Convention. Service of foreign legal documents is executed on the basis of bilateral Contracts of legal assistance or on actual mutual practice. The duration for incoming requests for service of process is about 2 months.

Austrian courts have still adopted a rather uncertain attitude with respect to international jurisdiction. The whole area of international jurisdiction in Austria is mostly case law, since until now Austria has neither ratified the Brussels Convention nor the Lugano Convention. (Ratification of the Lugano Convention is, however, scheduled for the very near future.)

2.11.2 Recognition and Enforcement

Austrian judgments are immediately enforceable (in the absence of further appeal by execution). An execution may be granted upon judgments, court settlements as well as on the ground of an enforceable document before a notary public. Realisation of moveables takes place only after seizure, whereas immovables can be realised by realisation or public sale.

Foreign judgments are recognised on the basis of reciprocity. In Austria neither the Brussels Convention, nor the Lugano Convention is in force. Nevertheless, Austria has signed bilateral Conventions, *inter alia*, with Belgium, Germany, the United Kingdom, the Netherlands, France, Luxembourg, Italy, Sweden, Spain, Norway and Finland regarding the enforcement and application of foreign judgments in civil and commercial matters. With several other countries, informal practice is applicable. A particularly close relationship exists with regard to Germany. The situation is supposed to improve in the near future. With respect to mutual acknowledgement and execution of costs, agreements exist with most east European countries.

In the proceeding of application for recognition and enforcement an attorney is recommended but not required. Certified translations of all relevant documents are required. Court and attorney fees do arise in the proceeding, further administrative costs normally do not arise. All these costs are recoverable from the debtor.

Basically, the court judgments have to be translated and a translated acknowledgment from the court must be enclosed, showing that the judgment is final and executable in the other country. In most cases a confirmation of the judgment's correct service will also have to be submitted. The motion will have to be supported by documentary evidence as stated in the applicable state treaties/government orders. Generally, this will mean a duly certified and authenticated original foreign award and documentary proving finality/enforceability of the award in the country of origin and service of the original award. Nevertheless, the total of the lawyers' fees under the RATG (Rechtsanwaltstarifgesetz)-Tariff and the costs would be ECU 300 for such a proceeding, with another 300 for the enforcement itself, including court fees ranging between between ECU 50 and ECU 75, depending on the kind of execution. It should be noted that if several attempts are necessary or if execution into real estate is desired, they would count additional in costs and duration.

For enforcements abroad, the costs are relatively modest for the preparation made for the foreign counsel and range at ECU 200 for lawyers fees and costs. Translation fees may, however, rise quickly to higher amounts. If a certified translation of the Austrian judgment is required, the additional costs are ECU 12/page for the translation plus ECU 12 for the certification or apostille. Recovery depends on the foreign law.

2.11.3 Recommendation of Forum

If Austrian law should be used, the lawyer would recommend a domestic venue. This is anyhow deemed to be advantageous for the client, because the lawyer has a direct contact to the court and moreover his knowledge concerning the legal remedies being at disposal would be much better. The duration of the proceeding would be shorter and the fees would be less for the client. If certainly foreign law should apply, the lawyer would recommend to start the action abroad, because in general, Austrian lawyers and the courts are not familiar with the foreign legal order, and therefore the knowledge of the foreign law must first be appropriated. Possibilities of enforcement were also considered, particularly as Austria had not yet ratified the Brussels/Lugano Conventions.

2.11.4 Costs

Austrian lawyers bill according to a statutory fee schedule, the Rechtsanwaltstarifgesetz, RATG (BGBl 20/93) and the Autonomous Guide-lines for Attorney's Fees. Under the RATG, the fees are calculated on the basis of the value of the matter and the kind of services rendered. The client and his Austrian attorney may have a separate fee arrangement which might supersede and exceed the tariff. Where hourly rates are agreed, they range at an estimated ECU 230 per hour. Contingency fees are not allowed under Austrian law and bar rules.

If the value in dispute is approximately ECU 2.000 ECU, the client has to pay lawyer's fees of approximately ECU 2.800 in case of loosing the action in first instance according to the RATG. This amount includes lawyer's fees of the opposite party and also court fees according to the court's fees law (BGBI 153/94) amounting to ECU 110 for entering the action. The court fees are lump sum fees payable to the court in advance by the plaintiff when a civil or commercial law action is lodged. For his own lawyer, the fees would be ECU 620. Thus, disregarding an eventual recovery or the payment of opposing lawyers' fees, ECU 730 are the aggregate cost to be estimated for a first instance proceeding for one side's lawyer and the court fees.

If an hourly rate is applied, 30 hours of work seemed reasonable for a case of high value (more than, *e.g.*, ECU 10.000) which would add up to ECU 6.900. For very high values this may be less than the RATG-tariff. For low values, the RATG-tariff is also lower.

As per *Gebührenanspruchsgesetz 1975* (BGBl 1992/214) the sworn interpreter can charge as a reimbursement for delays an amount of ECU 18 per hour (§ 32 *Gebührenanspruchsgesetz).* Written translations cost ECU 7 per page for the written translation (*§ 54 Gebührenanspruchsgesetz).* Further costs amounting to ECU 3 per page will arise for each translation in valid legal form. German language is required for all documents to be presented in court.

The preparation for a procedure to be brought abroad would be charged at an hourly rate. Taking into account the intake of the client, but leaving most work to the foreign co-counsel,

the fees would generally be less than full proceeding, at about ECU 250, without translations costs.

Differences for foreign clients were anticipated for translation and certification expenses, higher postage as well as more expensive foreign telephone calls. Lawyers fees would remain the same. Therefore, taking into account these costs, except translation costs, the minimum additional expenses for a foreign client would amount to ECU 50.

Austrian lawyers may and do plead in other court districts, travel expenses apply and are only partially recoverable from the other party. Usually, co-counsel is appointed but no additional costs arise as the statutory fees are shared. Service of process is generally included in the court fees.

2.11.5 Cost Recovery

The amount of costs to be reimbursed depends on a certain tariff which is based on the amount in dispute. Therefore, the higher the amount in dispute, the higher are the legal fees under the tariff and hence the costs to be reimbursed. In contrast to other procedural law codes which award such refund only in cases of intentional denial, it may be easier to litigate in Austria. Nevertheless, the unsuccessful party does not have to reimburse the winning party for all costs actually incurred by the winning party. In particular, in cases with a foreign element additional costs will accrue, for instance, translation of documents to be produced in the proceeding, obtaining information on foreign law or the necessary means of communication. Also, in many cases, the fees agreed upon between client and lawyer do not correspond to those under the respective tariff, so that the fees which the client actually owes could - in particular with very low amounts in disputes - be considerably higher than those under the tariff. And, attorney's fees exceeding the fees calculated under the RATG are not reimbursed by the party losing the proceedings.

Other than that, in case of succeeding in an action the costs will be reimbursed by the opposite party. In case of a partial success proportionate reimbursement is made in Austria. If the client succeeds at 80 % he is entitled to a reimbursement of 60 %. For certain *ex parte* proceedings

there is no reimbursement (*e.g., Verlassenschaftsverfahren)*. The fees for the foreign lawyer (*e.g.* counsel or correspondence) will not be reimbursed by the opposite party in case of success but have to be paid by the client himself.

2.11.6 Duration

The duration of the proceeding will take a little more than 1 year up to a first instance decision, if Austrian law can be applied at an Austrian court. One lawyer estimated the duration before receiving an enforceable judgment in first instance at 6 months to 2 years. However, if foreign law must be applied, the duration of the proceeding would take about 2 years. The duration of the proceeding would also be longer, if witnesses must be heard abroad by judicial assistance, or if foreign witnesses must be cited before an Austrian court for the purpose of their testimony. The most rapid way to get a decision from a national court is, if a judgment by default is pronounced. The procedure for a judgment by default will take approximately 2 months.

The duration for recognition of a foreign judgment varies between 4 and 6 months. Thereafter, attachments of earnings is relatively fast and may take less than 2 months, but execution into real estates takes about 1 year. About 6 months is a reasonable minimum expectation.

2.11.7 Summary and Advice

Austrian advice is made dependent on the country involved. With regard to Germany, the lawyers would recommend to commence action in all cases and both directions. They would also take on the case on the RATG-Tariff. With regard to other countries, they would rather not recommend any action for a value of ECU 2.000. One of the lawyers set the threshold value at ECU 15.000 for all matters with foreign elements with the exception of, perhaps, Germany. For lower values the RATG-tariff provides for lower rates, nevertheless, the lower the value in dispute the faster the costs will achieve the height of the value in dispute, so that the amounted lawyer's fees do not stand in an acceptable relation to the value in dispute. In addition, if the client insists, they would prefer an hourly fee schedule for themselves.

2.12 PORTUGAL

2.12.1 Civil Proceedings

Where not otherwise stipulated by the parties, Portuguese courts generally apply the law of Portugal on all cases, regardless of the residence or nationality of the parties. Under the provisions of the law of evidence, affidavits are not considered and it is not the practice of the courts to accept them as proof.

Depositions are only taken in court or in the preparation of a criminal case and are the strongest means of proof in judicial proceedings.

Portugal is signatory of the Hague Convention. Generally, there is no translation of the documents required but the recipient of the served document may refuse to accept service if the document has not been translated. Fees are not charged. According to estimates from other Member States, the duration for the return of service requests is about 3 to 6 months.

2.12.2 Recognition and Enforcement

Other than in Convention cases, in order for a foreign judgment to be effective and enforced in Portugal it must be examined and confirmed by the Court of Appeal as second instance. Only thereafter may it be used in Portugal.

In Portugal all requests for recognition and enforcement, under the conventions or otherwise must be filed by a lawyer.

Under the Brussels Convention, the court of competent jurisdiction to give the exequatur in Portugal is the "Tribunal Judicial de Circulo". These courts, although created by virtue of law, have not yet been installed everywhere in the country. A new law is expected to be published in the near future indicating civil courts as the applications for exequatur made under the Brussels Convention as long as the "Tribunais Judiciais de Circulo" are not fully working.

Until such law is published, and where there are no courts of competent jurisdiction, the special procedure of review and confirmation of foreign judgments by the Portuguese Court of Appeal pursuant to the rules of the Code of Civil Procedure should be considered. This procedure should also apply in the cases not covered by the Brussels Convention. For this particular purpose, the costs and expenses are basically little less than a full first instance proceeding, *i.e.*, probably ECU 650, of which court fees comprise about ECU 120.

For the enforcement itself, half of the regular court fees are charged, but the lawyers fees would be about the same as for the recognition stage. Accordingly, ECU 600 should be taken into account.

For an enforcement abroad, it would be necessary to contact a foreign correspondent lawyer and provide him with a duly notarized and legalized (with the Hague Apostille) copy of the judgment. (The cost of a copy of the judgment also depends on its number of pages, *e.g.*, a judgment with three pages would cost approximately 10 ECU). Therefore, the expenses generated locally would comprise legal fees (including preparation of legal documents to be sent to the foreign correspondent lawyer as well as any assistance required by the latter and apostille costs). Exclusive of translations one should expect at least ECU 500.

2.12.3 Recommendation of Forum

Portuguese lawyers make their choice of forum dependent on the applicable law. They argue that, whenever a law foreign to the forum needs to be applied, it would duplicate the attorney fees if the proceedings were brought in a different forum.

2.12.4 Costs

In Portugal, lawyers fees are calculated on a contingency basis taking into account the criteria established by the lawyers Bar Articles of Association. According to these Articles of Association, lawyers' fees should be calculated taking into account the time spent, the complexity of the matter, the relevance of the legal service, the wealth of the interested party, the outcome of the case as well as the uses of legal practice within the area.

It is admissible to agree on the lawyers' fees in advance. Nevertheless, lawyers are forbidden to:

- demand the client to pay them part of the subject of debt or any other claim as fees,
- share fees, or
- receive their fees only in case of a certain outcome of court proceedings or of a business.

According to the relevant regulations of the Bar, lawyers' fees can be established as a percentage of the amount claimed in court proceedings provided that those fees are not excessive taking into account the criteria established by the Lawyers Bar Articles of Association.

Court fees for stamp duty, notarized documents, entertainment expenses and reimbursement of the successful party for his expenses required by law to be paid to court are determined by statute Decree-Law no. 387-D/87 of December 29, 1987 (Code of Court Costs). Estimated court fees for a procedure with the value of approximately ECU 2.000 would be approximately ECU 120. In addition, there are minor costs involved, such as the stamp duty for the power of attorney (ECU 2), *etc.* Service of process is included in the court fees. For the preparation and the application for service to be effected in another country, the lawyers estimated additional costs of ECU 100, even if courts and Central Authority do not charge extra.

With all the criteria mentioned above in mind, it was quite difficult for the lawyers to make an estimate of the fees they would charge. Inclusive of costs and court fees, based on hourly billings, a good estimate of the minimum costs was in the range of ECU 900.

In case the value of the good were much lower, *e.g.* 500 ECU, although court fees would decrease (would be around 52 ECU) probably the other costs would be the same.

In case the value of the good were much higher, *e.g.* 50.000 ECU, basically only court fees would suffer an increase (such fees would be around ECU 705 ECU).

The lawyers fees in Portugal for a procedure to be commenced abroad would not differ significantly from a procedure in Portugal. Court fees would not apply, but translation costs, notarisation fees and stamp duties would be higher. Exlusive of translation costs, about ECU 600 should be considered.

The same applies for actions brought by foreign parties in Portugal. Basically the costs would be the same as for a domestic client although translation expenses would suffer a significant increase. Other than these translation expenses, an additional amount of about ECU 150 in telephone, fax and courier charges have been estimated. It has been mentioned that, some lawyers generally charge higher rates for foreign clients but most lawyers do not follow this practice.

Other extra costs involved and not calculated would be related with foreign witnesses (possible trips or alternatively costs considered by the court according to the Portuguese Code of Court Costs (approximately 14 ECU) - in case foreign witnesses testify before a foreign court at a Portuguese court's request and translation services on top of that).

Another possible additional cost that should be taken into account regards the possible need to have a correspondent lawyer in case the competent court is located in a city other than the one where the first lawyer has his office. While in Portugal all lawyers are allowed to plead in court all over the country, either travel expenses may occur, or a correspondent counsel is engaged who would generally bill by the hour. At the same time, however, the primary lawyers' fees might be reduced for some of these fees.

In such a case the correspondent lawyer's role would be to follow up court proceedings, making payment of court fees and requesting copies of documents whenever instructed by the first lawyer to do so. However, legal advice as well as representation of the client before court (including preparation of the statement of claim and any other pleadings as well the presence before the judge at any time requested to do so, v.g. hearing) would always remain with the first lawyer's office. Altogether, the additional travel expenses or the involvement of correspondent counsel might cost ECU 300.

2.12.5 Cost Recovery

Costs and fees are not entirely recoverable from the other party by the winning party. According to the Portuguese Code of Court Costs as well as to the Code of Civil Procedure, a pecuniary allowance can be granted to the successful party, being recoverable from the losing party, for his expenses in the court proceedings (initial costs, interlocutory costs, costs for court expenses and costs of the day). However, this pecuniary allowance never includes lawyer's fees.

While the plaintiff has the possibility of claiming the legal fees on his statement of claim it is in the discretion of the judge to decide whether the plaintiff is entitled to be reimbursed of the same.

2.12.6 Duration

The estimated duration before receiving an enforceable judgment in the first instance would be approximately one year.

The estimated duration of a special proceeding of review and confirmation of a foreign judgment at the Court of Appeal ranges from six months to one year, so about 8 months can be taken into account. The enforcement of a judgment in Portugal should take about 8 months. Other activities have been estimated to take about 2 months, each.

2.12.7 Summary and Advice

Costs, duration and difficulties to start an action of the kind involved would probably be more expensive to the client than the value of the case in question. In this light, the lawyers would advise their client to try and settle the dispute out of court. In any event, the lawyers themselves would rather not take on the case, except for an existing client. The lawyers could not imagine an agreement on lawyers fees that would satisfy both the client and themselves.

Only if the value would be much higher than the ECU 2.000 anticipated, the lawyers would advise their client to take action and would take on the case.

2.13 FINLAND

2.13.1 Civil Proceedings

The City Courts are the courts of first instance having general jurisdiction. These are followed by the Courts of Appeal and the Supreme Court. With regard to depositions, a court of first instance in Finland is obliged to assist foreign judicial officers. Permission may also be given for a testimony to be taken in a petition before a foreign official.

Finnish law provides a proceeding of simplified debt collection. This summary procedure is permissible against debtors in other EU-Member States.

Judgments from other EU-Member States which have been rendered in a summary procedure can be enforced under the Lugano Convention. Only such judgments which are rendered in a simplified debt collection system in Sweden are not enforceable in Finland.

Finland is a signatory of the Hague Service Convention. The Central Authority does not charge fees. A translation of the documents to be served is generally required. In 1994, there have been 211 incoming and 410 outgoing requests for service of process from or to other EU-Member States. The estimated duration for incoming requests is about 1-2 months.

2.13.2 Recognition and Enforcement

Other than under the Lugano Convention or bilateraly treaties, the President of the Republic may on the principle of reciprocity or in accordance with the provisions of a treaty direct that a foreign judgment must be enforced in Finland. The party concerned may present a petition or a request may be made through the relevant diplomatic channels (along with the document for such an enforcement). This must be accompanied by an official document declaring the decision to be final.

In Finland the Lugano Convention is in force. The procedure is legally instituted according to the provisions under the title III of the Convention. The Convention has been entirely incorporated to the Finnish legislation as one law. For this reason, the provisions of the

Convention are followed as such also in the procedure for making the application for enforcement. The procedure does not require an attorney but are normally filed by local lawyers. The Finnish courts require a translation of the documents presented in the proceeding.

As a court fee, an application fee is charged. Furthermore, there are attorney fees to pay which may vary depending on the case.

The court fees for the recognition enforcement in Finland of a foreign judgment are relatively modest. Under the Lugano Convention or among the Nordic countries, the costs of proceedings in a court of first instance would be about ECU 50 or ECU 60, respectively (Act 21.2.1992/150 and 6.3.1992/211; Act 20.8.1993/774).

Estimates for lawyer fees had a wide range: between ECU 170 per hour (with one hour estimated), plus costs of about ECU 9 for the execution officer by one attorneys account, between ECU 1.800 and ECU 3.500 in total by another attorneys account and ECU 900, plus the court fees of ECU 60 and miscellaneous expenses according to the consumer association. This conflicting evidence may be explained in that, so far, there have apparently only been very few cases of recognition and enforcement of foreign judicial awards under the Lugano Convention. Upon further confirmation, the estimate of a total of ECU 1.000, as has also been stated by the consumer association, seemed the most reasonable minimum amount to be reconned with.

It further appears that, probably the amount of ECU 170 (plus the costs of the execution officer) referred to the enforcement stage itself. The Finnish authorities responsible for enforcing judgments are government officials and therefore their services are offered free of charge or are very moderate, *e.g.*, the ECU 9 mentioned for the execution officer.

For the enforcement of a Finnish judgment abroad lawyers fees could occur in Finland itself with respect to the preparation of transmittal of the request to the foreign jurisdiction in one way or the other. These costs would range between ECU 650 up to ECU 3.500, depending on the difficulties. The consumer association estimates the costs to be at least ECU 2.500 (finding a foreign lawyer, translations, correspondence, phone calls, *etc.*). Nevertheless, considering

again the conflicting evidence, a minimum of ECU 1.000 should be reasonably set aside for such a matter.

As mentioned, in Finland service of process of the judgment is required for a default judgment to become final. This should also then be the requisite for any enforcement under the applicable conventions or other agreements. The related costs, difficulties and duration are stated, *infra*.

2.13.3 Recommendation of Forum

The Consumer Association and one of the lawyers recommends commencing the action in Finland, "because it would probably be the cheapest and the easiest alternative". Nevertheless, they also point to the execution costs which, other than in Sweden or Denmark, could be expensive and time consuming. All matters considered, they would prefer to commence the action in Finland, feeling that the interest of the consumer is better served by doing so. The lawyer points out that, their strong expertise in the Finnish legal system and good rapport with Finnish authorities may be used to the benefit of the client only in Finland. When commencing an action abroad, they must rely on the competence of a foreign correspondent counsel, a situation that does not always yield the desired results. Furthermore, when an action is commenced abroad, the consumer often is, due to travel and language difficulties, denied the opportunity to actively participate.

Other lawyers take a different approach. They agree that, it is certainly always most likely that litigating on home ground is less expensive, especially if the judgment will be given by default. Nevertheless, they would almost always recommend their client to commence the action in the other state. In such a case they would contact a familiar lawyer in that state (most larger Finnish law-firms are a member in world-wide networks) and pass on the case describing the relevant legal issues. If the client is able to communicate sufficiently (regarding both the language used and the legal implications) with the foreign lawyer, the case would be more or less closed in Finland.

The reasons given for recommending the action to be brought abroad are that there is always a certain degree of uncertainty whether the Finnish judgment is conveniently executable (*i.e*, as

quick as possible after the judgment has become non-appealable without any further declaratory actions) in the other state. Currently, Finland has not joined the Brussels Convention, and the Lugano Convention is not yet ratified by all parties of the same.

If the law of the other Member State of some reason would be applicable, it might also be advisable to litigate in that state.

A further reason to transfer the matter to the foreign lawyer is that he has the best capability to assess the actual outcome of the execution of the judgment.

Generally speaking: Before they recommend their client to take any legal steps, they would always emphasize that legal steps (either in Finland or abroad) may turn out to be worthless, if there is not a sufficient degree of certainty, that the execution will eventually lead to a payment. The difficulties in determining a foreign parties' liquidity are said to be extreme.

2.13.4 Costs

Finnish lawyers generally work on hourly rates. The fees in Finland are in other words not calculated according to a statutory scheme. While contingency (*pactum de quota litis* or *pactum de palmario*) and other agreements are possible, they are rarely used. As with all countries in which fees are charged by hourly rates, estimates are very difficult. As already mentioned above, differences and ranges are particularly wide in Finland.

Most of the costs arise directly from advocate's fees since Finnish courts do not charge any significant amounts for their services. In the Helsinki area, the hourly billing of an associate in a law firm ranges from ECU 140 to ECU 250, depending on his or her experience. A partner in a Helsinki law firm would bill at an hourly rate ECU 265 and up, again depending on his or her experience. The client would also be billed for other related costs, such as telephone and photocopy costs. Additionally, legal services and advice are subject to value added tax in Finland (presently 21%). Non-lawyers or non-members of the bar may also act and generally charge less, about ECU 70 per hour. However, in a cross-border dispute it is highly unlikely that their services would be utilized.

As the clients are invoiced on an hourly rate (basically irrespective of the nature of the matter), it is said to be impossible to estimate the fees beforehand. The costs for the scenario of sending the case to a foreign lawyer, depending upon who handles the case, may usually start at perhaps 350 ECU for the advice and finding of foreign counsel. Thus the general minimum may be calculated as follows:

Lawyer's fee (correspondence):	350 ECU
Translation, when needed	350 ECU
Apostille (if required by the foreign lawyer)	5 ECU

Whereas if the case requires more translations and continuous follow-up the costs may quickly rise to, *e.g.*, ECU 3.500. Translations alone cost about ECU 50 per page. One lawyer has estimated the possible costs in the range of ECU 5.000. Taken this conflicting advice, and with further confirmation, an amount of ECU 1.300 should be reconned with. This exact amount has also been estimated by the consumer association as the minimum for lawyers' and related fees, exclusive of translations.

The work could include the translation of documents, maintain correspondence with the foreign counsel, and, potentially, the Finnish lawyers' own legal assessment of the action. It should be noted that Finnish advocates are entitled to and do generally charge a higher hourly fee for legal services and advice given in a foreign language.

The first (preparatory) stage in a court of first instance in Finland costs approximately ECU 50 (Act 26.7.1993/701). If the consumer and the seller do not reach an agreement or if the court of first instance does not give judgment by default, there will be another stage that costs about ECU 130 (Act 26.7.1993/701).

The lawyers fees for a simple procedure are estimated at ECU 900 (exclusive of translations, *etc.*) and for a full proceeding, according to consumers' associations at a minimum of ECU 2.600 (exclusive of translations, *etc.*) and by the lawyers at about ECU 3.500 (inclusive of translations). Accordingly, inclusive of costs but without translations, one should take at least ECU 3.000 into account.

Particularly foreign parties may be happy to find a foreign lawyer at all, regardless of his or her place of office. When the litigation has to take place at a different location in Finland than the place of the office of the lawyer selected by the client, the lawyer may select to have travel costs or may select to ask another lawyer to represent the case in court. In either event, additional costs for a foreign client in the amount of about ECU 1.000 may arise.

Finally the costs of the hearing of a possible witness should not be forgotten: the party having called for the witness would generally compensate the travel-costs and loss of income, which could be estimated at, *e.g.*, ECU 400. These costs were not included in the summary tables.

The Finnish lawyers themselves estimate the additional costs for a foreign client or cross-border matter at between 20-30%, minimum, or, in figures, at about ECU 1.100 for the preparation of the claim, correspondence, *etc.*

Regarding service abroad, if the court handles the service through, *e.g.*, the ministries of justice in Finland and the foreign country, the costs are very modest, perhaps 50 ECU, but this may take up time, *e.g.*, at least 4 months or up to 18 months. This fact may also comprise an additional reason to consider litigation abroad. If the lawyer chooses to handle the service himself and where this means of service of process is available, it could be done in a month. However, the costs may be high, depending on the fees of the various lawyers involved and may range between ECU 350 and 3.500. Nevertheless, for the purpose of the table the minimum of ECU 50 was chosen as well as the minimum duration of a month (see, *infra*), even if these two scenarios exclude each other.

2.13.5 Cost Recovery

All reasonable costs and fees would be recoverable from the other party (Act 26.11.1993/1013). This is the basic rule. The risk for the parties involved therefore doubles. The recovery theoretically includes the fees of a foreign lawyer, if any. The judges may, however, in their discretion reduce the fees. Though the Code requires full compensation, the courts often in practice award less compensation than demanded by the parties to the dispute.

In general, costs incurred by a party seeking the recognition of a judgment are not recoverable. As mentioned before, the services of the Finnish authorities responsible for enforcing judgments are offered free of charge or are very moderate. Such costs as advocate fees incurred by a party while applying to the enforcement officials are likewise not recoverable.

However, expenses that are incurred by the authorities while, for example, liquidating property in a public auction, are deducted from the auctioned price of the property. This implies that these expenses are indirectly borne by the party against whom the judgment is directed.

2.13.6 Duration

The duration for a proceeding of first instance in Finland is estimated as between 2 to 8 months, depending on the place of the litigation in Finland (due to a recent reform of the code of procedure) but 4 months is a reasonable expectation. In some cases, however, it may take longer.

When the procedure is commenced in Finland, the time for the service of process and for serving the judgment becomes essential. (A Finnish judgment by default must be served to the defendant in order to become non-appealable.)

Notably, appeals take comparatively long in Finland (24 months) but related costs are surprisingly modest. *E.g.*, estimated lawyers' fees ECU 1.000.

The estimated duration for the recognition process is 7-30 days, only. Other activities are also usually handled in less than a month. The other part of the enforcement is estimated to around 8 months to either receive the monies or a declaration of insolvency.

2.13.7 Summary and Advice

In light of the costs of a proceeding in Finland it comes at no surprise that, all experts agree that the costs which would exceed the value of the case and one should not proceed for any amounts up to ECU 2.000 and more, unless the costs were covered by insurance or of no concern, such as when the plaintiff is interested in the judgment for other reasons. In the opinion of the lawyers, ECU 2.000 would be close to a threshold value in (very) clear-cut

cases or in cases in which a default judgment can be obtained. A settlement of 20-30% of the case value would generally be preferred. It is noteworthy that if the consumer would wish to proceed with the matter despite the lawyer's recommendations, they would require payment for the fees up-front. It should also be mentioned, that all experts and the consumer association made very clear statements to the effect that it would be very likely for the costs to be higher than estimated above.

On the other hand, a claim for ECU 50.000 was held to be worthwhile to proceed.

During the course of this study, it was noted that the Finnish correspondent experts were highly efficient. In their entirety, they had extremely short response times, very interesting and detailed insight into the matter and good command of foreign languages. This may be of a tremendous value, in light of the fees, if higher amounts are at stake.

2.14 SWEDEN

2.14.1 Civil Proceedings

Courts in Sweden are divided into four divisions. There are some ninety courts of first instance. The Courts of Appeal are six in number. Their jurisdiction extends to appeals from the courts of first instance in that particular territory. Further appeal may be submitted to the Supreme Court which sits in Stockholm and is composed of twenty two members. In addition there exists a number of special courts for the purpose of deciding matters concerning tax, real estate and matters concerning labour law. If a proper request is made through the Ministry of Foreign Affairs then a Swedish Court will take evidence on behalf of a foreign court. A sworn statement necessary to protect a lawful right abroad may be administered by a Swedish court. Evidence may be taken by a foreign court and forwarded by the Ministry of Foreign Affairs.

A different procedure applies for small claims, where the amount at dispute is below ECU 1.800. In such cases the parties have to stand their own costs irrespective of the outcome as the Swedish Act on Court Procedure does not allow for compensation of costs. This limit is said to make clients less interested to appoint lawyers. In Sweden a party may represent himself in court, by a layman or in-house counsel. Further, it is often advisable before going to court to make use of a debt collection agency, *e.g.*, a company specialized in recovering debts and firmly controlled by law. The rate mainly applied is less than ECU 20 for a written reminder to pay.

Debts can be recovered by a so-called "order for payment" ("betalningsföreläggande"). This summary proceeding cannot be used if the respondent is domiciled abroad. There is no similar proceeding especially for foreigners.

A special note should be made in that in Sweden a number of extra judicial means for redress exist for consumers. The Complaints Board (Sw. Allmänna Reklamationsnämden) is a state sponsored body which on a rather informal basis will pronounce itself as to the substance of a claim. The Complaints Board handles about 3.000 cases a year. In addition, there are a number of complaints bodies, set up by members of a particular branch of trade or industry an

operating on a self-regulatory basis. These institution work very efficiently and successful on a domestic level. However, they are largely unavailable for foreign consumers or against foreign sellers.

A judgment rendered in a foreign summary procedure is enforceable in Sweden, if it has been rendered by a court and all other provisions according to the convention have been met.

Sweden is a Member State of the Hague Convention. Fees are not charged. A translation of the documents to be served is generally required. According to information from other Member States, requests to Sweden are generally returned within 2 or 3 months.

2.14.2 Recognition and Enforcement

Other than in matters under the Lugano Convention, unless expressly authorized by Swedish law, a foreign judgment will not be recognised by a Swedish court unless a special agreement exists between Sweden and the other country such as exists with Denmark, Finland, Iceland and Norway - Act 1977:595. Application for the recognition of a foreign arbitral award is submitted to the Svea Court of Appeal.

The procedure for making an application for enforcement under the Lugano convention does not require an attorney, applications can be filed by local or foreign lawyers or by the judgment creditors themselves. Most commonly they are filed by foreign lawyers.

There are no court fees or administrative costs required in the procedure, only lawyers fees may arise. If attorney costs have been paid in advance they are recoverable from the debtor in the execution in the case that the court makes the debtor liable for them.

A translation of the documents presented in the proceeding is generally required, but documents in English or Norwegian are also accepted and need not be translated.

The Swedish experience with the recognition and enforcement of foreign judgments is generally favourable, however not very wide, of course, since the Lugano Convention has not been in force for a long time. The Convention is well known among lawyers and it is generally considered as an useful instrument.

Enforcing a foreign judgment in Sweden can be very easy but can also take both time and be expensive. Generally speaking, the client should not rely on that his foreign judgment can be executed in Sweden if the Lugano Convention does not apply. In case the judgment is not executable one would have to try the case once again in Sweden although that litigation could be expected to be somewhat less costly as a foreign judgment can be used as evidence before the Swedish court.

For the exequatur in Sweden the Svea Court of Appeal (Sw. Svea Hovrätt), Stockholm, is the competent court. There is no court fee for the Swedish exequatur. About ECU 500 to ECU 1.000 in lawyers fees and costs, plus any translations which may be necessary, would be charged. Those costs are recoverable from the defendant. Otherwise, in general, costs incurred by a party seeking the enforcement of a judgment are not recoverable.

The enforcement of a Swedish or recognized foreign judgment in Sweden would cost about ECU 100 for the court, the bailiff, *etc.* and about 4 to 5 hours in lawyers work, so that a total minimum amount of ECU 1.000 would be charged.

The foreign costs of the enforcement of Swedish judgment abroad are dealt with under the respective country. In Sweden itself, lawyers fees could occur with respect to the preparation of transmittal of the request to the foreign jurisdiction in one way or the other. In the normal case, costs would be rather minimal for the domestic lawyer as the main activity will be taken by the foreign appointed lawyer to apply for the execution. The principal costs would be translation of the judgment. The total costs have been estimated to be in a range between ECU 300 (which would be about one hour of lawyers' work plus expenses) and up to ECU 3.000, depending on the difficulties.

2.14.3 Recommendation of Forum

All Swedish experts concur that they would prefer to commence the action at home. They claim that normally a client would be more comfortable to pursue a case in his own jurisdiction and at the same time it would put further pressure on the opponent to defend a case in another jurisdiction. The Swedish language would be used at the proceedings of the court and for the

client's communications with his lawyer; the documents would normally appear in Swedish, and there would be familiarity with the culture of the country and occasionally with the domestic court procedure.

In addition, the possibilities for enforcement of a Swedish judgment under the Lugano/Brussels Convention are estimated to be good. For the Swedish lawyers it is a clear advantage in that connection that the Conventions also provide for enforcement of default judgments. Moreover, costs would generally tend to be more limited if the case is pursued by the clients' established or first counsel, better knowing the client and having immediate access to information. If the case is commenced in a foreign court additional costs will normally be created for lawyers' fees, translations and also less flexible contacts with the ultimate counsel and the client.

Finally, the Swedish procedural rule that the losing party will have to pay (reasonable) legal costs (including lawyer's fee) is cited as an additional advantage.

The difficulties involved with bringing actions against a foreign client are seen in the necessity to arrange for service of process which, they assume, must be made through the assistance of the Swedish foreign office. Only among the Nordic countries, service of process seems to be relatively simple.

With respect to commencing an action abroad, other disadvantages would include the additional cost for arranging for a foreign correspondent counsel. The Swedish client is supposed to need to discuss the matter not only with his foreign lawyer but also with his domestic lawyer. The need for interpreters and to arrange for translation of documents and making any other necessary adjustments that might be necessary to please the foreign court are held to be further difficulties warranting against a proceeding abroad. In general terms it was also difficult for the Swedish lawyer to give the client specific advise with respect to the costs connected to foreign litigation.

2.14.4 Costs

Most of the costs arise directly from advocate's fees since Swedish courts do not charge any significant amount for their services. The costs for commencing an action in the ordinary

courts in Sweden amount to an application fee of less than ECU 40. Service of process, whether domestic or abroad is included in these fees and are handled automatically with no additional work required by the plaintiff or the attorney.

The average hourly billing rate is approximately ECU 200. The client would also be billed for other related costs, such as telephone and photocopy costs. Under the legal aid scheme, lawyers get a fixed rate of approximately ECU 100 per hour. Swedish lawyers may not take on cases on a contingency fee basis. However, it is an established principle that a lawyer may, when setting his fee level, take into account the result obtained.

As with all arrangements under hourly fee schedules, the work necessary cannot be exactly estimated and so the costs may differ significantly from case to case. The lawyers themselves have estimated total fees for first instance matters to range between ECU 5.000 up to 7.500, theoretically, in complicated matters, the fees can reach ECU 100.000. In addition, legal costs insurance seems to be quite common in Sweden. These insurances apply maximum amounts for the cost recovery which range between ECU 7.700 and ECU 20.000. Nevertheless, and after further enquiry, an amount of ECU 3.000 was stated to be the absolute minimum one would have to consider.

In Sweden all lawyers may appear before all courts. Most often the lawyer appointed by the foreign client would handle the case even if it would relate to a court in another part of Sweden. However, if the dispute should be of a low value and not bear such costs, a local lawyer would be appointed to handle the case, often in direct contact with the client. The additional amount for travel expenses or for the correspondent counsel could be estimated at about ECU 1.000. Non-lawyers or non-members of the bar may also act before any court as there is no monopoly for lawyers and they generally charge less. However, in a cross-border dispute it is highly unlikely that their services would be utilized or that they could be found by a foreign consumer.

The additional costs for a foreign client have been estimated at ECU 1.000 for the preparation of the claim, correspondence, *etc.*, exclusive of translations.

The preparation of a proceeding to be commenced abroad would include about one hour of lawyers work for the intake, and a total of another two hours for a telephone call, the preparation of a memorandum to foreign correspondent counsel, organizing the necessars translations and the collation and transmission of the supporting documentation, plus telephone and postage. Such activity would therefore cost about ECU 800, plus the translation itself.

2.14.5 Cost Recovery

In Swedish litigation the principle rule is that the losing party will have to pay the costs for the winning party (but for the exception of "small claims" noted, supra, in the introduction). Principally all costs related to the proceedings are recoverable, *i.e.*, legal fees, fees for witnesses *etc.* The courts do not charge costs for rendering the judgment.

In Sweden, recovery does include reasonable foreign counsel fees.

2.14.6 Duration

The estimated duration before receiving an enforceable judgment in first instance is approximately 12 months. The small claims procedure will generally run somewhat faster.

The recognition of a foreign judgment, if possible, can often be obtained within about two months but takes longer in some cases. The enforcement would take about a total of 8 months until all monies can be delivered to the judgment creditor. The preparation of a claim or the recognition of a Swedish judgment abroad might take about 2 months, including the time needed for the translations.

2.14.7 Summary and Advice

None of the lawyers would bring a small claims case to court. At least in theory it is supposed that the simplified procedure for such claims will allow the plaintiff to conduct his case without the help of a lawyer, the judge being given the task to see to it that the case is sufficiently investigated. Unfortunately, this would in practice not apply to a foreign plaintiff.

Neither Sweden's recent accession to the European Union nor the EEA-Agreement has so far increased any number of cross-border consumer disputes.

2.15 UNITED KINGDOM

2.15.1 Civil Proceedings

Courts are organised in England and Wales through the division of districts. Each county has the jurisdiction to decide civil matters[38]. The Court of Appeal has competent jurisdiction to take appeals from the High Court or a county court judge (only on points of law). The House of Lords has both original and appellate jurisdiction as well as being a final court of appeal. The threshold amount for the jurisdiction of the county court is approximately ECU 30.000. For higher amounts, the High Court has first instance jurisdiction. In Northern Ireland an additional Magistrates' Court handles special types of claim which are of no concern for this study. In Scotland, the Sheriff Courts and the Court of Session have concurrent jurisdiction for first instance matters. There is no threshold value but the procedures before the Court of Session tends to be more expensive so that it would rather be used for very high claims. Further, the Court of Session is in Edinborough and only certain lawyers are allowed to plead.

Affidavits in England must state the party's name to whom it is filed, secondly the initials and name of the deponent, thirdly the number of the affidavit and finally when it was sworn. An affidavit may be used for evidential purposes, by an order of the court, on a motion, petition or summons, in admiralty actions, and in actions *in rem*. In civil cases the submission of oral and written evidence is permitted if the witness is not called. Where evidence is required out of the jurisdiction of the court then this may be achieved either by letter of request or by the appointment of a special examiner.

All the methods in England and Wales of simplified debt collection relate solely to enforcement within England and Wales and are not therefore applicable in other EU-Member States. For cases with a value of less than about ECU 1.250 in England and Wales and Northern Ireland simplified procedure exists which may somewhat reduce the costs and is more akin to

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38 Where applicable and relevant for this study, distinctions between England and Wales, Scotland, and Northern Ireland are made accordingly in the text.

arbitration than to a normal court procedure. In Scotland there is a small claims procedure for debts not exceeding ECU 900 and a summary cause procedure for debts between ECU 900 and ECU 1800. For England and Wales, a recent proposal by the Lord's Chancellor's Office would raise the threshold value for this small claims procedure (or County Court Arbitration) to ECU 3.500. The procédure has an additional advantage of shortened time frames. In these procedures solicitor fees are not recoverable at all, thus lawyers are rarely used. However, for a foreign party this procedure, as it is now, may be of a certain disadvantage.

In Scotland it is possible to raise small claims or summary cause proceedings against debtors in other EU-Member States provided the Scottish Court can establish jurisdiction under the Brussels Convention. There is no special form of proceeding especially for foreign debtors. A judgment from another EU-Member State which has been rendered in a summary proceeding or simplified debt collection procedure is in principle enforceable in Scotland, provided the judgment and the foreign proceeding from which it emanates meet the conditions set out in the Brussels or Lugano Conventions.

The U.K. has ratified the Hague Convention. The Central Authority never charges a fee for its services. A translation of the document to be served is required.

The average duration for service of process of foreign legal documents under the Convention in England, Wales and Northern Ireland is 4 months. In Scotland, the average time taken from the date the documents are received, service is carried out and the documents are returned is 19 days. Accordingly, 3 months were used for the table.

In Scotland, in 1994, there have been the following incoming requests for service of process: France: 69, Germany: 55, Belgium: 28, Italy: 16, Greece: 15, Netherlands: 10, Spain: 3, Austria: 2, Denmark: 2 (Non-EU-Countries: 87, therein Norway with 42 requests).

2.15.2 Recognition and Enforcement

Judgments for fixed amounts obtained outside the jurisdiction of the court may be enforced if the defendant was present in the original hearing. Common law proceedings may not be entertained for the registration of multiple damages.

The procedure for recognition and enforcement, under the conventions or otherwise, does not, as a matter of law, require an attorney. Nevertheless, in practice, applications for enforcement are normally filed by local lawyers. Court fees do arise in the procedure for recognition and enforcement.

Where the foreign judgment in question is not in English language a translation into English must be certified by a notary public or a person qualified for the purpose in one of the Contracting States or may be authenticated by affidavit.

In England, Wales and Northern Ireland, the enforcement of a foreign judgment is by an *ex parte* application to a District Judge or the High Court of Justice. The Judge makes an order giving leave to register the judgment and state a time limit for appeal. Execution is stayed until the time limit expires. The estimated costs for this proceeding is between ECU 500 and ECU 1.000. The minimum duration for this registration procedure is about two months.

In Scotland this procedure is governed by the Civil Jurisdiction and Judgments Act and is far more straightforward. The applications for recognition and enforcement must be made to the Court of Session (the Supreme Civil Court in Scotland). The procedure does not necessarily require a lawyer to act for the applicant. The application can be made by an applicant himself, or a solicitor or advocate acting for him. However, applications made to the Court of Session under these procedures have generally been made by solicitors practising in Scotland.

The court charges a fee for lodging the application for registration of judgment. If the applicant employs a solicitor or advocate to handle the application on his behalf then fees will also be payable to such lawyers. Finally, administration fees arise: The keeper of the Registers charges a fee for registering the copy of a judgment and providing an extract. Including lawyer fees, the costs are estimated at ECU 300. Only in the event of an appeal they may exceed ECU 600.

The reasonable costs or expenses of the registration procedure are recoverable as if they were contained in the judgment enforced. Where the applicant has benefited from legal aid or exemption from costs or expenses in the state of origin, he is entitled to the most extensive exemption from costs and expenses under Scottish Law.

For comparative purpose, as a U.K. average, an amount of ECU 500 can be reasonably assumed as the minimum total costs and fees for a procedure for recognition of a foreign judgment.

In addition, for the execution itself, additional costs should be envisaged. Investigating a debtor's means may be by oral examination on Court Order or by instructing an enquiry agent. In either event, the cost should be not less than ECU 500, enquiry agents being more expensive, generally.

Depending on the type of execution, additional costs of between ECU 150 for seizing a debtors goods or attachment of earnings and ECU 600 for garnishee proceedings and ECU 1000 for charging order on land may occur. The involvement in a bankruptcy proceeding may cost ECU 750 or more. All in all, an amount of ECU 300 can be reasonably assumed. The costs in Scotland are somewhat less and the system is said to be more efficient than in the other parts of the U.K. An amount of ECU 250 was used for the average.

The lawyer costs, certification and transmission expenses for the preparation of the recognition and enforcement of a U.K. judgment in another EU-Member State are estimated at about the same as for a full proceeding abroad, between ECU 500 to ECU 1.000. Altogether, about ECU 600 should be taken into account.

2.15.3 Recommendation of Forum

The lawyers in the U.K. disagree on the preferable forum. Suing at home is preferred by most lawyers easing access to courts and lawyers. Others would make the forum dependent on the applicable law, preferring the court which would apply its own law. Three lawyers put importance on the cost of the proceedings. In light of the cost, two of these would generally recommend commencing action abroad rather than in the U.K.

2.15.4 Costs

In the U.K., attorney fees are not regulated by statute and are generally billed by the hour wherefore estimates are difficult and have a wide range. Hourly rates range between ECU 140

to ECU 250 for assistant solicitors and partners, respectively and ECU 100 for paralegals. The court fee is about ECU 80 for a proceeding in county court. Nevertheless, the estimated fees for obtaining an enforceable judgment are far higher. Contingency fees are not permitted for this type of case throughout the U.K.

The legal fee charged for obtaining judgment in a very simple and undisputed case has been estimated at ECU 500 together with miscellaneous expenses of ECU 100, exclusive of translations. In a more complex case, ECU 4.000 can easily be reached or exceeded. One of the lawyers estimated that the cost would easily reach ECU 6.000, another estimated the costs in the region of ECU 3.800 for a summary or default judgment to no less than ECU 25.000 for a fully defended trial. In Scotland the fees seem to be slightly more reasonable and are estimated at about ECU 1.500 for a defended case but may in other cases exceed ECU 4.000. Taken this conflicting evidence, nevertheless an amount of at least ECU 1.500 should be expected throughout the U.K. for a first instance trial proceeding. If the case is commenced in a different county, an average of ECU 300 should be considered for travel expenses or correspondent counsel. Additional work by correspondent counsel would reduce the costs for primary counsel and thus his fees.

The additional costs in the U.K. for a foreign client's case have been estimated at 50% more than for a domestic client, in other words, at least ECU 750 should be considered. This amount may be higher if the client is not represented by counsel in his home country as this would make communication more difficult.

Preparation fees in the U.K. for a case which is to be commenced abroad have been estimated at between ECU 500 and ECU 1.000 for intake, transmission and follow up work plus related communication expenses, certifications, *etc.* The majority of lawyers seems to agree that ECU 750 would be a reasonable minimum amount to expect. Additional translation fees of up to ECU 300 are envisaged.

Due to the hourly rates and the comparatively low court fees, the costs would not change significantly whether the value of the case is much higher or lower. Nevertheless, additional

expenses would be envisaged once the value of the case exceeds a certain amount, *e.g.*, about ECU 30.000 being the threshold value for the High Court in England and Wales.

The cost of preparation of and service of process also varies but would be about ECU 250, with an additional ECU 100 where service is to be effected abroad.

2.15.5 Cost Recovery

If judgment is obtained, the judicial expenses would be recovered by the plaintiff. These expense would definitely include court fees but would in total amount to no more than 40-60% of the actual costs incurred. In particular, items such as pre-litigation expenses, translations and foreign counsel fees will tend to be unrecoverable. Even local solicitor's fees cannot be recovered as a separate item and frequently exceed the fixed costs permitted under the rules.

2.15.6 Duration

The estimated duration before receiving an enforceable judgment would be 6-8 weeks for an undefended case from the day of receipt of the case by the handling attorney. For a full action, the duration would rather be 12 to 18 months or more.

Recognition of a foreign judgment can usually be obtained within about two months, the execution takes about four months minimum, and tends to take longer in England than in Scotland.

2.15.7 Summary and Advice

Most of the experts agree and are very clear on the point that it would be totally uneconomical to instruct solicitors for values under ECU 3.000 or 4.000. Even for the far higher value of ECU 50.000 some lawyers would make their advice depending on the actual case whether or not they would advise their client to proceed. One lawyer estimated the threshold value for a cross-border case in which a summary or default judgment cannot be obtained to make economical sense to be in the region of ECU 20.000.

The availability of legal aid changes the situation to some extent and for such cases the lawyers are more inclined to consider the case. Nevertheless, taking into account the additional time spent on a cross-border case and the foreign lawyers which may be involved they would still be cautious.

2.15.8 Special Note

From the above and all other advice received, while differing on the respective procedure and legal basis, the structure of cost and duration which is of interest here does not differ significantly between the different jurisdictions of the U.K. as to warrant separate tables. Therefore, also for comparative purposes, the tables, *infra*, shall not make special reference. It should be noted, here, that the overall cost and duration in Scotland is slightly less than in the other parts of the U.K.

3. Preliminary Summary

3.1 Description of Tables

At the end of this chapter there are four tables and four diagrams summarizing some of the results of this report. Table 1 outlines the cost and duration which are incurred for various necessary steps of a cross border procedure in the respective EU Member State based on a case value of ECU 2.000. The cost are given in ECU, the duration in months.

Using this table, one can calculate the cost and duration for a proceeding for each combination of countries. This has been done twice, taking under consideration the potential possibility of the dispute being located in the forum at the plaintiff's (or consumer's) place of residence (Table 2) or at the defendant's place of business (Table 3).[39] Finally a summary of tables 2 and 3 is provided, which takes into account the total costs and durations which arise in either type of proceeding and further attempts to calculate the minimum, the maximum and the average costs that would occur in the various combination of two countries.

Four diagramms supplement the tables providing a comparative overview for the tables. For purposes of graphical representation, the duration is given in approximate days rather than in months (the table data have been multiplied by thirty).

3.2 Additional Costs

Some of the additional potential cost bearing barriers have not been considered since, depending on the case, they may not occur every time. Expert witness cost are generally extremely high. Further, with regard to a litigation taking place at the plaintiff's domicile, it might be necessary for such a party to retain a foreign law firm which may be due to the fact that foreign substantive law applies to the respective case, for instance because the parties had contractually agreed on foreign law to apply, or also because the private international law of

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39 We do acknowledge that, under the Brussels/Lugano Convention certain rules with regard to jurisdiction exist which would preclude a law suit at the plaintiff's home in most cases.

the state in which the proceeding is conducted refers to foreign substantive law. In these cases, the parties can hardly get around retaining a foreign lawyer and plaintiff will have to do so even before a lawsuit is initiated. These problems may be less serious where the contractual relationship between the parties is governed by international uniform law (*e.g.*, the UN-Convention On Contracts for the International Sale of Goods).

In particular, the following items of cost and duration are not quantified in the tables (and have been mentioned only at random in the country reports above). Chapter C on Austria, *infra, hereafter,* provides a good example and various tables of cost items that may occur and which, except for the actual amounts, are also applicable to a large degree to the situation in other EU Member States.

As to personal appearance, in cross-border disputes there is a particular problem involved in the fact that one party will have difficulties to appear before the court in person. While this is generally not required under the procedural codes, it may create the need for additional evidence as the court does not have the possibility to ascertain the party's own credibility. The same applies with regard to procedural systems in which the court has the custom to make settlement proposals. The attendance of the parties in addition to counsel can be of advantage in the acceptance of such proposals.

The need for additional evidence creates additional costs. Expert witness expenses can be particularly high. Written reports generally cost at least ECU 150 in most countries, testimony in court is more expensive and costs at least the double of this amount. In fact, even if such fees are recoverable, as in most Member States, the fees are so high in relation to the risk as to pose another obstacle with regard to claims under a certain threshold value.

Other significant additional costs are due to language issues. According to the lawyers experience, translations of foreign language documents are almost always required in all Member States for all full proceeding. As an exception, in Germany, in practice the commercial chambers at the *Landgerichte* which only handle disputes between corporations, as well as the chamber for "international" disputes at the *Landgericht* Hamburg (which is the only such chamber with this special competency in Germany), sometimes waive the translation

requirements, particularly for English language documents. Similarly, Sweden also allows documents in English and Norwegian to be used in some proceedings. While this is a noteworthy and positive tendency, it is unfortunately only limited and, by defintion, does not apply to consumer disputes in the case of Germany.

With a few exceptions, translations cost ECU 50 to ECU 60 per page. For a simple complaint and supporting documents with a total of only four pages, an amount of ECU 200 to ECU 240 needs to be added. This would be the absolute minimum. If the judgment has to be enforced abroad, the translation fees arise a second time in about the same amount. Translation fees may further arise in court, if a witness or party comes from abroad and finally, apart from these "compulsory" translations, correspondence between counsel and co-counsel or between attorney and client may also need to be translated. For a single case, up to ECU 1.000 or more, depending on the circumstances (and the number of pages involved each time) may have to be added.

Further, banking fees need to be considered. For the payment of an advance retainer to the attorney or for the bill at the end of the case, for the payment of an additional amount to the lawyer or for administrative and court fees as the case continues, for the payment of the proceeds to the client at the end of a case: each time an amount of about ECU 10 is charged. These costs are generally not recoverable.

Further costs are involved in the search of an address, in the range between ECU 5 and ECU 300, depending on the country and the circumstances. In light of the risks involved and outlined in the report, it is strongly advised by some of the lawyers for any cross-border claimant to initially instruct a debtor's search to establish if it is worthwhile to proceed to seek execution as the debtor may be impecunious. Such additional (non-recoverable) costs differ from country to country but generally range between ECU 30 to ECU 400 with an average of about ECU 100, again depending on the country and the circumstances.

Finally, the cost and duration all are based on situations in which the attorney at the plaintiff's place of residence is able to handle the case, make the necessary initial legal assessments and, find and communicate with foreign correspondent counsel directly. Particularly outside of the

major commercial centres, lawyers may not be able to do so and may engage an additional attorney in their own country as an intermediary for either of these steps. These may also cause additional costs (and probably delay), either for the consumer's travel or for additional attorney fees and work.

3.3 Additional Barriers

Additional barriers exist for cross-border disputes which cannot be exactly quantified for consumers. The following comments does not take into account other barriers in access to court, which also exist on a domestic level but may be multiplied for cross-border disputes.

Some Member States have not yet ratified the Lugano Convention or the most recent Brussels Convention so that some judgments are not enforceable throughout the EU.[40] Nevertheless, the empirical data show that the conventions have also done little to improve the situation. Some lawyers have additionally reported a lack of knowledge by the courts regarding applicable conventions. The fact that an appropriate convention would be in force between one state and the other state, does not automatically mean that a judgment is enforceable in a foreign state without delay. It has been specifically pointed out that despite the call for equal application, the practice in the application of the Brussels and Lugano Conventions varies between the Member States. It has been criticized that the rule that foreign judgments must not be challenged at the recognition stage is not equally applied.

The disparate situation has additional consequences which need to be mentioned. Generally, and most significantly, different levels of ratification or practice of convention law by the Member States causes confusion and thus, causes additional costs due to, at least, research time.

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40 In the text, this has been specifically noted.

Additionally, few of the lawyers seemed able to assess the costs for the investigation of a foreign address or outlined the basis for such expenses.[41] Thus, it has to be assumed that when such address is not known, this procedural step alone may necessitate foreign counsel to be engaged although not legally necessary.

Generally, the lawyers asked also had difficulties to estimate the cost of foreign proceedings or enforcement abroad. This is generally a big problem and can be assessed easily from the country reports. For example, the French insecurity about fees can be dangerous for the uninitiated foreign consumer, even if he utilizes an attorney at his domicile. For a foreigner, the French fee system may create significant risks, if he is unaware of the necessity to negotiate the same. The same applies, to some degree to all foreign lawyers' fees. Accordingly, *e.g.*, the National Belgian bar recommends that the foreign client be specifically informed in advance about the method of calculation, and the Dutch Bar Association offers a leaflet published in several languages "How Your Lawyer Calculates His Fees". But this positive attitude does not seem natural for all lawyers.[42] In fact, for the reason of differences in the legal system and culture, rather than the law, communication problems were anticipated by most of the lawyers. What may appear natural for the lawyer of one country, may not be reasonable for the foreign colleague or client. Particularly with French and U.K. lawyers, complete prior agreement on the fees has been strongly advised by lawyers from other countries, having had prior "surprises" in this connection.

Another aspect are the differing and sometimes extreme short period of limitation of actions. Depending on the type of claim and the country involved, the statutory limitation periods in the EU-Member States range between 6 months and 30 years. If 6 months is short within a domestic context, for a foreign consumer it is almost impossible to go through all preparation

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41 Expenses connected with the research of a party's address are approximately ECU 5 in administration fees in most countries in which registries exist. Where not, such expenses are significantly higher. In addition, counsel fee have to be added for all lawyers working on hourly schedules. Both are usually not recoverable.

42 but see the European Bar Association (CCBE) Rules of international practice which mandate such information to be given.

stages within this period of time. Even if he employs a lawyer at an early stage, the limitation period of the other country may come as an unpleasant surprise.

Finally, in the course of international business, parties usually take precaution, mostly in the form of contractual provisions, to the effect that claims, if any, need not be asserted in the course of a civil proceeding to be conducted abroad. In many cases, the parties therefore agree on an arbitral tribunal to resolve disputes, or on the international jurisdiction of the courts of the state in which the potential claimant is domiciled as well as on the applicable law. For a typical consumer interaction such precautions are not possible so that questions of jurisdiction and applicable law may cause additional burden and delay.

3.4 Conclusions

The conclusions, which can be found in Table 4 are not surprising for anyone who is knowledgeable in the field of cross-border disputes but nevertheless somewhat shocking in their clarity: In the average, a cross-border complaint with a value of ECU 2.000 would cost the plaintiff far in excess of that amount! An average duration of more than two years is also clearly more than discouraging. Actions against a defendant residing abroad may raise special difficulties and long durations with regard to service of process and the following enforcement procedure.

It should be noted that, in congruence with common assumptions, there is a clear South-North increase with regard to the cost, and a North-South increase with regard to the duration. In other words, consumers from Greece having a claim against a Belgian seller and who are able to bring the procedure in Greece would be advantaged in terms of cost but would have to wait particularly long.

Another interesting result is that the cost and duration do not in the average differ very significantly whether the proceeding takes place in the plaintiff's or in the defendant's country. Nevertheless, the differences in the combination of countries may be extreme and need to be considered by all parties who may have a potential lawsuit. Wherever a choice exists, the

applicable substantive law should not be the only factor taken under consideration when the choice of forum is made.

As a first impression one might argue that the lawyers are to blame as they create the lion's share of the cost. In some states, courts do not even charge for their services. For cross border disputes, the significance of the lawyers' fees as such is worsened by two more factors.

For one, in most Member States, for matters in the value of approximately ECU 2.000, parties need not employ a lawyer for domestic disputes, as they can personally bring their claim in court. But for a foreign consumer, the situation is quite different.

In practice, there is no alternative for the consumer who has a cross-border problem that to contact a lawyer if the consumer's own efforts of negotiations fail. While commencing an action abroad through ones' own counsel and foreign correspondent counsel seems inevitable, there is an unavoidable degree of redundancy in the work done by domestic counsel and the work done by the foreign counsel. Domestic counsel will often have to independently examine the matter before entrusting it to a foreign correspondent counsel, who in turn will have to examine the matter in light of the laws in effect in his or her own country. In most events the redundancy will cause costs which are not fully recoverable. The same redundancy also occurs and may even be duplicated a second time, when recognition and enforcement is sought abroad. None of the lawyers, or even court officials we have asked, could anticipate such an application being made by a foreign lawyer or the foreign party himself.

Second, for domestic consumer disputes, consumer associations provide assistance with advice, out of court negotiations and settlements, and sometimes even for claim preparations. In some Member States, specialized claim boards exists, which provide for alternative dispute resolution of consumer disputes. Again, consumer associations play an important role in these tribunals in assisting the consumer with the advice (including the information that such tribunals exist and may be used), the preparation of claim and sometimes even representation.

The case is quite different for cross-border conflicts. The project team contacted consumer associations in all Member States. All consumer associations which have responded have

unanimously stated that they would not be able to assist a consumer in such a matter. Some would send the consumer away, some would refer to a lawyer, and only one would take the apparently best possible action in such an event as they would attempt to assist with contact to a consumer association in the other state. Most consumer associations did not even answer the questions or referred these questions to their lawyer. None of the consumer associations could recall dealings with such a case in the last twelve months.[43]

As to the lawyers, they are not to be blamed for their fees. To take an example, the German statutory fees are calculated under the consideration of a case mix. Cases with a small value have comparatively low legal fees, cases with a higher value automatically result in higher fees, each regardless of the actual amount of work involved. Thus, cases with a higher value are supposed to subsidize the cases with a lower value and, the anticipated case mix in a law firm would make the lawyer whole.

For cross-border conflicts, of course, this mix calculation does no longer work. The amount of work involved, as can be clearly seen with respect to Member States in which lawyers work on an hourly rate, clearly exceeds the time which statutory fees would cover. For domestic cases, a value of ECU 2.000 would come within the range of values which are viable for a law firm under the case mix described above, particularly where simplified procedures exist on a domestic level. Thus, one cannot blame the lawyers for covering their necessary work and expenses. In fact, most lawyers stated that they would likely reduce their fees, if they were to take the case at all. But it cannot be the general solution for cross-border conflicts for lawyers to "eat their bill".

Therefore, it is no surprise that, most lawyers, having the choice between fees that would be unreasonable for the client in light of the value of the case or fees that would be unreasonable for the lawyer in light of the necessary work, either would advice the client not to proceed or would prefer not to take the case.

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43 There are notable exception as regards particular consumer assosciations in some Member States as well as a number of institutions in border regions, some of which receive funds as part of a pilot project from the European Commission (DG XXIV).

Where cost recovery is not provided for, there is almost no economical sense to proceed in any of the countries to which this situation applies. But even in countries where cost recovery is available fully or in part, if the matter is complicated the consumer must still be ready to take the risk of not having his costs recovered as in the case of an insolvent debtor, or, if he loses, to compensate the costs of the defendant thus causing a double risk. When a judgment is enforced in a different country, the costs related to the foreign proceeding itself are sometimes not recoverable even when recovery is generally provided for domestic disputes.

According to instructions by the European Commission, legal aid schemes and private legal cost insurance were not taken under consideration. The systems are very different from country to country and a comparison of the same would be beyond the scope of this research.[44]

In any event, a full recovery of the costs is never available in the event of success, some costs, particularly post-judgment correspondence expenses are not recoverable, the overall percentages ranging between nil and 80% of the costs. Considering that, it is obvious that an informed consumer would not pursue the case if his own attempts of negotiations fail. An uninformed consumer, on the other hand, would probably do the same, either on his own account for insecurity or on advice of his lawyer. The consequences are obvious: **A rational actor would not pursue a cross-border consumer claim within Europe in court.**

This is confirmed by and explains the findings of the empirical court analysis conducted in Milano/Bremen/Hamburg which have not found any significant number of such disputes. In

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44 The European Commission is publishing a *Guide to Legal Aid in the European Economic Area*. In this Guide, legal aid in crossborder disputes is subject of a specific chapter.
A fairly recent study commissioned by the European Commission (DG XXIV) also provides more detail: Ewould H. Hondius, Wendela A. Jacobs and Carla A. Joustra: Consumer Redress Schemes in 11 EC Member States, (Brussels: European Commission 1993).
At the request of the Lord Chancellor's Department, and under the auspices of the Centre for Socio-Legal Studies in Oxford, a comparative study of legal aid schemes in various EU and non-EU countries is currently prepared by Alastair M. Gray, Neil Rickman and Hanno von Freyhold, publication forthcoming, 1996, which also provides some statistical information as to the percentage of the population entitled and the number of cases in which legal aid has been in fact granted. Please contact the Oxford Centre for further information.

fact, with a generalization which seems valid under the circumstance, there should currently be no significant number of cross-border consumer disputes for values up to ECU 2.000 between the EU-Member States in court. If recovery cannot be obtained out of court, the claim has to be forgotten and the loss borne by the consumer, as it would not be economical to continue. As one of the potential results, black sheep among sellers and service providers can be quite sure that they will most likely not be brought to justice by a consumer from another country.

Personally, most lawyers stated that they had no or very few cases regarding collection by or against a foreign party, at most, they recalled two cases per year in each direction. In addition, obviously, they stated that these cases were generally not consumer cases for amounts up to ECU 2.000. Some lawyers explicitly confirmed that their experience has shown that consumers hardly try to enforce their claim abroad. As a rule it has been stated that due to the small amounts involved with a typical consumer claim, very often it is not economically viable even to retain a foreign lawyer in order to litigate the matter.

Even if the interest was greater than ECU 50.000, many lawyers stated that they would still weigh carefully their client's interest against the risk of high legal costs. It must be remembered that the greater the interest of a party in a dispute the more that party would be willing to take a risk on legal costs escalating in so far that they do not rise above their interests.

The import of this report is, that consumers would generally give up their claims if negotiations fail. In other words, in practice a state of **anomie** exists in which there are no legal means of enforcement of a rightful claim.

SUMMARY TABLES

Table 1: Costs and Durations for a cross-border court dispute by member state

(All costs are in given in ECU, durations are given in months)

	Country:	B		DK		D		GR		E		F		IRL		I		L	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
1.	Preparation of proceeding abroad	250	1	500	1	160	1	100	2	500	1	750	1	500	1	400	2	250	1
2.	Additional for foreign client	100	1	50	1	30	1	80	1	50	1	150	1	300	1	100	2	100	1
3.	Domestic service of process	200	1	0	1	0	1	20	2	30	1	40	1	50	1	50	2	0	1
4.	First instance proceeding	450	12	850	8	740	8	250	24	600	12	1000	12	1000	24	1000	36	800	14
5.	Correspondent counsel	60	0	100	0	160	0	30	0	80	0	400	0	300	0	300	0	0	0
6.	Domestic enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6	250	4
7.	Preparation of service abroad	100	1	0	1	0	1	100	2	200	1	200	1	400	3	200	2	200	1
8.	Preparation of enforcement abroad	100	1	400	1	160	1	100	10	500	1	650	1	500	3	200	2	200	1
9.	Recognition of foreign judgment	500	1	250	3	350	1	300	18	500	2	500	1	1300	5	450	2	250	1
10.	Incoming service requests	200	2	0	2	0	1	0	2	200	12	40	2	0	2	0	2	0	1
	... cont ...																		
	Country:	NL		A		P		SF		S		UK							
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.						
1.	Preparation of proceeding abroad	250	1	250	1	600	2	1300	1	800	2	750	1						
2.	Additional for foreign client	100	1	50	1	150	2	1000	1	1000	1	750	1						
3.	Domestic service of process	50	1	0	1	0	2	0	1	0	1	250	1						
4.	First instance proceeding	700	6	730	14	900	12	3000	4	3000	12	1500	12						
5.	Correspondent counsel	100	0	0	0	300	2	1000	0	1000	0	300	0						
6.	Domestic enforcement	250	4	300	6	600	8	180	8	300	8	250	4						
7.	Preparation of service abroad	200	1	0	1	0	2	50	1	0	1	100	1						
8.	Preparation of enforcement abroad	200	1	200	1	500	2	1000	1	300	2	600	1						
9.	Recognition of foreign judgment	250	1	300	4	650	8	1000	1	500	2	500	2						
10.	Incoming service requests	0	3	0	2	0	3	0	2	0	2	0	3						

Notes:

1. A procedure at the defendant's place of residence is the standard under the Brussels Convention.
2. All calculations were made on a conservative, or realistic minimum basis. VAT, translation costs (note 4) and expert witness costs were excluded.
3. For stamp duty, certifications and other costs calculated by pages in some member states, a four page document served as basis.
4. Translation costs of ECU 50-60 per page (Greece: ECU 8,30 per page) have to be added
5. Bank transaction costs of approx. ECU 15 have to be **added** twice (once for payment to foreign counsel and once for the transmission of the proceeds)
6. Potential recovery of costs by winning plaintiff is complex and ranges between 0% and 80% as foreign counsel fees and additional expenses are generally not recoverable even in member states providing for full recovery in principle.
7. All cost and duration refer to the side of the plaintiff only.

Table 2: Costs and Durations related to a proceeding at the defendant's residence

	Country:	B		DK		D		GR		E		F		IRL		I		L	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
A-1	Preparation of proceeding abroad	250	1	500	1	160	1	100	2	500	1	750	1	500	1	400	2	250	1
A	Total (A1)	250	1	500	1	160	1	100	2	500	1	750	1	500	1	400	2	250	1
B-2	Additional for foreign client	100	1	50	1	30	1	80	1	50	1	150	1	300	1	100	2	100	1
B-3	Service of process	200	1	0	1	0	1	20	2	30	1	40	1	50	1	50	2	0	1
B-4	First instance proceeding	450	12	850	8	740	8	250	24	600	12	1000	12	1000	24	1000	36	800	14
B-5	Correspondent counsel	60	0	100	0	160	0	30	0	80	0	400	0	300	0	300	0	0	0
B-6	Enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6	250	4
B	Total (B2-B6)	910	18	1250	14	1130	14	880	39	960	20	1890	18	2150	30	1900	46	1150	20

.....cont:.....

	Country:	NL		A		P		SF		S		UK	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
A-1	Preparation of proceeding abroad	250	1	250	1	600	2	1300	1	800	2	750	1
A	Total (A1)	250	1	250	1	600	2	1300	1	800	2	750	2
B-2	Additional for foreign client	100	1	50	1	150	2	1000	1	1000	1	750	1
B-3	Service of process	50	1	0	1	0	2	0	1	0	1	250	1
B-4	First instance proceeding	700	6	730	14	900	12	3000	4	3000	12	1500	12
B-5	Correspondent counsel	100	0	0	0	300	2	1000	0	1000	0	300	0
B-6	Enforcement	250	4	300	6	600	8	180	8	300	8	250	4
B	Total (B2-B6)	1200	12	1080	22	1950	26	5180	14	5300	22	3050	18

Notes:

1. A procedure at the defendant's place of residence is the standard under the Brussels Convention.
2. The table is provided for comparative purposes only, costs of an actual case arise separately in country "A" and "B".

Table 3: Costs and Durations related to a proceeding at the plaintiff's residence

	Country:	B		DK		D		GR		E		F		IRL		I		L	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
C-7	Preparation of service abroad	100	1	0	1	0	1	100	2	200	1	200	1	400	3	200	2	200	1
D-10	Incoming service requests	200	2	0	2	0	1	0	2	200	12	40	2	0	2	0	2	0	1
C-4	First instance proceeding	450	12	850	8	740	8	250	24	600	12	1000	12	1000	24	1000	36	800	14
C-8	Preparation of enforcement abroad	100	1	400	1	160	1	100	10	500	1	650	1	500	3	200	2	200	1
D-9	Recognition of foreign judgment	500	1	250	3	350	1	300	18	500	2	500	1	1300	5	450	2	250	1
D-6	Enforcement	100	4	250	4	200	4	500	12	200	6	300	4	500	4	450	6	250	4
C	Total (C7,C4,C8)	650	14	1250	10	900	10	450	36	1300	14	1850	14	1900	30	1400	40	1200	16
D	Total (D10,D9,D6)	800	7	500	9	550	6	800	32	900	20	840	7	1800	11	900	10	500	6

... cont: ....

	Country:	NL		A		P		SF		S		UK	
	Activity	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.	Cost	Dur.
C-7	Preparation of service abroad	200	1	0	1	0	2	50	1	0	1	100	1
D-10	Incoming service requests	0	3	0	2	0	3	0	2	0	2	0	3
C-4	First instance proceeding	700	6	730	14	900	12	3000	4	3000	12	1500	12
C-8	Preparation of enforcement abroad	200	1	200	1	500	2	1000	1	300	2	600	1
D-9	Recognition of foreign judgment	250	1	300	4	650	8	1000	1	500	2	500	2
D-6	Enforcement	250	4	300	6	600	8	180	8	300	8	250	4
C	Total (C7,C4,C8)	1100	8	930	16	1400	16	4050	6	3300	15	2200	14
D	Total (D10,D9,D6)	500	8	600	12	1250	19	1180	11	800	12	750	9

Notes:

1. A procedure at the defendant's place of residence is the standard under the Brussels Convention.
2. The table is provided for comparative purposes only, costs of an actual case arise separately in country "C" and "D".

Table 4: Summary of Costs and Duration

The total costs and duration of any given proceeding are comprised of a combination of costs occuring in two member states.
In total, 420 combinations are possible, so that a table showing all combinations is not feasible.

1. For a procedure at the **defendant's** state, the combination is comprised of the cost and duration occuring in the plaintiff's state for the preparation and the defendant's state for the proceeding and enforcement.

Country:	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	SF	S	UK
Preparation Duration	1	1	1	2	1	1	1	2	1	1	1	2	1	2	1
Preparation Cost	250	500	160	100	500	750	500	400	250	250	250	600	1300	800	750
(See Diagram 1)															
Country:	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	SF	S	UK
Proceeding & Enforcement Duration	18	14	14	39	20	18	30	46	20	12	22	26	14	22	18
Proceeding & Enforcement Cost	910	1250	1130	880	960	1890	2150	1900	1150	1200	1080	1950	5180	5300	3050
(See Diagram 2)															

When combining each state's costs and durations with every other state's cost and durations, the following results for a ...

Procedure at defendant's residence:

Cost			Duration:		
Min.	Max.	Average	Min.	Max.	Average
980	6600	2489	13	48	23,5

2. For a procedure at the **plaintiff's** state, the combination is comprised of the cost and duration occuring in the plaintiff's state for the proceeding and for preparation of service and enforcement and in the defendant's state for service and for recognition and enforcement.

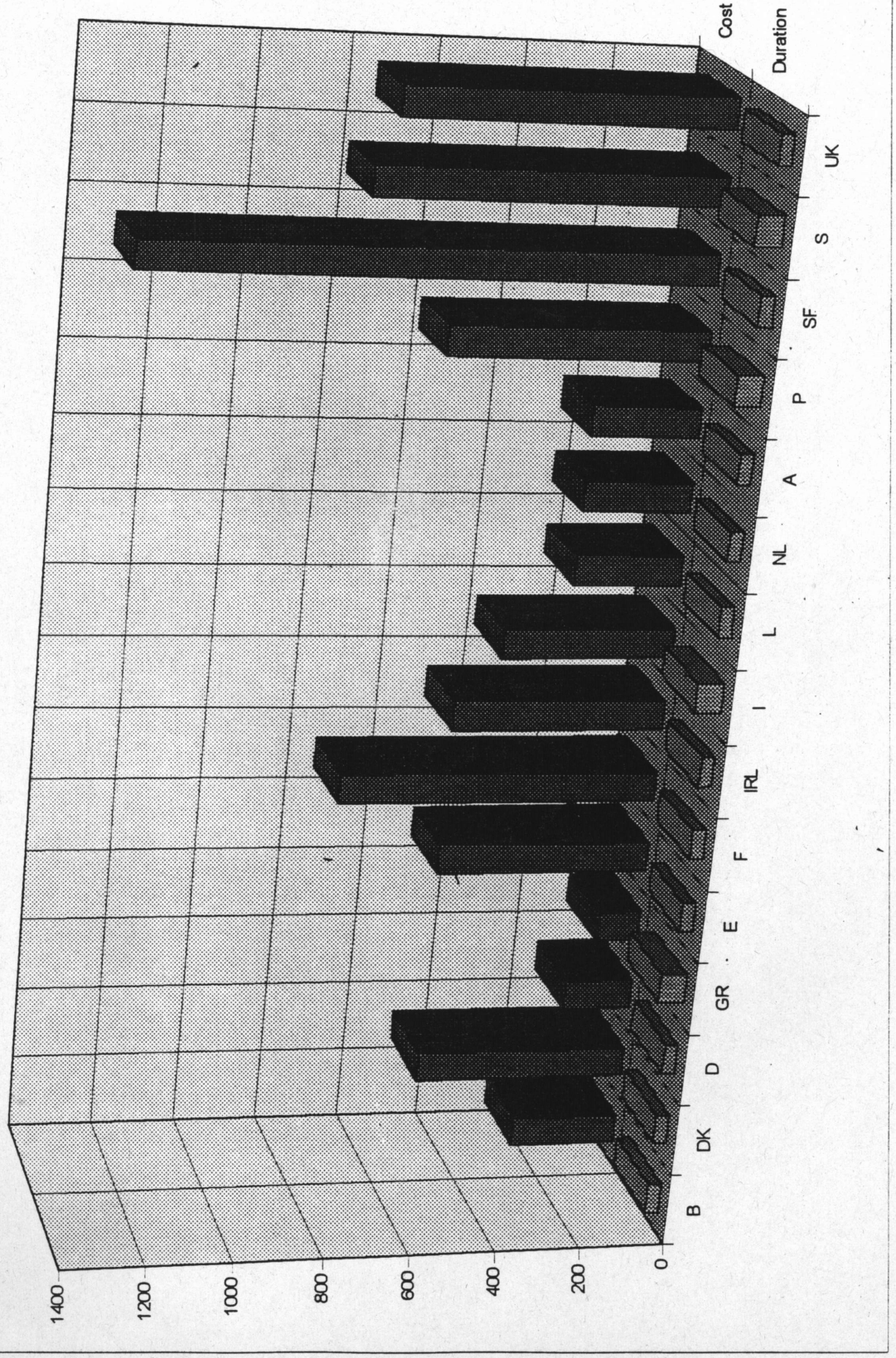
Country:	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	SF	S	UK
Proceeding and Preparation Duration	14	10	10	36	14	14	30	40	16	8	16	16	6	15	14
Proceeding and Preparation Cost	650	1250	900	450	1300	1850	1900	1400	1200	1100	930	1400	4050	3300	2200
(See Diagram 3)															
Country:	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	SF	S	UK
Recognition & Enforcement Duration	7	9	6	32	20	7	11	10	6	8	12	19	11	12	9
Recognition & Enforcement Cost	800	500	550	800	900	840	1800	900	500	500	600	1250	1180	800	750
(See Diagram 4)															

When combining each state's costs and durations with every other state's cost and durations, the following results for a ...

Procedure at plaintiff's residence:

Cost			Duration:		
Min.	Max.	Average	Min.	Max.	Average
950	5850	2437	12	72	29,2

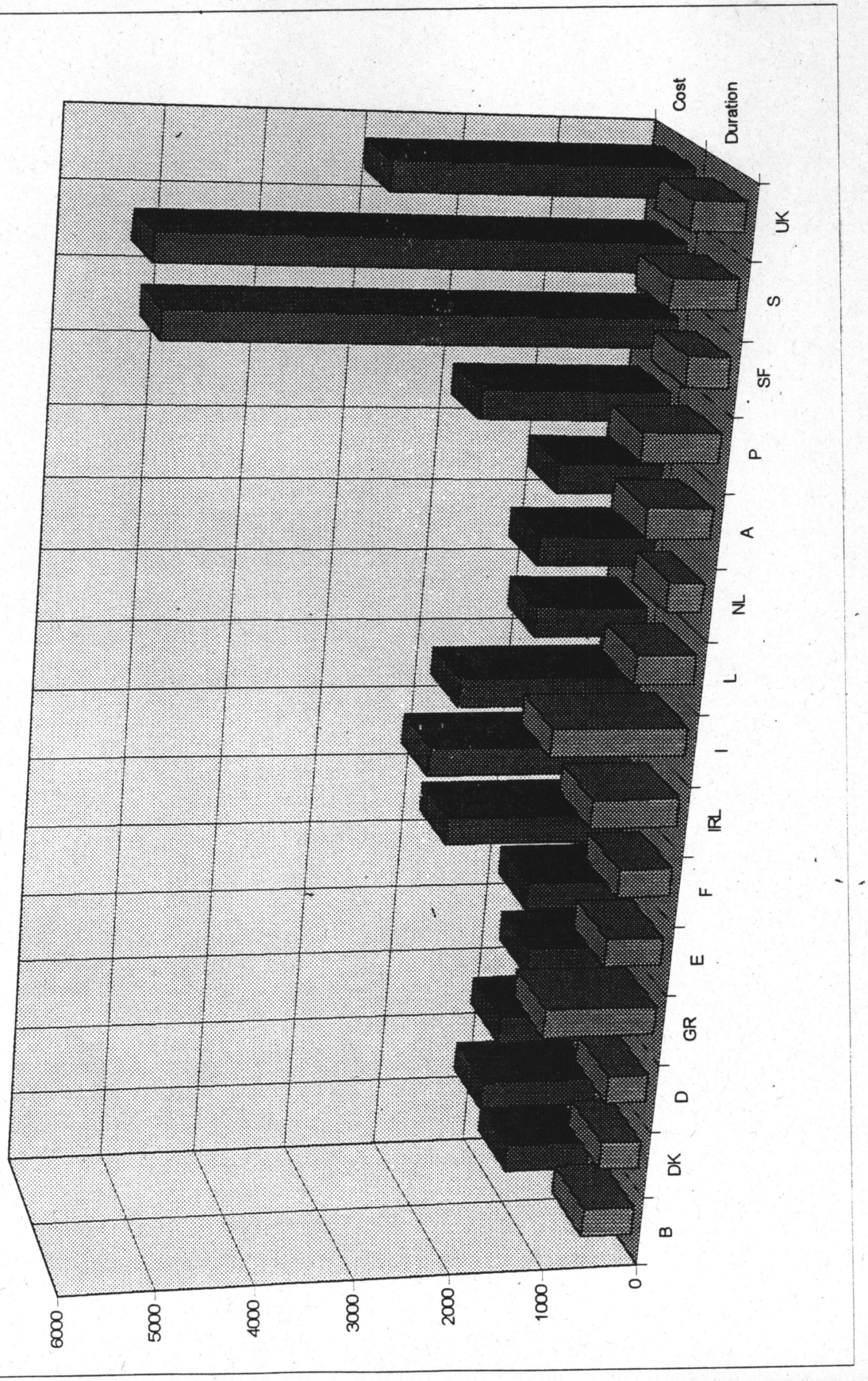
Diagram 1: Cost and Duration at Plaintiff's Residence for a Proceeding at Defendant's Residence for the Preparation of the Claim to be brought abroad.



Notes:

For purposes of graphical representation, duration is given in days in the diagrams.
Cost and duration relating to each step must not be compared with each other but with the same item of other member states.

Diagram 2: Cost and Duration at Defendant's Residence for a Proceeding at Defendant's Residence for First Instance Proceeding and Enforcement



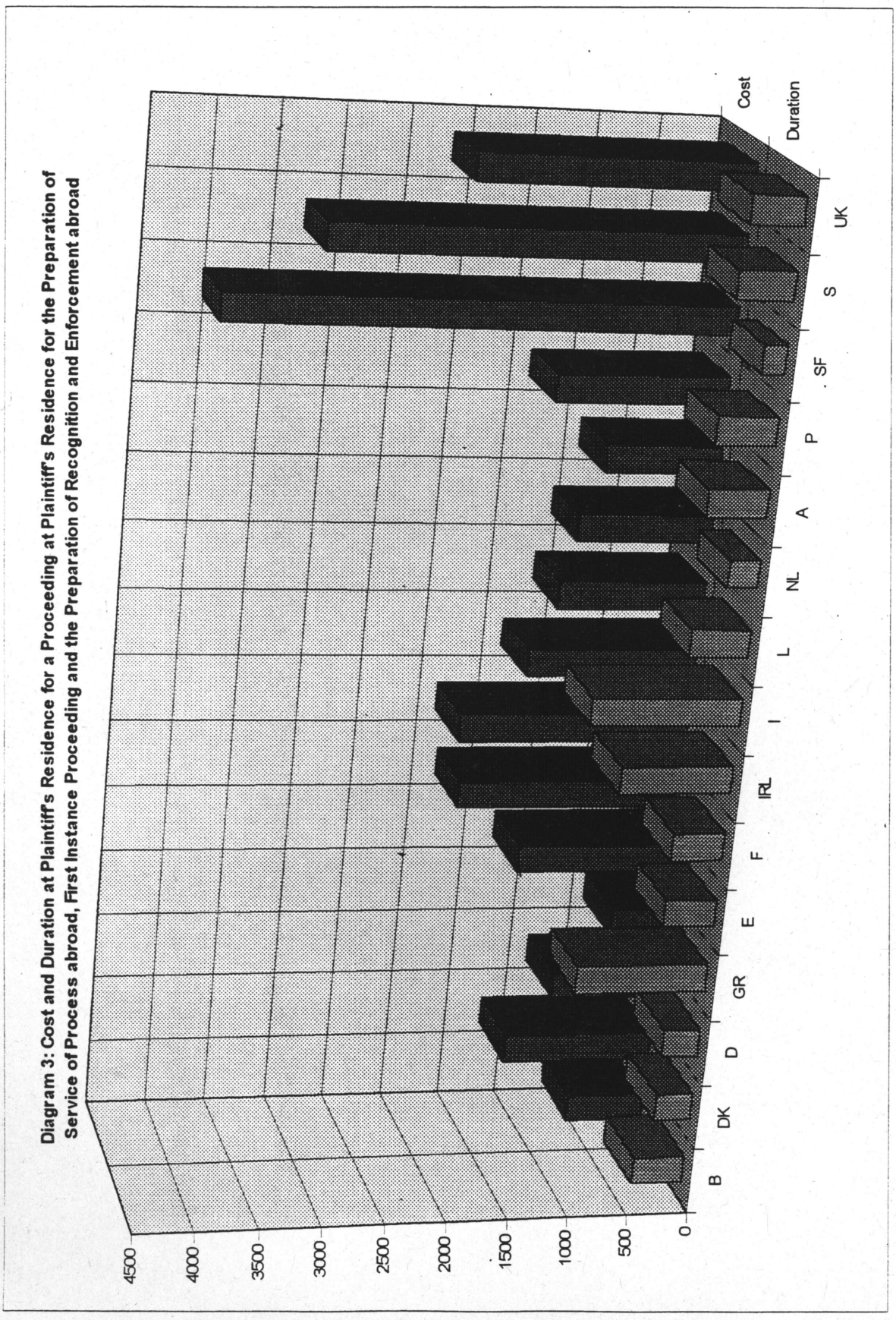
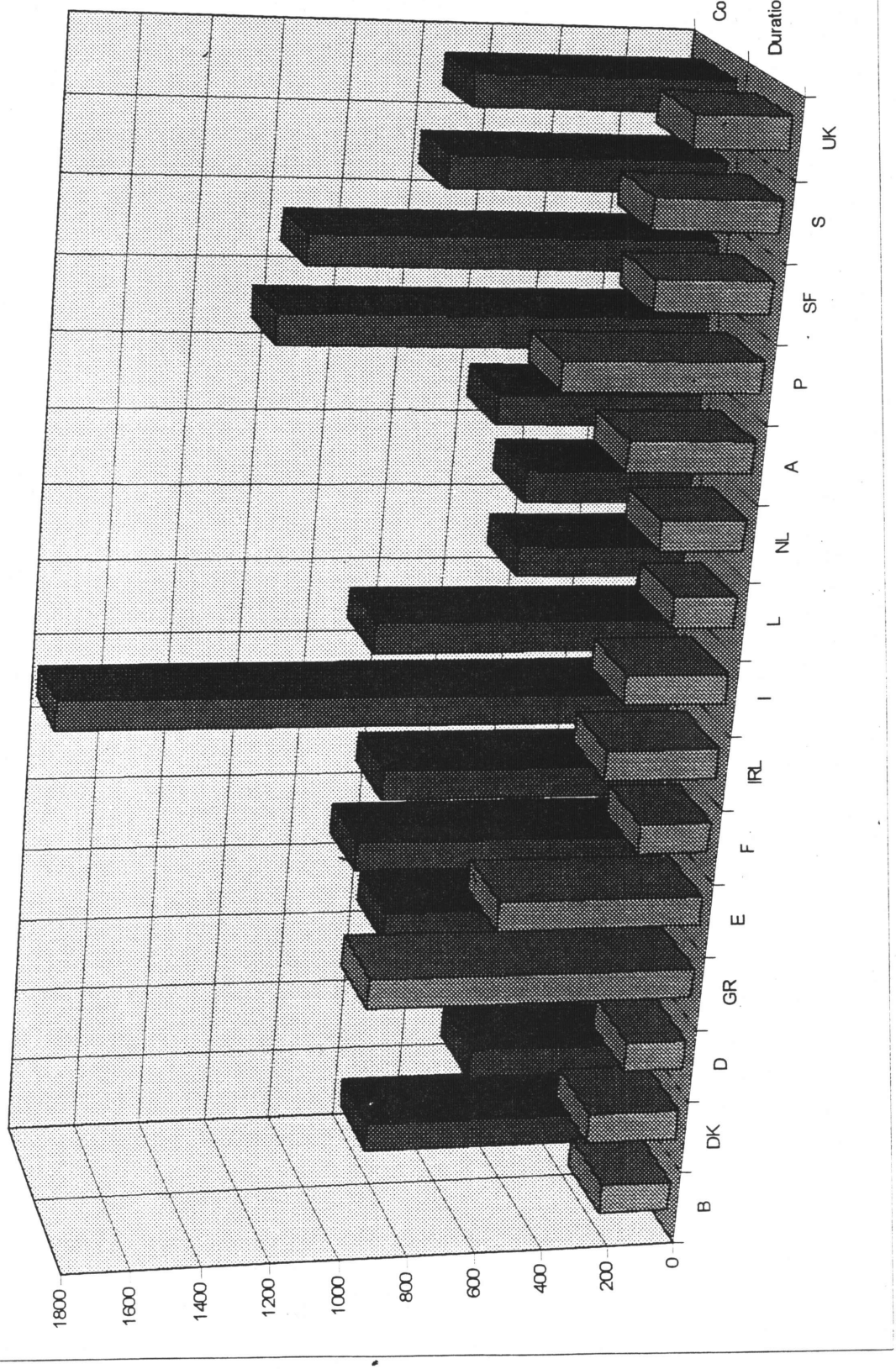


Diagram 3: Cost and Duration at Plaintiff's Residence for a Proceeding at Plaintiff's Residence for the Preparation of Service of Process abroad, First Instance Proceeding and the Preparation of Recognition and Enforcement abroad

Diagram 4: Cost and Duration at Defendant's Residence for a Proceeding at Plaintiff's Residence for the Recognition and Enforcement of the Foreign Judgment



C. Legal costs of cross-border claims in Austria

(Richard Wolf)[45]

The first part of this report gives a narrative overview of the Austrian court process as it regards legal costs. This part is divided into three parts, pre-trial negotiations, litigation, and enforcement, each with a table showing the relevant costs. The second part is a condensed response to the questions presented by the Centre for European Law and Policy.

1. Introduction

Litigation costs in Austria can assume proportions that must not be underestimated. They might well be decisive whether or not to bring an action. Recent research projects have shown that the costs of law suits which do not end by default judgment or by out-of-court settlement normally exceed the amount of the claim when the latter is less than ECU 2,370.[46]

These costs mainly consist of court fees, lawyers' fees, and the expenses for the production of evidence. Most of them are determined by law: court fees by the Court Fees Act[47], lawyers' fees by the Official Tariff of Attorneys' Fees[48], and by the Guidelines for Attorneys' Fees issued by the Austrian Bar Association[49], other expenses by the Official Regulation for Fees.[50]

As far as lawyers' fees are concerned the Official Tariff breaks legal services down into several different categories and establishes a scale of fees based on the value of the issues in dispute. With some tariff items the amount of time involved is not important, but for court hearings a time element is always incorporated. The Official Tariff also provides for a lump sum to be paid in addition to the costs of, *e.g.*, bringing an action. This lump sum is deemed to compensate for all additional services, such as phone calls, messages, legal research and so forth.[51] The attorney is free, however, to bill those expenses on an itemized basis instead.

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45 The author is a partner with the law firm of WOLF, THEISS & PARTNER, Schubertring 8, A-1010 Wien, Austria

46 *Fasching*, Zivilprozeßrecht, Second Edition [1990], p. 237.

47 *Gerichtsgebührengesetz* 1984; all references if not indicated otherwise refer to Austrian law.

48 *Rechtsanwaltstarifgesetz* 1969 as last amended in 1995.

49 *Autonome Honorarrichtlinien* 1976 as last amended in 1994.

50 *Gebührenanspruchsgesetz* 1975 as last amended in 1987.

51 The lump sum is called *Einheitssatz*.

On the other hand a lawyer may agree with his client on an alternate billing method. They may agree on higher fees or on hourly billing. Although this is still not the rule in Austria, it is becoming more and more customary for international clients. Mainly larger law firms tend to bill hourly or fixed fees in advance. Contingency fees are not allowed and it is rather unusual to negotiate a bonus for success.[52]

Whenever a local correspondent lawyer is needed within Austria, he will bill the requesting attorney according to the said statutory scheme. It is standard domestic practise, however, to charge only half of the Official Tariff (as a "collegial discount"). This does not apply to cross-border cases.

The Code of Civil Procedure[53] provides that a party losing on all counts must pay all of his opponent's legal costs. If each party has partially justified its claim, the costs are split accordingly – the courts have to decide on the proportions. The refund just comprises costs and expenses that have been necessary for the proceeding, pre-trial negotiations included. Only those legal fees are deemed to be "necessary" that are established under the statutory scheme - an alternate billing agreement has no influence on the amount payable by the losing party. The costs of a (justified) enforcement have to be paid up front by the creditor who is entitled to reimbursement – these expenses are usually then later recovered from the proceeds.

2. The model case

The following calculations and explanations are based on the given hypothetical in which a consumer from one EU-Member State has purchased an item for ECU 2,000 [alternatively 500 or 50,000] in another Member State. The price has been paid and the merchandise has either not been delivered or is faulty in some way.

Additional assumptions are that there are no extreme complications such as bankruptcy or demise of one party. Furthermore, each time foreign counsel is needed, it is assumed that all correspondence, *etc.* is in a common language such that there are no special costs for translations. In practice, Austrian lawyers do not charge more for correspondence in another language as long as this language is spoken in their firm.

52 In criminal proceedings are success fees are, however, common.
53 Zivilprozeßordnung 1875 as last amended in 1994, § 41.

The costs shown in the following tables do not include any taxes, in particular no VAT (which is 20% in Austria). To facilitate the calculation, the numbers have been rounded to whole numbers and the exchange rate was assumed to be 1 ECU = 13 ATS.

3. Pre-trial negotiations

3.1. Potential difficulties

During this stage the main problem will be to find out what really happened. It might be burdensome to get all the documents (in an understandable language) that one needs in order to give proper legal advice. Often it is difficult to identify the counter-parties concerned.

With a domestic client these problems may be overcome rather quickly by means of a phone call and, very probably, a meeting. In the case of a foreign client the Austrian lawyer will often be retained by or via a foreign attorney, which may complicate the exchange of data, and may necessitate more phone calls or letters until all useful information is gathered.

Normally, it is helpful to collect further information about the parties concerned, in particular by procuring an abstract from the Commercial Register if one or more parties are corporations, before taking any action.

If a potential complaint were to be filed abroad, foreign counsel would already be asked to negotiate beforehand or to send a demand note in the client's name.

3.2. Duration

This is clearly a phase which varies greatly in length depending on a host of factors, such as the interest of the client, the ability to collect documentary evidence, legal research, coordination between co-counsels *etc.*

3.3. Costs

Firms billing an hourly rate will charge approximately ECU 220 to 370 for partners and ECU 110 to 260 for associates. Below is an overview of typical activities and their corresponding costs under the Official Tariff. The costs are subject to a certain amount of subjectivity as the pricing of activities depends on the level of legal difficulty (especially on the

law applicable to the case), which also affects how much time is needed for each activity. *Italic* figures indicate costs and expenses that are not attorneys' fees. [54]

Table 1

PRE-TRIAL SERVICES	**COSTS** on the basis of ECU 500	2000	50,000	**TIME** minutes
1. *research of opponent's adress if*				
a) in Austria and duly registered	*2*			10
b) in Austria and not registered	*detective costs 100 - 770*			-
c) abroad	*detective costs abroad*			-
2. conference with client	22	40	192	30
3. telephone conversation w/ client	9	16	77	10
4. telephone conversation opponent	9	16	77	10
5. demand note to opponent	9	16	130	30
6. *translation of opponent's answer (3 pages)*	*31*			-
7. telephone conversation w/ client	9	16	77	30
8. costs of foreign counsel	*his costs plus*			-
two telephone conversations with foreign counsel	9 22	16 40	77 192	10 20
two letters (short/long) to foreign counsel	5 9	7 13	65 130	30 50
9. *translation of 20 pages*	*209*			-
10. *other cash expenses (time) such as copies, stamps, abstracts,...*	*10-30*			30
11. further information e.g.				
a) abstract from the Commercial Register	*12*			10
b) information request from a credit rating agency	*25*			10
Σ of attorney's fees in an average domestic case *plus costs*	**58** + *24*	**104** + *34*	**630** + *69*	
Σ of attorney's fees in an average international case[9] *plus costs*	**103** + *143*	**180** + *243*	**1,094** + *309*	

54 The totals in the table are not a total of all items mentioned above, but only of those which usually occur in such cases (in cases with a higher litigational value more research and more communication between client and attorney is common than in those with little value. Therefore, the ECU 50,000 case includes more meetings and more expensive research than the others).

4. Litigation

4.1. Potential difficulties

Litigation commences by the filing of a complaint with the competent court. In cross-border disputes the first problem will be to identify the court competent for the case at hand. At the time of filing it is possible to request a reference to the proper court within Austria if the initial court were to declare itself incompetent (provided Austria has international jurisdiction).

Where one decides to file the complaint (domestically or abroad) depends on several aspects. Crucial for that decision is that not all Austrian judgements are enforceable abroad and vice versa. Austria is not yet a member of the Brussels Convention nor of the Lugano Convention. The Code on the Enforcement of Judgements[55] stipulates that reciprocity is a prerequisite for enforcement.[56] The proceedings will last significantly longer when foreign witnesses have to be examined. In addition, the application of foreign law by an Austrian court makes appeals likely.

Foreign witnesses may also be examined by letters rogatory, a rather time consuming procedure, whereby again the problems of research of an address might occur.

In order to submit evidence – especially in those cases where faulty merchandise has been delivered – a (technical) expert opinion may be asked for. His fees depend on the specific case and the figures below show an average only.

4.2. Duration

A trial normally consists of a number of hearings occuring over several months. The first hearing will take place approximately two months after filing suit. In the vast majority of cases, judgement in the first instance is rendered within a year, although where foreign witnesses are to be examined, it may take more than one year.

Any adverse decision may be appealed only within rather short periods (2 to 4 weeks). The appellate court is not likely to review the fact finding of the trial court – in most cases a hearing is held only if one of the parties applies for it or if the appellate court deems it

55 *Exekutionsordnung* 1896 as last amended in 1995.

56 § 79 *Exekutionsordnung*. Bilateral treaties have been entered into with the following EU-Member States: Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom.

necessary. The possibility of further appeal to the Supreme Court mainly depends on the amount in litigation (whether it is below or above ECU 3,846). Almost always no hearings are held there.

In very extreme cases a proceeding with many witnesses and expert testimony may last up to five years and more. Appellate courts usually hand down a case within six months.

4.3. Costs

Typical litigation costs are listed in the table below. Again, italic figures demonstrate costs and fees other than attorney's fees. As a rule of thumb costs in a normal law suit in Austria will exceed ECU 2,370. This example shows that filing a claim may not be worth it where the client is not sure of his arguments.

Table 2

TRIAL SERVICES	**COSTS** on the basis of ECU			**TIME**
	500	2,000	50,000	minutes
1. *research of opponent's address*	*cf. Table 1*			
2. conference with client	22	40	192	30
3. written complaint or defense	65	109	620	90
4. *court fees (first instance)*	*45*	*76*	*1,040*	
5. preparatory brief	65	109	620	90
6. hearing	65	109	620	30
7. hearing with witnesses and/or experts	98	163	930	90
8. report letter to client	9	13	130	30
9. appeal or written reply to an appeal	81	135	775	120
10. *court fees (appellate court)*	*51*	*102*	*1,529*	
11. hearing on the appeal	81	135	775	30
12. report letter to client	9	13	130	45
13. conference with client	22	40	192	30
14. appeal or written reply to an appeal	n/a	n/a	931	150
15. *court fees (Supreme Court)*	n/a	n/a	*2,039*	-
16. report letter to client	9	13	130	30
Other costs during trial				
17. *expert's fee*	*400-1,500*			-
18. *witnesses' fees*	*200*			-
19. *translation during hearing (30 min)*	*22*			-
during a long hearing (150 min)	*54*			
20. *translation of documents (20 pages)*	*209*			-
21. *other cash expenses such as travel, photocopy, abstracts,...*	*30 - 50*			-
22. costs of foreign counsel	*cf. Table 1*			
Σ of attorney's fees in an average case (all instances) *plus costs*	**517** *+ 530*	**879** *+ 720*	**6,045** *+ 6,200*	

This table shows a billing according to individual service items. In court, however, the so-called "Einheitssatz" will be applied. It covers communication between the client and the attorney and is calculated as 50% or 60% markup on certain of the above fees (accordingly

telephone conversations, meetings and letters will not be billed separately). The following table shows the attorney's fees according to "Einheitssatz":

Σ of attorney's fees in an average case (all instances)	**768**	**1,281**	**8,218**	

5. Enforcement

5.1. Potential difficulties

The main problem is that the enforcement of foreign judgements is entirely subject to multilateral or bilateral treaties.[57] As far as court judgements are concerned, Austria has to ratify the Brussels and Lugano Conventions according to Article 3 of the Treaty of Accession to the EU. Unfortunately, there is no deadline for ratification which makes substantial facilitation difficult to foresee. The existing bilateral treaties vary slightly but usually require for enforcement a final and enforceable title with a certified translation. Service of process may also need to be proved.

Having once initiated the enforcement procedure, further problems may arise where the debtor is unwilling to co-operate or has changed address. When enforcing a judgement on the debtor's personal property, in order to gain entry to the debtor's premises, a locksmith may only be requested upon a second try. To carry out the enforcement by sale of real estate, an appraisal by a certified appraiser is necessary beforehand.

Austrian law provides for the possibility to enforce a judgment by different means at the same time. If the debtor owns real estate, one will always seek enforcement there. Enforcement by collecting the claims the debtor has vis-à-vis third parties (invoices or lease-agreements) is more helpful than enforcement against tangible property, which always necessitates an auction. Enforcement against a debtor's salary is common.

The court decides upon the distribution of the sum gained by the auction. Where more than one creditor have applied for enforcement, a distribution scheme is fixed beforehand. Both decisions are open to appeal, which will, of course, significantly lengthen the proceedings.

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57 cf. note 10.

5.2. Duration

Normally, at least nine months pass before the creditor has some money in his hands. In the vast majority of cases, real estate enforcements are completed within this time period, whereas to enforcement against moveables may take twice as much time.

5.3. Costs

Enforcement of a domestic judgement in another EU-Member State will habitually be handled by a foreign attorney. Thus the Austrian expenses would only be minor (two letters and/or phone calls).

Where a foreign client asks us for the enforcement of a foreign judgement in Austria the costs listed in Table 3 may occur.

Table 3

ENFORCEMENT SERVICES	**COSTS** on the basis of ECU			**TIME**
	500	2,000	50,000	minutes
1. research of the opponent's address	*cf. Table 1*			
2. telephone conversation with client	9	16	77	10
3. report letter to client	9	13	130	15
4. costs of foreign counsel	*cf. Table 1*			
5. application for enforcement	73	119	630	30
6. enforcement in presence of attorney's assistant	14	21	195	120
7. *enforcement (court) fees*	*30*	*41*	*122*	-
8. application for another attempt of enforcement at a new debtor's address	11	18	101	30
9. second enforcement in presence of attorney's assistant	14	21	195	30
10. *locksmith's fees for a (difficult) lock*	*77* *750*			-
11. *transport costs*	*77*			-
12. application for an auction sale	73	119	260	30
13. *appraisal costs for an expert in an enforcement in real estate*	*1,940*			
14. submission of auction rules	53	86	195	30
15. *other cash expenses (time) such as copies, stamps, abstracts,...*	*10 - 30*			
Σ of enforcement costs in an average case	**460**	**628**	**2,089**	

6. The Cost of certain proceedings (Answers to Questions Presented)

In accordance with the questionnaire our responses read as follows:

6.1. First instance proceeding

1. A domestic client asks us to commence an action against a defendant residing abroad in another EU-Member State.

1.1 If the action were brought in Austria

- the estimated costs of such proceedings may amount ECU 2,370 in an average case;
- all costs that have been necessary are recoverable from the party losing on all counts. Only those costs that are provided by the statutory scheme are refunded - different billing agreements between the lawyer and his client have no influence on what may be recovered form the opponent. Where a case is won only partially the costs are shared accordingly;
- normally about one year will have gone by until judgement in the first instance is rendered;
- additional problems may arise from the fact that Austria has not yet ratified the Lugano convention, and more time is necessary where witnesses from abroad have to be heard.

1.2 If the action were brought abroad:

- fees will usually amount up to ECU 500 (translations are included as long as they remain within a normal frame), alternate billing methods might be more expensive. The procedure will cause additional costs occurring in the country where the action is brought;
- whether all these costs are recoverable depends on the law applicable in the case;
- the duration of proceedings abroad can not be predicted by Austrian counsel;

- difficulties other those than mentioned above might arise from special provisions in other EU-Member States, especially concerning service of process;

6.2. Foreign client

2. A foreign client or colleague asks us to represent him in an action against a defendant in Austria:

- the costs will only rise by the fees necessary for translations and some correspondence with the foreign counsel. These will amount up to approximately ECU 200. The foreign counsel's fees will also be billed but cannot be determined by us;

- usually these costs will also be deemed to have been necessary and therefore are recoverable from the opponent as set out above. Austrian courts only accept billing according to the statutory scheme;

- the duration will essentially be the same as in 1.1;

- we do not expect further difficulties except the fact that sometimes it is a time (phone/cost) consuming procedure to collect all facts and documents necessary to produce evidence.

6.3. Enforcement abroad

3. A domestic client requests the enforcement of a domestic judgement in another EU-Member State:

- we would instruct foreign counsel to take the case, therefore only limited fees would need to be paid to us. For several telephone calls, letters and official translations they should not exceed ECU 200-300;

- whether these costs are recoverable depends on foreign law;

- as does the duration;

- special difficulties emerge mainly from the fact that the Lugano Convention does not apply (it might apply in the country where enforcement is taking place);

6.4. Recognition and Enforcement

4. A foreign client or colleague requests the enforcement of a judgement from another EU-Member State in Austria:

- the average costs will be approximately ECU 500-2,000 (translations not included as they would be done by the client in his home country and certified there);
- costs are recoverable from the debtor;
- normally at least nine months will pass until the foreign client will get his money, but it could take twice as much time;
- as mentioned above the fact that Austria has not ratified the Lugano Convention may give rise to further problems.

6.5. Feasibility

In light of the costs, the duration and the difficulties mentioned above we would not tend to advise a client to proceed in a matter where ECU 500 or less are at stake unless in a purely domestic setting with easy facts. If the client's claim were ECU 2,000, the decision mainly depends on the question of whether the submission of evidence is easy or not. In both cases the client is often better off if he is willing to accept an out-of-court settlement (again depending on the set of facts). We do not have many cross-border cases where up to ECU 2,000 are due, but we handle a large amount of such domestic cases.

If the amount in dispute equals ECU 50,000, even partially losing the case would not end up in a situation where the client were to pay more to his lawyer than he has won in court. On the other hand, lengthier litigation is very probable and the judge is more likely to ask for an expensive expert testimony. Especially for foreign clients the possibility of hourly billing makes a try almost always worth while.

6.6. Different values

Where the value of the merchandise is ECU 500, the costs would not decrease significantly - they would certainly exceed the value of the merchandise. The duration of the proceedings would essentially be the same as with ECU 2,000. A second appeal, however, will for legal reasons (small claims limitation) also not be possible in the vast majority of cases. Usually we

would rather not advise a domestic client to sue for ECU 500 in another country, where the acceptability of his arguments or the defendant's credibility are not certain. In a domestic setting such litigation is much easier and follows standard procedures.

If the amount in dispute were ECU 50,000, the duration of the litigation would certainly increase as each party would likely apply for more witnesses, submit more documents and file more pleadings. Costs would also increase but should be worth it, even where a case is not entirely won.

Our willingness to take on a case, however, does not depend on the value at stake. It will depend on the merits of the case. There may be high value cases with no positive chances that we would not recommend to litigate.

D. The Practice of International Civil Proceedings in Italy

(Enzo L. Vial)

1 Introduction

The difficulties of cross-border legal procedures must be considered against the background of the respective national procedural law and the legal and judicial culture. Accordingly, the objective of this part is to present the legal and practical peculiarities of a national civil procedure taking the Italian proceeding as an example..

Additionally, the desription of civil law practice is complemented by empirical data collected by Vittorio Olgiati at the Superiour Court of Milano which analyze the practice of international proceedings in Italy. The empirical data were collected within the framework of a Project on Global Legal Interaction funded by the Volkswagen Foundation and conducted by the project team under the auspices of the Centre for European Law and Policy at the University of Bremen.[58] For the pruspose of this report, a special analysis of the data was performed.

Since the largest group of foreign plaintiffs and defendants in the analysed procedures at the District Court of Milano represents German parties, it appears to be reasonable to examine the peculiarities of Italian civil procedure from the point of view of a German party or legal practitioner. Special Interest will be drawn upon the problems a private plaintiff (*e.g.* a consumer) who asserts a claim in Italy has to face.

2 The Civil procedure in Italy

2.1 Initial problems

By pointing to the unpredictability of judicature and the lengthy duration of procedures, juridical literature for practitioners warns all foreigners of litigating in Italy. [59] In a particular case, which had been pending in Italy, the German Federal High Court held a second action to be admissible in Germany.[60] This decision stands in contradiction to a general rule of German

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58 *See*, Vittorio Olgiati "Cross-Border Litigotiation in Italy" in: Volkmar Gessner (ed.) *Foreign Courts* (Aldershot: Dartmouth, forthcoming 1995)

59 Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): 6.

60 BGH NJW 1983, 1269.

procedural law, which provides that a procedure pending elswhere already, serves as a bar to the institution of a second proceeding by any of the parties involved (§ 261 Section 3 Number 1 of the German Code of Civil Procedure). The Court reasoned that, the duration of Italian civil procedure effectively denied the plaintiff his constitutional right of access to court and legal legal remedies.

This serves to demonstrate that from the point of view of German participants the Italian civil procedure obviously has a reputation of being rather ineffective and offers, particularly for the foreign plaintiff, but little promise of success.

Under the concept of "Litigotiation" Olgiati describes his hypothesis that the Italian civil suit does possibly not serve the solution of legal controversies as a technical instrument but as a framework, which offers the parties various options of settling their differences. Is it possible that the criticism of German practitioners described emerges from the fact that this way of solving problems remains sealed to them? Does the Italian civil procedure, due to its practical formation, constitute a social rather than a technical means of solving conflicts, and do foreign parties possibly fail for this reason?

2.2 The procedure at the tribunale

2.2.1 Legal framework

Only recently, the Italian legislation subjected the civil procedural law to a comprehensive reform. The aim of this reform was to shorten the duration of procedures and to reduce the backlog of pending civil procedures.[61] As the files examined by the Milano analysis were registered in the year 1988, which is to say, before the reform occured, the procedure will be presented here first in the version as was in force at the time. The most important changes subsequent to the reform will be presented at the end.

In 1988, the Italian Code of Civil Procedure (codice di procedura civile - c.p.c.) provided three courts for first instance claims:[62]

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61 law No. 353 of November 26, 1990 and No. 374 of November 29, 1991; for further details, see Virgilio Andrioli, "Sulla Riforma del Processo Civile", *Rivista di Diritto Civile* 37,2 (1991): 217 et seq.; Peter Winkler, "Die Reform des italienischen Zivilprozeßrechts" *Jahrbuch für Italienisches Recht* 6 (1993): 137 *et seq.*

62 see Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): chapter II.

- The Justice of the Peace *(conciliatore)*;

- the Inferior Court *(pretura)*; and

- the Superior Court *(tribunale)*.

2.2.1.1 Justice of the Peace (conciliatore)

The *conciliatore* has jurisdiction over small claims and does not require the parties to be represented by a lawyer. According to art. 7 c.p.c. (prior version) the *conciliatore* is competent for disputes about movable goods having a value up to not more than 1 Mio. Lire, unless there is a special assignment to another court. In addition, the *conciliatore* has exclusive jurisdiction over some special types of claims specified in art. 8 para. 2 c.p.c. (prior version).[63]

2.2.1.2 Inferior Court (pretura)

For claims with a value from 1 Mio. up to 5 Mio. Lire the *pretura* has jurisdiction notwithstanding any exclusive jurisdiction of the *conciliatore*.[64] Regardless of the value in dispute, the *pretura* has jurisdiction over different real estate matters. In addition, the *pretura* is exclusively competent for labour disputes (art. 409, 413 c.p.c).

2.2.1.3 Superior Court (tribunale)

The *tribunale* is competent for all disputes that do not fall under the jurisdiction of the *conciliatore* or *pretura*; *i.e.* all claims of a value exceeding 5 Mio. Lire or where the value cannot be determined.[65] The *tribunale* also has jurisdiction over family disputes, disputes about personal status, fiscal injury, civil rights and forgery.

Finally, the *tribunale* serves as an appellate Court for the *pretura* and *conciliatore* if the lower courts' decisions are not based on principles of equity, explaining why a number of disputes which in first instance fall under the jurisdiction of the *conciliatore* or *pretore* have been found among the researched files of the *tribunale*.

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63 Elio Fazzalari, "La Giustizia Civile in Italia" in *La Giustizia Civile nei Paesi Comunitari*, ed. Elio Fazzalari (Padova: Cedam 1994): 258.

64 art. 8 c.p.c. (prior version); Elio Fazzalari, "La Giustizia Civile in Italia" in *La Giustizia Civile nei Paesi Comunitari*, ed. Elio Fazzalari (Padova: Cedam 1994): 258.

65 art. 9 c.p.c. (prior version).

2.2.1.4 Venue

Under Art. 18 c.p.c. a claim falls under the jurisdiction of the court in the district in which the defendant has his residence or domicile. In the alternative, if the defendant's residence is unknown or abroad the court is competent in which district the plaintiff has his residence.

2.2.2 Judicial proceédings in practice

The procedure is entirely carried out in writing, being based on numeroûs individual dates for the hearing (*udienza*).[66] The lawyers of both parties appear in the office of the examining judge for the hearing. An obligatory appearance of the parties themselves only exists in exceptional cases, by special order of court.[67] The lawyers of both parties will confirm their due appearance by written entry into the official file on display there and, also by entry into the file, they will submit their respective motions. Thereafter, the file is presented to the judge for a decision and generally he will immediately decide on the motions and assign the next date for the hearing. The first impression of these hearings is one of total chaos. The first thing to notice is that the hearing itself generally will only last a few minutes, as only one individual motion will be processed, each time. Within a few hours, one judge will perform up to 50 hearings of this nature, per day. As many hearings are assigned simultaneously, the effect is that up to ten or twenty lawyers scrummage in the judge's office, looking for the lawyer of the opposing party (often by calling aloud), rooting through the open pile of official files for their process, or shoving in front of the judge's writing desk in order to present their file with the enclosed motions for his decision. Not altogether wrongly, these hearings have been jokingly referred to as "mercato" by the lawyers themselves.

In practice, no thorough discussion of the issues takes place; if there are any unclarities, some queries will possibly be made and the problem will be briefly discussed. Only when problems are more complicated the judge may reserve to adjourn his decision and not pass it until thorough examination. In such cases, he also has the option to appeal to a judges' panel of three for a judgment on the motion. Another possibility is to adjourn the hearing for another date at which the issue is going to be discussed with the parties at greater length.

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66 For a summary of the proceeding at the *tribunale*, Elio Fazzalari, "La Giustizia Civile in Italia" in *La Giustizia Civile nei Paesi Comunitari*, ed. Elio Fazzalari (Padova: Cedam 1994): 262 *et seq.*; Angela Krages and Nicoletta Contardi, "Der Zivilprozeß in Italien" *in Deutsche Unternehmen in Italien*, ed. Henning von Boehmer (Stuttgart: Schäffer-Poeschel 1993): chapter 2.3.

67 see Art. 117 c.p.c.

At the end of this "hearing of evidence" extending over many days of appearance, the pleadings will be specified at the **hearing for putting final motions** (*precisazione delle conclusioni*) and will be enclosed into the official file. With this hearing, the judge terminates the hearing of evidence and assigns a date for the **final hearing** (*udienza di discussione*, art. 275 c.p.c. *et seq.* - prior version). The waiting time for the final hearing can extend for between two to four years (the work-overload being cited as the reason for this delay). During this time, the judge presents the case for judgment to the panel of three before which the final hearing will take place. Art. 275 *et seq.* c.p.c. (prior version) provide that the case shall be discussed once more at this final hearing. However, contrary to this regulation, arguments take rarely place in practice: If one party does not specifically register the need for a discussion, the hearing will generally be limited to the pronouncement of the judgment. Subsequently, the judgment is deposited by the judges at the court registry and the judgment clause is served on the counsels. Not until the judgment has been registered, following an application submitted by the victorious party, the complete text may be served on the parties.

The unusualness of this procedural structure for German and many other European participants emerges by comparing it with the German civil procedure: The German Code of Civil Procedure provides that at the court hearing the parties will first be heard, directly followed by the taking of evidence and the discussion with the parties (§ 278 of the German Code of Civil Procedure). If at all possible, the pronouncement of judgment, too, occurs at the same date of hearing (§§ 310, 311 of the German Code of Civil Procedure). In Italy, on the other hand, no verbal discussions of the case take place during a hearing. The framework of the hearing alone would hamper any profound entering into the case or its verbal discussion. Consequently, the procedure merely forms a framework leading to the option of filing numerous written motions and of rendering judgment.

A further peculiarity consists of the possibility that the evidence may in fact be dragged on to an unlimited length, as the parties are entitled to file any number of motions.

On being questioned about the average number of hearings for any given civil procedure at the *tribunale*, lawyers stated that 20 hearings would be a realistic value. Each hearing at the *pretore* leads to a time loss of about two months and of four to eight months at the *tribunale* with the consequence that a simple civil lawsuit takes several years up to the end of the evidence proceedings.

Furthermore, the procedure also enables the lawyers to purposely delay the action indefinitely, as the parties can apply for an adjournment of the procedure (*rinvio*) at any given time. As long as the opposing party agrees, or does not contradict, the judge will grant such motion. On being questioned, several Italian lawyers stated that they indeed would be quite prepared to use a motion for adjournment as a tactical means for an action, in order to delay procedures, *e.g.* in order to move the opposing party to come to a settlement, or to conceal a temporary insolvency of the debtor sued. It was pointed out that, the readiness to come to a settlement would depend on the individual situation of the creditor: If the latter was interested in a prompt solution of the case a compromise would generally be offered to the opposing party, in order to avoid a lengthy procedure.

On the basis of the procedural circumstances described and the multitude of hearing dates involved, a further peculiarity to be noted, finally, would be that a constant presence of lawyers at court is indispensable during the procedure.

2.3 The reform of civil procedure

2.3.1 Legal framework

The reforms of the civil procedure of 1990 and 1991 introduced in order to shorten the duration of civil cases have changed the jurisdiction of the various courts.[68]

The competence of the *conciliatore*, now called *giudice di pace*, has been considerably extended. The highest value in dispute concerning proceedings about movable cases was increased from 1 Mio. Lire up to 5 Mio. Lire. In motor vehicle torts the *giudice di pace* is competent up to a value of 30 Mio. Lire.

In addition, he has jurisdiction over various cases which were previously proceeded before the *pretura, e.g.* condominium disputes.

Disputes about goods and real estates up to 20 Mio. Lire are allocated to the *pretore*, unless they do not come under the jurisdiction of the *giudice di pace* and unless the law does not allocate the dispute to another court.

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68 Peter Winkler, "Die Reform des italienischen Zivilprozeßrechts" *Jahrbuch für Italienisches Recht* 6 (1993): 137.

The jurisdiction of the *tribunale* has not been changed. Nevertheless, the *tribunale* is heavily releaved through the increase of the maximum values in dispute for *giudice di pace* and *pretura.*

2.3.2 The course of procedures after the reform

In addition to the redistribution of jurisdiction described above, the reform of civil procedure also aims to limit considerably the number of hearings and the duration of procedures.

An important aspect here is that of the initial hearing at which the defendant must in future already present his entire defence strategy. In constrast to before, an appearance of the parties is obligatory, which also applies to participants from abroad. By an examination of the parties, the judge is thus able to clarify the issues from the beginning and he can limit the matter to its decisive aspects. During this initial hearing, the parties may still amend or supplement their motions. By these means, the subsequent taking of evidence is supposed to be limited to a few hearings.

After completion of the evidence and lodgment of the final motion, the judge decides if he himself will adjudge the case as sole judge, or whether he is going to appeal to the panel. In future, the decision by a sole judge is supposed to become the rule.[69] Finally, a final hearing will take place only on application by the parties. If the latter do not explicitly register a need for discussion, the judgment will be rendered and deposited in the official file without any further discussion with the parties.

2.4 The role of lawyers and the protest against the reform

2.4.1 The lawyer's strike

On May 1, 1995, the Italian bar stated their opinion on the planned enforcement of the reform of civil procedure and on the establishing of "giudice di pace" and called on the lawyers to raise a national protest against the enforcement of these regulations. [70] In detail, the lawyers criticized in their call that the structural and personal conditions for establishing "*giudici di pace*" are not even rudimentary present; that the condition for the enforcement of the reform of

69 art. 43 legge sull ordinamento giudiziaro.

70 This declaration was made on the special meeting of the delegates of the Italian bar associationes on April 22, 1995.

civil procedure are not given and that the planned enforcement of the reform would bring the anyway impaired civil jurisdiction to a total collapse. According to the bar it would be "foolhardy" to believe that the planned enforcement of the reform would be suitable for overcoming the backlog of 2.600.000 pending civil procedures. The bar also pointed to the consequences for the parties affected, whose rights they have to safeguard, and called on the Italian lawyers to boycott all current procedures for two weeks. In practice this strike-similar boycott meant that the lawyers of both parties in dispute would appear on the scheduled day of hearing but instead of filing motions to receive evidence they would mutually apply for a postponement of the hearing.

2.4.2 Summary

This call, as well as the fact that the lawyers followed it almost unanimously, illustrates the attitude of the bar *vis-à-vis* the judiciary: For reasons of their personal and professional deficiencies alone, the judicial authorities are met with considerable distrust, the cause for the inefficiency of the Italian civil jurisdiction is not primarily regarded as a problem of its procedural law but as one of its structure. This criticism is not unjustified. The condition of the Italian administration, of which the judiciary is a part, has recently been investigated by the Italian Ministry of Public Service with the result that the inefficiency of public administration costs the Italian taxpayer an annual amount of more than a Billion ECU. Even the processing of simple applications take an average of six months.

These efforts by the bar to take influence on the civil procedure leads to the assumption that the lawyers regard themselves as protagonists of the procedure not only on a political level but also for individual lawsuits. As has been described, the course of the procedure is largely determined by the number and the content of the motions, which are filed by both parties. Although the judge decides, however, in accordance with the procedural law previously in force, he is bound to the motions filed by the parties. Consequently, he takes practically only very little influence on the course of the procedure. In practice, the judge only rarely makes suggestions for a solution, or compromise, and he is not able to speed-up the procedure. This means that the number of hearings involved, and therfore, the duration of the procedure, is determined exclusively by the lawyers. The possibility to delay the procedure, or to bring it to a standstill by a motion for postponement, is lastly an expression of this influence. The thesis that lawyers play a dominant role in civil procedures is also reinforced by practical experiences: Lawyers regard their contact among each other as an important part of their work, much time

is used at court for "corridor-talks" and discussions on the side of the hearings. A lawyer who was questioned about this considered this way of communication as more important than the close contact with his client or a discussion with the judge. Any suggestion for a compromise, any offer for a settlement, or questions on procedural tactics are, if possible, discussed directly with the opponent lawyer. Characteristic for this attitude is the following statement made to by a lawyer: He would only speak to his client in order to obtain the basic information from him. After this intake, he would do "his own thing", when planning his procedural strategy the client would only interfere with his amateur opinions. Through the multitude of hearings and the constant presence of lawyers at court connected with it, the outer structure is established here, too, in order to ensure a constant flow of information among lawyers.

It becomes clear how the legal structure of the procedure and the legal and cultural identity of the participants are connected with one another: The organization of civil procedure constituted by procedural law and accompanied by many hearings and little room for discussion in the presence ot the judge favours the largely independent working method of lawyers. Or, to return to Olgiati's picture of "Litigotiation": The legal organization of civil procedure produces the structure for informal ways of settling disputes.

If this assumption is correct, a further explanation for the vehement protest of the lawyers against the enforcement of the reform emerges: A successful realization of the reform, which would lead to an obligatory attendance of the parties at the judicial hearing and to reinforced conciliatory proposals by the judge, would reduce their power in this area and would at least limit their role as the central figure of the procedure. The well-geared system of "Litigotiation" would be thrown out of balance by the new regulations of civil procedural reform.

Such a functionalization of the procedure would finally explain, too, the distrust of German participants towards the Italian procedure: A foreigner, by his different cultural understanding, his lack of presence at the place of action and his missing insight into the negotiating structures, will inevitably be confronted with significant problems when he asserts a claim in Italy. Because of their lack of practical knowledge about foreign legal systems consumers will be affected by these problems in particular.

3 Particularities in procedures across national boundaries

3.1 Choice of venue

Olgiati describes in part II.6.2 that as a result of the legal rules of procedure (by the Brussels Convention, in particular) in international procedures a majority of foreign plaintiffs were to be expected, whereas the individual plaintiff himself, on the basis of practical considerations, would rather endeavour to sue at his native place of residence.

This poses a question as to the practical ramnifications and to the extent to which the latter stand in contradiction to the pertinent procedural regulations.

3.1.1 Legal framework

3.1.1.1 Competences regarding to Italian civil procedural law

Notwithstanding the jurisdiction of the court, whereas no distinction is made between Italians and foreigners or between the plaintiff's residence or domicile regarding the legal capacity to act as a plaintiff before Italian courts,[71] Italian law distinguishes between foreign and Italian nationals as regards the ability of the same to be sued in Italy: foreign citizens may be sued in Italy only in certain cases specified under art. 4 c.p.c.[72]

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71 Giuseppe Campeis and Arrigo De Pauli, *La Procedura Civile Internazionale* (Padova: Cedam 1991): Number 29.

72 These cases are:
- if he has a place of resident or domiciled in Italy;
- if he has has formally elected a representative in Italy, who is legally able to act in court; or
- if he formally accepts the Italian jurisdiction; and
- unless the claim concerns real estate located abroad.

Foreign citizens can also be summoned before an Italian court,
- if the claim concerns goods located in Italy, cautionary proceedings that have to be enforced in Italy, mortis causa of an italian citizen or testamentary succession in Italy;
- if the claim is connected with another law suit pending before an Italian court, or concerns cautionary proceedings which have to be enforced in Italy or legal relationships which come under the jurisdiction of an Italian judge.

Finally, art. 4 c.p.c. contains a reciprocity clause providing that, Italian courts entertain any claims against foreign citizens in circumstances where the courts of the foreigners' countries could deal with the same claims made against Italian citizens.

According to art. 2 c.p.c., the parties can derogate Italian jurisdiction in favor of a foreign jurisdiction only by written agreement and if the claim is about an obligation, and the parties are either both foreigners or a foreigner and an Italian, the latter having his place of residence abroad.

3.1.1.2 Competences pursuant to the Brussels Convention

In law suits in which the foreign party has his place of residence in a Member State of the Brussels Convention,[73] Italian procedural rules are replaced, accordingly. The application of Art. 2 and 4 c.p.c., *supra,* is expressly excluded by the convention. Rather, the convention provides for the defendant's place of residence as the principal place of jurisdiction (art. 2 of the convention). Furthermore, the convention provides various cases in which a jurisdiction can be established against the rules of national procedural law. Here it is of interest that according to art. 17 and contrary to art.2 c.p.c., the parties may generally select the jurisdiction of any Member State by written agreement.

3.1.2 Practical problems

3.1.2.1 Criteria for the choice of venue

The comparison of legal principles with the practical considerations of lawyers has shown that a lack of practice of the actors involved and an increased distrust of foreign procedural parties may be important factors in the choice of forum and the outcome of the procedure.

The problems of Italian civil jurisdiction described above would lead one to assume, at first, that a plaintiff would avoid taking legal action in Italy, if possible. When questioned about this, Italian as well as German lawyers stated that, above all, one reason not to sue in Italy, if possible, was indeed the long duration of Italian procedures.

However, as far as Italian lawyers are concerned, these statements must be modified to the effect that they would only apply to those lawyers, who themselves possess a respective command of language and of practical experience in cross-border disputes. An inquiry held among several lawyers inexperienced in this area showed that on no account would they

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73 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters* of September 27, 1968 (law No. 804 of June 21, 1971; law No. 756 of October 1, 1984; law No.745 of November 29, 1990).

venture on a procedure abroad. It must be taken into consideration, here, that the majority of Italian law firms, now as ever, is characterized by the personality of the individual lawyer. Whereas law firms of U.S.-American pattern, and large law firms with international experience andconstant connections to abroad, are the exception. [74]

One lawyer with international experience, on the other hand, pointed out a problem which he called "home advantage of the plaintiff": According to it, judges in most countries usually privilege the native party. Henceforth, if the issue was in dispute, an action abroad would always be of more risk. Independent of whether or not such an attitude by the courts of "hostility to foreigners" can indeed be verified by empirical data, it is notable that practitioners take this attitude for granted, at least, which should present a direct barrier to cross-border litigation.

3.1.2.2 Additional costs of procedures across national boundaries

The Italian regulation of fees enables the lawyer to assess his fees, according to the value of business, between minimum and maximum amounts which are to be determined in accordance with the regulation.

In cases of particular complexity or importance, the Bar Council grants the lawyer fees in excess of those provided by the regulation. In addition, the lawyer has the possibility to exhaust the scope of fees at his discretion, in any case. As has been stated, there are few specialized lawyers on the international level in Italy.

As a result of less competition, therefore, it is possible to charge higher fees right from the start. When asked, lawyers working in this field admitted that this was indeed current practice. Consequently, it automatically becomes a question of costs to find a lawyer who is prepared and competent to conduct a procedure abroad.

On top of these fees there are further additional costs, *e.g.*, for translations, services, and increased costs of communication.

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74 see Gerardo Broggini, "Europäische Dienstleistungsfreiheit auf dem Gebiet der rechtsberatenden Berufe (Rechtsanwälte): Situation in Italien", in: *Jahrbuch für Italienisches Recht* 4 (1991): 149 *et seq.*

3.1.2.3 Correspondence lawyers

A further factor to be observed with international procedures, which also may contribute to an increase of costs, is the need for a second lawyer residing at the place of jurisdiction.

In Italy, this problem first arises both for domestic procedures as well as for cross-border diputes. If an Italian lawyer wants to bring an action at a different donmestic at home, he needs a local lawyer, for at the tribunale the parties must be represented by a lawyer who is enrolled in the register of the respective *tribunale.* [75]

The opinion is held that in those cases, too, in which this legal prerequisite does not exist (which is to say, when no procedural acts are to be performed) a lawyer, who is not acquainted with the local rites and social structures, will always call for a local co-counsel.[76] Lawyers who were asked confirmed that within the limits of Italy they would always consult a lawyer residing at the forum.

For cross-border disputes the foreign party needs a correspondence lawyer as well, as foreign lawyers are not generally admitted to practice in Italian courts:[77] A condition for admission to practice, among others, is the Italian citizenship or a place of residence in Italy.[78]

The system of correspondence lawyers leads to additional costs on the international level.

On the domestic level, the initiating lawyer draws his written pleadings and transmits it to the correspondence lawyer at the place of jurisdiction. The latter will then submit the completed written pleadings under his letter heading to the court, without any further treatment.

On the international level, on the other hand, the rule is that the matter is always processed, once more, by the lawyer at the place of jurisdiction, and that the written pleadings are drawn by the latter, himself. Even in cases in which the initiating lawyer has a sufficient command of the language and the law of the place of jurisdiction, it is not customary that the correspondence lawyer would adopt the written pleadings of his foreign colleague.

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75 Art. 82 c.p.c. in connection with law No. 1578 of November 27, 1933.

76 Gerardo Broggini, "Europäische Dienstleistungsfreiheit auf dem Gebiet der rechtsberatenden Berufe (Rechtsanwälte): Situation in Italien", in: *Jahrbuch für Italienisches Recht* 4 (1991): 150.

77 For special rules regarding lawyers of the EU Member States see law No.9 of February 9, 1982.

78 law No. 1578 of November 27, 1933.

Consequently, the result is that for cross-border disputes one more fee arises for each written pleadings. In comparison to domestic disputes cases an increase of costs must be expected.

A further problem, which may possibly arise, is that the initiating lawyer, as a rule, will revert to a correspondence lawyer, whom he knows and trusts due to a long-term relationship. However, the latter will not inevitably be residing at the place of jurisdiction. The consequence being that the foreign correspondence lawyer will have to consult co-counsel at the forum on his part so that three lawyers may now be involved in the procedure. Given the case, finally, that the lawyer engaged by the client does himself not entertain any contact with any foreign lawyers, it is conceivable that he may first engage a colleague at home, who is going to pass on the case to the foreign colleague. In such an event, even four lawyers may be engaged in the case, connected with a respective increase of costs.

3.1.2.4 Summary

The interviews and observations made in practice support the assumption that in this area there are quite obviously problems, which might play a decisive role in the choice of forum. Additionally, it will be examined if this result is confirmed by the empirical data of the file-analyzes.

3.2 Recognition and enforcement of foreign judgments

The possibility to have a judgment recognized or enforced in Italy may be an important reason for the choice of the place of jurisdiction, or for conducting a procedure. One lawyer asked stated that the question of how complicated a recognition procedure or the enforcement of a judgment might well be decisive for the choice of the place of jurisdiction, in a particular case.

3.2.1 Legal framework

3.2.1.1 The procedure of enforcement

The enforcement requires the existence of an executory title.[79] According to art. 474 c.p.c. various legal and non-legal documents can be recognized as executory titles, *e.g.* judgments

79 see James Richardson, *Debt Recovery in Europe* (London: Blackstone press 1993): 84 *et seq.*; Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): chapter III.

and orders which by law are expressly granted executory force.[80] In order for an Italian judgment to be enforceable, it must be endorsed with the executory formula by the court. Judgments are directly declared provisionally enforceable by the court on application of the creditor. After the reform of the civil procedure the general rule is that a first instance judgment will generally be provisionally enforceable (art. 282 c.p.c.).[81]

Under art. 479 *et seq.* c.p.c., the creditor has to deliver a demand note *(precetto)* to the debtor before commencing an enforcement procedure. With the *precetto* he requires performance setting a deadline. This note is a required step for the enforcement procedure. After delivery of and the *precetto* and the enforceable title the enforcement procedure can be commenced within 90 days after expiration of the term set in the *precetto*.

3.2.1.2 The recognition of foreign titles

Under Italian law recognition and enforcement of a foreign title is achieved by a special proceeding *(procedimento di delibazione)*.[82] Art. 796 c.p.c. provides that the plaintiff has to obtain the recognition of a foreign judgment by application and suit at the Court of Appeal (*corte d'appello*).

The Court of Appeal reviews whether the foreign judgment meets the requirements of art. 797 c.p.c.[83] After this examination the court recognizes the foreign judgment. In this case the judgment is enforceable as an Italian judgment.

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80 James Richardson, *Debt Recovery in Europe* (London: Blackstone press 1993): 355.

81 see Virgilio Andrioli, "Sulla Riforma del Processo Civile", *Rivista di Diritto Civile* 37,2 (1991): 217; Richard Guy and Hugh Mercer, *Commercial Debt in Europe: Recovery and Remedies* (London: Longman 1991): 109 *et seq.*

82 Giuseppe Campeis and Arrigo De Pauli, *La Procedura Civile Internazionale* (Padova: Cedam 1991): Number 114.
In particular, it examines if
- under Italian law, the foreign court had jurisdiction;
- the defendant had adequate opportunity to be heard;
- the judgment is final pursuant to the foreign law;
- the judgment is not in conflict with an Italian decision or anticipated decision in the same dispute; and
- the judgment is not contrary to Italian public policy.

83 Edoardo Vitta and Franco Mosconi, *Corso di diritto internazionale privato e processuale* (Torino: UTET 1994): chapter III number 7.

Applications under the Brussels Convention are also made to the Court of Appeal (art. 32 of the Convention) but recognition is provided without any further proceeding and without the process of *delibazione*, described above.

3.2.2 Concerning the practice of recognition and enforcement procedures

On the practical realization of these regulations, the practitioners questioned described the Italian appellate courts as working quickly and effectively. Concerning the competence, or the readiness to apply the Brussels Convention, none of the lawyers asked had made bad experiences with the Italian courts. The recognition of a foreign judgment would need about one and a half to two months. The speedy dispatch of these procedures indicates that the lawyers are obviously not offered any opportunity for "Litigotiation", here.

The system of correspondence lawyers (connected with the additional costs for the second lawyer) has also established itself for recognition and enforcement procedures. In accordance with the regulations of the Brussels Convention, the recognition and enforcement of a German judgment, for example, could be applied for by a German lawyer without any problem. Astonishingly enough, however, this course of action is not customary, in practice. In Italy, any motion on the recognition or enforcement of a foreign judgment is categorically filed by an Italian correspondence lawyer.

This leads one to assume that for the foreigner, who is less experienced in his dealings with the Italian administration anyway, the infrastructural problems of the Italian administration present a special burden and cause him additional difficulties of taking action in Italy. When looking at the reverse case, however, the same picture emerges: In legal practice, an Italian lawyer, too, will always call in a German correspondence lawyer for enforcement in Germany. Practitioners call it "as good as impossible" as an Italian lawyer to directly engage the services of a German bailiff for an enforcement, as the distrust of the authorities towards a foreign applicant were too great.

To be noted, therefore, is that this distrust is not a specific problem of the Italian administration of justice. At least as far as German-Italian legal relations are concerned and contrary to the wording and the spirit of the Brussels convention, practice is a long way away from allowing a foreigner to take legal action in another state. Instead, a system of correspondence lawyers has established itself. This system may be effective, but it increases the

costs of procedures across national boundaries, and with this, it relativizes the facilities which international conventions aim for.

Differences in the national legal system and in the application of law may also cause problems and misunderstandings when applying the Brussels Convention: The handling of sanctioning of noncompliance with time-limits, for example, varies in different legal systems: In German procedural law, in the event of the defendant's failure to appear, following an application filed by the plaintiff, the court may take this failure as admission of claim and render a judgment by default (§ 331 of the German Code of Civil Procedure). The Italian law, by comparison, does not know of any judgment by default, a failure to comply with the time-limit may only be sanctioned by bar dates, so that the defaulting party can no longer plead. As a rule, only a loss of time is cause by the default as a result of an adjournment of the hearing. For procedures across national boundaries the Italian lawyer is thus confronted with more severe sanctions by the German courts. In pratice, these differences can sometimes be decisive for a procedure.

3.3 Summary procedure

On evaluating the number of foreign plaintiffs in Italy the possibility of recovering one's claim by means of a summary procedure must be taken into consideration, too.

3.3.1 Legal framework

A creditor who has does not have an executable title can instead of commencing a law-suit, order for payment (or delivery) within a summary procedure *(procedimento d'ingiunzione)*.[84]

The summary procedure can be utilized when the claim relies on written evidence or if the debt arises out of certain fees, rights or reimbursements as specified by art. 633 c.p.c. If the requirements are met, the court draws up a default (or delivery) order (*decreto ingiuntivo*) which will be delivered to the debtor without prior hearing.

Having received the order, the debtor may file an opposition or objection in which case, the procedure reverts into an ordinary civil law suit.

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84 see Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): chapter 4.; Angela Krages and Nicoletta Contardi, "Der Zivilprozeß in Italien" *in Deutsche Unternehmen in Italien*, ed. Henning von Boehmer (Stuttgart: Schäffer-Poeschel 1993): chapter 3.1.

If the debtor neither files an opposition nor pays the debt within 20 days, on application of the creditor the court can pronounce the order as enforceable. In this case the order becomes an executory title and may be enforced within the ordinary enforcement procedure.

While the summary procedure can be initiated by a foreign creditor, delivery of the *decreto ingiuntivo* abroad is explicitely excluded by art. 633 c.p.c. Therefore, the procedure is not available when a debtor has his place of residence outside Italy.

There is no special summary procedure in Italy for debts to be recovered from abroad, the respective foreign country's summary system alone can be applied.

3.3.2 Practical significance

In the literature it is recommended to foreign creditors that, before commencing litigation, he should first attempt to enforce his claim by means of a summary procedure.[85] This is in accordance with Italian practice: As long as a claim can be supported, a judicial summary procedure will be preferred to an immediate action. Consequently, many a claim will not even appear as lawsuit in the court file registries. Nevertheless, notwithstanding clear evidence the author observed a debtor filing an opposition against the default summons and thus provoked an action. As the lawyer of the sueing party was able to tell, the debtor happened to be insolvent. This particular case may serve as a confirmation of the thesis of "Litigotiation": Its purpose is of delaying payment, or of lowering it by means of an extrajudicial settlement. An Italian lawyers proverb is hereby topicalized, too, which says that a lean settlement is better than a fat judgment. [86]

4 Summary

An inspection of the legal and practical background of international proceedings in Italy renders the following picture:

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85 Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): 6.

86 Alberto Cristanelli and Hans-Jürgen Zahorka, *Beitreibung und Zwangsvollstreckung von Forderungen in Italien* (Sindelfingen: Libertas, 1991): 31.

The structure of civil procedure in Italy positively provides the conditions for the phenomenon of "Litigotiation" described by Olgiati. The conduct of lawyers, as well as the observations of procedural practice, reinforce this finding.

But a comparison, too, of the regulations governing procedural law with those practical particularities which the author was able to observe, and which are a special consequence of cross-border procedures, lead to the assumption that considerations of tactics, and of the economy of proceedings, must play a large role, in practice. An inspection of the theoretical and practical problems involved would indicate that the particularities of law and culture exert a considerable influence on international procedural practice.

5 Empirical part

The file analysis performed by Olgiati enables us to review the above mentioned conclusions using international cases which have been tried *de facto*. The mentioned file analysis investigates all civil disputes with foreign parties which have been filed in the *tribunale* of Milan in 1988. It includes a total of 189 cases, the most important data of which has been empirically recorded and can therefore be used for statistic calculations.

5.1 Proceedings

Civil proceedings in Italy can, as described above, be composed of many single hearings in court, thus giving the involved attorneys the possibility of an out-of-court settlement.

As regards the number of court hearings, Olgiati's findings confirm the following observation: less than 30% of the hearings in the *tribunale* have been concluded after only one or two hearings. 33% of all proceedings needed three to five hearings, while the major part (39,5%) needed more than five hearings.[87]

The thesis lying close at hand with regard to the description of the legal practice, namely this multitude of hearings only constituting the framework for an out-of-court settlement (ADR), is a procedure which has been described by Olgiati, as already mentioned, under the keyword *litigotiation* and which has been studied according to the court data. He found that only 34,9%

87 The latter may even be far higher in proportion since, for practical reasons, the research period had to be limited to a reasonable time frame of four years. An unknown number of cases which were not concluded within this time period are likely to exist and would influence the data significantly.

of the proceedings have been concluded with a judgment, whereas 65,1% ended by voluntary withdrawal of the action or due to absence of the parties. Olgiati valuates these cases as possible informal settlements which have been concluded between the parties due to out-of-court hearings, and thus as a confirmation of the principle of *litigotiation.*

5.2 Share of consumer claims

According to the results of our observation of Italian civil proceedings, one has to assume that many consumers would be discouraged to file an action in Italy which means that the data should show the share of private plaintiffs to be significantly small.

Tab. 1 (Milano): Parties legal status of plaintiffs and defendants

Type/Party	Plaintiffs		Defend.		Total	
Priv.Indiv.	67	35.8%	48	26.2%	115	31.1%
Small firm	7	3.7%	8	4.4%	15	4.1%
Company	95	50.8%	112	61.2%	207	55.9%
Insurance	6	3.2%	6	3.3%	12	3.2%
Bank	8	4.3%	5	2.7%	13	3.5%
Other	4	2.2%	4	2.2%	8	2.1%
Total	187	100%	183	100%	370	100%

Valid Cases: 370 Missing Value: 8

The table shows that more than half of the involved parties are big companies (55,9%), the group second in size being private parties (31,1%) (which would include consumers).

Olgiati points out that this large number of big companies corresponds to the general assumption that international claims mainly deal with economical (financial?) disputes. The relatively high share of private plaintiffs is valuated by Olgiati as a surprise in the first place, in the second place he points out, however, that a large part of these claims are due to traffic disputes which form about 25% of all disputes. This would generally mean that they are initiated and conducted on behalf and with the support of large insurance companies rather than by the private individuals themselves. He comes to the conclusion that although a domination of economically strong parties, like big companies, can be noted, the path to foreign courts is nevertheless not completely closed for private plaintiffs.

A concrete statement as to how many consumers take recourse to an in-court enforcement of their claims due to the above mentioned problems is not possible, amongst other because we do not know how many consumer conflicts do in fact arise in the international arena. A low number of private plaintiffs could also indicate a lower number of consumer conflicts in the international arena.

A clearer picture, however, can be drawn from the observation of cases initiated by German plaintiffs.

Tab. 2 (Milano): Plaintiff status ./. Plaintiff origin

		German	Italian	other	Total
Private	N	7	34	27	68
	%	30.4	34.3	35.5	
Business	N	16	65	49	130
		69.6	65.7	64.5	65.7
Total	N	23	99	76	198
	%	11.6	50.0	38.4	100.0

The table confirms, for the German plaintiffs, Olgiati's results (*see,* table 1 above): about 30% of the the German-Italian actions as well have been initiated by private plaintiffs. It seems that German plaintiffs are not entirely discouraged by the above mentioned problems more than local or other foreign plaintiffs from filing an action in Milan.

But when one goes further into the matter and analyses the individual cases, the picture changes completely: five cases of the seven cases involving private plaintiffs are traffic claims which - due to the involvement of insurance companies - cannot be counted with typical consumer claims.

A further case concerns enforcement of trade rights amongst business people and therefore can not be counted as a consumer claim either. **This means that only one single case remains in which a German consumer claimed a title in Milan Regional Court.** This result is astounding primarily due to the fact that the major part of foreign parties filing claims in Milan comes from Germany.

Even this case, however, has not been decided by a court judgment: the proceedings lasted one year (during which three hearings were held), finally the file has been closed due to voluntary withdrawal of the claim after the plaintiff did not appear. The question whether this plaintiff simply renounced his claim or was able to achieve an out-of-court settlement, remains open.

It has to be stated though that in 1988 no German consumer was able to commence action and bring about a judgment in the Milan Regional Court.

5.3 Facilitations for EU-countries?

Up to the year 1988, ten states had signed the Brussels Convention.[88] When examining international proceedings is has therefore to be expected that the described difficulties will be compensated by facilitations, at least in the mentioned ten countries in which significant differences can be noticed.

5.3.1 Share of involved parties from Member States of the Brussels Convention

First of all the question poses itself, of how high the real share of involved parties from Member States of the Brussels Convention is in the international proceedings.

88 The convention came into force for the six original EEC states (*Kingdom Belgium, Federal republic of German, France, Italy, Luxemburg* and *Kingdom of the Netherlands*) on 1.2.1973; with the membership convention on 9.10.1978 (O.J. C L 304/1), *Denmark, Ireland* and the *United Kingdom*, with the membership convention on 25.10.1982 (O.J. C L 388/1) *Greece* joined the Union.

Tab. 3 (Milano): Country of residence of plaintiffs and of defendants.[89]

	Plaintiffs		Defendants		All	
Country	N	%	N	%	N	%
Austria	2	1.2	3	1.8	5	1.5
Belgium	4	2.4	2	1.2	6	1.8
Bangladesh	1	0.6	0	0	1	0.3
Bahamas	1	0.6	0	0	1	0.3
Switzerland	4	2.4	9	5.5	13	3.9
Costa Rica	1	0.6	0	0	1	0.3
Germany	23	13.5	19	11.5	42	12.5
Algeria	0	0	1	0.6	1	0.3
Spain	1	0.6	0	0	1	0.3
Egypt	1	0.6	0	0	1	0.3
France	14	8.2	19	11.5	33	9.9
Liechtenstein	2	1.2	2	1.2	4	1.2
Great Britain	5	2.9	3	1.8	8	2.4
Greece	1	0.6	3	1.8	4	1.2
Italy	90	52.9	85	51.5	175	52.2
Israel	0	0	1	0.6	1	0.3
Japan	1	0.6	2	1.2	3	0.9
Libya	1	0.6	0	0	1	0.3
Norway	0	0	2	1.2	2	0.6
Netherlands	4	2.4	1	0.6	5	1.5
Portugal	0	0	1	0.6	1	0.3
Rumania	1	0.6	0	0	1	0.3
Philippines	0	0	1	0.6	1	0.3
Thailand	0	0	1	0.6	2	0.6
Finland	2	1.2	0	0	1	0.3
China	1	0.6	0	0	1	0.3
Tunisia	2	1.2	0	0	2	0.6
Turkey	0	0	1	0.6	1	0.3
USA	7	4.1	7	4.2	14	4.2
Nigeria	1	0.6	0	0	1	0.3
St.Vincent	0	0	1	0.6	1	0.3
Yugoslavia	0	0	1	0.6	1	0.3
Total	170	100	165	100	335	100

The table demonstrates that a large majority of the involved parties comes from European countries. The share of involved parties from Member States of the Brussels Convention is remarkably high: if one ignores the share of the local (Italian) parties, one finds that in 98 proceedings foreign residents from other Member States were involved, while in only 62 proceedings the foreign parts came from another country.

89 Figures in this Table which are not subsequently discussed have been provided for informational purposes only. For such further discussions the figures are too low in light of the incompleteness of the files sample.

These numbers demonstrate the high standard of economic integration within the European Community, and can be taken as evidence for an intense trade- und legal exchange.

Nevertheless, these numbers do not allow a statement regarding the fact whether this high rate of claims originates from factual legal facilitations, a fact being of particular importance for consumer claims.

5.3.2 Comparison to parties from non-Member States

If within the legal area of the Member States of the Brussels Convention legal facilitations exist which grant advantages to the residents of these states, then a direct comparison of parties from the ten Member States to other foreign parties should show fundamental differences.

The comparison regarding the result of the proceedings does **not** reveal any significant particularity: for the parties from Member States of the Brussels Convention as well as for parties from other countries, between 30% and 40% of the proceedings are concluded with a judgment, less than 60% by claim-withdrawal or non-appearance of the plaintiff.

A similar picture follows from the numbers of hearings: the share of proceedings which could be concluded with less than three hearings lies at 23,5% for Member States, and at 24,5% for other states. More than five hearings are needed by 44,4% of the Member States of the Brussels Convention, and 38,7% of the other foreign plaintiffs.

Also the size of the share of private plaintiffs and the sort of subject of the claim do not deviate from each other in comparison.

Therefore, in no area particularities of proceedings with parties coming from states which signed the Brussels Convention can be stated. The current problems in international proceedings gain the same importance for EU-residents as they do for parties from third countries.

Feasible facilitations of the legal traffic in the realm of the European Communities can therefore **not** be noticed in the empirical data.

5.3.3 Application of treaties and Community law

The above findings lead to the question of the status of international conventions and foreign law in national courts in general.

Olgiati comes to the result that from 189 examined files, only 12 files mention foreign or international law, or international conventions, contracts, legal documents or jurisdiction. All other cases are handled exclusively by and according to Italian law.

The possibility to question the international jurisdictional competence of the Milan *tribunale*, remains unused in practice: in 96,6% of the proceedings, no dispute arose regarding jurisdiction or venue. Only a very small significance of international agreements for cross-border legal interactions can be observed.

5.4 Conclusion

The data analysis confirms in its result that the observed practical difficulties of Italian Civil proceedings have a direct effect on foreign plaintiffs.

This statement holds surprisingly also for EU-residents, since the facilitations of international agreements do not have any remarkable influence on cross-border legal interactions.

Cross-border consumer claims therefore play, according to the present findings, no significant role within the EU and in Italian courts.

6 Results

The description of the legal and legal-cultural particularities of a national legal system shows that a EU citizen who wants to file action in another Member State, still has to overcome a multitude of problems. The facilitations of European Law do not reduce these obstacles, they are covered in reality by practical problems. The European consumer is confronted - with regard to access to courts - with the same problems he would have if he would commence action in a third country. At least for German-Italian legal interactions it can be assumed with great probability, that most consumers therefore would not resort to a legal enforcement of their claims.

E. The Practice of International Civil Proceedings in Greece

(Maria Tzinopoulou-Gilch)

1. Introduction

Being a small country in Europe, Greece, since attaining independence at the beginning of the last century, has been strongly influenced in the legal sphere by the larger countries in Western and Central Europe.

From 1832 till 1862 numerous German jurists followed King Otto I of Bavaria to Greece. They brought with them their legal system, its structure as well as its content. The norms and basic rules have thus been mostly taken from the German law of that time.

On the other hand, the social structure and characteristics of Southern Europe have more influence where the practical administration of justice is concerned. The legal proceedings have a number of features in common with those in Italy. The common southern temperament seems to be the deciding factor here.

2. Civil Proceedings in Greece

2.1. General

The duration of proceedings in Greek courts can vary considerably. The lawyers have manifold opportunities to lengthen the time taken for a proceeding by repeatedly applying for and obtaining adjournments. One can thus prolong a case for many years. The clients put forth indisposition or having to travel as reasons for getting adjournments. But financial problems can also necessitate getting adjournments. Since the lawyers are overtaxed and hence need more time to work on the case, they find it necessary to apply for adjournment. This problem can often be solved through a higher income for the lawyer, since the lawyer can then work more intensively with the clients.

Longer delays come about when the lawyers go on strike throughout Greece. The last time it happened was in 1993, when the strike lasted a whole year. The reason for that was the fiscal policy of the Government then in power, which wanted to divest the lawyers of benefits. Because of this, many civil suits became time-barred. Many parties had no opportunity to get their claims.

According to the judges, one reason why the proceedings take so long is the small number of judges. As a result, too few judges have to handle too many cases.

2.2. The Court Proceedings

2.2.1. Legal Framework

The Greek civil procedure code is a product of continental law, which is based on Roman law. One can recognise this from the fact that there are three courts of competent jurisdiction for handling cases of the first instance:

- Justice of the Peace (Eirinodikis)
- County Court (Monomeles Protodikeio)
- District Court (Polymeles Protodikeio)

a. The Justice of the Peace (Eirinodikis)

The Justice of the Peace is responsible for small claims. According to Art. 14a of the Greek Civil Procedure Code (GrCPC) all cases up to a cash value of 600.000 Drachmas (approx. ECU 2.000)[90] fall under the definition of small claims.

According to Art. 14b of the Civil Procedure Code he has also jurisdiction over certain cases pertaining to rental contracts.

Representation by a lawyer is not compulsory before the Justice of the Peace.

b. County Court (Monomeles Protodikeio)

This court has jurisdiction over cases with a cash value between 600,000 and 2 million Drachmas (approx. ECU 2.000 and ECU 6.600)[91]. This applies to all suits which do not fall under the exclusive jurisdiction of the Justice of the Peace under Art. 15 of the GrCPC.

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90 In 1993, the civil procedural law was amended and the jurisdiction of the various courts were altered. The jurisdiction of the Justice of the Peace was raised from a maximum dispute value of 300,000 Drachmas to 600,000 Drachmas.

91 In 1993, the maximum value of the dispute amount involved was raised from one to two million Drachmas. The value limits had to be changed relatively often due to inflation in Greece.

According to Art. 16 of the GrCPC the County Court has jurisdiction, independent of the value of the suit (thus also for sums greater than 2 million Drachmas), over various property cases, which do not come under the jurisdiction of the Justice of the Peace.

Certain cases pertaining to labour law, family law and estate law, which are specifically enumerated in Art. 16 of the GrCPC also come under the jurisdiction of the County Court.

One has to be represented by a lawyer in a County Court.

c. District Court (Polymeles Protodikeio)

According to Art. 18 of the GrCPC the District Court has jurisdiction over all cases which do not come under the jurisdiction of the Justice of the Peace or the County Court. These are cases where the dispute amount is greater than 2 million Drachmas.

In addition to this, the District Court has jurisdiction over appeals arising in his district from proceedings before the Justice of the Peace.

In a District Court representation by a lawyer is compulsory.

d. Venue

According to Art. 22 of the GrCPC the court has jurisdiction over cases in the district the defendant has his residence or is domiciled. This applies as far as general jurisdiction is concerned. A special jurisdiction is applicable to cases arising out of contracts. The decisive factor in determining the jurisdiction of the courts is the place where the contract was concluded or where the contract should be fulfilled (place of performance). In property cases, the place where the property is situated is decisive for determining the jurisdiction of the courts.

If the defendant has no permanent residence in Greece or in any other foreign country, then the court of that district, where the defendant is currently staying has the jurisdiction. In cases where the address of the defendant is not known, then the district where the defendant last resided or, if no place of residence in Greece is available, the place where he was last staying is the deciding factor.

2.2.2. Practice of Legal Proceedings

a. The Procedure before the Hearing

Normally a lawyer is responsible for conducting a case before the court.[92] After the client has given the lawyer the power of attorney, the lawyer is authorized to begin the proceedings before the court.

The lawyer draws up a written complaint (Agogi) and files it in the office of the Registrar of the court of competent jurisdiction within the prescribed framework and time limit as provided by law. The office of the Registrar then fixes the date and time of the hearing of the case. The case is numbered and entered on a list (Pinakio) (Art. 226 § 1 of the GrCPC).

It is then the responsibility of the lawyer to find out the case number and the date of hearing. He is also responsible for informing the defendant through the bailiff as provided by law. The defendant should be informed well in time of the case number and the date of hearing. These jobs are done most often by the juniors working in the lawyer's chamber. [93]

The procedure before a court hearing is always a written one. This is prescribed in the rules in Art. 115 § 1 of the GrCPC.

b. The Proceeding in the Court Room

The law 1478/84 has brought about important changes in the Greek civil procedure code. These refer firstly to expediting of civil proceedings and secondly to the immediacy of evidence.

This means that evidence shall be produced by the latest five days before the first hearing so that the other side has enough time to prepare counter arguments. If evidence is not timely presented, a judgement by default will be delivered (in contumaciam, Erimin).

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92 Proceedings before the Justice of the Peace are in practice also conducted by lawyers, even though it is not required according to Art. 94 § 2 of the GrCPC

93 In Greece one can go through the probationary training period only under supervision of senior lawyers. In the recent years the number of women undergoing training as lawyers has risen.

The first hearing is always conducted orally and it is obligatory for both parties to be present (Art. 115 § 2 and Art. 270 § 1a of the GrCPC). Both parties appear with their respective lawyers. If the obligation to be present is not fulfilled, that is, if one of the parties is not present, there are various rules which can be applied in such a case. The rule which is applied depends first of all on whether the absent party is the plaintiff or the defendant. If the plaintiff is absent, the complaint will be dismissed according to Art. 272 of the GrCPC. The application of the provision also depends on the status of the proceedings, that is, on whether it is the first or a later hearing.

The case is printed in a list, the Pinakio, which is hung on the door of the court-room. Up to 50 cases are entered in this list, which will be taken up for hearing one after the other. Since the hearings sometimes get over very fast, the lawyers take care to appear at the beginning of the hearing of cases. Thus a late appearance and a consequent dismissal of the complaint can be avoided.

Often an application for an adjournment (Anavoli) is made during the first hearing by the lawyer of one of the parties (most often the defendant). This leads to many impediments arise in conducting the proceedings, which are meant to slow down the process and which are of great interest to that party, which is not keen on seeing the proceeding come to an end.[94]

At first sight, the hearing seems to be conducted in a chaotic fashion. The lawyers force their way to the front before the chair of the judge along with their clients, who seem often to be very timid and reserved. Practically no thorough discussion of the subject matter takes place here.

The duty of the judge is mainly to examine whether the parties and their counsel are present, then to examine the petition and the evidence presented. Only if there are ambiguities, further inquiries are made of the parties and witnesses to the facts of the case are heard. The problem is discussed briefly. If more complicated problems arise, the judge reserves the right to postpone giving a ruling and to pronounce a judgement only after a thorough examination. In such cases, he can also call upon his colleagues to help him come to a decision about the petition (in the County and District Courts). Apart from this, it is also possible to adjourn the

94 Applications for adjournments (Anavoli) are often moved by counsel who are present in the court room on behalf of the attorney actually handling the case, who remains absent.

case and fix a date, when the case could be discussed in a more detailed manner with the parties.

According to Art. 308 of the GrCPC the final judgement is pronounced by the judge who had presided over the proceedings (or who had taken part in the proceedings, if there are more than one judge). This is often at the end of a long drawn-out process of taking evidence. The waiting period up to this point varies depending on the facts of the case and on the court.

In my personal experience, the waiting period for the first date of hearing is about ten to twelve months. It takes about two to three years before the proceeding is concluded and a judgement is pronounced. This can be avoided, if the parties discuss the problem among themselves before the first date of hearing and try to arrive at a settlement.

The judgement pronounced at the end of the proceeding is left in the Registrar's office. The parties to the proceeding can get the full text of the judgement from that office.

2.2.3. Lawsuits which are filed in Greece by Foreigners

From a legal point of view, Greece seems like a closed society with its rules and norms. Legally Greece is after all a constitutional part of Europe, whereby the legal fundamentals are considerably influenced by other European countries. However, that practically no legal proceedings are conducted in which one of the parties is a foreigner (natural person), seems to stem from ignorance of this fact.

Probably disputes with foreigners are sorted out through settlement before it can come to initiating a court proceeding. Because legal proceedings are such protracted affairs, a settlement is the only possibility to arrive at a quick resolution of the case. For foreigners there is the additional problem of dealing with the Greek language and characters. The great distance between Greece and other countries of the European Union is a further obstacle, where it concerns fast accessibility or being present at the court during the proceeding.

The prerequisite in these cases is the readiness to accept out-of-court settlements. The possibility of settling the problem fast is, as a rule, the overwhelming factor for deciding in favour of an out-of-court settlement, thus avoiding the uncertainties of a lawsuit, which can drag on endlessly and the costs of which are also uncertain.

This does not apply to foreign legal entities. Foreign firms often give a power of attorney to Greek lawyers, who then conduct these cases. However even here there is often a lack of confidence in the way lawsuits are conducted in Greece.

This is certainly a reason why there are very few lawyers in Greece with international contacts, although, especially in the recent years, the number of lawyers educated abroad has steeply risen.[95] Even big firms having international experience with constant contact with foreign countries are hardly represented.

Most of the contacts abroad are through Greeks, who permanently live abroad. Even in the legal sphere a contact with other countries of the European Union is through them.

2.3 The Role of the Lawyers

The lawyers have a great influence over the course the civil proceedings take. The form and the contents of the petition or complaint are specially important, since judgements are delivered based on them.

The lawyers therefore consider contact with one another as an important part of their work. This helps first of all in constantly improving their own style of working. But even the exchange of information about laws or their interpretation in spheres, which are not their special field, is important in order to be able to solve problems and discharge their ever expanding area of work and to present petitions which are well-founded.

Apart from contact with one another, cultivating contacts with the judges is of very high interest to a lawyer. The judge is free and independent and goes only by the contents of the plaints of the parties in arriving at a decision. He has the freedom to pass every judgement according to the law and to justify them based on the law. Therefore the lawyers try to influence the judges through personal contacts.

2.4. Conclusion

The strong functionalization of the procedure of civil law cases possibly explains the lack of trust foreigners have in the judicial apparatus in Greece. In addition to this, there is the often

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95 Many lawyers have a foreign master's or doctorate degree and have knowledge of several European languages.

endlessly long duration taken for a proceeding and the important and not always quite transparent role, which the lawyers play in conducting a proceeding. Although the influence the lawyers have over the judges is certainly more an exception than the rule, the close contact between the lawyers and the judges contributes to nurturing the distrust one may have in the independence of the judiciary.

3. Peculiarities of Cross-border Proceedings

3.1. Selection of Court of Competent Jurisdiction

In spite of international conventions like the European Convention on Jurisdiction and Enforcement (Brussels Convention of 1968), the majority of foreign plaintiffs prefer to file their cases in their own country.

The Brussels Convention gives the parties the opportunity (Art. 17 Brussels Convention) to choose the jurisdiction of a member state of the Brussels Convention by executing a written agreement. After considering the above described legal fundamentals and procedures in Greece, foreign plaintiffs would think twice before choosing a court in Greece as the court of competent jurisdiction for initiating a legal proceeding (if for instance the plaintiff is from Germany and the defendant from Greece). The great distrust against foreign procedural law is always a deciding factor while choosing a court of competent jurisdiction.

3.1.1. Legal Framework

According to Art. 3 of the GrCPC the Greek Civil Courts have jurisdiction over Greeks as well as foreigners of all nationalities and citizenships. The only requirement is that a Greek court has the jurisdiction according to the general rules for handling such cases. According to Art. 3 § 2 of the GrCPC there is a special rule for diplomats. The Greek courts have jurisdiction over them only if they appear as plaintiffs and not if they are considered defendants.

Art 3 and Art. 22[96] of the GrCPC which provide that the place of residence of the defendant should be the place of litigation is compatible with the rules of the Brussels Convention.

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96 After Greece's entry to the Brussels Convention this Article has been replaced by Art. 2, law no. 1329/83.

One should note here that the legislature in Greece is very active. Greece belongs to those nations, where the largest number of laws are enacted. However they are hardly followed. This problem is not only because of the bureaucratic machinery. There the people are sometimes engaged in the sisyphean job of sorting out things and bringing them up to the latest standard. A bigger problem is more often the antagonistic attitude of the ordinary citizen against the state.

3.1.2. Practical Problems

As described above, the Greek civil procedure code meets the international requirements for conducting a lawsuit from the time of filing a complaint to delivering a judgement in a quick, correct, reliable and transparent manner. The actual way in which the things run and the protraction of the court proceedings are due to the mentality of the people of Greece.

This contributes to the fact that, as far as possible, a foreign plaintiff avoids filing a suit in Greece. The cost of filing a suit plays no role here, since the court fees and the lawyers' fees in Greece are lower compared to other countries (also Germany). The scale of fees of the Greek Bar Council does not specify a fixed lawyer's fee, which can be charged depending on the case. These can be freely negotiated between the lawyer and the client. Only the minimum fees are fixed by the Bar Council. Falling short of the minimum fees is punishable under the law.

On the other hand it is unthinkable for a Greek, who has no permanent residence abroad, to file a suit in a foreign country. For him the higher costs abroad are a great problem. Naturally for Greeks the different legal system as well as the foreign language and the different legal culture pose a great obstacle. Just as the Greek judicial system is obscure for the foreigner, so is a foreign judicial system obscure for the Greeks.

3.2. The Recognition and Execution of Foreign Judgements in Greece

3.2.1. General

The European Convention on Jurisdiction and Enforcement regulates the reciprocal recognition of judgements in the signatory states. Until the entry of Greece into the Brussels Convention in 1982 (after its entry into the European Community) bilateral agreements with other countries were valid, for example the Greco-German Agreement of 4 November 1961.

The recognition of foreign judgements is governed by Articles 323 and 905 of the GrCPC. Those cases which are not governed by them are governed by the old bilateral agreements.

3.2.2. Legal Framework for the Recognition and Execution of Foreign Judgements

According to the Brussels Convention, a judgement of a foreign court is executable in Greece, if it is final and irrevocable in that country. For this a person should have obtained a final and executable judgement according to the law prevalent in that country. The judgement should not violate the good traditions and the public law. This is specified in Art. 323 and Art. 905 of the GrCPC according to the Brussels Convention.

The execution of a foreign judgement in Greece is intimated to the concerned person against whom the judgement is obtained (the debtor) by the County Court (Monomeles Protodikeio) situated where the concerned person has his place of residence or is residing at the moment according to Art. 905 of the GrCPC. If the debtor does not reside in Greece then the County Court of Athens, the capital of Greece, has jurisdiction over the case.

In the proceedings for recognition of the judgement, the plaintiff appears alone. This special procedure is called "ekousin diadikasia". In such cases, an advocate must always be called in.

The judge examines on the basis of the petition whether the preconditions for recognising the judgement are met according to Art. 323 and Art. 905 of the GrCPC. After a successful examination and recognition the judge pronounces the foreign judgement as executable.

The execution of the foreign judgement is carried out exactly as the execution of judgements obtained in Greece (Art. 960 ff. of the GrCPC).

3.2.3. Mode of Recognition and Execution

Since there are no special problems in filing a petition for recognition and handling it, Greek courts work relatively fast and effectively in the actual implementation of recognition and execution of foreign judgements.

Petition for recognition of foreign court judgements come up often before Greek courts. They are dealt with every three to four days and there are usually three to four such cases.

A proceeding for recognition lasts about a month from the time such petition is filed before the court. The costs of the proceedings, which are governed by the fee regulations of the Bar

Council, are in the minimum range of 24.000 Drachmas (about ECU 80). However, in practice the fees for lawyers are higher and are in the range of 50.000 Drachmas (about ECU 165) or more for such a case.

3.2.4. Conclusion

There is no particular problem about recognising foreign court judgements in Greece. However the execution of the judgement can be long drawn out and tedious because of the numerous possibilities that exist for effecting delays and getting adjournments. As such it is not possible to attach the bank account for purposes of execution of the judgement without the consent of the debtor.

4. Conducting Court Proceedings in Cases of International Legal Assistance involving Greece

4.1. General

Greece became a signatory to the Hague Convention of 1965 on international legal assistance in 1983. The Hague Convention governs cross-border petitions for legal assistance in civil procedural law, that is in matters concerning civil law. Criminal procedural law, that is in matters concerning criminal law are not contained in the convention.

4.2. Progress of Lawsuits

In Greece, in procedures pertaining to legal assistance, one has to basically differentiate between proceedings in which petitions for legal assistance are made by Greece to other countries and those in which other countries make such requests to Greece.

4.2.1. Proceedings Originating in Greece

The proceeding is conducted by the public prosecutor's office in the County Court of the region where the concerned person has his residence and which, therefore, is responsible for the proceedings. In the case of petitions for legal assistance in a foreign country, the public prosecutor's office turns to the ministry of justice in Athens. A formal procedure is adopted here, according to which the petition has to be made in three languages (Greek, English and French). The ministry of justice forwards the petition to the foreign ministry. According to

Art. 2 of the Hague Convention, the foreign ministry is considered the central authority which is responsible for forwarding the petition to other countries.

As per Art. 3 of the Hague Convention, the foreign ministry sends the petition directly to the central authority of the foreign country. There the petition is scrutinized to see if it complies with the rules prescribed in the Hague Convention. After scrutinizing and accepting the petition, the central authority in the foreign country sees to it that, service of the petition is effected on the appropriate authorities and the concerned persons (Art. 4 and 5 of the Hague Convention).

According to Art. 8 of the Hague Convention notice can also be served through the consulates and correspondence with persons abroad can be carried out through them. This is possible if the foreign state has no objections or if, in the case of the affected persons, it concerns citizens of the country of origin of the petition.

Legal assistance proceedings between the Federal Republic of Germany and Greece are not governed by the Hague Convention (Greek Law 1334/83), but by an old law (1432/38) which has been in effect since 1989 as an emergency law. At the request of Germany law 1432/38 continues to be in force, as there have been problems between these two states in implementing the Hague Convention.

According to Art. 1 of the Law 1432/38, in cases of petitions for legal assistance between Germany and Greece, a petition is forwarded to its consulate by the Greek foreign ministry. The Greek consulate directly approaches the District Court of the district in which service is to be effected. The petition must include a translation in German.

If an examination of witnesses abroad is necessary, then one has to differentiate between witnesses of Greek nationality and other nationalities:

- Greek nationals are directly examined by the appropriate Greek consulate.
- In the case of persons of another nationality, the courts of competent jurisdiction of that country are asked to carry out the examination. For example, German witnesses in Germany are examined by the County Court (Amtsgericht).

4.2.2. Legal Proceedings Originating Abroad

If requests for legal assistance are made in Greece from a foreign country, then the authorities mentioned above in the previous section are competent to do the needful, but in the reverse order. The request for legal assistance is made through the foreign central authority or through the Greek consulates to the Greek foreign ministry. It forwards the inquiry to the ministry of justice, which then informs the public prosecutor's office of the County Court of the region, in which the inquiry is to be carried out.

4.3. The Duration and Costs of the Proceedings

In one year, the Greek ministry of justice handles thousands of cases with international legal assistance inquiries. Since there are no statistical surveys of such cases for the whole of Greece, one can only roughly estimate the total number of such cases. In Thessaloniki alone, 500 to 600 cases per year are forwarded to the Ministry of Justice by the public prosecutor's office. These proceedings consume time. Art. 15 of the Hague Convention provides that in case of non-appearance of the defendant, a minimum time of six months must elapse from the time the inquiry, namely the official letter, is sent abroad by the central authorities before the court conducting the inquiry can decide the lawsuit.

The forwarding of the matter to the foreign ministry in Greece can however take up a longer period of time. This depends largely on the place of origin of the inquiry. One has to reckon with about one to two months if the inquiry is from Athens and if it is from other regions in Greece, it can take up to six months for forwarding the inquiry.

The costs for legal assistance are dependent on the total number of cases and the type and number of necessary inquiries, that is, which and how many written statements should be drawn up, or whether witnesses should be examined. As a rough estimate a minimum sum of between 20.000 and 100.000 Drachmas (about ECU 66 to 330) can be taken to be the costs.

4.4. Conclusion

Generally one could say, that proceedings in international legal assistance in fact are governed clearly by regulations and are also often taken advantage of. But the conducting of such a case is a very slow process and takes a long time. From the point of view of a normal citizen, it is desirable that the procedure is simplified and speeded up in order to ensure better legal security.

F. A Single Market for Litigants in Europe? International Cases in German First Instance Courts

(Volkmar Gessner)

1 Project Design

1.1 The Courts

Widespread assumptions describe international cases as being different from domestic cases - but legal institutions with international civil jurisdiction are inexistent. Cross-border claims can only be brought to domestic courts. In order to get an impression how such claims are handled domestically German, Italian and US-courts were chosen for a detailed quantitative and qualitative analysis.[97] Some of the German results are of intererest for this research report on civil litigation in the European context.

In spite of its federal structure Germany has a highly unified court system with three tiers in civil matters. The lowest level is split into two types of courts of first instance, namely the *Amtsgericht* (county court) with (in 1988) jurisdiction over cases of a value up to 5000 DM and the *Landgericht* (district court) with jurisdiction exceeding this limit. Apart from the (limited) jurisdiction in general civil matters the *Amtsgericht* decides all family matters as court of first instance.

At the county court civil matters as well as family matters (in a special section) are decided by a single career judge, at the district court by a bench of three career judges (chamber for civil matters) or on request of the plaintiff by a commercial chamber (*Kammer für Handelssachen*) which has one career judge and (on request of the parties) two lay judges from the local business community.

97 Cf. Volkmar Gessner (ed.), Foreign Courts - Civil Litigation in Foreign Legal Cultures, Aldershot 1995: Dartmouth.

1.2 The Sample

1.2.1 Selection of files

Since German official statistics do not contain any information about international cases we had to evaluate court files ourselves. This can be done only by way of a sample because the total number of civil cases in Germany (West) amounts to more than 3 Million annually. We decided to evaluate basically all (civil) cases which entered the *Landgerichte* (district courts) in Bremen and Hamburg in 1988. To ensure that the cases were terminated by the time we went into the archives (fall 1992 until summer 1993) we had to go back a couple of years and chose 1988 (after 4 years a civil case is definitely terminated - even running through several appeals; if exceptionally a case is taken to the Supreme Court, it may take one more year).

Bremen (0,5 Million inhabitants) and Hamburg (1,6 Million inhabitants) are large commercial cities in northern Germany. Since both have important seaports and are centres of export trade, international cases will be over-represented in comparison to the German average. Without a similar study in other parts of Germany the degree of over-representation (which may be substantial) cannot be estimated. Since in Bremerhaven (136.000 inhabitants) only family cases were evaluated the commercial structure is irrelevant for our purposes. Yet our data are biased for a different reason, namely the existence of a major US-american army base. A substantial part of the international family cases in our sample reflects this specific circumstance. By filtering out these US-american cases (as frequently in the tables shown in this report) the data should be fairly representative for a middle-sized German town.

The Hamburg sample has a particularity which consists in the existence of one (in 1988) international chamber, i.e., a chamber (with a panel of three judges) specialized in international matters.[98] Unfortunately, this special jurisdiction did not facilitate our search for international cases as much as we had expected since (1) the court's definition of "international" was different from ours , and (2) the "international" jurisdiction is subordinate to the jurisdiction of other chambers for special subject matters, *e.g.* to that of the chambers for road traffic cases, for press cases, for guardianship, for landlord-tenant disputes, for state liability, and, if chosen by one of the litigants, to the chambers for commercial claims. With the exception of road

98 Cf. Kurt Siehr, Special Courts for Conflicts Cases: A German Experiment, Am.J.Comp.L. 25 (1977) 663-680.

traffic cases these specializations virtually exclude international cases. We decided therefore not to go through the files of the chambers for special subject matters and to confine ourselves to a sample - in addition to the international chamber - of the chambers for commercial claims.

From the Bremen sample we learnt that international road traffic cases have a certain quantitative relevance and that by not evaluating this special chamber in Hamburg we will have missed 8 cases. Wherever this could be done without additional information about the characteristics of these cases the tables were corrected correspondingly.

Summing up this sampling report we evaluated

- in Bremen: all civil cases (decided either by the chambers for civil matters or commercial chambers) which were initiated in 1988.
- in Hamburg: all cases of the "international chamber" plus all cases of six commercial chambers which were initiated in 1988.

1.2.2 Selection of international cases

In the archives, our first step was to have a look in the files (7591 in Bremen, 4438 in Hamburg) in order to find out whether the case was international. Our definition of this term (one party in the case has its domicile outside Germany) was simple to handle since the first page of the file always contains information on the addresses of the parties. International cases were set aside for evaluation, national cases were set back on the shelfs.

1.2.3 Evaluation of international cases

International cases were evaluated by filling in an evaluation sheet for every single international file. In order to do this the file had to be read if not completely so in large parts (German civil procedure makes sure that all relevant information appears in the file). This evaluation sheet only complemented the information already collected as a matter of routine for each file by the court staff and then evaluated by the National Office of Statistics (*Statistisches Bundesamt*).

1.2.4 Coupling of research data with official statistical data

After obtaining the necessary authorizations from the Ministries of Justice in Hamburg and Bremen and after a difficult search through the data archives in both states (Bremen and Hamburg have status of federal states), we were - by developing a special computer program (done by an Indian software firm) - able to couple our research data with the corresponding

statistical data of each case. In many of the following tables these international data sets are compared with the data of national cases exclusively taken from the official statistic.

1.2.5 Quality of the sample

Apart from the above mentioned over-representation of international cases in all three courts we do not see any restrictions for generalizing the data for Germany as a whole. Regional differences may arise concerning the distribution of specific foreign parties in international cases (more Italian parties in Munich, more French parties in Cologne) or concerning sector-specific types of conflict resolution (more arbitration in maritime trade than in the textile sector) but we did not expect regional differences in procedural aspects. In order to check the quality of the sample we selected some significant indicators for a comparison between the sample (Hamburg & Bremen) and the data given for the Federal Republic as a whole. We found indeed very little differences between the sample and the totals as regards procedural aspects of civil cases. Even the comparison of party characteristics shows the good quality of the sample, the only important exception being the more frequent appearance of incorporated firms as plaintiffs as well as as defendants in the Hamburg and Bremen courts. This leads to the mentioned overrepresentation of international cases (which are - as we shall see - mostly commercial claims) in the sample.

Cases initiated in 1988 do not necessarily ressemble cases initiated in 1995. The parties may differ in their composition, substantive law has been changed (*e.g.* the UN Convention on the International Sale of Goods has meanwhile come into force in Germany) and also procedural law has been further developed (*e.g.* the jurisdiction of the Landgerichte begins now with a value of 10.000 DM instead of 5.000 DM and has been limited in international matters insofar as the simple fact of the defendant owning assets in Germany is not any more considered sufficient for being taken to court). These changes have certainly to be remembered when our data are interpreted. But as regards consumer cases they do not seem to be of crucial importance. In particular a significant increase of consumer cases is not to be expected for reasons explained in other parts of this report.

1.2.6 Validity of the data

The sample is very large (more than 12.000 cases) which means that even small quantities in our tables may have explanatory power.

As regards the correct data collection our own data went through various checks and seem now "clean". The statistical data are probably less trustworthy (the court staff does not have the reputation of taking this task too seriously) but are in general not put into doubt and are widely used in Germany - and for more important purposes than this research report.

1.2.7 Presentation of data

This report presents data either in descriptive or in analytical form. A description shows the quantitative distribution of all characteristics of a variable (*e.g.* a party to a law suit may be plaintiff, defendant, plaintiff intervenor or defendant intervenor). By way of statistical analysis the relationship of two (or more) variables is tested (*e.g.* the nationality of a party and success in law suits), the most common form to do this being a cross-tab. If not indicated otherwise the cross-tabs presented in this reports are significant on the 5% level which means that the chance of the variables showing differences only by accident is smaller than 5%.

1.2.8 Special evaluation in regard to EC-Countries

In 1988 the six founding members of the EC (Belgium, France, Federal Republic of Germany, Italy, Netherlands, Luxembourg) and the UK, Ireland, Denmark and Greece had signed the Brussels Convention which attempts to ease cross-border litigation by unifying jurisdictions, recognition of foreign judgements and their enforcement procedures. Whether these legal provisions in real life have lead to simplifying cross-border claims in the Community was never investigated. Our sample of international cases was a good opportunity to fill this gap. Wherever this seemed appropriate we selected out of all international cases those cases where the foreign party was a resident of one of the aforementioned 10 member states where the Brussels Convention was in force in 1988. By comparing the handling of EC cases with non-EC-cases the relative advantage of EC-citizen in using other EC-courts can be assessed.

2 International Civil Proceedings (except family cases)

2.1 Frequency of international cases

The relevance of professional knowledge in Private International Law, Foreign Law and International Civil Procedure is questioned since so far quantitative approaches are nearly

absent in these fields of legal science.[99] Monographs, textbooks and articles either go straight into the presentation of the (extremely sophisticated) normative order elaborated for conflicts of law cases or point in a few words to the increase of international (commercial, family and tourist) interactions.[100] Those who mention globalization processes assert direct effects on international case load in national courts[101] - a position harshly criticised by others who point to the unsuitability of national courts for international cases and the universal preference for arbitration procedures[102] or even to the unsuitability of Private International Law in general.[103] We will not be able to render sufficient information for answering such basic questions because Private International Law has a wider area of application than International Civil Procedure. To a certain and (due to a reform of German Private International Law in 1986) small degree it also applies in cases between German residents of foreign nationality (*e.g.* in divorce cases) and exceptionally even in cases between residents of German nationality. But in order to overcome unhelpful speculations as regards the role of national courts in resolving *disputes between parties residing in different countries* it may be worthwhile to study the following results from our file analysis in two district courts.

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99 Siehr op.cit.p.664 offers numbers of *published* cases but every attempt to draw conclusions regarding the occurrence of international cases in (German) courts from these numbers would obviously be misleading. The publication policy of courts and law reviews is highly selective.

100 E.g. Council of Europe, The practical guide to the recognition and enforcement of foreign judicial decisions in civil and commercial law, Strasbourg 1975: Morgan Grampian, p. 3; David McClean, International Judicial Assistance, Oxford 1992: Clarendon Press, p.1; Haimo Schack, Internationales Zivilverfahrensrecht, München 1991: Beck, p.5; Rolf A. Schütze, Deutsches Internationales Zivilprozeßrecht, Berlin/New York 1985: Walter de Gruyter,p. 12. An exceptionally detailed description of quantitative aspects in the area of recognition and enforcement of foreign judgments is to be found in Dieter Martiny, Handbuch des Internationalen Zivilprozeßrechts, Vol.III/1, Tübingen: Mohr, 1984, p. 34 ss.

101 E.g. Murad Ferid, Internationales Privatrecht, 3rd edition, Frankfurt/M. 1986, p.54, who writes about un unexpected number of international cases in all jurisdictions. Dagmar Coester-Waltjen, Internationales Beweisrecht, Ebelsbach 1983: Rolf Gremer, p. 2. This author wrongly deduces the frequency of cases where evidence in foreign countries has to be taken from the frequency of cases where foreign law has to be applied. Both situations have nothing to do with each other.

102 E.g. Michael D. Medwig, The New Law Merchant: Legal Rhetoric and Commercial Reality, Law and Policy in International Business 24 (1993), 589-616.

103 Cf. René David, The International Unification of Private Law, in International Encyclopedia of Comparative Law, Vol.II, Ch.5, p.7 ss; Coester-Waltjen (see note 2) quotes Goodrich (6 Vand.L.Rev. 444, 1953) who maintains conflicts of law being "an entertaining dialectic for law professors".

Tab. 1 Relative share of international cases in the district courts of Bremen and Hamburg (1988)

	Bremen			Hamburg		
	all cases	international	internatl.	all cases (sample)		
general	3605	45	1,2%	6661	110	1,6%
commercial	833	91	10,9%	930	99	10,6%
total	4438	136	3,0%	7591	209	2,7%
total Bremen/Hamburg	12029 (all cases)			345 (international)		2,8%

Tab.1 shows the proportion of international cases in the caseload of the Bremen and Hamburg courts. Out of 12029 civil cases we found 345 international cases (2,8%). It seems adequate to mention that 23 of these international cases concerned the recognition and enforcement of foreign decisions and other claims within enforcement procedures which is, legally and sociologically seen, a constellation quite different from a normal law suit. The corrected proportion of international law suits within the total number of law suits in Bremen and Hamburg would then be 2,6%.

Depending on one's expectations this overall proportion may seem high or low but there is no doubt that the proportion of international cases in the caseload of commercial chambers of the *Landgerichte* Bremen and Hamburg is quite a surprise. Even taking into account that both cities are export oriented and are the commercial centers of northern Germany, a share of more than 10% in commercial law suits is striking. This result is a clear refutation of the above mentioned position of the law merchant literature saying that national courts play no role in the resolution of international business disputes. The two district courts of Bremen and Hamburg had the same international case load like the ICC International Court of Arbitration which received 333 cases in 1991.[104] Of course we cannot tell anything about the proportion of law suits within the totality of commercial controversies - this proportion may be very low (and will be analyzed in other parts of our empirical research). But how frequent international arbitration procedures may be, the number of plaintiffs who decide to go to court in a commercial cross-border dispute is quite substantial.

104 Cf. Michael T. Medwig op.cit. p. 597.

Our data refer only to the situation in 1988 and hence cannot confirm or refute the argument of an increase of international cases in court due to globalization processes in recent years or decades and we would not dare to speculate about such a tendency. What is certainly more frequent is the occurrence of cross-border interaction. Whether this results in more frequent disputes is an open question, because at the same time there can be observed internalization and rationalization processes which aim at the reduction of the conflict potential. On the other hand, the courts may have become more attractive due to various national measures like reform of Private International Law as well as due to international conventions like those referring to international judicial assistance.

The data show a clear preference of plaintiffs to bring international cases before the commercial chambers - probably because the cases are more often of a commercial nature than domestic cases. Global exchanges are -as we know - the domain of businesspeople. In order to find out whether EC-citizen are more or less often businesspeople than the rest of the litigating parties we seperated the two groups in our sample of international cases.

Tab. 2 EC-citizen and other parties in the international caseload of civil chambers in the district courts of Bremen and Hamburg (1988).

	Bremen		Hamburg	
	EC-parties/non-EC-parties		EC-parties/non-EC-parties	
general	16 (23,9%)	28 (44,4%)	40 (43,5%)	55 (56,7%)
commercial	51 (76,15)	35 (55,6%)	52 (56,5%)	42 (43,3%)
Total	67 (51,5%)	63 (48,5%)	92 (48,7%)	97 (51,3%)

As we learn from Table 2, the EC is an arena for businesspeople: both district courts get considerably more commercial claims from EC-citizen than from other parts of the world (76% as opposed to 55% in Bremen, 56% as opposed to 43% in Hamburg). The data indicate already what is shown more clearly below that private individuals (*e.g.* as consumers) play a marginal role in intra-EC-cases. Non-EC-parties are less commercial than EC-parties.

Of particular interest is whether international cases are initiated by German or by foreign parties. Reading legal publications and information material for practitioners and businesspeople, we find a constant warning against suing abroad. It is said to be difficult to understand court organizations and procedures in a foreign country and to predict the decision

of a foreign judge. Other arguments concern the language problem, the duration and costs of a foreign law suit.[105] The German Supreme Court talks about "a natural interest of a citizen to sue in his own country where he knows best the state structure and the language and where he is culturally and socially deeply rooted".[106] It follows from these warnings that all businessmen who use standard contracts introduce a jurisdiction clause and derogate foreign jurisdictions.[107] Finally there may be even an explicit discrimination against foreign plaintiffs: on request of the defendant they may have to deposit a security for legal costs of the lawsuit (*e.g.*, in Germany § 110 ZPO). The only aspect in favour of suing abroad seems to be the easier enforcement of the judgment if the defendant is sued in his/her own country. One would therefore expect most international cases to be initiated by domestic parties and only exceptionally the reverse constellation. But surprisingly enough rather the opposite is true: 209 (65%) out of 320 international cases in Bremen and Hamburg were initiated by foreigners. We do not yet know whether German parties also mostly sue in the country of the foreign defendant or whether German courts are particularly attractive to foreign plaintiffs but we can tell that German parties are at least not taken to court more often abroad than in Germany. This is an information inferred from data we got from the international judicial assistance department of the Bremen district court: in 1988 this department registered 94 incoming requests for service of process.[108] If one takes into account that these requests concern only in part initial summonses it follows that an unknown quantity of less than 94 Bremen residents was sued in a foreign country in 1988.[109] Compared to 88 Bremen residents who were sued in Bremen during the same year this is an equal or very probably lower number. It is either legally necessary or for other reasons attractive for foreigners to sue a German resident in Germany and not in their own country of residence. We will try to explain this later.

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105 Cf. Alfred Schütze, Rechtsverfolgung im Ausland, p.24; Gerhard Kegel, Internationales Privatrecht, München 1987:Beck,p.684; Heimo Schack, Internationales Zivilverfahrensrecht, München: Beck, 1991, p. 77; Joachim Quittnat, Das Recht der Außenhandelskaufverträge, Heidelberg: Decker, 1988, p.170.

106 BGH 44,46. Similary in BGH 60,85 (90), BGH NJW 81,2642 (2643).

107 Christoph Graf von Bernstorff, Vertragsgestaltung im Auslandsgeschäft, Frankfurt am Main 1991: Fritz Knapp, p.158.

108 The most frequent requests came from Italy (25), France (14), Belgium (10), USA (9) and Turkey (8).

109 We must admit that this method of ascertaining the number of Bremen residents sued in another country is not a 100% waterproof. Due to the fact that Germany has objected the "freedom to send judicial documents, by postal channels, directly to persons abroad" of the Hague Convention of 15 November 1965 the official involvement cannot be avoided for service in Germany. But German residents while travelling in the common law countries can be served according to informal traditions of the common law - situations which might be more prominent in textbooks than in legal practice.

As regards the country of residence of both foreign plaintiffs and foreign defendants, Tab.3 and Tab.4 give more details.

Tab. 3 Country of residence of foreign plaintiffs in district courts of Bremen and Hamburg (1988).

Country of residence	number of cases
Italy	27
Netherlands	24
United Kingdom	22
Switzerland	16
France, USA	13
Austria, Belgium	9
Denmark, Luxembourg	8
Spain	7
Sweden	6
Hongkong	5
Turkey	4
Norway	3
Iran, Monaco, Lebanon, Yugoslavia, Australia	2
Sri Lanka, Cyprus, Egypt, Greece, Hungary, Honduras, Israel, Ireland, Island, Japan, Malta, Mexico, Poland, Puerto Rico, Argentina, Cameroon, Indonesia, Rumania, Finland, Syria, China, Tonga, South Africa	1
Total	209

These frequencies have obviously to be interpreted on the background of trade relations between Germany and these countries. But there is also a legal aspect. By the time these law suits where initiated (1988) Belgium, Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, Netherlands and the United Kingdom had ratified the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention 1968) which requires on the one hand to sue the defendant in the courts of his/her country (Art.2) but also permits (except in consumer and some other cases) derogation of this jurisdiction either by a jurisdiction clause (which is the rule in standard contracts) or by an agreement on the place of performance.[110] It stipulates in its Articles 31 and 32 that a

110 Cf.decision of the European Court of Justice (12/76) of oct. 6, 1976.

judgment given in a Contracting State shall be enforced in another Contracting State after submission of an application to the local courts at the place of domicile of the party against whom enforcement is sought. Notwithstanding this simple enforcement procedure which was intended to allow plaintiffs to bring their disputes to their national courts, plaintiffs in many situations have to sue or seem to prefer suing in the defendant's country. 53% of international cases with foreign plaintiffs were brought in by citizens of countries of the Brussels Convention. If one adds law suits with plaintiffs from countries which have signed bilateral agreements on jurisdiction and enforcement with Germany (like *e.g.* Austria, Switzerland, Norway) more than 70% of the foreign plaintiffs use the German courts and not their national courts in spite of unproblematic enforcement of their national judgments in Germany. The facilities offered by the Brussels Convention and other bilateral agreements do not seem to be attractive for plaintiffs. They prefer to bring the lawsuit where they want to enforce it.

If we consider another result which will be discussed *infra,* namely that enforcement of foreign judgments is extremely rare (only 23 such applications were found in our two district courts) there is also from this angle little doubt that residents of Germany are not sued frequently in other countries (as long as they do not have a subsidiary there).

Tab.4 Country of residence of foreign defendants in district courts of Bremen and Hamburg (1988).

country of residence	number of cases
Switzerland	13
France, United Kingdom	11
Netherlands	8
Belgium	7
Austria, Turkey	6
Spain, Sweden	5
Denmark, Hongkong, Italy	4
Cyprus, Finland, USA	3
Israel, Norway	2
Sri Lanka, Ecuador, El Salvador, Egypt, Greece, Iran, Luxembourg, Mozambique, Taiwan, South Korea, Soviet Union, Thailand, Nigeria, South Africa	1
Total	111

The data presented in Tab.4 suggest that also German residents seem to prefer suing the defendants in their home countries even if this conclusion in this case cannot be verified by a comparison with the number of enforcement applications or requests for international service of process (both being unnecessessary if the defendant is sued in his/her country of residence). If one imagines the number of commercial activities within the European Union our 47 law suits against defendants from the EEC countries (42% of all German claims against foreign defendants) are certainly a very small quantity and simply cannot represent the bulk of law suits between Bremen and Hamburg residents and the rest of the European Union.

Hence it must be concluded that quite contrary to our expectations and to widely spread opinions in legal literature most plaintiffs are either confronted with jurisdiction clauses against their home jurisdiction or are forced by the domicile principle of their domestic Private International Law to make their legal claims in foreign courts, or are taking the burden of going to foreign courts instead of suing at home for other reasons. Among these various possible reasons the jurisdiction clauses do not play - as one might have expected - the decisive role. Only 26 (20%) out of 130 foreign plaintiffs from whom we have sufficient information are

obliged by jurisdiction clauses to bring their contract claims to German courts.[111] On the other hand it follows from the legal situation that German residents are to a considerably higher degree, namely 32 (39%) out of 83 plaintiffs residing in Germany, supported by jurisdiction clauses when they sue foreigners in Germany.[112]

As regards our interest in EC-litigation we learn from the tables that in Hamburg and Bremen courts 53% of foreign plaintiffs and 42% of foreign defendants are EC-citizen. Hence, taking into account the high level of commercial and other forms of legally relevant interactions within the EC, we cannot observe impressive litigation activities between EC-citizen. In spite of attempts of creating something which could be called a "single litigation market", the borders still matter in the situation of persuing a legal claim.

2.2 Characteristics of parties

Parties to a civil law suit are plaintiff, defendant and third party intervenors. Out of these it is the plaintiff who deserves most interest since he/she decides to mobilize the law and to make use of the judicial system in order to resolve disputes. It is the plaintiff who brings law out of the books and takes it into action. The "access to law"-literature tries to find out about his/her characteristics compared with the entire population in order to look for eventual social barriers in the use of the legal system. If, *e.g.*, in 1988 44% of those who initiated law suits in the German Landgerichte were firms and 50% were private persons one concludes that firms are over-represented and hence have easier access to judicial enforcement. This conclusion is made on the (not empirically verified but plausible) background that even if firms do enter more frequently into legal relationships than private persons, their appearance in court exceeds by far their share of legally relevant social interactions. This tests is also done for stratificatory characteristics of the individual and led to similar results (over-representation of the wealthier strata as plaintiffs in court). As a consequence legal aid schemes were developed in order to facilitate the use of law by those (lower class) persons under-represented in court statistics.

Since our knowledge of stratificatory aspects of the world society is limited, it is much more difficult to carry out similar comparisons between distributions of variables in international law

111 49 files with foreign plaintiffs did not contain any information about eventual jurisdiction clauses, in 30 cases the foreign plaintiff brought a claim not based on contract. For more detailed information cf. chapter on international jurisdiction.

112 Again 22 files did not contain relevant information. 7 cases did not concern a contract claim.

suits and statistical descriptions of the (global) society. First of all, these descriptions are not available. But the reference can anyway not be made with mankind as a whole but only with the totality of actors participating in global legal interaction. Hence we have to ask whether the characteristics of parties we have found in our international law suits mirror what is known or is assumed about the characteristics of these international actors. As a first approximation Tab.5 shows the characteristics of plaintiffs in our sample of international cases in civ milatters.

Tab.5 Plaintiffs in international cases at the district courts in Bremen and Hamburg (1988).

	EC- residents	non-EC-residents	Total
Corporations	80 (51,3%)	76 (49,0%)	156 (50,2%)
Unincorporated firms	52 (33,3%)	27 (17,4%)	79 (25,4%)
Private individual	24 (15,4%)	52 (33,5%)	76 (24,4%)
Total	156 (52,2%)	155 (49,8%)	311 (100%)

The data demonstrate, firstly (row totals), a strong dominance of business actors as plaintiffs in German courts. More than 75% of plaintiffs are firms, most of them bigger firms, and only 24% are private individuals. Secondly, the role of private individuals as plaintiffs diminishes still more if only EC-residents are taken into account: their share in this group of plaintiffs amounts only to half of the corresponding share among non-EC-residents. This confirms our interpretation of Table 2 that the EC-market is mainly occupied by businesspeople and creates barriers for private individuals (*e.g.* as consumers). As regards smaller (unincorporated) firms it is interesting to note that their share as plaintiffs is twice as high in the EC than in the rest of the group of plaintiffs.

In order to test the hypothesis that this distribution rather reflects the structure of the social field of international interaction than the easier access of business to court proceedings we also counted the defendants' characteristics of our international cases.

Tab.6 Defendants in international cases at the district courts in Bremen and Hamburg (1988).

	EC-residents	Non-EC-residents	Totals
Corporations	91 (58,3%)	70 (44,0%)	161 (50,6%)
Unincorporated firms	30 (19,2%)	26 (16,4%)	56 (17,8%)
Private individuals	35 (22,4%)	63 (39,6%)	98 (31,1%)
Total	156 (49,5%)	159 (50,5%)	315 (100 %)

The comparison of the totals in Tab.5 and 6 shows no "access-to justice-discrimination" effect against private individuals: they appear in only a slightly higher proportion as defendants than as plaintiffs. Whereas the domestic caseload of courts is characterized by a vast amount of debt enforcement against private persons (as consumers) this constellation is rare in a cross-border context. Consumers do not buy goods or services frequently in other countries and if they do they have to pay in cash. The EC structures have not changed this overall picture. On the contrary, private EC-residents appear even more rarely as defendants of (debt enforcement) claims than non-EC-residents. These data are a clear indicator that due to legal uncertainty private individuals have only a marginal role in the European market.

From a legal point of view there would be no additional burden for private individuals not to initiate a law suit in Germany. According to German law (§ 114 ZPO) poor parties may claim legal aid and foreigners have the same right to legal aid as German parties in so far as they are private individuals. Corporations only get legal aid if a bilateral agreement with their country of residence (§ 116 ZPO)[113] exists. In our data of international cases legal aid plays a marginal role. There are only 11 petitions, five of which were rejected. Five foreign plaintiffs and one foreign defendant successfully claimed legal aid.

Globally seen, the data confirm the hypothesis of the dominance of business actors in the international arena in general: business actors - and among them particularly bigger firms organized in some form of legal structure - strongly dominate as either party to international lawsuits. Private actors appear only in every third international law suit. Due to many well known filter effects these results may not mirror the distribution of characteristics of parties to

113 Cf. Baumbach/Lauterbach, Zivilprozeßordnung, Anh. nach § 114)

cross-border disputes in general. Most commercial disputes are resolved out of court by arbitration and many other forms of autonomous procedures. Hence the data have to be interpreted as minimum numbers of international commercial disputes. The conclusion that the social field of international actors mainly consists of business actors and among them of relative big firms, seems valid on the basis of the German court sample. The question will of course be taken up in other parts of our research.

In conclusion to this chapter on characteristics of parties in court proceedings we compare in Tab.7 the sample of international cases with data from national cases taken from the official court statistics.

Tab.7 Characteristics of parties (plaintiff and defendant) in national cases compared with international cases at the district courts of Bremen and Hamburg (1988).

	National		International					
			EC-residents		non-EC-residents		total	
Corporations	17.778	(43,0%)	171	(54,8%)	146	(46,5%)	317	(50,6%
Unincorporated firms	2.876	(6,9%)	82	(26,3%)	53	(16,9%)	135	(21,6%
Private individuals	20.662	(50,0%)	59	(18,9%)	115	(36,6%)	174	(27,8%
Total	41.254	(100 %)	312	(49,9%)	314	(50,1%)	626	(100 %

Tab.7 shows the different composition of parties in national and international court proceedings and indicates differences in the national and the international social fields of action. Taking all conflicts (except those family conflicts which go to the family court) together private individuals are important legal actors nationally but are less important internationally and even far less important within the EC.

A striking difference can also be noticed as regards the role of unincorporated firms. Contrary to our expectations which were based on the assumption that they are less active in the international arena, they are more visible in international than in national court proceedings. A tentative explanation would be that those small firms who go into the global market have fewer remedies to resolve their conflicts than bigger firms who use either their power or their informal networks or their experienced lawyers or arbitrators in order to handle their legal

controversies or rather prevent such problems by elaborating complex international contracts. This explanation holds true also for those parties labelled as corporations by the official court statistics. As far as we can see from the data we collected ourselves these firms, mostly in the legal form of limited companies, are small or at best middle-sized whereas important firms or multinationals never appeared in the court files. Firms - be they incorporated or unincorporated - are visible in the sample of international cases because they dominate the arena of international legal interaction and they are relatively more visible the less other resources of conflict prevention and conflict resolution are at hand. These considerations apply in particular for economic actors within the EC. As our data show the EC is a field of legal activities also for small enterprises but has not supported private indidividuals (*e.g.* as consumers) in their cross-border participation in the European market.

2.3 Characteristics of cases

2.3.1 Subject matters

The subject matters of cases are of interest from a legal as well as from a sociological point of view. The legal interest lies in the relevance of specific areas of substantive law for international cases. Sociological curiosity is directed to patterns of cross-border activities (which may be only partially and selectively reflected in court files) and to differences which might be discernible between national and international cases taken to court.

In a first approximation the data tell us that 74% of claims in international cases are based on contract, 5% on antitrust law, 5% on family[114] and succession law, 4% on tort law and 7% on other legal areas. It is interesting to note how unimportant torts are in cross-border legal interactions in spite of so many possible sources of disputes over accidents and environmental damages.[115] This in part explains the underdevelopment of tort rules in Private International Law. More specific information is contained in Tab.8.

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114 Remember that most family cases go to the family court (cf. *infra* C).

115 The infrequency of traffic accident cases is explained by an agreement between insurance companies which "internalizes" cross-border into domestic cases - another example of creative *lex mercatoria* regulation.

Tab.8 Subject matters of international cases at the district courts in Bremen and Hamburg in 1988.

	n	%
Contract of sale	83	(41,2)
Sea/land transport	51	(25,3)
Contract for work	24	(11,9)
Commission of agents	13	(6,4)
Credit	11	(5,4)
Family affairs	10	(4,9)
Unfair Competition	10	(4,9)
Road accident	10	(4,9)
Tort	9	(4,4)
Real estate	8	(3,9)
Suretyship	8	(3,9)
Maritime accidents	6	(2,9)
Agency	6	(2,9)
Corporation affairs	5	(2,4)
Insurance	4	(2,o)
Travel business	2	(1,o)
Total	209	(100)

The distribution of subject matters shown in Tab.8 excludes those matters which are only defined in terms of the legal procedure chosen for the dispute: execution of judgment (32 cases), attachment (14 cases), documentary procedure (letters of credit, cheques) (12 cases), arbitration awards (5 cases). As far as cases of execution of judgments are concerned, all motions within the execution proceedings are considered. Out of 32 cases 23 dealt with the execution of a foreign judgment in Germany (only 11 among them were judgments from countries which had in 1988 ratified the Brussels Convention on Recognition and Enforcement of Foreign Judgments).

It is interesting to note that there is no statistically significant difference between the types of cases taken to court by or against EC-citizen and the rest of the cases.[116]

Unfortunately we cannot compare the subject matters of international cases with those of national cases since information in the official court statistics (on which we have to rely on in

116 Disregarding statistical tests we could mention some unspectacular differences: there are *more* contract for work, commission for agents and unfair competition cases among EC-citizen and *less* sea/land transport and credit cases.

national cases) assembling 80% (!) of cases in an unspecified category "others" is very poor.[117] But except for the high number of claims stemming from sea/land transport contracts the subject matters of our international cases look quite unspectacular and probably close to the common caseload of a national court in Germany. One looks in vain in our sample of international law suits for the "complexities of international trade"[118] or the peculiarities which René David claims for international relationships[119]. Nor did we find a single contract which resembles one of those highly sophisticated contracts US American law firms are famous for producing for cross-border affairs.[120] Our cases are simple from a legal and quite common from a sociological point of view and none of them mirrors what is called the new quality of the international economy represented by multinational actors moving enormous quantities of goods all over the world.

Since we do not want to question the correct description of the characteristics of international trade by so many authors we draw the conclusion that only a specific (ordinary) type of case is taken to municipal courts whereas indeed (legally and/or economically) complex controversies are resolved otherwise. Notwithstanding the picture of legal patterns of the world society drawn by national courts being only partial and selective it is certainly complementary to more spectacular descriptions. Also the international arena knows daily legal problems which are resolved as a matter of routine by ordinary legal institutions.

Among these daily legal problems of the international arena are to a certain degree also consumer problems - but they play hardly any role in the files analyzed in the district courts of Bremen and Hamburg.[121] In this respect the picture of a normal caseload has clearly to be qualified. In order to learn more about consumer sale of goods, hotel and travel and insurance matters were selected out of the total number of subject matters 9. The table shows that only 4 cases in our sample of 320 international law suits can be defined as consumer cases (private

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117 In addition, court data collection as regards subject matters proved to be wrong to a considerable degree: whereas the statistics categorized only 11 of our international cases as dealing with "purchase", we put 85 cases in this category.

118 Michael T. Medwig op.cit. p. 598

119 René David op.cit. p.11.

120 Cf. John H. Langbein, Zivilprozeßrechtsvergleichung und der Stil komplexer Vertragswerke, Zeitschrift für vergleichende Rechtswissenschaft 86 (1987), 141-157.

121 Insofar our study offers answers to the recent Greenbook of the Commission of the European Communities (Kom 93,576) where serious concern about cross-border consumer problems is articulated.

indidividuals whose claims against firms were based on a purchase of goods contract,a hotel and travel contract or an insurance contract).

Tab. 9 Sale of goods, hotel and travel and insurance matters within the international cases at the district courts in Bremen and Hamburg in 1988.

	DEFENDANTS			
PLAINTIFFS	INCORP. FIRMS	UNINCORP. FIRMS	PRIVATE INDIVID	Row Total
Incorp.Firms	29 64.4	5 29.4	6 31.6	40 49.4
Unincorp.Firms	13 28.9	11 64.7	7 36.8	31 38.3
Private Indiv.	3 6.7	1 5.9	6 31.6	10 12.3
Column Total	45 55.6	17 21.0	19 23.5	81 100.0

These data confirm again the unvisibility of private actors as consumers in the global legal arena and indicate that they simply do not participate in cross-border economic activities. They certainly buy goods while they stay abroad and pay in cash. But these are not valuable goods. Eventual claims are not taken to court.

We doubt that cross-border consumer cases are more frequent among the international cases in the *Amtsgerichte*. On the one hand these courts are with their jurisdiction up to a value of 5000 DM (in 1988) more prone to deal with consumer problems. On the other hand smaller amounts of claims make the cases so unattractive for lawyers that they will normally refrain from bringing an international consumer case to a court of petty jurisdiction. A case may also be brought to an *Amtsgericht* without being represented by a lawyer - but a private individual would be extremely courageous to do this in an international matter.

If our international cases did not show a particular high complexity they still could be relatively more important as regards the value of the claim taken to court.

2.3.2 Amount of claim

As regards the amount of claim international cases can be compared with national cases since official court statistics offer reliable information (attorney and court fees are calculated on this basis).[122]

Tab.10 Amount of claim in national and international cases in district courts of Bremen and Hamburg (1988)[123]

Value	Count / Col Pct	National	International 1	Row Total
2.00 <= 5T		959 / 8.2	6 / 1.9	965 / 8.0
3.00 >5T AND <=10T		4280 / 36.6	66 / 20.6	4346 / 36.1
4.00 >10T AND <=20T		2792 / 23.8	65 / 20.3	2857 / 23.8
5.00 >20T AND <=50T		2177 / 18.6	72 / 22.5	2249 / 18.7
6.00 >50T AND <= 100T		797 / 6.8	51 / 15.9	848 / 7.0
7.00 >100T		704 / 6.0	60 / 18.8	764 / 6.4
Column Total		11709 / 97.3	320 / 2.7	12029 / 100.0

Tab.10 is highly significant and contains a clear message: in international cases more money is at stake than in national cases. 45% of national cases but only 22% of international cases deal with less than 10.000 DM. On the lower end of the columns we find the reverse picture: in

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122 If an amount of money is claimed, this amount is taken as amount of claim. If the law suit does not deal with payment of money an "amount of claim at stake" is calculated by the judge in order to enable the court clerks and the attorneys to calculate their fees.

123 It may be confusing that the amount of claim in some cases is below 5000 DM which is the threshold value of the competence of the district court (in 1988). In these cases the claim has been reduced during the proceedings.

only 13% of national cases but in 35% of international cases claims are higher than 50.000 DM.

If the subject matters of international law suits did not show a particular "global" aspect one can at least confirm assumptions as to the relative importance of international legal disputes in terms of the money involved. For small amounts of money parties to an international dispute rarely go to court and will rather give up their claim. Parties seem to conceive an international law suit as something difficult and arduous which is initiated only in serious situations.

This barrier to initiate international law suits in minor cases exists also in intra-EC-cases. Given the harmonization of laws within the EC and the Brussels Convention which attempts to create a "single litigation market" in Europe one would expect also smaller amounts taken to court. But quite the contrary is true: the amount of claim of cases taken to court by EC-citizen is on the average higher than in non-EC-cases.

2.3.3 Relationship between parties

Although legal abstraction allows little insight into the complexities of social relationships and court files consequently contain hardly any data in this respect, we learnt at least something about the existence and duration of contractual relations. 74% of our international cases were based on a contractual relationship which is in view of the above distribution of subject matters no surprise at all. Most of these contracts (55%) were negotiated for a single purpose, 26% were based on a standard form elaborated and imposed by one of the parties and 18% were based on a standard form offered by the respective business associations. In 38% of the cases we estimated the contractual relationship to be isolated and short term whereas the great majority of contracts (62%) seemed to be an expression of a relatively (in our definition more than a year) long term relationship. A frequent example for this latter type of cross-border interaction was the supply of goods from foreign producers whereas the typical one-shot-contract was the contract for work or service.

2.4 Procedural aspects of international cases

The data presented *supra* lead to hypotheses which go into opposite directions. On the one hand the characteristics of parties in international cases differ considerably from national cases,

on the other hand subject matters seem to be quite similar. The civil procedure[124] might in some aspects be more influenced by the first, in other cases by the second variable. It might also be assumed that most more or less "exotic" inputs into the legal procedure are filtered out by the fact that foreign parties are necessarily represented by domestic attorneys[125] leading to a levelling off of all or most differences between national and international cases. The following data will show that there are indeed many answers to our question.

Apart from a comparison between national and international cases it is of interest to know more about the handling of international cases in particular. We'll therefore deal with questions of German jurisdiction in cases with foreign parties, with questions of judicial assistance for service of process and the taking of evidence, and with the problem of the application of foreign law and international conventions.

2.4.1 International jurisdiction

Germany is generous in granting international jurisdiction: apart from the universally known jurisdiction based on factors like domicile (of the defendant and in exceptional cases of the plaintiff) or *rei sitae* it accepts jurisdiction by choice of forum clauses or voluntary appearance in the proceedings even if both contesting parties are non-residents. The mere presence of any assets belonging to a non-resident defendant can also serve as a basis of unlimited jurisdiction in personam (§ 23 ZPO)[126] - a much criticised "exorbitant jurisdiction" which nevertheless seems to be of practical importance (except within the area of the Brussels Convention which in its Art.5 excludes assets jurisdiction).[127]

This generosity in granting jurisdiction is clearly visible in our data. Out of a total of 337 international cases German jurisdiction was denied to only 3 foreign plaintiffs (residents of Cameroon, Netherlands and Switzerland) and 2 German plaintiffs (suing defendants from the Netherlands and Belgium).In four of these five cases jurisdiction clauses in favor of German jurisdiction were not accepted or the foreign defendant claimed successfully the recognition of

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124 For a general introduction to German Civil Procedure written in English cf. John Langbein, The German Advantage in Civil Procedure, The Univ. of Chicago L.R. 52 (1985) 823-866; John Ratliff, Civil Procedure in Germany, Civil Justice Quaterly, 257-267.

125 According to § 78 Zivilprozeßordnung parties need a local attorney to represent them in district courts.

126 Only recently (i.e. after the time our cases were decided) the German Federal Supreme Court introduced a "minimum contact" doctrine in the interpretation of § 23 ZPO (BGH NJW 1991,3092).

127 Dieter Martiny, Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, Am.J.Comp.L. 35 (1987),721-759 (739) gives more details about restrictions of assets jurisdiction in various bilateral conventions.

jurisdiction clauses in favor of his home jurisdiction. A dismissal rate of 1,4% on jurisdiction problems seems to be very low indeed. It is low also if one takes into consideration that in 29 cases defendants (21 of them residents of different European countries) tried to question German jurisdiction.

Jurisdiction based on jurisdiction clauses appears much more rarely in our data than expected. 58 such clauses seem to be a low number. Related to 236 disputes based on contracts, jurisdiction clauses appeared only in 25% of the cases.[128] As mentioned before, this surprising result certainly gives a wrong picture of international contracts in the whole (where jurisdiction clauses are said to be the rule) but it might be valid in direction for those (few and less complex) contracts being taken to court. These low numbers indicate that parties using courts for dispute settlement are mostly unexperienced actors in the international arena: experienced businessmen use to have jurisdiction clauses in their contracts (which in no way means that they litigate if a dispute arises).

Our 58 jurisdiction clauses were found in contracts involving parties from France and Switzerland (8 cases), U.K. (6), Belgium, Netherlands (5), Denmark, Italy, Luxembourg, Sweden (3),Austria, Cyprus, Honkong, USA (2) and Spain, Greece, Monaco, Indonesia, Cameroon and Nigeria (1).

In general our international files did not confirm those opinions in the legal literature (mostly of common law provenance) which emphasize the importance of choice of forum, recommend "forum shopping" and elaborate arguments for attacking jurisdiction. The issue of the correct choice of jurisdiction was raised only in 8% of the cases and if so, the judges dealt with it quite shortly. This might be a peculiarity for Germany (or continental law in general) where in sharp contrast to the US-American *forum non conveniens* doctrine and the reasonableness doctrine, there is hardly any discretion left to the court in accepting or rejecting its jurisdiction.[129] This conflict-avoiding function of codified law is impressively illustrated by Tab. 11.

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128 As mentioned *supra*, within the area of the Brussels Convention the agreement on a place of performance may be used as an alternative to jurisdiction clauses. The quantitative occurrence of these clauses cannot be ascertained in our data.

129 Heimo Schack, Die Versagung der deutschen internationalen Zuständigkeit wegen forum non conveniens und lis alibi pendens, RabelsZ 58 (1994),40-58.

Tab.11 Controversy on questions of jurisdiction by forum selection clauses in international cases at the district courts of Bremen and Hamburg (1988).

Count / Col Pct	Existence of forum select clause: no	yes	Row Total
Jurisdict.dispute no	146	41	187
	95.4	70.7	88.6
yes	7	17	24
	4.6	29.3	11.4
Column Total	153	58	211
	72.5	27.5	100.0

The data in Tab. 11 are interpreted in the following way: if the contract contains a forum selection clause the defendant tries in nearly every third case to challenge the chosen jurisdiction. If no such clause has been contracted jurisdiction is clearly defined by the German Code of Civil Procedure so that only every 20th defendant raises legal arguments against the forum.

2.4.2 Service of process

In order to better understand our research data on the modes and success of service of process in the observed international cases a short introduction into this very special and complicated legal field[130] seems necessary where each country has its own law and practice.

In many common law jurisdictions the responsibility for service rests in principle with the plaintiff or his/her attorney who leave a copy of the document with the person to be served. There are a number of exceptions, so that in England a county court summons will normally be served by an officer of the court sending it by post; in the United States federal courts, summonses in civil actions may be served out of state by an United States Marshal. What is the exception in common law countries is the rule in civil law countries. Originating summonses will be served by an officer of the court who either has to deliver the document in person or by using a formal delivery provided by the Postal Service. The formal civil law tradition requires

130 For more detailed information cf. David McClean op.cit. p. 6-55.

international service to be initiated by specified officials and (because service of process is considered an act of State, an expression of sovereignty) the strict observation of all formalities in the state of destination. The mode of communication originally required by this doctrine is the diplomatic or consular channel but this has been considered inadequate since the beginning of this century. A number of international (bilateral or multilateral) conventions tried to ease international service procedures, the most recent one being the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague Service Convention 1965). According to this Convention each contracting state designates a Central Authority which undertakes to receive requests for service coming from competent authorities or judicial officers in other contracting states and arranges to have the documents served by a method prescribed by its internal law.

The Hague Service Convention 1965 was in force at the time when the observed international cases were initiated (1988) between Germany and 24 other contracting states. Direct communication between German courts and foreign Central Authorities facilitates service of original summons whereas subsequent service of documents during the proceedings in Germany are facilitated through the nomination of a representative authorized by the non-resident party (§ 174 para 2 ZPO). Service of process of parties resident in other countries is effectuated either on the basis of bilateral conventions or by traditional diplomatic or consular channels.

International service of process had to be expected in those 121 cases of our sample (320 cases) where the defendant was not resident in Germany - but only 79 files contained the corresponding information. It has to be assumed that 42 defendants had authorized a local representative already beforehand in order to avoid costs of service abroad or for other reasons. The modes used for service in those 79 files without local representative are listed in Tab.12.

Tab.12 Modes for international service of process in civil actions of German residents against non-residents (79 cases in district courts of Bremen and Hamburg in 1988).

Hague Convention 1965	48	60%
diplomatic channels	17	22%
others	14	18%
Total	79	100%

We were interested to know more about the efficiency of these various modes of service of process but the files did not contain sufficient information. All we could find out unambiguously (and this seems already to be an important result) is that 10 attempts (8%) of international service of process remained unsuccessful - mostly not, as one might expect, in remote but in European countries. In 7 of these 10 cases the service was eventually effected by public notice (*öffentliche Zustellung*).

In order to learn more about the practical experiences in general we interviewed a clark (*Rechtspfleger*) in the international legal assistance department of the Hamburg district court. This is what she told us:

The service of process centralized in her department for the district court concerns not only original summons but also judgments and all other kinds of judicial decisions but rarely summons of witnesses. In 1988 349 such requests were sent out to foreign authorities, the number remaining quite stable over the past 10 years. Whereas a complete failure is rather the exception, the experience as to the duration of service of process varies from country to country. Within three months documents are normally served in Austria, Switzerland and the Netherlands. Three to six months are needed for service in Denmark, France, Great Britain, Portugal, Sweden, Norway, Poland and Hungary. Service takes normally more than six months (quite often more than twelve months) in Brazil, Argentina, India, Libya and Spain. The frequently addressed Central Authority of this last country is particularly slow and cooperates only with assistance of local attorneys who seem to use everything from personal relations to bribes in order to accelerate service. The German Ministry of Justice recommends in this particular case to proceed without delivery of the document according to German internal law (*öffentliche Zustellung*, § 203 ZPO) if a period of nine months has elapsed without the request being successful. Service in Turkey is also slow but reliable. In Italy problems result from the fact that the Central Authority refuses to certify service of process.

In view of these experiences with international service of process (confirmed by the corresponding department in the district court of Bremen) it is quite understandable that plaintiffs prefer to avoid the problems with judicial assistance by suing in the country of residence of the defendant. Our data show clearly that proceedings with foreign defendants (who have to be served abroad) take considerably longer than the opposite constellation where a foreign plaintiff sues a defendant resident in Germany: the mean duration of a proceeding with service abroad amounts to 284 days whereas the mean duration without service abroad is 190 days.

The advantage of getting the lawsuit started quicker may in many situations be the decisive argument in favour suing abroad (where the defendant lives) and less so the easier enforcement of the judgment.

2.4.3 Summary collection proceedings

German civil procedure offers a judicial debt collection (*Mahnverfahren*, §§ 688 ss.ZPO) which only leads to a normal lawsuit if the debtor rejects the claim within a stipulated period. Whereas in national lawsuits in Bremen and Hamburg a previous judicial debt collection attempt was quite frequent (30%), this procedure was found rarely in international cases (10%). Although this simple form of debt collection is also accessible for non-residents (§ 689 para 2 ZPO), it can only be used *against debtors* if they are residents of the European Community, Norway or Israel.[131] In addition, one must take into account that this procedure is unknown in most foreign legal orders and that the claims in international cases are relatively high (in which case the judicial debt collection is much less used equally in domestic disputes).

2.4.4 Single judge or chamber

The civil chambers in German district courts are constituted of three professional judges, the commercial chambers of one professional and two lay judges. In both chambers the case may be decided by a single professional judge, in civil matters if there are no particular legal or factual problems or questions of legal policy involved (§ 348 ZPO), in commercial matters the only requisite being that both parties agree (§ 349 ZPO). According to a recent study about the

131 This follows from international conventions,in particular the Brussels Convention, cf. § 688 para. 3 ZPO with § 34 AVAVG (Gesetz zur Ausführung zwischenstaatlicher Anerkennungs- und Vollstreckungsverträge in Zivil- und Handelssachen).

selection of cases for single judge decision making[132], some district courts never opt for the single judge and some do so in 80% of the cases which means that the statutory provision of reserving complex and important cases for the bench is in practice a poor guide-line. The criteria in favour of the bench (better quality of the decision) compete with the criteria in favour of the single judge (speed and lower costs of decision making). The interviewed attorneys generally did not have a strong feeling for or against one or the other type of proceedings.

As regards international cases the arguments in favour of the bench seem to prevail slightly. Whereas in 82% of the national civil cases the district courts of Bremen and Hamburg took the matters to the bench, they did so in 93% of the international cases. One explanation is that international cases are more important as regards the amount of the claim (cf.*supra*). Within our sample of international cases the decision to proceed either on the bench or with a single judge is made clearly on the basis of this criteria: The mean value of proceedings before the single judge is 22.000 DM, before the bench it is 157.000 DM.[133]

Another explanation seems to be that judges conceive international matters as being more complex. In international as in domestic commercial matters (*i.e.* in the chamber for commercial matters) the single (professional) judge decided nearly all cases which could be interpreted as a lack of factual complexity of international law suits because lay judges (who are necessarily businessmen) could help understanding the economic aspects of cases. Both observations (preference for the bench in civil matters, preference for the single judge in commercial matters) seem to contradict each other but the most plausible explanation is business experience of the judges. Judges in commercial chambers are selected for this purpose whereas judges in civil chambers are not - and therefore need and seek support from other colleagues.

2.4.5 Hearings

German civil procedure is oral insofar as judgments and (with exceptions) other decisions are based on oral pleadings in a hearing where attorneys and possibly the litigants themselves are present. The oral elements have been increased by a recent reform of procedural law but in

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132 Hubert Rottleuthner, Ellen Böhm, Daniel Gasterstädt, Rechtstatsächliche Untersuchung zum Einsatz des Einzelrichters, Köln 1992: Bundesanzeiger.

133 The corresponding values within domestic cases (in Bremen and Hamburg, 1988) are 30.000 and 46.000 DM. This smaller difference has led Rottleuthner and his team not to attribute decisive importance to the amount of claim in the selection of the single judge/bench. Cf. Rottleuthner/Böhm/Gasterstädt op.cit. p.98.

practice written pleadings still dominate. The intention of law reform was to concentrate everything (including the taking of evidence) in one hearing only in order to accelerate the decision making and to create a better ambience for compromise and settlement. This has been successful to a certain degree but as we shall see in Tab.13, quite a number of proceedings need two or more hearings. Since the number of hearings seems to be an indicator for legal and/or factual difficulties, the table compares national and international proceedings.

Tab.13 Number of hearings in national and international cases in the district courts of Bremen and Hamburg (1988)

Col Pct / Hearings	National	International	Row Total
1.00 One	5554	133	5687
	74.5	67.5	74.3
2.00 Two	1455	39	1494
	19.5	19.8	19.5
3.00 Three and more	449	25	474
	6.0	12.7	6.2
Column Total	7458	197	7655
	97.4	2.6	100.0

In domestic cases three quarters of the proceedings only have one hearing, whereas three and more hearings are needed in only 6% of the cases. In international cases, a clear tendency toward more hearings can be observed - the difference not being spectacular but visible. We conclude from these data that international cases cause some more problems which mean additional effort for both judges and attorneys. The problems have to do with the communication between domestic and foreign attorneys and to a certain degree also with the taking of evidence which is more frequent in international than in national cases (25% compared to 21 %). On the other hand, the taking of evidence besides being more frequent does not cause particular trouble: only in two of the 320 international cases of our sample the evidence had to be taken in a foreign country (one in the Netherlands, one in Cameroon).[134]

134 The taking of evidence abroad has been facilitated by the Hague Evidence Convention 1970 which according to David McClean, op.cit.p. 86, has proved to be one of the most successful of the Hague

Our hypothesis that intra-EC-litigation might show some significant differences in the direction of reducing difficulties in civil litigation was again falsified. In cases between EC-citizen even slightly more hearings were necessary than in all other international cases (16 cases against 13 cases with more than three hearings).

2.4.6 Duration of proceedings

The greater number of hearings indicate a longer duration of international proceedings. In order to test the duration we excluded from the data temporary injunctions, attachments, documentary proceedings and proceedings about recognition as well as enforcement of foreign money judgments because these do not represent the ordinary law suit.

conventions - but this success relates more to the number of ratifications than to the actual use. Similarly, legal literature overestimates the problems as well as the frequency of taking evidence abroad, cf. Dagmar Coester-Waltjen op.cit.

Tab.14 Duration of national and international ordinary law suits in the district courts of Bremen and Hamburg (1988).

DURATION	Count / Col Pct	National	International	Row Total
<= 3MTS		3126	61	3187
		31.2	25.5	31.1
>3MTS <=6MTS		2943	56	2999
		29.4	23.4	29.2
>6MTS <=9MTS		1734	39	1773
		17.3	16.3	17.3
>9MTS <=1YR		777	28	805
		7.8	11.7	7.8
>1YR AND <=2YRS		1154	42	1196
		11.5	17.6	11.7
>2YRS AND <=3YRS		228	12	240
		2.3	5.0	2.3
> 3YRS		55	1	56
		.5	.4	.5
	Column Total	10017	239	10256
		97.7	2.3	100.0

Tab.14 shows a significant longer duration of international ordinary proceedings - independent of the fact whether they have been initiated by EC-citizen or not. 78% of the national cases but only 65% of the international cases are concluded within 9 months, 14 % of the national cases but 23% of the international cases take more than a year. The mean duration of a national proceeding amounts to 201 days whereas the mean duration of international proceedings is 253 days. This difference is in part a consequence of those problems which cause more hearings, but it may also be influenced by problems in the service of process. These problems occur if the defendant resides in a foreign country and has to be served either through diplomatic channels or with the judicial assistance of Central Authorities. We have described *supra* how long that may take. Tab.**Fehler! Textmarke nicht definiert.** now clearly demonstrates the slowing down of proceedings by the delays of service of process abroad.

Tab.15 Duration of international proceedings in relation to domestic or foreign service of process in district courts of Bremen and Hamburg (1988)

Count / Col Pct	INTERNAT.PROC. domest serv	INTERNAT.PROC. foreign serv	Row Total
DURATION			
<=3MTS	104 / 43.2	16 / 20.3	120 / 37.5
>3MTS <=6MTS	58 / 24.1	15 / 19.0	73 / 22.8
>6MTS <=9MTS	32 / 13.3	8 / 10.1	40 / 12.5
>9MTS <=1YR	15 / 6.2	14 / 17.7	29 / 9.1
>1YR	32 / 13.3	26 / 32.9	58 / 18.1
Column Total	241 / 75.3	79 / 24.7	320 / 100.0

Whereas 67% of international proceedings with domestic service of process (*i.e.* the defendant is a resident of Germany or has nominated an authorized representative) take less than 6 months, this is the case only in 39% of the proceedings with foreign service of process. On the other end of the columns we find the reverse picture: the first group of cases takes longer than 1 year only in 13%, but the second group in 33% of the proceedings. The decisive problem which causes enormous delays is clearly the service of process abroad.

The (statistically highly significant) table shows a certain but not very accentuated advantage of intra-EC-service of process as compared to extra-EC-service. This is of course the least one could expect from legal assistance conventions that service of process in Europe is a little bit more effective than in the rest of the world. The only limited effect on the duration of the proceedings must rather be interpreted a being disappointing.

2.4.7 Role of foreign law or unified law in international proceedings

Whereas courts all over the world apply their own procedural law they may not in the same way apply their own substantive law. This last point is subject either to autonomous rules of Private International Law which refer entire legal cases or parts thereof to domestic law or to foreign law or the question is decided by the parties if a contract contains a choice of law clause. Recent international conventions[135] stipulate a clear preference for the designation of the applicable law by the parties in order to avoid problems arising out of divergences between the conflict of law rules of national legal systems and in order to free attorneys and judges from the burden of studying and understanding specialized literature in the highly sophisticated disciplines of Private International Law. Germany having signed the EC-Convention also gives preference to choice of law in contractual obligations (Art.27 EGBGB).

Private International Law is further replaced in certain legal areas by unified law, *e.g.* by the UN Convention on the International Sale of Goods (1980) and by quite a number of conventions on the unification of transport law, patent and copyright law, maritime law and family law. As regards the European Community there are additional efforts of legal unification by way of directives.

In order to collect data on the law applied in international

cases we distinguished first between pleadings and judgments, then looked within this material for the legal basis of argumentation (distinguishing between German law, foreign law and unified law) and finally tried to find out whether this legal basis is called for by choice of law (in a contract) or by Private International Law rules.

135 E.g. the Hague Convention on the Law applicable to International Sale of Goods (1955) and the more recent Hague Convention on the Law applicable to Contracts for the International Sale of Goods (1985). Similarly Art.3 of the EC-Convention on the Law applicable to Contractual Obligations (1980).

Tab.16 Law applied in international cases in district courts of Bremen and Hamburg (1988).

	Pleadings	
German Law	248	79%
Foreign Law	44	14%
Unified Law	21	7%
Total	313	100%
	Judgments	
German Law	98	86%
Foreign Law	8	7%
Unified Law	8	7%
Total	114	100%

Nearly 80% of the pleadings in international cases did not mention foreign or unified law and/or argued in favour of the application of German law. More interesting for our purposes were those 44 pleadings where the application of foreign law was requested. But even in these cases foreign law was in general mentioned vaguely without indications of statutes and/or case law - only 4 pleadings pointed to specific foreign rules and 6 pleadings to foreign judgments (two of them were decisions of the European Court of Justice).

Those pleadings which made the existence of a conflict of laws explicit (86 files contained such an argument) were mostly based on a choice of law clause (70) whereas only 16 deduced the application of (German or foreign) law from German Private International Law. In relative figures the application of law in our sample of 320 international cases was according to the pleadings based in 22% on a choice of law clause and in 5% solely on the statutory rules of Private International Law. The large majority of the pleadings either pointed to the application of unified law (7%) or simply did not mention a possible conflict of laws (66%). In theory the court in view of foreign elements in the pleadings must *ex officio* raise the question that foreign law might govern the controversy but in practice the judges take the silence in regard to this question as a tacit or conclusive choice of law and apply German law without further discussion. In some files this understanding was made explicit by a short statement in the summary of the oral hearing.

As regards judgments, German law played an even greater role since 86% of the decisions were based on it whereas the remaining 14% were equally distributed among foreign law and unified law. Again we observed an amazing lack of specification: only two judgments mentioned the wording of foreign statutory rules and two other judgments referred to foreign case law (one case being decided by the European Court of Justice). There were no attempts of interpretation or discussion of these foreign rules or cases. Foreign legal literature does not seem to be read at all in German district courts.

Tab.17 Foreign law applied in international cases in the district courts of Bremen and Hamburg (1988).

	Pleadings		Judgments
Great Britain, Italy	6	Austria	3
Switzerland	5	Italy	2
Netherlands	4	Spain, Singapore	
France, USA, Cyprus	3	South Africa	1
Sri Lanka, Austria, South Africa	2		
Argentina, Denmark, Spain, Japan, Finland, Sweden, Singapore	1		

Tab.17 gives more details about foreign law in German proceedings. The first observation is that judges are much more cautious or hesitant in applying foreign law than attorneys in their pleadings. Secondly, in spite of EC-harmonization and approximation of laws, the law of EC-countries is not more often applied in German courts than other countries' law. A third remark is very speculative: it seems that judges being educated in a civil law tradition are more ready to apply codified law than common law with its much more difficult access to legal knowledge and different methods of reasoning. If this last observation holds true (our data basis is unfortunately very small) legal cultural elements appear as decisive variables in the handling of international cases.

As regards unified law, the main source used in international cases is the Convention on the International Carriage of Goods by Road (CMR) followed by EC rules. At a time (1988) when the UNCITRAL Sales of Goods Convention was not yet in force in Germany its predecessor,

the Uniform Law on International Sales, played a modest role in pleadings but no role at all in the judgments of our sample.[136]

Similar to universal practice, a German court may reject the application of foreign law for reasons of public policy (ordre public). German legal literature recommends a restrictive practice in order to tolerate foreign legal cultures and foreign values as far as possible the limits of acceptance being only the fundamental rights of the German constitution. Our cases show clearly this liberal attitude: the two pleadings requesting rejection of foreign law (of the Netherlands and of Sweden) remained unsuccessful in the final decisions.

2.4.8 Hamburg special court section for international cases

German experts in Private International Law and Comparative Law use to complain about the incompetence of judges in dealing with international cases.[137] One of the proposals for improving the situation was to create special court sections for the decision of international cases defined as matters where the application of Private International Law , Unified Law or International Procedural Law have to be considered.[138] Although there are no legal obstacles at least for large courts to organize their work load accordingly (through court regulations in which for every case the competent judge or chamber has to be fixed beforehand) there has been created in Germany (in 1971) only one special "international" section, namely the 5th chamber in the Hamburg district court (which has been extended to three chambers recently).[139] Our data may help to evaluate its actual practice.[140]

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136 Only few countries had ratified this Convention.

137 Memorandum on the improvement of the German civil practice in international matters, RabelsZ 35 (1971) 323-331; Murad Ferid, Auslandsrechtsfälle in der deutschen Rechtspraxis, in Festschrift Oskar Möhring, München 1973, 1-11 and in: Tugrul Ansay, Volkmar Gessner, Gastarbeiter in Gesellschaft und Recht, München 1974,144-158.

138 Deutscher Rat für Internationales Privatrecht, Denkschrift zur Verbesserung der deutschen Zivilrechtssprechung in internationalen Sachen vom 27.4.1982, RabelsZ 46 (1982) 743-745.

139 In order not to neglect eventual recent developments which might have occurred we inquired in all Ministries of Justice in other German *Länder* about their dealing with international matters and their steps to concentrate international cases in special sections. All answers were negative: international matters are part of the normal tasks of judges in all branches of the administration of justice. As regards Hamburg, also the family courts have assigned international matters to specific judges.

140 Evaluations have already been published by the (then) presiding judge of the international chamber: Gerhard Luther, Kollisions- und Fremdrechtsanwendung in der Gerichtspraxis, RabelsZ 37 (1973) 660-681, and by Kurt Siehr, op.cit. Both reports are outdated due to change of jurisdiction in 1977: divorce cases then 90% of the case load of the international chamber have now to be brought to the family courts.

The Hamburg international chamber is competent for cases, first, where one party is not German or is a company not domiciled in Germany, and second, where foreign or international unified law may apply. This second element leads to a broader definition of "international cases" than the one we used for our file analysis. Nevertheless we used our access to the data of the official statistics to run a few cross-tabs and means with all cases (538) which were initiated in 1988 in the 5th chamber of the Hamburg district court. The results can be summarized as follows: the amount of claims is higher in the international than in all other chambers of the court (57.000 DM vs. 42.000 DM) whereas the number of judgments and settlements is lower (more interim injunctions, attachments *etc.*). The assumption of the former presiding judge of the chamber that in comparison to domestic cases international proceedings take three times more time and energy [141] is not confirmed: the mean duration of cases of this chamber is 221 days (in all other chambers it is 202 days), the mean number of hearings without taking of evidence is 1,4 (all other proceedings 1,3), the mean number of hearings with taking of evidence is 1,3 (all other proceedings 1,2). These mean values may of course seem unfair to judges who suffer from the burden of some very time and energy consuming cases where foreign law has to be studied and language problems with parties and witnesses have to be resolved. But over all cases the additional burden is only 10%.

The remaining tests are carried out with international cases according to our own definition. Our main interest lies in comparing the handling of international cases in the special chamber and in ordinary chambers in order to learn about the effectiveness of specialization in international judicial decision making.

First we calculated the mean duration of an international case in the special chamber and in other (ordinary) chambers: the special chamber needs 220 days, the ordinary chambers need 208 days. This result runs against our expectations since one might reasonably expect specialized judges to gather experience and routine and therefore handle international matters more quickly than ordinary judges. The only way of explanation then seems to assume a more thorough proceeding by way of extensive legal research in foreign law, taking of evidence abroad, writing of judgments or preparing settlements.

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141 Gerhard Luther op.cit.p.672. See also Siehr, op.cit.p.677: "Conflicts cases anyhow require more time and effort than normal domestic ones (1.5 times more in divorce suits and 3 times more in all other cases)".

The data are not clearly supporting this assumption. The special chamber does not carry out more oral hearings (even less) and does not take more evidence although both cases in our 320 international proceedings with the taking of evidence abroad proceed from the special chamber; the special chamber does not show significant differences as regards the frequency of judgments and settlements. But these may not be the best indicators for thorough disposition of complicated international matters. More meaningful are data about the consideration, discussion and eventually the application of foreign or unified law. We find on the one hand twice as many pleadings requesting the application of foreign law: 18 out of 79 valid cases (23%) in the special chamber and 26 out of 213 cases (12%) in other chambers, on the other hand the reverse picture in pleadings based on unified law: one out of 79 valid cases (1%) in the special chamber and 20 out of 213 cases (nearly 10%) in the other chambers. The logic behind the weaker role of unified law in the special chamber seems to be that there is much more unified law in commercial than in other matters, the most frequently mentioned unified law being the CMR. These commercial disputes rather go to the comercial chambers than to the special chamber for international matters.

Tab.18 Role of foreign and unified law in pleadings before the Hamburg international chamber and before ordinary chambers in district courts of Bremen and Hamburg (1988).

		Special Chamb.		Ordin. Chamb.	
pleadings based on foreign law	yes	18	23%	26	12%
	no	61	77%	187	88%
	Total	79	100%	213	100%
pleadings based on unified law	yes	1	1%	20	9%
	no	78	99%	193	91%
	Total	79	100%	213	100%

This hypothesis is - although on a very low quantitative level - clearly confirmed by an analysis of judgments: whereas 5 out of 31 judgments of the special chamber are based on foreign law (16%) this is only the case in 4 out of 70 judgments in ordinary chambers (6%). A similar tendency is found as regards unified law.

Tab.19 Role of foreign law and unified law in judgments of the Hamburg international chamber and of ordinary chambers of the district courts of Bremen and Hamburg (1988)

		Special Chamb.		Ordinary Chamb.	
judgments based on foreign law	yes	5	16%	4	6%
	no	26	84%	66	94%
	Total	31	100%	70	100%
judgments based on unified law	yes	3	10%	4	6%
	no	28	90%	66	94%
	Total	31	100%	70	100%

This special data analysis on the role of the Hamburg international chamber thus leads us to the following conclusions. In nearly 80%, international cases are handled as if they were domestic cases. But the remaining 20% are dealt with more thoroughly than in the ordinary chambers, taking foreign law more seriously, encouraging attorneys not to grasp the first opportunity of a choice of (German) law and even - in very exceptional cases - to take evidence in a foreign country. The additional effort of judges is nonetheless not too impressive: In international matters they only had to write 8 judgments based on foreign or unified law in 1988.

2.5 Outcome of proceedings

Our data allow us to analyse the outcome of international proceedings according to the types of formal decision as well as to the characteristics of winners and losers. As regards the enforcement there are no particularities in comparison to domestic proceedings. Therefore we only deal in the last section of this chapter with enforcement of foreign decisions in Germany.

2.5.1 Types of formal decisions

The specific structures of international proceedings lead to final decisions which are different from domestic cases.

Tab.20 Types of formal decisions in international compared to national proceedings in the district courts of Bremen and Hamburg (1988).

	Count / Col Pct	National	International	Row Total
Judgment		3042	73	3115
		26.0	22.8	25.9
Settlement		2060	43	2103
		17.6	13.4	17.5
Judgment in default		2304	61	2365
		19.7	19.1	19.7
Injunction/attachment of assets		528	26	554
		4.5	8.1	4.6
Withdrawal of claim		1503	60	1563
		12.8	18.8	13.0
Other		2272	57	2329
		19.4	17.8	19.4
Column Total		11709	320	12029
		97.3	2.7	100.0

The main differences between national and international cases were found in the relative frequency of judgments, settlements and injunctions. Due to the complications which may arise in an international proceeding it is no surprise that judgments are less frequent. But unexpectedly also settlements are quite visibly more rare. Possibly all potential ways of conciliation between the parties have already been exhausted before an international law suit has been initiated. Instead of concluding an agreement one party seems to prefer a withdrawal of the claim: the very high number of this item (nearly one fifth of the claims) indicates misunderstandings, confusion and certainly poor communication between parties - a sign of legal cultural distance.

This cultural distance seems also to persist within the EC-countries. It was really a suprise to discover significantly more judgments in default and withdrawals in law-suits among EC-citizen than in other international cases.

It is tempting to create hypotheses as to possible influences of the plaintiff (resident or non-resident) on these different outcomes of proceedings. In particular one expects more default judgments against foreign defendants and more withdrawals of foreign plaintiffs. Although Tab.21 shows significant differences between law suits initiated by foreign plaintiffs and suits initiated by German plaintiffs, these hypotheses are only partly confirmed.

Tab.21 Types of formal decisions in international cases initiated by foreign and by German plaintiffs in the district courts of Bremen and Hamburg (1988).

Count / Col Pct	Plaintiff: Foreign	German	Total
Judgment	49 / 23.4	24 / 21.6	73 / 22.8
Settlement	29 / 13.9	14 / 12.6	43 / 13.4
Default Judgment	42 / 20.1	19 / 17.1	61 / 19.1
Injunction/attachment of assets	8 / 3.8	18 / 16.2	26 / 8.1
Withdrawal	41 / 19.6	19 / 17.1	60 / 18.8
Others	40 / 19.1	17 / 15.3	57 / 17.8
Column Total	209 / 65.3	111 / 34.7	320 / 100.0

The most visible differences shown in Tab.21 are those between the low number of injunctions/attachments of foreign plaintiffs and the corresponding high number of German residents who get this court decision. This decision is relatively easy to obtain (even without safeguarding the defendant's right to be heard) and can be enforced immediately within the jurisdiction of the court. In cities with a seaport (like Bremen and Hamburg) this procedure is used frequently against foreign shipowners. Consequently the predominance of German

residents in this type of procedure is no surprise.[142] It is also no surprise but follows from the legal situation that injunctions and attachment of assets are significantly more often obtained by German plaintiffs against non-EC-citizen than against EC-citizen. The European Court of Justice has ruled in the *Denilauler/Couchet Frères* case[143] that the Brussels Convention requires the defendant to be heard before an injunction or an attachment is decided by the court. This requirement makes these legal remedies less attractive in case EC-citizen are involved.

Unexpected and difficult to explain is that foreigners obtain more default judgments in their favour than German residents - the picture of the foreigner who for reasons of lack of time and money or because of difficulties to find a local attorney does not appear in court is not confirmed by the data. More in conformity with our expectations is the result that foreign plaintiffs - probably due to unsufficient knowledge of German law and legal procedure - more often withdraw their claims than German residents, the only surprise being that this does not occur more often.

2.5.2 Winners and losers

Winners and losers of a German civil proceeding are defined clearly according to who has to bear the judicial and extrajudicial costs. Since official court statistics contain reliable data about the judicial cost decision concluding the proceeding it is unproblematic to attribute to each party his/her relative success.

The normal picture is that plaintiffs win their cases more often than defendants: they normally check their risks carefully before commencing a law suit. Since international law suits create additional problems and risks, it is to be expected that plaintiffs bring only promising claims to court. They should therefore win even more often than plaintiffs of domestic cases. This hypothesis is clearly confirmed in Tab.22.

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142 At the time when the attachment petitions of our sample were pending (1988) German residents had a privilege in § 917 para.2 ZPO: the danger of unenforceability did not have to be proved if a judgment would have to be enforced in a foreign country. This privilege might explain in part the predominance of German residents in the attachment procedures. The European Court of Justice has recently declared this provision void, European Court of Justice 10 Feb.1994 - Case C-398/92, *Mund v. Hatrex*, NJW 1994,1271.

143 Decision 125/79 of 21 May 1980.

Tab.22 Cost decisions in national and international cases in the district courts of Bremen and Hamburg (1988).

Count / Col Pct / Costs imposed on	National	International	Row Total
Plaintiff totally	1797 / 21.6	45 / 19.6	1842 / 21.6
Plaint.predomin.	535 / 6.4	7 / 3.0	542 / 6.4
Plaint/Defend eq.	979 / 11.8	23 / 10.0	1002 / 11.7
Defend.predomin.	971 / 11.7	21 / 9.1	992 / 11.6
Defendant totally	4023 / 48.4	134 / 58.3	4157 / 48.7
Column Total	8305 / 97.3	230 / 2.7	8535 / 100.0

The message of tab.22 is that plaintiffs of international cases win three times more often than defendants of international cases. In addition it would be interesting to know whether this success in international law suits must be attributed predominantly to German plaintiffs suing defendants residing in a foreign country, or rather to foreign plaintiffs suing German residents. The first alternative is supported by the fact that German residents have everything in their favour: acquaintance with the legal system, contacts with local attorneys, application of German procedural and (mostly) substantive law *etc.* The second alternative again relies on the filter effect of foreseeable difficulties: foreigners bring only claims to a German court if they are certain to have a sufficient legal basis and all necessary evidence. The data discussed in Tab.21 did not necessarily support this alternative since more foreigners than German residents had to withdraw their claims during the proceedings.

Tab.23 Cost decisions in relation to the place of residence of the plaintiff in all cases in the district courts of Bremen and Hamburg (1988).

Count / Col Pct	Place of residence of Plaintiff: Germany	all other	Row Total
Cost imposed on			
Plaintiff totally	1813 / 21.6	29 / 18.8	1842 / 21.6
Plaint.predomin.	537 / 6.4	5 / 3.2	542 / 6.4
Plaint/Defend.eq.	989 / 11.8	13 / 8.4	1002 / 11.7
Defend.predomin.	979 / 11.7	13 / 8.4	992 / 11.6
Defendant totally	4063 / 48.5	94 / 61.0	4157 / 48.7
Column Total	8381 / 98.2	154 / 1.8	8535 / 100.0

Tab.23 tells us that plaintiffs who are not resident in Germany are significantly more successful in German courts than German residents normally in (international or domestic) law suits. They win totally or at least predominantly in 70% of the cases! If the mentioned filter effect must be discarded as a possible interpretation, an explanation must be sought in the subject matters of the foreign actions. As we have mentioned already in another context and as will be shortly treated in the next section with some more details, there are 18 requests for enforcement of foreign judgments among the suits initiated by foreigners. These requests are obviously atypical law suits which normally lead to a quick positive decision. In our sample all such requests were successful and hence led to the imposition of costs to the defendant (the German debtor). If we eliminate these requests for enforcement of foreign judgments from our sample the apparent advantage of foreign plaintiffs disappears. In a normal international law suit they have about the same chance of winning as German residents - but this is already more than one might reasonably have expected.

We have also tested the hypothesis that within the group of foreign plaintiffs EC-residents are more successful than non-EC-residents. They could be more knowledgeable about neighbouring legal systems and cultures or better supported by their legal infrastructure. The data show indeed a slight tendency in favour of such an hypothesis but did not survive a test of statistical significance. We can therefore not confirm such an assumtion.

2.5.3 Enforcement of foreign judgments

Our sample of 320 international cases of the district courts of Bremen and Hamburg contains 18 requests for enforcement of foreign judgments. They were mostly based on the Brussels Convention. In addition 5 requests were based on a bilateral agreement with Austria and one on a similar one with Norway.[144] Not a single request came from a non-European country, especially none from the USA. Twice as many requests for enforcement of foreign judgments are brought to the municipal courts (*Amtsgerichte*)[145], in particular judgments on support claims in favor of children born out of wedlock.

The low numbers of requests for enforcement of foreign judgments at the district courts[146] are certainly surprising since these courts have according to Art.32 of the Brussels Convention to be addressed in order to obtain the *exequatur*. We take these data as another indicator for our assumption that German residents (without foreign subsidiaries) are rarely taken to court not only in foreign countries in general but also in other countries of the European Union.

We learnt from a survey carried out by an European Community "Judicial Cooperation Working Group" and evaluated by its UK counterpart[147] that the low numbers of requests for

144 As regards the legal situation cf. Dieter Martiny, Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany, Am.J.Comp.L. 35 (1987) 721-759.

145 Cf. Dieter Martiny, Handbuch des Internationalen Zivilverfahrensrechts III/1, Tübingen: Mohr, 1984, p.36. The data given in this book only cover the period until 1981 because official statistics unfortunately abandoned later special reference to this item.

146 Our data are confirmed by the numbers given by Martiny.

147 Questionnaire on the Application of the Hague Convention of 1965 on Service Abroad and the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgments - Synthsis of Replies by Member States, Lord Chancellor's Department, London.

enforcement of foreign judgments observed in Bremen and Hamburg are no German exception. The report which seems to have been written in 1992 gives the following data:

Netherlands: 590 judgments in 1989.

Italy: perhaps 100 per year (in five years there were 128 in Milan and 18 in Salerno).

France: there have been 279 in Paris in the last four years.

Ireland: 75 since 1988 (nearly all from the UK).

UK (England and Wales): 283 since 1987.

3 Conclusions

In 1988 when our sample of civil cases at the district courts of Bremen and Hamburg was filed the Brussels Convention was in force in Germany for 15 years, the Hague Service Convention for 9 years, the Hague Evidence Convention also for 9 years. In addition many bi-lateral conventions for many years tried to facilitate international litigation between citizens in Germany and in other European countries.

Our data show that these conventions so far have not been able to create something like a "single litigation market" in Europe. We have tested a number of possible hypotheses about access to courts, type of cases, amount of claim, duration and outcome of procedure, and recognition and enforcement of foreign judgments, but did not find significant differences between "European cases" (which involve citizen of the European Community) and "Non-European cases" (between German residents and parties with residence outside the EC). Only the service of process is slightly more efficient in Europe than in the rest of the world. The fact that in a comparison between EC- and non-EC-residents as parties to a law-suit the former are far more visible as businesspeople than as private individuals was interpreted as a result of the marginal position which the EC-structures (including legal institutions and in particular courts) offer to private citizen. The data show only four international consumer cases in the district courts of Bremen and Hamburg. It follows that consumers either are not economic actors in the European market or refrain from persuing their claims. Both alternatives can be related to legal uncertainty.

State courts may or may not be considered by lawyers as accessible and effective institutions for the resolution of cross-border claims. But as regards the European Community state courts do not offer any special advantage for European residents - not for business actors who use the courts and less so for private actors (mainly consumers) who even do not use them. If cross-border legal interactions suffer in general from legal uncertainty the same is true for legal interactions across European borders.

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BAKER & MCKENZIE ADVOKATBYRÅ
Eriksbergsgatan 46
S-100 41 Stockholm
Tel.: +46-8-676 7700
Fax.: +46-8-24 89 20
attn.: Mr Lindqvist

BERLIOZ & Co
Boulevard de Courcelles, 68
F-75017 Paris
Tel.: +33-1-440 144 01
Fax.: +33-1-441 594 15
attn.: Mr David

BEUC
Avenue de Tervueren, 36 bte 4
B-1040 Bruxelles
Tel.: +32-2-735 31 10
Fax.: +32-2-735 74 55
attn.: Ms Kerstiens

BICHLER & ZRZAVY
Weyrgasse 8
A-1030 Wien
Tel.: +43-1-712 66 94 0
Fax.: +43-1-712 64 82
attn.: Dr. Bichler

BISHOP AND ROBERTSON CHALMERS
2 Blythswood Square
UK-Glasgow, G2 4 AD / Scotland
Tel.: +44-141-24 84 672
Fax.: +44-141-22 19 270
attn.: Mr Taylor

BOEKEL DE NERÉE
Stawinskylaan 3037
NL-Amsterdam 1077
Tel.: +31-20-541 52 52
Fax.: +31-20-661 29 49
attn.: Mr Pel

BONN & SCHMITT
Avenue Guillaume 62
L-2015 Luxembourg
Tel.: +352-45 56 58
Fax.: +352-45 58 59
attn.: Mr Arendt

BOODLE HATFIELD
Town Quay House, 7 Town Quay
UK-Southampton SO14 2PT
Tel.: +44-1703-332 001
Fax.: +44-1703-222 480
attn.: Mr Hamblin

BRANDT-MONGIN
Rue St. Louis-en-I'Ile 81
F-75004 Paris
Tel.: +33-1-432 979 25
Fax.: +33-1-432 63309
attn.: Ms Brandt-Mongin

BUFETE ARMERO
Velázquez, 21-4°
E-28001 Madrid
Tel.: +34-1-431 3100
Fax.: +34-1-577 2675
attn.: Ms Escardó

CHIOMENTI E ASSOCIATI
Via Bertoloni n. 44/46
I-00197 Roma
Tel.: +39-6-809701
Fax.: +39-6-8097023
attn.: Mr Bruna, Ms Curcuruto

CONFÉDÉRATION SYNDICALE DU CADRE DE VIE (CSCV)
15, Place d'Aligre
F-75012 Paris
Tel.: +33-1-53 17 17 15
Fax.: +33-1-43 41 40 06
attn.: Ms Modez

CONSUMERS' ASSOCIATION
2 Marylebone Rd.
UK-London NW1 4DF
Tel.: +44-171-830 6000
Fax.: +44-171-830 6220
attn.: Ms Evans

COPPENS VAN OMMESLAGHE HORSMANS & FAUR
Avenue Louise 81 (b.1)
B-1050 Bruxelles
Tel.: +32-2-542 88 88
Fax.: +32-2-542 89 89
attn.: Mr Sacré

DE SOUSA E BRITO
Rua Castilho, 71, R/C
P-1250 Lisboa
Tel.: +351-1-386 1407
Fax.: +351-1-386 1735
attn.: Mr de Sousa e Brito

DOCKRELL FARRELL
Fitzwilliam Square 51-52
IRL-Dublin 2
Tel.: +353-1-661 5866
Fax.: +353-1-678 9747
attn.: Ms Carey

DELPHI ADVOKATFIRMAN
Sergels Torg 12, 6 TR
S-111 84 Stockholm
Tel.: +46-8 677 54 00
Fax.: +46-8 20 18 84
attn.:Mr Dhunér

FLADGATE FIELDER SOLICITORS
Heron Place 3 George Street
UK-London W1H 6AD
Tel.: +44-171-468 9231
Fax.: +44-171-935 7358
attn.: Ms Kolkmann

HENRIQUE ABECASIS, ANDRESEN GUIMARAES & ASSOCIADOS
Av. Miquel Bomarda, 36-60
P-1000 Lisboa
Tel.: +351-1-793 4140
Fax.: +351-1-793 4066
attn.: Mr Guimaraes

HERBERT SMITH
Primrose Street
UK-London EC2A2HS
Tel.: +44-171-374 8000
Fax.: +44-171-496 0043
attn.: Mr Evans

KPMG PEAT MARWICK KYRIACOU
PO Box 14111
GR-11526 Athens
Tel.: +30-1-77 52 001
Fax.: +30-1-77 04 182
attn.: Mr Papacostopoulos

KROMANN & MÜNTER LAW FIRM
Avenue Louise 475/B 12
B-1050 Bruxelles
Tel.: +32-2-646 3620
Fax.: +32-2.646 4049
attn.: Mr Eric Bertelsen

KYRIAKIDES & PARTNERS
6, Queen Sophia Ave
GR-106 74 Athens
Tel.: +30-1-72 43 072
Fax.: +30-1-72 50 670/1
attn.: Mr Hadjioannou

LINDAHL ADVOKATFIRMAN
P.O. Box 14240
S-104 40 Stockholm
Tel.: +46-8-670 58 00
Fax.: +46-8-667 73 80
attn.: Ms Bjurman

MACLAY MURRAY & SPENS
SOLICITORS
3 Glenfilas Street
UK-Edinburgh EH3 6 AQ
Tel.: +44-131-226 5196
Fax.: +44-131-226 3174
attn.: Mr Edward

MCGRIGOR DONALD
Pacific House, 70 Wellington Street
UK-Glasgow G2 6SB
Tel.: +44-141-248 6677
Tel.: +44-141-204 1351
attn.: Mr MacKechnie

NICHOLSON GRAHAM & JONES
SOLICITORS
Moorgate 25-31
UK-London EC2R 6AR
Tel.: +44-171-628 9151
Fax.: +44-171-638-3102
attn. Mr Robinson

OPPENHOFF & RÄDLER
Hohenstaufenring 62
D-50674 Köln
Tel.: 0221-2091-0
Fax.: 0221-2091-435
attn.: Dr. Günther

PELTONEN ÖRNDAHL RUOKONEN &
ITÄINEN
Fredrikinkatu 48 A
SF-00100 Helsinki
Tel.: +358-0-694 4966
Fax.: +358-0-694 4206
attn.: Mr Aspelin

PINSENT CURTIS
Dashwood House
UK-London EC2M 1NR
69 Old Broad Street
Tel.: +44-171-418 7000
Fax.: +44-171-418 7050
attn.: Mr Robinson

RADCLIFFES & CO SOLICITORS
5 Great College Street
UK-London SW1P 3SJ
Tel.: +44-171-222 7040
Fax.: +44-171-222 6208
attn.: Mr Sear

ROSCHIER-HOLMBERG & WASELIUS
Keskukatu 7 A
SF-00100 Helsinki
Tel.: +358-0-22 85 51
Fax.: +358-0-17 54 51
attn.: Mr Thompson

RUSSEL ADVOCATEN
Reimersteek 2
NL-1082 AG Amsterdam
Tel.: +31-20-301 55 55
Fax.: +3120-301 56 78
attn. Mr Russel

SCHÖNHERR BARFUSS TORGGLER & PARTNER
Tuchlauben 13
A-1014 Wien
Tel.: +43-1-534 37-0
Fax.: +43-1-533 25 21
attn.: Mr Zeiler

SCHILTZ LINDEN GROLIG
Koningsstraat 87
B-1000 Brussels
Tel.: +32-2-218 18 80 70
Fax.: +32-2-218 37 69
attn.. Mr Linden

SIMMONS & SIMMONS
21 Wilson Street
UK-London EC2M 2TQ
Tel.: +44-171-628 2020
Fax.: +44-171-628 2070
attn.: Mr Aspelin

STUDIO LEGALE ALBISINNI
Via Zenale, 3
I-20123 Roma
Tel.: +39-6-321 6171
Fax.: +39-6-321 7034
attn.: Ms Capuano

STUDIO LEGALE BUSE
Via Monte Napoleone, 21
I-20121 Milano
Tel.: +39-2-79 54 97
Fax.: +39-6-79 55 48
attn.: Mr Buse

SUOMEN KULUTTAJALIITTO
Mannerheimintie 15A
SF-00260 Helsinki
Tel.: +358.0.44 82 88
Fax.: +358.0.44 87 25
attn.: Ms Taipale

TASIES OEHLER ABOGADOS
Beethoven 8
E-08021 Barcelona
Tel.: +34-3-202 1138
Fax.: +34-3-200 3062
attn.: Dr. Oehler

THOMMESSEN KREFTING GREVE LUND AS
PO Box 413 Sentrum
N-0103 Oslo
Tel. 0047-22-42 18 10
Fax.: +47-22-42 35 57
attn.: Mr Riekeles

VAN SCHOONHOVEN IN`T VELD
Peter van Androoystraat 7
NL-1076 DA Amsterdam
Tel.: +31-20-679 69 69
Fax.: +31-20-676 43 39
attn.: Ms Adema

VEREIN FÜR KONSUMENTENINFORMATION
Mariahilfer Str. 81
A-1060 Wien
Tel.: +43-1-587 8686
Fax.: +43-1-587 9300-38
attn.. Ms Kogler

WILLIAM FRY
Wilton Place
IRL-Dublin 2
Tel.: +353-1-688 1711
Fax.: +353-1-668 7016
attn.: Mr E. Fry

WOLF, THEISS & PARTNER
Schubertring 8
A-1010 Wien
Tel.: +43-1-513 4979
Fax.: +43-1-513 4979-25
attn.: Mr Wolf

YANNIS N. YANNACOU
10, Tsimiki Str.
GR-546 24 Thessaloniki
Tel.: +30-31-270.771
Fax.: +30-31-270.551
attn.: Mr Yannacou

III. Macro-Economic Analysis of the Cost of Judicial Barriers in the Single Market

0. English Summary

0.1. Topic and Content

That legal uncertainty (or judicial barriers) impede(s) economic growth and stability in an economy is a central hypothesis in development economics as well as in the political economy of transformation in Eastern European reform countries. On the contrary, this aspect has hardly been recognised in the research on European integration. It has not been considered in the planning of the European union that economic integration induces an increase in legal uncertainty respecting transborder transactions that can destroy or at least reduce the expected positive effects of an internal market programme and also of a European economic and monetary union.

The **target** of this study has been to work out the macroeconomic costs or effects of this legal uncertainty in the internal market. The study comes to the conclusion that legal uncertainty produces substantial costs for the European economy.

One can distinguish qualitative and quantitative methods. We here concentrate on qualitative analyses as this study has been a kind of pilot study with only a range of time of 6 months. We prove that negative macroeconomic effects of a European internal market programme arise unless the legal uncertainty mentioned is erased or diminished. There are several theoretical areas and methods that can be used and combined to show this. The main theoretical areas we have concentrated on are: the „new" institutional economics, trade and competition theory, the „new" growth theory, option theory and the time inconsisteny theory of optimal economic policy. These approaches are explained in chapter 3 and - in more detail - in chapter 7 of the report (Part 2). By using these approaches to work out the economic effects of legal uncertainty one gets a table of different effects that in sum produce the macroeconomic effect asked for. This table is to be found in chapter 2. The single

effects themselves are explained in chapter 3. Chapter 4 includes the results of some thorough investigations in the light of the theoretical areas mentioned above.

We have refrained from doing quantitative analysis in the sense of numerical estimations because of the lack of data. In chapter 5 we present some approaches and emphasise necessary preconditions and the difficulties arising when trying to do quantitative estimations of the effects or costs qualitatively derived. In chapter 6, we nevertheless develop some scenarios regarding static transaction costs caused by legal uncertainty. There we come to the conclusion that static costs of legal uncertainty alone may well be at a two-digit billion ECU level.

The term **legal uncertainty** (hindrances or constraints) is here used in a very wide sense. It also includes situations of legal instability and legal refusal as well as legal nonknowlegde. The term **macroeconomic costs** is here interpreted as losses in aggregate income or growth. As a reference scenario we refer to the expected gains of an internal market as pointed out in the so-called Cecchini-Report. The growth hopes expressed there can be interpreted as the expected gains of an Internal market when there is total legal certainty. The macroeconomic costs investigated here can be understood as the growth gains lost because of not-total legal certainty.

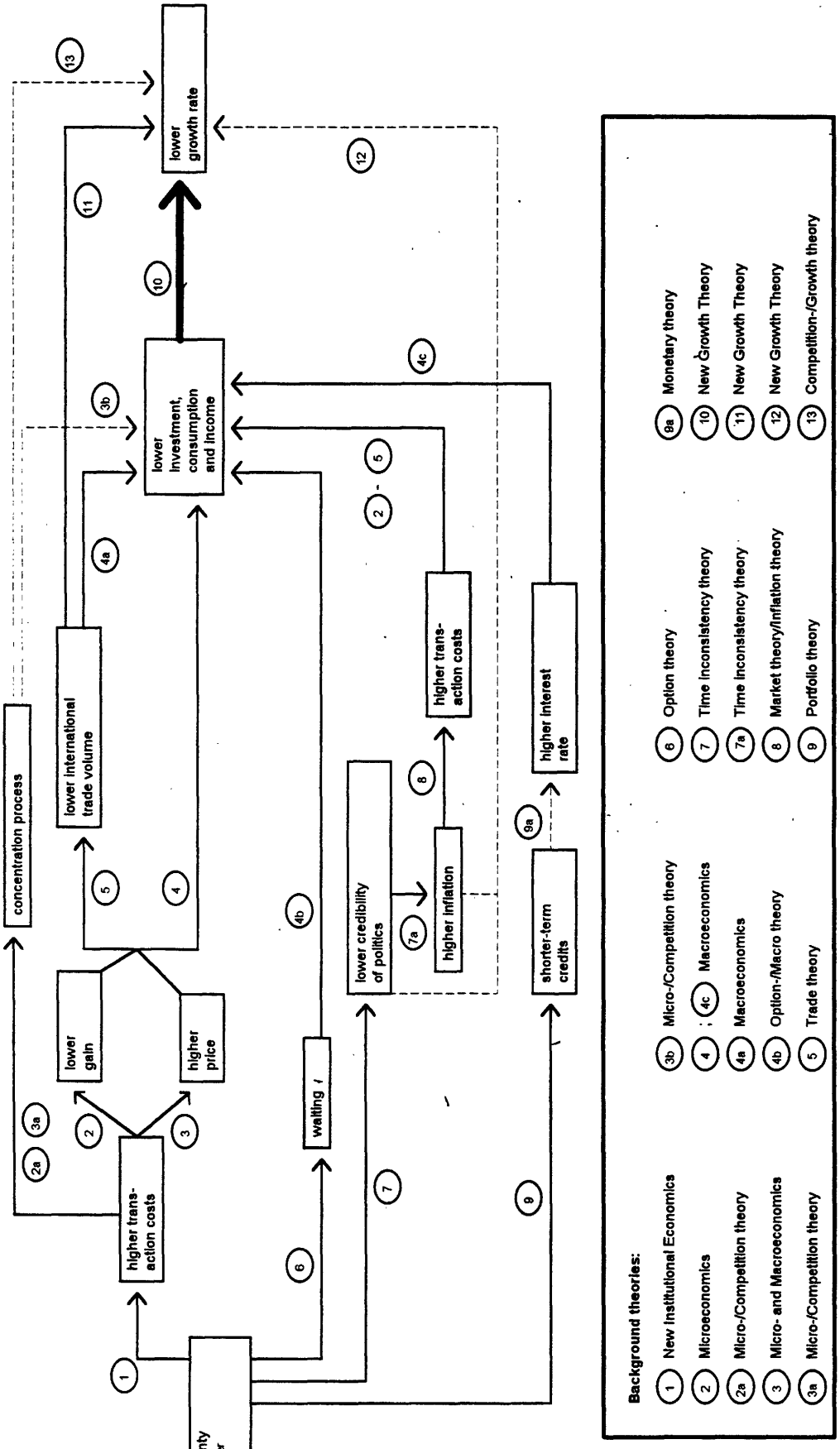
0.2. Table of economic effects of legal hindrances

The following flow diagramme shows the different effects of legal uncertainty (hindrances, constraints) inducing macroeconomic costs. The encircled numbers above the effects point at the following descriptions (in chapter 3) and the background theories denoted in the box below the diagramme. The single effects are explained in chapter 3. The background theories are also presented in chapter 3 and in more detail in chapter 7.

We can distinguish direct and indirect costs for the consumers. Effect (1) denotes direct costs whereas (2) to (13) describe indirect costs for the consumers. The indirect costs are the more important costs. They are initiated by induced circular flow effects. These indirect effects can be separated into static and dynamic costs. (2) to (9) symbolise static costs whereas (10) to (13) characterise dynamic costs. The dynamic costs are the most relevant costs though they are very difficult to determine empirically.

(Static costs denote a once and for all decrease in the level of economic welfare. Dynamic costs delineate a decline in the permanent, potential growth rate of the economy.)

Figure 1: Table of effects of legal uncertainty (macroeconomic costs)



0.3. Significant Effects

The following descriptions refer to the most significant effects denoted by encircled numbers in figure 1.

0.3.1 Some static costs of legal uncertainty

Traditional effect

Legal uncertainty leads to higher transaction costs. Examples for transaction costs induced by legal uncertainty respecting transborder transactions are:

- costs of information gathering
- costs of legal disputes
- costs of setting incentives in order to implement legal claims
- other transaction costs

Even expected transaction costs let some consumers shy away from buying abroad. The reason is that, when regarding the higher transaction costs, foreign goods have lower utility for the potential buyers even at the same or even a lower market price for those goods compared with home goods. The same is valid for producers. The risk of having to use higher transaction costs to get payment for delivered goods reduces the profit or incentive from selling abroad. Therefore the rate of return for transborder transactions may fall short of the respective rate of return for home goods. This means transborder transactions then will not be carried out, or prices will be increased for foreign goods to compensate for the risk mentioned above. This again means that aggregate demand for these goods tends to go down. Macroeconomically aggregate income will decrease.

If this legal uncertainty in transborder transactions is effective in several or all countries, legal uncertainty will induce a general price increase. Foreign goods then have a lower utility for the consumers. Hence more home and fewer foreign goods will be demanded. Therefore international trade will decrease. This is not only

substantiated by lower demand. Also aggregate supply will decrease because of the higher risk of transborder transactions mentioned above.

Additional effects

Legal uncertainty not only leads to many consumers' and producers' shying away from transborder transactions. Legal uncertainty can also affect waiting. Waiting is a rational strategy when imperfect information hinders the ability to decide of the agents and if simultaneously additional useful information can be expected to arise or/and legal uncertainty can be expected to be reduced (*e.g.*, through legal harmonisation). Thereby legal uncertainty reduces international trade and leads to losses in aggregate income.

Moreover, legal uncertainty in the sense of legal instability correlates with low credibility of politics or politicians. Low credibility, however, creates suboptimal aggregate economic results. This has been shown theoretically and practically in many studies over the past decade, in particular in monetary policy. Here low credibility of monetary politics has inflation-increasing effects. Higher inflation, however, hurts the function of the market price mechanism insofar as relative market prices lose part of their information content respecting scarcity relations for consumers and producers. Hence higher information or transaction costs arise. This particularly affects producers in their investment decisions, but also consumers are effected indirectly thereby.

Finally another static effect is emphasised here that refers to a concentration process that is produced by transborder legal uncertainty. As transborder legal uncertainty is relatively more important for small enterprises than for big ones, small enterprises tend to be outcompeted by big enterprises. Insofar a concentration process towards bigger companies is likely because of legal uncertainty. As concentration tends to go along with higher prices and worse product quality, negative macroeconomic effects can also be derived.

0.3.2 Some dynamic macroeconomic costs of legal uncertainty

Enduring growth effects of legal uncertainty are much more significant than purely static effects. In the last few years a modern macroeconomic theory has been

developed that seems to be able to prove such enduring growth effects. In chapter 7 of the report (of Part 2) as well as in chapters 6 and 7 of the Appendix volume this theory is described. Here we just point out the main arguments.

Lower investment (derived above as a consequence of legal uncertainty) can lead to a lower growth rate if investments are essential for the growth engine of an economy. In modern macroeconomics technical progress usually is regarded as the main growth engine. If investment fosters technical progress, it also enhances the growth rate of the economy. One main argument in this context is that investment (defined as capital accumulation) incorporates accumulation of knowledge. Another empirically proved argument is that lower aggregate income (*e.g.* caused by legal uncertainty) leads to lower investment in infrastructure and hence decreases technical progress and hence the growth rate.

We have argued above that legal uncertainty tends to induce lower international trade. A decrease in international trade, however, may reduce economic growth because it reduces the fusion of capital stocks and hence lowers positive external effects. For instance, fix costs are not distributed on a larger volume of products and identical research & development activities in different countries are not avoided.

As we have emphasised above, legal uncertainty here also includes legal instablity, and legal instability is correlated with political instability. Now there is a large amount of modern literature that shows that political instability hinders and reduces economic growth. This is derived in particular in neo-institutionalist work such as that by Oliver North or in the new branch of „New political economy of macroeconomic policy".

We have argued above that legal uncertainty leads to concentration. If this goes along with a reduction of competition this means less product and process innovation. Competition forces companies to reduce costs and to implement structural change, so that X-inefficiences are abolished/avoided. Insofar competition leads to positive growth effects and competition-reducing concentration induces declining economic growth.

0.4. Results from qualitative model analyses

We have carried out different model analyses in the framework and as a basis of this report. These model analyses are published in the appendix volume. In chapter 4 of the report (Part 2) the results of these analyses are summarised. Here we can just condense that summary of results.

In these analyses we have investigated what the macroeconomic costs of legal uncertainty for the consumers in the Internal Market are in the light of some economic theories. The economic theories used have been the „new" institutional economics, trade and competition theory, option theory, the time inconsistency theory of optimal economic policy, and the „new" growth theory.

The new institutional theory approach indicates that transborder contracts are more costly than national ones because of legal uncertainty. It is analysed for consumers and producers which potential reactions may arise that cause costs. In the consumer sector the following costs are identified: (i) information costs because of the nonknowledge of foreign legal systems; (ii) costs arising from the fact that consumers - supposed to be risk-averse - do not realise potential price advantages and do not accept a jurisdiction in other countries. This creates costs in the producer sector, too. So producers react to foreign consumers and have to decentralise their legal affairs. This is (iii) costly in particular for small suppliers. Legal barriers for transactions between enterprises also produce (iv) information costs that, however, are only significant for small companies. Finally, the expectation of a reduction of legal barriers leads to (v) costly waiting.

Trade-theoretical analyses show that the welfare gain that is won by free trade of economic integration (through exploitation of comparative advantages or scale effects) is diminished by the trade barrier „legal uncertainty".

The competition-theoretical approach emphasises the concentration effect of legal uncertainty and the welfare costs following herefrom.

Option-theoretical as well as portfolio-theoretical analyses come to the conclusion that legal uncertainty exercises a negative effect on trade, direct investment and

demand. While this result depends upon the assumption of risk-averse agents in portfolio theory, it is also valid for risk-neutral agents in the option-theoretical approach.

The time-inconsistency approach emphasises that legal uncertainty is an endogenous phenomenon that cannot be erased or reduced as long as there are credibility problems of politics or politicians that themselves can only be - if at all - diminished by institutional reforms.

The new-growth-theoretical analyses prove that the above static costs of legal uncertainty can result in long-run growth (or dynamic welfare) losses for the European Union and its countries.

0.5. Approaches, necessary preconditions and difficulties of quantitative estimations of costs

In this chapter it is shown for each of the above model analyses how the qualitatively derived results could be quantitatively proved or, resp., by which difficulties or lack of data such quantitative proofs are hindered.

0.6. Cost scenarios related to (anticipated) legal disputes

In this section we have tried to quantify the direct static costs of legal uncertainty. These costs for the consumers have several components.

(i) costs caused by the purchase of goods consumers are not completely satisfied with and which are only partly replaced or not replaced at all

(ii) costs caused by complaints to the seller abroad (*e.g.* telephone calls, correspondence, translations, transportation, *etc.*)

(iii) costs caused by not taking advantage of lower foreign prices due to legal uncertainty

(iv) costs caused by not taking advantage of foreign quality advantages and/or more efficient foreign legal systems

The estimates we have taken here are to be understood as preliminary ideas because the analysis suffers from a lack of data. Thus, we have concentrated on the elaboration of methods how to quantify the direct static costs of legal uncertainty for the consumers. These methods are well capable of incorporating different national characteristics concerning the role legal uncertainty plays. Improved data will lead to useful results. In order to get a first impression of the dimension of the costs we have partly based our calculations on hypothetical figures. As there is no information available on these numbers, we developed scenarios. For each cost category we calculated minimum, average, and maximum scenarios. The key figures we differentiated for the scenarios seemed plausible to us, but still are, admittedly, results of speculation.

The extrapolation of the Eurobarometer (1995) identifies costs in the range of 75.38 to 10919.31 million Ecu in cost catagory (i) and 150 to 1500 million Ecu in cost category (ii). By far the highest costs are caused by consumers not making use of price differentials within the EU due to legal uncertainty. In category (iii) we found numbers in the range of 7.000 to 61.370 million Ecu. Category (iv) proved to be of only theoretical relevance, the cost figures we calculated are negligible. Adding up the direct static costs of the categories (i) to (iii) leads to costs in the range of 7230 to 73790 million Ecu. The sum of the hypothetical average scenarios we regarded as plausible is 27530 million Ecu.

A high amount of care has to be applied in interpreting these figures. It is important to point out that especially the direct static costs identified in category (iii) are strongly influenced in the dynamic process. Dynamic effects may well lead to complete erosion of the numbers identified, if increasing demand in the cheapest country leads to price rises and finally to a price equal to the average level of EU member states. On the other hand, a rise of demand can foster exploitation of scale economies in the production sector and thus lead to even lower prices than those used in our calculations. Finally, it is very interesting that by far the largest amount of costs [identified under category (iii)] is exerted on the consumers because of their risk

averse behavior. According to Eurobarometer (1995) the actual risk of a legal dispute for consumers in international transactions is rather low.

0.7. Appendix: More thorough explanation of some background theories

In chapter 3 we have referred to some economic theories and in chapter 4 we have summarised the results of some qualitative model analyses. Here in this chapter, more thorough explanation is given regarding the background theories underlying the above explanations or analyses.

The theories explained are:

- the New Institutional Economics
- trade theory
- option theory
- time inconsistency theory
- the New Growth Theory.

1. Einleitung

Die 1992 erfolgte Vollendung des Europäischen Binnenmarkts ist von der Erwartung begleitet gewesen, daß sie zu einer Steigerung des Einkommens und des Wachstums der am Binnenmarkt beteiligten Länder führt. So wurden im Rahmen des Cecchini-Berichts[148] Effizienzsteigerungen aufgrund einer verbesserten Ressourcenallokation in einer Größenordnung von 2,5% bis 6,5% der Bruttoinlandsprodukte prognostiziert. Während dies einmalige Integrationsgewinne darstellen, hat Baldwin (1989) die langfristigen Wachstumseffekte des Binnenmarkts betont. Der langfristige Gewinn wird von ihm mit einer 0,2 - 0,9%igen Steigerung der langfristigen EU-Wachstumsrate angegeben. Als ökonomische Begründung werden eine Ausweitung des Marktes, welche den Unternehmen die Möglichkeit verschafft steigende Skalenerträge zu nutzen, und technologische Spillovers angeführt.

In den letzten zwei, drei Jahren seit Vollendung des Binnenmarkts haben sich allerdings noch keine nennenswerten Wachstumsgewinne eingestellt. Die Gründe können zum Teil in der konjunkturellen Rezession der letzten Jahre gesucht werden. Dies würde bedeuten, daß die Integrationsgewinne erst in den kommenden Jahren auftreten. Wahrscheinlicher ist jedoch, worauf bestimmte Indikatoren hindeuten, daß noch andere Faktoren hierbei eine wichtige Rolle gespielt haben. Von besonderer Bedeutung dürften in diesem Kontext institutionelle Elemente sein. Ein aus institutioneller Perspektive relevanter Faktor ist das Rechtssystem. Ein aus ökonomischer Sicht besonders wichtiger Aspekt in diesem Zusammenhang ist die Eindeutigkeit rechtlicher Regelungen. Nur wenn dies gegeben ist, können die wirtschaftlichen Akteure ihr Handeln auf einer sicheren Basis planen. Es spricht einiges dafür, daß in der EU Rechtsunsicherheit herrscht. Vor allem abweichende Rechtssysteme verursachen für Verbraucher und Unternehmer Kosten im Zuge der vertraglichen Absicherung grenzüberschreitender Transaktionen innerhalb des Binnenmarkts.

148 Cecchini (1988)

Daß Rechtsunsicherheit (rechtliche Schranken) das Wachstum und die Stabilität einer Volkswirtschaft behindert, ist heutzutage eine zentrale Hypothese in der politischen Ökonomie der Transformation osteuropäischer Reformländer sowie in der Entwicklungsländerforschung[149]. Dagegen hat dieser Aspekt in der Forschung zum europäischen Integrationsprozeß noch kaum analytische Beachtung gefunden.

In der EU-Planung wurde nicht berücksichtigt, daß wirtschaftliche Integration eine Zunahme von grenzüberschreitender Rechtsunsicherheit nach sich zieht, die die erhofften positiven Wirkungen eines Binnenmarktprogramms und auch einer weitergehenden Europäischen Wirtschafts- und Währungsunion (EWWU) zunichte machen oder zumindest reduzieren kann. So wurden z.B. im Cecchini-Bericht die Umsetzungsprobleme eines Binnemarktprogramms, die aufgrund institutioneller Asymmetrien und Informationsunvollkommenheiten entstehen (können), völlig unterbelichtet[150]. Von daher ist nicht verwunderlich, daß die bisherigen Ergebnisse des Binnenmarktprogramms auf dem Hintergrund der vom Cecchini-Bericht geweckten Hoffnungen als eher enttäuschend angesehen werden. Wenn die Hoffnungen in Modelluntersuchungen aufgrund der Nichteinbeziehung wesentlicher Umsetzungsprobleme zu optimistisch ausgelegt werden, können Enttäuschungen nicht ausbleiben. Eine realistischere, institutionell angereichertere Betrachtung wird entweder zu reduzierten Hoffnungen oder zu Vorschlägen institutioneller Ergänzungsmaßnahmen führen müssen.

Das **Ziel** der Untersuchungen in diesem Teil ist es, die makroökonomischen Kosten oder Wirkungsmechanismen grenzüberschreitender Rechtsunsicherheit im Binnenmarkt herauszuarbeiten. Da es hierzu so gut wie keine Voruntersuchungen gibt, hat die vorliegende Untersuchung eine Art Pilotfunktion. Die Untersuchung kommt zu dem Ergebnis, daß Rechtsunsicherheit im obigen Sinne beträchtliche Kosten, statischer wie dynamischer Art, für die europäische Wirtschaft mit sich bringt.

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149 Vgl. Wagner, H.: Wachstum und Entwicklung. Theorie der Entwicklungspolitik, München/Wien 1993.

150 Siehe hierzu auch den sogenannten „Sutherland-Bericht", vgl. die Mitteilung der Kommission an den Rat und das Europäische Parlament: Der Binnenmarkt der Gemeinschaft nach 1992, Folgemaßnahmen zum Sutherland-Bericht vom 2. Dezember 1992, SEK(92)2277 endg.

Was die Untersuchungsmethode anbelangt, so kann man qualitative und quantitative Methoden unterscheiden. Da es sich hier, wie gesagt, um eine (auf 6 Monate befristete) Pilotstudie handelt, muß der Schwerpunkt erstmal auf **qualitative** Analysen gelegt werden. So soll mit Hilfe moderner ökonomischer Analysemethoden nachgewiesen werden, daß sich negative makroökonomische Effekte im europäischen Binnenmarkt (entgegen der Hoffnungen) aufgrund von noch bestehender Rechtsunsicherheit bestehen. Es gibt mehrere Theoriebereiche und damit verbundene analytische Methoden, die man benutzen kann und die man verbinden muß, um dies aufzudecken.Es handelt sich dabei vor allem um:

1. die Neue Wachstumstheorie

2. die Neue Handels- und Wettbewerbstheorie

3. die Neue Institutionenökonomie

4. die dynamische oder Zeitinkonsistenztheorie optimaler Wirtschaftspolitik

5. die Optionstheorie.

Diese Ansätze werden in Kapitel 3 sowie im Anhang (Kapitel 7) näher erläutert. Die Zusammenführung der in diesen Ansätzen herausgearbeiteten Wirkungsmechanismen von Rechtsunsicherheit ergeben in ihrer Synthese ein makroökonomisches Wirkungs- oder Kostentableau, das im nächsten Kapitel 2 dargestellt wird. Dieses Wirkungstableau enthält verschiedene aufeinander aufbauende Wirkungsketten, die im einzelnen in Kapitel 3 erläutert werden. Die hinter den einzelnen Wirkungsketten stehenden theoretischen Begründungslinien werden schon in Kapitel 3 jeweils unmittelbar nach der Erläuterung der einzelnen Wirkungsketten kurz beschrieben: einige besonders wichtig erscheinende Theorielinien werden, wie gesagt, in Kapitel 7 ausführlicher dargestellt. Kapitel 4 enthält die Ergebnisse gründlicher Einzeluntersuchungen, die im Rahmen der vorliegenden Studie durchgeführt worden sind.

Eine **quantitative** Analyse im Sinne numerischer Schätzungen wird nicht durchgeführt, da die mangelhafte Datenlage keine seriöse Schätzung zuläßt. In Kapitel

5 werden die Ansätze, die notwendigen Voraussetzungen und die Schwierigkeiten quantitativer Abschätzungen der qualitativ abgeleiteten Wirkungsmechanismen oder Kosten aufgezeigt. Nichtsdestoweniger werden allerdings in Kapitel 6 dem Auftrag der Studie entsprechend einzelne Szenarien zu statischen Transaktionskosten von Rechtsunsicherheit, insbesondere zu Kosten im Zusammenhang mit (antizipierten) Rechtsstreitigkeiten, entwickelt.

Exkurs: Zur Themenstellung und zum Anfangsverständnis

Die dem Autor vorgegebene Themenstellung ist sehr weit und vielleicht sogar etwas mißverständlich gehalten. Das heißt, es war nicht eindeutig, was unter "rechtliche Schranken (Hemmnisse)" genau zu verstehen ist. Ich habe daher den Begriff "rechtliche Schranken (Hemmnisse)" umdefiniert in den Begriff "Rechtsunsicherheit". Mein Ausgangsverständnis des Problems "Rechtsunsicherheit" im Hinblick auf diese Studie, das forschungsprägend gewesen ist und meinen Mitarbeitern als Leitlinie gedient hat, ist im folgenden kurz dargestellt.

Box 1: Ausgangsverständnis von Rechtsunsicherheit (rechtlichen Schranken oder Hemmnissen)

H. Wagner 11. 2. 1995

Erste Skizze zu

MAKROÖKONOMISCHE KOSTEN RECHTLICHER SCHRANKEN FÜR DIE VERBRAUCHER IM EUROPÄISCHEN BINNENMARKT

Analysegegenstand:

"Rechtliche Schranken" im europäischen Binnenmarkt und ihre Bedeutung für das Verbraucherverhalten (Nachfrage), damit implizit für das Unternehmerverhalten (Angebot), und daraus abgeleitet für das gesamtwirtschaftliche Wachstum und die Beschäftigung.

Ausgangspunkte:

1. Kosten, im Ausland Rechtsansprüche durchzusetzen.

2. Rechtliche Unkenntnis/Uninformiertheit hinsichtlich der Möglichkeiten/des Verfahrens, im Ausland bei grenzüberschreitenden Rechtsstreitigkeiten Recht zu bekommen.

3. Unsicherheit über die rechtlichen Verhaltensstrukturen oder Regeln und deren Stabilität.

Zu 1.: Wird vom ZERP ermittelt für alle 15 Mitgliedstaaten.

Zu 2.: Herrscht in allen Ländern vor; betrifft Garantieansprüche, Kosten der Rechtsfindung usw.

Kostenabschätzung über Ermittlung der "Beseitigungskosten", d.h. über die Bestimmung der notwendigen Informations- und Transaktionskosten zur Überwindung der obigen Unkenntnis/Uninformiertheit.

Nun ist es nicht profitabel für den einzelnen Verbraucher, diese Informations- und Transaktionskosten in vollem Umfang auf sich zu nehmen. Er wird nur so viel an Informations- und Transaktionskosten aufwenden, bis die Optimumbedingung „subjektiver Grenznutzen der Informationsgewinnung = subjektive Grenzkosten" erreicht ist. Darüber hinausgehende Unkenntnis bleibt bestehen, wirkt abschreckend (Entscheidung unter "Unsicherheit") und führt zu nicht so hohen Auslandskäufen wie bei vollständiger Information. Die gesamtwirtschaftlichen Kosten dürften höher sein als die Summe der zugrunde gelegten subjektiven Kosten der Nichtinformation durch die einzelnen Verbraucher, da diese die gesamtwirtschaftlichen Kreislaufeffekte nicht berücksichtigen. Folglich bestehen positive Externalitäten, die Koordinationsmechanismen, private wie staatliche, nahelegen. Nun muß man davon ausgehen, daß die Kosten der Bereitstellung und der Überwachung der Finanzierungsbeiträge für die große, unübersichtliche Masse der Verbraucher zu hoch und damit nicht lohnend sind. Das Vorliegen von Externalitäten legt es nahe, nach staatlicher Informationsbereitstellung über ausländische Rechtssysteme zu rufen, da diese effizienter/kostengünstiger ist als die individuelle Informationsbeschaffung, und eine größere Internalisierung externer Effekte zuläßt. (Allerdings würde auch eine vollständige Informationsbereitstellung das Problem nicht ganz lösen können. Denn es bleibt immer noch das Problem der Informations*verarbeitung*. Die Verarbeitung verursacht zum einen *Kosten*, die wiederum nur bis zur Grenze, bei der die Bedingung „Grenznutzen gleich Grenzkosten" erfüllt ist, getragen werden. Daneben besteht aber auch noch das Problem der *Nichtverarbeitbarkeit* bestimmter Informationen, d.h. kognitiver Schranken. Daraus folgt, daß wir es immer mit Entscheidungen unter "Unsicherheit" zu tun haben.)

Auf jeden Fall müßten zur Kostenbestimmung dieser rechtlichen Unsicherheit oder Uninformiertheit neben den Informations- und Transaktionskosten und den Kosten der staatlichen Informationsbereitstellung auch die verbleibenden nicht-

internalisierten externen Effekte (vor allem die obigen gesamtwirtschaftlichen Kreislaufeffekte) ermittelt werden.

Zu 3.: Das Ausgangsproblem ist hier das asymmetrischer Information, das nicht durch Informationssammlung überwunden werden kann (Nichtbeobachtbarkeit der Präferenzfunktionen). Dies schlägt sich nieder in einer allgemeinen Unsicherheit über die Verhaltenstrukturen anderer und über deren Stabilität, was man mit "Rechtsunsicherheit im engeren Sinne" umschreiben kann. Die damit verbundene Gefahr, die für uns interessant ist, ist die der *willkürlichen* Durchsetzung von Regeln durch den Staat im weitesten Sinne ("politische Instabilität" im engeren Sinne). Dieser Unsicherheit unterliegt ein Verbraucher auch im Inland (Glaubwürdigkeitsproblem gegenüber Versprechen der Politiker bezüglich einer stabilen Rechtsordnung). Bei grenzüberschreitenden Käufen ist diese Unsicherheit jedoch größer. Von daher ist der Abschreckungeffekt bei Auslandskäufen größer und es werden weniger Käufe getätigt (bzw. es werden mehr Käufe nichtgetätigt).

Nun ist die politische Stabilität und damit die "Rechtsunsicherheit" in den verschiedenen EU-Ländern - auch bei einer laufenden Harmonisierung der Rechtsvorschriften[151] - unterschiedlich und besonders groß in einigen EU-Südländern sowie in den mitteleuropäischen Beitrittskandidatsländern. Von daher könnte man den Umkehrschluß ziehen und spekulieren, daß die Verbraucher in diesen Ländern weniger abgeschreckt sein dürften von Käufen in den EU-Nordländern. Ob dem so ist, darf bezweifelt werden. Von daher liegt das

151 Neben einer Harmonisierung der Rechtsvorschriften wäre auch eine Harmonisierung bei der Umsetzung (Verfahren und Dauer) sowie die Schaffung der Rahmenbedingungen für gleichermaßen stabile Rechtsordnungen zur Lösung des obigen Problems notwendig.

Problem sicherlich nicht nur in der obigen "Rechtunsicherheit im engeren Sinne", sondern auch und wahrscheinlich vor allem in

- der größeren Unkenntnis hinsichtlich der Rechtslage im Ausland (Punkt 2 oben)
- den voraussichtlichen Kosten eines Rechtsstreits (Punkt 1 oben)
- zusätzlichen Transaktionskosten[152]
- Präferenzen für eigene Produkte (Qualitätseinschätzung sowie kulturell bedingt)
- größere Unsicherheit hinsichtlich der Einschätzung der Verhaltensstrukturen in anderen Ländern (subjektive Sicherheit durch Sozialisation).

In den EU-Nordländern, die eine vergleichsweise höhere politische Stabilität als die EU-Südländer aufweisen (These), dürfte allerdings die größere "Rechtsunsicherheit im engeren Sinne" in den EU-Südländern eine signifikante Abschreckung vor Käufen in diesen Ländern bewirken. Die quantitative Einschätzung der ökonomischen Kosten dieser Rechtsunsicherheit, sprich der Angst vor überraschenden Änderungen der Rechtsgepflogenheiten oder vor einer "Ineffizienz" des Rechtssystems in diesen Ländern, dürfte sich jedoch äußerst schwierig gestalten.

Auch der **Begriff "makroökonomische Kosten"** ist sehr vage. Hier wird dies verstanden als Einkommens- bzw. Wachstumsverluste. Als Referenzszenarium werden die erwarteten Wachstumsgewinne aus dem Cecchini-Report (1988) herange-

152 Hierunter fallen die Reisekosten an den Ort der Gerichtsbarkeit bei Prozessen, die Umtauschkosten und -schwierigkeiten bei Nichtgefallen, Kosten, Zeit und Ärger bei Beanstandungen bzw. beim Versuch der Inanspruchnahme von Garantieansprüchen u.a.

zogen. Die dort geäußerten Wachstumshoffnungen können als die erwarteten Binnenmarktgewinne bei völliger Rechtssicherheit gefaßt werden. Die hier untersuchten makroökonomischen Kosten können als die entgangenen Wachstumsgewinne aufgrund nicht-vollständiger Rechtssicherheit verstanden werden.

Exkurs zum Begriff "Rechtsunsicherheit":

Der **Begriff "Rechtsunsicherheit"** wird hier sehr weit gefaßt. Im engeren Sinne umfaßt Rechtsunsicherheit nur Situationen, (a) in denen etwas nicht gesetzlich geregelt ist, oder (b) wenn Gesetze zu oft und zu schnell oder zu geballt geändert werden, so daß die Justiz dem "nicht nachkommt", d.h. wenn selbst Fachleute den Durchblick verlieren und Unsicherheit herrscht, ob noch altes oder schon neues Recht gilt. Man spricht bei ersterem auch von "rechtsfreien Räumen". Beispiele sind staatsfreie Räume wie der "Weltmeeresboden", der Weltraum, aber auch der Umweltbereich (mit grenzüberschreitender Luftverschmutzung). Andere Beispiele sind (noch) nichtfestgelegte Rechtsbereiche in Transformationsländern. Beispiele für zweiteres sind sehr häufige Regierungswechsel mit vielen damit verbundenen Gesetzesänderungen.

Davon abgrenzen kann man das, was ich *"Rechtsverweigerung"* nenne, d.h. die Verschleppung oder Verhinderung der Durchsetzung von Rechtsansprüchen durch Verwaltungsbehörden oder -mitarbeiter. Als Folge davon entsteht eine subjektive Unsicherheit über die Durchsetzbarkeit von Rechtsansprüchen. Schließlich könnte man noch *"Rechtsinstabilität"* konstatieren, und zwar dann, wenn subjektive Unsicherheit über den Fortbestand bestehender Rechtsansprüche über Konsum- oder Investitionszeiträume gesehen vorherrscht.

Hier wird, wie gesagt, von einem sehr weiten Begriff von "Rechtsunsicherheit" - bezogen auf grenzüberschreitende Transaktionen - ausgegangen, der die obigen Aspekte von "Rechtsinstabilität" und "Rechtsverweigerung" mit umfaßt. Gelegentlich wird unter den Begriff "Rechtsunsicherheit" sogar Rechtsunkenntnis subsumiert - aber nur dann, wenn dies für die Argumentation belanglos ist. Noch auf eine andere Sprachbesonderheit ist aufmerksam zu machen: Manchmal wird statt von "Rechtsunsicherheit" auch (synonym) von "rechtlichen Hemmnissen" oder "rechtlichen Schranken" gesprochen.

2. Wirkungstableau rechtlicher Hemmnisse: Makroökonomische Kosten

Das folgende Fließdiagramm in Abbildung 1 zeigt die verschiedenen Wirkungskanäle von Rechtsunsicherheit (rechtlicher Hemmnisse, Schranken) hinsichtlich makroökonomischer Kosten auf. Die umkreisten Zahlen auf den Wirkungskanälen kennzeichnen diese für die spätere Beschreibung und verweisen gleichzeitig - in der Legende zum Diagramm beschrieben - auf die Hintergrundtheorien hin. In Kapitel 3 werden erstmal die Wirkungskanäle "an sich" erläutert und im Anschluß an die jeweilige Erläuterung der einzelnen Wirkungskanäle die dahinterstehenden theoretischen Analysemethoden kurz skizziert. In Kapitel 7 werden dann einige für unsere Themenstellung als besonders bedeutsam angesehene Hintergrundtheorien genauer dargestellt.

In Abbildung 1 sind rund 20 Wirkungskanäle angegeben, die mit ① - ⑬ gekennzeichnet sind, einschließlich einiger spezifischer Varianten oder Verbindungsglieder, die mit ⑵a, ⑶b u.ä. beschrieben sind. Hinter den Wirkungskanälen stehen bestimmte Grundlagentheorien, die im Block unter dem Fließdiagramm angeführt sind. Wichtig für unsere Studie ist nun folgende Einteilung:

① = direkte Kosten für die Verbraucher

② - ⑬ = indirekte Kosten für die Verbraucher

Zu den direkten Kosten werden einige Szenarien in Kapitel 6 entwickelt.

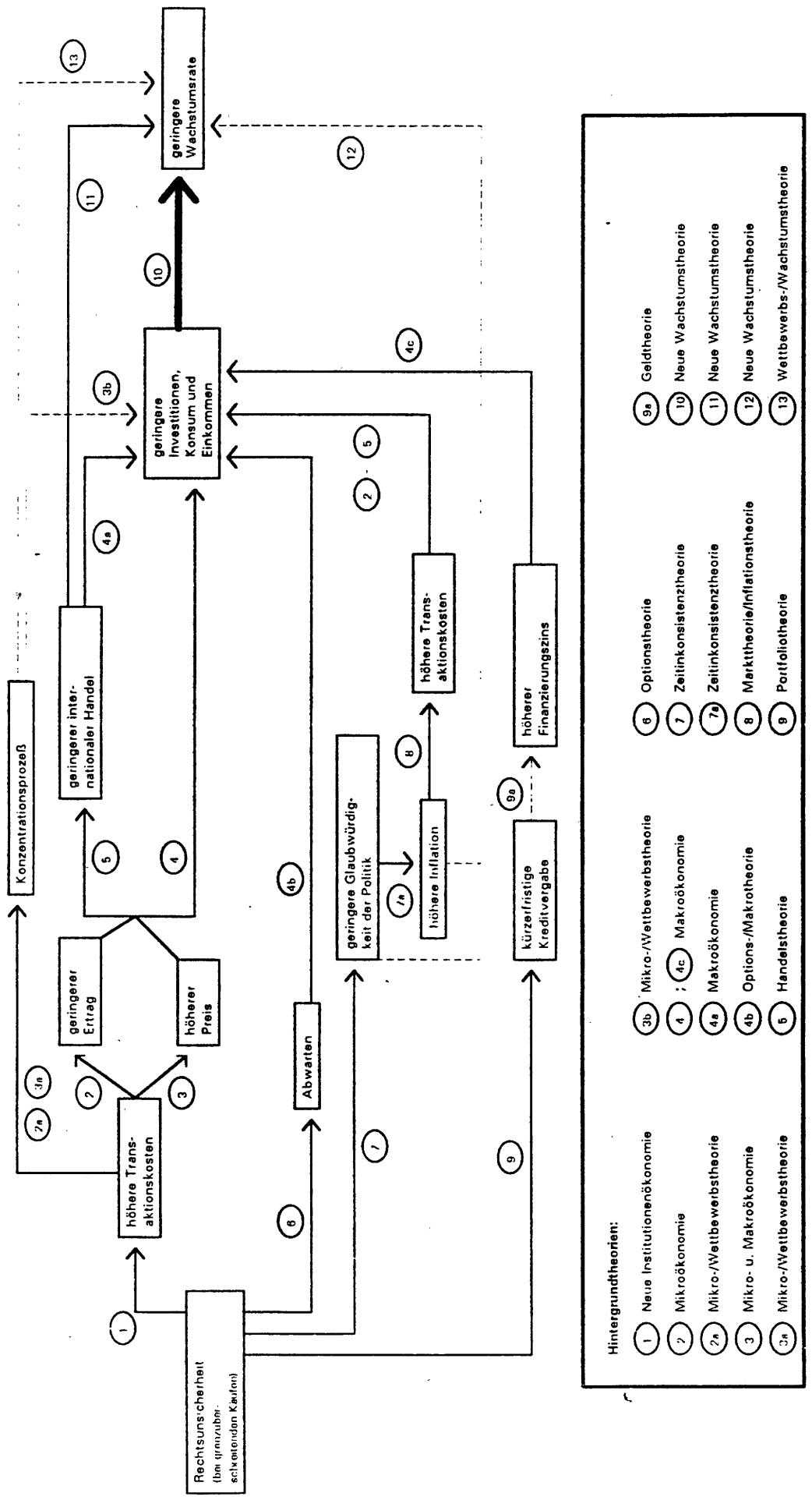
Die gewichtigeren indirekten Kosten entstehen durch initiierte Kreislaufeffekte. Sie lassen sich wiederum einteilen in "statische Kosten" und "dynamische Kosten".

② - ⑨ = statische Kosten

⑩ - ⑬ = dynamische Kosten.

Die dynamischen Kosten sind am schwierigsten empirisch zu bestimmen, sind jedoch - vom theoretischen Grundverständnis her - die bedeutendsten.

Abb. 1: Wirkungstableau rechtlicher Hemmnisse (Makroökonomische Kosten)



3. Einzelne Wirkungskanäle

Die Ausführungen in diesem Kapitel beziehen sich auf die in der obigen Abbildung 1 mit umkreisten Zahlen gekennzeichneten einzelnen Wirkungskettenglieder. Die Wirkungskanäle werden der Reihe nach dargestellt. Nur die Kanäle (2a), (3a) und (3b), die sich mit dem Auslösen und den statischen Kosten eines Konzentrationsprozesses beschäftigen, werden gesondert am Ende des Teils über statische Kosten der Rechtsunsicherheit behandelt. Die Wirkungskanäle (1) bis (5) kann man als aus der traditionellen Mikro- und Makroökonomie ableitbare Effekte ansehen, während die Wirkungskanäle (6) bis (13) eher als aus der "neuen", modernen Mikro- und Makroökonomie gewinnbare Erklärungen betrachtet werden können.

3.1 Statische Kosten der Rechtsunsicherheit

Unter "statische Kosten" wird ein einmaliger fortbestehender Wohlfahrts- oder Einkommensentgang gegenüber dem Referenzfall bei Rechtssicherheit ("Cecchini-Welt") verstanden. Die folgenden Wirkungskanäle begründen solche statischen Kosten.

Wirkungskanal 1

(1) Rechtsunsicherheit ⟶ höhere Transaktionskosten

Beispiele für die bei (höherer) Rechtsunsicherheit (bei grenzüberschreitenden Käufen) anfallenden Transaktionskosten sind:

(1) Kosten der Informationssammlung

(2) Kosten der Rechtsstreitigkeiten

(3) Kosten der Anreizsetzung zur Durchsetzung von Rechtsansprüchen

(4) Sonstige Transaktionskosten.

Zu (1): Hierunter fällt das Problem der Unkenntnis über ausländisches Recht, das grenzüberschreitende Käufe verhindert oder zur Notwendigkeit der mehr oder weniger kostspieligen Informationssammlung führt. (Siehe hierzu Box 1 oben.) Diese Kosten werden normalerweise für die Konsumenten (relativ zum Transaktionswert)

höher sein als für die Unternehmen. Doch auch für letztere fallen Kosten dieser Art an, was über Kreislaufeffekte indirekte Kosten für die Verbraucher entstehen läßt (siehe unten).

Zu (2): Die Kosten der Rechtsstreitigkeiten bei grenzüberschreitenden Käufen sind im 1. Teil dieser Studie beschrieben. Auch in Kapitel 6 wird nochmals darauf Bezug genommen.

Zu (3): Diese Kosten fallen vor allem (aber nicht nur) bei grenzüberschreitend tätigen Unternehmen an und produzieren indirekte Kosten für die Verbraucher (siehe unten). Und zwar geht es hier um private Versuche der Beschleunigung von Genehmigungs- und im weitesten Sinne Rechtsverfahren. Hierunter fallen vor allem Anreiz- oder Bestechungszahlungen. Im Ausland gezahlte Bestechungs- oder Schmiergelder dürfen ja beispielsweise in der Deutschland als Betriebsausgaben unter dem Stichwort „nützliche Abgaben" von der Steuer abgesetzt werden, wenn die Zahlungen als „betrieblich veranlaßt" deklariert werden und der Empfänger im Ausland dem zuständigen Finanzamt genannt wird. Die offizielle Begründung lautet: Bestechungsgelder seien - in bestimmten Ländern - internationale Praxis. Deutsche Unternehmen dürften hier nicht benachteiligt werden.

Zu (4): Bei grenzüberschreitenden Käufen fallen in der Regel höhere Reisekosten an den Ort der Gerichtsbarkeit an, sofern es zu Prozessen kommt. Auch die Umtauschkosten und -schwierigkeiten bei Nichtgefallen der Ware dürften sich als höher erweisen. Entsprechend entstehen höhere Kosten, höherer Zeitaufwand und Ärger bei Beanstandungen und beim Versuch der Inanspruchnahme von Garantieansprüchen.

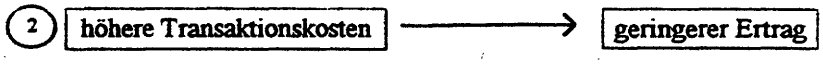
Theoretische Analysemethode:

Die grundlegende Methode zur Analyse solcher Transaktionskosten ist die Neue Institutionenökonomie (NIÖ). Im Mittelpunkt des ökonomischen Geschehens stehen für sie Transaktionen. Das Wesen von Transaktionen sieht die NIÖ in der Übertragung von Verfügungsrechten. Die Verfügungsformen umfassen das Recht auf Nutzung, das Recht zur Abänderung der Form und Substanz, das Recht auf Nutzung der Erträge

und die Überlassung der Verfügung an andere. Jeder Vertrag stellt eine institutionelle Regelung für eine solche Transaktion dar. Diese Regelung spezifiziert die Verfügungsrechte aus der Transaktion und soll die Vertragspartner vor opportunistischem Verhalten der "Gegenseite" schützen. Dazu fallen Anbahnungskosten, Abschlußkosten und Kontrollkosten an. Durch nicht kostenlose Informationen und opportunistisches Verhalten entstehen bei jeder Übertragung von Verfügungsrechten Transaktionskosten. Transaktionskosten machen den wesentlichen Teil des heutigen wirtschaftlichen Geschehens aus. Diese Transaktionskosten liegen im Zentrum der Frage, nach den Kosten für die Verbraucher. Bei den Kosten, die Verbrauchern im Binnenmarkt durch rechtliche Schranken entstehen, handelt es sich entweder direkt um Transaktionskosten oder um Kosten, die aus diesen resultieren.

Siehe näher zur Neuen Institutionenökonomie in Kapitel 7.

Wirkungskanal 2



Bei den obigen Transaktionskosten handelt es sich um entweder tatsächlich anfallende oder erwartete Kosten. Auch schon erwartete Kosten können Verbraucher vor Käufen zurückschrecken lassen. Für die Verbraucher bedeutet Rechtsunsicherheit bei grenzüberschreitenden Käufen, daß ausländische Güter für sie einen geringeren Nutzen bringen. Man kann den Nutzen oder Wert eines Gutes ja durch verschiedene Faktoren bestimmen, einmal durch den Marktpreis, zum anderen durch die Qualität, und nicht zuletzt durch die nichtmonetären Leistungen, worunter Garantieansprüche etc. fallen. Wenn letztere unsicher sind, wird dadurch auch der Nutzen, den ein Gut für die Verbraucher stiftet, geringer.

Aber auch für die Unternehmer entstehen bei grenzüberschreitenden Transaktionen zusätzliche Transaktionskosten - verglichen mit inländischen Transaktionen (siehe unter Wirkungskanal (1)). Diese zusätzlichen Transaktionskosten schmälern den Ertrag. Wenn wir als Ertragsfaktor die Kapitalrendite (Gewinn pro Kapitaleinheit) nehmen, so lautet die zentrale Ausgangsformel:

(1) Gewinn = Preis x Absatzmenge - Produktionskosten - Transaktionskosten

- Risikoabschlag

jeweils in Kapitaleinheiten gemessen.

Wie oben in Kapitel 1 (Box 1) erläutert, werden die Unternehmer nicht versuchen, Rechtsunsicherheit durch Informationssammlung vollständig zu beseitigen (abgesehen davon, daß dies auch gar nicht möglich wäre). Folglich verbleibt immer noch "echte" Unsicherheit, die in der Ertragsrechnung in Form eines Unsicherheits- oder Risikoabschlags berücksichtigt wird.

Die Gewinne aus dem Binnenmarktprogramm der EU ergeben sich laut Cecchini-Bericht vor allem durch eine Senkung der Produktionskosten pro Kapitaleinheit und pro Produktionseinheit (bedingt durch steigende Skalenerträge und verstärkten Wettbewerb; siehe näher unten). Demgegenüber wirken die durch Rechtsunsicherheit im grenzüberschreitenden Wirtschaftsverkehr anfallenden Transaktionskosten und Risikoabschläge gewinn- oder ertragssenkend. Das heißt, ein Teil der durch das Binnenmarktprogramm erwarteten Ertragszuwächse für die Unternehmer entfällt aufgrund der grenzüberschreitenden Transaktionskosten und des verbleibenden Risikos wegen fehlender Rechtssicherheit.

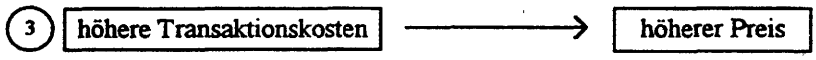
(*Anmerkung:* Auch im Inland besteht keine absolute Rechtssicherheit. Hier wird von der Annahme ausgegangen, daß die Rechtsunsicherheit bei grenzüberschreitenden Transkationen größer ist als bei inländischen Transaktionen. Es wird demnach durchgängig eine positive Rechtsunsicherheitsdifferenz zwischen grenzüberschreitenden und nationalen Transaktionen unterstellt. Wir können die Argumentation analytisch und sprachlich vereinfachen, wenn wir die inländische Rechtsunsicherheit auf Null normieren und nur von der grenzüberschreitenden Rechtsunsicherheit reden. So wird im folgenden auch verfahren.)

Dieser Rückgang der erwarteten Erträge könnte nur dann vermieden werden, wenn der erste Term auf der rechten Seite der obigen Gleichung (Preis x Absatzmenge) größer würde. Da die Absatzmenge c.p. wohl kaum steigen wird, verbliebe nur die Möglichkeit eines Preisanstiegs; siehe hierzu den nächsten Punkt.

Theoretische Analysemethode:

Die obigen Aspekte können im Rahmen sowohl der traditionellen als insbesondere auch der modernen Mikroökonomik herausgearbeitet werden. Die moderne Mikroökonomik wird manchmal auch als Neue Institutionenökonomie bezeichnet. Siehe hierzu in Kapitel 7.

Wirkungskanal 3



Höhere Transaktionskosten im obigen Sinne bedeuten für den Verbraucher c.p. einen geringeren Güternutzen. Anders gesagt, der "effektive" Preis des Gutes steigt dann für den Verbraucher (verglichen mit dem monetären Marktpreis).

Für den (repräsentativen) Unternehmer bedeuten höhere Transaktionskosten, daß er c.p. seinen Preis erhöhen muß, um seine Kapitalrendite aufrechtzuerhalten (siehe Gleichung (1) oben). Die Frage ist nur, ob ihm dies gelingt. Ich möchte im folgenden nur kurz erläutern, warum der (durchschnittliche) Verbraucher durch Rechtsunsicherheit einen Nutzenentgang erleidet, egal ob es dem Unternehmer gelingt, die Transaktionskosten in den Preis zu überwälzen oder nicht. Gelingt es ihm, muß der Verbraucher einen höheren Preis für das Gut zahlen. Gelingt es ihm nicht, so wird der Unternehmer tendenziell ein geringeres Güterangebot bereitstellen (als Ergebnis eines Gewinnmaximierungsbestrebens) und deshalb auch tendenziell eine geringere Beschäftigung nachfragen[153]. Folglich wird der (durchschnittliche) Verbraucher aufgrund der so entstehenden Arbeitslosigkeit c.p. ein geringeres Konsumbudget zur Verfügung haben. Letzteres kann auch bei einer Erhöhung des Preises geschehen, sofern die Nachfrageelastizität des Gutes hinsichtlich des Preises groß genug ist. Die Preiserhöhung wird dann nämlich einen überproportionalen Nachfragerückgang bewirken, so daß aufgrund dessen der Ertrag für die Unternehmer sinkt mit der eben beschriebenen Folge eines Beschäftigungs- und Konsumbudget-Rückgangs.

Dies läßt sich auch graphisch in der folgenden Form veranschaulichen.

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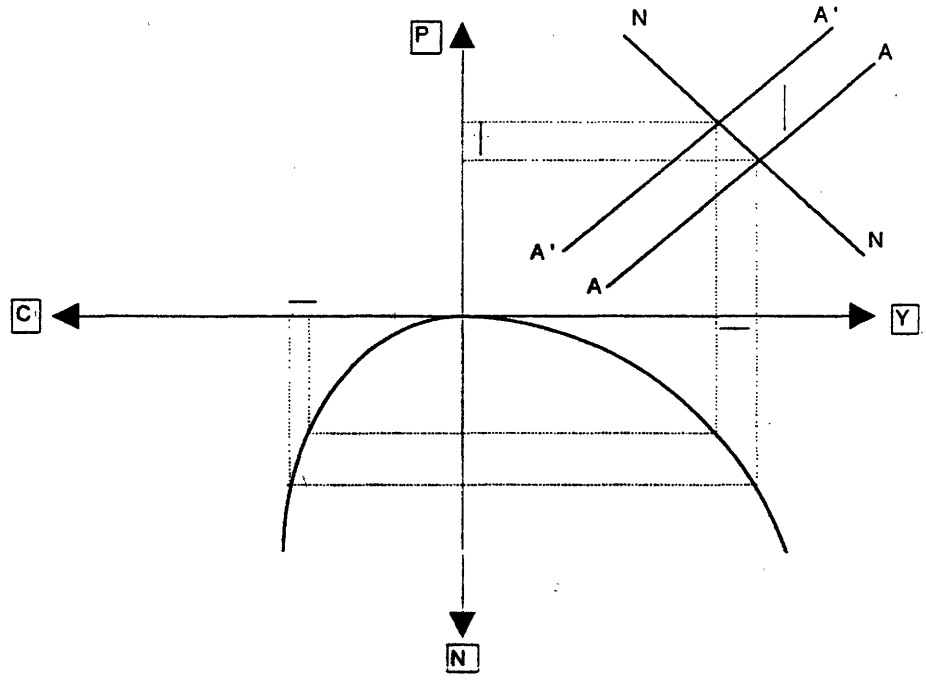
[153] Nur wenn die Faktorpreise völlig flexibel wären, was sie jedoch (in Europa) nicht sind, würde dies nicht zutreffen.

Abb. 2: Preis-Mengendiagramm



Symbolerklärung: P = Preis; Y = Output (produzierte Gütermenge);

N = Beschäftigung;

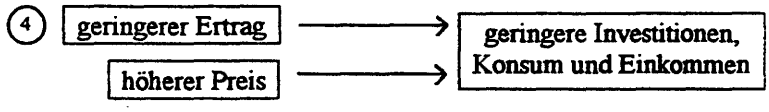
C = Konsum (Verbraucherbudget).

Angesichts der Transaktionskostenerhöhung verschiebt sich die Angebotskurve AA im ersten Quadranten der Figur nach oben. Beim neuen Schnittpunkt mit der Nachfragekurve liegt das Outputniveau niedriger und das Preisniveau höher. Aufgrund des durch die Produktionsfunktion bestimmten Zusammenhangs zwischen Produktionsmenge und Beschäftigung sinkt die Beschäftigung, dargestellt im zweiten Quadranten der Figur. Mit sinkender Beschäftigung sinkt dann auch das Konsumeinkommen, ausgedrückt im dritten Quadranten der Figur.

Theoretische Analysemethoden:

Traditionelle Mikro- und Makroökonomie.

Wirkungskanal 4



Diese Wirkungskette wurde zum Teil gerade schon angesprochen. Man kann diese Wirkung mikroökonomisch wie eben begründen. Die von Privatunternehmern getätigten Investitionen in grenzüberschreitende Transaktionen ($\tilde{I}$) werden dabei als abhängig von der erwarteten Kapitalrendite (r^e) angesehen, genauer von der Differenz aus erwarteter Kapitalrendite und der höchsten Alternativrendite, d.h. der Rendite von Alternativanlagen (r_a^e), so daß

$$(2) \qquad \tilde{I} \quad = \quad \tilde{I}\,(r^e - r_a^e).$$

Wenn wir r_a^e als die Rendite inländischer Transaktionen fassen und r^e als die Rendite grenzüberschreitender Transaktionen, so kann der oben beschriebene Rückgang von r^e bei einzelnen Unternehmen dazu führen, daß sie, die sie ansonsten grenzüberschreitende Transaktionen durchgeführt hätten, aufgrund des rechtsunsicherheitsbedingten Rückgangs von $r^e - r_a^e$ davon Abstand nehmen, da die Differenz zwischen $r^e - r_a^e$ negativ wird. Bei anderen Unternehmern mag die Differenz zwischen $r^e - r_a^e$ immer noch positiv sein, so daß sie trotz alledem grenzüberschreitend tätig sein werden. Makroökonomisch allerdings wird es zu einem Rückgang der grenzüberschreitenden Investitionstätigkeit kommen. Der Unterschied

zwischen einer mikroökonomischen und einer makroökonomischen Betrachtungsweise besteht ja darin, daß für den einzelnen Unternehmer gilt

$$(2a) \quad \tilde{I} = \tilde{I}\,(r^e - r_a^e), \quad \text{mit} \quad \tilde{I} = 0 \text{ wenn } r^e - r_a^e \leq 0$$

$$\text{und} \quad \tilde{I} > 0 \text{ wenn } r^e - r_a^e > 0\,,$$

während gesamtwirtschaftlich gilt:

$$(2b) \quad \tilde{I} = \tilde{I}\,(r^e - r_a^e), \quad \text{mit} \quad \tilde{I}' > 0\,.^{154}$$

Makroökonomisch läßt sich ein Einkommensrückgang aus Ertragsrückgängen und/oder Preiserhöhungen folgendermaßen ableiten. Drei Wirkungslinien sollen hier nur erwähnt werden, die sich aus der traditionellen Makroökonomie heraus begründen lassen:

(i) Die Handelshypothese, die vereinfacht ausgedrückt lautet:

$$(3) \quad Y = f(H), \text{ wobei } H = g(\tilde{I}), \text{ mit } f' > 0,\ g' > 0,$$

und H = internationales Handelsvolumen, Y = Volkseinkommen.

$\tilde{I}$ wird in (3) als gesamtwirtschaftliche Investition in grenzüberschreitende Transaktionen betrachtet, d.h. die Investitionsfunktion (2) wird aggregiert (das obige Investitionsverhalten als repräsentativ angesehen). Das bedeutet, das obige Investitionsverhalten wirkt sich in einem Rückgang des grenzüberschreitenden Handels und damit in einer Verringerung des Volkseinkommens aus. Nähere Erläuterungen siehe unter Wirkungskanal (5).

(ii) Vermögenseffekte, die besagen, daß Konsum (C) und Invesitionen (I) vom realen Vermögen (V/P, wobei V = nominelles Finanzvermögen und P = Preisniveau) abhängig sind, d.h.

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154 Für die Verbraucher gilt die gleiche Ertragsrechnung:

$$(2c) \quad \tilde{C} = \tilde{C}\,(r^e - r_a^e),$$

wobei $r^e - r_a^e$ jetzt die Differenz der erwarteten Nutzen eines einmal im Ausland und alternativ im Inland gekauften Gutes ausdrückt. Insofern gilt die obige Argumentation genauso für die Verbraucher. Man braucht hierfür nur die Worte Investition durch Konsum und erwartete Kapitalrendite durch Nutzenrendite ersetzen.

(4a) $C = C(V/P)$, mit $C' > 0$, und

(4b) $I = I(V/P)$, mit $I' > 0$.

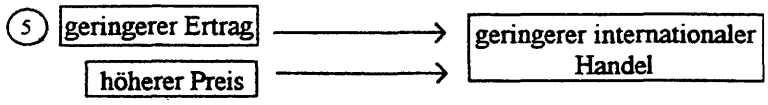
(4a) wird in der makroökonomischen Literatur auch als Pigou-Effekt und (4b) als Robertson-Effekt bezeichnet. Sie drücken aus, wenn das Preisniveau steigt (weil z.B. die Unternehmer die durch grenzüberschreitende Rechtsunsicherheit entstehenden Transaktionskosten auf die Preise überwälzen), so sinken c.p. der Konsum und die Investitionstätigkeit. Da Konsum und Investitionen ein Teil der volkswirtschaftlichen Gesamtnachfrage sind (neben Staatsnachfrage und Exportüberschuß), sinkt c.p. die Gesamtnachfrage. Bei unterstelltem ursprünglichen Gütermarktgleichgewicht kommt es so zu einem Ungleichgewicht, d.h. konkret zu einem Überangebot, das durch sofortige Preissenkungen und/oder durch eine Anpassung des Güterangebots beseitigt wird. Der empirisch wahrscheinlichere letztere Fall geht einher mit einem Rückgang der Nachfrage nach Produktionsfaktoren, so daß i.d.R. auch als Folge die Beschäftigung zurückgeht und weniger Arbeitseinkommen (= potentielles Verbrauchereinkommen) entsteht. (Die entsprechende Reaktion der Unternehmer ist individuell rational, da die Unternehmer nur so ihre Kosten minimieren können, was selbst wieder eine Voraussetzung für Gewinnmaximierung darstellt.)

(iii): Der sogenannte Keynes-Effekt. Er besagt, daß Preiserhöhungen zu einem Rückgang der Realkasse (= realem Geldangebot) führen. Dadurch kommt es c.p. zu einer Übernachfrage auf dem Geldmarkt mit der Folge eines steigenden Zinssatzes (zum Ausgleich des Geldmarktes). Der Zinsanstieg wird jedoch c.p. zu einer Verringerung der Investitionsnachfrage und damit der Gesamtnachfrage führen. Bei nicht unendlich schneller Preisanpassung bewirkt dies, wie oben erläutert, eine Anpassung des Güterangebots und der Beschäftigung. Das Volkseinkommen geht mithin zurück.

Theoretische Analysemethode:

Die traditionelle Makroökonomie. Siehe zu den obigen Effekten irgendein gutes Makroökonomie-Lehrbuch (siehe zu den theoretischen Grundlagen auch Wagner 1989, 2. Kapitel).

Wirkungskanal 5



Die eben beschriebene Wirkungskette (4) ist eigentlich nur eine Veranschaulichung des allgemeinen theoretischen Bezugsrahmens. Denn in Wirklichkeit verläuft der Prozeß über die Wirkungsketten (5) und (4a). Die Rechtsunsicherheit, deren makroökonomische Kosten hier herausgea rbeitet werden sollen, betrifft ja nur grenzüberschreitende Käufe und Verkäufe. Wenn von geringerem Ertrag und höherem Preis die Rede ist, so betrifft dies nur die ausländischen Güter. Allerdings, wenn die Rechtsunsicherheit allseitig ist, d.h. in allen Ländern gegenüber grenzüberschreitenden Transaktionen vorherrscht, wofür vieles spricht, wirkt sie wie eine allgemeine Preiserhöhung und kann dementsprechend wie in (4) behandelt werden.

Wie ich oben schon erläutert habe, bedeutet Rechtsunsicherheit bei grenzüberschreitenden Käufen für die Verbraucher, daß ausländische Güter für sie einen geringeren Nutzen bringen. Die Aufteilung zwischen in- und ausländischen Gütern verschiebt sich in der Güternachfrage zugunsten der ersteren. Internationaler Handel nimmt folglich ab. Auch von seiten der Unternehmer her ist dies begründbar. Im Prinzip können die Folgen von grenzüberschreitender Rechtsunsicherheit natürlich auch von inländischen Anbietern übernommen werden. So kann ein Handelsunternehmen preisgünstigere ausländische Güter in sein Sortiment nehmen und den Verbrauchern inländische Garantieleistungen etc. zusichern, d.h. die Risiken aus grenzüberschreitenden Rechtsproblemen selbst auf sich nehmen. Allerdings wird dies das Unternehmen nicht umsonst tun, sondern hierfür einen Ausgleich für das von ihm übernommene Risiko verlangen und dies in Form eines höheren Preises an die Verbraucher weitergeben. Wenn der dann geforderte Preis höher liegt als der für vergleichbare inländische Produkte, wird das Unternehmen rationalerweise das ohne Rechtsunsicherheit billigere ausländische Produkt gar nicht in sein Sortiment aufnehmen. Den Verbrauchern werden auf jeden Fall Kosten aufgebürdet, entweder in Form von höheren Preisen (wenn Handelsunternehmen das Risiko tragen und in den Preis überwälzen) oder (wenn sie Kosten der Rechtsstreitigkeiten u.ä. selbst tragen müssen) in Form von geringerem Nutzen, wegen höherem Risiko, oder in Form eines geringeren

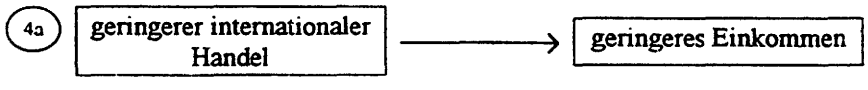
Angebots durch Ausfall des ausländischen Gütersortiments. Auf jeden Fall wird es so zu einer vergleichsweisen Verringerung des internationalen Handels kommen.

Bislang haben wir nur von einer Verringerung der Nachfrage nach ausländischen Gütern gesprochen. Es kann jedoch auch zu einem vergleichsweisen Rückgang des Angebots an Exportgütern aufgrund der grenzüberschreitenden Rechtsunsicherheit kommen. Dies ist begründet vor allem durch das Risiko für die Anbieter (Unternehmer), daß grenzüberschreitende Rechtsstreitigkeiten im Falle der Nichtzahlung gelieferter Güter auftreten können, wobei unterstellt wird, daß sowohl die Wahrscheinlichkeit der Nichtzahlung im Ausland als auch die Kosten der grenzüberschreitenden Rechtsstreitigkeiten höher als im Inland sind.

Theoretische Analysemethoden:

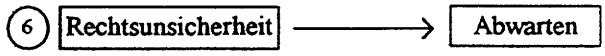
Die obigen Aspekte lassen sich mit Hilfe der Handelstheorie näher begründen. Man kann hier verschiedene Modelltypen unterscheiden. Das "klassische" Modell betrachtet die Auswirkungen, die Rechtsunsicherheit auf das Ausmaß des Handels hat, der zwischen zwei Ländern im Rahmen der klassischen Heckscher-Ohlin-Theorie als Folge von Ausstattungsunterschieden entsteht. Rechtsunsicherheit, sofern sie für beide Länder gilt, führt hier zu einer Verteuerung der Exportgüter. Die Folge ist, daß die Nachfrage nach den importierten Gütern in beiden Ländern zurückgeht und durch den erhöhten Konsum des gleichen, aber im Inland produzierten Gutes substituiert wird. Die Konsequenz dieser Nachfrageverschiebung ist eine Reallokation der inländischen Produktionsfaktoren, so daß in beiden Ländern mehr des jeweiligen Import- und weniger des Exportgutes produziert wird. Dies bedeutet, daß bei Rechtsunsicherheit der Handel zwischen den Ländern zurückgeht. Dies läßt sich im Grunde auch aus neueren Handelstheorien ableiten. Siehe näher in den Kapiteln 4 und 7.

Wirkungskanal 4a



Geringerer internationaler Handel besagt, daß bestehende internationale Preisdifferenzen aufgrund der Rechtsunsicherheit nicht ausgenutzt werden. Das bedeutet, das Preisniveau in den Volkswirtschaften ist höher als bei stärkerem internationalen Handel (bei Rechtssicherheit). Über die in der Wirkungskette ④ erläuterten Vermögens- und Keyneseffekte lassen sich wiederum konsum- und investititonshemmende und dadurch auch einkommensreduzierende Effekte ableiten.

Wirkungskanal 6



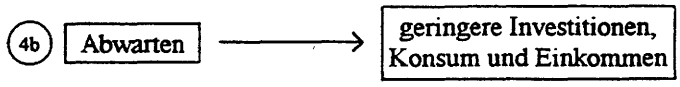
Rechtsunsicherheit führt nicht nur dazu, daß viele Verbraucher und auch Anbieter Abstand nehmen von grenzüberschreitenden Käufen und Verkäufen. Rechtsunsicherheit kann einfach auch nur Abwarten bewirken. Abwarten ist eine rationale Strategie, wenn unvollkommene Information die Entscheidungsfähigkeit der Akteure beeinträchtigt und gleichzeitig erwartet werden kann, daß in der folgenden Periode zusätzliche nützliche Informationen eintreffen bzw. die Rechtsunsicherheit abgebaut wird (z.B. durch Rechtsangleichung).

Theoretische Analysemethode:

Dieser Aspekt wird insbesondere in der Optionstheorie herausgearbeitet. Dieser Ansatz stammt aus der Finanzmarkttheorie. Finanzmarktoptionen zeichnen sich durch das Recht oder die Pflicht aus, beispielsweise Wertpapiere zu bestimmten Kursen zu kaufen oder zu verkaufen. Solange der aktuelle Kurs des Wertpapiers nicht dem Kurs der Verkaufsverpflichtung entspricht, kann die Möglichkeit, in Zukunft diesen Kurs zu erreichen, als Option betrachtet werden. Diese besitzt einen Wert, der mit mathematischen Methoden der Optionstheorie berechnet werden kann. Dabei wird meistens auf die Annahmen verschiedener Wahrscheinlichkeitsverteilungen zurückgegriffen, um die zukünftigen Wahrscheinlichkeiten zu bewerten. Seit Beginn der achtziger Jahre wurde diese mathematische Methode zunehmend für die Beschreibung anderer ökonomischer Sachverhalte benutzt, wobei sich die Investitionstheorie als eine Art Referenztheorie anbietet.

Zur Optionstheorie siehe näher in Kapitel 7.

Wirkungskanal 4b



Aus optionstheoretischer Sicht verzögert Rechtsunsicherheit die individuellen ökonomischen Entscheidungen und verringert so das grenzüberschreitende Angebot und die grenzüberschreitende Nachfrage nach dauerhaften Konsumgütern im speziellen. Anders gesagt reduziert Rechtsunsicherheit internationalen Handel und führt damit auch zu gesamtwirtschaftlichen Einkommensverlusten (siehe hierzu auch die Erläuterung zur Wirkungskette (5) oben).

Wirkungskanal 7

Rechtsunsicherheit habe ich, wie schon in Kapitel 1 erläutert, hier sehr weit gefaßt. Der Begriff umfaßt auch Rechtsinstabilität. In diesem Sinne kann man hierunter auch das Nichtbestehen rechtlicher Regelungen über die Verhaltensweisen oder von Regelbindungen der Politiker subsumieren. Nun wird in der modernen Makroökonomie betont, daß das Fehlen von Regelbindungen zur Unglaubwürdigkeit von Politikankündigungen - wie z.B. des Versprechens der Herstellung von Rechtsstabilität - führt. Die privaten Wirtschaftssubjekte berücksichtigen nämlich die Möglichkeit bzw. den Anreiz von Politikern, von ihren Ankündigungen / Versprechen nach Erwartungsanpassung der Privaten wieder abzurücken.

Der Anreiz von Politikern, von ihren Versprechen wieder abzurücken, ist dadurch begründet, daß die Umsetzung von Versprechen Kosten verursacht. Solange die privaten Individuen den Versprechen Glauben schenken und ihre Verhaltensweisen darauf einstellen, erscheint es den Politikern u.U. nicht notwendig, die Kosten des Umsetzens der Versprechen auf sich zu nehmen. Erst wenn sich die Privaten später nach Wahrnehmung des Nichteinhaltens von Versprechen weigern, zukünftigen Versprechungen Glauben zu schenken, treten gesamtwirtschaftliche Kosten auf, die die Politiker mit der Kostenersparnis der Nichtumsetzung der ersten Versprechen zu vergleichen haben. Bei sogenannten rationalen Erwartungen der Privaten werden diese

den Anreiz der Politiker u.U. schon von Beginn an erkennen und dementsprechend Ankündigungen (oder auch Androhungen) von Politikern gar keinen Glauben schenken.

Theoretische Analysemethode:

Die Analysemethode, mit der dieser Gedankengang in der modernen Makroökonomie modelliert wird, ist unter dem Namen dynamische oder Zeitinkonsistenztheorie optimaler Wirtschaftspolitik bekannt. In der Zeitinkonsistenztheorie wird - entgegen der traditionellen Theorie der Wirtschaftspolitik - die Interdependenz zwischen der Regierung eines Staates und ihren Wählern, die gleichzeitig Wirtschaftssubjekte sind, berücksichtigt. Die Regierung und der private Sektor werden als rationale Subjekte behandelt, die wissen, daß ihre eigene Entscheidung auch die des anderen beeinflußt und dieses Wissen mit in ihr Kalkül einbeziehen.

Der Ansatz der Zeitinkonsistenztheorie scheint auch für die Analyse von Verbraucherschutzproblemen vielversprechend zu sein. Wie Micklitz und Weatherwill (1993) betonten, war vor dem Maastricht-Vertrag kein expliziter Verbraucherschutz in der EG verankert. Es fehlten Institutionen, um diesen durchzusetzen. Fehlende Institutionen sind aber häufig eine Quelle von Zeitinkonsistenzproblemen[155]. Doch selbst wenn es Institutionen gibt, ist die Frage, als wie stabil diese erachtet werden. Dies prägt entscheidend die Glaubwürdigkeit von Politikankündigungen.

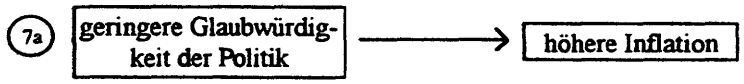
Als Lösung dieses Problems wird häufig eine rechtliche Festlegung oder Regelbindung der Politik(er) gefordert. Zum Beispiel kann man an eine verbindliche, z.B. verfassungsmäßig festgelegte, Umsetzung von Politikversprechen (wie z.B. Rechtsangleichung) denken. Doch sind solche Vorschläge nicht unproblematisch. Denn erstens ist selbst dann die Umsetzbarkeit von Politikversprechen nicht gesichert, da die Umsetzung nicht nur von Politikerverhalten abhängig ist, sondern die Akzeptanz und Mitarbeit anderer gesellschaftlicher Gruppen voraussetzt. Zum anderen besteht das damit verbundene Problem der Aufgabe von Flexibilität. Der Nutzen von Flexibi-

155 Micklitz (1993) gibt eine exemplarische Darstellung der potentiellen Schwierigkeiten bei der juristischen Durchsetzung von Verbraucherinteressen bei grenzüberschreitenden Konflikten.

lität besteht darin, daß auf unerwartete Ereignisse oder besser Problementwicklungen, die nur durch ein Abweichen von der vorherigen Regelfestlegung bewältigbar sind, schnell und adäquat reagiert werden kann. In Hayek'scher Terminologie könnte man auch sagen, daß man durch eine starre Regelfestlegung des Nutzens der Möglichkeit einer permanenten Suche nach optimalen Lösungen (z.B: Rechtsverfahren) verlustig geht. Somit ist eine Regelbindung (oder z.B. eine starre Rechtsangleichung) u.U. auch gar nicht wünschenswert.

Eine genauere Darstellung der Zeitinkonsistenztheorie wird in Kapitel 7 geliefert.

Wirkungskanal 7a



Geringe Glaubwürdigkeit der Politik geht mit suboptimalen volkswirtschaftlichen Ergebnissen einher. Dies läßt sich gut am Beispiel der Geldpolitik veranschaulichen, wie in vielen Veröffentlichungen seit den achtziger Jahren dokumentiert worden ist. Hier soll nur der Grundgedanke kurz skizziert gemacht werden. Wenn die Geldbehörden versprechen, daß sie in Zukunft Preisniveaustabilität herstellen, werden die privaten Wirtschaftssubjekte, wenn sie ihr Glauben schenken, ihre Inflationserwartungen abbauen. Dadurch wird auch in die Faktorpreise kein Inflationsausgleich mehr einbezogen. Preisniveaustabilität kann so hergestellt werden. Wenn dagegen die privaten Wirtschaftssubjekte der Geldbehörde keinen Glauben schenken, weil sie den Anreiz zu einem Abweichen von diesem Versprechen erkennen, werden sie weiterhin Inflationserwartungen mit in ihre Verhaltenskalküle einbeziehen, so daß dementsprechend - da die Inflationserwartungen in die Faktorpreisverhandlungen und in die Preissetzung miteingehen - eine positive Gleichgewichtsinflationsrate entsteht. Der Anreiz zu einem Abweichen von Versprechen besteht darin, daß eine überraschende Inflationsproduktion nach moderner makroökonomischer Anschauung häufig die einzige Möglichkeit für die Politiker darstellt, (vorübergehend) Beschäftigung positiv zu beeinflussen und/oder eine Einkommensumverteilung zugunsten des Staates vorzunehmen.

Theoretische Analysemethode:

Auch diese Argumentationslinie wird in der sogenannten Zeitinkonsistenztheorie herausgearbeitet (siehe oben). Zu den globalen theoretischen Hintergründen vergleiche z.B. Wagner (1989).

Wirkungskanal 8

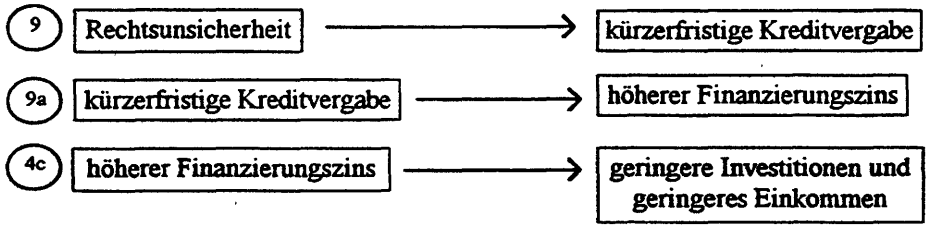
Das Hauptargument verläuft hier wie folgt: Das Funktionieren einer Marktwirtschaft ist entscheidend von der Wirkung des sogenannten Preismechanismus abhängig. Marktpreise, insbesondere Preisrelationen, sollten Knappheitsverhältnisse ausdrücken, so daß eine Veränderung der relativen Preise Änderungen von Knappheitsverhältnissen auf den Märkten signalisieren. Diese Informationen sollten Verbrauchern und Investoren kostenlose Entscheidungshilfen bei ihren Planungen liefern. Bei Inflation, insbesondere bei höherer Inflation, können die Marktpreise diese Funktion nicht mehr erfüllen. Es kann nicht mehr genau unterschieden werden, ob sich Preisrelationen wegen Struktur- oder Präferenzänderungen oder einfach nur wegen der unterschiedlichen Inflationsanpassung (Kostenüberwälzung) geändert haben. Fehlinterpretationen und darauf basierende Fehlentscheidungen der Verbraucher und Investoren treten dann gehäuft auf. Um diese zu vermeiden oder gering zu halten, bedarf es kostspieliger Informationssammlung. Es treten mithin höhere Transaktionskosten auf. Zudem verbleibt eine gewisse Unsicherheit hinsichtlich der Aussagekraft von relativen Preisänderungen, da nicht alle Unsicherheit durch Informationssammlung behoben werden kann.

Insofern sind wir wieder dort angelangt, wo wir bei der Wirkungskette ① waren. Die weiteren Argumentationsschritte ② bis ⑤ können nun wiederum auch auf diesen Fall angewandt werden. Das bedeutet, es lassen sich genauso wie dort geringere Investitionen, Konsum und Einkommen (verglichen mit dem Fall von Rechtssicherheit) ableiten.

Theoretische Analysemethoden:

Die obigen Aspekte werden in der Markttheorie sowie in der Inflationstheorie, insbesondere in der empirischen Inflationstheorie herausgearbeitet. Vergleiche hierzu z.B. Wagner (1985).

Wirkungskanal 9, 9a und 4c



Die der Wirkungskette (9) zugrundeliegende Annahme lautet: Rechtsunsicherheit - hier im Sinne von Rechtsinstabilität - trifft längerfristige Kreditvergaben stärker als kürzerfristige; ja, es wird davon ausgegangen, daß bei Rechtsinstabilität das Risiko mit der Vergabedauer der Kreditvergabe überproportional stark ansteigt. Die Unsicherheit über mögliche größere Politikänderungen oder -schocks ist für die kürzere Zukunft gering, jedoch für die fernere Zukunft sehr hoch (da auf die längere Frist Regierungswechsel oder sonstige grundlegende Änderungen als sehr viel wahrscheinlicher eingeschätzt werden als auf die kurze Frist; die näherliegende Zukunft wird als subjektiv eher überschaubar betrachtet). Referenzfall ist die Situation in instabilen Entwicklungsländern oder Transformationsländern wie Rußland oder andere Staaten der ehemaligen UdSSR. Dort steigt die die Rechtsunsicherheit widerspiegelnde Risikoprämie im Zins mit der Kreditvergabedauer überproportional stark an (Wirkungskette (9a)).

Aufgrund der ungewissen politischen Lage in diesen Ländern nimmt das Ausfallrisiko mit der Anlagedauer überproportional stark zu. Folglich sind Vermögensanleger kaum mehr bereit, selbst bei hohen Zinsen längerfristige Ausleihen in solche Staaten zu vergeben. Auch Banken werden aus den gleichen Gründen zögern, längerfristige Kredite dorthin zu vergeben; stattdessen werden lieber kürzerfristige Kredite ständig

verlängert, solange die befürchteten Schocks nicht eingetroffen sind. Die Knappheit an langfristigen Kreditvergaben treibt somit den Preis - sprich hier, den Zins - hoch.

Für die Unternehmer bedeutet dies, daß sie keine Langfristplanungen mehr eingehen können. Längerfristige Investititonen werden zugunsten von kürzerfristigen Investitionen zurückgestellt. Da aber insbesondere bei den für Entwicklungsprozesse entscheidenden Infrastrukturinvestitionen (und F&E-Investitionen) längerfristige Finanzierungen (längerfristiges Risikokapital) notwendig sind, wird der Entwicklungsprozeß wie auch der Transformationsprozeß in Transformationsländern durch Rechtsunsicherheit behindert. Die indirekten Kosten für die Verbraucher sind hier ganz gravierend. Es läßt sich nämlich zeigen (siehe die Wirkungsketten (10) bis (13) unten), daß die Wachstumsrate in Volkswirtschaften entscheidend von solchen Investitionen und indirekt von der Zurverfügungstellung von kostengünstigem längerfristigen Risikokapital abhängig ist.

Theoretische Analysemethode:

Als Analysemethode für das obige Argument (9) bietet sich die Portfoliotheorie an.

In der Portfoliotheorie wird untersucht, in welcher Weise ein Wirtschaftssubjekt sein Vermögen auf verschiedene Anlageformen aufteilt, die typischerweise durch unterschiedliche Ertragsraten und Risiken gekennzeichnet sind.

Neben einer Begründung des obigen Arguments kann die Portfoliotheorie auch herangezogen werden, um zu zeigen, daß bei Ansteigen der ausländischen Rechtsunsicherheit eine Umschichtung im Portfolio zugunsten inländischer Konsum- und Investitionsprojekte sinnvoll oder rational ist. Siehe dazu in Kapitel 4.

Wirkungskanal 2a und 3a

(2a) (3a) höhere Transaktionskosten ⟶ Konzentrationsprozeß

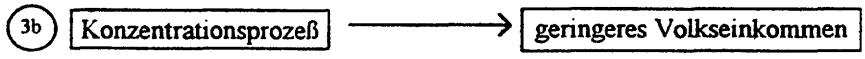
Grenzüberschreitende Rechtsunsicherheit führt tendenziell zu einem Konzentrationsprozeß in Richtung Großunternehmen. Die Begründung lautet: Die Rechtsunsicherheit hinsichtlich grenzüberschreitender Geschäfte ist für Klein- und Mittelbetriebe höher als für Großunternehmen. Zum einen haben Großunternehmen bessere Ausgangsbedingungen: In der Regel haben sie schon häufigere und dauerhaftere

Geschäftsbeziehungen zu ausländischen Geschäftspartnern; von daher ist ihr Ausgangswissen, ihr Informationsstand über ausländische Rechtssysteme in der Regel größer. Zum anderen ist ihre infrastrukturelle Basis in Form von Auslandsfilialen und/oder unternehmenseigenen Rechtsanwälten im Durchschnitt wesentlich besser ausgebildet. Beides erzeugt einen geringeren Bedarf an Informationssammlung und damit geringere Informationssammlungskosten bzw./und einen geringeren Risikoaufschlag in ihrer Ertragsrechnung. Außerdem ist zu berücksichtigen, daß sich die Rechtsunsicherheit bzw. der Versuch ihrer Bewältigung in Großunternehmen in einem geringeren Rückgang der Kapitalrendite ausdrückt, da sich die Fixkosten der Informationssammlung dort auf viel mehr Güter oder Geschäftsaktivitäten verteilen. Dies bedeutet auch, daß sich Informationssammlung für Großunternehmen eher lohnt als für Kleinunternehmen oder gar für die Verbraucher.

Hieraus kann man eine Konzentrationstendenz in Richtung der Großunternehmen im grenzüberschreitenden Handelsverkehr ableiten, da sich die Kosten durch grenzüberschreitende Rechtsunsicherheit für die Klein- und Mittelunternehmen überproportional stark erhöhen, so daß sie c.p. weniger konkurrenzfähig sind im Vergleich zu den Großunternehmen.

Vergleiche näher hierzu in Kapitel 4.

Wirkungskanal 3b



In der traditionellen Mikroökonomie und Wettbewerbstheorie wird i.d.R. davon ausgegangen, daß Konzentration c.p. mit Preissteigerungen und geringerer und/oder qualitätsmäßig schlechterer Versorgung für die Verbraucher einhergeht. Der Grund ist die zurückgehende Wettbewerbsintensität. Ein höheres Preisniveau bewirkt allerdings nach der Erläuterung von Wirkungskette (4) tendenziell ein geringeres Volkseinkommen und geringere Beschäftigung (und damit ein geringeres Verbrauchereinkommen). Siehe näher dort.

3.2 Dynamische Kosten der Rechtsunsicherheit

Die bisher abgeleiteten statischen Einkommenseffekte von Rechtsunsicherheit signalisieren ein andauernd niedrigeres Einkommensniveau gegenüber dem Referenzfall von Rechtssicherheit. Ein solcher einmaliger Rückgang des Volkseinkommens ist ein kurzfristiger negativer Wachstumseffekt. Andauernde Wachstumseffekte im Sinne eines permanenten Einkommensausfalls gegenüber dem Referenzszenarium von Rechtssicherheit wären demgegenüber jedoch wesentlich bedeutsamere Kosten. Um solche dynamischen, andauernden Kosten geht es in diesem Abschnitt. Mit der traditionellen makroökonomischen Theorie ließen sich solche dynamischen Kosten allerdings nur bei problematisierbarer Annahme von Verhaltensrigiditäten begründen. Dagegen liefert ein neuer Theoriezweig der Makroökonomie, nämlich die sogenannte "Neue" oder "endogene" Wachstumstheorie, ein mikroökonomisch fundierteres Analyseinstrumentarium für die Erklärung solcher dynamischer Kosten[156].

Als die zentralen dynamischen Kosteneffekte von Rechtsunsicherheit werden die Wirkungskanäle (10) und (11) angesehen. Insbesondere auf (11) wird später noch ausführlich eingegangen. Doch auch die Wirkungskanäle (12) und (13) sind interessante Erklärungskandidaten für dynamische Kosten von Rechtsunsicherheit.

Wirkungskanal 10

Geringere Investitionen führen zu einer geringeren Wachstumsrate, wenn Investitionen wesentlich für den Wachstumsmotor einer Volkswirtschaft sind. Als zentraler Wachstumsmotor wird häufig der technische Fortschritt angesehen. Wenn also gezeigt werden kann, daß geringere Investitionen zu geringerem technischen Fortschritt führen, wäre man einen wesentlichen Schritt weiter. In der Neuen Wachstumstheorie wird dies auch unterstellt. Es wird davon ausgegangen, daß Investitionen ja angebotsseitig Kapitalakkumulation darstellen und Kapitalakkumulation immer mit der Produktion zusätzlichen neuen Wissens einhergeht. (Hintergrund

156 Vgl. näher hierzu z.b. Wagner (1993), 2. Kapitel.

dieser Sichtweise ist die plausible Annahme, daß ja nicht immer wieder in die gleichen Güter oder Produktionsverfahren investiert wird.) Da nun Wissen als der zentrale Input in der Produktion technischen Fortschritts angesehen wird, kann man daraus folgern, daß niedrigere Investitionen auch mit geringerem technischen Fortschritt und damit mit einer geringeren Wachstumsrate der Wirtschaft verbunden sind.

Gleichermaßen kann man geringeres Volkseinkommen als Ursache für Wachstumseinbußen ansehen, wenn geringeres Volkseinkommen z.B. geringere Infrastrukturinvestitionen induziert und eine positive Korrelation zwischen Infrastrukturinvestitionen und technischem Fortschritt unterstellt werden kann.

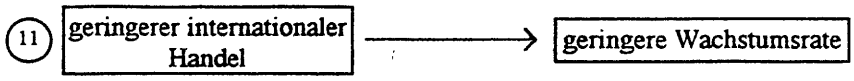
Theoretische Analysemethode:

Die Methode, mit der die obigen Gedankengänge modelliert werden können, ist die "Neue Wachstumstheorie". Diese Theorielinie, die Mitte der 1980er Jahre begonnen hatte, baut auf der traditionellen neoklassischen Wachstumstheorie auf, endogenisiert jedoch den technischen Fortschritt.

Man kann die Neue Wachstumstheorie in zwei unterschiedliche Zweige einteilen. Der *eine Zweig* baut auf Modellen der "Erfindung" auf und betrachtet technischen Wandel als einen kostspieligen und wohlüberlegten Prozeß. Die Modelle der Erfindung konzentrieren sich dabei auf Faktoren, die den Anreiz, bewußt zu erfinden, beeinflussen, wie z.B. den institutionellen Rahmen und die Marktgröße. Der *andere Zweig* der Neuen Wachstumstheorie basiert auf Modellen des "learning by doing" und sieht technischen Wandel als das nichtintendierte Nebenprodukt der Güterproduktion an. Die dabei verwendeten Lernmodelle haben Faktoren im Blickpunkt, die den Anreiz, verschiedene Güterarten zu produzieren, beeinflussen, wie z.B. das Muster des komparativen Vorteils.

Siehe näher in Kapitel 7. Zu einem umfassenden Überblick zur Neuen Wachstumtheorie siehe Barro und Sala-i-Martin (1995).

Wirkungskanal 11



Rechtsunsicherheit im hier gebrauchten Sinne kann als ein nichttarifäres Handelshemmnis angesehen werden, das - wie im Wirkungskanal (5) begründet - zu einem Rückgang des internationalen Handels führt.

Nun gibt es in der Neuen oder endogenen Wachstumstheorie mehrere Ansätze, die zeigen, wie Freihandel das Wirtschaftswachstum verstärken kann bzw. wie Handelshemmnisse optimales Wachstum verhindern. Grundidee dabei ist, daß die Öffnung einer Volkswirtschaft gegenüber der übrigen Welt häufig (zumindest kurz- bis mittelfristig) zu einer Änderung der Wachstumsraten führt und (langfristig) ein höheres Steady State erreicht wird. Das Verschmelzen der Kapitalstöcke bewirkt eine Verstärkung der positiven externen Effekte und somit einen Wachstumsschub. Beispielsweise können Fixkosten auf ein größeres Volumen verteilt und doppelte Forschungs- und Entwicklungstätigkeiten vermieden werden.

Theoretische Analysemethoden:

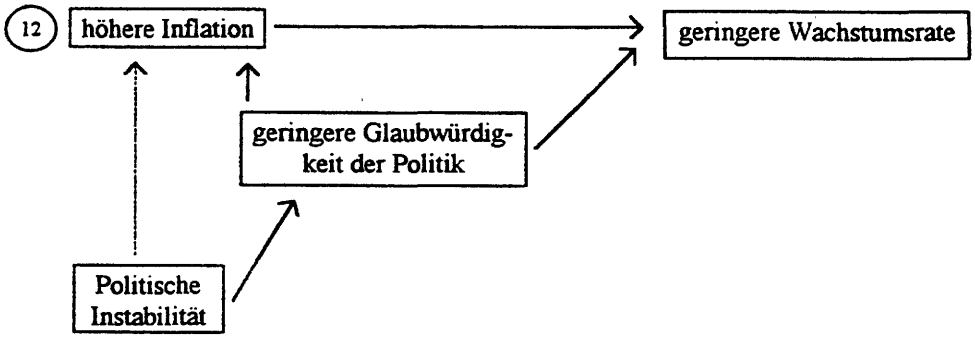
Die grundlegende Analysemethode ist hier, wie gesagt, wiederum die Neue Wachstumstheorie mit ihren verschiedenen Modellansätzen. Diese werden näher in Kapitel 4 und 7 dargestellt.

Alle Ansätze der Neuen Wachstumstheorie bieten Möglichkeiten, die "Güter" Rechtssicherheit und Rechtsunsicherheit via Außenhandel Einfluß auf das Wachstum nehmen zu lassen. Am naheliegendsten ist es sicherlich zunächst, Rechtssicherheit als eine Art öffentliches Gut zu betrachten, das im Rahmen des EU-Binnenmarktes von der Gemeinschaft zum Nutzen der Verbraucher zur Verfügung gestellt werden sollte. Gemäß einer anderen Variante können durch Rechtsunsicherheit verursachte Handelshemmnisse die optimale Kapital- und Humankapitalbildung und somit auch die Produktivität und die Innovationsrate beeinträchtigen.

Die aktuellsten und komplexesten Modelle erklären die zunehmenden Innovationsraten mit endogenem technologischen Fortschritt. In ihnen wird das physische Kapital als ein Aggregat von Zwischengütern interpretiert, dessen Zunahme technologischen Fortschritt reflektiert. Gleichgewichtiges Wachstum wird nun auf die ständige Einführung neuer Zwischenprodukte zurückgeführt. Außenhandel kann dabei das Wachstum verstärken, indem einerseits doppelte Forschung und Entwicklung von Zwischengütern vermieden wird (geringere Fixkosten) und statt dessen mit diesen gehandelt wird, und andererseits durch Diffusion von Wissen. Wie können nun rechtliche Hemmnisse in diese Modelle einfließen? Eine andere Möglichkeit ist die Handhabung von Rechtssicherheit oder Rechtskenntnis als handelbares Zwischengut; eine andere, sie mit Wissen gleichzusetzen. Die Modelle von Grossman und Helpman bieten noch eine dritte Möglichkeit, denn in ihnen werden auch die Auswirkungen von Handelsschranken untersucht. Als solche können rechtliche Hemmnisse gut modelliert werden.

Vgl. näher hierzu Barro und Sala-i-Martin (1995).

Wirkungskanal 12



Wie in der Erklärung des Wirkungskanals (8) beschrieben, tritt bei (höherer) Inflation eine Unsicherheit hinsichtlich der Aussagekraft von relativen Preisänderungen auf. Dies läßt sich im Kontext der Neuen Wachstumstheorie als wachstumsbehindernd oder -reduzierend ableiten.

Darüber hinaus muß auch folgender Zusammenhang gesehen werden:

Hohe Inflation wie auch geringe Glaubwürdigkeit der Politik wird häufig als Hand-in-Hand-gehend mit politischer Instabilität angesehen bzw. darauf zurückgeführt.

Politische Instabilität kann nun selbst wachstumshemmend wirken. Dahinter steckt die Vermutung, daß politische Instabilität negative Effekte auf Investitionen und auf den Spezialisierungsprozeß und damit auf den Wachstumsprozeß einer Volkswirtschaft ausübt.

Die allgemeine Begründung hierfür lautet: Politische Instabilität verunsichert die privaten Akteure, da die Handlungsregeln die Stabilität verlieren, die erforderlich ist, um sie analog den technologischen Restriktionen als feste Nebenbedingungen in die individuelle Verhaltensoptimierung einbauen zu können.

Politische Instabilität treibt die Risikoprämie in der Renditekalkulation von Investitionen hoch. Wie weithin bekannt ist, ist politische Instabilität häufig und vor allem in Entwicklungsländern der Anlaß dafür, daß heimische Investitionen wie auch notwendige ausländische Direktinvestitionen nicht durchgeführt werden. Für die Unternehmer ist aufgrund der politischen Instabilität das Risiko andauernder Kurswechsel und dadurch der Nichtrealisierbarkeit ihrer ursprünglichen, für Investitionen entscheidenden, Gewinnerwartungen prohibitiv hoch.

Theoretische Analysemethoden:

Zum einen lassen sich einige der obigen Gedankengänge im Kontext der schon oben skizzierten "Zeitinkonsistenztheorie optimaler Wirtschaftspolitik" modellmäßig beschreiben. Fast noch wichtiger ist zum anderen die Anwendung der "Neuen politischen Öknomie der makroökonomischen Politik" sowie der "Neuen Institutionenökonomie" schlechthin. Zu letzteren beiden siehe näher in Kapitel 7 unter dem Kapitel "Neue Institutionenökonomie".

Die Frage, wie sich politische Instabilität auf Wachstum auswirkt, ist von einigen Autoren auch empirisch untersucht worden. Dabei wurde bislang auf zwei Möglichkeiten zurückgegriffen, politische Instabilität zu definieren.

Die erste Möglichkeit besteht darin, politische Instabilität als die Tendenz der Staaten zu Regierungswechseln zu definieren. Dabei können diese Regierungswechsel innerhalb des legalen Systems der einzelnen Staaten erfolgen oder in der Form eines Putsches. Cukierman, Edwards und Tabellini (1991) benutzen diese Definition, um politische Instabilität in Zusammenhang mit Inflation zu betrachten.

Die zweite Möglichkeit greift auf einen Index zurück, der die sozio-ökonomischen Verhältnisse in einer Gesellschaft widerspiegeln soll. Dabei werden zunächst die relevanten Variablen entsprechend gewichtet und dann die speziellen Indexwerte für die einzelnen Staaten berechnet. Eine solche Gewichtung kann z.B. mit einer Faktorenanalyse bestimmt werden. Alesina und Perotti (1994) benutzen einen solchen Ansatz, um die Auswirkungen von politischer Instabilität und Einkommensdifferentialen auf Wachstum zu untersuchen. Sie bejahen die These, daß politische Instabilität zu weniger Investitionen führt und deswegen das wirtschaftliche Wachstum hemmt. Veneris und Gupta (1986) zeigen, daß politische Instabilität zu weniger Ersparnis und so zu weniger Wachstum führt. Alesina und Tabellini (1989) zeigen, daß politische Instabilität zu Kapitalflucht und dadurch zu weniger Wachstum führt.

Interessant bei den Ergebnissen ist, daß Glaubwürdigkeitsprobleme nie aus sich selber heraus zu weniger Wachstum führen, sondern sich zunächst über andere makroökonomische Variablen äußern.

Wirkungskanal 13

Dieser letzte Wirkungskanal ist zur "Abrundung" aufgeführt, obwohl es sehr wohl sein kann, daß der oben abgeleitete Konzentrationsprozeß positive und nicht negative Wachstumseffekte erzeugt. Es gibt zwei gegenläufige Thesen zum Zusammenhang von Wettwerb und Wirtschaftswachstum:

Positiver Zusammenhang: Wettbewerb fördert das Wirtschaftswachstum durch Rationalisierungswirkung und Innovationsdruck.

Negativer Zusammenhang: Gewinne werden um so schneller wegkonkurriert, je stärker der Wettbewerb ist. Anreizwirkungen und Finanzierungsspielräume aus Erträgen werden damit verringert.

Da der oben in (2a) und (3a) erläuterte Konzentrationsprozeß nur mit einer Gewichtsverschiebung von Klein-/Mittel- zu Großunternehmen einhergeht, kann nicht automatisch damit ein signifikanter Wettbewerbsrückgang verbunden werden, auch wenn dies nicht unwahrscheinlich erscheint. Außerdem könnte man argumentieren, daß eine Konzentration im obigen Sinnne in schwächer entwickelten EU-Volkswirtschaften eher eine im Aufbau befindliche Wirtschaftsstruktur schützen könnte. Schließlich ist es möglich, daß sich ein Konzentrationsprozeß im Sinne europäischer Unternehmenszusammenschlüsse so auswirkt, daß sich die EU-Unternehmen besser im Weltmarkt behaupten können.

Dem stehen jedoch folgende Argumente gegenüber:

Die Binnenmarktvorteile werden mit Preissenkungen aufgrund eines höheren Wettbewerbs durch den Abbau von Handelshemmnissen (wie z.B. Rechtsunsicherheit) begründet. Die Annahme beruht auf folgender unterstellter Wirkungskette: Preissenkungen stimulieren die Nachfrage (siehe in (4) oben). Die Nachfrageer-höhung führt zu einer Steigerung des Produktionsvolumens und ermöglicht economies of scale (steigende Skalenerträge).

Weiterhin regt der höhere Wettbewerbsdruck Produkt- und Prozeßinnovationen an. X-Ineffizienzen werden abgebaut, da der Wettbewerbsdruck die Unternehmen zu Kosteneinsparungen und Umstrukturierungen zwingt[157]. Hieraus können dann positive Wachstumseffekte von Wettbewerb begründet werden, was umgekehrt bedeutet, daß Konzentrationsprozesse im obigen Sinne, sofern sie mit Wettbewerbsrückgang einhergehen, Wachstumseinbußen nach sich ziehen.

Theoretische Analysemethode:

Die grundlegende Analysemethode für die obigen Argumente ist die Wettbewerbstheorie. Hierzu siehe näher in Kapitel 7. Die dort herausgearbeiteten Argumente müßten jedoch mit den Argumentationslinien der Neuen Wachstumstheorie verbunden werden, um überzeugende makroökonomische Kosten eines Konzentrationsprozesses begründen zu können.

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157 Vgl. Cecchini (1988), S. 100 f.

4. Ergebnisse qualitativer Modellanalysen

Im Rahmen und als Grundlage der vorliegenden Studie wurden verschiedene Modellanalysen durchgeführt, die die Frage makroökonomischer Kosten von Rechtsunsicherheit unter dem Blickwinkel verschiedener moderner Theorieansätze behandelt haben. Und zwar wurden die Kosten im Lichte der

(1) Neuen Institutionenökonomie,

(2) Handelstheorie,

(3) Options- und Portfoliotheorie,

(4) Zeitinkonsistenztheorie,

(5) Neuen Wachstumstheorie,

(6) Wettbewerbstheorie

untersucht.

Die Vorgehensweise und die Ergebnisse dieser Untersuchungen werden im folgenden zusammengefaßt. Die Modellanalysen selber sind in einem von mir herausgegebenen Anhangsband abgedruckt, der von der Europäischen Kommission (DG XXIV), auf Anfrage erhältlich ist.[158]

4.1 Neue Institutionenökonomie

In dieser Arbeit werden die qualitativen Wirkungen untersucht, die makroökonomische Kosten rechtlicher Schranken für die Verbraucher im europäischen Binnenmarkt im Lichte der Neuen Institutionenökonomie (NIÖ) implizieren können. Rechtliche Schranken werden dort interpretiert als (1) Rechtsunkenntnis und Rechtsunsicherheit auf ausländischen Märkten im EU-Binnenmarkt (2) von Verbrauchern und Unternehmen, die im Binnenmarkt ansässig sind, (3) in bezug auf

158 Erstellt wurden diese Modelluntersuchungen unter meiner Anleitung und Koordination von Jörg Chittka, Matthias Grawitter, Andreas Jahn, Matthias Ross, Manfred Stamer, Martin Wolburg und Achim Wolter.

grenzüberschreitende Transaktionen innerhalb des Binnenmarktes. Rechtsunsicherheit wird dabei so verstanden, daß die Sicherung von in Verträgen vereinbarten Eigentums- und Verfügungsrechten nicht vollkommen gewährleistet ist.

Die NIÖ erkennt ausdrücklich an, daß die Sicherung von Verfügungsrechten Kosten verursacht. Diese Kosten sind in grenzüberschreitenden Verträgen höher als in nationalen und führen damit in der **Tendenz zu Preiserhöhungen**, die bzw. deren Folgen als Kosten rechtlicher Schranken bezeichnet werden können. Getrennt nach Verbrauchern und Unternehmen wird analysiert, welche potentiellen Reaktionen in diesen Sektoren auftreten können, die Kosten verursachen. Dazu werden zunächst allgemein die **Güter oder Dienstleistungen** klassifiziert, die **für Opportunismus** des ausländischen Vertragspartners **besonders anfällig** sind. Es handelt sich um Güter mit geringer Transaktionshäufigkeit und hohen Opportunitätskosten durch mangelhafte Vertragserfüllung. Jede Untersuchung der Kosten muß sich auf die Sektoren konzentrieren, in denen Güter mit diesen Eigenschaften gehandelt werden. Im **Verbrauchersektor** werden folgende Kosten als wesentlich ausgemacht: Die Unkenntnis ausländischer Rechtssysteme verursacht **Informationskosten**. Grundsätzlich wird dem Verbraucher im Rahmen der NIÖ eine extrem hohe Risikoaversion unterstellt. Damit schätzt der Verbraucher das Risiko sehr hoch ein, daß sich ein ausländischer Lieferant opportunistisch verhält. Infolgedessen werden Verbraucher **mögliche Preisvorteile** durch Kauf **im Ausland nicht realisieren** und vor allem bei opportunismusanfälligen Gütern grundsätzlich keinen Gerichtsstand im Ausland akzeptieren. Im **Unternehmenssektor** spielt rechtliche Unsicherheit ebenfalls eine erhebliche Rolle. Zunächst müssen Unternehmen auf ausländische Verbraucher reagieren und ihre **rechtlichen Angelegenheiten dezentralisieren**. Dies ist mit hohen Kosten verbunden, insbesondere für kleinere Anbieter. Rechtliche Schranken für Transaktionen zwischen Unternehmen verursachen ebenfalls **Informationskosten**, die jedoch nur für kleine Unternehmen bedeutsam sind. Damit wird eine Tendenz zur **Konzentration** begründet. Des weiteren können internationale Konzentrationsprozesse als Reaktion auf rechtliche Schranken damit begründet werden, daß durch eine grenzüberschreitende Eingliederung in die Hierarchie die Opportunismusanfälligkeit des Vertrages verringert wird. Demgegenüber führt allgemein rechtliche Unsicherheit jedoch zu **weniger internationalen Direktinvestitionen**. Da in der

EU kein konkretes Enteigungsrisiko besteht, wird der erste Effekt als dominant identifiziert. Die Erwartung eines Abbaus rechtlicher Schranken führt zu **abwartendem Verhalten** im Hinblick auf internationale Transaktionen. In einer Situation mit verringerter Rechtsunsicherheit können die Ressourcen, die derzeit zur Überwindung derselben aufgewandt werden, einer alternativen Verwendung zugeführt werden. Prognosen werden nicht vorgenommen, es wird aber darauf verwiesen, daß die Ressourcen nicht zwangsläufig für 'sinnvollere Aufgaben' eingesetzt werden, wie dies im Cecchini-Bericht angenommen wird.

Als mikroökonomischer Ansatz ist die NIÖ nicht vorrangig geeignet, makroökonomische Kosten zu beziffern, die sämtlichen Verbrauchern, unabhängig von deren individuellen Motiven, und sämtlichen Unternehmen, unabhängig von deren Größe und Organisationsformen, durch rechtliche Schranken entstehen. Jede empirische Ermittlung makroökonomischer Kosten sollte auf mikroökonomischen, sektoralen Analysen basieren. Nur in individuellen Betrachtungen kann das Element 'rechtliche Unsicherheit' in der Gesamtmotivation des Verbrauchers, ausländische Preisvorteile nicht zu nutzen, isoliert werden. Nur in mikroökonomischen Analysen kann nach Ansicht der NIÖ die Wirkung der rechtlichen Unsicherheit auf Unternehmensstrukturen und Preisgestaltung abgeleitet werden. Auch Prognosen über eine alternative Verwendung der Ressourcen, die derzeit in der Absicherung rechtlicher Unsicherheit gebunden sind, sind nur anhand der Betrachtung individueller Marktstrukturen möglich. Schließlich sollten Ableitungen der Kosten realistische Referenzszenarien zugrunde gelegt werden. In einer Gesamtbetrachtung muß berücksichtigt werden, daß alle alternativen institutionellen Rahmenbedingungen nur unter **hohen Transaktionskosten** durchzusetzen sind.

4.2 Handelstheorie

In dieser Arbeit werden die Wohlfahrtsauswirkungen der in der EU vorherrschenden Rechtsunsicherheit aus außenwirtschaftstheoretischer Sicht analysiert. Dazu werden die Handelsverflechtungen innerhalb der EU auf die drei Motive Ausstattungsunterschiede (Heckscher-Ohlin), Skaleneffekte und unvollkommene Konkurrenz zurückgeführt. Für jedes dieser Motive werden in der Folge anhand eines Modells die Wohlfahrtsgewinne aus Handel gegenüber Autarkie ohne Berücksichtigung von Handelshemmnissen aufgezeigt. Anschließend wird untersucht, ob diese Wohlfahrts-

gewinne bei Existenz des Handelshemmnisses Rechtsunsicherheit geringer ausfallen. Die Ergebnisse dieser Modelle werden im folgenden zusammengefaßt:

Das erste Modell betrachtet die Auswirkungen, die Rechtsunsicherheit auf das Ausmaß des Handels hat, der zwischen zwei Länder im Rahmen der klassischen Heckscher-Ohlin-Theorie als Folge von Ausstattungsunterschieden entsteht. Unmittelbar führt in diesem Modell Rechtsunsicherheit, sofern sie für beide Länder gilt, zu einer Verteuerung der Exportgüter. Die Folge ist, daß die Nachfrage nach den importierten Gütern in beiden Ländern zurückgeht und durch den erhöhten Konsum des gleichen, aber im Inland (teurer) produzierten Gutes substituiert wird. Die Konsequenz dieser Nachfrageverschiebung ist eine Reallokation der inländischen Produktionsfaktoren. Dadurch kann der in jedem Land reichlich vorhandene Produktionsfaktor nicht mehr wie zuvor zur Produktion des Gutes, für das das Land den komparativen Vorteil aufweist, eingesetzt werden. Das Ergebnis ist, daß der Wohlfahrtsgewinn, den Freihandel durch die Ausnutzung der komparativen Vorteile beider Länder impliziert, durch das Handelshemmnis Rechtsunsicherheit geschmälert wird, da in beiden Ländern die Produktionsfaktoren ineffizienter als zuvor eingesetzt werden.

Das zweite, auf ein Vorbild Krugmans aufbauende Modell untersucht die Auswirkungen, die Rechtsunsicherheit auf das Ausmaß des Handels zwischen zwei Ländern hat, der auf die Existenz wachsender Skalenerträge zurückzuführen ist. Rechtsunsicherheit, die als proportionaler Preisaufschlag modelliert wird, wirkt in diesem Model auf zweierlei Weise: Der erste Effekt ähnelt dem bei Handel aus Ausstattungsunterschieden: Durch die Existenz von Rechtsunsicherheit steigt die Nachfrage nach heimischen und sinkt die Nachfrage nach ausländischen Gütern. Die Folge ist, daß der Output jedes Gutes sinkt, da die durch Güterhandel möglichen zusätzlichen Skalenerträge nicht mehr gänzlich ausgeschöpft werden. Entsprechend kommt es auch zu einer Schmälerung der Wohlfahrtsgewinne, die sich bei Freihandel aus der Ausschöpfung dieser Skalenerträge sowie der für den Konsumenten verfügbaren Produktvielfalt ergeben. Dieser Wohlfahrtsverlust drückt sich für die Konsumenten in einem Rückgang des Reallohns aus. Unter einer zusätzlichen Annahme, nämlich einer vereinfachten Nutzenfunktion der Konsumenten, läßt sich noch ein zweiter Effekt ableiten, falls beide betrachteten Länder eine unterschiedliche Größe aufweisen: In diesem Fall liegt,

bei gleichem Reallohn in beiden Ländern, im größeren Land der Nominallohn, aber auch das Preisniveau höher als im kleineren Land. Dies entspricht einem *Terms-of-Trade*-Vorteil des größeren Landes, da dessen Konsumenten günstiger Waren aus dem anderen Land nachfragen können.

Das dritte Modell, das auf einem Artikel Markusens basiert, analysiert die Auswirkungen, die Rechtsunsicherheit auf das Ausmaß des Handels hat, der zwischen zwei Ländern entsteht, wenn Güterhandel in einem zuvor in beiden Ländern monopolisierten Sektor zugelassen wird. Bezüglich der Auswirkungen von Rechtsunsicherheit muß in diesem Modell zwischen den Fällen gleich großer und unterschiedlich großer Länder unterschieden werden. Sind beide Länder gleich groß, bietet die Marktöffnung des monopolisierten Sektors keinen Anreiz zur Aufnahme von Güterhandel. Die Existenz von Rechtsunsicherheit kann deshalb nicht direkt wirken; wohl aber indirekt dadurch, daß sie in das Output-Kalkül der Duopolisten einfließt: Da Rechtsunsicherheit die Kosten des Eintritts auf den anderen Markt erhöht, wird letzterer unwahrscheinlicher. Entsprechend wird der Anreiz zur Produktionsausweitung für beide Duopolisten geringer sein als bei Freihandel. Da eine Produktionsausweiterung in dem Modell wohlfahrtssteigernd wirkt, weil sie mögliche Monopolrenten schmälert, impliziert die gegenüber Freihandel geringere Produktionsausweitung Wohlfahrtsverluste. Letztere teilen sich auf beide Länder gleichmäßig auf. Sind beide Länder unterschiedlich groß, kommt es in dem Modell bei Marktöffnung zum Export des zuvor monopolisierten Gutes von dem kleineren ins größere Land. Auf diesen Güterhandel wirkt die Existenz von Rechtsunsicherheit direkt, indem sie den Preis des Exportgutes anhebt. Die Folge ist ein Handelsrückgang und damit auch ein Rückgang der Produktion des Gutes in dem kleineren Land. Letzterer ist für das kleinere Land mit Wohlfahrtsverlusten verbunden. Keine Aussage läßt sich darüber treffen, wie die Existenz von Rechtsunsicherheit auf das größere Land wirkt. Die Produktion des Gutes kann bei Rechtsunsicherheit steigen oder fallen, entsprechend können sich für das Land Wohlfahrtsgewinne oder -verluste ergeben. In der Aggregation führt Rechtsunsicherheit aber zu einem Weltwohlfahrtsverlust.

4.3 Options- und Portfoliotheorie

In dieser Arbeit wird der Einfluß von Rechtsunsicherheit auf die Exportaktivitäten von Unternehmen und die Nachfrage der Konsumenten nach ausländischen Gütern mit zwei Methoden untersucht.

Dies sind erstens die Methode der „stochastischen dynamischen Programmierung" und zweitens die Portfoliotheorie. Beiden Methoden ist die Modellierung der Rechtsunsicherheit durch die Varianz der zugrunde gelegten Wahrscheinlichkeitsverteilungen gemeinsam. Die Methode der dynamischen Programmierung erklärt zusätzlich das Verhalten im Zeitablauf, wohingegen sich die portfoliotheoretische Untersuchung auf die komparativ statische Untersuchung von Zuständen beschränkt.

Mit der Methode der „stochastischen dynamischen Programmierung" werden einerseits das gewinnmaximierende Verhalten eines exportierenden Unternehmens und andererseits das Konsumverhalten nach dauerhaften Gütern untersucht. In klassischen statischen Modellen wird die Rechtsunsicherheit im allgemeinen durch die Varianz einer Wahrscheinlichkeitsverteilung beschrieben, die - dem komparativ statischen Analyserahmen entsprechend - intertemporal konstant ist. In dynamischen Modellen hingegen ist es möglich, daß Rechtssituationen um so unsicherer beurteilt werden, je weiter sie in der Zukunft liegen. Im Rahmen der optionstheoretischen Analyse wird hier die Rechtsunsicherheit durch die Varianz eines stochastischen Prozesses, der die Ertragsentwicklung beschreibt, modelliert. Diese Varianz der Ertragsentwicklung nimmt im Zeitablauf zu, so daß Rechtssituationen um so unsicherer beurteilt werden, je weiter sie in der Zukunft liegen. Die zweite wesentliche Annahme der „Irreversibilität" der Export- und Kaufentscheidungen begründet sich für die Unternehmensseite mit Markterschließungskosten in Form von Werbung, Anpassung an nationale Normen, Aufbau eines Vertriebsnetzes, usw., die im Falle einer Ausstiegsentscheidung verloren sind. Auch die Kaufentscheidungen dauerhafter Güter sind typischerweise nur mit erheblichen Verlusten wieder rückgängig zu machen, so daß auch hier die Irreversibilitätsannahme notwendig ist.

Unter diesen Annahmen warten Unternehmen und Konsumenten so lange mit ihrer Markteintritts- bzw. Kaufentscheidung, bis sich die aktuelle Rechtssituation als so

günstig herausstellt, daß mögliche Verluste relativ unwahrscheinlich werden. Konsequenz dieses Verhaltens ist, daß mit zunehmender Rechtsunsicherheit immer günstigere aktuelle Rechtssituationen notwendig sind, um die Akteure zu einer Markteintrtitts- bzw. Kaufentscheidung zu bewegen.

Mit der Methode der Portfoliotheorie wird der Einfluß von Rechtsunsicherheit auf die Aufteilung eines Vermögensportfolios, welches aus inländischen (rechtssicheren) und ausländischen (rechtsunsicheren) Vermögenstiteln besteht, untersucht. Diese Herangehensweise basiert auf der Überlegung, daß Exportentscheidungen mit anfänglichen Markterschließungsinvestitionen einhergehen, und die anschließenden Erträge gemäß der Unsicherheit schwanken. Die Entscheidungskriterien der Unternehmen ähneln demnach denen einer Vermögensanlage.

Die Aussage der portfoliotheoretischen Untersuchung ist, daß risikoaverse Unternehmen ihr Vermögen unter Rechtsunsicherheit in erhöhtem Maße in inländischen sicheren Titeln anlegen zuungunsten der ausländischer Anlagealternativen.

Da sich nicht alle Produzenten und Konsumenten identisch verhalten, kann auf aggregiertem Niveau in Abhängigkeit von der Unsicherheit eine Verringerung des Angebots von und der Nachfrage nach Handelsgütern bescheinigt werden. Aus den einzelwirtschaftlichen Verhaltensannahmen können somit gesamtwirtschaftlich geringerer Handel, weniger Direktinvestitionen und ein suboptimaler Konsum abgeleitet werden.

Die dargestellten Modelle kommen damit zu dem Ergebnis, daß Rechtsunsicherheit einen eigenen, negativen Einfluß auf Handel, Direktinvestitionen und Nachfrage ausübt. Diese Ergebnisse hängen in der portfoliotheoretischen Untersuchung von der (realistischen) Annahme der Risikoaversion der Akteure ab. Mit der Optionstheorie hingegen wird dieser negative Einfluß der Rechtsunsicherheit sogar für risikoneutrale Akteure abgeleitet, so daß Rechtsunsicherheit unabhängig von der Verhaltensannahme über die Akteure negativ bewertet wird. Rechtsunsicherheit ist damit vergleichbar mit einem Preisaufschlag, der, verglichen mit einer rechtssicheren Situation, geringeren Handel und suboptimale Güterverwendung impliziert.

4.4 Zeitinkonsistenztheorie

In dieser Arbeit wird versucht plausibel zu machen, daß Glaubwürdigkeitsprobleme zu Rechtsunsicherheit führen können.

Es wird von einem privaten Sektor ausgegangen, der rational handelt. Dieser versucht unter anderem, die Aktionen der Regierung vorherzusehen und entsprechend zu handeln. Der private Sektor muß langfristige Verpflichtungen eingehen, die sein Arbeitsangebot betreffen. Die Höhe seines Arbeitsangebotes ist abhängig von dem Steuersatz der Regierung. Bei einem höheren Steuersatz wird er weniger arbeiten, weil die Grenzerträge der Arbeit durch den höheren Steuersatz verringert werden. Ziel des privaten Sektors ist es, soviel wie möglich zu konsumieren und so wenig wie möglich zu arbeiten. In seiner Entscheidung muß er zwischen den beiden Möglichkeiten abwägen.

Der private Sektor kann im In- oder Ausland konsumieren. Der Staat kann in das Gut Rechtssicherheit im Inland investieren und so den Nutzen von Konsum im Inland erhöhen. Bei einem größeren Maß an innerer Rechtssicherheit können die Konsumenten für gleiches Geld mehr Nutzen erhalten. Die Investitionen in Rechtssicherheit müssen vom Staat durch Steuern auf Arbeit finanziert werden. Eine Verschuldung ist im Modell nicht möglich. Steuern auf Arbeit verringern aber annahmegemäß das Arbeitseinkommen und damit das monetäre Konsumeinkommen.

Dieses Spiel zwischen privatem Sektor und dem Staat gleicht einer Gefangenendilemma-Situation. Wenn das Spiel nur einmal ohne Wiederholungen gespielt wird, dann ist das Ergebnis nicht Pareto-effizient. Es ist für beide Seiten vorteilhaft zu kooperieren, d.h. ihren Ankündigungen zu folgen, wenn sie wissen, daß sich auch der Partner kooperativ verhält. Durch Abweichen von seinen Vorhersagen kann der Staat kurzfristig Vorteile erzielen, wenn der private Sektor an seinem Verhalten festhält. Aber der private Sektor wird ihm dann nicht mehr vertrauen und sich deshalb auch nicht mehr kooperativ verhalten.

Das Ergebnis der Modellstudie besagt folgendes: Mangelnde Investitionen in Rechtssicherheit und ihr Ergebnis (Rechtsunsicherheit) können als Glaubwürdigkeitsproblem interpretiert werden. Um solche Probleme zu vermeiden, muß zwischen

der Institution, die diese Investitionen vornimmt und dem privaten Sektor ein Vertrauensverhältnis bestehen, falls die Institution nicht an Regeln gebunden ist.

4.5 Neue Wachstumstheorie

Die Auswirkungen von Rechtsunsicherheit im Lichte der Neuen Wachstumstheorie wurden in zwei Arbeiten untersucht. Die erste Arbeit betrachtet die EU als einen Markt, während die zweite Arbeit in einem Zwei-Länder-Modell die Verbindung von Neuer Handels- und Neuer Wachstumstheorie herzustellen versucht.

4.5.1 Erste Arbeit: EU als ein Markt

Wie in Kapitel 3 erläutert, führt Rechtsunsicherheit zu einem prozentualen Preisaufschlag, was einen Wohlfahrtsverlust induziert.

Mit Hilfe der Neuen Wachstumstheorie kann gezeigt werden, daß sich die aufgrund von Rechtsunsicherheit ergebenden *statischen* Wohlfahrtsverluste in dynamischen Wohlfahrtseinbußen niederschlagen.

Rechtsunsicherheit wirkt über eine Verminderung des Ertrags von Investitionen. Für die Auswirkungen auf das Wachstum ist es dabei unerheblich, ob die Ursache der Rechtsunsicherheit angebots- oder nachfrageseitig determiniert ist.

Im Rahmen der Wachstumsmodelle mit **vollständiger Konkurrenz** wird in der Arbeit die Relevanz institutioneller Regelungen zur Sicherung der property rights betont. Unter den Begriff der property rights werden sowohl quantitative Dimensionen, z.B. Ausgaben für innere Sicherheit, als auch qualitative Aspekte, wie z.B. Rechtssicherheit, subsumiert. Rechtsunsicherheit beeinflußt somit den erwarteten Grenzertrag des Kapitals und damit die Wachstumsrate. Gelingt es nicht, eine eindeutige und klare Durchsetzung rechtlicher Normen zu gewährleisten bzw. bleiben die zur Aufrechterhaltung der Rechtssicherheit notwendigen Ausgaben hinter ihrem wachstumsoptimalen Wert zurück, so sinkt der erwartete Grenzertrag des Kapitals und damit das Wachstum der Volkswirtschaft.

Fallen für die Beseitigung von Rechtsunsicherheit Kosten an, welche langfristig durch Steuern finanziert werden müssen, so gilt eine umgekehrt u-förmige Beziehung

zwischen dem Steuersatz und der Wachstumsrate der Volkswirtschaft. Ausgehend von einem geringen Anteil am Sozialprodukt (der EU) überwiegt zunächst der produktivitätssteigernde Effekt via einer Sicherung der property rights über eine Verminderung des Grenzertrags des Kapitals aufgrund der Steuern. Ist der Steuersatz hingegen zu hoch, überwiegt der produktivitätssenkende Effekt und es kommt zu einer Wachstumsverminderung. Trifft der erste Fall für die EU zu, so sind zusätzliche Ausgaben zur Sicherung der property rights Wachstumspolitik.

Innovationsgetriebene Wachstumsmodelle versuchen den Schumpeterschen Wachstumsprozeß zu modellieren, wobei der Prozeß der Produktdifferenzierung betont wird. Zur Generierung einer langfristig positiven Wachstumsrate ist es notwendig, daß der Grenzertrag eines akkumulierbaren Produktionsfaktors nicht sinkt. Konsumenten gewichten Produktdiversifizierung positiv, was eine Aufteilung des Budgets auf mehr Güter und damit geringere Gewinne pro Gut zur Folge hat. Ein konstanter Grenzertrag der Innovationstätigkeit wird im vorliegendem Modell durch eine Senkung der Innovationskosten aufgrund einer Vermehrung des Wissensstandes mittels Innovationen erreicht. Erhöht sich im Zeitablauf der Wissensstand, so führt dies zu einer Senkung der Kosten, welche den Gewinnrückgang teilweise kompensieren. Wissen wird durch die Entwicklung neuer Produkte erworben. Dieser Mechanismus ist zentral, um eine langfristig positive Wachstumsrate zu ermöglichen.

Legt man wie in dieser Arbeit ein innovationsgetriebenes Wachstumsmodell zugrunde, so treibt Rechtsunsicherheit einen Keil in Form eines Risikozuschlages zwischen Angebot und Nachfrage. Insofern die Unternehmen diesen Risikozuschlag nicht vollständig überwälzen können, ergibt sich im neuen statischen Gleichgewicht in beiden Fällen ein verminderter Nettoerlös, so daß der Gewinn aus der Innovationstätigkeit sinkt und deshalb weniger Forschung und Entwicklung (F&E) unternommen werden kann. Weniger F&E bewirkt wiederum ein Sinken der Innovationsrate, was mit einer Verminderung der langfristigen Wachstumsrate der Volkswirtschaft einhergeht.

4.5.2 Zweite Arbeit: Zwei-Länder-Modell (Verbindung von Handels- und Wachstumstheorie)

In dieser Arbeit wird ein auf endogenem technologischen Fortschritt beruhendes Zwei-Länder-Modell herangezogen, in dem Wachstumseffekte durch oligopolistische Märkte und unterschiedliche Faktorproduktivitäten entstehen. Letztere bedingen komparative Vorteile, die Land 1 im Forschungs- und Entwicklungs-Sektor und Land 2 im Konsum- und Investitionsgüter-Sektor hat. (Land 1 kann hier realistischerweise mit der Gesamtheit der nördlichen EU-Staaten und Land 2 mit der der südlichen EU-Staaten gleichgesetzt werden.)

Zur Anwendung des Modells ist es somit notwendig, den Wirtschaftsraum Europäische Union gedanklich in zwei strukturell verschiedene Regionen ("Länder") aufzuteilen. Dann wird endogen eine langfristige steady-state-Wachstumsrate für die Konsumausgaben in der Gemeinschaft hergeleitet, die der Wachstumsrate der Produktvielfalt, d.h. der Innovationsrate in diesem Modell entspricht. Der Output an Endprodukten (das BIP) wächst proportional zu dieser Rate, die um so höher ist, je besser die komparativen Vorteile in der Gemeinschaft ausgenutzt werden, d.h. je größer die Spezialisierung aufgrund von Außenhandel ist.

Welche Auswirkungen hat nun Rechtsunsicherheit in diesem Modell? Sie erzeugt in erster Linie Handelshemmnisse bei den Konsumenten gegenüber den Endprodukten des jeweils anderen Landes, z.B. weil die Kosten zur Informationsbeschaffung über die Gewährung von Garantieansprüchen für einzelne Haushalte zu hoch sind. Bei den Produktionsgütern liegen dagegen keine relevanten Hemmnisse vor, denn sie werden nur zwischen Unternehmen gehandelt. Deren Transaktions- und Informationskosten zur Klärung von Rechtssituationen sind relativ gering im Verhältnis zu ihrem Umsatzvolumen.

Die durch die rechtlichen Schranken verursachten Preiserhöhungen "ausländischer" Endprodukte haben Nachfrageverschiebungen zur Folge. Innerhalb der Europäischen Union wird jetzt unterstellt, daß vornehmlich die Konsumenten in Land 1 (welches komparative Vorteile in F&E hat) rechtliche Handelshemmnisse gegenüber Land 2 haben, d.h. dessen Endprodukte sind relativ zu teuer. Es setzt eine relative Nachfragesteigerung nach den Konsumgütern von Land 1 ein, die eine Ressourcenre-

allokation zur Folge hat, um die höhere Nachfrage zu befriedigen. Aufgrund der modellierten Vollbeschäftigungsannahme werden in Land 1 Arbeitskräfte aus den Sektoren für F&E und Zwischengüter abgezogen und im Endprodukt-Sektor eingesetzt. Im anderen Land findet ein umgekehrter Prozeß statt. Das in F&E ineffizientere Land ist nun für einen höheren Anteil an Innovationen verantwortlich. Dies impliziert eine geringere langfristige Innovations- und Wachstumsrate der Europäischen Union. Von diesen Wohlfahrtseinbußen sind alle Wirtschaftssubjekte, insbesondere die Verbraucher betroffen.

4.6 Wettbewerbstheorie

In dieser Arbeit wird untersucht, inwieweit Rechtsunsicherheit Konzentrationsprozesse auslöst und welche Wohlfahrtswirkungen damit einhergehen. Insgesamt kommt die Untersuchung zu dem Ergebnis, daß Rechtunsicherheit Konzentrationsprozesse / Wettbewerbsbeschränkungen bewirkt. Weiterhin wird gefolgert, daß von Konzentrationsprozessen negative Wohlfahrtseffekte ausgehen bzw. durch das Nichteintreten von zusätzlichem Wettbewerb im EU-Binnenmarkt (bedingt durch Rechtsunsicherheit) die erwarteten Binnenmarkteffekte eingeschränkt werden. Wie Konzentrationsprozesse bzw. ausbleibende Wettbewerbsverstärkungen im Zusammenhang mit Rechtsunsicherheit ausgelöst werden, kann folgendermaßen theoretisch begründet werden:

1. Rechtsunsicherheit führt zu einer Erhöhung der Transaktionskosten. Die Unternehmen sind bestrebt, diese Kosten zu senken. Erreichen können sie die angestrebte Transaktionskostensenkung durch vertikale Integration. Hierbei soll es durch Unternehmenszusammenschlüsse und der damit einhergehenden Einbeziehung vor- oder nachgelagerter Marktaktivitäten zu einer Verminderung der Summe aus Produktions- und Transaktionskosten kommen.

2. Eine weitere theoretische Begründung besteht darin, daß Unternehmen die Erzielung von Skalenerträgen anstreben. Unter der Annahme, daß es sich bei den Kosten zur Bewältigung von Rechtsunsicherheit vorwiegend um Fixkosten handelt, werden Unternehmenszusammenschlüsse ausgelöst, da die Unternehmen bestrebt sind, die Fixkosten auf eine größere Ausbringungsmenge zu verteilen. Aufgrund personeller und institutioneller Ausstattung sind Groß- und Kleinunternehmen zudem in unterschiedlichem Ausmaß von rechtsunsicherheitsbedingten Fixkosten betroffen. Konzentrationsprozesse werden in diesem Zusammenhang

daher zusätzlich durch die Tendenz zur Verdrängung kleinerer Unternehmen begünstigt.

3. Rechtsunsicherheit begünstigt, daß die Märkte im EU-Binnenmarkt separiert bleiben (ausbleibender zusätzlicher Wettbewerb im Binnenmarkt). Dies kann sowohl nachfrage- als auch angebotsseitig begründet werden. Die Erklärung erfolgt über den informationsökonomischen Ansatz. Danach vergleichen die Verbraucher nicht die Marktpreise sondern die vollen Preise, das heißt den Marktpreis + Informationskosten. Die Verbraucher vermuten im Ausland für sie höhere Rechtsunsicherheit als im Inland. Wollen sie diese abbauen, müssen sie Informationskosten aufwenden. Ein niedrigerer Auslandsmarktpreis (über den sie sich ebenfalls erst informieren müßten) allein ist also nicht ausreichend, um den Verbraucher zu grenzüberschreitender Nachfrage zu bewegen. Der Vergleich der vollen Preise kann einen potentiellen Marktpreisvorteil des Auslandsgutes kompensieren. Trotz Abbau sonstiger Handelshemmnisse wird der Kauf von Inlandsgütern bevorzugt, zusätzlicher Wettbewerb wird durch Rechtsunsicherheit verhindert. Auf der Seite des Auslandsanbieters entstehen ebenfalls Informationskosten: Er muß die Verbraucher des Inlandsmarktes gezielt über sein Produkt informieren (u.a. auch über Garantieleistungen, was dann wieder im Zusammenhang mit dem Abbau von Rechtsunsicherheit steht), und er selbst unterliegt ebenfalls Rechtsunsicherheit. Diese liegt u.a. darin, daß ihm das inländische Rechtssystem unbekannt ist, er bspw. darüber unsicher ist, wie er Forderungen durchsetzen kann. Kosten, die er in diesem Zusammenhang aufwenden muß, sind für ihn Markteintrittskosten, denen der inländische Anbieter nicht unterliegt. Der ausländische Anbieter muß also einen höheren Preis erzielen als in seinem angestammten Markt oder eine geringere Gewinnspanne akzeptieren. Verzichtet der ausländische Anbieter unter diesen Umständen, trotz Abbau sonstiger Handelsschranken, auf die Erschließung des Inlandsmarktes, begünstigt Rechtsunsicherheit das Fortbestehen separierter Märkte in der EU und hat damit wettbewerbsbeschränkende Wirkung.

Die Intensität des Wettbewerbs hat auch Auswirkungen auf die gesamtwirtschaftliche Wohlfahrt. Wettbewerb begünstigt technischen Fortschritt, da die Unternehmen unter Wettbewerb ständig bemüht sein müssen, technische Neuerungen als erste einzuführen. Wettbewerbsdruck begünstigt daher die Einführung und Diffusion technischen Fortschritts und induziert so wirtschaftliches Wachstum. Auch der Modernitätsgrad der Volkswirtschaft ist abhängig von der Intensität des Wettbewerbs, denn

der Existenzdruck zwingt zur Einführung neuer Produktionsverfahren und löst so Investitionen aus.

Es gibt jedoch innerhalb der wettbewerbstheoretischen Diskussion auch Ansätze, die Unternehmenszusammenschlüsse positiv beurteilen. So liegt aus Sicht der Chicago-School die treibende Kraft für Unternehmenszusammenschlüsse ausnahmslos in der Erzielung höherer Effizienz. Es wird unterstellt, daß Marktzutrittsschranken unbedeutend sind und Effizienzvorteile daher durch den Druck potentieller Konkurrenz an die Konsumenten weitergegeben werden. Insofern besteht kein Widerspruch zwischen Konzentration und Wettbewerb. Es ist jedoch gezeigt worden, daß Rechtsunsicherheit als Marktzutrittsschranke zu sehen ist, so daß diese Theorierichtung (insbesondere) im Fall des EU-Binnenmarktes nicht anwendbar ist. Die Wirkungskette Rechtsunsicherheit $\Rightarrow$ höhere Transaktionskosten $\Rightarrow$ Konzentrationsprozeß $\Rightarrow$ negative Wohlfahrtseffekte ist folglich gut theoretisch begründbar.

5. Ansätze, notwendige Voraussetzungen und Schwierigkeiten quantitativer Kostenschätzungen

Die folgenden Ausführungen sind auf die qualitativen Modellanalysen, deren Vorgehensweise und Ergebnisse in Kapitel 4 referiert wurden, bezogen.

5.1 Betrachtung aus institutionenökonomischer Sicht

Aus der Sicht der NIÖ ist zunächst zu prüfen, ob die betrachteten Transaktionen sensibel für rechtliche Schranken sind. In diesem Zusammenhang wird in Kapitel 1 des von der Europäischen Kommission erhältlichen Anhangsbandes ein Schema der Klassifizierung vorgestellt, in dem sämtliche Vertragsgegenstände eingeordnet werden können. Je höher der Anteil an potentiellen grenzüberschreitenden Transaktionen mit hoher Faktorspezifität und geringer Häufigkeit, desto größer ist die tatsächliche Bedeutung der rechtlichen Schranken.

Das wesentliche Problem aus Sicht der NIÖ besteht darin festzustellen, welche Faktoren eine Zurückhaltung der Akteure in bezug auf internationale Transaktionen motivieren. Für diese Frage gilt: "The need at the present time, in my view, is for more empirical work. However, those wishing to undertake such work ... are handicapped by a lack of data." (COASE, 1993, S. 361). Je höher der Anteil monetär quantifizierbarer Transaktionskosten (Transport, Sprachprobleme, Wunsch nach Beratung, Serviceleistungen, etc.) und nicht pekuniärer Transaktionskosten (persönliche Bindung zum Verkäufer, etc.) ist, desto geringer ist der Einfluß rechtlicher Schranken im Kalkül. Durch Rechtssicherheit können nur die expliziten Elemente einer Vertragsbeziehung abgesichert werden. Je größer die Rolle impliziter Vereinbarungen ('Generalklausel', Vertrauen), desto geringer sind die Kosten, die durch Sicherheit über den formalen rechtlichen Rahmen eingespart werden können. Folglich verursachen rechtliche Schranken bei Dominanz nicht formaler Vertragselemente auch nur geringe Kosten. Die Gesamteinschätzung der makroökonomischen Kosten hängt also im wesentlichen daran, wie die Entscheidungen der Akteure motiviert sind. Dem Kalkül unter Berücksichtigung der Rechtsunsicherheit liegen nicht direkt zu beobachtende Transaktionskosten zugrunde. Die NIÖ erkennt die Existenz dieser Kosten explizit an und weist auf ihre stellenweise erhebliche

Bedeutung hin. Um sie zu quantifizieren, bedarf es jedoch sektorspezifischer Analysen. Das größte Problem besteht darin, den Faktor 'rechtliche Schranken' im individuellen Kalkül zu isolieren.

Ist ein Einfluß rechtlicher Schranken zu bejahen, bleibt zu untersuchen, wie die Unternehmen freiwerdende Ressourcen aus eventuell verringerten Informationskosten verwenden. In Abhängigkeit von spezifischen sektoralen Gegebenheiten sind gegensätzliche Reaktionen möglich. Die abschließende Beurteilung, wie die Reaktionen im Unternehmenssektor makroökonomische Variablen wie Wachstum oder Preisniveau beeinflussen, liegt außerhalb der NIÖ.

Die NIÖ erkennt explizit an, daß rechtliche Schranken einen erheblichen Einfluß auf ökonomische Transaktionen und letztlich auch auf das Wirtschaftswachstum haben. Insofern sind durchaus erhebliche makroökonomische Kosten durch rechtliche Schranken für die Verbraucher im Binnenmarkt zu konstatieren.

Direkte Kosten für die Verbraucher entstehen durch Informationskosten über ausländische Rechtssysteme. Diese Kosten sind jedoch relativ gering, da bei Gütern, die für Opportunismus sensibel sind, grundsätzlich kein Interesse besteht, im Ausland zu kaufen. Folgekosten entstehen allerdings dadurch, daß Unternehmen ihre rechtlichen Angelegenheiten nicht im Land des Hauptsitzes zentralisieren können, weil sie sonst keine Auslandsumsätze tätigen. Die daraus resultierenden Kosten muß letztendlich auch der Verbraucher tragen. Sie stellen die wesentliche Kostenkomponente rechtlicher Schranken für Transaktionen zwischen Verbrauchern und Unternehmen dar und entstehen durch Reaktionen im Unternehmenssektor und Überwälzung der Kosten auf den Verbaucher.

Die konkrete Prognose von Kosten ist nicht zentraler Untersuchungsgegenstand der NIÖ. In anderen Arbeiten wird von Gewinnen gesprochen, die durch Tausch und moderne Technologien möglich werden. Eine Verhinderung dieser Gewinne ist mit Kosten der rechtlichen Schranken gleichzusetzen. In Europa sollen Kostensenkungen für den Verbraucher insbesondere durch verschärften Wettbewerb und die Nutzung von Größenvorteilen zustande kommen. Die NIÖ geht davon aus, daß Wettbewerb eine Auslese zwischen mehr oder weniger effizienten Methoden liefert. Es konnte abgeleitet werden, daß geringere rechtliche Unsicherheit zu mehr Wettbewerb im

europäischen Binnenmarkt führt. Verbraucher, die bislang die Unsicherheitsprämie (Risikoabschlag) so hoch ansetzen, daß eine grenzüberschreitende Transaktion für sie nicht in Frage kommt, werden in einer Situation ohne Rechtsunsicherheit europaweit Preise vergleichen und damit die Marktmacht nationaler Anbieter verringern. Durch die rechtlichen Schranken kommt es zu geringerem Wettbewerbsdruck, der sich in höheren Verbraucherpreisen niederschlagen wird. Werden allerdings durch den Aufwand von Ressourcen zur Überwindung rechtlicher Schranken F&E-Aufwendungen gekürzt, wird dies auch zu Wachstumseinbußen führen.

Konkrete Einbußen durch rechtliche Schranken werden in diesem Teil nicht quantifiziert. Es scheint jedoch durchaus plausibel, Größenordnungen in zweistelliger Ecu-Milliardenhöhe anzunehmen.[159] Dies deckt sich mit den Prognosen des CECCHINI-Reports, der die Mehrkosten durch den EG-Vorschriftendschungel auf 'Dutzende' von Milliarden Ecu beziffert. Gleichzeitig wird auch dort eingeräumt, daß eine Quantifizierung sehr problematisch ist.

Die Prognose wird anhand von Erkenntnissen der NIÖ weiter qualifiziert. Ein wesentliches Ergebnis der NIÖ besteht darin, daß durch die Berücksichtigung von Transaktionskosten bestimmte Organisationsformen von Unternehmen als effizient gekennzeichnet werden, die im Gegensatz dazu von der konventionellen Theorie als ineffzient bezeichnet werden. Da z.B. trotz Realisierung von Skaleneffekten bei der Produktion eines Gutes Kontrollkosten innerhalb eines Unternehmens bei zunehmender Größe steigen, können mittelgroße Betriebe dieses Gut eventuell kostengünstiger als sehr große anbieten. Da alternative Unternehmensstrukturen transaktionseffizient sein können, wird der 'militante Wettbewerbsschutz' abgelehnt. Insofern muß sektoral geprüft werden, welche Reaktionen auf rechtliche Schranken zu erwarten sind und welche Wachstumseinbußen diese zur Folge haben können. Diese Argumente deuten darauf hin, daß die oben gemachten Schätzungen eventuell zu hoch angesetzt sind. Demgegenüber liefert die NIÖ aber auch ein wichtiges Argu-

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159 Dies wäre ein Teil der im Cecchini-Bericht prognostizierten Kostenvorteile für die Verbraucher durch den Abbau der 'traditionellen' rechtlichen Schranken; vgl. CECCHINI (1988), S. 65: Die erwarteten Kostenvorteile werden im Kredit- und Versicherungssektor in einer Höhe von 21,7 Mrd. Ecu angenommen; ebda., S. 70: in der Telekommunikation 4 Mrd. Ecu p.a.; ebda., S. 72: für andere Dienstleistungen 9,2 Mrd. Ecu; ebda., S. 62: bis zu 50 Prozent bei einigen Versicherungen.

ment in die entgegengesetzte Richtung. Wenn durch rechtliche Schranken organisatorische Innovation behindert wird, die Transaktionskosten spart und damit zu Preissenkungen führen kann, hätte dies erhebliche zusätzliche Kosten zur Konsequenz.

Abschließend soll nochmals auf die eingangs vorgenommene Eingrenzung rechtlicher Schranken verwiesen werden. Es wurde ausschließlich rechtliche Unsicherheit in grenzüberschreitenden Transaktionen betrachtet. Tendenziell ist diese zwar größer als in nationalen Transaktionen, gleichwohl sind Verfügungsrechte in nationalen Transaktionen alles andere als vollkommen sicher. Bezöge man auch die Kosten nationaler Rechtsunsicherheit in die Betrachtung mit ein, würden die ermittelten Größenordnungen der Kosten durch rechtliche Schranken beträchtlich ansteigen.

5.2 Möglichkeiten einer empirischen Überprüfung des handelstheoretischen Ansatzes

Zur Quantifizierung der in der handelstheoretischen Arbeit abgeleiteten Wohlfahrtsverluste bietet es sich an, eine Methodik ähnlich der zu verwenden, die Smith/Venables (1988) bzw. Gasiorek/Smith/Venables (1992) zur Analyse der Wohlfahrtsgewinne des Europäischen Binnenmarktes genutzt haben. Sie haben dazu ein Modell aufgestellt, das in der Tradition des Modells von Krugman (1979) steht.

Es umfaßt (mit unterschiedlichem Detaillierungsgrad) alle von der Errichtung des Binnenmarktes betroffenen Industriesektoren und Länder. Über Krugman hinausgehend erlaubt das Modell hauptsächlich eine Verallgemeinerung des Marktverhaltens von Unternehmen (Cournot- oder Bertrand-Strategie) sowie der Marktstruktur (mit oder ohne Ein- und Austritt von Firmen). Nach einer Kalibrierung des Modells anhand von Eurostat-Daten lassen sich so die Wohlfahrtsauswirkungen des Binnenmarktes (der pessimistisch lediglich als 2,5-prozentige Reduktion der Handelskosten, optimistisch zusätzlich als echte Marktintegration, bei der die Unternehmen nicht mehr zwischen Heim- und Exportmärkten preisdiskriminieren können, modelliert wird, siehe Gasiorek/Smith/Venables 1992, S. 15) unter den verschiedenen Annahmen ermitteln. Ursachen dieser Wohlfahrtsauswirkungen sind innerhalb des Modells hauptsächlich eine durchschnittliche erhöhte Firmengröße, die zu Skaleneffekten führt,

sowie eine erhöhte Firmenzahl auf den einzelnen Märkten, die zu einer Zunahme der Konkurrenz führt.

Grundsätzlich unterscheiden sich die Wohlfahrtsverluste durch Rechtsunsicherheit kaum von denen, die durch andere Handelsbarrieren innerhalb der EU entstehen. Daraus folgt, daß das Modell von Smith/Venables auch auf erstere anwendbar ist. Die Durchführung einer solchen Computermodellierung war aber im Rahmen dieser Studie unmöglich, da sie einen enormen Aufwand bedeutet. Insbesondere verlangt sie die Durchführung folgender Schritte:

1. Zunächst müssen die von Rechtsunsicherheit maßgeblich betroffenen Industriesektoren und Länder ermittelt werden, die in das Modell aufzunehmen sind.

2. Für die ermittelten Sektoren ist jeweils zumindest das aktuelle Ausmaß von Handel und nationalen Verkäufen, der jeweilige Grad unvollkommener Konkurrenz und das Ausmaß möglicher Skaleneffekte zu bestimmen (vgl. Gasiorek/Smith/Venables 1992, S. 8ff.).

3. Anschließend muß ermittelt oder geschätzt werden, welche Handelskostenreduktion (pessimistisch, optimistisch) mit der Beseitigung der Rechtsunsicherheit in der EU einhergeht.

4. Aufbauend auf diesen Informationen kann ein Modell analog dem von Smith/Venables genutzt werden, um die Auswirkungen dieser Handelskostenreduktion auf Firmengröße und Firmenzahl in den einzelnen Industriesektoren zu errechnen. Daraus lassen sich dann die Veränderungen in Produktion und Handel und damit auch die Wohlfahrtsauswirkungen der Beseitigung der Rechtsunsicherheit nach Sektoren und Ländern ermitteln.

Über die reine Machbarkeit einer solchen Modellierung hinaus stellen sich aber auch noch Fragen nach der Zuverlässigkeit der erhaltbaren Ergebnisse. Selbst Gasiorek/Smith/Venables (1992, S. 29) warnen davor, ihre Ergebnisse überzuinterpretieren, da diese immer den Begrenzungen des Modells und der zur Verfügung stehenden Daten unterliegen. Darüber hinaus ließe sich mit einer Vorgehensweise analog der von Smith/Venables immer nur ein Teil der gesamten Wohlfahrtseffekte ermitteln, da sie,

wie schon Baldwin (1989, 1992) kritisiert, die langfristigen, dynamischen Wachstumsauswirkungen der Handelsausweitung außer acht läßt. Vorschläge, wie letztere in die Quantifizierung der Wohlfahrtseffekte einzubeziehen wären, macht der Abschnitt 5.5.2 unten, der die aktuellen Ansätze zur Integration von Neuer Außenwirtschafts- und Wachstumstheorie vorstellt.

5.3 Methoden und Schwierigkeiten einer empirischen Überprüfung des options- und portfoliotheoretischen Ansatzes

Das Hauptproblem der empirischen Behandlung von Rechtsunsicherheit liegt in der Formalisierung und Quantifizierung von Unsicherheit. Letztlich sind für eine empirische Aussage Daten zur Beschreibung der Unsicherheit notwendig.

Im Rahmen einer Regressionsanalyse stellt sich dann die empirische Frage, welchen Einfluß die formalisierte Unsicherheit auf das Angebot und die Nachfrage nach Konsumgütern hat und letztlich - über diese Größen - auf die Wachstumsrate.

Die bisherigen Versuche, Unsicherheit ökonomisch zu quantifizieren, haben deshalb auch alle das Problem, daß Unsicherheit nur als Instrumentenvariable in eine Untersuchung eingehen kann, das heißt, daß wiederum andere ökonomische Variablen das Maß „Unsicherheit" bestimmen. In der Wechselkurstheorie werden bevorzugt die Streuungen der Kurse als Unsicherheitsmaß genommen; Inflation, oder die Häufigkeit von Gesetzesänderungen sind weitere Möglichkeiten, ein Maß für Unsicherheit zu konstruieren.[160] Am vielversprechendsten erscheint die Verwendung von Daten aus dem International Country Risk Guide[161], damit den verschiedenen Ländern direkt ein Maß an Rechtsunsicherheit zugeordnet werden kann.

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160 Vgl. hierzu die Untersuchungen von Krugman (1989), Pindyck and Solimano (1993), Hasset and Metcalf (1994) und Weder (1994). Letztere untersucht allerdings nur Entwicklungsländer.

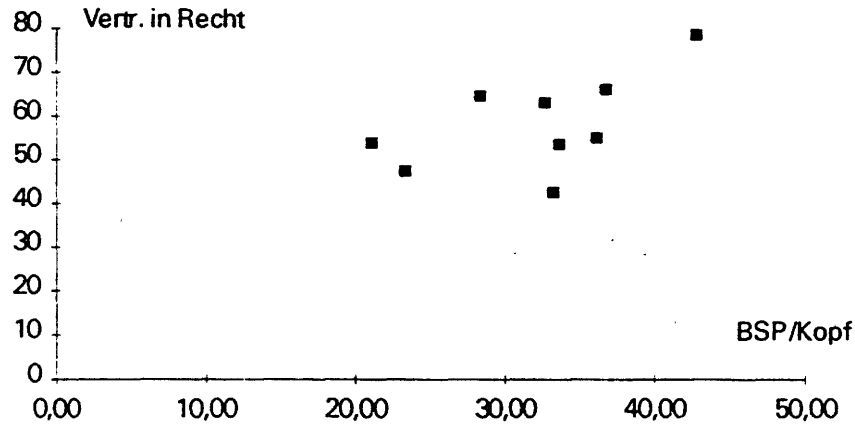
161 Vgl. die Untersuchung und die Datenquelle in Knack und Keefer (1994).

5.4 Möglichkeiten der empirischen Überprüfung des zeitinkonsistenz-theoretischen Ansatzes

Ziel ist es hier, eine Methode zu entwickeln, mit deren Hilfe entschieden werden kann, ob Zeitinkonsistenzprobleme auch in dem Problembereich der Rechtsunsicherheit eine wichtige Rolle spielen, wie es im obigen Modell vorgestellt wurde.

Um empirische Schätzungen über makroökonomische Kosten zu liefern, ist es nötig, den Begriff der Kosten zu definieren. Es wird hier vorgeschlagen, als Kosten der Rechtsunsicherheit für den Verbraucher die Variablen Inflationsrate und Wirtschaftsleistung (BSP/Kopf) zu benutzen.

Im Rahmen einer deskriptiven Statistik kann man zeigen, daß die Variablen "Vertrauen in das Rechtssystem" und "BSP/Kopf" in einem Zusammenhang stehen. Dazu können entsprechende Daten aus dem World Value Survey 1980 nutzt werden. Dieser beinhaltet Einschätzungen der Bevölkerung verschiedener Staaten zu bestimmten öffentlichen Institutionen. Man erkennt an der gezeigten Graphik, daß ein proportionaler Zusammenhang zwischen den beiden Variablen vermutet werden kann.



Doch ist zu bedenken, daß bei einer solchen Analyse nur das Vertrauen der Bevölkerung in die Institutionen des eigenen Staates berücksichtigt werden. Probleme des grenzüberschreitenden Verkehrs bleiben dabei unberücksichtigt. Eine solche Analyse ist nicht möglich, weil keine Daten hierzu vorliegen. Jedoch legen die Ergebnisse der innerstaatlichen Analyse die Vermutung nahe, daß Vertrauen in Rechtssysteme des Auslandes das Verhalten der Konsumenten beeinflußt.

Solche grenzüberschreitenden Daten müssen erst erhoben werden. Dazu sollten folgende Kriterien berücksichtigt werden:

1. Zur Analyse eines möglicherweise eingetretenden Wandels (longitudiale Analyse) müssen die Erhebungen zu verschiedenen Zeitpunkten erhoben werden. Eine solche Erhebung ist für die Vergangenheit nicht möglich, deshalb scheidet eine solche Analyse aus.

2. Zum Vergleich der Einstellungen der Konsumenten innerhalb der EU wird eine gesamteuropäische Erhebung benötigt, die die internationale Vergleichbarkeit der Daten zuläßt.

3. Eine Frage in einer solchen Erhebung könnte ähnlich der des World Value Service lauten: "Sagen sie mir, wieviel Vertrauen Sie in das Rechtssystem der folgenden Staaten haben", mit einer Auflistung der EU-Staaten. Möglich wäre eine Erweiterung der Liste um andere Institutionen oder um einige Nicht-EU-Staaten.

Mit den so gewonnen Daten ließe sich eine Cross-Country Analyse durchführen, die auf einer deskriptiven Ebene das Verhältnis zwischen makroökonomischen Kosten und Vertrauen in Institutionen beschreibt. Eine Änderung der Einstellungen der Konsumenten ließe sich jedoch mit einer solchen Methode nicht darstellen.

Möchte man ein solches Ziel verfolgen und mehr Klarheit darüber gewinnen, auf welchen Kanälen Rechtsunsicherheit wirkt, muß man einen anderen Weg beschreiten. Grundlegendes Problem dabei ist, ein Maß für Glaubwürdigkeit zu entwickeln. Man kann dazu beispielsweise den von Baxter (1985) vorgeschlagenen Ansatz benutzen, um zu untersuchen, ob Glaubwürdigkeit einen Einfluß auf die Entwicklung von

Rechtssicherheit hat. Wenn das tatsächlich der Fall ist, dann können die makroökonomischen Kosten von Rechtssicherheit als Differenz zwischen den Werten der realen Welt und denen einer hypothetischen Welt ohne Zeitinkonsistenzprobleme ermittelt werden.

Zunächst benötigt man die Annahme, daß sich Regierungspolitik in einem Regressionsmodell darstellen läßt. Es sei y die Zielvariable der Regierungspolitik, X ein Datenvektor, θ der Vektor der Regressionskoeffizienten und u der Störterm. Dann soll gelten:

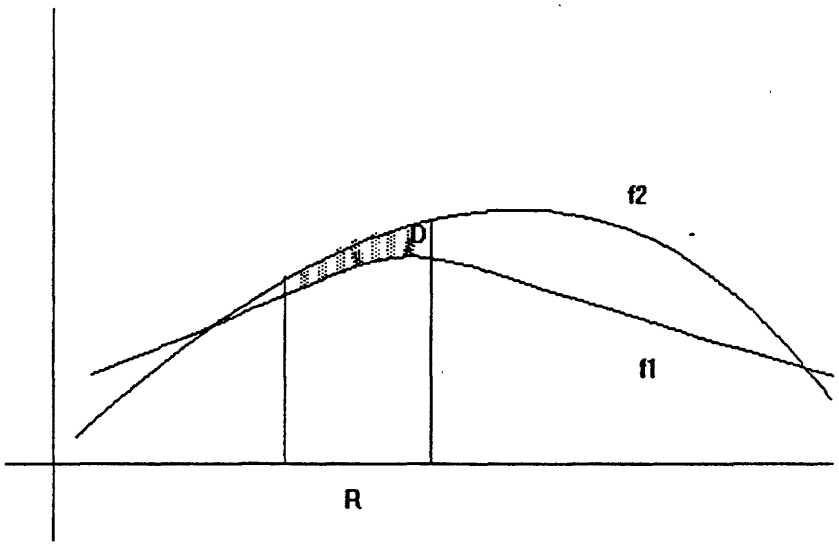
$$y = X'\theta + u.$$

Die Agenten haben eine vorher gefaßte Meinung über die Entwicklung der Regierungspolitik. Das heißt, sie verfügen über eine Wahrscheinlichkeitsverteilung über den Vektor θ; dabei gibt ihre Varianz an, wie sicher sich die Agenten dieser Einschätzung sind. Die Agenten passen aber im Laufe der Zeit ihre Meinung an die Entwicklung der Regierungspolitik an, indem sie vergangene Ereignisse mit bei ihrer Verteilung berücksichtigen. Theoretisch bestimmen sie ihre Verteilung so, daß sie ihre Bayes-Verlustfunktion minimieren.

Die Regierungspolitik kann in zwei Klassen eingeteilt werden, entweder Reform (R) oder Nicht-Reform (N). Die Agenten müssen nun bestimmen, ob die beobachtete Regierungspolitik eher einer Reform- oder einer Nicht-Reform-Politik entspricht. Wenn f die sich anpassende Dichtefunktion der Verteilung von θ ist, dann läßt sich Glaubwürdigkeit C definieren als

$$C = \int_{\theta \in R} f(\theta)\ d\theta$$

Das bedeutet, man betrachtet das Integral über all die Werte von θ, die einer Reformpolitik entsprechen. Die Funktion f kann sich über die Zeit ändern, das heißt die Wahrscheinlichkeit von bestimmten Werten für θ ändert sich im Laufe der Zeit. Damit ändert sich dann auch der Wert für die Glaubwürdigkeit einer bestimmten Politik.



Nehmen wir an, daß sich die Verteilung von f1 auf f2 ändert. Dann vergrößert sich der Wert für die Glaubwürdigkeit um die Fläche, die zwischen f2 und f1 in dem von R bestimmten Intervall liegt (die schraffierte Fläche).

Nach der Konstruktion einer solchen Variable *C* kann man untersuchen, ob Glaubwürdigkeit einen Einfluß auf bestimmte Indikatoren hat. Wenn wir annehmen, daß sich verringernde Rechtsunsicherheit u.a. in sinkenden Preisen äußert, ließe eine negative Korrelation von *C* und einem Preisindex vermuten, daß Glaubwürdigkeit über Rechtsunsicherheit Einfluß auf die Preisentwicklung hat. Vielleicht können auch noch andere Indikatoren für Rechtsunsicherheit konstruiert werden. Eine andere Möglichkeit wäre, Zeitreihen von diversen Einschätzungen von Länder-Risiko-Indizes mit dieser Variablen zu korrelieren.

5.5 Methoden und Schwierigkeiten einer empirischen Überprüfung der wachstumstheoretischen Ansätze

5.5.1 Globaler Ansatz

Die theoretische Analyse in der in 4.5.1 skizzierten Arbeit hat gezeigt, daß Rechtsunsicherheit zu einer Verminderung der Rentabilität des Kapitals führt. Dabei

ergab sich eine direkte Beeinflussung durch eine Erhöhung der Unsicherheit bzgl. der property rights und eine indirekte über die Verminderung der Unternehmensgewinne. Im folgenden werden Methoden zur empirischen Überprüfung beider Ansätze aufgezeigt.

a) Property Rights und Wachstum: Growth Accounting

Die Beziehung zwischen Rechtsunsicherheit und Wachstum ist empirisch bisher weitgehend unerforscht. Allerdings gibt es eine vor allem auf Entwicklungsländer ausgerichtete Analyse institutioneller Wachstumsdeterminanten, welche sich mit der Beziehung zwischen Wachstum und ökonomischer Freiheit (Scully, 1988) sowie Wachstum und dem politischen System beschäftigt (Pourgerami, 1992). Barro (1991) findet eine negative Beziehung zwischen property rights, definiert als politische Morde pro Million der Bevölkerung, und Wachstum. Zusammen mit der Studie von Alesina und Perotti (1994), die u.a. Demokratie und politische Stabilität als Wachstumsdeterminante identifiziert, läßt sich schlußfolgern, daß institutionelle Faktoren eine signifikante Bedeutung für das Wachstum haben.

Untersuchungen, welche ausschließlich den Einfluß von property rights auf das Wachstum für Industrieländer analysieren oder zumindest Variablen verwenden, welche für Industrieländer ebenfalls relevant sind, gibt es bisher nur vereinzelt. Das prinzipielle Problem aller Untersuchungen liegt in dem sample, welches Industrie- und Entwicklungsländer enthält. Es besteht somit die Gefahr, daß Variablen, welche für Industrieländer allein nicht signifikant sind, in einer solchen Querschnittsanalyse signifikant sind. In diesem Fall lassen sich die quantitativen Aussagen nicht auf Industrieländer, worunter die EU fällt, übertragen.

Trotz obiger Probleme werden im folgenden zwei Studien vorgestellt, welche Variablen enthalten, die für eine entsprechende Untersuchung auf EU-Ebene verwandt werden könnten.

Die Verbindung zwischen property rights und Wachstum wird von Knack und Keefer (1994), welche ihre Daten aus dem International Country Risk Guide beziehen, analysiert. Diese Daten reflektieren die subjektive, d.h. von Experten ausgedrückte, Qualität politischer Institutionen in bezug auf das Investitionsrisiko für diese Länder.

Die Daten sind für 111 Länder verfügbar und umfassen fünf Kategorien. Als Variablen werden verwandt **rule of law**, d.h. das Ausmaß, in dem Institutionen wirkungsvoll Gesetze implementieren, die Streitigkeiten juristisch regeln und die Macht ordnungsgemäß ausüben, **Korruption** in der Regierung, gemessen an der Häufigkeit von Schmiergeldzahlungen in den Bereichen internationaler Handel, Besteuerung und Polizeischutz, **Qualität der Bürokratie**, was deren Unabhängigkeit von politischen Einflüssen einschließt, das **Enteignungsrisiko** und die **Zuverlässigkeit der Regierung** bei der Einhaltung von Verträgen, was das Risiko einer Vertragsänderung aufgrund einer Regierungsänderung einschließt.

Die ersten drei Variablen werden auf einer Skala von eins bis sechs, die letzten drei Variablen auf einer Skala von eins bis zehn gemessen, wobei ein höherer Wert mit einer aus Sicht der Investoren günstigeren Investitionssituation einhergeht. Rechtsunsicherheit ist vor allem in der rule of law Variablen enthalten.

Im Rahmen einer Querschnittsanalyse erweist sich die rule of law Variable als die wichtigste. Ihre Einbeziehung in die Regressiongleichung für die Wachstumsrate führt zur Insignifikanz aller anderen Variablen.

Diese Untersuchung macht deutlich, daß der gesetzliche Rahmen einen Einfluß auf die Wachstumsrate hat. Die rule of law Variable kann als Approximation des Grades an Rechtssicherheit, aufgefaßt werden.

Neben den oben ausgeführten Beschränkungen, liegt die Begrenzung der Aussagekraft dieser Studie für die Folgen der Rechtsunsicherheit in der EU in der Definition der rule of law Variablen, bei der die juristische Regelung von Streitigkeiten nur ein Aspekt ist.

Torstensson (1994) testet anhand von 68 Ländern den Einfluß von property rights auf das Wachstum. Operationalisiert wurde der Begriff der property rights analog zu obiger Studie mittels Expertenbefragung auf einer Skala von eins bis vier. Getestet wurden die Variablen **Statprop**, d.h. das Ausmaß, in dem Besitz sich in der Hand des Staates befindet, und **Arbsei**, das ist das Ausmaß in dem Individuen vor willkürlicher Beschlagnahme ihres Besitzes sicher sind, wobei sich letztere Variable als allein signifikant herausstellt. Die in dem sample enthaltenen EU-Staaten (Belgien, Dänemark, Frankreich, Griechenland, Irland, Italien und Großbritannien) erhielten aber

durchweg einen Wert von 1, d.h. dort sind Individuen vor der willkürlichen Beschlagnahme ihres Besitzes sicher. Wachstumsdifferenzen zwischen diesen Ländern können somit nicht durch property rights erklärt werden.

Um für die EU eine adäquate Erhebung durchführen zu können, muß man folglich Experten zu dem Ausmaß von Rechtsunsicherheit in der EU und anderen Industrieländern befragen. In einer Querschnittsanalyse wäre sodann die Signifikanz dieser Variablen zu testen.

Obwohl prinzipiell möglich, hat dieses Vorgehen den Nachteil, daß die Anzahl der Industrieländer nicht den üblichen statistischen Anforderungen entspricht. Wenn man aber in die Expertenbefragung Entwicklungsländer mit einbezöge, bestände die Gefahr, daß die entsprechenden Variablen für Entwicklungländer andere als die in bezug auf Industrieländer zu ermittelnden Einflußfaktoren reflektieren und damit ungeeignet zur Ermittlung von Wachstumsdifferenzen zwischen entwickelten Ländern sind.

b) Innovation und Wachstum: Fallstudien

Um die Wirkung von Rechtsunsicherheit auf Wachstum im Rahmen innovationsgetriebener Wachstumsmodelle zu ermitteln, muß zunächst modellimmanent der Effekt von Rechtsunsicherheit auf das Wachstum ermittelt werden.

Die Wirkung von Rechtsunsicherheit auf das Wachstum ergibt sich allgemein als

$$\frac{\partial g}{\partial RU} = \frac{\partial g}{\partial p}\frac{\partial p}{\partial t}\frac{\partial t}{\partial RU},$$

d.h. Rechtsunsicherheit schlägt sich in einem Preisaufschlag nieder, welcher teilweise überwälzt werden kann. Der nicht überwälzbare Teil von Rechtsunsicherheit schlägt sich in einer Verminderung der Nettoerlöse nieder und induziert ein Absinken der Innovationsrate und damit des Wachstums.

In der Praxis erfordert dies folgendes Vorgehen:

1. Zuerst ist der innovative Sektor zu identifizieren, was z.B. mit Hilfe sektoraler Patentanmeldungen getan werden könnte, und sein Einfluß auf das Wachstum zu ermitteln.

2. Sodann ist zu ermitteln, inwiefern der innovative Sektor von Rechtsunsicherheit betroffen ist. Ist dies nicht gegeben, so muß geprüft werden, ob Faktormobilität dazu führt, daß Rechtsunsicherheit in einem anderen als dem innovativen Sektor zu einem Fortpflanzen von Rechtsunsicherheit auf den innovativen Sektor führt.

3. Mit Hilfe von Unternehmensbefragungen kann dann geklärt werden, ob diese Art der Rechtsunsicherheit zu einer Verminderung der F&E-Tätigkeit führt.

4. In einem letzten Schritt lassen sich abschließend die Kosten der Rechtsunsicherheit im Binnenmarkt durch Wachstumsverluste ausdrücken.

5.5.2 Integration von handels- und wachstumstheoretischen Ansätzen

Mangels empirischer Befunde und Implementationen ist eine Evaluation der Modelle der Neuen Wachstumstheorie äußerst diffizil. Es stellt sich die Frage, welches Modell für eine empirische Analyse verwendet werden soll. Komplizierte Modelle mit größerer theoretischer Aussagekraft verfügen meist über viele Variablen und Parameter, für die die entsprechenden Daten nicht verfügbar, unvollständig, unzuverlässig oder unbeobachtbar sind, z.B. die Diffusion von Wissen oder die Zuweisung von Innovationen. Baldwin (1989) ist zwar der Ansicht, daß die Neue Wachstumstheorie geeignet ist für die Messung der Effekte des vollendeten Binnenmarktes, jedoch verwendet er in seinen Studien (1989 und 1992) einfache Modelle ohne technologischen Fortschritt. Seine Ergebnisse werden im nächsten Abschnitt kurz dargestellt. Anschließend werden die Möglichkeiten einer Überprüfung des Modells von Grossman und Helpman (1990) untersucht.

a) Baldwins empirischer Ansatz

Der "Cecchini-Report" von 1988, der Wachstumsgewinne des Bruttoinlandsprodukts (BIP) von 2,5 bis 6,5 % infolge der Vollendung des Binnenmarktes prognostiziert, war Anlaß zu zwei empirischen Untersuchungen von Richard E. Baldwin (1989 und 1992). Cecchini mißt nur die einmaligen statischen Effekte für Produktivität und Output. Diese beinhalten weder Änderungen des Kapital- und Humankapitalbestandes noch des technologischen Fortschritts. Aufgrund steigender Skalenerträge können jedoch (laut Baldwin) - zumindest mittelfristig - dynamische Effekte, die proportional zu den statischen sind, auftreten und das Wachstum langfristig erhöhen.

Baldwin (1992) verwendet eine einfache Version von Romers Kapital-Akkumulierungs-Modell. Er setzt die Technologie-Wachstumsrate = 0, die Konstante $B = 1$ und normiert den Arbeitseinsatz auf $N = 1$. Dadurch ergibt sich die Produktionsfunktion

$$Y = K^{\alpha+\beta},$$

d.h. der Output (Y) wächst proportional zum Kapital (K) mit dem Faktor $(\alpha + \beta)$, wo β die steigenden Skalenerträge repräsentiert. D.h. aber auch, daß dieses Modell vom technologischen Fortschritt und, wenn $(\alpha + \beta) < 1$ ist wie anderswo (siehe unten) gezeigt, auch von den Neuen Wachstumsmodellen unabhängig ist.

Bestehende Handelsbeschränkungen beeinflussen nun über die Konsumquote und den Realzins (für Konsumverzicht) den Kapitalbestand und somit indirekt den Output. Dessen zusätzliches Wachstum aufgrund der Handelsliberalisierung ist letztendlich nur noch von dem statischen Wachstumseffekt und der Skalenelastizität des Faktors Kapital $(\alpha + \beta)$ abhängig.

Die statische Wirkung modelliert Baldwin nun durch Cecchinis Prognosen (zwischen 2,5 und 6,5 %). Zur Berechnung des dynamischen Effekts verwendet er mehrere frühere Schätzungen des Parameters $(\alpha + \beta)$ für fünf Staaten der Europäischen Union.[162] Diese Schätzungen liegen zwischen 0,22 und 0,58; sie sind also wie schon erwähnt stets kleiner als Eins. Daraus folgt, daß die dynamische Wirkung zwischen 24

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162 Diese fünf Staaten sind Belgien, Deutschland, Frankreich, Großbritannien und die Niederlande.

und 136 % der statischen betragen kann, und somit eine zusätzliche Erhöhung der Wachstumsrate des BIP zwischen 0,6 und 8,9 Prozentpunkten aufgrund der Vollendung des Binnenmarktes möglich ist.[163]

Bleiben jetzt allerdings Handelsschranken aufgrund von Rechtsunsicherheit innerhalb der Union bestehen, so vermindern sich statische und dynamische Wachstumseffekte. Für eine quantitative Bewertung müßte man die Größenordnung des Faktors für Preisaufschläge von Handelshemmnissen bestimmen oder verschiedene Werte hiervon simulieren, dann die statischen Schätzungen von Cecchini revidieren, und schließlich die totalen Wachstumseinbußen berechnen.

b) Probleme einer empirischen Überprüfung des Modells von Grossman und Helpman

Die theoretische Analyse hat gezeigt, daß rechtliche Schranken die durch die Vollendung des Binnenmarktes prognostizierten langfristigen Wachstumsraten beeinträchtigen können, wenn gewisse Voraussetzungen zutreffen. Diese müßten daher zunächst empirisch untersucht werden. Die Aufteilung der Europäischen Union in zwei Regionen - eine mit hohem und eine mit niedrigem Technologiestand - dürfte noch relativ einfach sein, indem man die sektoral disaggregierten Produktionswerte der einzelnen Staaten auswertet. Die Bestätigung der für die Ergebnisse wichtigen Annahme, daß nun vorwiegend in der hochtechnologisierten Region rechtliche Hemmnisse gegenüber Konsumgütern der anderen Region vorliegen, dürfte sich dagegen als schwierig erweisen. Sie muß im Prinzip durch Konsumentenbefragungen in allen Mitgliedsstaaten erfolgen. Entsprechende oder ähnliche Daten liegen uns zur Zeit nicht vor.

Wenn alle Annahmen plausibel sind, könnten die langfristigen Wachstumsraten der Europäischen Union in der Freihandelssituation ohne rechtliche Schranken sowie bei Vorliegen eben dieser Schranken geschätzt und verglichen werden. Hierbei treten jedoch größere technische und Daten-Probleme auf, auf die hier im einzelnen nicht eingegangen werden soll. Interessenten seien auf den schon erwähnten, von der Europäischen Kommission erhältlichen Anhangsband, dort Kapitel 7, verwiesen.

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163 Vgl. Baldwin (1992), S.169f.

6. Kostenszenarien im Zusammenhang mit (antizipierten) Rechtsstreitigkeiten

(unter Mitarbeit von Jörg Chittka und Matthias Grawitter)

In diesem Kapitel wird versucht, die **direkten statischen Kosten** rechtlicher Unsicherheit zu ermitteln. Diese Kosten haben mehrere Komponenten.

(1) Kosten durch den Erwerb mangelhafter Güter, die nicht oder nur zum Teil ersetzt werden

(2) Kosten für Beschwerden beim Verkäufer im Ausland (z.B. Telefonate, Korrespondenz, Übersetzungen, Transport, etc.)

(3) Kosten für Verbraucher durch Nicht-Nutzung ausländischer Preisvorteile aufgrund einer stark risikoaversen Haltung (Überbewertung des Ausfallrisikos durch Unmöglichkeit der ausländischen Klagemöglichkeiten)

(4) Kosten für Verbraucher durch Nicht-Nutzung ausländischer Qualitätsvorteile und/oder eines effizienteren ausländischen Rechtssystems (entsprechend eines Risikos des Erwerbs mangelhafter Ware und besserer Möglichkeiten der Durchsetzung von Rechtsansprüchen beim Erwerb mangelhafter Ware)

Die hier vorgenommenen Einschätzungen sind in erster Linie als vorläufige Ideen für konkretere Ermittlungen der Kosten zu verstehen. In diesem Kapitel werden Methoden vorgestellt, die bei besserer Informationslage zu nutzbaren Ergebnissen führen. Durch nur im Ansatz vorhandene Informationen liegt bei sämtlichen Schätzungen ein erheblicher Spekulationsgrad vor, so daß alle Ergebnisse mit großer Vorsicht zu betrachten sind und wir mit Hilfe von Szenarien Bandbreiten vorstellen, innerhalb derer plausible Werte liegen könnten. Auf fehlende Informationen, die relativ große Interpretationsspielräume lassen, wird an gegebener Stelle hingewiesen. Dort erfolgen auch konkrete Vorschläge für die Erhebung zukünftiger Daten im Eurobarometer oder von Sonderuntersuchungen, die zu genaueren Werten führen können. Diese Vorschläge sind jeweils eingerahmt.

Zunächst werden die Informationen des EUROBAROMETER (1995) auf die Fragestellung zugeschnitten, und es werden einige grundlegende Interpretationen vorgenommen. Darauf basierend orientiert sich der weitere Aufbau an der oben getätigten Klassifikation der Kosten. Abschließend findet eine Gesamtbewertung der ermittelten Kosten statt, insbesondere wird auf die sehr bedeutenden Vorbehalte im Zusammenhang mit einer Quantifizierung auf der Basis der vorhandenen Daten hingewiesen.

6.1 Themenrelevante Zusammenstellung der Daten des Eurobarometers

Das Eurobarometer (1995) liefert die relevanten Informationen nur indirekt, so daß zunächst einige **neue Zusammenstellungen des Zahlenmaterials** erfolgen. In diesem Kapitel versuchen wir zunächst eine Vorstellung von der Bedeutung internationaler Verbrauchertransaktionen zu erhalten. Rechtsunsicherheit wird nur dann bedeutsam, wenn Verbraucher nicht vollkommen mit ihren Käufen zufrieden sind und bei einer Beschwerde nicht vollständig kompensiert werden. Das Eurobarometer liefert dazu einige Informationen. Auf dieser Basis wird hier ermittelt, wie hoch das konkrete Risiko ist, bei einem Kauf im EU-Ausland einen Teil des Kaufwertes einzubüßen.

6.1.1 Die Signifikanz des grenzüberschreitenden Konsums in der EU

Zunächst ist es interessant zu erfahren, wieviele Europäer im EU-Ausland kaufen. Diese Gruppe wird im folgenden als **'Eurokonsumenten'** bezeichnet. Die Eurokonsumenten machen nach Hochrechnung des Eurobarometers 24,04 Prozent aller Verbraucher der EU aus[164]. Dabei handelt es sich jedoch lediglich um Bürger aus

164 Zu dieser Zahl kommt man, wenn man die sich aus der Addition der letzten Spalte der Seite 12 des Eurobarometers ergebende Anzahl von 3798 Konsumenten, die grenzüberschreitend gekauft haben, zur Gesamtheit der Befragten (15.800) in Beziehung setzt.

Mitgliedstaaten der EU, die überhaupt einmal im EU-Ausland gekauft haben. Jeder Urlauber, der im Urlaubsland getankt hat, etc. ist hier mitgezählt. Immerhin 56,72 Prozent der Eurokonsumenten haben im Gesamtwert unter 500 Ecu im Ausland gekauft. Interessant ist es zu erfahren, welchen Umfang die grenzüberschreitenden Käufe von Verbrauchern haben. Dazu haben wir versucht, in Tabelle 1 die Informationen aus dem Eurobarometer hochzurechnen. Die Vorgehensweise ist folgendermaßen: Die vom Eurobarometer vorgegebenen vier Preisklassen der im Ausland konsumierten Güter sind in Spalte A abgetragen. Genauere Informationen sind nicht vorhanden, so daß die in Spalte B vorgenommenen Annahmen über die repräsentativen Durchschnittswerte innerhalb der Preisklassen rein spekulativ sind. In Spalte E werden auf der Basis der Daten des Eurobarometers, die in den Spalten C und D eingetragen sind, die Anteile der Eurokonsumenten innerhalb der Preisklassen an der Gesamtheit der Befragten ermittelt. Diese Quoten werden als repräsentativ für alle über 15jährigen Verbraucher der EU betrachtet. Die Multiplikation der Quoten in Spalte E mit der Gesamtzahl der über 15jährigen EU-Bewohner und dem spekulativen gewichteten Durchschnittswert der Preisklassen aus Spalte B ergibt in Spalte G die Gesamtwerte für den Eurokonsum in Mio. Ecu nach Preisklassen. Die Totalsumme ist im Feld G5 zu finden. In der unteren Hälfte der Tabelle 1 werden die Anteile der Gesamtwerte der Preisklassen am EU-BIP bzw. dem privaten EU-Konsum ermittelt. Der Anteil der gesamten Auslandskäufe am EU-BIP findet sich im Feld C10, der Anteil am gesamten privaten EU-Konsum in Feld F10.

Wie gesagt, ist der Ansatz der Durchschnittswerte der Wertklassen in Spalte B problematisch. Es liegen keine Informationen über diese Werte vor, so daß an dieser Stelle lediglich eine Bandbreite angenommen werden kann. In der Tabelle haben wir

folgende Werte als plausibel erachtet. In der Klasse unterhalb 500 Ecu sind auch sämtliche 'Kleinstkäufe' erfaßt, so daß der Mittelwert der Preisklasse von 250 Ecu mit Sicherheit zu hoch angesetzt wäre. Aus diesem Grunde haben wir 100 Ecu gewählt. Für die beiden höheren Preisklassen haben wir die Mittelwerte ausgewählt und in der höchsten Preisklasse 15000 Ecu angesetzt, da in dieser Preisklasse außer Autos lediglich Immobilien eine Rolle spielen dürften.[165]

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165 Hierbei handelt es sich um vorsichtige Schätzungen auf der Basis von unterstellten Durchschnittswerten für die Gesamtheit des Gemeinsamen Marktes. Für einen Teilausschnitt desselben, nämlich die grenznahen Gebiete benachbarter Mitgliedstaaten, ergeben sich aus den Statistiken des Pilotprojektes der Europäischen Kommission (siehe Teil I, Kapitel B) weitergehende Tendenzen: Die Durchschnittswerte nach Hauptsektoren der Streitigkeiten, die wohlgemerkt im Stadium der Datenerfassung nicht vor ordentlichen Gerichten geltend gemacht wurden, sind wie folgt:

Bank- und andere Finanzdienstleistungen (Basis: 343 Streitfälle):	46.457 ECU
Versicherung (Basis: 216 Streitfälle):	56.076 ECU
Immobilien (Basis 299 Streitfälle):	26.843 ECU
Automobile (Basis: 134 Streitfälle):	6.845 ECU

Die Zahlen bestätigen einerseits die Richtigkeit des oben zugrundegelegten Durchschnittswerts von 15.000 ECU per Streitfall für die höchste Preisklasse. Sie zeigen aber auch an, daß die Bedeutung dieser Preisklasse gewichtig ist, daß tendenziell auch und gerade in dieser Klasse die Streitfälle zunehmen und daß sie sich auf mehr Sektoren erstreckt.

Tab. 1: Die Höhe des grenzüberschreitenden Konsums in der EU

	A	B	C	D	E	F	G
	Preisklassen	Durchschnitts-wert in Ecu	Zahl der Euro-Konsumenten*	Zahl der Befragten *	Anteil der Euro-konsumenten an den Befrag-ten in %	Bewohner über 15 J.**	Gesamtwert in Mio. Ecu
1	< 500	*100*	2123	15800	13,437	302,51	4064,827
2	500 - 1999	*1250*	1167	15800	7,386	302,51	27929,24
3	2000 - 5000	*3500*	279	15800	1,766	302,51	18698,14
4	> 5000	*15000*	174	15800	1,101	302,51	49959,53
5							**100651,7**
-		EU-BIP Konsum in Mrd. Ecu***	Anteil der EU-Auslandskäufe am Gesamt-BIP in %		privater EU-Konsum in Mrd. Ecu****	Anteil der EU-Auslandskäufe am Gesamt-Konsum in %	
6	< 500	5873,1	0,069		3682,43	0,11	
7	500 - 1999	5873,1	0,476		3682,43	0,758	
8	2000 - 5000	5873,1	0,318		3682,43	0,508	
9	> 5000	5873,1	0,851		3682,43	1,357	
10		5873,1	**1,714**		3682,43	**2,733**	

spekulative Werte kursiv

* Eurobarometer (1995), S. 12

** eigene Berechnung nach Eurostat (1994), S. 126f.

*** Werte für 1992 nach Eurostat (1994), S. 41

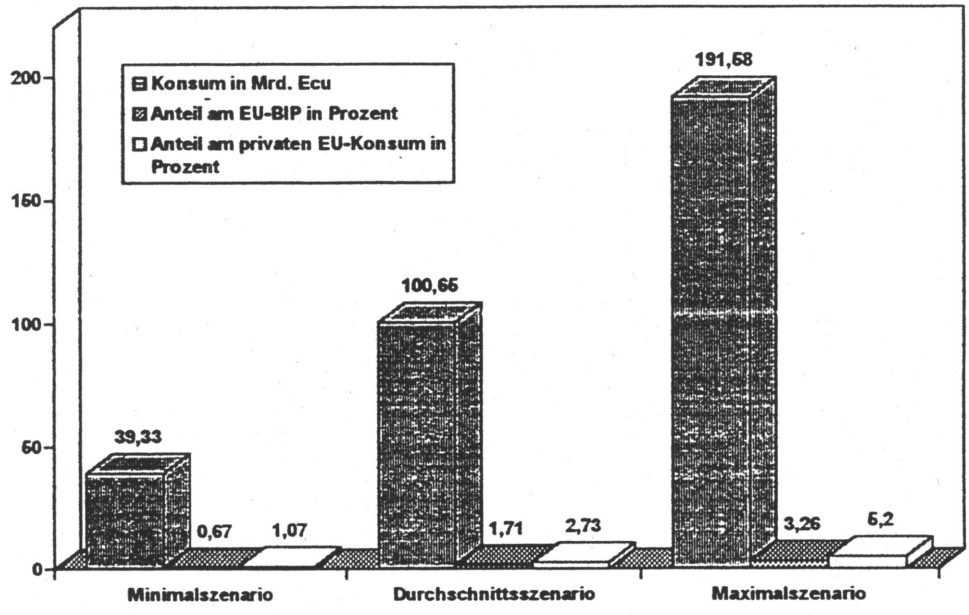
**** eigene Berechnungen nach Eurostat (1994), S. 47 und S. 50f.

Bei Zugrundelegung der hier gewählten Werte kommt man zu dem Ergebnis, daß jährlich Güter und Dienstleistungen in Höhe von gut **100 Mrd. Ecu** im EU-Ausland erworben werden, entsprechend ca. 1,71 Prozent des Gesamt-BIPs (1992) der Union und 2,73 Prozent des gesamten privaten Konsums.

Gleichwohl bleiben die gesetzten Werte in Spalte B spekulativ, so daß wir durch das Ansetzen sehr niedriger und sehr hoher repräsentativer Werte in den Preisklassen Minimal- und Maximalszenarien aufgestellt haben, um einen Eindruck über die Bandbreite möglicher Kosten zu erhalten. Im Minimalszenario werden jeweils die unteren Grenzen der Preissegmente in Spalte B eingesetzt (im Segment < 500 Ecu haben wir

spekulativ 20 Ecu gewählt), so daß in der Tabelle in den Feldern B1 bis B4 die Werte *20, 500, 2000 und 5001* eingetragen werden. Im Maximalszenario werden die Obergrenzen gewählt (im Segment > 5000 Ecu wird spekulativ 30000 Ecu als Wert eingesetzt), so daß in der Tabelle in den Feldern B1 bis B4 die Werte *499, 1999, 5000 und 30000* eingetragen werden. Die ermittelten Werte sind in Abbildung 1 dargestellt.

Abb. 3: Höhe des grenzüberschreitenden Konsums im Binnenmarkt im Minimal-, Durchschnitts- und Maximalszenario



Die Bandbreite der errechneten Werte für den grenzüberschreitenden Konsum im Binnenmarkt ist von 39,3 bis 191,6 Mrd. Ecu sehr groß. Die Werte des Durchschnittsszenarios sind Spekulationen, die auf Plausibilitätsüberlegungen beruhen.

6.1.2 Die Signifikanz des Erwerbs mangelhafter Ware in grenzüberschreitenden Vertragsbeziehungen von Verbrauchern im Binnenmarkt

Interessant sind darüber hinaus die Anteile derjenigen Eurokonsumenten, die nicht vollständig mit ihren Käufen zufrieden waren, an der Gesamtheit aller Befragten bzw.

an der Gesamtheit aller Eurokonsumenten. Diese Informationen sind in Tabelle 2 zusammengestellt. Sämtliche Daten sind dem Eurobarometer (1995) entnommen.

Alle Berechnungen werden auf die für die jeweilige Betrachtung gültigen Antworten bezogen. Z.B. gaben 3798 der befragten 15800 Verbraucher an, im Ausland gekauft zu haben. Diese Zahl wird zur Ermittlung des prozentualen Anteils der Eurokonsumenten zugrunde gelegt. Allerdings wußten 44 der 3798 Eurokonsumenten nicht, in welchem Wert sie Güter erworben hatten, und 11 gaben keine Antwort. Insofern ist die Grundgesamtheit zur Berechnung des Anteils der 'unzufriedenen' Eurokonsumenten: 3798 - 44 - 11 = 3743.

In Tabelle 2 wird in der ersten Zeile jedes Blockes die absolute Zahl der Antworten im Eurobarometer aufgeführt. In der zweiten Zeile wird diese auf die Gesamtheit der Befragten im Eurobarometer bezogen (15800). Damit erhält man Informationen über die gesamteuropäische Bedeutung von nicht vollkommen befriedigenden grenzüberschreitenden Käufen. So kann man auf der Basis der Informationen aus dem Eurobarometer der Zahl im Feld D5 entnehmen, daß 0,77 Prozent aller europäischen Verbraucher (1) ein Gut > 500 Ecu im Ausland gekauft haben, (2) damit nicht vollkommen zufrieden waren und sich infogedessen (3) beschwerten. Bezogen auf die Eurokonsumenten, dieser Anteil ist jeweils in der dritten Zeile abgetragen, ist der Anteil immerhin schon bei 7,47 Prozent (Feld D6). Der vierten Zeile ist zu entnehmen, wie groß der Anteil der unzufriedenen Eurokonsumenten ist, der sich beschwerte bzw. der nichts unternahm. (Durch nicht gültige Antworten ergeben sich Differenzen bei der Addition der Zeilen bzw. Spalten.)

Tabelle 2 ist zu entnehmen, daß 91,1 Prozent der Eurokonsumenten mit ihren Käufen vollkommen zufrieden sind, nur **8,87 Prozent sind nicht 'completely satisfied'**. Diese Quoten lassen sich nach Preissegmenten differenzieren. Im folgenden werden Güter und Dienstleistungen

(1) < 500 Ecu und

(2) > 500 Ecu

betrachtet. In der ersteren Gruppe sind lediglich 6,41 Prozent der Eurokonsumenten nicht vollkommen zufrieden, wohingegen Erwerber höherpreisiger Güter zu 11,73 Prozent unzufrieden sind. Bezogen auf die Gesamtheit aller Verbraucher in Europa haben 2,1 Prozent im EU-Ausland gekauft und waren mit diesem Kauf nicht vollkommen zufrieden.

Tab. 2: Zahl und Reaktionen der nicht vollkommen zufriedenen Eurokonsumenten

	A	B	C	D
		gesamt	< 500 Ecu	> 500 Ecu
	Nicht vollkommen zufriedene Eurokonsumenten			
1		332	136	190
2		2,1	0,86	1,2
3		8,87	6,41	11,73
	Nicht vollkommen zufriedene Eurokonsumenten, die sich beschwerten			
4		163	42	121
5		1,03	0,27	0,77
6		4,35	1,98	7,47
7		49,1	30,88	63,68
	Nicht vollkommen zufriedene Eurokonsumenten, die nichts unternahmen			
8		138	84	54
9		0,87	0,53	0,34
10		3,69	3,96	3,33
11		41,57	61,76	28,42

Angaben innerhalb der Blöcke
absolute Zahl der Antworten im Eurobarometer
Anteil an der Grundgesamtheit in %
Anteil an den Eurokonsumenten mit gültigen Antworten in %
Anteil an den nicht vollkommen zufriedenen Eurokonsumenten in %

In bezug auf die Wirkung von Rechtsunsicherheit sind darüber hinaus die **Erfolgsquoten von grenzüberschreitenden Beschwerden** (als Vorstufe eines Rechtsstreits) von besonderer Bedeutung. Diese werden in der vierten Zeile jedes Blockes in Tabelle 3 ermittelt. Tabelle 3 enthält zudem, wie Tabelle 2 auch, Informationen über die gesamteuropäische Bedeutung der Beschwerdeerfolge in den zweiten und dritten Zeilen der einzelnen Blöcke. So ist dem Feld C6 zu entnehmen, daß 0,08 Prozent aller europäischen Verbraucher (1) ein Gut im Wert < 500 im europäischen Ausland kaufen, (2) damit nicht vollkommen zufrieden sind, (3) sich beschweren und infolgedessen (4) den vollen Kaufpreis erstattet bekommen.

Grundsätzlich sind die Chancen relativ gut, infolge einer Beschwerde den vollen Kaufpreis erstattet zu bekommen oder ein neues Produkt oder eine neue Dienstleistung zu erhalten. Die Quoten liegen bei 64,29 Prozent (Summe der Felder C4 und

C8) für Güter < 500 Ecu, bzw. 54,55 Prozent (Summe der Felder D4 und D8) für Güter > 500 Ecu. Vgl. aber für die tendenzielle Bedeutung (zahlenmäßig und wertmäßig) der nicht gütlich beigelegten Streitigkeiten, für die Verbraucher Lösungen außergerichtlich über Beratungsstellen in grenznahen Gebieten gesucht haben, die vorläufigen Daten über das von der Europäischen Kommission finanzierte Pilotprojekt (siehe Teil I, Kapitel B).

Tab. 3: Erfolgsquoten von Beschwerden nach grenzüberschreitenden Käufen in der EU

	A	B	C	D
		gesamt	< 500 Ecu	> 500 Ecu
	neues Gerät oder neue Diensleistung			
1		66	15	51
2		0,42	0,09	0,32
3		1,76	0,71	3,15
4		40,49	35,71	42,15
	100% Geld zurück			
5		27	12	15
6		0,17	0,08	0,09
7		0,72	0,57	0,93
8		16,56	28,57	12,4
	51-99% Geld zurück			
9		7	1	6
10		0,04	0,01	0,04
11		0,19	0,05	0,37
12		4,29	2,38	4,96
	1-50% Geld zurück			
13		21	4	17
14		0,13	0,03	0,11
15		0,56	0,19	1,05
16		12,88	9,52	14,05
	keine Erstattung			
17		42	10	32
18		0,27	0,06	0,2
19		1,12	0,47	1,98
20		25,77	23,81	26,45

Angaben innerhalb der Blöcke

absolute Zahl der Antworten im Eurobarometer

Anteil an der Grundgesamtheit in %

Anteil an den Eurokonsumenten mit gültigen Antworten in %

Erfolgsquote der Beschwerde in %

Von daher ist es erstaunlich, daß insbesondere im Preissegment unterhalb 500 Ecu nur **wenige Konsumenten** (30,88 Prozent) **sich** überhaupt **beschweren**. Dieses Verhalten läßt mehrere Schlußfolgerungen zu:

(1) die (antizipierten) **Kosten der Beschwerde übersteigen einen relativ geringen Warenwert**

Auf diese These deutet die Beobachtung hin, daß sich mit 63,68 Prozent mehr als doppelt so viele der unzufriedenen Konsumenten im Preissegment > 500 Ecu beschweren wie im Segment < 500 Ecu.

(2) die **Beeinträchtigung ist nur geringfügig**

Ein wesentliches Problem des Eurobarometers besteht darin, daß 'not completely satisfied' nicht nach der Höhe des Schadens differenziert wurde.

(3) die **Aussichtlosigkeit einer (rechtlichen) Durchsetzung der Beschwerde** führt dazu, daß Konsumenten auch bei Totalverlust von einer Beschwerde Abstand nehmen. Vor dem Hintergrund der vom ZERP im ersten Teil der Studie ermittelten Kosten eines grenzüberschreitenden Rechtsstreits in Höhe von 2.489 Ecu ist dieses Verhalten durchaus rational, da diese Kosten bei einem Streitwert unterhalb 2000 Ecu prohibitiv sind.

Von nur untergeordneter Bedeutung sind Erstattungen im Bereich zwischen 50 und 99 Prozent des Wertes. Tab. 3, Feld B12 ist zu entnehmen, daß nur 4,29 Prozent der Beschwerdeführer eine Erstattung in dieser Höhe erhielten. Geringfügigere Erstattungen wurden häufiger gewährt (9,52 bzw. 14,05 Prozent; Tab. 3, C16 und D 16), aber in ca. einem Viertel der Fälle (25,77 Prozent; Tab. 3, B20) wurde infolge einer Beschwerde keine Ersatzleistung bewilligt. Nur 0,09 Prozent aller europäischen Verbraucher haben (1) ein Gut im Wert < 500 Ecu erworben, (2) waren damit unzufrieden, (3) beschwerten sich und (4) bekamen weniger als 50 Prozent erstattet (Tab. 3, B14 + B18).

6.2 Die Höhe der Kosten durch mangelhafte Leistungen der Anbieter in grenzüberschreitenden Transaktionen

In diesem Abschnitt wird eine vorläufige, spekulative Einschätzung gegeben, welche Kosten den Verbrauchern durch mangelhafte Leistungen der Anbieter in grenzüberschreitenden Transaktionen entstehen. Dazu werden zunächst die **Verluste durch den Erwerb mangelhafter Ware im Ausland** untersucht. Im Anschluß wird

analysiert, welche **direkten Kosten** Verbrauchern **durch grenzüberschreitende Beschwerden** entstehen. Soweit nicht anders angegeben, entstammen die verwendeten Zahlen dem EUROBAROMETER (1995). Darin wurden nur Personen über 15 Jahre befragt. Entsprechend wird zur Hochrechnung auch nur die Zahl der europäischen Einwohner im Alter über 15 Jahre verwendet. (D.h., der Konsum der unter 15jährigen muß für absolute europäische Größen addiert werden.)

6.2.1 Verluste durch den Erwerb mangelhafter Ware im Ausland

Die Ermittlung der Verluste ist insofern interessant, als man eine Vorstellung von der Größenordnung des Problems erhält, inwieweit Verbraucher heute Schäden bei grenzüberschreitenden Käufen erleiden, die bei größerer Rechtssicherheit vermeidbar wären.

In Tabelle 4 wird eine Methode vorgestellt, die bei besserer Datenlage zu einer genauen Einschätzung der direkten Kosten für Verbraucher in Europa durch mangelhafte Leistungen der Anbieter führen kann. In Spalte B wird wiederum die Zahl der über 15jährigen Einwohner der EU angegeben, in Spalte C findet sich die Gesamtheit der Befragten im Eurobarometer (1995). In Spalte D wird die Zahl der im Eurobarometer befragten Verbraucher genannt, die einen vollständigen Verlust zu verzeichnen hatten. In Spalte E ist die Prozentzahl der Betroffenen in Europa auf der Basis der Werte des Eurobarometers errechnet. Spalte F enthält den Wert für den durchschnittlichen Verlust eines unzufriedenen Konsumenten. Die ermittelten Prozentzahlen der betroffenen Verbraucher werden mit dem repräsentativen Verlustwert und der Zahl der über 15jährigen Konsumenten multipliziert, so daß man in Spalte G den Gesamtverlust in Mio. Ecu erhält. In Feld G3 ist der gesamte Verlust durch mangelhafte Anbieterleistung bei grenzüberschreitenden EU-Käufen abgetragen.

Tab. 4: Die Höhe der Kosten durch mangelhafte Leistung des Anbieters

	A	B	C	D	E	F	G
	Preis-segmente	Einwohner über 15 J. in Mio.*	Zahl der Befragten**	Zahl der Betroffenen***	Anteil der Betroffenen in Prozent	durchschnittl. Verlust****	Gesamtverlust in der EU in Mio. Ecu
1	< 500 Ecu	302,51	15800	*13,25*	0,08	*50*	12,1
2	> 500 Ecu	302,51	15800	*46,25*	0,29	*1557*	1365,92
3		302,51	15800	*59,5*	0,37		**1378,02**

spekulative Werte sind kursiv

* eigene Berechnungen nach Eurostat (1994), S. 126f.

** Eurobarometer (1995), S. 12.

*** spekulative Schlußfolgerungen aus dem Eurobarometer (1995), S. 15.

**** spekulative Schlußfolgerungen aus dem Eurobarometer

Unsicher sind die Angaben in den Spalten D und F der Tabelle 4. Der Ansatz der betroffenen Verbraucher sowie die Höhe des Verlustes sind auf der Basis der Daten des Eurobarometers kaum zu ermitteln. Insbesondere die **nicht vorhandenen Angaben** über die **Höhe des Verlustes** bei 'not completely satisfied' führt zu Problemen. Hierzu ein Beispiel: Ein Verbraucher hat einen Schaden am im EU-Ausland erworbenen Gut, der 20 Prozent des Warenwertes beträgt. Auf seine Beschwerde hin wird er vollständig kompensiert, erhält also 20 Prozent des Warenwertes erstattet. Es wird nicht ersichtlich, in welches Erstattungssegment dieser Verbraucher eingeordnet ist. Er wurde zwar zu 100 Prozent kompensiert, diese 100 Prozent des Schadens betragen jedoch nur 20 Prozent des Warenwertes. Insofern könnte er in der Statistik in der Erstattungsklasse 1 - 49 Prozent auftauchen, genau wie ein Verbraucher der einen 100prozentigen Verlust zu beklagen hat und auf eine Beschwerde hin ebenfalls nur 20 Prozent erstattet bekommt.

In Spalte D der Tabelle 4 haben wir also zwei Unbekannte. **Erstens** wissen wir nicht, wie hoch die Erstattungen innerhalb der Erstattungsklassen tatsächlich waren und welcher Teil des Verlustes dadurch abgedeckt wurde. **Zweitens** wissen wir nicht, warum sich viele Konsumenten nicht beschwert haben. Die Zahlen in Spalte D erklären sich folgendermaßen. Zunächst wird nur die Zahl der Verbraucher verwendet, die (1) ein Gut im Wert von < 500 Ecu oder > 500 Ecu im Ausland gekauft, (2) ein Problem damit gehabt und (3) sich beschwert haben. Bei einer Erstattung infolge der Beschwerde von 50 - 99 Prozent des Wertes[166], wird hier der **Mittelwert als Verlust angesetzt**, d.h. der Verlust in diesem Erstattungssegment beträgt 25 Prozent, der Verlust im Erstattungssegment 1 - 49 Prozent wird mit 75 Prozent angesetzt. Aus diesem Grund sind die Zahlen in Spalte D keine ganzen Werte. Für unser Durchschnittsszenario I haben wir die Zahlen in Spalte D der Tabelle 3 entnommen. Im Preissegment < 500 Ecu haben 10 Eurokonsumenten, die sich beschwerten, nichts erstattet bekommen (Feld C17, Tab. 3), 4 erhielten - annahmegemäß - 25 Prozent, hatten also einen 75 prozentigen Verlust und einer erhielt - annahmegemäß - 75 Prozent, hatte also einen Verlust von 25 Prozent. In der Summe ergibt dies 10 • 1 + 4 • 0,75 + 1 • 0,25 = 13,25. Dabei berücksichtigen wir zunächst nur unzufriedene Konsumenten, die sich beschwert haben. Wie oben erwähnt, ist jedoch für die Berechnungen die Gruppe derjenigen **Eurokonsumenten** problematisch, die nicht vollkommen zufrieden war, sich jedoch **nicht beschwerte**. Dieses Verhalten ist in gegensätzlicher Weise interpretierbar. Zum einen kann die **Beeinträchtigung geringfügig** gewesen sein, zum anderen können **verhältnismäßig hohe Beschwerdekosten** bei niedrigpreisigen Gütern oder die **Aussichtlosigkeit einer (rechtlichen) Durchsetzung der Beschwerde** dazu führen, daß Konsumenten auch bei Totalverlust von einer Beschwerde Abstand nehmen. Im Durchschnittsszenario II gehen wir spekulativ davon aus, daß alle Verbraucher, die nicht vollkommen zufrieden waren und sich nicht beschwerten, im Durchschnitt einen 50prozentigen Verlust erleiden. Damit wird die Zahl dieser Konsumentengruppe zu 50 Prozent zu den oben gewählten Werten in Spalte D addiert.

166 Vgl. für die Erstattungsklassen Tabelle 3.

Die Werte der Durchschnittsszenarien sind reine Spekulationen. Wir haben willkürlich die Mittelwerte der Erstattungsklassen eingesetzt und nur die Hälfte derjenigen Konsumenten berücksichtigt, die sich nicht beschwerten. In einem Minimalszenario dürfen nur diejenigen Verbraucher gezählt werden, die infolge einer Beschwerde nichts erstattet bekamen, denn wie erläutert kann auch ein Verbraucher, der 20 Prozent erstattet bekam, verlustfrei kompensiert sein. Die Werte für die Felder D1 und D2 in Tab. 4 sind damit 10 bzw. 32. In einem Maximalszenario gehen wir von der unteren Grenze innerhalb der Erstattungsklassen aus (1 bzw. 51 Prozent) und unterstellen sämtlichen Verbrauchern, die sich nicht beschwert haben, einen vollen Verlust.

Die Höhe des Verlustes im Preissegment, die in Spalte F angetragen wird, basiert ebenfalls in doppelter Hinsicht auf Spekulationen. Zum einen wissen wir nicht, wie hoch der Durchschnittswert der in den Preissegmenten gekauften Waren ist. Dieses Problem trat bereits bei den Untersuchungen zur Ermittlung der Höhe des Auslandskonsums in der EU auf. Dort konnten wir jedoch auf genauer differenzierte Preisklassen zurückgreifen. Für die folgenden Berechnungen greifen wir auf die Werte zurück, die wir im Abschnitt 6.1.1 in Tabelle 1, Spalte B, rein spekulativ als plausibel erachtet hatten. D.h., wir setzen in der Preisklasse < 500 Ecu als Durchschnittswert 100 Ecu an und benutzen in der Preisklasse > 500 Ecu den gewichteten Durchschnitt der in den drei oberen Preisklassen der Tab. 1 gewählten Durchschnittswerte. Dieser Wert liegt bei 3114 Ecu. Zum anderen haben wir wie gesagt keine Information über den Grad der Unzufriedenheit, so daß wir die Durchschnittswerte der Preisklassen mit 50 Prozent multiplizieren. Unter diesen Vorbehalten tragen wir in Spalte F 50 Ecu (100 Ecu • 50%) bzw. 1557 Ecu (3114 Ecu • 50%) als repräsentative Werte für Verluste infolge eines mangelhaften Kaufes ein. Diese Werte legen wir für beide Durchschnittsszenarien zugrunde, in denen nur die Zahl der Betroffenen variiert wird.

Für das Minimalszenario, dessen Ergebnis in Abbildung 2 dargestellt wird, setzen wir die im Minimalszenario des Abschnitts 6.1.1 gewählten Untergrenzen der Preisklassen an (20, 500, 2000 und 5001 Ecu) und gehen zudem davon aus, daß der tatsächliche Verlust bei Unzufriedenheit lediglich 10 Prozent ist. Damit wird im Minimalszenario das Wertepaar 2 (20 • 0,1) und 124 [0,1 • (500 • 7,386 + 2000 • 1,766 + 5001 •

1,101)/(7,386 + 1,766 + 1,101)] in die Felder F1 und F2 der Tabelle 4 eingetragen. Im Maximalszenario verfahren wir analog, setzen die Werte des Maximalszenarios des Abschnitts 6.1.1 an (499, 1999, 5000 und 30000 Ecu) und legen einen Verlust von 90 Prozent zugrunde. Im Maximalszenario ermitteln wir Verluste in Höhe von 450 bzw. 4971 Ecu.

Zusammenfassend haben wir zur Ermittlung der Kosten für die Verbraucher in Europa durch mangelhafte Ware die Werte in den Spalten D und F der Tabelle 4 variiert und so Szenarien erhalten, die einen vorläufigen Eindruck über die Höhe dieser Kosten geben können. Für die im folgenden dargestellten Szenarien wurden in Tabelle 4 in den Feldern D1; D2; F1 und F2 folgende Zahlen zugrunde gelegt:

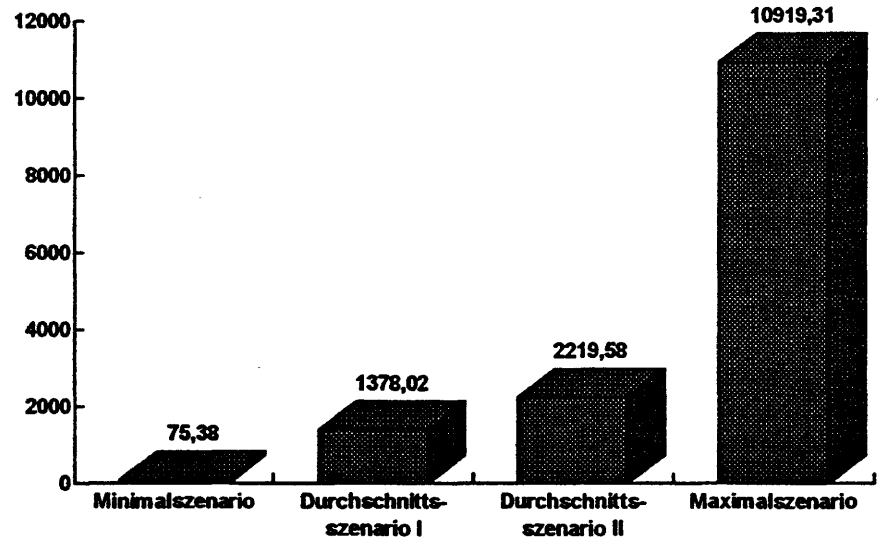
Minimalszenario: 10; 32; 2 und 124

Durchschnittsszenario I: 13,25; 46,25; 50 und 1557

Durchschnittsszenario II: 55,25; 73, 25; 50 und 1557

Maximalszenario: 98,45; 105,77; 450 und 4971.

Abb. 4: Verluste für die Verbraucher durch den Erwerb mangelhafter Ware im Ausland



Für die Durchschnittsszenarien werden Kosten in Höhe von knapp 1,4 Mrd. Ecu bzw. gut 2,2 Mrd. Ecu ermittelt. Diese Werte sind allerdings mit großer Vorsicht zu betrachten, da unter den genannten Vorbehalten Werte zwischen 75 und 10919 Mio. Ecu möglich scheinen. Wie immer, liegt die 'Wahrheit' wohl in der Mitte der extremen hier aufgeführten Szenarien. Diejenigen Konsumenten, die Verluste in grenzüberschreitenden Transaktionen erlitten haben, sind potentielle Kandidaten für Rechtsstreitigkeiten. Diese Verluste könnten durch geringere Kosten der grenzüberschreitenden Klagemöglichkeiten erheblich gesenkt werden. Allerdings muß gesehen werden, daß auch nationale Transaktionen Verlustrisiken bergen. Um diese müßten die ermittelten Kosten in grenzüberschreitenden Transaktionen bereinigt werden, denn ein risikofreies Referenzszenario erscheint unrealistisch. Informationen über nationale Risiko-Werte sind gemäß Auskunft sämtlicher einschlägigen Behörden und Institutionen nicht verfügbar.[167]

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167 Vorschlag 1: Ein zukünftiges Eurobarometer sollte Unzufriedenheitsgrade auch für den nationalen Konsum in allen Mitgliedstaaten ermitteln.

6.2.2 Kosten durch grenzüberschreitende Beschwerden

In Tabelle 5 wird versucht abzuschätzen, welche Kosten in der EU durch Beschwerden infolge grenzüberschreitender Käufe entstehen. Dazu wird nach Staaten differenziert vorgegangen. In Spalte B finden sich die über 15jährigen Einwohner der EU-Mitgliedstaaten. In Spalte C sind die absoluten Zahlen der im Eurobarometer (1995) Befragten eingetragen, Spalte D enthält die Angaben über die Konsumenten, die im Ausland kauften, nicht vollständig zufrieden waren und sich beschwerten. Aus den Spalten D und E werden die Prozentzahlen derjenigen Konsumenten jedes Landes ermittelt, die im Ausland kauften und sich beschwert haben. Die Werte in Spalte F über die durchschnittlichen Kosten einer grenzüberschreitenden Beschwerde sind Spekulationen. Multipliziert man diese Kosten mit dem Anteil der Beschwerdeführer in jedem Land, erhält man in Spalte G die Kosten pro Einwohner, die wiederum multipliziert mit der Einwohnerzahl die Gesamtkosten der grenzüberschreitenden Beschwerden in Mio. Ecu in Spalte H ergeben. Im Feld H16 sind die Kosten für die ganze EU ermittelt.

Wie erwähnt, haben wir keine Informationen über die tatsächlichen durchschnittlichen Kosten einer grenzüberschreitenden Beschwerde, so daß wir rein spekulativ ein Minimalszenario mit Kosten in Höhe von 50 Ecu pro Beschwerde und ein Maximalszenario mit Kosten von 500 Ecu pro Beschwerde durchgerechnet haben.[168]

Die Kosten der Beschwerdeführung umfassen Telefonate, Korrespondenz, Übersetzungen, Transport, etc. und sind von Fall zu Fall wahrscheinlich sehr unterschiedlich. Im einen Extrem fällt der Mangel am Urlaubsort auf, so daß sich der Verbraucher praktisch kostenfrei beschweren kann, auf der anderen Seite scheint es durchaus möglich, daß teure Telefonate und hohe Transportkosten anfallen, um den Schaden zu melden und nachzuweisen. Zudem müßten bei den Kosten auch nichtpekuniäre Werte wie Ärger, etc. berücksichtigt werden.

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168 Vorschlag 2: Ein zukünftiges Eurobarometer sollte erheben, welche Kosten Verbrauchern entstanden sind, die sich infolge mangelhafter Ware beim ausländischen Lieferanten beschwerten.

Tab. 5: Die statischen Kosten der Vertragsnachverhandlungen bei grenzüberschreitenden Käufen in der EU [Szenario: 150 Ecu pro Beschwerde]

	A	B	C	D	E	F	G	H
		Einw. in Mio*	Anzahl der Befragten**	Anzahl der Beschwerden***	Anteil der Beschwerdeführer in %	Kosten pro Beschwerde in ECU	Beschwerdekosten je Einw. in ECU	Gesamtkosten in Mio. ECU
1	B	8,25	1000	12	1,2	*150*	1,8	14,85
2	DK	4,3	1000	8	0,8	*150*	1,2	5,16
3	D	67,59	2000	57	2,85	*150*	4,275	288,947
4	GR	8,51	1000	3	0,3	*150*	0,45	3,83
5	E	31,91	1000	1	0,1	*150*	0,15	4,787
6	F	46,08	1000	5	0,5	*150*	0,75	34,56
7	IRL	2,63	1000	6	0,6	*150*	0,9	2,367
8	I	47,99	1000	3	0,3	*150*	0,45	21,596
9	L	0,33	500	11	2,2	*150*	3,3	1,089
10	NL	12,46	1000	3	0,3	*150*	0,45	5,607
11	A	6,53	1000	10	1	*150*	1,5	9,795
12	P	7,97	1000	2	0,2	*150*	0,3	2,391
13	SF	4,1	1000	4	0,4	*150*	0,6	2,46
14	S	7,1	1000	6	0,6	*150*	0,9	6,39
15	UK	46,76	1300	11	0,85	*150*	1,269	59,338
16	EU	302,51						**463,167**

spekulative Werte kursiv

* eigene Berechnungen nach Eurostat (1994), S. 126f.

** Eurobarometer (1995), S. 11

*** Eurobarometer (1995), S. 14

Bei hoher Rechtssicherheit bzw. sehr geringen Kosten internationaler Klagen werden Ausländern in geringerem Maße mangelhafte Waren verkauft. Insofern verringern sich

auch Beschwerdekosten. Die Beschwerdekosten liegen zwischen 150 Mio. Ecu (im Minimalszenario) und 1,5 Mrd. Ecu (im Maximalszenario). Für ein uns plausibel erscheinendes, gleichwohl spekulatives, Durchschnittsszenario mit Kosten von 150 Ecu für eine komplette Beschwerde werden Kosten in Höhe von 463,17 Mio. Ecu ermittelt.

Allerdings liefert die Tabelle auch noch einige interessante Interpretationen des Eurobarometers. So sind die Deutschen eindeutige Europameister im Beschweren. Pro Einwohner beschweren sie sich mehr als doppelt soviel im Ausland wie alle anderen Europäer. Nur Luxemburger beschweren sich annähernd so häufig, doch scheint dies aufgrund der geographischen Sonderposition durchaus angemessen. Insgesamt fallen damit 60 Prozent der aktuellen Kosten für grenzüberschreitende Beschwerden bei Deutschen an.

6.3 Kosten durch Nichtausnutzung internationaler Preisvorteile aufgrund von Rechtsunsicherheit in internationalen Transaktionen

Viele Konsumenten in der EU würden sicher gern im europäischen Ausland Güter kaufen. Doch stellt für sie wie auch für die Produzenten Rechtsunsicherheit ein Kauf- bzw. Handelshemmnis dar. Konsumenten nutzen ausländische Preisvorteile u.a. deshalb nicht, weil sie fürchten, daß sie bei nicht vertragsgemäßen Leistungen keine rechtlichen Möglichkeiten der Vertragsdurchsetzung haben. Diese Sorge ist durchaus berechtigt vor dem Hintergrund, daß eine Klage, wie im ersten Teil der Studie vom ZERP ermittelt wurde, im Ausland im Durchschnitt 2.489 Ecu kostet. Dieser Aufwand lohnt sich nur bei hochpreisigen Gütern oder Dienstleistungen. Erst ein Abbau dieser Rechtsunsicherheit durch geeignete Institutionen würde die Konsumenten dazu bringen können, verstärkt Preisvorteile im Ausland wahrzunehmen und den EG-Binnenmarkt mit mehr Leben zu füllen.

6.3.1 Die Bedeutung von Rechtsunsicherheit für grenzüberschreitenden Konsum

Eine Klassifizierung der Güter, bei denen Rechtsunsicherheit eine große Rolle spielt, bietet die Neue Institutionenökonomie an. Dort wird davon ausgegangen, daß Vertragspartner 'opportunistisch' ihren eigenen Vorteil verfolgen. Dieses Verhalten beinhaltet auch Handlungen, die nicht im Sinne des Vertrages sind. Für den konkreten

Fall bedeutet das, daß einem ausländischen Verbraucher im Zuge einer Transaktion 'Zitronen', d.h. mangelhafte Güter, verkauft werden. Rechtsunsicherheit bedeutet, daß Schutz gegen Opportunismus des ausländischen Vertragspartners gar nicht oder nur unter sehr hohen Kosten möglich ist. Die Kosten der Absicherung gegen Opportunismus steigen. Die Frage ist nun, welche Transaktionen besonders anfällig für Opportunismus sind und damit sensibel auf Rechtsunsicherheit reagieren.

Die wesentlichen Merkmale zur Beschreibung von Transaktionen sind Opportunitätskosten im Falle von Nicht-Erfüllung (abhängig vom Wert des Vertragsgegenstandes und dessen Faktorspezifität), Unsicherheit und Häufigkeit. Von Unsicherheit, die nicht dem rechtlichen Rahmen entstammt, soll hier abstrahiert werden, so daß ausschließlich die Faktoren Häufigkeit und Faktorspezifität betrachtet werden. Die Faktorspezifität beeinflußt in hohem Maße die potentiellen Verluste eines Vertragspartners bei Opportunismus. Ein hochgradig spezifisches Gut kann praktisch nicht liquidiert werden, da keine alternativen Verwendungsmöglichkeiten bestehen. Sich nur selten wiederholende Transaktionen ermöglichen es den Partnern nicht, Erfahrungen über opportunistisches Verhalten der 'Gegenseite' zu machen. Je höher die Faktorspezifität und je geringer die Häufigkeit, desto anfälliger sind die Vertragspartner damit für Opportunismus der Gegenseite.[169] Deshalb wird jede Seite nach zusätzlichen Absicherungen suchen. Solche Absicherungen bestehen bezogen auf die Fragestellung in Rechtssicherheit, d.h. in der Sicherheit über die Möglichkeit, im Vertrag vereinbarte Verfügungsrechte ex-post auch durchzusetzen.

Nicht-spezifische Transaktionen mit hoher Häufigkeit können ohne externe Schiedsinstanz koordiniert werden, da sich unzufriedene Vertragspartner zu geringen Kosten neu orientieren können. In nicht spezifischen Transaktionen geringer Häufigkeit kann sich ein Vertragspartner durch Beratungsstellen oder Erfahrungen anderer Käufer gegen Opportunismus schützen. Ein rechtlicher Rahmen ist bei solchen Transaktionen vorteilhaft, aber nicht notwendig. Die rechtliche Stützung ist in erster Linie zur Übertragung von Rechtsansprüchen erforderlich.[170]

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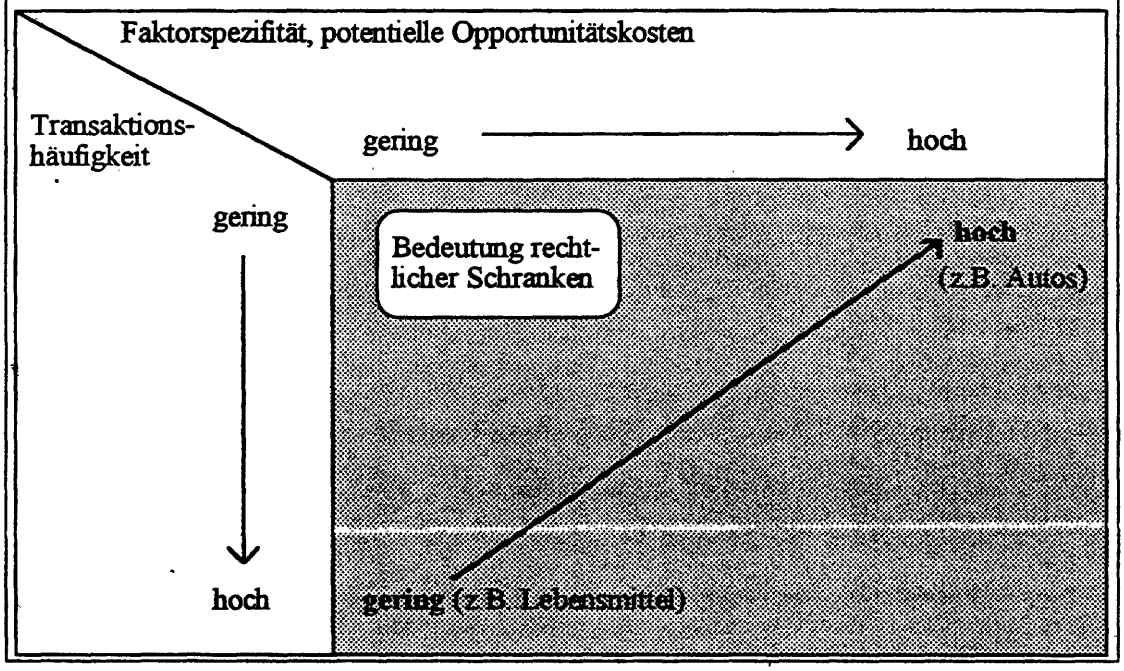
169 Vgl. Williamson (1990), S. 81.

170 Ebda., S. 83.

Dieser Zusammenhang läßt sich anhand folgender Abbildung veranschaulichen:

Abb. 5: Die Rolle der Transaktionscharakteristika für die Bedeutung rechtlicher Schranken



Jeder Vertragsgegenstand in Transaktionen zwischen Unternehmen und Verbraucher kann in dem grau unterlegten Feld auf dem Kontinuum zwischen geringer und hoher Bedeutung rechtlicher Schranken angeordnet werden. Überlegungen, welche Transaktionen von Konsumenten durch rechtliche Unsicherheit oder Unterschiede in rechtlichen Systemen nicht getätigt werden, müssen die Gütergruppen ausmachen, bei denen der Konsument anfällig für Opportunismus ist und Rechtssicherheit von daher eine große Rolle für ihn spielt. Wie oben erläutert spielt bei häufigen Transaktionen mit geringen potentiellen Opportunitätskosten, z.B. dem Kauf einer Tüte Speiseeis am Urlaubsort oder das Tanken jenseits der Grenze, um Differenzen in Mineralölsteuersätzen auszunutzen, rechtliche Unsicherheit keine Rolle. Auch bei Transaktionen geringer Häufigkeit kann der Konsument auf Erfahrungen anderer Verbraucher oder Verbraucherorganisationen zurückgreifen. Gerade im Hinblick auf

das letzte Argument sind viele Transaktionen von Verbrauchern als wenig anfällig für Opportunismus zu charakterisieren. Bei diesen Transaktionen verursacht rechtliche Unsicherheit keine makroökonomischen Kosten.

Interessant sind vielmehr Transaktionen mit geringer Häufigkeit und relativ hohen potentiellen Opportunitätskosten, wie z.B. der Erwerb von Elektrogeräten, Automobilen oder Kapitalanlagen. Beim Erwerb eines elektronischen Gerätes mit vereinbarten weitgehenden Garantieansprüchen hat die Einschätzung, ob man als Käufer rechtliche Ansprüche geltend machen kann, eine nicht unerhebliche Bedeutung. Insgesamt ist jedoch davon auszugehen, daß deutlich unter 50 Prozent des Gesamtkonsumes opportunismusanfällig sind.

6.3.2 Die Messung der direkten statischen Kosten infolge der Nichtausnutzung intraeuropäischer Preisdifferenzen durch Rechtsunsicherheit

Hier wird in Tabelle 6 eine **Methode vorgestellt**, wie die **direkten statischen Kosten durch Nichtausnutzen intraeuropäischer Preisdifferenzen infolge von Rechtsunsicherheit** in Europa ermittelt werden können. Der Anteil nicht genutzter intraeuropäischer Preisdifferenzen, der auf Rechtsunsicherheit zurückzuführen ist, wird hier sektoral hochgerechnet. Die im folgenden exemplarisch für den Automobilmarkt durchgeführte Analyse müßte also gleichermaßen für alle weiteren Güter der EU durchgeführt werden, bei deren Kauf Rechtssicherheit von hoher Bedeutung für den Verbraucher ist. Wir haben uns auf den Automobilmarkt konzentriert. Unsere umfangreichen Nachforschungen haben für sämtliche anderen Sektoren keine verwertbaren Zahlen ergeben und auch für den Automobilsektor sind die erforderlichen Daten nur im Ansatz vorhanden.[171]

In Tabelle 6a sind in Spalte B die aktuellen Zulassungszahlen für neue Pkws abgetragen. Nach Ländern aufgegliedert finden sich in Spalte C die Preisindices für ein 'repräsentatives' Gut. Der niedrigste Preis in der EU hat den Index 100, der zugehörige absolute Preis ist rechts oben in der Tabelle eingetragen. In Spalte D stehen die sich aus den Indices und dem repräsentativen Preis ergebenden Differenzen für den

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171 Vorschlag 3. Es sollten Daten über intraeuropäische Preisdifferenzen und Konsummengen von Gütern und Dienstleistungen erhoben werden, bei deren Erwerb Rechtssicherheit ein bedeutende Rolle spielt.

absoluten Preis des europäischen Durchschnittsgutes nach Ländern[172]. Wird diese Preisdifferenz nicht ausgenutzt, ist dieses Verhalten in Höhe des Anteils μ auf Rechtsunsicherheit zurückzuführen. Insofern muß die Preisdifferenz mit μ gewichtet werden. μ ist der durch Rechtsunsicherheit bedingte Anteil, der den Konsumenten von einer Kaufentscheidung im Ausland Abstand nehmen läßt. Die mit μ gewichtete Preisdifferenz findet sich in Spalte F. Die Multiplikation dieser Differenz mit den jährlichen Zulassungszahlen aus Spalte B ergibt in Spalte G die Verluste pro Land in Mio. Ecu. Die gesamten Verluste in der EU sind im Feld G16 errechnet.

172 Diese Differenz ist jedoch noch irreführend, denn es besteht ein gewisses Risiko, im Ausland ein schadhaftes Gut zu erwerben. Dieses Risiko läßt sich aus dem Eurobarometer ablesen. Das Risiko, beim Kauf eines Gutes über 500 Ecu ein schadhaftes Gut zu erwerben und infolge einer Beschwerde nichts erstattet zu bekommen, beträgt 1,98 Prozent (vgl. Tabelle 2). Davon muß das inländische Risiko, ein schadhaftes Gut zu erwerben und keine Erstattung zu bekommen, abgezogen werden. Diese Differenz kann als inländischer Risikoaufschlag aufgefaßt werden, d.h., um diesen Betrag kann der inländische Anbieter teurer als der ausländische Konkurrent sein, ohne den inländischen Konsumenten zu verlieren. Erforderlich sind jedoch Zahlen über das entsprechende Risiko im Inland. Der Deutlichkeit halber muß darauf hingewiesen werden, daß dieser Risikoaufschlag nichts mit rechtlicher Unsicherheit zu tun hat, sondern lediglich das Risiko ausdrückt, nach dem Kauf eines schadhaften Gegenstandes einen großen Verlust zu erleiden. Das Risiko, infolge einer Beschwerde nichts zu erhalten, hängt jedoch wiederum von den hohen Kosten der Inanspruchnahme des ausländischen Rechtssystems ab. Unsere Berechnungen mit der Risikodifferenz führten zu keinen grundlegend abweichenden Ergebnissen, so daß wir im folgenden von dem hier ausgeführten Argument zur Entlastung der Darstellung abstrahieren.

Tab. 6a: Komparativ statische Kosten der Rechtsunsicherheit in der EU durch nicht getätigte Käufe im EU-Ausland (Szenario: Güterpreis 15000 Ecu, $\mu = 0{,}24$)

repräsentativer Mindestpreis des Euroautos in Tsd. Ecu *15*

	A	B	C	D	E	F	G
		Konsum p.a. in Tsd.*	Preis-indices**	Preis-differenz in Tsd. Ecu	μ	Preis-differenz mal μ in Tsd. Ecu	Verluste in Mio. Ecu
1	B	387,3	115,6	2,34	*0,24*	0,5616	217,51
2	DK	139,6	*100*	0	*0,24*	0	0
3	D	3210,3	120,1	3,015	*0,24*	0,7236	2322,97
4	GR	109,1	*105*	0,75	*0,24*	0,18	19,64
5	E	908,1	103,9	0,585	*0,24*	0,1404	127,5
6	F	1973,2	106,5	0,975	*0,24*	0,234	461,73
7	IRL	80,4	114,3	2,145	*0,24*	0,5148	41,39
8	I	1646,9	100	0	*0,24*	0	0
9	L	29,2	107,8	1,17	*0,24*	0,2808	8,2
10	NL	433,1	104,7	0,705	*0,24*	0,1692	73,28
11	A	274,2	*115*	2,25	*0,24*	0,54	148,07
12	P	233,2	100,8	0,12	*0,24*	0,0288	6,72
13	SF	67,2	*115*	2,25	*0,24*	0,54	36,29
14	S	156,4	*115*	2,25	*0,24*	0,54	84,46
15	UK	1910,9	110,1	1,515	*0,24*	0,3636	694,8
16	EU	11559,1	100		*0,24*		**4242,56**

spekulative Werte kursiv

* ACEA (1995), S. 1: Angaben für 1994

** EU-Kommission (1994), S. 13: Preisindices für den VW-Passat (90 PS), Angaben ohne Steuern

Die hier vorgenommene Berechnung basiert in vielfacher Hinsicht auf Spekulationen. Die Ermittlung des repäsentativen Autos der EU ist offensichtlich zum Scheitern

verurteilt. Als repräsentatives Auto haben wir den VW Passat (90 PS) zum Mindestpreis von 15 Tsd. Ecu zugrunde gelegt. Die Preisindices sind KOMMISSION (1994), S. 13 entnommen. Danach ist dieses Modell in Italien am günstigsten und hat den höchsten Preis in Deutschland. Für die Länder Dänemark, Griechenland, Österreich, Finnland und Schweden liegen keine Angaben vor, die Werte sind Schätzungen. Bei dem gewählten VW Passat (90 PS) handelt es sich zwar um ein Mittelklasseauto, die Wahl ist per se jedoch rein willkürlich. Insofern bestehen hohe Unsicherheitsgrade sowohl im Hinblick auf die gewählten Preisindices als auch auf den repräsentativen Preis. Die Indices gelten ausschließlich für den VW Passat (90 PS) und können sich bei vergleichbaren Mittelklassewagen vollkommen anders gestalten. Sie erscheinen uns insofern akzeptabel, als sie von der Streuung her im mittleren Bereich liegen[173]. Zudem ist aufgrund von Ausstattungsunterschieden ein repräsentativer Preis nicht zu ermitteln, weshalb wir hier Szenarien mit zugrunde gelegten Preisen von 14.000, 15.000, 16.000 und 17.000 Ecu entwerfen.

Wie oben erwähnt, hängt die Entscheidung, einen ausländischen Preisvorteil nicht zu nutzen, nicht ausschließlich von Rechtsunsicherheit ab. Das Problem besteht nun darin, den Anteil der Rechtsunsicherheit zu isolieren, also den Wert für μ zu ermitteln. Die Gesamtheit der Faktoren, die den Konsumenten nicht im Ausland kaufen läßt, ist gleich 1. Insgesamt gilt also: $\mu = 1$ - alle anderen Faktoren.

Ein wesentliches Motiv, einen ausländischen Preisvorteil nicht zu nutzen, liegt in unverhältnismäßig hohen Transportkosten. Niemand wird für den Kauf einer 0,5 Ecu billigeren Packung Zigaretten von Berlin mit einem Kostenaufwand von 80 Ecu nach Luxemburg fahren. Allerdings können durch den Versandhandel diese Kosten erheblich verringert werden. Je nach Vertriebsstruktur, effektivem Preisunterschied, Distanz und Größe/Gewicht der Güter weicht die Bedeutung der Transportkosten deutlich ab. Transportkosten werden auch für eventuelle Reparaturen relevant. Die Inanspruchnahme von Tausch- und Reparaturleistungen nannten 25 Prozent als wesentliches Hindernis, im Ausland zu kaufen[174]. Für Bewohner grenznaher Regionen

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173 Kommission (1994) gibt die Preisindices für 76 Wagentypen an.

174 Vgl. Eurobarometer (1993), S. 10.

sind Transportkosten von relativ geringer Bedeutung, μ ist demnach verhältnismäßig groß.

Ein weiterer wichtiger Faktor sind **Sprachprobleme**, insbesondere bei beratungsintensiven Gütern wie z.B. Computern. Sprachprobleme spielen ebenfalls eine große Rolle, falls Gewährleistungsansprüche geltend gemacht werden müssen. Das Eurobarometer (1993, S. 10) hat ermittelt, daß 18 % der Käufer Sprachprobleme für ein wesentliches Hindernis für internationale Käufe halten. Sprachliche Schwierigkeiten sind auch ein wesentliches Problem im Zusammenhang mit **Informationen über Verkaufsbedingungen**. Die Probleme bei der Ermittlung der Bedeutung dieses Elementes im Rahmen einer Entscheidung nicht im Ausland zu kaufen werden deutlich, wenn man empirisch ermittelte Zahlen betrachtet. In Deutschland nannten 55 Prozent der Befragten mangelnde Information als wesentliches Hindernis[175], im Eurobarometer (1993, S. 10) führten dagegen nur 6 Prozent Informationsprobleme über ausländische Verkaufsbedingungen als Hemmnis an. Ähnlich groß ist die Diskrepanz bei **Informationen über Qualitäts- und Sicherheitsstandards**. Hier wurden 45 Prozent für Deutschland ermittelt[176], im Ggs. zu 6 Prozent lt. Eurobarometer[177]. Viele Bewohner der EU sind mehrsprachig (z.B. Belgien, Luxemburg, Niederlande). Für diese Konsumenten sind Sprachprobleme von relativ geringer Bedeutung, μ ist demnach verhältnismäßig groß. Man kann sich eine Vielzahl weiterer Beweggründe vorstellen, die individuell - besonders für 'einfache Bürger' - eine Rolle spielen können, wie Zahlungsprobleme, etc.

Neben monetär quantifizierbaren Motiven können auch nicht pekuniäre Elemente den Kaufentscheid wesentlich beeinflussen. Nationalismus ("ich kaufe grundsätzlich nur im Inland") oder eine psychologische Händlerbindung können hier als Beispiele angeführt werden. Interessanterweise nannte in Deutschland jedoch niemand diesen Faktor als entscheidend im Hinblick auf sein Kalkül, im In- oder Ausland zu kaufen[178].

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175 Vgl. Breitenacher (1993), S. 208.

176 Vgl. Breitenacher (1993), S. 208.

177 Vgl. Eurobarometer (1993), S. 10

178 Vgl. Breitenacher (1993), S. 208.

Diese, je nach betrachtetem/r Gut/Dienstleistung vollkommen unterschiedlich ausgeprägten Parameter, müssen für die **Ermittlung von μ** in Betracht gezogen werden. Die erforderlichen Informationen hatten wir zum Zeitpunkt der Bearbeitung nicht zur Verfügung, so daß mit unterschiedlichen Werten für μ Szenarien modelliert werden.[179]

Nur für Deutschland liegt eine Einschätzung vor. 42 Prozent der Befragten (von 174 Prozent, Mehrfachnennungen waren möglich) nannten Rechtsunsicherheit als entscheidenden Beweggrund, nicht im EU-Ausland zu kaufen[180]. Insofern kann für Deutschland μ mit 42/174 = 0,24 beziffert werden. Dieser Wert ist jedoch tendenziell niedrig angesetzt. Es ist durchaus denkbar, daß für 42 Prozent der deutschen Verbraucher Rechtsunsicherheit für sich genommen prohibitiv für einen Auslandskauf ist und die anderen Elemente wie Informationsdefizite, etc. hinzukommen. In diesem extremen Fall wäre μ in Deutschland gleich 0,42. Diesen Wert nehmen wir EU-weit für ein wertmäßig tendenziell hoch angesetztes Szenario an. Ein drittes grundsätzlich plausibles Szenario besteht darin, auf der Basis des deutschen Wertes zu berücksichtigen, daß μ in flächenmäßig kleinen Ländern, deren Bevölkerung mehrsprachig ist, tendenziell hoch ist. Danach ist μ für Belgien, Luxemburg, die Niederlande, etc. eher hoch anzusetzen, da Sprachprobleme nur gering wiegen und die Bewohner aufgrund der geringen flächenmäßigen Ausdehnung der Staaten praktisch alle grenznah wohnen. Das Gegenteil ist in den südlichen Mitgliedsländern der Fall. In Tabelle 6b findet sich ein spekulatives differenziertes μ-Szenario, das uns plausibel erschien, in Spalte E.

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179 Vorschlag 4: Es ist für die Ermittlung der makroökonomischen Kosten der rechtlichen Unsicherheit für die Verbraucher im Binnenmarkt von essentiellem Interesse zu erfahren, warum Verbraucher nicht im EU-Ausland kaufen.

180 Vgl. Breitenacher (1993), S. 208.

Tab. 6b: Komparativ statische Kosten der Rechtsunsicherheit in der EU durch nicht getätigte Käufe im EU-Ausland (Szenario: Güterpreis 16000 Ecu, μ - differenziert)

repräsentativer Mindestpreis des Euroautos in Tsd. Ecu *16*

	A	B	C	D	E	F	G
		Konsum p.a. in Tsd.*	Preis-indices**	Preis-differenz in Tsd. Ecu	μ	Preis-differenz mal μ in Tsd. Ecu	Verluste in Mio. Ecu
1	B	387,3	115,6	2,496	*0,4*	0,9984	386,68
2	DK	139,6	*100*	0	*0,4*	0	0
3	D	3210,3	120,1	3,216	*0,24*	0,7718	2477,71
4	GR	109,1	*105*	0,8	*0,1*	0,08	8,73
5	E	908,1	103,9	0,624	*0,2*	0,1248	113,33
6	F	1973,2	106,5	1,04	*0,25*	0,26	513,03
7	IRL	80,4	114,3	2,288	*0,2*	0,4576	36,79
8	I	1646,9	100	0	*0,2*	0	0
9	L	29,2	107,8	1,248	*0,5*	0,624	18,22
10	NL	433,1	104,7	0,752	*0,4*	0,3008	130,28
11	A	274,2	*115*	2,4	*0,3*	0,72	197,42
12	P	233,2	100,8	0,128	*0,1*	0,0128	2,98
13	SF	67,2	*115*	2,4	*0,2*	0,48	32,26
14	S	156,4	*115*	2,4	*0,2*	0,48	75,07
15	UK	1910,9	110,1	1,616	*0,2*	0,3232	617,6
16	EU	11559,1	100		*0,2593*		**4610,1**

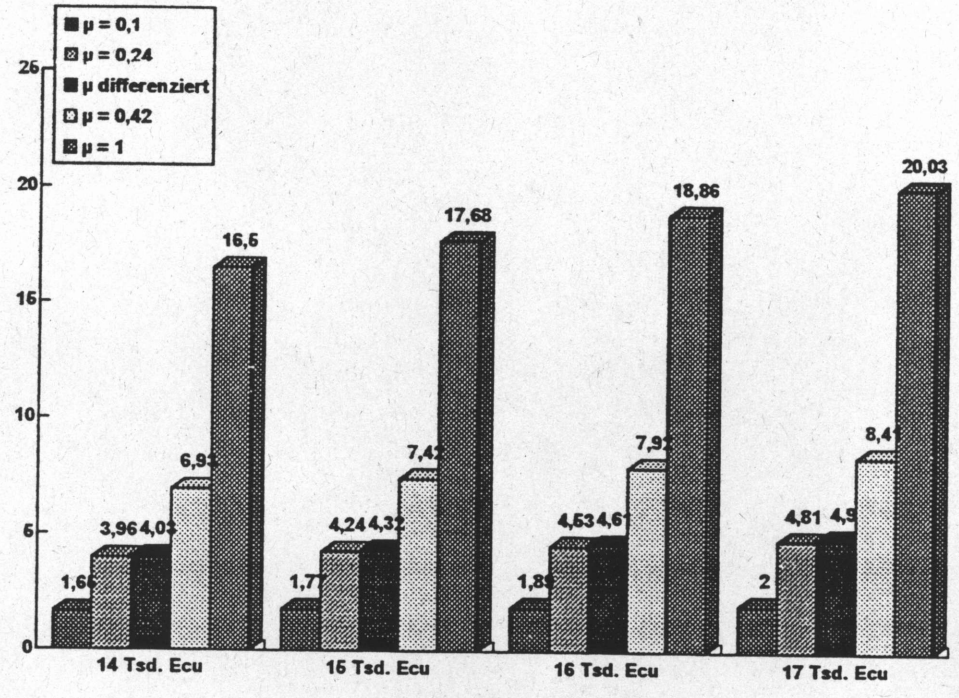
spekulative Werte kursiv

* ACEA (1995), S. 1: Angaben für 1994

** EU-Kommission (1994), S. 13: Preisindices für den VW-Passat (90 PS), Angaben ohne Steuern

Gleichwohl sind sämtliche Werte für μ rein spekulativ. Es ist deshalb interessant, in Minimal- bzw. Maximalszenarien Werte von 0,1 bzw. 1 einzusetzen. Im ersten Fall werden je nach zugrunde gelegtem Preis des repräsentativen Autos Kosten in Europa zwischen 1,65 und 2 Mrd. Ecu ermittelt. Ein **(unrealistischer) Extremfall** besteht darin, daß $\mu = 1$ gesetzt wird, d.h., ausschließlich wegen Rechtsunsicherheit nicht im Ausland gekauft wird. Die Ermittlung dieses Wertes ermöglicht die Kenntnis der **theoretischen Obergrenze** der ermittelbaren Kosten. Die Gesamtheit der Ergebnisse in Abhängigkeit von der Variation der unsicheren Variablen 'μ' und 'repräsentativer Autopreis' ist in Abbildung 4 veranschaulicht.

Abb. 6: Direkte statische Kosten der Rechtsunsicherheit im Automobilsektor aufgrund nicht ausgenutzter Preisdifferenzen



Unter zahlreichen Vorbehalten konnten für den hier modellierten Automobilmarkt direkte statische Kosten der Rechtsunsicherheit in Höhe von ca. zwei bis acht Mrd. Ecu ermittelt werden. Für den unrealistischen Fall '$\mu = 1$' wurde die theoretische

Obergrenze in Abhängigkeit vom Preis des repräsentativen Autos zwischen 16,5 und 20 Mrd. Ecu ermittelt.

Pkws stellen jedoch bei weitem nicht alle opportunismusanfälligen Verbrauchsgüter dar, bei denen Preisvorteile im Ausland realisiert werden können. Für Gütergruppen, wie Haushaltsgeräte, Kleidung, Unterhaltungselektronik kann die vorgestellte Methode gleichermaßen angewandt werden. Die dabei ermittelten Kosten können zu denen des Automobilsektors addiert werden, so daß für eine sämtliche Sektoren berücksichtigende Analyse statische Kosten in zweistelliger Ecu-Milliardenhöhe prognostiziert werden können. Diese statische Betrachtung beinhaltet jedoch ein **grundlegendes Problem**, das in der Nichtberücksichtigung dynamischer Effekte besteht. In der Kostenrechnung ist implizit die Angleichung der Preise auf dem geringsten Niveau unterstellt. Diese Annahme scheint für den Automarkt nicht realistisch. Vielmehr wird, wenn alle Konsumenten im preiswertesten Land kaufen, die steigende Nachfrage dort zu Preissteigerungen führen. In der Folge ist eher ein einheitlicher Preis zu erwarten, der dem aktuellen Durchschnittspreis entspricht. Damit können die realisierbaren **Vorteile durchaus Null** sein.

6.3.3 Ideen zu einer makroökonomischen Ermittlung der Kosten

Eine alternative Vorgehensweise zu der in 6.3.2 vorgestellten sektoralen Methode besteht prinzipiell in einer makroökonomischen Herangehensweise. Diese Methode stellen wir hier vor, müssen aber bereits zu Beginn auf die sehr eingeschränkte Relevanz der Ergebnisse hinweisen. Während wir in einiger Hinsicht wiederum auf spekulative Schätzungen angewiesen sind, liegt das zentrale Problem in der Zugrundelegung von Preisindices für den makroökonomischen Güterkorb. Auf der Basis uns vorliegender Preisstatistiken erscheint es plausibel, **europaweite Preisdifferenzen von 30 Prozent** anzunehmen.[181] Dabei ist selbstredend nicht für alle Warengruppen der-

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181 Umfassende Untersuchungen für die EU sind allerdings nicht vorhanden, es liegen lediglich sektorale Preisvergleiche für wenige Staaten vor. Vgl. z.B. IFAV (1992), S.26, S. 29 und S. 31. Dort werden relative Preisunterschiede zwischen Deutschland und Dänemark angegeben. Für Photogeräte betragen die durchschnittlichen Indices 137 (Dk): 100 (D), für TV- und Audiogeräte 122 (Dk): 100 (D) und für Cassetten, CDs 133 (Dk): 100 (D). Die maximalen relativen Preisdifferenzen für Autos liegen lt. Kommission (1994) je nach Wagentyp zwischen 17 und 33 Prozent. In der SZ v. 25.7.1995 werden neueste Marktstudien der Kommission sogar mit Preisunterschieden bis zu 55,5 Prozent bei Automobilen zitiert.

selbe Staat der günstigste. Um einen Eindruck von möglichen Bandbreiten zu erhalten, wie sich alternative Preisindices im Modell auswirken, haben wir die Preisindices im Bereich 100 bis 130 **randomisiert**. Das bedeutet, daß das Land mit dem günstigsten Preisindex laufend wechselt, ebenso wie die Preisindices sämtlicher Länder, wobei die Preisabweichungen maximal 30 Prozent betragen.

Eine zufällige Auswahl der randomisierten Preisindices ist zur Veranschaulichung beispielhaft in Tabelle 7a in Spalte B eingetragen. In Spalte C ist basierend auf den Preisindices die Preisdifferenz eingetragen, um die jeder Verbraucher des jeweiligen Landes günstiger kaufen kann, wenn er im EU-Mitgliedstaat mit dem geringsten Preisniveau kauft. Im abgedruckten Szenario kann also beispielsweise der Belgier 7,285 Prozent (Feld C1) sparen, wenn er zum günstigsten Preis in Europa kauft.

Die nächste Schwierigkeit besteht in der Identifikation opportunismusanfälliger Güter, bei denen Rechtsunsicherheit beim Kauf eine Rolle spielt. Die Auswahl der Gütergruppen folgte Plausibilitätsüberlegungen. Für die bedeutenden Positionen Nahrungsmittel und Wohnungsmieten spielt potentielle Rechtsunsicherheit in internationalen Transaktionen eine untergeordnete Rolle. Wir haben die Gruppen (1) Haushaltsgeräte (excl. laufende Haushaltsführung), (2) Kleidung, (3) Verkehr und (4) sonstige Waren ausgewählt. Da nicht alle Elemente dieser Warengruppen opportunismusanfällig sind, haben wir die Summe mit einem Faktor kleiner 1 gewichtet. Für Szenarien haben wir 40, 60 und 80 Prozent gewählt. Da Eurostat (1994) nur Prozentzahlen für bestimmte Warengruppen vom Gesamtkonsum angibt, haben wir in Spalte D der Tabelle 7a zunächst opportunismusanfällige Güter als Prozentzahl vom Gesamtkonsum eingetragen. Für den privaten Konsum in den Staaten waren nach Eurostat (1994) wiederum nur Prozentzahlen vom nationalen BIP vorhanden. Auf dieser Basis wird in Spalte E der private Gesamtkonsum jedes Staates in Mrd. Ecu ermittelt. Die Multiplikation dieses Wertes mit der Prozentzahl aus Spalte D ergibt in Spalte F die Höhe des Konsums in Mrd. Ecu, bei dem Rechtssicherheit eine Rolle in der Kaufentscheidung spielt. Multipliziert man diesen Wert wiederum mit dem prozentualen Einsparungspotential aus Spalte C, erhält man in Spalte G die absoluten Werte des Einsparungspotentials in Mrd. Ecu. Diese mögliche Ersparnis muß wiederum mit dem oben ausführlich problematisierten Faktor μ aus Spalte H gewichtet werden. Führt man diesen Schritt durch, erhält man in Spalte I die direkten

statischen makroökonomischen Kosten der Rechtsunsicherheit für die Verbraucher durch Nichtausnutzung internationaler Preisdifferenzen. Im Feld I 16 der Tabelle 7a sind die gesamten Kosten für die Verbraucher in Europa abgetragen.

Tab. 7a: Statische makroökonomische Kosten der Rechtsunsicherheit für den Verbraucher [Szenario: μ = 0,24; Berücksichtigung von 60 **Prozent** der Warengruppen Haushaltsgeräte (excl. laufende Haushaltsführung), Kleidung, Verkehr und sonstige Waren]

	A	B	C	D	E	F	G	H	I
		Preis-indices*	Differenz in %	Konsum opp.anfäll. Güter in %**	Konsum in Mrd. Ecu***	opp. anfäll. Konsum in Mrd. Ecu	mögl. Ersparnis in Mrd. Ecu	μ	Kosten der Rechts-unsicherheit in Mrd. Ecu
1	B	*109,97*	7,2815	28,74	106,8712	30,7148	2,2365	*0,24*	0,537
2	DK	*121,52*	16,0929	23,1	57,0318	13,1743	2,1201	*0,24*	0,509
3	D	*103,41*	1,3931	25,32	957,5415	242,45	3,3776	*0,24*	0,811
4	GR	*101,97*	0	24,78	43,0917	10,6781	0	*0,24*	0
5	E	*124,29*	17,9587	33,48	280,6712	93,9687	16,8756	*0,24*	4,05
6	F	*107,66*	5,2853	26,28	617,221	162,206	8,5731	*0,24*	2,058
7	IRL	*107,08*	4,7758	22,86	21,8268	4,9896	0,2383	*0,24*	0,057
8	I	*129,56*	21,2995	29,16	595,224	173,567	36,969	*0,24*	8,873
9	L	*115,36*	11,6061	30,06	5,125	1,5406	0,1788	*0,24*	0,043
10	NL	*106,07*	3,866	25,8	148,8076	38,3924	1,4843	*0,24*	0,356
11	A	*105,8*	3,6237	29,88	79,1896	23,6619	0,8574	*0,24*	0,206
12	P	*106,58*	4,3253	28,62	47,3291	13,5456	0,5859	*0,24*	0,141
13	SF	*118,44*	13,9092	24,9	45,0718	11,2229	1,561	*0,24*	0,375
14	S	*129,23*	21,0937	22,68	103,3594	23,4419	4,9448	*0,24*	1,187
15	UK	*124,41* Minimum	18,0391	28,8	515,584	148,488	26,7859	*0,24*	6,429
16	EU	*101,97*							**25,63**

spekulative Werte kursiv

* per Zufallsgenerator ermittelte Werte zwischen 100 und 130

** eigene Berechnungen auf der Basis von Eurostat (1994), S. 50f.

*** eigene Berechnungen auf der Basis von Eurostat (1994), S. 41 u. 47.

In einem spekulativen Durchschnittsszenario mit μ = 0,24 und Berücksichtigung von 60 **Prozent** der Warengruppen Haushaltsgeräte (excl. laufende Haushaltsführung),

Kleidung, Verkehr und sonstige Waren werden in der abgebildeten Tabelle 7a 25,63 Mrd. Ecu ermittelt. Dabei stellt die präsentierte Tabelle nur einen beliebigen möglichen Fall dar, der zur Illustration unserer Vorgehensweise dienen soll. Um einen aussagekräftigen Wert zu erhalten, muß die Rechentabelle mit den sich laufend ändernden randomisierten Preisindices mehrfach durchkalkuliert werden. Aus diesem Prozeß haben wir eine Stichprobe von 100 gezogen. Das daraus errechnete arithmetische Mittel für die makroökonomischen Kosten der Rechtsunsicherheit für die Verbraucher in Europa liegt im Szenario (μ = 0,24; 60 Prozent) bei 25,69 Mrd. Ecu, die Standardabweichung liegt bei 5,8 Mrd. Ecu, entsprechend 22,57 Prozent des arithmetischen Mittels. Insofern ist die Bandbreite recht groß, gleichwohl kann man eine vorläufige Vorstellung über die Größenordnung der statischen makroökonomischen Kosten für die Verbraucher im Binnenmarkt erhalten.

Wird derselbe Warenkorb [60 Prozent der Warengruppen Haushaltsgeräte (excl. laufende Haushaltsführung), Kleidung, Verkehr und sonstige Waren] zugrunde gelegt und μ analog zu Tabelle 6b differenziert, erhält man das in Tabelle 7b abgebildete Rechenschema.

Tab. 7b: Statische makroökonomische Kosten der Rechtsunsicherheit für den Verbraucher [Szenario: **μ differenziert**; Berücksichtigung von **60 Prozent** der Warengruppen Haushaltsgeräte (excl. laufende Haushaltsführung), Kleidung, Verkehr und sonstige Waren]

	A	B	C	D	E	F	G	H	I
		Preisindizes*	Differenz in %	Konsum opp. anfäll. Güter in %**	Konsum in Mrd. Ecu***	opp. anfäll. Konsum in Mrd. Ecu	mögl. Ersparnis in Mrd. Ecu	μ	Kosten der Rechtsunsicherheit in Mrd. Ecu
1	B	129,75	22,764	28,74	106,8712	30,7148	6,9919	*0,4*	2,797
2	DK	106,55	5,9541	23,1	57,0318	13,1743	0,7844	*0,4*	0,314
3	D	114,9	12,7853	25,32	957,5415	242,45	30,9979	*0,24*	7,439
4	GR	114,89	12,779	24,78	43,0917	10,6781	1,3646	*0,1*	0,136
5	E	101,65	1,4138	33,48	280,6712	93,9687	1,3285	*0,2*	0,266
6	F	100,21	0	26,28	617,221	162,206	0	*0,25*	0
7	IRL	119,09	15,8519	22,86	21,8268	4,9896	0,7909	*0,2*	0,158
8	I	125,13	19,9145	29,16	595,224	173,567	34,5651	*0,2*	6,913
9	L	115,41	13,17	30,06	5,125	1,5406	0,2029	*0,5*	0,101
10	NL	128,43	21,9752	25,8	148,8076	38,3924	8,4368	*0,4*	3,375
11	A	109,09	8,1423	29,88	79,1896	23,6619	1,9266	*0,3*	0,578
12	P	104,74	4,3202	28,62	47,3291	13,5456	0,5852	*0,1*	0,059
13	SF	127,31	21,2875	24,9	45,0718	11,2229	2,3891	*0,2*	0,478
14	S	106,29	5,7214	22,68	103,3594	23,4419	1,3412	*0,2*	0,268
15	UK	118,14	15,1735	28,8	515,584	148,488	22,5309	*0,2*	4,506
		Minimum							
16	EU	100,21							**27,388**

spekulative Werte kursiv

* per Zufallsgenerator ermittelte Werte zwischen 100 und 130

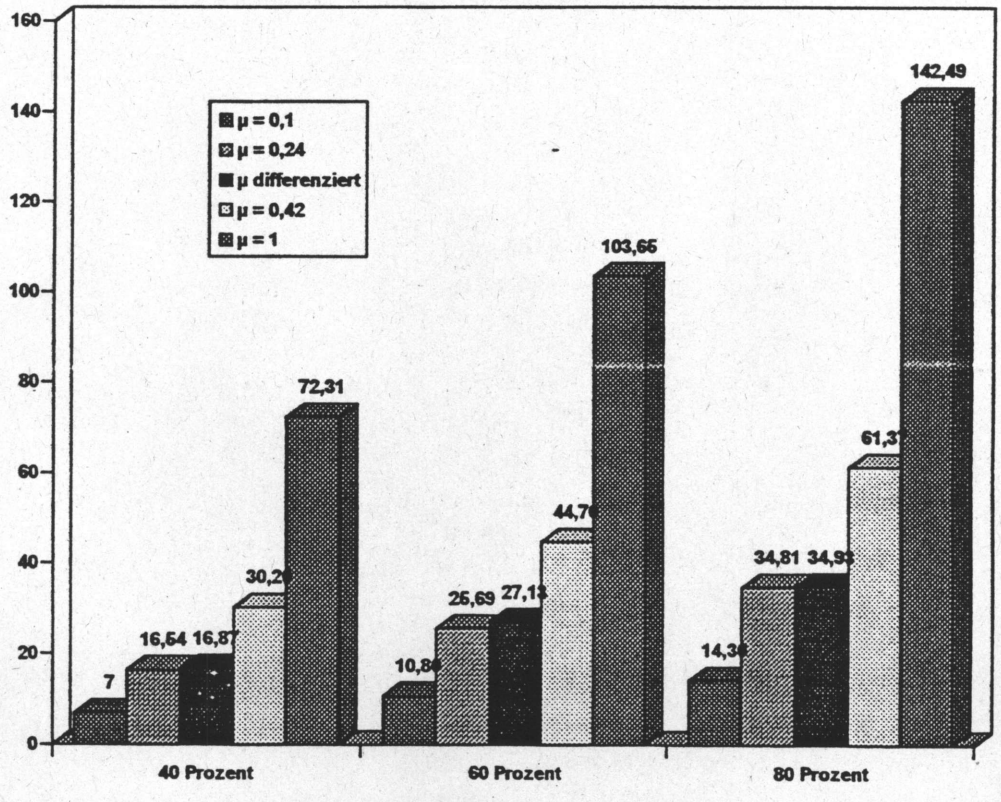
** eigene Berechnungen auf der Basis von Eurostat (1994), S. 50f.

*** eigene Berechnungen auf der Basis von Eurostat (1994), S. 41 u. 47.

Auch diese Tabelle haben wir 100 mal durchkalkuliert und aus der daraus resultierenen Ergebnisstichprobe für dieses Szenario (μ - diff.; 60 Prozent) ein arithmetisches Mittel von 27,13 Mrd. Ecu bei einer Standardabweichung von 5,91 Mrd. Ecu entsprechend 21,78 Prozent des arithmetischen Mittels errechnet. Alternative Szenarien lassen sich nach μ und der Prozentzahl der berücksichtigten Warengruppen modellieren. Wir haben szenarisch für μ wie oben die Werte 0,1; 0,24;

differenziert; 0,42 und 1 gewählt und 40, 60 und 80 Prozent der Warengruppen Haushaltsgeräte (excl. laufende Haushaltsführung), Kleidung, Verkehr und sonstige Waren zugrunde gelegt und durchgerechnet. Die errechneten arithmetischen Mittelwerte sind in Abbildung 5 dargestellt.

Abb. 7: Direkte statische - makroökonomische - Kosten der Rechtsunsicherheit aufgrund nicht ausgenutzter Preisdifferenzen in Mrd. Ecu



Da in der Graphik nur arithmetische Mittelwerte angegeben werden können, fassen wir die zur Beurteilung der Signifikanz unserer Ergebnisse erforderlichen Informationen für alle 15 Szenarien in Tabelle 8 zusammen.

Tab. 8: Statistische Kennzahlen der Szenarien

	μ = 0,1	μ = 0,24	μ - diff.	μ = 0,42	μ = 1
40 Prozent					
Stichprobe:	100	100	100	100	100
arithmet. Mittel in Mrd. Ecu	7,00	16,54	16,87	30,26	72,31
Minimum in Mrd. Ecu	3,73	6,41	8,33	14,49	23,32
Maximum in Mrd. Ecu	12,63	26,21	26,67	47,43	107,92
Standardabw. in Mrd. Ecu	1,73	4,47	4,08	7,16	18,08
Standardabweichung. in % vom arithmet. Mittel	24,75	27,03	24,20	23,66	25,00
60 Prozent					
Stichprobe:	100	100	100	100	100
arithmet. Mittel in Mrd. Ecu	10,86	25,69	27,13	44,76	103,645
Minimum in Mrd. Ecu	5,24	13,21	12,66	23,68	31,46
Maximum in Mrd. Ecu	17,21	37,99	47,73	68,24	166,63
Standardabw. in Mrd. Ecu	2,76	5,80	5,91	10,46	26,84
Standardabweichung. in % vom arithmet. Mittel	25,37	22,57	21,78	23,36	25,90
80 Prozent					
Stichprobe:	100	100	100	100	100
arithmet. Mittel in Mrd. Ecu	14,36	34,81	34,93	61,37	142,49
Minimum in Mrd. Ecu	7,96	14,25	15,56	27,43	74,19
Maximum in Mrd. Ecu	22,65	51,04	51,98	92,55	206,97
Standardabw. in Mrd. Ecu	3,42	7,14	8,04	15,21	30,31
Standardabweichung. in % vom arithmet. Mittel	23,79	20,51	23,03	24,79	21,27

Neben den Vorbehalten, unter denen die errechneten direkten statischen Kosten zu sehen sind, wird auch hier das bereits am Ende des Abschnitts 6.3.2 angesprochene grundlegende Problem wirksam, das in der Nichtberücksichtigung dynamischer Effekte besteht. In der Kostenrechnung ist auch hier implizit die Angleichung der Preise auf dem geringsten Niveau unterstellt. Diese Annahme scheint nur in einigen Spezialfällen realistisch. Vielmehr wird, wenn alle Konsumenten im preiswertesten Land kaufen, die steigende Nachfrage dort zu Preissteigerungen führen. Der sich einstellende einheitliche Preis wird wahrscheinlich eher dem aktuellen Durchschnittspreis entsprechen. Damit können die realisierbaren **Vorteile durchaus Null** sein.

6.4 Kosten durch den nationalen Erwerb mangelhafter Güter oder Dienstleistungen

Die Studie hat im Abschnitt 6.2 zeigen können, daß Rechtsunsicherheit in internationalen Transaktionen hohe Kosten verursacht. Zudem wurde in den vorangegangenen Kapiteln auch für die nationale Ebene belegt, daß unsichere Property Rights hohe Kosten verursachen. Insofern liegt es nahe, Spekulationen darüber anzustellen, welche Kosten Verbrauchern dadurch entstehen, daß sie statt unter einem eventuell effizienteren ausländischen Rechtssystem im eigenen kaufen, unter dem die Durchsetzung von Rechtsansprüchen nicht oder nur eingeschränkt möglich ist. Das Argument wäre also, daß Rechtsunsicherheit in internationalen Transaktionen für den europäischen Verbraucher die Wahl des effizientesten Rechtsstandortes innerhalb der EU behindert.

Verbrauchern entstehen nicht nur bei internationalen Transaktionen Kosten (wie in Abschnitt 6.2 abgeleitet), sondern auch in nationalen Transaktionen werden Kosten durch mangelhafte Ware verursacht. Nicht sämtliche Güter sind einwandfrei, und auch trotz verhältnismäßig geringer Kosten eines Rechtsstreits werden Konsumenten nicht für alle Verluste kompensiert. Bereits angesprochen wurde der Disziplinierungeffekt durch geringe Rechtsunsicherheit oder geringe Kosten der Rechtsdurchsetzung: Anbieter werden vor dem Hintergrund einer leichteren Durchsetzung von Verbraucherrechten weniger mangelhafte Waren ('Zitronen') verkaufen und höhere Kosten zur Kontrolle aufwenden.

In der **Tendenz wird jeder Konsument in Europa in dem Land kaufen, in dem er den geringsten potentiellen Verlust durch Opportunismus seitens des Anbieters hat.** Davon wird er z.Z. nicht zuletzt durch die hohen Kosten der internationalen Rechtssicherheit abgehalten. Man kann also Szenarien entwickeln, welche Einsparungspotentiale für den Verbraucher durch Nutzung des effizientesten Rechtssystems bestehen. Die Vorgehensweise ist dabei ähnlich wie in Tabelle 7 (Abschnitt 6.3.3), nur werden statt der Preisindices Verlustrisiken beim Kauf in den jeweiligen Ländern eingetragen. Auf dieser Basis können die Einsparungspotentiale im Vergleich

zum 'sichersten' bzw. verbraucherfreundlichsten EU-Staat ermittelt werden. Nun liegen uns keine Werte über nationale Verlustrisiken vor.[182]

Insgesamt scheint die Festlegung nationaler Risikowerte recht sensibel. Spekulationen erschienen uns in diesem Zusammenhang unangebracht. Was wir versucht haben, war folgendes: Wir haben Werte des BERI[183] zugrunde gelegt und daraus eine Reihenfolge nationaler Risiken beim Güterkauf errechnet. Die absoluten Abstände waren jedoch rein willkürlich, und die ermittelten Größenordnungen deutlich unterhalb 1 Mrd. Ecu erschienen uns vernachlässigbar, so daß wir diese Methode nicht intensiver verfolgt haben.

6.5 Zusammenfassung

In diesem Kapitel wurden Methoden vorgestellt, wie direkte statische Kosten durch Rechtsunsicherheit für die Verbraucher im Binnenmarkt ermittelt werden können. Die Ergebnisse sind unter großen Vorbehalten zu betrachten, da uns viele essentielle Daten nicht zur Verfügung gestanden haben. Um eine erste grobe Einschätzung der Größenordnung zu erhalten, haben wir Szenarien durchgerechnet, die auch extreme Werte beinhalteten. Nur die gesamten Bandbreiten der ermittelten Kosten erscheinen uns zu diesem Zeitpunkt seriös. Die Durchschnittsszenarien beruhen auf rein willkürlichen Werten, die uns jedoch plausibel für die Ermittlung der direkten statischen Kosten erschienen. Dynamische Effekte können demgegenüber zu einer erheblichen Verringerung oder Erhöhung der errechneten Kosten führen. Ersteres ist der Fall, wenn sich die Preise in Europa beim Durchschnitt der aktuellen Werte einpendeln. Zu weiteren Kostenersparnissen kann es im dynamischen Prozeß für Verbraucher kommen, wenn durch die verstärkte Konzentration des sektoralen Konsums auf wenige Staaten (und Hersteller) Skaleneffekte realisiert werden können. Solange keine Monopolstellung eines marktbeherrschenden Herstellers daraus resultiert, werden

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182 Vorschlag 5: Ein zukünftiges Eurobarometer sollte die 'Zufriedenheitsgrade', die im Eurobarometer (1995) für grenzüberschreitende Transaktionen ermittelt wurden, auch für die nationale Ebene in allen Mitgliedstaaten erheben.

183 Der Business Environment Risk Index (BERI) erfaßt durch Expertenbefragungen systematisch die Risiken von Staaten, die auf einer Skala von 0 (geringster Wert, höchstes Risiko) bis 100 (höchster Wert, geringstes Risiko) eingeordnet werden. Die EU-Staaten liegen im Bereich von 50 bis 72.

konkurrierende Oligopolisten Kostenvorteile auch an Verbraucher weitergeben. Die Vielfalt der möglichen indirekten statischen und dynamischen Effekte wurde in den Kapiteln 3 und 4 ausführlich erläutert.

Insgesamt setzen sich die durch Rechtsunsicherheit in internationalen Transaktionen bedingten Kosten aus vier Elementen zusammen, für die wir in unseren Modellen folgende Werte ermittelt haben:

(1) Kosten durch Verluste in internationalen Käufen: **75,38 bis 10919,31 Mio. Ecu** (Hochrechnung des Eurobarometers)

(2) Kosten durch internationale Beschwerden: **150 bis 1500 Mio. Ecu** (Hochrechnung des Eurobarometers)

(3) Kosten durch Nicht-Inanspruchnahme internationaler Preisvorteile aufgrund von Rechtsunsicherheit: **7 bis 61,37 Mrd. Ecu** - mit 142,49 Mrd. Ecu als theoretischer Obergrenze

(4) Kosten durch Nicht-Inanspruchnahme des effizientesten Rechtssystems: **vernachlässigbar**

In der Summe sind also direkte statische Kosten der Rechtsunsicherheit für die Verbraucher im Binnenmarkt **zwischen 7,23 und 73,79 Mrd. Ecu** zu konstatieren. Eine Addition der Werte der Durchschnittsszenarien führt zu Gesamtkosten von 1,38 Mrd. Ecu (Verluste aller Eurokonsumenten) + 0,46 Mrd. Ecu (Beschwerdekosten aller Eurokonsumenten) + 25,69 Mrd. Ecu (Nichtausnutzung von Preisvorteilen) = **27,53 Mrd. Ecu**.

Wie sind nun diese Kosten unter den genannten Vorbehalten zu interpretieren? Eine isolierte Ermittlung der Kosten von Rechtsunsicherheit in internationalen Transaktionen unterstellt implizit als Referenzszenario eine Situation mit vollkommener Rechtssicherheit. Die NIÖ betont jedoch die Kosten der Herstellung von Rechtssicherheit, die für eine eindeutige Festlegung der Property Rights prohibitiv sind. Insofern ist auch in keinem Staat der EU absolute Rechtssicherheit zu finden. **Leider**

fehlen jedoch nationale Referenzdaten. Das Eurobarometer hat zeigen können, daß grenzüberschreitende Transaktionen nicht mit einem auffallend hohen Risiko behaftet sind. Das deutet darauf hin, daß eine subjektive Überbewertung dieses Risikos oder andere nicht nachweisbare Ursachen die Verbraucher von der Realisierung internationaler Preisvorteile Abstand nehmen lassen. Das Gros der hier berechneten direkten statischen Kosten dürfte demnach nicht aus der 'Unsicherheit' internationaler Transaktionen rühren, sondern aus dem stark risikoaversen Verhalten des repräsentativen Verbrauchers. Nichtsdestoweniger ist davon auszugehen, daß ein Abbau der vorherrschenden Rechtsunsicherheit durch geeignete institutionelle Innovationen den EU-Binnenhandel nachhaltig fördern dürfte.

7. Anhang: Nähere Erläuterung einiger Hintergrundtheorien

Als die wichtigsten Hintergrundtheorien für die Begründung von bedeutsamen makroökonomischen Kosten von Rechtsunsicherheit können - wie schon in Kapitel 3 oben angemerkt - folgende Theorien angesehen werden:

(1) die Neue Institutionenökonomie,

(2) die Handelstheorie,

(3) die Optionstheorie,

(4) die Zeitinkonsistenztheorie,

sowie vor allem (für die Begründung der dynamischen Kosten)

(5) die Neue Wachstumstheorie.

Diese Hintergrundtheorien werden im folgenden näher (aber immer noch sehr kurz) dargestellt. Die Länge der Darstellungen ist dabei sehr unterschiedlich je nach subjektiv eingeschätzter Notwendigkeit der Erklärungsbedürftigkeit.

7.1 Neue Institutionenökonomie

7.1.1 Theoriemuster

Die Neue Institutionenökonomie (NIÖ) stellt kein einheitlich definiertes Theoriegebäude dar. Den Ansätzen gemeinsam ist die Erkenntnis, daß Institutionen im weitesten Sinne eine große Bedeutung in der Koordination menschlichen (ökonomischen) Handelns aufweisen. Institutionen bestehen dabei aus informellen Beschränkungen, formalen Regeln und der effektiven Umsetzung beider. Die NIÖ steht nicht im Konflikt mit der konventionellen Theorie, sondern versucht vielmehr, institutionelle Details zu berücksichtigen, die durch sehr abstrakte Betrachtungsweisen nicht erfaßt werden können. Insofern handelt es sich im wesentlichen um eine mikroökonomische Her-

angehensweise, die jedoch nicht vollkommen klar umrissen ist. Der Grund für die mangelnde Einigkeit über die Erklärungsansätze der NIÖ liegt darin, daß sich Ökonomen aus unterschiedlichsten Richtungen der Untersuchung verhaltensprägender Wirkungen von Institutionen zuwandten. Beispielhaft seien hier nur VON HAYEK als Vertreter der österreichischen Schule, BUCHANAN als Finanzwissenschaftler und Demokratietheoretiker der Virginia-Schule, COASE und WILLIAMSON, deren Denktradition dem Bereich der Industrieökonomie zuzuordnen ist, und schließlich NORTH als Wirtschaftshistoriker genannt.

Dementsprechend haben auch Überblicksartikel über die NIÖ unterschiedliche Schwerpunktsetzungen. Gleichwohl können folgende Theoriegebiete unter der Überschrift NIÖ subsumiert werden.

* Theorie der Property Rights (Verfügungsrechte)

  (konzentriert sich auf die Untersuchung der These, daß die Verteilung von Verfügungsrechten über knappe Ressourcen das Verhalten der betroffenen Individuen in vorhersehbarer Weise beinflußt)

* Transaktionskostentheorie

  (analysiert die Vertragsgestaltung zwischen privaten Wirtschaftssubjekten unter dem Gesichtspunkt der Kosten der Markt- bzw. Organisationsbenutzung)

* Ökonomische Theorie des Rechts

  (benutzt die ökonomische Theorie zur Analyse von Fragen der Rechtsprechung und Gesetzgebung, der Ahndung von Straftaten, der Schadenshaftung, etc.)

* Neue Politische Ökonomie (NPÖ)

  (wendet die ökonomische Analyse auf politikwissenschaftliche Fragen an; auch als „Public Choice" bezeichnet)

Diese Klassifikation ist nicht überschneidungsfrei, reflektiert jedoch weitgehend den Stand der Diskussion im Hinblick auf die NIÖ. Wesentliches Element der NIÖ ist dabei der methodologische Individualismus, die Betrachtung von Individuen und ihrem Verhalten in gesellschaftlichen Systemen. Grundsätzlich wird jedem Akteur unterstellt, daß er seinen Nutzen individuell maximiert, daß er dabei begrenzt rational und auch opportunistisch handelt. Die begrenzte Rationalität resultiert aus der Tatsache, daß eine wesentliche Kostenkomponente im Kalkül jedes Akteurs die Beschaffung von Informationen ist. Grundsätzlich erfordern Informationsaktivitäten den Einsatz ökonomischer Ressourcen. Die Analyse des individuellen Kalküls im Hinblick auf den Informationsgrad geht im wesentlichen auf SIMON (1949, 1955) und STIGLER (1961) zurück. Diese beziehen auch Argumente aus der Psychologie in die Betrachtung mit ein. Besondere Bedeutung gewinnt in diesem Zusammenhang das satisfiszierende Verhalten, d.h. die Realisierung eines bestimmten Anspruchsniveaus, das unterhalb der individuell möglichen 'Nutzenmaximierung' liegt. Solches Verhalten wird in der NIÖ durchaus rational betrachtet, da die Kosten vollkommener Information immer prohibitiv sind. Insofern werden Entscheidungen immer unter Ungewißheit getroffen, auch ohne kognitive Schranken, die allerdings das Problem noch intensivieren. Das individuell nutzenmaximierende Verhalten ist grundsätzlich opportunistisch und kann auch illegale Handlungen beinhalten. Akteure setzen sich damit über formale, rechtliche Schranken hinweg.

Im Mittelpunkt des ökonomischen Geschehens sieht die NIÖ Transaktionen. Für die NIÖ besteht das Wesen von Transaktionen in der Übertragung von Verfügungsrechten. Die Verfügungsformen umfassen das Recht auf die Nutzung (usus), das Recht zur Abänderung der Form und Substanz (abusus), das Recht auf Nutzung der Erträge (usus fructus) und die Überlassung der Verfügung an andere. Die letztgenannte Form stellt auf Prinzipal-Agenten-Beziehungen ab, in denen der Eigentümer seine Verfügungsrechte an Beauftragte delegiert. Jeder Vertrag stellt eine institutionelle Regelung für eine solche Transaktion dar. Diese Regelung spezifiziert die Verfügungsrechte aus der Transaktion und soll die Vertragspartner vor opportunistischem Verhalten der 'Gegenseite' schützen. Dazu fallen Anbahnungskosten, Abschlußkosten und Kontrollkosten an. Durch nicht kostenlose Informationen und opportunistisches Verhalten entstehen bei jeder Übertragung von Verfügungsrechten Transaktionskosten. Transaktionskosten machen den wesentlichen Teil

des heutigen wirtschaftlichen Geschehens aus. Diese Transaktionskosten liegen im Zentrum der Themenstellung. Bei den Kosten, die Verbrauchern im Binnenmarkt durch rechtliche Schranken entstehen, handelt es sich entweder direkt um Transaktionskosten oder um Kosten, die aus diesen resultieren.

In der NIÖ wird darüber hinaus davon ausgegangen, daß keine Entscheidungen unter Sicherheit gefällt werden. Vertragsprobleme unter Abwesenheit von begrenzter Rationalität und Opportunismus werden als trivial und eine ökonomische Analyse solcher 'Ideal-Verträge' als überflüssig angesehen. In einer Welt mit positiven Transaktionskosten und nicht perfekter Information sind alle Verträge unvollständig. Es lassen sich aber Grade der Unvollständigkeit ausmachen.

7.1.2 Exkurs: Zum Zusammenhang von Politischer Instabilität und Wirtschaftswachstum bzw. Inflation[184]

Es wird davon ausgegangen, daß zwischen Rechtsunsicherheit im Sinne von Rechtsinstabilität und politischer Instabilität eine positive Korrelation besteht, so daß man auch auf eine „gemeinsame Kausalität" hinsichtlich von makroökonomischen Wirkungen schließen kann. Nun gibt es so gut wie keine wissenschaftlichen Untersuchungen des Einflusses von Rechtsunsicherheit auf Inflation und Wirtschaftswachstum (zu vereinzelten Ansätzen siehe in Kapitel 5 oben). Dagegen gibt es in neuerer Zeit viele Versuche, die makroökonomischen Auswirkungen von politischer Instabilität wissenschaftlich herauszuarbeiten. Von daher stütze ich mich im folgenden auf diese.

Politische Instabilität und Wirtschaftswachstum

Politische Instabilität wird in der Neuen Politischen Ökonomie (die ein zentrales Theoriegebiet der NIÖ ist) als Hauptursache für Wachstumsverluste angesehen / behandelt. Dies beinhaltet die Unterstellung, daß politische Instabilität kontraproduktiv wirkt. Dahinter steckt die Vermutung, daß politische Instabilität negative Effekte auf

184 Auszüge aus: Wagner (1995), S. 114-121.

Investitionen und auf den Spezialisierungsprozeß und damit auf den Wachstumsprozeß einer Volkswirtschaft ausübt.

Die allgemeine Begründung hierfür lautet: Politische Instabilität verunsichert die privaten Akteure, weil die Handlungsregeln die Stabilität verlieren, die erforderlich ist, um sie analog den technologischen Restriktionen als feste Nebenbedingungen in die individuelle Verhaltensoptimierung einbauen zu können.

Um dies besser verständlich machen zu können, werde ich die Funktion eines stabilen politischen Systems näher erläutern. **Die Funktion eines politischen Systems** kann man darin sehen, daß es möglichst stabile Institutionen schafft für komplexes interaktives Handeln in einer hochgradig arbeitsteiligen Wirtschaft/Gesellschaft. Institutionen sind Mechanismen, die die Restriktionen aus sozialer Interaktion in irgendeiner Form regeln. ("Restriktionen aus sozialer Interaktion" besagt, daß für die Individuen Handelsbeschränkungen dadurch vorliegen, daß sie sich mit anderen Menschen austauschen, handeln müssen, was seinerseits zu Arbeitsteilung führt.) Institutionen sind in diesem Sinne Spielregeln, die den Handlungsraum von Akteuren genauso beschränken wie technologische Restriktionen dies tun. Soziale Interaktion ist immer mit potentiellen Koodinationsproblemen behaftet, da es zu gegenseitigen Interessenüberschneidungen kommt. Damit nicht über jede einzelne Interaktion laufend von neuem verhandelt werden muß, setzt man gewisse Spielregeln, eben Institutionen, die die Verhandlungs- oder Koordinationskosten senken. Solange das interaktive Handeln nicht zu komplex und die Arbeitsteilung nicht zu hoch ist, lassen sich die Restriktionen privat effizient regeln. Sobald die Gesellschaft zu groß und die Arbeitsteilung zu umfangreich und damit die Komplexität zu hoch wird, wird es effizienter, ja notwendig, einem Dritten, dem Staat, das Gewaltmonopol zur Errichtung und Überwachung von Institutionen zu übertragen.

Dies läßt sich am Beispiel der Eigentumsrechte gut erläutern. **Die unpersönliche Durchsetzung von Eigentumsrechten** durch einen Dritten garantiert, daß mit Personen Austausch betrieben werden kann, die man nicht persönlich kennt und deren Vertrauenswürdigkeit man nicht abschätzen kann. Die staatliche Garantie von Eigentumsrechten ermöglicht es somit, mit einer größeren Anzahl von Personen in wirtschaftlichen Kontakt zu treten. Der hierdurch entstehende unpersönliche Markt er-

laubt Arbeitsteilung und Spezialisierung in ganz anderer Größenordnung als das persönliche Beziehungsnetz etwa in dörflichen Gemeinschaften. Hiermit eröffnen sich auch **größere Wachstumsmöglichkeiten** für ein Wirtschaftsgebilde. Dies wird auch in historisch-empirischen Studien (siehe z.B. die Studien von North u.a.) bestätigt.

Ein **Problem** taucht jedoch dadurch auf, daß die Existenz von Institutionen noch nicht hinreichend ist für die Reduktion von strategischer Unsicherheit, d.h. von Unsicherheit im Kontext mit interaktiver Abhängigkeit/Komplexität. Entscheidend ist, daß die Institutionen stabil sind. (So ist es z.B. wichtig, daß die Eigentumsrechte eindeutig, dauerhaft und verläßlich zugeordnet werden.) Hier gibt es jedoch ein tiefergehendes Grundproblem. Man ordnet dem Staat, wie oben gesagt, aus Gründen der Senkung der Koordinationskosten ein Gewaltmonopol zu, um über die Errichtung und Überwachung von notwendigen Institutionen soziale Komplexität bewältigen zu können. Dabei taucht jedoch - zumindest wenn die Zuordnung unkontrolliert erfolgt - die Gefahr auf, daß der Staat die ihm zur Erfüllung seiner gesamtwirtschaftlichen Aufgabe zugewiesene **Diskretionarität** mißbraucht[185]. Der Staat hat hierzu die Möglichkeit, indem er die Institutionen als Instrumente verwendet. Dies kann aus eigennützigen Gründen erfolgen. (Der Staat ist ja de facto nicht der in der Wirtschaftstheorie häufig angenommene Gemeinwohlmaximierer, sondern ein Gebilde aus eigennutzorientierten Akteuren. Jedoch auch ein gemeinwohlmaximierender Staat kann unter bestimmten Umständen einen Anreiz haben, Institutionen immer wieder überraschend zu verändern. Dies ist Gegenstand der sog. "Zeitinkonsistenztheorie optimaler Politik" (siehe in Kapitel 4 unten).

Die **Gefahr** besteht einerseits in Wachstumseinbußen, zum anderen in einem Inflationsbias. Politische Instabilität i.S. nicht hinreichender/falscher institutioneller Vorkehrungen erzeugt geringere Investitionen und eine geringere Spezialisierung und

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185 Solche **Diskretionarität** führt dazu, daß Institutionen nicht den Charakter fester, unveränderlicher Regeln aufweisen. Dies bewirkt **institutionelle Unsicherheit**. Die Diskretionarität der Exekutive schafft überdies für private Akteure große Anreize, sich durch Einflußnahme auf die Bürokratie „Renten" zu sichern. (Als „Renten" werden hier jene Zahlungen an einen Produktionsfaktor bezeichnet, die über die Mindestzahlung hinausgehen, die notwendig ist, damit der Faktor angeboten wird.) Dieses *„rent seeking"* verschlimmert jedoch die oben angesprochene institutionelle Unsicherheit. Diese institutionelle Unsicherheit wiederum bewirkt, daß die Wirtschaftssubjekte ihr Transaktionsnetz verkleinern, was sich in geringerer Marktgröße und **geringerem Wachstum** niederschlägt.

dadurch ein geringeres Wirtschaftswachstum. Die privaten Akteure versuchen in Reaktion auf solche institutionelle Unsicherheit, sich dem Einfluß des Staates so weit wie möglich zu entziehen und kehren zu wachstumsineffizienteren Regeln auf der Basis persönlicher Bekanntschaften (Ausweitung des informellen Sektors) zurück. Wachstumssteigernde Spezialisierung und Investitionen werden damit beeinträchtigt. Dies ist insbesondere in Ländern mit stark instabilen politischen Systemen wie in Lateinamerika zu sehen. (Vgl. bezogen auf Peru z.B. De Soto 1989; vgl. zu neueren theoretischen Analyseansätzen Wagner 1993, 5. Kap.)

Dies zeigt, daß das bewußt geschaffene und gewollte staatliche Gewaltmonopol in irgendeiner Weise daran gehindert werden muß, jederzeit die Institutionen verändern zu können. Eine **Lösungsstrategie**, die häufig vorgeschlagen wird, ist die, Kontrollmechanismen in der Form einer Regelbindung zu schaffen. Eine starre Regelbindung, d.h. eine totale Beschränkung der Diskretionarität des Staates, ist jedoch in einer dynamischen, wachsenden Wirtschaft mit beträchtlichen Kosten verbunden, da auch Regeln an unvorhersehbare/unvorhergesehene Umweltänderungen angepaßt werden müssen[186]. Insofern existiert ein Tradeoff-Problem zwischen der Vorhersehbarkeit und der Anpassungsfähigkeit von politischen Systemen. Aus Effizienzgründen ordnet man in komplexen Gesellschaften dem Staat das Gewaltmonopol zur Errichtung und Überwachung notwendiger Institutionen zu. Der Staat wird diese Aufgabe in einer dynamischen Umgebung um so besser erfüllen können, je flexibler er handeln kann, d.h. je größer seine Diskretionarität ist. Letztere ermöglicht es ihm jedoch, Institutionen als Instrumente zu verwenden, d.h. die Diskretionarität zu "mißbrauchen" (z.B. durch Abweichen von Ankündigungen, was ein Glaubwürdigkeitsproblem schafft). Die Lösung deutet auf eine Art flexibler Regelbindung hin[187]. Siehe hierzu auch näher Kapitel 4 unten sowie im Anhangsband Kapitel 4.

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186 Je schwieriger es ist, eine Institution zu verändern, um so vorhersehbarer ist sie. Je schwieriger allerdings die Veränderung von Institutionen ist, um so schwerer ist es, sie neuen Rahmenbedingungen anzupassen.
Hierbei ist zu beachten, daß der Wachstumsprozeß insbesondere auf neuen Technologien basiert. Solche neuen Technologien verändern jedoch die Effizienz bisheriger Institutionen. Wenn eine Gesellschaft die Institutionen diesen Veränderungen nicht anpaßt, dann werden die technologisch realisierbaren Wachstumspotentiale immer weniger ausgeschöpft. In diesem Kontext ist beispielsweise auch die Entwicklung der Gesetzgebung während der letzten hundert Jahre zu sehen.

187 Dies impliziert Regeln zur Veränderung von Regeln, also politische Entscheidungsregeln. Prinzipiell kann man jedoch in einen „infiniten Regreß" geraten.

Politische Instabilität und Inflation

Eine zweite wichtige These, die in der Neuen Politischen Ökonomie herausgearbeitet wird, besagt, daß politische Instabilität die Inflationsgefahr vergrößert und indirekt damit auch das Wirtschaftswachstum verringert.

Die obige These kann man mit Hilfe moderner politökonomischer Theorien auf mindestens zweierlei Weise begründen.

Erste Begründung:

Die Aussage, daß bei politischer Instabilität die Inflationsgefahr höher liegt als bei politischer Stabilität, läßt sich u.a. im Kontext der "Neuen Politischen Ökonomie der makroökonomischen Politik" erklären (vgl. z.B. Persson und Tabellini 1990). Dieser Theoriezweig baut auf der Annahme auf, daß Regierungen wie auch einzelne Politiker und Bürokrat(i)en eigennutzorientiert sind und von daher mit dem gleichen methodischen Apparat analysiert werden können wie private Wirtschaftssubjekte. Regierungen haben demzufolge gar kein Interesse daran, das Gesamtinteresse (d.h. hier: die gesamtwirtschaftlich optimale Strategie einer Inflationsbekämpfung) zu verfolgen. Die Nichtdurchführung einer gesamtwirtschaftlich-optimalen Strategie ist hier das Ergebnis einer **strategischen Entscheidung** der Regierung, die gerade an der Macht ist. Insbesondere mag eine Regierung (oder eine legislative Mehrheit) gezielt ein ineffizientes Steuersystem aufrechterhalten oder schaffen, um so das Verhalten zukünftiger konkurrierender Regierungen, mit denen sie in wesentlichen ideologischen (vor allem auch nichtökonomischen) Fragen nicht übereinstimmt, zu beschränken. Ein ineffizientes Steuersystem - d.h. eines, das z.B. Steuerhinterziehung erleichtert und hohe Steuereinsammlungskosten auferlegt - fungiert nämlich wie eine Beschränkung der Einnahmesammlungsfähigkeiten der nachfolgenden Regierung.

Je instabiler das politische System ist, um so ineffizienter ist nun - so die These - die Gleichgewichtsmischung der Regierungseinnahmen und desto höher ist das Vertrauen auf die Inflationssteuer. (Vergleiche zu einer Untersuchung dieser These z.B. Cukierman, Edwards und Tabellini 1992. Das Neue an diesem politökonomischen

Ansatz ist, daß er die Evolution des Steuersystems eines Landes als abhängig von den institutionellen Charakteristika des politischen Systems und nicht nur von denen des Wirtschaftssystems betrachtet.) Der Grund hierfür ist, daß eine Regierung in einem instabilen politischen System nicht bzw. nur mit einer geringen Wahrscheinlichkeit erwarten kann, daß sie die Erträge der Investitionen in ein effizientes Steuersystem, die erst in der Zukunft anfallen, für sich in Anspruch nehmen kann. Mit anderen Worten: die Regierung, die sich gerade an der Macht befindet, ist unsicher über ihre Wiederwahl. Folglich wird sie auch die Kosten eines Budgetdefizits, die in der Zukunft anfallen, gar nicht voll internalisieren. Die Regierung wird sich über das gesamtwirtschaftliche Optimum hinaus verschulden und die Nachfolgeregierung "die Rechnung bezahlen" lassen. Politische Instabilität und Polarisierung führen hier zu einer ineffizienten Allokation, selbst wenn Politiker und Wähler individuell-rational und vorwärtsblickend handeln. Technisch ausgedrückt, wird der (mit einer gewissen Wahrscheinlichkeit erwartete) politische Regierungswechsel die Regierung, die sich an der Macht befindet, dazu verleiten, auf strategische Weise den Zeitpfad der Zustandsvariablen zu wählen. Der obige Fall eines ineffizienten Steuersystems ist nur ein Beispiel. Die Problematik läßt sich auch auf andere Wahlentscheidungen übertragen.

Zweite Begründung:

Ausgangspunkt sei die These, daß sich politische Instabilität in einer "Schwäche" des Staates bei seinem Versuch der Durchsetzung gesamtwirtschaftlicher Interessen ausdrückt. Dies führt dazu, daß mit politischer Instabilität die Erwartung des Nachgebens des Staates bei Verteilungskonflikten steigt.

Hieraus kann man folgern, daß dann die erwartete Geldmengenwachstumsrate höher als im Falle politischer Stabilität ausfällt. (Bei politischer Stabilität würde der Staat eher in der Lage sein, Budgetdefizite abzubauen und Inflation wirksam zu bekämpfen.) Dies heißt, die erwartete Inflationsrate nimmt mit dem Grad der politischen Instabilität zu. Demzufolge wird dann die Gleichgewichtsinflationsrate ansteigen.

Hintergrund für diese Überlegungen, die auf die Erklärung einer "rationalen" Verzögerung erforderlicher Stabilisierungsprozesse hinauslaufen, ist die **Modellvorstellung eines "Zermürbungskriegs"** (war of attrition) zwischen verschiedenen sozioökonomischen Gruppen mit konfligierenden Verteilungszielen (siehe hierzu z.B. Alesina und Drazen 1991). Das heißt: Wenn eine Stabilisierung bedeutende Verteilungsimplikationen hat - wie im Fall von Steuererhöhungen, um ein großes Budgetdefizit zu beseitigen -, so werden verschiedene sozio-ökonomische Gruppen mit konfligierenden Verteilungszielen versuchen, die Stabilisierungskosten auf andere Gruppen abzuwälzen. Daraus kann sich ein "Zermürbungskrieg" ergeben, in dem es jede Gruppe rational findet, abzuwarten, bis die anderen auf- oder nachgeben. Stabilisierung findet nur dann statt, wenn eine Gruppe nachgibt und einen unverhältnismäßig hohen Lastenanteil auf sich nimmt. Der Staat wird hier in dieser zweiten Begründung der Inflationseffekte politischer Instabilität als zu "schwach" angesehen, um dieses Spiel zu beenden/zu verhindern.

7.2 Handelstheorie

In der modernen Außenwirtschaftstheorie unterscheidet man heute hauptsächlich drei Motive für Güterhandel zwischen zwei Ländern: Den schon auf Ricardo zurückgehenden Mechanismus des komparativen Vorteils aus Ausstattungsunterschieden (das Heckscher-Ohlin-Modell), die Existenz steigender Skalenerträge auf Unternehmens- oder Industrieebene sowie (damit verbunden) die Existenz von Marktunvollkommenheiten. Güterhandel aus dem ersten Motiv wirkt in der Theorie, verglichen mit dem Zustand der Autarkie, auf beide Länder eindeutig wohlfahrtssteigernd. Doch auch die beiden anderen Motive, die vor allem (intra-industriellen) Handel zwischen ähnlichen Ökonomien begünstigen, wirken sich tendenziell positiv auf die Wohlfahrt beider Länder aus. Allerdings birgt eine Handelsliberalisierung bei unvollkommener Konkurrenz für einzelne Länder das Risiko einer Wohlfahrtsminderung.

Der Anteil der drei Motive am Güterhandel in einem Wirtschaftsraum ist jedoch nur schwer zu ermitteln. In der EU ist ein Großteil des Binnenhandels intra-industrieller Natur. Es kann deshalb davon ausgegangen werden, daß die beiden letzten Motive (Skalenerträge und unvollkommene Konkurrenz) große Bedeutung für Umfang und

Struktur des bestehenden EU-Binnenhandels haben. Diese Überzeugung spiegelt sich auch im "Cecchini-Bericht über die Auswirkungen des Europäischen Binnenmarktes vom 01.01.1993" der EG-Kommission (Cecchini 1988) wider. In ihm geht die EG-Kommission davon aus, daß auch die Wohlfahrtseffekte des am 01.01.1993 inkrafttretenen Binnenmarktes hauptsächlich durch Skaleneffekte bei gestiegener Marktgröße sowie durch eine erhöhte Konkurrenz erreicht würden. Im gleichen Bericht gibt die EG-Kommission sogar eine Schätzung der Höhe der zu erwartenden Gewinne ab (Skaleneffekte 2,1% des BIP, erhöhte Konkurrenz 1,6% des BIP). Diese Zahlen beruhen auf Computermodellierungen der Auswirkungen des Binnenmarktes, die von Smith/Venables (1988) im Rahmen eines *partial-equilibrium*-Ansatzes angefertigt wurden. Dieser wurde später unter Einbezug zusätzlicher Länder und Industriesektoren zu einem *general-equilibrium*-Ansatz ausgedehnt. Dennoch sind ihre Resultate und Methodik unter Ökonomen umstritten; insbesondere, da sie den langfristigen, dynamischen Wachstumsauswirkungen des Europäischen Binnenmarktes, die nach Baldwin (1989) wichtiger sein könnten als die statischen, keine Aufmerksamkeit schenken.

7.3 Optionstheorie

Aus der Finanzmarkttheorie stammt ein Ansatz zur Berechnung von Optionswerten an den Finanzmärkten, der auf Merton (1973) zurückgeht. Finanzmarktoptionen zeichnen sich durch das Recht oder die Pflicht aus, beispielsweise Wertpapiere zu bestimmten Kursen zu kaufen oder zu verkaufen. Solange der aktuelle Kurs des Wertpapiers nicht dem Kurs der Verkaufsverpflichtung entspricht, kann die Möglichkeit, in Zukunft diesen Kurs zu erreichen, als Option betrachtet werden. Diese besitzt einen Wert, der mit mathematischen Methoden der Optionstheorie berechnet werden kann. Dabei wird meistens auf die Annahmen verschiedener Wahrscheinlichkeitsverteilungen zurückgegriffen, um die zukünftigen Wahrscheinlichkeiten zu bewerten.

Seit Beginn der achtziger Jahre wurde diese mathematische Methode zunehmend für die Beschreibung anderer ökonomische Sachverhalte benutzt, wobei die Investitionstheorie sich als eine Art Referenztheorie anbietet. Viele ökonomische Ent-

scheidungen orientieren sich an der Fragestellung, ob aktuellen Aufwendungen ausreichend positive zukünftige Erträge gegenüberstehen.

Die Untersuchungen über den Einfluß der Unsicherheit unterscheiden sich grundsätzlich durch die Annahmen der Reversibilität oder Irreversibilität. Eine ökonomische Entscheidung wird als reversibel bezeichnet, wenn sie - ohne relevante Kosten - rückgängig zu machen ist. Eine irreversible ökonomische Entscheidung ist entsprechend nicht umkehrbar.

Unter der Annahme der Reversibilität kommen die meisten Untersuchungen zu dem Ergebnis, daß der Einfluß der Unsicherheit indifferent und speziell von der Gestalt der Ertragsfunktion abhängig ist. Unter der Annahme der Umkehrbarkeit der Investitionen (Reversibilität) und linear homogener Produktionsfunktionen kommen allerdings einige rein theoretische Untersuchungen zu dem Ergebnis, daß zunehmende Unsicherheit steigende Investitionen impliziert.

Da die unterstellte Reversibilität der Investitionen aber in vielen beobachtbaren Situationen nicht gewährleistet ist, bietet sich häufig eine optionstheoretische Betrachtung an. Die zukünftige Möglichkeit zu investieren wird als eine Option auf zukünftige Gewinne betrachtet. Wird die Option ausgeübt, entspricht dies der durchgeführten Investition, die nicht wieder rückgängig zu machen ist (Sunk Costs, Irreversibilität). Unsicherheit bewirkt hier ein abwartendes Verhalten, und in der Summe sind die Investitionen negativ mit der Unsicherheit korreliert.

Ausgehend von diesem Investitionsansatz untersuchte Pindyck (1988) den Einfluß von Unsicherheit auf Auslastungsgrad und Firmenwert. Unternehmen halten unter Unsicherheit weniger Kapazität (geringere Investitionen) bereit, und ihr Firmenwert ist höher als unter sicheren, bekannten zukünftigen Erwartungen. Hauptgrund für den erhöhten Firmenwert ist die zusätzliche Berücksichtigung von möglichen Marktchancen, die das Unternehmen in der Zukunft besitzt (Erweiterungsoption).

Dixit (1989) untersuchte sektorale Ein- und Austrittsentscheidungen von Unternehmen unter der Annahme, daß Eintritts- und Austrittskosten existieren. Zukünftige Preisunsicherheit impliziert abwartendes Verhalten der Unternehmen bei Markteintrittsentscheidungen.

In jüngster Zeit sind viele Anstrengungen unternommen worden, um die gegensätzlichen Annahmen Reversibilität und Irreversibilität im Rahmen eines einheitlichen Modells zu berücksichtigen und eindeutige Aussagen über die Wirkung von Unsicherheit zu erhalten. In einem Modell von Abel und Eberly (1994) wird das Investitionsverhalten unter asymmetrischen konvexen Anpassungskosten, die zusätzlich Irreversibilität zulassen, untersucht. Das dort vorgestellte Modell zeichnet sich durch die Möglichkeit aus, die verschiedensten Annahmen einheitlich zu berücksichtigen. Ergebnis ist letztlich, daß in einem Intervall die Ergebnisse der Irreversibilitätsannahme gelten und im übrigen die indifferenten Aussagen der Reversibilitätsannahme weiterhin Gültigkeit haben.

Die empirischen Arbeiten deuten auf einen eher negativen Einfluß der Unsicherheit auf das Investitionsverhalten hin. Den wenigen bisher veröffentlichen Untersuchungen ist gemeinsam, daß die empirische Beschreibung von Unsicherheit, die ja nicht beobachtbar ist, sich schwierig gestaltet. Als Instrument wird meistens die Varianz einer vergleichbaren Größe genommen.

In ihrer Mehrheit sprechen die Ergebnisse der empirischen Arbeiten deshalb für einen negativen Einfluß der Unsicherheit auf das Verhalten der Wirtschaftssubjekte.

Exkurs: Beispiel zur Motivation und Einführung in die Optionstheorie

Um einen Eindruck von den Aussagen der Optionstheorie zu erhalten, wird ein einfaches Beispiel vorgestellt, welches die Überlegenheit einer strategischen, optionstheoretischen Vorgehensweise gegenüber der klassischen Nettogegenwartsregel demonstrieren soll.

Dazu wird ein inländisches Unternehmen betrachtet, welches vor der Entscheidung steht, auf dem Auslandsmarkt ein Produkt zu verkaufen. Diese Entscheidung ist mit einmaligen Kosten der Markteinführung (Werbung, Anpassung an nationale Normen, Aufbau eines Vertriebsnetzes, usw.) von 700 verbunden. Es wird insgesamt mit einem Verkauf gerechnet, der zu Forderungen gegenüber den ausländischen Kunden pro Periode in Höhe von 100 führt.

In der aktuellen Periode t=0 werden nur 70% der Forderungen eingetrieben. Die zukünftige Rechtssituation im Ausland wird aber als unsicher betrachtet, und zwar

insofern, als ab der folgenden Periode t=1 mit Wahrscheinlichkeit 0,5 genau 90% der Forderungen und mit Wahrscheinlichkeit 0,5 nur 50% der Forderungen eingetrieben werden können.

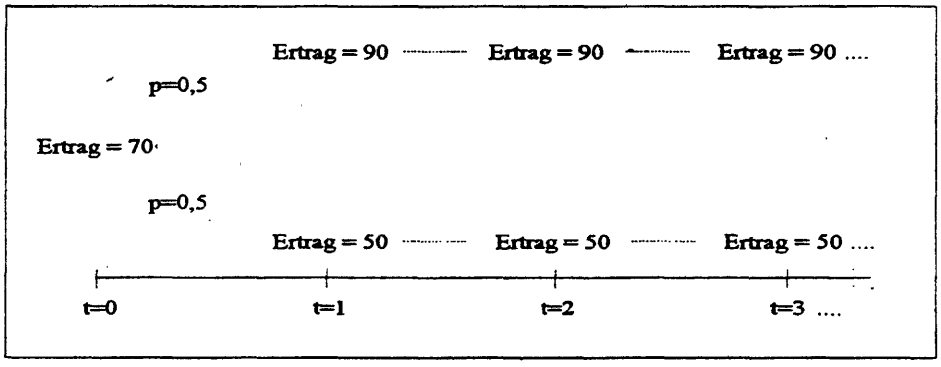

Bild 1: Beispielhafte Ertragsentwicklung

Um zu einer Entscheidung zu kommen, ob und wann investiert werden soll, werden üblicherweise die erwarteten Gegenwartswerte der Erträge mit den Investitionsaufwendungen verglichen. Bei der Berechnung dieser Gegenwartswerte wird hier ein Zinssatz von 10% (r=0,1) angenommen.

Klassische Beurteilung eines Markteintritts

Der Gegenwartswert der erwarteten Erträge berechnet sich aus der Summe der abdiskontierten Erträge der Zukunft:

Ertrag der Periode 0	Diskontfaktor der Periode 1 auf die Periode 0	Wahrscheinlichkeit, daß die günstige Entwicklung eintritt	günstige Erträge ab der Periode 1	Diskontfaktor aus der unendlichen Zukunft auf die Per. 1	Wahrscheinlichkeit, daß die ungünstige Entwicklung eintritt	ungünstige Erträge ab der Periode 1	Diskontfaktor aus der unendlichen Zukunft auf die Per. 1

(*)

$$70 + \frac{1}{1{,}1}\left(0{,}5 \cdot \left(90 \cdot \frac{1{,}1}{0{,}1}\right) + 0{,}5 \cdot \left(50 \cdot \frac{1{,}1}{0{,}1}\right)\right)$$

$$= 70 + 450 + 250 = 770$$

Sind Markteintrittskosten in Höhe von I = 700 notwendig, ergibt sich ein Nettogegenwartswert von

$$770 - 700 = \mathbf{70}.$$

Nach klassischer Sichtweise müßte der Auslandsmarkt sofort erschlossen werden, weil der Gegenwartswert dieses Projektes gleich 70 und damit positiv ist.

Optionstheoretische Beurteilung eines Markteintritts

Im Rahmen der Optionstheorie werden aber auch Entscheidungen in der Zukunft berücksichtigt und mit dem Erwartungswert der "Jetzt oder Nie -Bewertung" der klassischen Investitionsrechnung verglichen.

Dazu wird im folgenden der Erwartungswert derjenigen Strategie berechnet, die eine Periode abwartet, und im Falle, daß sich die Rechtssituation positiv entwickelt, den Auslandsmarkt erschließt. Diese Strategie hat den Nachteil, daß in der ersten Periode aufgrund der Inaktivität keine Erträge anfallen. Andererseits wird der ausländische Markt nur dann erschlossen, wenn die günstige Rechtssituation eintritt. Wird die ungünstige Rechtssituation realisiert, dann wird der Markt nicht erschlossen. Den entgangenen Gewinnen der ersten Periode stehen so mögliche verhinderte Verluste ab der Periode 1 gegenüber.

Es wird angenommen, daß die Erschließungskosten des ausländischen Marktes in der folgenden Periode 770 betragen. (Auf die heutige Periode abdiskontiert entsprechen die Markterschließungskosten von 770 heute genau 700.) Tritt die günstige Rechtssituation ein, ist der Gegenwartswert der Investition

$$(**) \qquad \frac{1}{1{,}1}\left[\left(90\cdot\frac{1{,}1}{0{,}1}\right)-770\right]=\frac{1}{1{,}1}(990-770) = 200$$

Falls die negative Rechtssituation eintritt, wird nicht investiert, daß heißt der Gegenwartswert dieser Alternative ist Null. Insgesamt ergibt sich ein erwarteter Ertrag der Abwartestrategie von 100, das ist der gewichtete Durchschnitt der beiden Alternativen (0,5·200+0,5·0=100).

Resümee der Strategien

Sofortige Markterschließung in der Periode t=0 besitzt einen Erwartungswert von 70. Wird hingegen eine Periode abgewartet und dann erst entschieden, ob der ausländische Markteintritt durchgeführt wird, hat diese Strategie einen Gegenwartswert von 100. Ein gewinnmaximierendes Unternehmen wird unter diesen beispielhaften Annahmen eine Periode abwarten und dann erst eine Markteintrittsentscheidung treffen.

Das Warten des Unternehmens auf günstige rechtliche Rahmenbedingungen kann als eine Option betrachtet werden, die dem Unternehmen die Möglichkeit eröffnet, unter günstigen Bedingungen eine Markterschließung vorzunehmen, und unter ungünstigen Bedingungen den Markt nicht zu erschließen.

7.4 Zeitinkonsistenztheorie

Die Zeitinkonsistenztheorie knüpft an die im zweiten Teil von Abschnitt 7.1 diskutierten Gedankengänge an. Zeitinkonsistenz bedeutet, daß eine zukünfige Handlung, die ein Teil eines heute formulierten optimalen Plans ist, vom Blickwinkel eines zukünftigen Zeitpunkts nicht mehr optimal ist - und dies obwohl inzwischen keine wichtigen neuen Informationen aufgetreten sind.

Seit den siebziger Jahren läßt sich eine Änderung des Ansatzes in der ökonomischen Theorie der Wirtschaftspolitik feststellen. Bis dahin konzentrierte man sich auf die Frage, welche Politikinstrumente für die Erreichung gegebener Ziele optimal sind. Das heißt, Aufgabe der Wirtschaftspolitik war die Auswahl aus geeigneten Maßnahmen, um ein gegebenes Ziel optimal zu erreichen. Dabei wurde der Staat gleichgesetzt mit seiner Regierung und losgelöst von seinen Bürgern und Wählern untersucht. Sobald die Maßnahmen entsprechend bestimmt waren, konnte die Regierung diese maschinell anwenden. Es wurde vorausgesetzt, daß der private Sektor sich entsprechend der Vorgaben anpaßte.

In einer Fortentwicklung dieses Ansatzes werden nun auch die Interdependenz zwischen der Regierung eines Staates und ihren Wählern, die gleichzeitig Wirtschaftssubjekte sind, berücksichtigt. Die Regierung und der private Sektor werden in

dieser Tradition als rationale Subjekte behandelt, die wissen, daß ihre eigene Entscheidung auch die des anderen beeinflußt und dieses Wissen mit in ihr Kalkül einbeziehen.

Der Ansatz der Zeitinkonsistenztheorie scheint auch für die Analyse der Kosten von Rechtsunsicherheit vielversprechend zu sein. Laut Micklitz und Weatherwill (1993) war vor dem Maastrichtvertrag kein expliziter Verbraucherschutz in der EG verankert. Es fehlten Institutionen, um diesen durchzusetzen. Fehlende Institutionen sind jedoch oft eine Quelle von Zeitinkonsistenzproblemen. Micklitz (1993) zum Beispiel gibt eine exemplarische Darstellung der potentiellen Schwierigkeiten bei der juristischen Durchsetzung von Verbraucherinteressen bei grenzüberschreitenden Konflikten.

Wenn Rechtsunsicherheit als Wachstumshindernis wirkt, stellt sich allerdings die Frage, warum Regierungen dann nicht alles daran setzen, diese Unsicherheit zu verringern, um so einen Beitrag zur wirtschaftlichen Entwicklung ihres Landes zu leisten. Dies wurde in einer der dieser Studie zugrundeliegenden Vorarbeiten analysiert (vgl. im Kapitel 4 unter dem Stichwort „Zeitinkonsistenztheorie").

Nach Erscheinen der bahnbrechenden Artikel von Fischer (1980) und von Barro und Gordon (1983) läßt sich eine wahre Flut von Zeitinkonsistenzansätzen in der Makroökonomie feststellen. Dieses Gebiet hat sich als überdurchschnittlich fruchtbar für die Bearbeitung von Politikproblemen erwiesen. Deswegen ist es mittlerweile kaum noch möglich, eine erschöpfende Darstellung dieser Ansätze zu liefern.

Hier kann nur eine schematische Einführung in die Prinzipien des Zeitinkonsistenzansatzes und Fragen ihrer empirischen Überprüfung gegeben werden. Ich werde mich deshalb auf deren exemplarische Darstellung beschränken. Dabei ist zu bemerken, daß Fragen der Empirie besonders anhand von Problemen der Geld-, Fiskal- und Wechselkurspolitik bearbeitet wurden. Ausgangspunkt dieser Ansätze war das Ziel der Inflationsbekämpfung. Diese Tatsache erfordert auch eine kurze Einführung in die Probleme glaubwürdiger Geldpolitik.

Ausgehend von der Konsumententheorie führen Kydland und Prescott (1977) in die Theorie des politischen Konjunkturzyklus den Begriff der Zeitinkonsistenz ein. In der Konsumententheorie ergibt sich Zeitinkonsistenz durch die sich ändernden

Präferenzen der Verbraucher im Laufe der Zeit. Wenn die Verbraucher nicht vorhersehen können, wie sich ihre Präferenzen ändern werden, tendieren sie dazu, langfristige Entscheidungen der Vergangenheit ändern zu wollen.

Kydland und Prescott zeigen, daß die Methoden der Kontrolltheorie bei Anwendung auf Wirtschaftspolitik nicht zu optimalen Ergebnissen führen. Sie führen in ihrem Modell eine Folge von Politikmaßnahmen ein, die die Entscheidungen der privaten Subjekte beeinflussen. Diese Entscheidungen und die Maßnahmen werden in einer Wohlfahrtsfunktion bewertet, die allen Beteiligten bekannt ist.

Die Autoren definieren eine zeitliche Abfolge von Politikmaßnahmen als **konsistent**, wenn in jeder Periode die Politik so gewählt wird, daß diese Politik die Wohlfahrtsfunktion maximiert und dabei die vergangenen Entscheidungen als gegeben betrachtet. Also berücksichtigt eine in diesem Sinne konsistente Politik nicht, daß die privaten Subjekte in der Erwartung zukünftiger Politikmaßnahmen ihr Verhalten auf die Zukunft einrichten. Rationale Subjekte schauen aber in die Zukunft und durchkreuzen die Pläne der Politiker, wenn sie es können und es für sie vorteilhaft ist. Deshalb ist eine zeitinkonsistente Politik im allgemeinen nicht optimal.

In dem Artikel wird folgendes Beispiel gegeben: Leute können auf einem von Überschwemmungen bedrohten Stück Land siedeln. Sobald jemand dort sein Haus baut, ist es sozial wünschenswert, daß dieses Haus durch Dämme vor Überflutung geschützt wird, obwohl die Kosten hierfür so hoch sind, daß eine Besiedlung dieses Landes a priori nicht erwünscht ist. Wenn dann das private Subjekt die zukünftige Entscheidung der Regierung kennt, wird es dort siedeln, denn es weiß, daß die Dämme gebaut werden. Gesamtwirtschaftlich erwünscht wäre es, wenn dort nicht gesiedelt werden würde. Doch für das private Subjekt, das die zukünftigen Entscheidungen der Regierung kennt, ist es rational, dorthin zu ziehen. Daraus folgt, daß die inkonsistente Politik nicht optimal ist.

Die Resultate der beiden Autoren entstehen aus der Tatsache, daß Wirtschaftspolitik nicht als ein Spiel gegen die Natur betrachtet wird, sondern als Spiel gegen rationale Agenten, die ihre Entscheidungen in Hinblick auf die Zukunft fällen und ihre Konsequenzen für die zukünftige Entwicklung abwägen können.

Ein Ausweg aus diesem Dilemma besteht darin, die Regierung zu zwingen, bestimmten Regeln zu folgen. Diese Vorgaben sind dann auch den ökonomischen Subjekten bekannt und sie können sich darauf einstellen. In der Literatur wird diese Art der Politikbindung dann **Regelpolitik** genannt. Existieren keine solche Regeln, kann die Regierung zu jedem Zeitpunkt ohne eine derartige Beschränkung Politikmaßnahmen ergreifen. Man spricht dann von **diskretionärer** Politik.

Calvo (1978) wendet diese Ideen ausführlich auf Probleme der Geldpolitik an. Im Rahmen einer monetären Ökonomie kommt er zu dem Ergebnis, daß in diesem Ansatz eine optimale Geldpolitik existiert, die jedoch zeitinkonsistent ist. Da eine optimale zeitinkonsistente Geldpolitik existiert, wird Zeitinkonsistenz erst zu einem Problem. Zeitinkonsistenz selbst ist kein Problem, das nur dadurch entsteht, daß die Politiker und die Wirtschaftssubjekte gegenläufige Interessen haben, sondern dadurch, daß die Subjekte rational sind und deswegen Maßnahmen der Regierung, die in der Zukunft liegen, antizipieren. Dadurch wird die optimale Inflationsrate nicht erreicht.

Diese Resultate lassen es vernünftig erscheinen, Zeitinkonsistenzprobleme mit Methoden der **Spieltheorie** zu bearbeiten. Spieltheorie bezeichnet dabei keine abgeschlossene Theorie, sondern ist eher als eine Sammlung von Methoden zu verstehen, die gewisse Elemente gemeinsam haben. Dazu gehört unter anderem, daß mehrere rationale Individuen einen Interessenkonflikt lösen und dazu verschiedene Strategien verfolgen können. Die Qualität der einzelnen Alternativen ist für das Individuum bewertbar, etwa durch eine Nutzenfunktion.

Barro und Gordon (1983) verbinden solche Ansätze mit dem von Kydland und Prescott. Sie benutzen aber nun nicht mehr Methoden der Kontrolltheorie, sondern modellieren Geldpolitik als sogenanntes Spiel zwischen den Politikern einerseits und den privaten Subjekten andererseits. Dieses Spiel wird dabei wiederholt. Das gibt dem privaten Sektor die Möglichkeit, seine Erwartung zukünftiger Ereignisse anhand der vergangenen Maßnahmen der Regierung anzupassen. So erhält die Regierung die Möglichkeit, eine gewisse Reputation aufzubauen. Wenn die Regierung über eine lange Zeit in der Vergangenheit eine strikte Geldpolitik betrieben hat, ist die Erwartung des privaten Sektors hoch, daß diese restriktive Politik fortgesetzt wird, und er wird sich auf eine niedrige Inflationsrate einstellen.

Die Wiederholung des Spiels wirft einige theoretische Fragen auf. So ist es vor allem nicht klar, ob genau ein Gleichgewicht existiert oder mehrere. Falls genau ein Gleichgewicht existiert, dann liegt der Wert zwischen den Lösungen bei diskretionärer und regelgebundener Politik. Das heißt, durch eine Wiederholung des Spiels kann das Dilemma umgangen werden, und die Regierung kann auch im Fall diskretionärer Politik ein gutes Ergebnis erzielen, das zwar nicht optimal ist aber dafür auch nicht die Flexibilität der Regierung, auf exogene Schocks zu reagieren, einschränkt.

7.5 Neue Wachstumstheorie[188]

Nach dem traditionellen neoklassischen Wachstumsmodell von Solow (1956) ist dauerhaftes (Pro-Kopf-)Wachstum nur möglich bei fortwährendem technischen Fortschritt, welcher jedoch als exogen betrachtet wurde. Erste Versuche, den technischen Fortschritt innerhalb der traditionellen Wachstumstheorie zu endogenisieren, waren wenig erfolgreich, weil die Verknüpfung steigender Skalenerträge mit einem dynamischen allgemeinen Gleichgewichtsansatz nicht gelang. Erst mit der Arbeit von Romer (1986), die unter Annahme einer traditionellen neoklassischen Produktionsfunktion sowie unter der Annahme, daß das Sparen auf intertemporaler Nutzenmaximierung eines repräsentativen Verbrauchers basiert, arbeitet, wurde ein Durchbruch erzielt, der den Beginn der "Neuen Wachstumstheorie" markierte. Romer zeigte, daß die Wirtschaft eine strikt positive Wachstumsrate aufrechterhalten kann, weil die abnehmenden Grenzerträge von Kapital fortwährend durch externe Verbesserungen der Technologie, welche die Kapitalakkumulation mit sich bringt, ausgeglichen werden.

Dieser Ansatz hat inzwischen eine Fülle von Erweiterungen erfahren, die sich als Varianten der beiden Modellzweige "Learning-by-doing-Modelle" und "Erfindungsmodelle" darstellen lassen.

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188 Dieser Abschnitt ist auszugsweise übernommen aus Maennig / Wagner (1994), S. 21-28.

Learning-by-doing-Modelle

Die "Learning-by-doing-Modelle" (Romer 1986 sowie Lucas 1988) sehen technischen Wandel als nichtintendiertes, externes Nebenprodukt der Güterproduktion an. Wirtschaftspolitische Handlungsvariablen sind demnach die Determinanten des Anreizes, verschiedene Güterarten zu produzieren, wie z.B. das Muster des komparativen Vorteils.

Der "Learning-by-doing-Ansatz" läßt sich als direkte Erweiterung der schon in den 60er Jahren entwickelten "optimalen Wachstumstheorie" fassen, deren Kernstruktur durch die folgenden Gleichungen (1)-(3) beschrieben wird:[189]

(1) $Y_t = F(A_t N, K_t)$

(2) $K_{t+1} = K_t + Y_t - C_t$

(3) $\text{Max} \int_0^{\infty} U(C)e^{-rt}dt$, wobei $U'(C)>0$.

wobei $U'(C)>0$ und U strikt konkav ist.

(1) drückt die Produktionsfunktion aus mit den üblichen Bedingungen (vor allem konstante Skalenerträge und abnehmende Erträge bezüglich der einzelnen Inputs). (2) beschreibt die Investitions- oder Kapitalakkumulationsgleichung, wobei K_t als Kapitalstock einer repräsentativen Firma zu interpretieren ist. (3) bezeichnet die intertemporale Nutzen- oder Zielfunktion.

Die obige Kernstruktur der optimalen Wachstumstheorie ist gleichzeitig auch die Kernstruktur des "Learning-by-doing-Ansatzes". Entscheidend für den Fortschritt der

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189 K = Kapitalstock; N = (fester) Arbeitsbestand; A = Arbeitsproduktivität (Technologiestand); Y = Output; C = Konsum; U = Nutzenparameter ; r = Diskontierungs- oder Zeitpräferenz-rate.

Neuen Wachstumstheorie gegenüber der traditionellen neoklassischen Wachstumstheorie sind die unterschiedlichen Annahmen über die Entwicklung der Technologie (bzw. hier der Arbeitsproduktivität). Gleichung (4a) beschreibt die Annahme der traditionellen neoklassischen Wachstumstheorie, Gleichung (4b) die des "Learnings-by-doing-Zweigs" der Neuen Wachtumstheorie.

(4a) $A_t = A_t^*$ (" * " kennzeichnet hier die unterstellte Exogenität)

und

$$A_t^* = e^{\lambda t}.$$

(4b) $A_t = A(R_t)$, wobei $R_t = \{K_t, H_t\}$.

Während in (4a) die Arbeitsproduktivität exogen mit der konstanten Rate λ wächst, wird sie in (4b) durch den Ressourcenbestand R bestimmt. R beinhaltet sowohl physisches Kapital K als auch Humankapital H. Je nach Schwerpunktsetzung kann man zwei verschiedene Varianten innerhalb des "Learning-by-doing-Ansatzes", die hier als Romer- und Lucas-Variante bezeichnet werden, unterscheiden:

$A_t = A(K_t)$ Romer-Variante

$A_t = A(H_t)$ Lucas-Variante.

Die Lucas-Variante hat den Vorteil, daß sie explizit macht, daß der wesentliche Input bei der Technologieentwicklung Wissen ist, so daß es also auf die Wissens- oder Humankapitalakkumulation ankommt (A ist oben zu interpretieren als der akkumulierte Bestand an Humankapital pro Kopf). Hieraus lassen sich dann auch unmittelbar die Spillovers ableiten, die die Grundlage für eine häufig vorgeschlagene Strukturpolitik bilden.

Spillovers, die einen Multiplikatoreffekt des exogenen technischen Fortschritts produzieren, lassen sich aber natürlich auch in der Romer-Variante zeigen. Gehen wir von der folgenden Technologiefunktion aus:

$$A_t = A_t^* R_t^{\theta}$$

und bilden wir die Wachstumsrate hierüber:

$$\hat{A} = \hat{A}^* + \theta \hat{R}$$

Nun wissen wir, daß im Steady State: $\hat{A} = \hat{R} = \hat{C} = \hat{Y} = g$. Hieraus folgt, daß im Steady State gilt:

$$g = \hat{A}^* / (1-\theta).$$

θ drückt die Externalität aus. In der traditionellen neoklassischen Wachstumstheorie ist $\theta = 0$.

Wenn R nun als *Wissen* interpretiert, und realistischerweise angenommen wird, daß Wissen von den einzelnen Produzenten nicht voll internalisierbar ist, sondern einen Öffentlichen-Gut-Charakter aufweist, der länderübergreifend wirkt, kann man von positiven internationalen Externalitäten bzw. Spillovers sprechen. Insofern kann man auch schreiben:

$$A_t^f = A(qR_t^f + (1-q)R_t^h)$$

wobei h für inländisch und f für ausländisch steht und $0 \leq q \leq 1$. Wenn $q < 1$, liegen internationale Spillovers vor. Wissensproduktion wie auch Technologiepolitik des Auslandes erzeugen dann positive Spillover-Effekte auf das Inland.

Erfindungsmodelle

Neuerdings dominieren allerdings zunehmend "Erfindungsmodelle" in der Neuen Wachstumstheorie[190], welche technischen Wandel als einen kostspieligen und wohlüberlegten Prozeß betrachten und sich dabei auf die Anreizdeterminanten eines bewußten Erfindens konzentrieren, wie z.B. den institutionellen Rahmen und die Marktgröße. So ist bei Romer (1990) technischer Fortschritt das Ergebnis der Einführung einer größeren Vielfalt von Gütern. Aufgrund der größeren Märkte in einer wachsenden Wirtschaft lohnt sich der Aufwand der fixen Produktionskosten einer größeren Anzahl von Zwischengütern. Diese wiederum steigern die Produktivität von Arbeit und Kapital, was anhaltendes Wachstum ermöglicht. Die entscheidende Abweichung vom ersten Romer-Modell (1986) besteht darin, daß unvollkommener Wettbewerb und damit Monopolrenten vorliegen, und zwar vorerst nur im Zwischengütersektor. Damit wurde es möglich, das Problem steigender Skalenerträge in einem gleichgewichtigen Wachstumsmodell zu behandeln, und Firmen als Akteure zu analysieren, die sich bewußt in Forschungsaktivitäten engagieren, um mit Monopolrenten für erfolgreiche Innovationen belohnt zu werden.

Man kann das zunehmende Emporkommen der Erfindungsmodelle auf zweierlei zurückführen. Zum einen verblieben die modernen Pioniere des "Learning-by-doing-Ansatzes" (Romer und Lucas) vorerst innerhalb des Ansatzes der vollkommenen Konkurrenz und erklärten steigende Skalenerträge über eine technologische Externalität. Auch wenn dies das technische Problem löst, erscheint diese Vorgehensweise irgendwie unbefriedigend. In moderner neuklassischer Art stellt sich sofort die Frage, warum denn die Externalität nicht über Institutionenbildung internalisierbar sein soll. Übliche naheliegende Erklärungen, die beispielsweise auf Koordinationsprobleme verweisen, lassen sich in einem vollkommenen Konkurrenzmodell nicht anführen. Von daher spricht vieles für einen Übergang zu Modellen der unvollkommenen Konkurrenz. Dieser Übergang wurde in den Erfindungsmodellen vollzogen. Zum anderen wirkte der in den "Learning-by-doing-Modellen" unterstellte Automatismus von Lerneffekten bzw. der Anwendung technologischer Spillovers unrealistisch. Empiri-

190 Vgl. z.B. Romer (1990), Grossman und Helpman (1991), Segerstrom u.a. (1990).

sche Untersuchungen[191] stützen die Annahme, daß technischer Fortschritt nicht durch von ökonomischen Anreizen unabhängiger Wissenschaft vorangetrieben wird, sondern von der kommerziellen Ausbeutung wissenschaftlicher Ideen. In Japan beispielsweise werden mehr als 70 % aller F&E-Tätigkeiten von der privaten Industrie finanziert. Firmen investieren jedoch immer nur dann in neue Technologien, wenn sie eine Möglichkeit sehen, Gewinne zu erzielen. Die Entwicklungsgleichung für Technologie lautet folglich im Erfindungsansatz

(4c) $A_t = A\,(I_t^{F\&E})$,

wobei $I_t^{F\&E} = I\,(Prof^e)$,

und $Prof^e$ die erwarteten Gewinne sind.

Dabei beeinflussen institutionelle, rechtliche und wirschaftliche Rahmenbedingungen, die die Profitabilität dieser F&E-Investitionen bestimmen, die Geschwindigkeit und die Richtung des technischen Wandels. Selbst in Entwicklungsländern, wo vorhandene Techniken verwendet werden, ist das Lernen, diese Techniken zu benutzen, nicht kostenlos. Die Rate der Verbreitung und Umsetzung dieser aus den Industrieländern übernommenen Techniken spiegelt somit die Institutionen, die Eigentumsrechte und die Preisstrukturen in diesen Ländern wider, da diese die private Profitabilität der Wissensaneignung bestimmen.

Dies deutet aber darauf hin, daß auch der "Erfindungsansatz" für sich genommen zu kurz greift. Angebrachter ist es, beide Ansätze, den "Learning-by-doing-Ansatz" und den "Erfindungsansatz" miteinander zu verbinden, was in neuester Zeit auch modelltheoretisch versucht wird. Es liegt nämlich nahe, von einer dynamischen Interaktion zwischen Lernen und Erfindung auszugehen. "Learning-by-doing" ist in der Praxis endlich und begrenzt. Nur durch ein fortwährendes Angebot an neuen Erfindungen scheint ein Lernprozeß aufrechterhaltbar zu sein. Andererseits ist davon auszugehen, daß "learning by doing" die Anreize für weitere Erfindungen beeinflußt.

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191 Vgl. z.B. Dosi (1984) oder Mowery und Rosenberg (1989).

Denn indem es die Kosten der Erfindung und die Produktionskosten nach der Erfindung beeinflußt, bestimmt "learning by doing" die Profitabilität und folglich die Rate der Erfindungen. Lernen hängt mithin von Erfindungen ab, insofern Lernen als die nichtintendierte Erforschung des endlichen produktiven Potentials erfundener Technologien betrachtet wird. Gleichzeitig hängt die Profitabilität kostspieliger Erfindung vom Lernen ab, insofern als die Produktionskosten von der aggregierten geschichtlichen Lernerfahrung einer Gesellschaft abhängen.

Technologische Spillovers spielen auch im "Erfindungsansatz" eine zentrale Rolle. Auch dort wird dem Öffentlichen-Gut-Charakter der Wissensproduktion zentrale Beachtung geschenkt. Investitionsanreize werden in der Wachstumserklärung dieses Ansatzes endogen durch technologische Spillovers aufrechterhalten. Diese Spillovers ermöglichen es zukünftigen Generationen von Forschern, technologische Durchbrüche mit weniger Ressourcenaufwand als ihre Vorgänger zu erzielen. Der hieraus entstehende Rückgang der realen Kosten von Erfindungen wirkt jeglicher Tendenz einer fallenden Profitrate entgegen. Der Prozeß der Wissensakkumulation erzeugt somit *endogen* die Produktivitätsgewinne, die andauerndes Wirtschaftswachstum aufrechterhalten.

Neuere Arbeiten (z.B. Grossman und Helpman 1991) betonen den Zusammenhang zwischen diesem Prozeß und internationalem Handel oder ökonomischer Integration. Der beschriebene Prozeß wirkt demnach um so intensiver, je reger der internationale Austausch von technischen Informationen ist. Das heißt, mit größerer internationaler Transmission des Wissenskapitals werden die Forschungskosten in *allen* Regionen und Ländern geringer. Dies ist bei einer zunehmenden Marktöffnung, wie sie mit dem europäischen Integrationsprozeß verbunden ist, der Fall. Bei Abwesenheit internationalen Wettbewerbs haben Forscher, in verschiedenen Ländern, wenig Anreiz, eine doppelte Ausführung identischer Forschungsarbeiten zu vermeiden. Wenn die Innovatoren jedoch in integrierten Produktmärkten konkurrieren müssen, haben sie Grund, verschiedenen Ideen zu folgen. Von daher bringt freier Handel die Unternehmer dazu, ihre Erfindungen zu differenzieren und dadurch zu einer globalen Wissensanhäufung beizutragen.

Internationaler Handel spielt aber auch eine Rolle bei der Gleichgewichtsallokation industrieller Forschung. Ökonomische Integration wie in der Europäischen Union

kann die Ressourcen eines Landes von F&E weglenken, wenn lokale Unternehmer sehr schwach im globalen technologischen Wettbewerb sind. Zumindest zwei Situationen lassen sich hierfür angeben: So wird zum einen ein Land, das einen komparativen Nachteil in der Forschung aufweist, zum Schluß kommen können, daß es aufgrund der Integration besser eine relative Spezialisierung in anderen (vielleicht stagnierenden) Tätigkeitsfeldern wählen sollte. In diesem Fall wächst seine Wirtschaft trotz der Nutzen technologischer Spillovers langsamer als im Zustand der Autarkie. Zweitens, wenn technologische Spillovers nur von nationaler Reichweite sind, mag ein Land, das klein ist oder das bisher nur wenig Forschung betrieben hat, innerhalb des integrierten Wirtschaftsraums einen Anreiz haben, sich im verarbeitenden Bereich zu spezialisieren. Schließlich kann so technischer Fortschritt ganz aufhören in einem Land, das weiter innovativ tätig sein würde, wäre es isoliert.

Wohlfahrtstheoretische Implikationen

Einige zentrale wohlfahrtstheoretische/wachstumspolitische Aussagen in der endogenen Wachstumsliteratur lassen sich damit isolieren:

Zum einen werden im Laissez-faire Gleichgewicht aufgrund positiver Externalitäten auf andere Branchen oder zu kleiner Märkte zu wenig Ressourcen für wachstumerzeugende Forschungsaktivitäten aufgewendet. Zum anderen können aufgrund von statischen oder dynamischen Skalenerträgen internationale Monopole entstehen, welche zu entsprechenden Monopolrenten führen. In beiden Fällen können Einkommensniveau und Wachstumsrate somit zu gering ausfallen. Dieser Mangel kann aufgrund von Transaktionskosten oder asymmetrischer Informationen von den privaten Marktakteuren auch nicht durch Koordinationsversuche behoben werden.

Aus diesen, letztlich klassischen Argumenten zum Marktversagen wird dann häufig die Notwendigkeit staatlicher (Ergänzungs-)Maßnahmen abgeleitet.

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IV. Summary of results

1. The EUROBAROMETER survey of 17 May 1995 reveals that 24% of Member States' citizens buy sporadically (mostly while travelling abroad) goods or services for up to 2.000 ECU in other EU countries. 10% of these consumers are unsatisfied and two thirds of them are unable or unwilling to persue their claims. The survey also shows that a Single Market for durable goods hardly exists. They are rarely bought abroad due to the risks of not being able of claiming repair or return of money.

2. According to previous studies for the Commission and some additional information in the course of the present research Consumer Organisations are not prepared to help in international cases. Hence except for a few regional institutions recently created for support in cross-border consumer claims consumers depend on the existing legal structures of the Member States if they want to pursue their claims.

3. The Member States offer lawyers, courts and Central Authorities (for legal assistance) which may or may not be accessible and helpful for consumers in cross-border cases.

4. Most lawyers from the outset refuse to take on international cases. Those few lawyers with an international practice deal with business disputes. They have very little experience with consumer cases either because consumer do not turn up in their offices or the lawyers refuse to represent them for economical reasons. If fees are calculated on an hourly basis they quickly surpass the average amount of a consumer claim. If fees follow guidelines or statutory regulations the lawyer's time investment for a consumer claim is not profitable.

5. If lawyers do normally not represent consumers in cross-border cases it is no surprise that these cases are rarely found in court files (in the year 1988 there were 4 cases filed in the *Landgerichte* Bremen and Hamburg and 1 case in the *Tribunale* in Milan). The Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgements does not seem to have any positive influence as regards the access to court for consumers or the enforcement of

judgments (in neither of the mentioned German or Italian district courts an international consumer claim filed in 1988 was enforced).

6. The **Central Authorities** which according to the Hague Service Convention give legal assistance when foreign service of process is required report a varying number of cases filed but cannot give any information as to the subject matter of the cases. Service abroad within Europe is slightly more effective than in Non-Member countries, in particular when bi-lateral conventions are in force which allow for direct service applications between courts. But some Central Authorities (Spain is mostly mentioned) are extremely slow and ineffective resulting in virtual obstruction of service of process.

7. The **total costs** of pursuing a cross-border consumer claim with a value of 2000 ECU varies, depending on the combination of Member States from 980 ECU to 6.600 ECU and amounts to 2.489 ECU for a proceeding at the defendant's residence on the average. The minimum, and average costs for a proceeding at the plaintiff's residence are about 3% lower, the maximum cost are even 11% lower than for a proceeding at defendant's residence. Generally, Greece and Belgium are on the lowest cost levels whereas Sweden, Finland, the U.K. and Ireland offer very expensive legal services. Since part of the costs have to be paid even by successful plaintiffs and the risk of having to cover the full costs in unsuccessful cases always exists, a reasonable consumer would not sue for 2.000 ECU.

8. In addition consumers will take the **duration** of the legal action into account. Decisive elements in this respect are the proceedings (and within these the service of process) and the enforcement. Whereas some Member States offer proceedings which take a year or less the courts with jurisdiction over small consumer claims in Ireland and in particular in Italy need several years for resolving the dispute. The average duration of a cross-border civil law suit in Europe is almost 2 years at the defendant's residence and six months more at the plaintiff's residence where service of process under the Hague Service Convention and the procedure for recognition and enforcement add to the duration. In some Member States the recognition of a foreign judgement takes very long: 8 months in Portugal and 18 months in Greece. Taking all

elements together Belgium, the Netherlands and Germany offer the most effective legal service.

9. The data indicate **legal uncertainty** for consumers in the Single Market. The existing structures do not secure compliance with contractual obligations. As a consequence informed consumers will avoid anonymous markets and uninformed consumers suffer risks when buying abroad. A Single Market will not become reality without trustworthy, accessible and effective legal institutions. The structures offered for cross-border civil litigation are far from showing these qualities.

10. On a macroeconomic level, calculations of **direct costs** for consumers with some (partly hypothetic) model assumptions indicate that the aggregate costs of transborder consumer legal uncertainty is significant. Adding up different cost categories led to costs in the range of 7.230 to 73.790 million ECU with a weighted mean of about 28 billion ECU.

11. Furthermore, there are also **indirect costs** for the consumers arising macroeconomic circular flow effects. Legal uncertainty of consumers in transborder transactions results in a loss of aggregate income. This is mainly due to the legal uncertainty which the consumers have to face implying higher transaction costs for consumers as well as for producers thereby leading to lower rates of return of transborder transactions. Hence international trade within the Single Market is lower and the price level is higher inducing negative effects on economic welfare.

12. Moreover, there are not only static costs for the consumers but also **dynamic costs** that denote a lower permanent potential growth rate of the European economies. For example, lower aggregate income (caused by consumer's legal uncertainty) may lead to lower investment in infrastructure and hence decrease technical progress thereby lowering economic growth. A quantification of (static and dynamic) indirect costs requires more research on consumer and producer behaviour in the Single Market.