

# HOW MANY CASES? ASSESSING THE COMPARABILITY OF EU JUDICIAL DATASETS\*

ELENA ALINA ONTANU<sup>1</sup> - MARCO VELICOGNA<sup>2</sup>

FRANCESCO CONTINI<sup>3</sup>

*The paper discusses the consistency, reliability, and compatibility of the data set and the appropriateness of indicators used by the EU Justice Scoreboard to assess the efficiency of European justice systems. The EU Commission has introduced the Justice Scoreboard as a tool providing objective, reliable, and comparable data on the functioning of the justice systems of all Member States (EU Commission 2013, p.3). This instrument is formally directed toward strengthening the rule of law, the functioning of national justice systems, and upholding more effective justice. The tool identifies the comparison of the efficiency of Member States justice systems and of other variables as specific means to reach such objectives.*

*This paper analyses conceptual flaws and data quality problems, which undermine the use of the tool. From a conceptual perspective, the study makes clear that caseload data are used to measure workload. Furthermore, the Scoreboard uses the numbers of cases (incoming, pending and resolved) and indicators of effectiveness like clearance rate and length of proceedings to measure the efficiency of justice systems.*

*The assessment of how Member States count apparently simple categories of cases as administrative and litigious or non-litigious civil and commercial cases shows cross-country inconsistencies that make a cross-country comparison at least problematic. While suggesting some clear actions to improve the flaws, the paper advice to take an extremely cautious approach in using such indicators for comparative purposes in the academic debate and policy-making.*

SUMMARY: I. Introduction - II. Methodology - 2.1. The Scoreboard's data eco system - 2.2. The subset of Scoreboard's data analysed in the research - 2.3. Data consistency check: countries selection - 2.4. Data consistency check: selecting variables - III. Evolution of the Scoreboard and CEPEJ data - 3.1. Evolution of the CEPEJ data - 3.2. Evolution of the Scoreboard - IV. Conceptual matters – significance of terminology and definitions - 4.1. Assessment of conceptual consistency: the question of efficiency - 4.2. Assessment of Caseload or Workload? - 4.3 Counting the cases: assessing the case flow - V. Number of cases: a journey in search of consistency and comparabilità - 5.1 Case definition and case typology - 5.2 Data inconsistency: identifying the causes in the CEPEJ Report - 5.3

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<sup>1</sup> Assistant professor of Private International Law, Erasmus University Rotterdam; Ricercatrice, Istituto di Ricerca sui Sistemi Giudiziari, Consiglio Nazionale delle Ricerche.

<sup>2</sup> Ricercatore, Istituto di Ricerca sui Sistemi Giudiziari, Consiglio Nazionale delle Ricerche.

<sup>3</sup> Francesco Contini, Primo ricercatore, Istituto di Ricerca sui Sistemi Giudiziari, Consiglio Nazionale delle Ricerche.

Consequences of inconsistencies in case categories - 5.4 Possible solutions for identified inconsistencies - VI. Concluding remarks.

## I. INTRODUCTION

Efficiency is often considered a key component of any well functioning justice system. A growing body of comparative studies explore how judicial reforms leading to a greater efficiency or effectiveness are positively correlated with economic growth (e.g. Global Competitiveness Report of the World Economic Forum, Doing Business Report of the World Bank, Judicial Reforms in Europe Report of the ENCJ, The Economics of Civil Justice of the OECD). At EU level, the European Commission has launched tools like the EU Justice Scoreboard (‘the Scoreboard’) to help the Member States to improve the effectiveness of their justice systems.

The Scoreboard, on which this paper focuses, is part of a wider effort.<sup>4</sup> This instrument is formally directed toward strengthening the rule of law, the functioning of national justice systems, and upholding more effective justice. The comparison of the efficiency of justice systems is identified as a specific means to reach these objectives. The belief is that more effective and efficient justice systems will drive stronger economic growth, since “effective justice systems are a prerequisite for an investment and business friendly environment”.<sup>5</sup> The Scoreboard evaluation seeks to focus on parameters that are essential for an effective justice system, regardless of the model of the national justice system or the legal tradition a Member State belongs to.<sup>6</sup> Efficiency, quality and independence are singled out as key elements of effective justice systems, and the Scoreboard indicators are grouped around these three categories.

This paper undertakes an in-depth analysis of the key quantitative variables that are presented and considered by the Commission to be indicators for what should be an efficient justice system in the Scoreboard discourse: the numbers of cases. However, it should be noted that the concept of efficiency as used by the Scoreboard and CEPEJ studies refers to effectiveness and caseload. Due to this inconsistency between the Scoreboard discourse and standard economic definitions, the paper takes two

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<sup>4</sup> A. DORI, *The EU Justice Scoreboard - Judicial Evaluation as a New Governance Tool*, MPI Luxembourg Working Paper Series, (2015) 2, p. 12; N. PERŠAK, J. ŠTRUS, *Legitimacy and Trust-Related Issues of Judiciary: New Challenges for Europe*, in N. PERŠAK (ed.), *Legitimacy and Trust in Criminal Law, Policy and Justice. Norms, Procedures, Outcomes*, Ashgate Publishing Limited, 2014, p. 105.

<sup>5</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 1.

<sup>6</sup> EUROPEAN COMMISSION, *ibidem*.

perspectives. One is internal to the Scoreboard, the other external. The internal perspective considers the internal consistency of the Scoreboard approach. The external puts the Scoreboard concepts and definitions into a broader context.

Efficiency and effectiveness are just two, out of several, basic features of justice systems. An efficient (or effective) justice system could potentially suffer from a lack of independent judiciary and/or miss fairness of procedures and quality of judicial service. However, the paper does not want to challenge the efficiency approach on these grounds. The focus of our analysis is to verify to what extent the data on efficiency used in academic and political discourses that are provided by the Scoreboard is sound enough to make empirically grounded comparative (historical series or cross-countries) statements. Any attempt to make cross-country comparisons has to rely on comparable datasets that are used for the exercise. If this basic condition is not respected, judicial reform, policies, and the growing body of studies based on Scoreboard and CEPEJ data should be seriously questioned.

Another scholar - Marco Fabri - explores the question of the comparability of human resources data (i.e. judges) that in organisation relying intensively on the labour factor such as courts can be considered to be the key production factor.<sup>7</sup> This paper explores a different area, complementing Fabri's work. The researchers choose to explore the case-flow indicators presented by the Scoreboard which bases its analysis on the number of incoming, pending and resolved cases. In the Scoreboard discourse, the number of cases a court system handles in a year is considered emblematic for its efficiency. Even if that were true (see Sec. 4.1 for a critical appraisal), previous analyses suggest that the comparability of such data are problematic in many areas, particularly the consistency of the answers across time (at the state level), and between countries within the same period.<sup>8</sup> The paper explores how the data provided by the Member States to fill

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<sup>7</sup>M. FABRI, *Too few judges? Methodological issues in the comparative analysis of the number of judges in European countries, Regulating the number of judges in society*, Onati Seminar June 30-July 31, 2016.

<sup>8</sup>M. FABRI, *ibidem*; M. VELICOGNA, *Study on Council of Europe Member States Appeal and Supreme Courts' Lengths of Proceedings Edition 2015 (2006-2012 data)*, CEPEJ(2015)7Rev, Strasbourg, 7 September, p. 10-15; G. PALUMBO, G. GIUPPONI, L. NUNZIATA, J. S. MORA SANGUINETTI, *The Economics of Civil Justice. New Cross-Country Data and Empirics*, OECD Economics Department Working Papers No. 1060, 2013, p. 13 (available at [dx.doi.org/10.1787/5k41w04ds6kf-en](https://dx.doi.org/10.1787/5k41w04ds6kf-en)); A. UZELAC, *Efficiency of European Justice Systems. The strength and weaknesses of CEPEJ evaluations*, *International Journal of Procedural Law*, 1(2012)1, p. 127-128; M. VELICOGNA, *The EU Justice Scoreboard and the challenge of investigating the functioning of EU justice systems and their impact on the economy of the Member States*, XXVII

apparently simple categories of cases like civil and commercial litigious or non-litigious case, and administrative cases vary, making a comparison at least problematic over time and across justice systems. The analysis will deal with the comparability of these data and shows that such comparability cannot be taken for granted. The definition of a ‘case’ as well as of the different ‘case types’ and their status (i.e. incoming, pending and resolved) may differ quite consistently across countries.

In seeking to answer the question of soundness, reliability, and comparability of data provided by the EU Justice Scoreboard on the number of cases (as indicators of efficiency), the researchers considered:

1. the evolution of the questionnaires and reports that provided the indicators;
2. the consistency of the conceptual framework; and
3. the causes of the data inconsistency and possible solutions that can improve the present situation.

The paper is structured in six parts. Section 2 is dedicated to the **methodology**. The section introduces the “**Scoreboard data ecosystem**” and the data sources, the **means used to carry out the assessment**, and the **Member States chosen** to conduct the necessary checks to **assess the ways the cases are counted and categorised**. The **consistency of the data** will be verified across historical series and through the analysis of documents that rely on the same data collection source. Section 3 provides an overview of the **evolution of the Scoreboard and CEPEJ data** on which the Scoreboard relies. Then, section 4 is dedicated to **conceptual matters, conceptual consistency of key terminology** used by the Scoreboard: namely, the concepts of ‘efficiency’, ‘caseload’ or ‘workload’, and the ‘case flow’. Section 5 looks first into **what is considered to be a case** according to national approaches in the selected Member States and **the typology of cases included in the case categories** that are part of the Scoreboard evaluation. In the exercise particular attention is given to the **consistency of the categories of cases and historical data series**, and the **consequences that inconsistencies** can have for the evaluation of the analysed justice systems. Possible solutions for identified deficiencies are explored before concluding on the findings of this analysis. Section 6 sums up on the **possibilities of comparison** available under the present data format and series.

## II. METHODOLOGY

### 2.1 *The scoreboard's data eco system.*

The **EU Justice Scoreboard** relies on various sources for its data. A large part of the statistical data is provided by the **CEPEJ** (Council of Europe Commission for the Evaluation of the Efficiency of Justice) with which the European Commission has concluded an agreement for the preparation of an annual study.<sup>9</sup> The “CEPEJ methodology” is used for this purpose (i.e. CEPEJ Questionnaires and Explanatory Note, data validation process, etc.).<sup>10</sup>

Together with the CEPEJ data, **a number of other sources** are used. These vary to a certain extent from one edition to the other of the Scoreboard based on the indicators used and the focus a certain edition has. Between the additional sources of data used for the making of the Scoreboard, the following can be indicated:

- a group of contact persons on national justice systems (designated by the Member States),<sup>11</sup>
- the European Network of Council of the Judiciary (ENCJ),
- the Network of the Presidents of the Supreme Judicial Courts of the EU,
- Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA),
- the European Competition Network, the Council of Bars and Law Societies of Europe (CCBE), the Communication Committee,
- the European Observatory on Infringements of Intellectual Property Rights,
- the Consumer Protection Cooperation Network,
- Eurostat,
- the European Judicial Training Network (EJTN),
- the World Bank, and
- the World Economic Forum.<sup>12</sup>

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<sup>9</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 1.

<sup>10</sup> EUROPEAN COMMISSION, *ibidem*.

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<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3022> .

<sup>12</sup> EUROPEAN COMMISSION, *ibidem*.

These other sources of data that are addressing various punctual topics selected by the Scoreboard are not part of the present analysis.

Figure 1 illustrates how the different reports and documents interrelated.

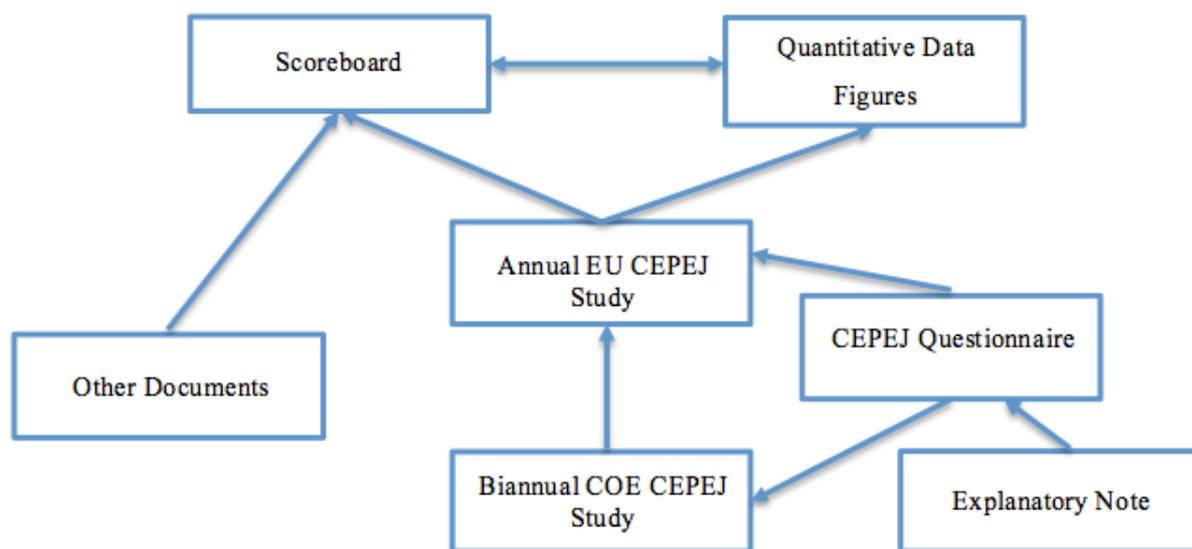


Fig. 1. Interrelation between the documents forming the Scoreboard data ecosystem.

## 2.2 – The subset of Scoreboard's data analysed in the research

In assessing the soundness and comparability of data concerning the number of cases as presented in the analysis undertaken by the European Commission in the EU Justice Scoreboard a number of evaluation documents are analysed (Table 1). These are the **2016 Scoreboard**,<sup>13</sup> the Quantitative Data Figures for the 2016 Scoreboard (**Quantitative Data Figures**), the CEPEJ Study on the functioning of judicial systems in the EU Member States, Facts and Figures from the CEPEJ questionnaires 2010-2012-2013-2014 (**Annual EU CEPEJ Study**),<sup>14</sup> the Explanatory Note to the Scheme for

<sup>13</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final.

<sup>14</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 2*, CEPEJ(2015)15Part2rev2 (available at [http://ec.europa.eu/justice/effective-justice/files/cepj\\_study\\_scoreboard-country-fiches\\_2016\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-country-fiches_2016_en.pdf)).

Evaluating Judicial Systems (**Explanatory Note**),<sup>15</sup> and the Studies No. 23 (**Biannual COE CEPEJ Study**).

2016 Scoreboard	EU Justice Scoreboard, 2016 edition
Quantitative Data Figures	Quantitative Data Figures for the 2016 Scoreboard
Annual EU CEPEJ Study	CEPEJ Study on the functioning of judicial systems in the EU Member States, Facts and Figures
CEPEJ database	CEPEJ structured database containing all data collected through the questionnaire filled by the CoE and EU Member States and by the follow-up comments provided by the Member States
CEPEJ Questionnaire	Scheme for Evaluating Judicial Systems
Biannual COE CEPEJ Study	CEPEJ Studies No. 23
Explanatory Note	Explanatory Note to the Scheme for Evaluating Judicial Systems

**Table 1.** The key documents and database forming the Scoreboard data ecosystem

The documents and database that form the Scoreboard statistical data ecosystem are interrelated. The European Commission has requested the European Commission for the Efficiency of Justice (CEPEJ) to conduct a study that would provide the data on the functioning of the judicial system of the Member States.<sup>16</sup> The data the **Biannual COE CEPEJ Study** provides are used to prepare an **Annual EU CEPEJ Study** for each edition of the Scoreboard.<sup>17</sup> The **Annual EU CEPEJ Study** is based on the data analysis and comments provided by the Member States as part of the **Biannual COE CEPEJ**

<sup>15</sup> CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2014-2016 Cycle*, 2 June 2015 (available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ\(2015\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)).

<sup>16</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 2*, CEPEJ(2015)15Part2rev2, p. 3.

<sup>17</sup> The 2016 edition of the study is available at [http://ec.europa.eu/justice/effective-justice/files/cepj\\_study\\_scoreboard-indicators\\_2016\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-indicators_2016_en.pdf), as well as the countries' data fiches [http://ec.europa.eu/justice/effective-justice/files/cepj\\_study\\_scoreboard-country-fiches\\_2016\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-country-fiches_2016_en.pdf).

**Study** (2010, 2012, and 2014) and a specific questionnaire<sup>18</sup> filled by the CEPEJ's national correspondents for the years not covered by the biennial CEPEJ evaluation. The **EU Justice Scoreboard** and the **Quantitative Data Figures** rely on the **Annual EU CEPEJ Study** data for the indicators regarding the number of cases (incoming, pending and clearance rate). The **Quantitative Data Figures** is an additional document containing a selection of the Scoreboard graphs together with the quantitative data values used for drawing the graphs. The **Biannual COE CEPEJ Study** is based on the **CEPEJ Questionnaire**: namely, the Scheme for evaluating judicial systems, filled in by the national CEPEJ correspondents/members. The responses are statistically processed and analysed by the CEPEJ. The **Explanatory Note** to the Biannual COE CEPEJ Study provides the operative definition of the variables that are common for both Biannual and Annual CEPEJ Studies.

When useful for the argument discussed or for illustration purposes, reference to prior to 2016 editions of the analysed documents is made.

### *2.3. Data consistency check: countries selection*

To carry out a data consistency verification of the 2016 Scoreboard three justice systems were chosen. These are **France, Italy** and **Romania**. The choice of justice systems to carry out the verification is not random but is based on the scholars' familiarity and knowledge of the justice systems analysed, as well as languages competencies that allow easy access to primary sources of information in the chosen jurisdictions. Furthermore, the three systems belong to the Latin legal tradition that makes them relatively homogeneous. This would reduce the risks of over-estimating differences and inconsistencies that may arise when comparing judicial systems belonging to different legal traditions (such as German or Nordic), not to mention civil and common law countries).

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<sup>18</sup> This is the "Scheme for evaluating judicial systems" used by the CEPEJ for the Biannual CEPEJ Study. See CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 11.

2.4. Data consistency check: selecting variables

The consistency of the Scoreboard data for France, Italy and Romania have been checked for the different case categories the evaluation uses (i.e. civil, commercial, administrative and other cases, civil and commercial cases, and administrative cases). These variables were chosen due to their use by the Scoreboard as key elements to estimate the efficiency of the national proceedings.

The data consistency check are carried out in steps comparing the values of the variables and indicators across the sections of the Quantitative Data Figures of the Scoreboard and Annual EU CEPEJ Study, and between annual editions of the Annual EU CEPEJ Study evaluations. The first step focuses on the reliability of the historical data series. This means **checking the consistency of the Quantitative Data Figures of the Scoreboard** in Figures 2-3 corresponding to incoming cases, Figures 7-9 concerning the rate of resolved cases, and Figures 10-12 regarding pending cases with the corresponding data in the **Annual EU CEPEJ Study**. The comparison is carried out between the values of the indicators contained in the two evaluation documents. This verification is necessary because the **Quantitative Data Figures** variables rely on the results of the **Annual EU CEPEJ Study** (Table 2). Thus, it is crucial for the data consistency that the values of the variables correspond.

Quantitative Data Figures of the Scoreboard	Annual EU CEPEJ Study
Figure 2, Number of incoming civil, commercial, administrative and other cases (first instance/per 100 inhabitants)	Indicator 3: The performance of courts at all stages of the proceedings Table 3.1.1.1 to 3.1.4.4 First instance courts: Number of other than criminal cases (Q91)
Figure 3, Number of incoming civil and commercial litigious cases (first instance/per 100 inhabitants)	Indicator 3: The performance of courts at all stages of the proceedings Table 3.1.1.1 to 3.1.4.4 First instance courts: Number of other than criminal cases (Q91)

Quantitative Data Figures of the Scoreboard	Annual EU CEPEJ Study
	Table 3.2.1.1 to 3.2.1.8 First instance courts: Clearance rate and disposition time in different type of other than criminal cases (Q91)
Figure 7, Rate of resolving civil, commercial, administrative and other cases (first instance/in %)	Table 3.2.2.1 to 3.2.2.4 First instance courts: Variation of clearance rate and disposition time in different type of other than criminal cases (Q91)
	Table 3.10.1 to 3.10.6 First instance courts: Disposition time and clearance rate for other than criminal cases, litigious civil and commercial cases and administrative cases (Q91)
	Table 3.2.1.1 to 3.2.1.8 First instance courts: Clearance rate and disposition time in different type of other than criminal cases (Q91)
Figure 8, Rate of resolving litigious civil and commercial cases (first instance/in %)	Table 3.2.2.1 to 3.2.2.4 First instance courts: Variation of clearance rate and disposition time in different type of other than criminal cases (Q91)
	Table 3.10.1 to 3.10.6 First instance courts: Disposition time and clearance rate for other than criminal cases, litigious civil and commercial cases and administrative cases (Q91)
	Table 3.2.1.1 to 3.2.1.8 First instance courts: Clearance rate and disposition time in different type of other than criminal cases (Q91)
Figure 9, Rate of resolving administrative cases (first instance/in %)	Table 3.2.2.1 to 3.2.2.4 First instance courts: Variation of clearance rate and disposition time in different type of other than criminal cases (Q91)
	Table 3.10.1 to 3.10.6 First instance courts: Disposition time and clearance rate for other than criminal cases, litigious civil and commercial cases and administrative cases (Q91)
Figure 10, Number of civil, commercial, administrative and other pending cases (first instance/per 100 inhabitants)	Indicator 3: The performance of courts at all stages of the proceedings Table 3.1.1.1 to 3.1.4.4 First instance courts: Number of other than criminal cases (Q91)
	Indicator 3: The performance of courts at all stages of the proceedings
Figure 11, Number of litigious civil and commercial pending cases (first instance/per 100 inhabitants)	Table 3.1.1.1 to 3.1.4.4 First instance courts: Number of other than criminal cases (Q91)

Quantitative Data Figures of the Scoreboard	Annual EU CEPEJ Study
Figure 12, Number of administrative pending cases (first instance/per 100 inhabitants)	Indicator 3: The performance of courts at all stages of the proceedings Table 3.1.1.1 to 3.1.4.4 First instance courts: Number of other than criminal cases (Q91)

**Table 2.** Variables/Indicators whose consistency is checked against each other across the Annual EU CEPEJ Study and Quantitative Data Figures of the Scoreboard (year 2016).

The second step of the verification concerns the yearly series of variables between the 2016 edition of the Annual EU CEPEJ Study with the **previous editions of the Annual EU CEPEJ Studies** and explanations regarding the data provided by the Member States. This exercise verifies whether there is any existing data variation because the 2016 Annual EU CEPEJ Study contains a methodological disclaimer warning about data values that do not coincide.<sup>19</sup>

The third step consists of a **cross-check between the case categories of CEPEJ** and the clarifications provided by the chosen Member States. The check is carried out in two stages. First, it considers the evolution of the content of the CEPEJ case categories by comparing the 2013 and 2015 **Explanatory Notes** against each other. Then, the CEPEJ case categories are compared with the explanation provided by France, Italy, and Romania about the type of cases they included in each of the CEPEJ categories analysed. Hence, seeking to identify for each justice system the type of cases the national statistics include in the analysed categories: namely, civil, commercial, administrative and other cases, civil and commercial cases (litigious and non-litigious), and administrative cases. This exercise offers a clearer image of the comparability of the case categories and their content in the analysed jurisdictions providing the tools to assess the soundness, reliability and comparability of data concerning the number of cases.

### III. EVOLUTION OF THE SCOREBOARD AND CEPEJ DATA.

Over the years, the Scoreboard evolved in two directions. On the one hand, there are the changes in the CEPEJ data, which reflected in almost automatic manner in the Scoreboard data, leading to a series of invisible changes. On the other hand, the scope of

<sup>19</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 2*, CEPEJ(2015)15Part2rev2, p. 11-12.

the Scoreboard evolved. In its first version, the Scoreboard was a ‘tool to support the efficiency of justice in EU Member States’<sup>20</sup> and ‘to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States’,<sup>21</sup> while the most recent versions have taken a softer and more comprehensive approach.

### *3.1. Evolution of the CEPEJ data.*

In Europe, the CEPEJ is the primary collector of data from the Member States through CEPEJ members and national correspondents.<sup>22</sup> The CEPEJ data are collected biannually and are published in the ‘CEPEJ Evaluation of European Judicial Systems Report’. To provide yearly data for the Scoreboard, since 2014 an additional data collection is carried out in the missing years. This exercise, called **Annual EU CEPEJ Study** on the functioning of judicial systems in the EU Member States, involves only the EU Member States, and fills in an important gap in the completeness of the historical dataset series.

The data collected by the Member States and provided for the **Biannual COE CEPEJ Study** are often gathered by the Member States for their own internal institutional purposes. Hence, they are likely based on different categories and operational definitions than those of the CEPEJ.<sup>23</sup> This also applies to the **Annual EU CEPEJ Study** that complement the baseline data the Scoreboard is built upon.

**Shifting case categories** - Over the years, the CEPEJ cases categories used for the CEPEJ Report and Study were amended several times. The 2016 edition of the evaluation contains references to different amendments related to the CEPEJ categories as well as modification of national statistics methodology for some Member States (changes in national categories definition, changes in the aggregation of national categories to provide aggregated data to CEPEJ). This modification impairs on the

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<sup>20</sup> M. VELICOGNA, *The EU Justice Scoreboard and the challenge of investigating the functioning of EU justice systems and their impact on the economy of the Member States*, XXVII Convegno annuale della Società Italiana di Scienza Politica (SISP), 12 -14 September 2013, Firenze, Italy, p. 1.

<sup>21</sup> EUROPEAN COMMISSION, *The EU Justice scoreboard*, COM(2013) 160 final, p. 3.

<sup>22</sup> The national correspondents are often part of the Ministry of Justice of the Member State.

<sup>23</sup> R. MOHR, F. CONTINI, *Conflicts and Commonalities in Judicial Evaluation*, *Oñati Socio-legal Series*, 4(2014)5, p. 846.

comparability of indicators as part of historical data series.<sup>24</sup>As a result, the long-term goal of CEPEJ data collection: namely, ‘to define a core of quantitative and qualitative key data to be regularly collected and dealt with in a similar manner in all states, bringing out shared indicators on the quality and the efficiency of court activities in the Member States of the Council of Europe (...) and highlighting organisational reforms, practices and innovations in a view to enabling the further improvement of the service provided to court users’<sup>25</sup> is far from being achieved in practice.

### 3.2. *Evolution of the scoreboard*

The evolution of the Scoreboard is two folded. One of the evolution lines is the reflection of the changes registered by the CEPEJ data which reflect automatically on the Scoreboard variables. The Justice Scoreboard has, since its first edition in 2013, made a systematic use of the statistical data collected by the CEPEJ.<sup>26</sup>

The other line of evolution is related to the scope of the Scoreboard. As noticed, the original aim of the Scoreboard was to assist the Member States to achieve ‘more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice’.<sup>27</sup> However, the switches in the operative definition of the data provided by the **CEPEJ data series have not always and consistently been indicated in the various editions of the Scoreboard and in the Quantitative Data Figures**. In such circumstances, and particularly in the first editions of the Scoreboard, the whole body of additional information that qualifies the CEPEJ data disappeared from the Scoreboard charts, as well as any caution about the

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<sup>24</sup> For example, the notices under Table 3.9.1 First instance courts: Caseload in the EU in 2014 (incoming cases per 100 inhabitants) CEPEJ Study based on the CEPEJ Reports.

<sup>25</sup> CEPEJ, *European Judicial Studies. Efficiency and Quality of Justice, CEPEJ Studies No. 23, Edition 2016 (data 2014)*, p. 8 (available at <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%202023%20report%20EN%20web.pdf>).

<sup>26</sup> R. MOHR, F. CONTINI, *Conflicts and Commonalities in Judicial Evaluation, Oñati Socio-legal Series*, 4(2014)5, p. 846.

<sup>27</sup> EUROPEAN COMMISSION, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013) 160 final, Brussels, 27.3.2013, p. 2. “Given the importance of national justice systems for the economy, the [...] Scoreboard focuses on the parameters of a justice system which contribute to the improvement of the business and investment climate.”; EUROPEAN COMMISSION, *EU Justice Scoreboard 2013*, p. 4; EUROPEAN COMMISSION, *The 2014 EU Justice Scoreboard*, COM(2014) 155 final, p. 3; EUROPEAN COMMISSION, *The 2015 EU Justice Scoreboard*, COM(2015) 116 final, p. 3; EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 1. On an in-depth analysis of the data, see further section 3.3.

comparability of the data provided.<sup>28</sup> As remarked by Mohr and Contini, the ‘objectified rank’ which results from this process ‘becomes the only relevant information’ repudiating ‘the very *raison d’être* of the CEPEJ study, which is to give an overview of the situation of the European judicial systems, not to rank the best judicial systems in Europe, which would be scientifically inaccurate and would not be a useful tool for the public policies of justice’.<sup>29</sup> To avoid this trap, the reader of the Scoreboard and dedicated fiches should be aware of these data details. With the latest editions of the Scoreboard, the ranking approach has been softened by the inclusion of additional information and clarifications on the datasets changes and national particularities that influence the results. While this approach is a welcomed development, the information and clarifications provided are not sufficient. For example, in the 2016 Scoreboard the Figures 2-3 and 7-12 regarding the number of cases and clearance rates do contain some notices reporting changes in methodology for data collection and categorisation, but the same warning is not included in the corresponding Quantitative Data Figures charts. The Quantitative Data Figures charts, when read separately from the Scoreboard and the CEPEJ Study warnings, create the impression that the data presented are fully comparable.

Figure Caption	2016	2015	2014	2013
<b>Number of incoming cases</b>				
Number of incoming civil, commercial, administrative and other cases per 100 inhabitants	Figure 2	Figure 2	Not used	Not used
Number of incoming civil and commercial litigious cases per 100 inhabitants	Figure 3	Figure 3	Not used	Not used
<b>Clearance rate</b>				
Rate of resolving civil, commercial, administrative and other cases	Figure 7	Figure 7	Figure 5	Figure 5 <sup>30</sup>
Rate of resolving civil and commercial cases	Figure 8	Figure 8	Figure 6	Figure 6
Rate of resolving administrative cases	Figure 9	Figure 8	Figure 7	Figure 7

<sup>28</sup> R. MOHR, F. CONTINI, *Conflicts and Commonalities in Judicial Evaluation*, *Oñati Socio-legal Series*, 4(2014)5, p. 846.

<sup>29</sup> R. MOHR, F. CONTINI, *Conflicts and Commonalities in Judicial Evaluation*, *Oñati Socio-legal Series*, 4(2014)5, p. 847.

<sup>30</sup> Rate of resolving non-criminal cases.

Figure Caption	2016	2015	2014	2013
Pending cases				
Number of civil, commercial, administrative and other pending cases	Figure 10	Figure 10	Figure 8	Figure 8 <sup>31</sup>
Number of civil and commercial pending cases	Figure 11	Figure 11	Figure 9	Figure 9
Number of administrative pending cases	Figure 12	Figure 12	Figure 10	Figure 10

**Table 3.** Scoreboard evaluation figures correspondence regarding the number of cases (2013-2017).

Further, from an internal perspective, the Scoreboard indicators are grouped around three categories of indicators: efficiency, quality, and independence. These categories can be identified in all editions, even though the way the data are presented evolved over the years. The number of Scoreboard indicators regarding the number of cases included in the various editions of the evaluation since 2013 can be seen in Table 3. The number of indicators has varied little over the years. The indicators have been steadily used by the Scoreboard evaluation, but the way in which they have been built has varied during the exercises. This aspect will be analysed in detail in the following sections.

#### IV. CONCEPTUAL MATTERS – SIGNIFICANCE OF TERMINOLOGY AND DEFINITIONS

Concepts need to be uniformly used by the Member States collecting the data and by the studies analysing the data. Uniformity is a key prerequisite to secure comparability of variables and indicators. In analysing the datasets and the content of the studies we identify a few conceptual matters that are certainly problematic. This section deals with the assessment of some key concepts used in the Scoreboard report, namely: efficiency, case flow, and category of cases.

##### 4.1. Assessment of conceptual consistency: the question of efficiency

The concept of ‘efficiency of justice system’ is not defined by the Scoreboard or by the CEPEJ Studies (i.e. Annual EU CEPEJ Study and Biannual COE CEPEJ Study). Nevertheless, both evaluation exercises make use of indicators that the CEPEJ uses to

<sup>31</sup> Number of non-criminal pending cases.

qualify court efficiency. From an external perspective, based on the standard economic definition, ‘efficiency’ is to be understood as obtaining the same results with the smallest possible inputs, or getting the maximum possible output from given resources.<sup>32</sup> Hence, efficiency can be defined as the ratio between inputs (resources) and outputs (resolved cases) of the system.<sup>33</sup> From this definition, the efficiency of a judiciary can be calculated on the basis of the number of cases resolved for a given amount of resources, basically cost per case. Its calculation must build upon proper definition and measurement of the two factors (inputs/resources and outputs/resolved cases).

From an internal perspective, the indicators used by the Scoreboard for assessing the efficiency of court activities are mainly related to the length of the proceedings (disposition time), clearance rate, and number of pending cases.<sup>34</sup> These indicators do not make a connection between the input in terms of resources used and the output achieved based on the resources used. In analysing the Scoreboard concept of ‘efficiency’, this does not seem to be used in a manner that reflects on the input of resources and outputs achieved with such resources. The Scoreboard does not link input and output indicators to measure or compare efficiency. The concept of ‘efficiency’ as used by the Scoreboard (and by the CEPEJ) comes closer to the concept of ‘effectiveness’, namely: the degree to which objectives are achieved and the extent to which targeted problems are solved.<sup>35</sup> This creates some confusion as to what exactly is assessed with regard to the functioning of the justice systems of the Member States.

**Finding 1:** The Scoreboard uses effectiveness indicators instead of efficiency.

#### 4.2 Assessment of Caseload or Workload?

<sup>32</sup> JOHN BLACK, *Dictionary of Economics*, Oxford University Press, 1997, p. 139.

<sup>33</sup> For a more technical discussion of the concept of efficiency, see for example M. J. FARRELL, *The measurement of productive efficiency*. *Journal of the Royal Statistical Society. Series A (General)*, 120(3), 1957, p. 253-290; R. FÄRE, C. K. LOVELL, *Measuring the technical efficiency of production*. *Journal of Economic Theory*, 19(1), 1978, p. 150-162.

<sup>34</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 5; CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 2*, CEPEJ(2015)15Part2rev2, p. 5 (available at [ec.europa.eu/justice/effective-justice/files/cepj\\_study\\_scoreboard-country-fiches\\_2016\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard-country-fiches_2016_en.pdf)).

<sup>35</sup> [www.businessdictionary.com/definition/effectiveness.html](http://www.businessdictionary.com/definition/effectiveness.html).

According to the 2016 Scoreboard, ‘the relevance of Member States efforts to improve the effectiveness of their justice systems is also confirmed by the consistently high workload for courts over the years, although the situation varies between Member States, as shown by the figures below’.<sup>36</sup> From an internal perspective of the Scoreboard, several aspects need to be singled out. While reference in the text is made to ‘workload’, the ‘figures below’ present just the variables related to the ‘Number of incoming civil, commercial, administrative and other cases (first instance/per 100 inhabitants)’<sup>37</sup> (Figure 2) and the ‘Number of incoming civil and commercial litigious cases (first instance/per 100 inhabitants)’<sup>38</sup> (Figure 3).<sup>39</sup> This is puzzling. Furthermore, the Scoreboard renames the CEPEJ category ‘Total of other than criminal law cases’ into ‘Number of incoming civil, commercial, administrative and other cases’. In verifying the data value, the categories correspond, but this change can create doubts as to the content of the ‘other cases’ referred to by the Scoreboard.

From an external perspective, confronting the Scoreboard and the questionnaire understanding of ‘workload’ with a dictionary definition for the same concept, there seems to be some confusion in the way this is used. The Merriam-Webster dictionary defines ‘workload’ as ‘1: the amount of work or of working time expected or assigned [... and] 2: The amount of work performed or capable of being performed (as by a

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<sup>36</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 4.

<sup>37</sup> Under the CEPEJ methodology, this category includes all civil and commercial litigious and non-litigious cases, non-litigious land and business registry cases, other registry cases, other non-litigious cases, administrative law cases, and other non-criminal cases. Notice of existing differences is given for Italy (‘IT: A different classification of civil cases was introduced in 2013, so comparing different years might lead to erroneous conclusions’) and Denmark (‘DK: An improved business environment reportedly explains that courts on all levels received fewer cases’).

<sup>38</sup> Litigious civil and commercial cases concern disputes between parties, e.g. disputes regarding contracts, under the CEPEJ methodology. By contrast, non-litigious civil (and commercial) cases concern uncontested proceedings, e.g. uncontested payment orders. Commercial cases are addressed by special commercial courts in some countries and handled by ordinary (civil) courts in others. Notice of existing differences is given for Spain (‘ES: The introduction of court fees for natural persons until March 2014 and the exclusion of payment orders reportedly explain variations’), Greece (‘EL: Methodological changes introduced in 2014’), and Italy (‘IT: A different classification of civil cases was introduced in 2013, so comparison between different years might lead to erroneous conclusions’).

<sup>39</sup> EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 5.

mechanical device) usually within a specific period'. The same dictionary defines caseload as 'the number of cases handled (as by a court or clinic) usually in a particular period'.<sup>40</sup>

Looking back at the documents on the basis of which the data is collected it can be discovered that the Commission at least initially asked the CEPEJ to investigate the workload of courts and justice systems.<sup>41</sup> Furthermore, it looks also clear that the CEPEJ team working at the first edition of the Annual EU CEPEJ Study had a notion of the difference between caseload and workload. In fact, within the Study, the following definition of workload is provided: 'Workload – it may be defined as the whole of the work handled by a court, while the caseload only refers to the number of cases handled by a court.'<sup>42</sup> The study provides a definition also for the caseload, which is the actual value the CEPEJ tries to provide: 'Caseload – it is the number of cases that a court has to deal with in a period of time.'<sup>43</sup> As the experts clearly stated, though, 'the extreme differentiation in the composition of the caseload<sup>44</sup> and the level of delegation of judicial or quasi-judicial activities to non-judicial staff and non-professional judges, result in very different judicial workloads. As result, any comparative analysis of this kind of variables becomes, at least potentially, extremely misleading'.<sup>45</sup> Therefore, in the 2013 Annual EU CEPEJ Study the following three indicators of caseload were used as a partial and only

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<sup>40</sup> For a more technical definition, the National Center for State Courts, refers to the caseload as the number of pending cases e.g. active pending caseload ([www.courtools.org/~media/Microsites/Files/CourTools/courtools\\_Trial\\_measure4\\_Age\\_Of\\_Active\\_Pending\\_Caseload.ashx](http://www.courtools.org/~media/Microsites/Files/CourTools/courtools_Trial_measure4_Age_Of_Active_Pending_Caseload.ashx)), while workload refers to the amount of judicial work required to dispose of those cases ([www.ncsc.org/Topics/Court-Management/Workload-and-Resource-Assessment/Resource-Guide.aspx](http://www.ncsc.org/Topics/Court-Management/Workload-and-Resource-Assessment/Resource-Guide.aspx)).

<sup>41</sup> M. VELICOGNA, *The EU Justice Scoreboard and the challenge of investigating the functioning of EU justice systems and their impact on the economy of the Member States*, XXVII Convegno annuale della Società Italiana di Scienza Politica (SISP), 12-14 September 2013, Firenze, Italy. The **Scoreboard Questions**, prepared by the European Commission – DG Justice as guidelines for the preparation of first edition of the Annual EU CEPEJ Study, included the following question: '7. Workload of courts on a disaggregated level (e.g. court districts, regions, cities), including the number of incoming and resolved cases for each court district (alternatively regions, cities) and the number of judges and non-judge staff for each court district (alternatively regions, cities)' (E. DUBOIS, C. SCHURRER, M. VELICOGNA, *The functioning of judicial systems and the situation of the economy in the European Union Member States, Cepej-CoE Report* prepared for the European Commission (Directorate General JUSTICE), Strasbourg, 15 January 2013, p. 14).

<sup>42</sup> E. DUBOIS, C. SCHURRER, M. VELICOGNA, *The functioning of judicial systems and the situation of the economy in the European Union Member States, Cepej-CoE Report* prepared for the European Commission (Directorate General JUSTICE), Strasbourg, 15 January 2013, p. 686.

<sup>43</sup> *Ibidem*.

<sup>44</sup> The type of cases that are included in the various categories, their relative ratio and their procedural complexity.

<sup>45</sup> M. VELICOGNA, *Study on Council of Europe Member States Appeal and Supreme Courts' Lengths of Proceedings Edition 2015 (2006-2012 data)*, p. 1.

possible reply to the workload question: ‘Incoming first instance non-criminal cases in 2010/Professional judges sitting in courts full time’; ‘professional judges sitting in courts on occasional basis, non-professional judges, and Rechtspfleger for countries which have such category’; and ‘Incoming first instance non-criminal cases in 2010/ (judges and administrative personnel)’. These values are accompanied by a notice that strongly qualifies them, pointing out that what can be provided is not even the caseload but a very general indicator of the ‘other than criminal cases’ caseload.<sup>46</sup>

In the 2014-2016 editions of the Annual EU CEPEJ Study, only the caseload in the EU has been indirectly defined in some table headings as the number of first instance incoming cases and the number of pending cases per 100 inhabitants (e.g. ‘Table 3.9.1: First instance courts: Caseload in the EU in 2014 (incoming cases per 100 inhabitants) (Q1, Q91)<sup>47</sup> and ‘Table 3.9.2: First instance courts: Caseload in the EU in 2014 (pending cases on 31 Dec. per 100 inhabitants) (Q1, Q91)<sup>48</sup>). Regrettably, in these subsequent editions of the study, no explicit definition of ‘workload’ or ‘caseload’ is provided.

**Finding 2:** The Scoreboard uses caseload variables rather than providing data on court workload as initially intended by the Commission.

The distinction between caseload and workload, which was initially clear at least in the Annual EU CEPEJ Study, seems to be now abandoned.

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<sup>46</sup> ‘Data on the workload of courts at a disaggregated level are not available. Furthermore, available data on incoming and resolved cases are collected per case action not per court level. Caseload in terms of incoming and resolved therefore cannot be calculated by comparing incoming and resolved cases with the number of judges and administrative staff available at each court level. What can be done is to take the number of incoming cases at first instance, considering it as the actual number of cases which the court system needs to deal with, or system caseload (appeals do not introduce new cases but merely imply that cases need further processing after the work already done), and dividing it by the number of judges and administrative staff that the court system employ to deal with it. In particular, three caseload indicators are calculated, incoming non-criminal cases at first instance per professional judge sitting in courts full-time; incoming non-criminal cases at first instance in 2010 per judge-like agents (this includes professional judges sitting in courts full-time, professional judges sitting in courts on occasional basis, non-professional judges (it may include lay judges), and Rechtspfleger for countries which have such a category); and incoming non-criminal cases at first instance in 2010 per judge-like and administrative agent.’, E. DUBOIS, C. SCHURRER, M. VELICOGNA, *The functioning of judicial systems and the situation of the economy in the European Union Member States, Cepej-CoE Report* prepared for the European Commission (Directorate General JUSTICE), Strasbourg, 15 January 2013, p. 684.

<sup>47</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, p. 249.

<sup>48</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, p. 250.

### *4.3. Counting the case assessing the case flow*

In seeking to identify the national caseload flow in the three Member States selected for a more in-depth comparison, a number of documents are analysed: the 2016 Scoreboard, the Quantitative Data Figures, the Annual EU CEPEJ Study, and the Biannual COE CEPEJ Study.

From an internal perspective, the 2016 Scoreboard addresses the matter of courts caseload at first instance from a fragmented approach by relying on a number of indicators taken from the Annual EU CEPEJ Study. The indicators considered to be relevant for the Scoreboard are: (1) the number of incoming civil, commercial, administrative and other cases (Figure 2);<sup>49</sup> (2) number of incoming civil and commercial litigious cases (Figure 3);<sup>50</sup> (3) number of civil, commercial, administrative and other pending cases (Figure 10);<sup>51</sup> (4) number of litigious civil and commercial pending cases (Figure 11); and (5) number of administrative pending cases (Figure 12). Another three indicators can be considered in the assessment of the caseload flow at the national level. These are the clearance rates for the national courts: namely, resolving civil, commercial, administrative and other cases (Figure 7), for resolving litigious civil and commercial cases (Figure 8), and for resolving administrative cases (Figure 9). Indirectly, they can provide information on the national caseload, but additional variables should be available for this purpose, such as the number of pending cases at the beginning of the year (1 January) and the number of resolved cases.

In comparison with the Annual EU CEPEJ Study, the Scoreboard uses only part of the indicators that compose the annual caseload flow of national courts, leaving some of the collected information aside from the main overall evaluation. The indicators regarding the number of pending cases at January 1 as well as the number of cases resolved are left aside. This might leave the reader wondering whether the clearance rate

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<sup>49</sup> Under the CEPEJ methodology, this category includes all civil and commercial litigious and non-litigious cases, non-litigious land and business registry cases, other registry cases, other non-litigious cases, administrative law cases, and other non-criminal cases.

<sup>50</sup> Litigious civil and commercial cases concern disputes between parties, e.g. disputes regarding contracts, under the CEPEJ methodology.

<sup>51</sup> The Scoreboard Chart does not clarify whether the number presented in the chart concern pending cases at the end of the year (31 December) or at the beginning at the year (1 January). The position of the chart after the clearing rates charts hints to an end of the year indicator that is confirmed by comparing the Quantitative Data Figures of the 2016 Scoreboard (Figure 10) with the CEPEJ Study data for the same period (Table 3.10.7), hence, total number of pending cases at first instance/100 inhabitants at 31 December.

indicators in the Scoreboard (Figures 7-9) are intended to supplement or indirectly reflect on the indicators chains that are left out of the annual case-flow assessment.<sup>52</sup> **No explanation as to the choice of indicators is provided by the Scoreboard evaluation.** The consequences of this approach are an incomplete image of the case flow and court activity the Scoreboard presents annually to the reader as absolute facts.<sup>53</sup> The number of cases pending on 1 January is part of the courts' caseload, together with the incoming cases, the resolved cases and the pending cases at the end of the year.<sup>54</sup> For the CEPEJ Questionnaires, the Member States are required to provide information on the number of pending cases within the previous year (pending cases on 1 January) and for the reference year (pending case on 31 December), as well as incoming and resolved cases.<sup>55</sup>

	Pending 1 <sup>st</sup> January	Inco ming during the year	Decided during the year	Pending 31 <sup>st</sup> December
Number of civil, commercial, administrative and other cases	Missing	2	Figure	Missing 10
Number of civil and commercial litigious cases	Missing	3	Figure	Missing 11

<sup>52</sup> The use of a clearance rate indicator is not actually able to fill in the gap for the missing quantitative indicators as the Scoreboard and the Quantitative Data Figures do not provide the indicators concerning the number of pending cases on 1 January and the number of resolved cases.

<sup>53</sup> The number of cases pending on 1 January is part of the courts caseload, together with the incoming cases, the resolved cases and the pending cases on 31 December.

<sup>54</sup> E. DUBOIS, C. SCHURRER, M. VELICOGNA, *The functioning of judicial systems and the situation of the economy in the European Union Member States, Cepej-CoE Report* prepared for the European Commission (Directorate General JUSTICE), Strasbourg, 15 January 2013, p. 628-629; CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from CEPEJ evaluation exercises*, CEPEJ 2012-2014, CEPEJ(2014)4 final, p. 70-71; CEPEJ, *Study on the functioning of judicial systems in the EU Member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013*, Annex 4 Extract of the explanatory note to the scheme for evaluating justice systems, CEPEJ(2014)17final(v2.0 - 16 feb.2015), p. 890; CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2014-2016 Cycle*, Strasbourg, 2 June 2015, CEPEJ(2015)2, Questions 91 to 100 (available at [wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2015\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](http://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)).

<sup>55</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013*, Annex 4 Extract of the explanatory note to the scheme for evaluating justice systems, CEPEJ(2014)17final(v2.0 - 16 feb.2015), p. 890; CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2014-2016 Cycle*, Strasbourg, 2 June 2015, CEPEJ(2015) 2, Questions 91 to 100.

	Pending 1 <sup>st</sup> January	Inco ming during the year	Decided during the year	Pending 31 <sup>st</sup> December	
Number of administrative cases	Missing	Missi ng	Missing	12	Figure

**Table 4.** Categories of case charts contained in 2016 Scoreboard, in comparison with the variables available in the Annual EU CEPEJ Study.

While providing all these values, the Annual EU CEPEJ Study (2014-2017) also presents data on the so called ‘courts caseload’, which are represented by two variables, incoming cases per 100 inhabitants and pending cases on 31 December. From an internal perspective, an explanation on why these two variables are used is not provided. Probably on the basis of this choice of the Annual EU CEPEJ Study, the Scoreboard limits itself to this couple of variables and does not provide the number of cases pending at the beginning of the year or the number of resolved cases.<sup>56</sup> This choice limits the availability of information needed to grasp the case flow dynamics. The fact that the Scoreboard provides clearance rate data coupled with the incoming cases and pending cases offers at least an indirect indication of the resolved cases and the effectiveness of justice systems in handling the number of cases they receive.

Another aspect that creates difficulties in assessing the annual case flow as resulting from the Scoreboard and the Quantitative Data Figures is the presence of significant inconsistencies in the numbers of cases. Such inconsistencies can be clearly identified confronting data on pending cases. The Annual EU CEPEJ Study includes two types of data on pending cases: number of pending cases on 1 January and the number of pending cases on 31 December. The Scoreboard and the Quantitative Data Figures use the number of pending cases reported by the Member States on 31 December.<sup>57</sup> A verification of the Annual EU CEPEJ Study (Part 2) data on the three selected Member States reveals differences between the two sets of pending cases variables. This aspect is further addressed in Section 5.2. Furthermore, from an internal perspective, **it would be desirable that future editions of the Scoreboard would make the information on the number of pending cases clearer for each of the categories.** A cross-check of the

<sup>56</sup> This clarification is not included also in the Quantitative Data Figures corresponding charts, leaving the reader hesitant over which set of data is used - pending at beginning or end of the year -although it can be surmised it is the later in view of the Scoreboard information and cross-check with the values in the Annual EU CEPEJ Study.

<sup>57</sup>EUROPEAN COMMISSION, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, p. 9.

statistical data in the Quantitative Data Figures (Figures 10-12) with a number of tables in the Annual EU CEPEJ Study (Tables 3.1.1.1 to 3.1.4.4 (Q91) of the country fiches for France, Italy, and Romania) reveals that the values regarding the number of pending cases on 31 December match for both evaluations. Clear information is key for an appropriate understanding of the data and the information presented with regard to justice systems and would improve comparability.

These identified aspects and gaps in the presented national cases statistics make the assessment of the courts' caseload difficult from a Scoreboard internal perspective. Furthermore, the Scoreboard reader is offered a partial image of the number of cases as information is missing or this needs to be identified in additional documents providing the data used (i.e. Annual EU CEPEJ Study, Biannual COE CEPEJ Report).

**Finding 3:** The Scoreboard uses only part of the variables of the Annual EU CEPEJ Study that compose the annual first instance courts case flow. While a selection of key data may help not overload the reader, in this case, the result is that key data are missing for various categories (e.g. number of pending cases on 1 January, the number of resolved cases).

The selection criteria for the basic data included in the Scoreboard is not clear.

Future editions of the Scoreboard should make the information presented on the number of pending cases clearer for each category.

## V. NUMBER OF CASES: A JOURNEY IN SEARCH OF CONSISTENCY AND COMPARABILITY

### *5.1. Case definition and case typology*

The Annual EU CEPEJ Study<sup>58</sup> and the 2016 Scoreboard do not contain a specific definition with regard to what is considered to be a case for the purpose of the gathering of the statistical data and for the evaluation of the activity carried out by the national courts. The concept remains under the competence of each Member State and the national statistics methodology used for the collection of data. Sometimes the 'case' definitions used by the Member States domestic statistics are implicit and could depend

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<sup>58</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016.

on technical aspects based on which cases are registered and/or data registered. Therefore, the definition of what is considered a case for the national statistics can sometimes not be directly available for consultation with the published statistics reports as the notion is implicitly understood.<sup>59</sup> For example, in Romania, the series of modifications of the Code of civil procedure concerning the request of initiating enforcement proceedings, the writ of execution (*încuviințarea executării silite*), changed the status of the act a couple of times within the period of a few years. These modifications moved the competence for the issuance of the document from court to bailiffs and back to the court.<sup>60</sup> These changes have not been singled out in the datasets provided by Romania. Furthermore, there can be situations in practice when there is some delay between the date of the lodging of the case or the closing of a case following the issuance of a judgment and the actual registration of the case within the court's case system as incoming or closed due to registry office overload (i.e. Italy). Situations such as these can also influence the number of incoming and pending or closed cases.

When it comes to the definition of 'case types' used by the Scoreboard, the EU evaluation relies on the CEPEJ Study indicators that are based on the CEPEJ Database, CEPEJ questionnaires and the CEPEJ Explanatory Note for evaluating judicial systems. The definitions provided in the Explanatory Note are periodically amended to 'assist the national correspondents and other persons entrusted with replying to the questions'<sup>61</sup> to make sure that the concepts and categories are addressed according to a common understanding. However, the definitions of the categories of cases are not exhaustive in the type of cases that are to be included in each of them but leave space for appreciation to the Member States and the national correspondents entrusted with providing the

<sup>59</sup> For example, France, 'cause - Au sens large, désigne une affaire dont est saisi un juge', see Mots clés de la justice (available at [www.justice.gouv.fr/budget-et-statistiques-10054/definitions-et-methodes-12718/concepts-27118.html](http://www.justice.gouv.fr/budget-et-statistiques-10054/definitions-et-methodes-12718/concepts-27118.html)), the Council of the Magistracy Statistics in Romanian do not contain a definition of the 'case' concept.

<sup>60</sup> Initial text of the code than modified by Law No. 138/2014 in October 2014 that established that a judicial decision is no longer required to issue a writ of execution (*încuviințarea executării silite*) (Article 641 Code of civil procedure). Government Emergency Ordinance No. 1/2016 modify it giving it back to court to decide (see Article 666).

<sup>61</sup> CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2012-2014 Cycle*, CEPEJ(2012)13Rev, 23 May 2013, (available at [wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ\(2012\)13Rev&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](http://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ(2012)13Rev&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)); CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2014-2016 Cycle*, CEPEJ(2015)2, 2 June 2015, (available at [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ\(2015\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)).

requested data. Furthermore, some of the categories of the CEPEJ Questionnaire that are part of the present analysis, **have registered an evolution from the 2010-2012 cycle to the 2014-2016 cycle Quantitative Data Figures charts**. This is, for example, the case of the definition of ‘litigious civil (and commercial) cases’ and the ‘general non-litigious civil (and commercial)’ between the 2012-2014 cycle and the 2014-2016 one. However, these amendments seem to be related to a certain refining and further clarification of the type of cases that are to be included in each of them. The numerical value of the presented data has not been amended in subsequent reports, apart from some computation of the number of cases for the ‘general non-litigious civil (and commercial)’ cases. This raises some questions as to whether the data were also previously included in the aforementioned category, and the definition used was not sufficiently precise in indicating it or whether this change in the definition of the type of case was triggered by the type of cases the Member States generally include in the category of ‘litigious civil (and commercial)’ cases. There are also other possible additional explanations. One could be that the change of definition is ignored by the Member State and upon CEPEJ request for updated data, the Member States provide the same dataset. Another explanation could be related to the fact the dataset is described as homogenous, but in reality, this is subject to various changes and a plethora of case types that are not always clearly reported as included in a certain category of cases. From the 2012-2014 Explanatory Note, the ‘cases relating to enforcement’ definition, it appears that the litigious enforcement procedures were not included in this category, but should have been included in the litigious civil (and commercial) claims.<sup>62</sup> Furthermore, what was previously indicated as being ‘cases related to enforcement’ are now included in the category of ‘general civil (and commercial) non-litigious cases’. The separation of litigious and non-litigious enforcement cases and absorption within the litigious and non-litigious civil (and commercial) cases categories has not led to an amendment of the previously published results of the two categories of datasets compared to previous editions of the CEPEJ Studies. This raises some question as to whether all cases previously labelled as enforcement cases were actually non-litigious cases.

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<sup>62</sup> CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems, 2012-2014 Cycle*, CEPEJ(2012)13Rev, 23 May 2013, p. 16 (available at [wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ\(2012\)13Rev&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](http://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ(2012)13Rev&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)).

With regard to the category of ‘general non-litigious civil (and commercial) cases’, the 2014-2016 Explanatory Note clarifies that the category should not include ‘non-contentious register cases and/or other cases’.<sup>63</sup> The present data indicated as non-litigious land registry and business registry cases were also previously provided in a separate format when available at the national level; thus, this reference does not seem to change the already used categories.

An additional aspect that needs to be raised with regard to the typology of cases is that besides the CEPEJ definition of what should be understood to be included in categories such as ‘litigious civil (and commercial) cases’, ‘general non-litigious civil (and commercial) cases’, ‘administrative law cases’, there are **no uniform and steady information provided by each Member State to indicate the type of cases they include or are able to include in the CEPEJ established categories**. It is not clear whether this is only the type of data that are specified as example in the definition or also additional type of cases that are considered to fall under the indicated categories in the statistics collected. This raises questions as to the comparability of the data among different national systems and the soundness of the way the data is currently presented. A good example in this regard are the ‘administrative law cases’, the type of cases included in this category differs across jurisdictions (e.g. asylum cases, traffic fines, tax cases, procedures concerning incapable persons). The Annual EU CEPEJ Study and Biannual COE CEPEJ Study, as well as the Scoreboard, do not make it clear for each country what this category includes. This certainly affects the comparability of data among the Member States as well as that of datasets, if amendments have been made over time. For example, the administrative jurisdiction in the three analysed jurisdictions concern:

- In France, the administrative courts have jurisdiction over disputes concerning public liberties; any litigation involving a public person or entity; irregular immigration; regulation of GMOs; administrative police; taxes; public contracts;

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<sup>63</sup> CEPEJ, *Explanatory Note to the Scheme for Evaluating Judicial Systems 2014-2016 Cycle*, CEPEJ(2015)2, 2 June 2015, (available at [wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ\(2015\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](http://wcd.coe.int/ViewDoc.jsp?p=&Ref=CEPEJ(2015)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)).

- the civil service; public health; competition rules; environmental law; and urban and regional development disputes;<sup>64</sup>
- in Italy administrative courts have jurisdiction to handle cases that concern the legitimate interests (*interessilegitimi*) (e.g. expulsion of third States nationals; compulsory medical treatments; procedures regarding public recruitment of public administration employees; labour relations that remain completely within the public law sphere not being privatised; lawfulness of the negotiation phase of public procurement contract; award damages for infringement of legitimate interests and consequential to economic rights; disputes concerning the exercise or non-exercise of public power related to undertaken measures, acts, agreements or behaviour (even when indirectly linked to the exercise of publicpower));<sup>65</sup>
  - in Romania administrative and tax sections of the courts will handle all requests related to administrative acts and documents issued by the central or local public administration, or administrative acts not issued within the legal timeframe by the public administration; tax and customs fees; infringement of legitimate interests and rights by an administrative act with individual character or concerning a third party.

Although common points can be identified in the competence of the administrative courts of the three jurisdictions, there are also differences that cannot be ignored. These differences or possible changes are not always made clear by the Scoreboard or by the CEPEJ Studies. On the basis of the Annual EU CEPEJ Study data provided by the national contacts, the 2016 Scoreboard edition flagged out changes that have been communicated with regard to the collection of data, reorganisation of courts, type of cases included in the CEPEJ categories, and methodology used (e.g. Figures 2-3 and Figures 10-12).<sup>66</sup> From an internal perspective of the Scoreboard, this is a welcomed step in identifying modifications and consistency of the data, and the way these are collected and aggregated in the CEPEJ categories. Changes can affect the comparability of historical datasets as well as compatibility of categories between various jurisdictions. However, from an internal perspective, this approach of singling out modifications that are not always detailed does not fully answer the need of having clear information on the

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<sup>64</sup>[english.conseil-etat.fr/Judging](http://english.conseil-etat.fr/Judging); <http://www.conseil-etat.fr/Conseil-d-Etat/Missions/Juger-l-administration>; [www.conseil-etat.fr/Tribunaux-Cours/Missions](http://www.conseil-etat.fr/Tribunaux-Cours/Missions).

<sup>65</sup> [www.treccani.it/enciclopedia/giurisdizione-amministrativa/](http://www.treccani.it/enciclopedia/giurisdizione-amministrativa/).

<sup>66</sup> EUROPEAN COMMISSION, *The 2015 EU Justice Scoreboard*, COM(2015) 116 final, p. 5 and 9-10.

type of cases that are selected and included in each CEPEJ category used for the Scoreboard. Additional action should be taken in this respect for future evaluation and data collection.

**Findings 4:** There is no specific definition of what should be considered a case for the collection of statistical data or its interpretation.

Some categories of cases in the CEPEJ questionnaire that are part of the present analysis, have registered an evolution from the 2010-2012 cycle to the 2014-2016 cycle Quantitative Data Figures charts.

Member States provide no uniform and steady information on the type of cases they include or are able to include in the CEPEJ established categories.

### *5.2. Data inconsistency: indentifying the causes in the CEPEJ Report*

As the Scoreboard relies on CEPEJ collected data, the data of the Scoreboard are sound and homogeneous to the extent the data collected for the CEPEJ studies (i.e. Annual EU CEPEJ Study and Biannual COE CEPEJ Study) have these characteristics. Hence, a reverse engineering process is advisable to check data inconsistency in the CEPEJ reports.

#### *Historical data series inconsistencies*

As the previous section indicates, the CEPEJ and Scoreboard evaluations are likely to encounter difficulties in securing the comparability of data concerning the number of cases in the various categories used. The data comparability cannot be taken for granted, and data have to be interpreted and handled with care. More reason for this as the Methodology section of the Annual EU CEPEJ Study includes a disclaimer mentioning that annual data might differ across editions of the report due to updates and validations done by the Member States during subsequent periods; hence, data published in the latest reports might not coincide with data published in previous reports.<sup>67</sup> In verifying the data series between the 2016 Annual EU CEPEJ Study counties fiches and the 2016 Quantitative Data Figures some **small differences often appear in the values of the overall number of incoming cases per 100 inhabitants and the overall**

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<sup>67</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 11-12.

**number of pending cases per 100 inhabitants.** This is the case in all the three studied jurisdictions and often seem to be due to the way the data are presented, summed up, and rounded up (the variation is of +/-0.1). An exception seems to be the case of Italy where for the overall number of Annual EU CEPEJ values and the pending cases for the period 2010-2013 there are more significant difference in values between the Quantitative Data Figures (variations are between +/-0.5 to 0.8). This **can create doubts to the reader** and raise the question as to the soundness of the data when variations of results for the same period are more significant between the different studies.

Another point of inconsistency is revealed by a comparative assessment of the pending cases data series in 2016 Annual EU CEPEJ Study containing country fiches. The study uses two types of pending cases: namely, 'Pending cases on 31 December' and 'Pending cases on 1 January' for each of the case category assessed (e.g. total of other than criminal cases; civil (and commercial) litigious and non-litigious cases; registry cases; administrative cases, etc.). In checking this information for the 31 December 2012-1 January 2013 and 31 December 2013-1 January 2014 datasets in France, Italy, and Romania significant inconsistencies emerge at times as revealed by Table 5.

	31 December 2012- 1 January 2013	31 December 2013- 1 January 2014
<b>France</b>		
Total other than criminal law cases	Not consistent (-7.566 cases)	Not consistent (+7.448 cases)
Civil (and commercial) litigious cases	Consistent	Consistent
Civil (and commercial) non-litigious cases	Consistent	Consistent
Administrative law cases	Not consistent (-7.566 cases)	Not consistent (+7.448 cases)
<b>Italy</b>		
Total other than criminal law cases	Not consistent (+130.443 cases)	Not consistent (+376.768 cases)
Civil (and commercial) litigious cases	Not consistent (+137.268 cases)	Not consistent (-91.830 cases)

Civil (and commercial) non-litigious cases	Not consistent (-6.819 cases)	Not consistent (+170.378 cases)
Administrative law cases	Not consistent (-1.168 cases)	Not consistent (+4.472 cases)
<b>Romania</b>		
Total other than criminal law cases	Consistent	Not consistent (+301.347 cases)
Civil (and commercial) litigious cases	Consistent	Not consistent (+316.420 cases)
Civil (and commercial) non-litigious cases	Consistent	Not consistent (-54.899 cases)
Administrative law cases	Consistent	Not consistent (+35.409 cases)

**Table 5.** Consistency of data regarding the pending court cases at 31 December compared to 1 January of the next year.

The differences between the ‘Pending cases on 31 December’ and ‘Pending cases on 1 January’ of the next year are significant (i.e. sometimes hundreds of thousands of cases differences between 31 December and 1 January). The reasons behind these discrepancies are not steadily provided by the country fiches or the explanations included in the Annual EU CEPEJ Study. From the three analysed jurisdictions, only Romania offers an explanation to the possible existing discrepancies between the number of pending cases on 31 December 2013 and 1 January 2014. This is due to a change in the data collection, new definitions for the fields ‘stocks’ and ‘closed’ and the moment a case is considered ‘closed’.<sup>68</sup>

The significant differences between the two categories raise questions as to the consistency of the data provided by the national contacts and the content of the different cases categories, as well as the soundness of the data used by the Scoreboard on pending cases (Figures 10-12).

<sup>68</sup> According to the explanation provided by the Romanian CEPEJ contact, a case is considered to be ‘closed’ only when the final decision, including its reasoning is drafted, signed and communicated to the parties’, and for this reason the number of pending cases on 31 December 2013 cannot be identical to the number of pending cases on 1 January 2014. CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 279.

Another element that is likely to create inconsistencies and limit the comparability of the historical datasets are related to the changes in the classification of cases. The Annual EU CEPEJ Study flags modifications in the classification and methodology for data collection. The Scoreboard is lately also briefly warning the reader on such changes. However, the explanation offered by the Member States in the Annual EU CEPEJ Studies is broader (even if often still insufficient) and would be useful to be read together with the absolute values presented by the Scoreboard charts.<sup>69</sup>

**Findings 5:** General small variations in the results of the variables regarding the overall number of incoming or pending cases can be found in the Quantitative Data Figures and the Annual CEPEJ EU Study due to the use of approximation in the summing up of different categories of cases.

There are systematic differences between the ‘Pending cases on 31 December’ and ‘Pending cases on 1 January’ of the next year in the analysed Member States, and at times these differences are significant without the reasons behind it being always clear.

Changes in the classification of cases at national level limit the comparability of the historical datasets and warnings in this sense are useful.

#### *Inconsistencies related to the categories of cases*

As previously remarked in section 5.1, the way Member States aggregate the data regarding the type of cases required by the case categories of the Biannual COE CEPEJ Study, and Annual EU CEPEJ Study is not clear. The explanation the French, Italian, and Romanian national contacts provide in relation to the typology of national cases included in the CEPEJ case categories is often not exhaustively clarified. Additionally, in some cases the Member States offer an indication in this regard only in certain editions of the reports, or sometimes mention that there have been modifications in the type of cases computed within a certain category. For example, **Italy** in the 2016 edition of the Annual EU CEPEJ Study mentions that for 2010, 2012, and 2013 the category of ‘civil and commercial non-litigious cases’ contains the same typology of cases: namely, separation and divorce by mutual consent, interdiction and incapacitation, protective measures for underage, guardianship and trusteeship, etc. From 2014 evaluation, the category includes uncontested payment orders, uncontested divorces, technical

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<sup>69</sup> See for example the case of Italy and the explanation this Member State provides with regard to changes made in 2013 for the classification of civil cases influencing the split between the litigious and non-litigious cases (2014, 2015 CEPEJ Studies).

appraisals, judicial interdiction and incapacitation, hereditament, etc.<sup>70</sup> Moreover, apart from not being able to check what type of cases are covered by the ‘etc.’, from 2014 onwards the combination of cases in the same category contains significant differences. This makes the data hardly comparable within the same Member State, let aside across jurisdictions. An exhaustive list of the type of cases included in a CEPEJ category would be more helpful approach when it comes to the comparability of the data across jurisdictions. An example in this regard appears to be **France**. According to the 2016 Annual EU CEPEJ Study, the French ‘non-litigious civil cases’ include: divorces by mutual consent, legal separation, change in matrimonial regime, child custody demands, adoption, medically assisted procreation, the incapacity of a minor, inheritances, compensation for violation of privacy, change of surname, marital status, nationality, the functioning of a grouping and the disciplining of notaries and ministerial officers. To these cases, in 2014 the ‘non-litigious enforcement cases’ have been included in the ‘non-litigious civil (and commercial) cases’ category. Table 6 below offers a visual example of the comparability of the same data category between the analysed Member States.

<b>Civil (and commercial) non-litigious cases, 2016</b> <b>Annual CEPEJ Study</b>	<b>Member State</b>
Divorces by mutual consent	FR, IT <sup>71</sup> , RO
Legal separation	FR, IT
Change in matrimonial regime	FR
Child custody demands	FR
Adoption	FR, RO <sup>72</sup>
Medically assisted procreation	FR
Incapacity of a Minor	FR, IT <sup>73</sup> , RO
Inheritances	FR, IT <sup>74</sup>

<sup>70</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 277.

<sup>71</sup> The ‘uncontested divorces’ indicated in this category since 2014 by Italy appears to correspond to the previous ‘divorces by mutual consent’.

<sup>72</sup> Possibly this could be included in the broader indicated category ‘Other non-litigious requests according to the Civil Procedure Code and the Civil Code (civil, litigation with professionals, minors and family)’.

<sup>73</sup> This category might be the equivalent of the Italian category ‘protective measures for underage’.

<b>Civil (and commercial) non-litigious cases, 2016</b> <b>Annual CEPEJ Study</b>	<b>Member State</b>
Compensation for violation of privacy	FR
Change of surname	FR
Marital status	FR
Nationality	FR
Functioning of a grouping	FR
Disciplining of notaries and ministerial officers	FR
Non-litigious enforcement cases	FR, IT <sup>75</sup> , RO <sup>76</sup>
Guardianship and trusteeship	IT
Uncontested payment orders	IT <sup>77</sup>
Technical appraisals	IT <sup>78</sup>
Granting of legal personality	RO
Modification of the constitutive acts of legal persons	RO
Requests related to unions	RO
Other non-litigious requests according to the Civil Procedure Code and the Civil Code (civil, litigation with professionals, minors and family)	RO
Etc.	IT

**Table 6.** Types of case categories included by three different member states in the CEPEJ ‘Civil (and commercial) non-litigious cases, 2016’.

Such situations show that **the comparability of data in the CEPEJ case categories is more a desirable achievement than the actual reality**. This reinforces the conviction that the **comparability cannot be taken for granted** and improvements should be considered for future evaluations.

Further, it is not clear whether significant differences among the type of cases included in a CEPEJ case category or flagged by the Member States as being included in

<sup>74</sup> The ‘hereditament’ cases indicated in the ‘civil (and commercial) non-litigious cases’ since 2014 might concern ‘inheritances cases’, but this cannot be verified on the basis of the CEPEJ Study explanations provided by Member States.

<sup>75</sup> Included on the basis of statistical data presented with regard to the 2010-2013 datasets though not expressly indicated by the Italian national contact for CEPEJ. In the 2016 CEPEJ Study the enforcement cases have been included in the ‘Other’ category of cases.

<sup>76</sup> Included on the basis of statistical data presented with regard to the 2010-2013 datasets although not expressly indicated by the Romanian contact for CEPEJ in the 2016 CEPEJ study.

<sup>77</sup> Since 2014 included in the ‘civil (and commercial) non-litigious cases’.

<sup>78</sup> Since 2014 included in the ‘civil (and commercial) non-litigious cases’.

a specific category of cases are due to the structural limitations. Thus, a limitation that is due to the way the cases are registered and collected, the detail of information included in the registration of the case within the courts' systems, or whether there are additional reasons such as the respondents' individual perceptions or interpretation of the question. Other reasons that could lead to **case categories inconsistencies are the differences in domestic approaches towards what would be considered a litigious or non-litigious case**, or whether certain requests are dealt with by administrative authorities or the courts. All these differences and inconsistency in datasets affect the coherence of the data and its quality. Hence, Member States data that is not equivalent is directly compared against each other without sufficient cautions.

**Findings 6:** The typology of national cases included in the CEPEJ case categories is often not exhaustively clarified by the Member States.

The comparability of data in the CEPEJ case categories cannot be taken for granted, at the moment it is more a desirable achievement than a reality.

The inconsistencies are sometimes related to the different domestic approaches towards how a certain case would be qualified: civil (and commercial) case litigious or non-litigious or an administrative case.

*Inconsistencies related to the nature of a case*

On the basis of punctual information provided by the Member States on the type of cases, they count for the CEPEJ case categories, another element that leads to inconsistencies in datasets across various jurisdictions are related to the legal nature of particular cases. **The legal nature of the case**, meaning whether a specific claim is an administrative, civil and/or commercial, litigious or non-litigious, **is established by domestic legislation.**

An example in this regard is the way the cases of interdiction and incapacitation are categorised in France and Italy. In France, there is an indication that at least part of such cases are handled and counted as civil litigious cases. According to an explanation provided by the French CEPEJ contact, since 2014 the cases regarding persons in psychiatric care are counted as litigious civil cases. In Italy, cases regarding interdiction and incapacitation are counted in the category 'civil (and commercial) non-litigious

cases'.<sup>79</sup> Therefore, **information with regard to the specific type of cases and their inclusion in a category or other of the Annual EU CEPEJ Study cannot be taken for granted**, as national differences exist and they might not be immediately visible to the reader based on charts information.

**Findings 7:** Information on the specific types of cases and their inclusion in a category or other of the Annual EU CEPEJ Study cannot be taken for granted.

The legal nature of a case is established by domestic legislation, national differences exist, and they might not be immediately visible to the reader based on charts information.

#### *Inconsistencies related to the status of a case*

The status of a case according to the CEPEJ categories can be 'incoming', 'pending' or 'resolved'. **Inconsistencies appear to be especially related to 'pending' and 'resolved' cases, as this status depends on national legislation.** Hence, what is considered to be a 'pending' or a 'resolved' case might differ from a Member State to another, or even within the same legal system, if domestic legislation has been amended over the years. An example in this regard is Romania. As Table 5 above shows and the CEPEJ Study clarification reveal an amendment of the national norms regarding the registration of cases in the court registration system – ECRIS - has led to differences between the number of registered pending cases at 31 December and 1 January of the following. According to Decision No. 46/2012 of the Superior Council of Magistracy amending the definition of the indicators of the court registration system, a case will be considered 'closed' only when 'the final decision, including its reasoning, is drafted, signed and communicated to the parties'.<sup>80</sup> Thus, since 2014 when the new registration methodology applies, there is a discrepancy between the two indicators as indicated in Table 5. For the two other analysed national systems it is **not clear why such inconsistency exist between the pending number of cases on 31 December and 1**

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<sup>79</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 275 and 277.

<sup>80</sup> According to the explanation provided by the Romanian CEPEJ contact, a case is considered to be 'closed' 'only when the final decision, including its reasoning is drafted signed and communicated to the parties', and for this reason the number of pending cases on 31 December 2013 cannot be identical to the number of pending cases on 1 January 2014. CEPEJ, *Study on the functioning of judicial systems in the EU Member States, Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014, Part 1*, CEPEJ(2015)15Part1rev2, Strasbourg, 14 March 2016, p. 279.

**January of the following year, or why for certain categories of cases there is a consistency of the statistical data and for the others not,** as it is the case in France.

Such differences between the two indicators can be problematic from an internal perspective, especially as the Scoreboard relies only on one of these indicators, the number of pending cases on 31 December for the evaluation of the efficiency Member States' justice systems. This can create **additional distortions in the way the data presented are interpreted and used.**

Further, the national approach to consider a case 'closed', therefore, no more pending, influences the results of a justice system in terms of effectiveness and time needed to resolve a certain type of case. This certainly affects and influences the results of a Member State justice system in the Scoreboard charts.

**Findings 8:** Inconsistencies appear with regard to the 'pending' and 'resolved' status of a case, as this status depends on national legislation.

The national approach to consider a case 'closed', influences the results of a justice system in terms of effectiveness and the time needed to resolve a case.

### *5.3. Consequences of inconsistencies in case categories*

The **way various types of national cases are counted and registered** in a certain national and/or CEPEJ category of cases **together with the nature of the cases** according to domestic legislation and their status at a particular moment in time **can have important implications for the results of a justice system** (i.e. length of judicial proceedings and clearance rate). For example, a case in France where the judge is required to verify acts and confer authenticity to a document, such as for the homologation of an agreement resulting from methods of alternative dispute settlements (mediation, conciliation, transaction or participative procedure) is likely to require a shorter period of time. Additionally, the case is less complex than other civil claims where there is a dispute between the parties such as regarding the validity of a title or the existence of the debt.<sup>81</sup> Another example in this regard is the opposition to administrative sanctions, such as traffic fines. These cases are considered civil cases in Italy. In other

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<sup>81</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013*, CEPEJ(2014) 17final (v2.0 - 16 feb.2015) Strasbourg, 16 February 2015, p. 131.

jurisdictions, such as Romania, the case will be considered administrative.<sup>82</sup> Additionally, according to the explanations provided by the Italian Ministry of Justice for the 2015 Annual CEPEJ Study, the introduction of a court fee for oppositions to administrative sanctions resulted in a significant drop in the number of incoming cases which further resulted in an improvement of the clearance rate.<sup>83</sup> Hence, in comparing the clearance rate between the two countries, **the improvements might not be related to an improvement of the effectiveness of court activity, but to other factors**, such as court fees and barriers to access to justice.<sup>84</sup> Furthermore, it would be difficult to compare the results in this area between Romania and Italy as the case would be counted for different CEPEJ categories. The result is that data are not actually comparable, or can be compared only in carefully selected cases, with warnings and data tunings.

Further, **inconsistencies and discrepancies in the CEPEJ datasets can create more distortions of data interpretation and comparability** between the results of various Member States justice systems **when taken over by other evaluations** such as the Scoreboard. This becomes particularly important when these results that contain inconsistencies and discrepancies contribute to the country's assessment and recommendations regarding justice improvements as part of the European Semester.

Further research should be carried out to weight the impact of the errors identified and to better map the case categories used in the various Member States in order to reduce such error.

#### *5.4. Possible solutions for identical inconsistencies*

In the short term, a number of aspects could be considered by the European Commission in addressing data inconsistencies and clarifying this in the Scoreboard and related documents. First, from an internal perspective, it would be useful if the

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<sup>82</sup> *Ibidem*; for traffic offences in Romania, see Government Ordinance No. 2/2012 regarding the legal regime of contraventions.

<sup>83</sup> CEPEJ, *Study on the functioning of judicial systems in the EU Member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013*, CEPEJ(2014) 17final (v2.0 - 16 feb.2015) Strasbourg, 16 February 2015, p. 131.

<sup>84</sup> In Italy a court fee for opposition to administrative acts was included in 2010 and this influenced the number of incoming cases (Decree of the President of the Republic No 115/30 May 2012). In Romania a court fee for contesting traffic fees as administrative acts was introduced in 2013 (Art. 19 Government Emergency Ordinance No. 80/2013), but the contact point for Romania has not made any remarks in the evolution of caseload determined by this amendment in court fees.

Scoreboard would use complete data series for addressing the court's caseload argument. This would make certain implicit variables (i.e. number of resolved cases and number of pending cases on 1 January) immediately visible to the reader. Second, it would be useful for the Quantitative Data Figures to include, below the charts, the same type of warnings the Scoreboard includes with regard to particular data distortions, modifications in the collection of data methodologies in certain Member States, and particular national situations that influence the results of the variables. Another welcomed development that could be easily achievable would be for the European Commission to publish an additional document to the Scoreboard which includes all the additional information and clarifications that can explain the values and results of the datasets used, giving the interested reader the full possibility of understanding and analysing in-depth the results of a particular justice system in a specific area of law or category of variables/indicators. Only detailed and clear information on the results and actions undertaken in a justice system can serve as an example for other justice systems that seek to achieve similar results.

Further, in the short to the long term, steps should be taken to clarify and address identified inconsistencies in the Member States' historical data series in the Annual EU and Biannual CEPEJ Studies as well as in the information provided by Member States. Some of these actions require coordinated or concerted measures between the Member States and the CEPEJ. This concerns particularly the improvement of the soundness of the statistical data and data series that can facilitate comparison at national and European level. In addition, each Member State should make clear and exhaustive the type of cases it includes in each of the CEPEJ categories. Having a clear image of the type of cases that are included in a particular category can facilitate the understanding of the results, of the way a certain justice system performs, works, and where particular actions to improve results are necessary. In managing to have a clearer understanding of the typology of cases included in the CEPEJ categories, in the medium to long term, consideration should be given to the possibility of carrying out more in-depth analysis of results in clusters of Member States that have a similar approach in terms of categories of cases. This could make data more easily comparable.

## VI. CONCLUDING REMARKS

This paper identified two fundamental problems which undermine the EU Justice Scoreboard: a problem of definition, where the concept of efficiency but also of workload and caseload are concerned, as well as a problem of data, both in terms of quality and comparability.

The findings of this analysis on the variables concerning the number of cases in the Scoreboard together with similar problems associated with measuring the number of judges identified by another scholar (Marco Fabri) suggest that extreme caution should be exercised in the use of such indicators for comparative purposes among justice systems in the academic and political debate. The quality and soundness of the present data can hardly allow a political or legislative comparative discourse based on efficiency between EU jurisdictions due to inconsistencies and comparability deficiencies.

A full or partial comparability of data regarding the cases a justice system receives, resolves and remain pending across jurisdiction will be possible only if factors that lead to inconsistencies, as identified by this paper, are set aside or isolated. Otherwise, results must be considered with great caution and any kind of comparability on the existing datasets between the Member States must be addressed with care and in a broader framework that provides all the particular details that characterise the registered values.