ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION

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TRANSVERSAL ANALYSIS 2017

EU JUSTICE SCOREBOARD

SUPREME (ADMINISTRATIVE) COURTS’ CASE-LAW ON SAFEGUARDS FOR JUDICIAL INDEPENDENCE

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I. INTRODUCTION

1. ACA-Europe has set the following key objectives in its action plan for 2015-2017, which were established during the "Call for proposals":

- To contribute to proper legislative implementation and correct application of the EU law in courts;
- To improve the rule of law and the compliance with the Charter of Fundamental Rights;
- To promote the convergence of national administrative law when possible and to develop common principles of law and administrative procedure in the case-law of the member courts;
- To improve access and governance of administrative justice by comparing and sharing national best practices;
- To increase mutual awareness, trust and cooperation between the legislative formations and between the Supreme Administrative Courts of Member States.

2. One of the main activities in order to achieve these objectives involves the conducting of three cross-sectional studies over this period of three years in order to collect, analyse, share and provide information on best practices and recommendations.

The first cross-sectional study was conducted in 2015, and focused on “Access to the Administrative Supreme Courts and to their decisions”. A second cross-sectional survey was carried out in 2016 and covers the subject, "Uniformization of administrative jurisprudence". The summary reports of these two surveys can be consulted on the Association's website (See www.aca-europe.eu).

Finally, a third cross-sectional survey was conducted in 2017 which focused on the subject, “Supreme (Administrative) Courts’ case-law on safeguards for judicial independence”.

Supreme (Administrative) Courts are well placed to provide an overview of case-law relating to judicial independence as they often, in their function as the highest administrative courts which consider cases concerning judges, review situations in which there may be a risk to judicial independence (e.g. appointment and dismissal of judges, transfer of judges without their consent). Gathering information about actual cases in relation to the situations mentioned above provides an unprecedented insight into how judicial independence is in practice protected, including on the effectiveness of legal safeguards for protecting such

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1 JUST/2014/SPOB/OG/NETW 3-YEAR FRAMEWORK PARTNERSHIP AGREEMENTS ANNEX 1 - ACTION PLAN FOR 2015 – 2017 - JACC - Effective access to justice for all, including rights of victims of crime and rights of the defence.
independence. The relevant questionnaire thus aims to identify selected situations in which there may be a risk to judicial independence and, where Supreme (Administrative) Courts are involved, do so in the context of judicial review. This summary report presents the results of the answers provided to this questionnaire by the ACA-Europe Member Courts.

3. The methodology involved the establishment of a working group within the organisation. This group includes Ms. Mylène BERNABEU, Mr. Joris CASNEUF, Mr. Jacek CHLEBNY, Mr. Frank CLARKE, Ms. Elizabeth DUNNE, Mr. Geert DEBERSAQUES, Mr. Carsten GÜNThER, Mr. Auke KUIPERS and Mr. Ales ROSTOČIL.

In close collaboration with Mr Emmanuel CRABIT and his team (Directorate-General for Justice and Consumers), this "enlarged" group first defined the methodology and prepared the questionnaire. From the methodological point of view, it was decided to develop a questionnaire which identified certain situations in which the independence of the judiciary might be threatened and in which the Supreme (Administrative) Courts intervene through their role of judicial control, in order to collect data concerning the number of such cases and more detailed case information (brief description of the case, main facts, outcome of the case and reasons / reasoning of the Court). This methodology makes it possible to establish in a rather precise manner the extent of the legal dispute concerning standard situations that may threaten the independence of the judiciary and the (administrative) judge.

4. Participation in the consultation on this topic was particularly significant: all of the member jurisdictions of the Association being the supreme administrative jurisdictions of each of the Member States of the European Union, participated in the study. Of the observer or invited Courts, Serbia participated. It can therefore be concluded that the results obtained give a very reliable overview of the state of affairs in the member jurisdictions of the Association.

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2 See annex 1.
II. LEGAL FRAMEWORK FOR PROTECTING JUDICIAL INDEPENDENCE

5. According to article 2 TEU the European Union is founded on values such as the rule of law, which are common to the Member States in a society characterized in particular by justice. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded. The CJEU, in Grand Chamber, recently added that article 19 TEU, which gives concrete expression to the value of the rule of law provided for in Article 2 TEU, entrusts the responsibility of judicial review in the EU legal order not only in the Court of Justice but also in national courts and tribunals.

6. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. In order for that protection to be ensured, the CJEU has emphasized that the maintainance of such a court or tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to access to an ‘independent’ tribunal as one of the requirements of the fundamental right to an effective remedy.

The guarantee of independence, which is inherent in the task of adjudication, is required at the level of the Member States as regards national courts.

7. The CJEU has defined the notion of independence as follows:

“The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.”

The existence of a legal framework for the protection of the independence of the judiciary is essential to the guarantee of judicial independence. In that regard, according to settled case-law, the factors to be taken into account in assessing whether a body is a ‘court or

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3 CJEU 18 December 2014, Opinion 2/13 (Accession of the Union to the ECHR), EU:C:2014:2454, point 168.
5 CJEU 28 March 2017, Rosneft, n° C-72/15, EU:C:2017:236, point 73.
7 CJEU 27 February 2018, n° C-64/16, Associação Sindical dos Juízes Portugueses, EU:C:2018:117, point 41.
tribunal’ include, inter alia, whether the body is established by law. This implies, among other things, the existence of legal provisions which lay down the manner of appointing judges, incompatibilities and the rules on their dismissal, etc.

8. It appears from the consultation with ACA-Europe members that standards concerning the independence of judges are specified in the Constitution and/or in national law of Member States. Specific situations and the detailed responses of ACA-Europe members to the questionnaire are outlined in further detail below.

Finally, the results have been analysed and synthesised by the working group and communicated to the correspondents of the Association for a final approval.

The results of this consultation of ACA-Europe members are detailed below.
III. SELECTED SITUATIONS IN WHICH THERE MAY BE A RISK TO JUDICIAL INDEPENDENCE

Chapter one: Appointment and career of judges

1. Review of decisions on (non-)appointment of judges

9. In most Member States the competence to preside over cases of (non) appointment of judges lies – at least as a last instance – with the ACA member court, i.e. the Supreme Administrative Court (SAC) or the Council of State. There are only in a few countries in which other or special judicial bodies are competent in this matter. In countries in which the SAC or the Council of State does not have competence, it lies with the Constitutional Court (Croatia), with the highest administrative court in social cases (Netherlands) or with a special Service Court competent in matters of judges only (Germany). There is no regulation of this competence and there has to date been no relevant case in Lithuania. In Sweden the appointment of judges is considered a governmental act and thus there is no judicial review of these questions.

10. Not all participants in the transversal analysis commented on the competence to nominate and/or appoint judges. The questionnaire did not directly ask for this process. Yet, there seem to be interesting differences between Member States. In some Member States different organs participate in the process. In many cases the competence to nominate a candidate differs from the competence to appoint a judge. In the majority of Member States it is the president of the republic who appoints judges, upon nomination by the government or the minister of justice (Ireland, Cyprus – only Supreme Court Judges, Czech Republic, Greece, Slovakia, Poland, Finland – only ordinary judges, Germany – in case of federal judges after a vote of an election committee). In Estonia the president appoints only ordinary judges, Supreme Court judges are appointed by parliament. In Belgium, Italy and Finland (only the judges of the highest court) there is a selection process within the SAC or the Council of State. In some other Member States the government or the minister of justice appoints judges (Denmark, Sweden). In Slovenia and Latvia judges are appointed by parliament, after a nomination by the Council of the Judiciary or the competent minister. Finally, there are Councils of the Judiciary which nominate or appoint the judges (Cyprus – only ordinary judges, Bulgaria).

11. In most Member States the nomination or appointment (or refusal to do so) can be challenged before court as indicated above. Yet, in three Member States only the nomination and not the appointment itself (which is considered a non-justiciable political act) can be challenged before a court (Slovenia, Latvia, Cyprus). In Bulgaria there seems to be a form of action popularis which allows every citizen to challenge a judicial appointment before court.
In the majority of Member States there been no cases concerning the appointment of judges, although – as previously mentioned – judicial recourse is provided for (20 out of 29).

2. Review of decisions on the transfer of judges without their consent (permanent or temporary)

12. In the vast majority of Member States it is not legally permissible to transfer a judge without his/her consent. Yet, some Member States have pointed out that this may be possible under certain circumstances, such as for disciplinary reasons (Slovakia, Poland), for the purpose of reorganizing the judiciary (Poland, Germany) or to ensure the proper functioning of the courts (Italy).

Some Member States have referred to a general competence of the president of the republic (Greece, Czech Republic), the Council of the Judiciary (Serbia, Hungary, Slovakia, Slovenia, Cyprus only ordinary judges, no administrative judges), the president of the court (Estonia) or the president of the SAC (Poland) to transfer judges. Not all of these Member States have explained the circumstances in which such a transfer is legal. The two countries which provide for the president’s competence to transfer a judge have limited possibilities of judicial review. In Greece judicial review falls within the competence of the Council of the Judiciary which is also competent to advise the president of the republic before making a transfer decision. Yet, within the Council different panels/sections are involved. In the Czech Republic no judicial review is granted.

13. In most Member States administrative courts or other courts (Sweden: labour court, Netherlands: highest administrative court in social cases, Malta: ordinary courts, Germany: Service Court competent in matters of judges only) are competent, usually enabling the SAC or the Council of State to adjudicate as a last instance court. In some Member States the Council of State is competent in first and last instance (France, Spain) and in other Member States it falls within the competence of the constitutional court to adjudicate transfer cases (Belgium, Slovakia). Yet, only a few Member States have been able to report cases between 2012 and 2017.

3. Review of decisions on individual evaluation and promotion of judges

3.1. The jurisdiction of last resort with competence in this field:

14. Within the different Member States, there are a variety of bodies - judicial or otherwise - with competence to reach decisions concerning professional appraisal and the
promotion of judges, which makes it difficult to draw up a precise applicable typology. However, the following general aspects should be stressed.

In certain rare cases there is no possibility of recourse against decisions concerning professional appraisal and the promotion of judges (e.g. the Czech Republic).

In other States, it is the supreme administrative court which is competent in the last resort to pronounce a ruling on decisions concerning the professional appraisal and promotion of judges. For instance, in France the Council of State is the competent court with regard to both administrative judges and judicial judges. This is also the case in Italy, Spain, Portugal, Ireland, Austria, Rumania, Serbia, Lithuania (disciplinary court within the Supreme Court), Malta (except in cases where a question of a constitutional nature is raised, which comes within the jurisdiction of the Constitutional Court) and Slovenia. In Denmark, a decision made by the Minister of Justice after they have taken cognizance of the opinions given by the judicial courts competent in this field may, in theory, be made the subject of a recourse action submitted to the courts of last resort, after having gone through a system involving the filtering of appeals by the Supreme Court. In Luxembourg, with regard to the promotion of judges and individual professional appraisal, which does not presently exist as such in the form of institutional procedures in this State – it is incumbent on the Administrative Court to acquaint itself with and give a final ruling on questions concerning the appraisal and promotion of judges.

In certain cases the professional appraisal of judges and subsequent contesting of the appraisal can only be carried out by specific bodies. In Greece, for example, the appraisal of judges is carried out by higher ranking judges (Article 87 paragraph 3 of the Constitution), who draw up a report which is communicated to the judge being appraised. The judge in question may, under certain conditions, seek recourse before a council made up of higher ranking judges, which has the power to either make corrections to the report or order a new appraisal. No jurisdictional recourse against the council’s decisions exists. A similar process exists in Hungary with regard to the appraisal of judges, which can only be contested before bodies specific to the latter, who may contest their appraisals before bodies that are also competent to deal with disciplinary matters. In Cyprus, the appraisal and promotion of lower court judges fall within the competence of the Supreme Council of Judicature.

Croatia also has a special procedure: the individual appraisal of judges falls within the competence of a specific council for each branch of judicial power. The members of this council are elected by judges themselves. The council of administrative courts thus has fifteen members. A judge may appeal the decision taken by the aforesaid council before the Special Chamber of the Supreme Court of the Republic of Croatia, which has two departments (one relating to criminal law and the other to civil law).

15. In certain scenarios, the professional appraisal and promotion of judges is not subject to the same recourse procedure and jurisdiction. This is the case in Lithuania for example: a
judge whose activities have been appraised may contest the results of the appraisal before the judicial council, though it is permissible for a judge to contest certain aspects of the promotion procedure before the administrative courts, whose jurisdictional decisions are then submitted in the last resort to the Supreme Administrative Court. The same applies for example, in Estonia, where the appraisal of a judge may be the subject of a final decision taken by the President of the Republic while promotion may be contested via a jurisdictional procedure concluding with the possibility of submitting an appeal to the Supreme Administrative Court.

In Poland, decisions concerning the promotion of administrative judges generally fall within the competence of the President of the Supreme Administrative Court and are not the subject of a jurisdictional procedure through which such decisions may be contested. There is no special procedure relating to "the individual appraisal" of judges. Such an appraisal may constitute one of the elements relevant to the procedure for appointing judges.

Sometimes, the jurisdiction with competence to hear disputes relating to the appraisal and promotion of judges differs depending on the status or nature of the person under consideration. In the Netherlands for example, matters relating to the appraisal and promotion of judges fall within the competence of the highest administrative jurisdiction for social matters ("Centrale Raad van Beroep"), though decisions concerning State Councillors cannot be the subject of a judicial review by an administrative court, only civil proceedings brought against the State before a civil court (in the case of an alleged illegal action) may be initiated.

Finally, the special case of Germany is worth highlighting. Disputes relating to the appraisal or promotion of judges are generally classed as a civil service question and thus fall within the competence of the Federal Administrative Court. However, when a question relating to the independence of a judge is being considered, competence lies with “the Service Court”, which has a jurisdiction that applies specifically to magistrates. Thus, the same case could fall within the jurisdiction of two different bodies: the Service Court is solely competent to examine questions relating to the independence of a judge while the Administrative Federal Court rules on the legality of the other aspects of the contested measure. Thus, although the Administrative Federal Court has heard disputes relating to the appraisal or promotion of judges, none of these has concerned questions relating to the independence of judges.

3.2. Cases relating to the professional appraisal or promotion of judges that were heard by the Supreme Administrative Court before ("historic decisions or decisions in principle") or during the period from 2012-2017:
16. During the period chosen for the transversal study running from 2012 to 2017, in ten out of twenty-nine Member States that replied to the questionnaire the Supreme Administrative Courts heard cases relating to the professional appraisal or promotion of judges (approximately 34%): this occurred in Slovenia, Latvia, Ireland, Italy, Lithuania, Spain, France, Bulgaria, Serbia and Portugal.

The cases described by the supreme jurisdictions of the aforesaid Member States varied considerably with regard to the contested decisions and the factual circumstances: they concerned the professional appraisal of judges (which sometimes concerned criteria linked to work carried out and the merits of such work, but also, in some cases, criteria of a psychological nature) with a view to the appointment or non-appointment of a judge to a specific post, their promotion to a higher grade in their statutory body or to a specific office or post, or the appointment of other judges by their promotion to or competition for a post which the judge seeking recourse had themselves applied for, and bonuses relating to remuneration based on the number of cases settled by the judges.

17. The questions which arose in each case were also very diverse: one may thus distinguish between aspects arising from the form of the contested decision or the procedure followed (poorly justified decisions or failure to comply with the obligation to give both sides an equal hearing in certain procedures, etc.), questions of law posed in certain disputes (in particular infringement of the principles of the separation of powers, the independence of the judicial authority, or equality and the absence of any discrimination, but also questions relating purely to appraisal of the personal merits of judges). In reality there have been few jurisprudential cases in which a failure to comply with the principle of the independence of judges was capable of being invoked in order to cancel or amend a decision relating to the professional appraisal or promotion of judges.

18. In most of the cases the decision involved a rejection of the arguments raised (for questions of admissibility but especially for substantive reasons). In that regard, Bulgaria indicated that, during the period 2012-2017, 85% of the cases concerned were rejected and the decisions of the Supreme Judicial Council were found to be legal in all respects by the Supreme Court.

Among the successful cases, it should be noted that in a dispute submitted to the Supreme Administrative Court of Lithuania, it was decided that the obligation to provide conclusions relating to the psychological appraisal of judges during their promotion procedures was contrary to the "Act concerning courts" As the relevant act did not establish such a requirement, such a requirement was created without any legal basis. The Court found that the obligation was also contrary to the primacy of the right to and the principles of the protection of privacy and proportionality (case I-11-492/2017, 19 September 2017). In a case submitted to the Chamber for Contentious Administrative Proceedings of the Supreme Court of Spain (no. 130/2017, ruling of 5 October 2017), which was also decided in a manner favourable to the petitioner, the question posed was whether a decision that maternity
leave should not be taken into account in calculating an additional payment received by judges and magistrates in addition to their remuneration, based on the number of cases settled each half-year, was lawful. A magistrate had sought recourse before the Supreme Court which decided that failure to take into account the maternity leave was illegal.

4. Review of decisions on the external activities of a judge

4.1. The jurisdiction of last resort with competence in this field:

19. The diversity of the solutions which apply in Member States is also worth examining. In certain Member States, multiple bodies – of a jurisdictional nature or not – have competence with regard to decisions relating to the "external activities" of judges, which prevents the formulation of a precise typology in this area. However, some general observations may be made.

In certain cases, there is no jurisdiction of last resort with competence in this field. Thus, Lithuania did not reply to the question relating to the competent body and did not present cases falling within the competence of the Supreme Administrative Court. The Czech Republic indicated that there is no possibility of recourse against decisions relating to the "external activities" of judges.

20. In certain Member States, it is the Supreme Administrative Court which has competence in last resort to hear decisions relating to the exercise by judges of "external activities" (the meaning of which varies quite considerably according to the replies given in the questionnaire by certain courts). This is the case in particular in Malta (subject to the same reservation as expressed previously in point 3.1.), Italy, Spain, Austria, Ireland, Romania, Portugal, Estonia, Bulgaria, Belgium, Luxembourg and France. In that regard, the exercise by a French administrative or judicial judge of "external activities" in breach of their ethical obligations may give rise to disciplinary sanctions which may be contested before the Council of State. With regard to members of the Constitutional Council, Article 10, paragraph 1 of decree no. 56-1067 of 7 November 1958 introducing the law on the Constitutional Council stipulates that the latter "records, where applicable, the automatic resignation of one of its members who has exercised an activity or accepted a position or an elected office that is incompatible with their capacity as a member of the council or who has been deprived of their civil and political rights". In Luxembourg, the competent jurisdiction of last resort for these types of activities is the Administrative Court, insofar as these activities are considered as ancillary to the judicial office and, specifically, fall within the competence of administrative jurisdictions.

21. In certain Member States there are special mechanisms authorising judges to pursue "external activities". This is the case in Slovenia, where the extent of the external activities
that judges are authorised to pursue is defined by law. The judge in question must inform the President of the relevant court of their intention to perform extra-judicial activities. If the President of the court considers that the proposed activities are not compatible with judicial services, they may ask the Judicial Council to rule on the question. The decision of the Judicial Council may be contested in the context of an administrative dispute before the Supreme Court. In Cyprus, decisions concerning the external activities of judges working in the lower courts fall within the competence of the Supreme Court and the examination of such decisions may only be undertaken by the Supreme Court.

In Italy, it is generally possible for judges to engage in "external activities" (i.e. activities associated with the law) following approval by the competent meeting, in accordance with the legal and regulatory provisions in force within the judicial body, which identifies the tasks in which judges are authorised or prohibited from engaging. In all cases, it is possible to temporarily transfer judges to the civil service to carry out advisory missions without such a transfer having any consequences in terms of their promotion in their career as judges.

In Finland, judges may not agree to work or continue to work outside the context of their judicial activities (that is to say they may not accept remuneration for work performed outside the Court concerned) unless the Court has, at their request, granted them permission to do so. Under the "Act concerning Courts", a judicial decision concerning authorisation to accept external work may be the subject of an ordinary appeal to the supreme administrative Court.

In Poland, the possibility of judges pursuing "external activities" is limited by the Constitution and legislation. Under the Constitution, a judge may not belong to a political party or a trade union, or pursue public activities incompatible with the principles of the independence of courts and judges (Article 178, paragraph 3). There is a system which provides for the authorisation of certain activities under certain conditions (teaching, for example) by the president of the relevant Court. The decision of the relevant council (the Administrative Court of the province and the supreme administrative Court) in a given case cannot be contested.

In Serbia, under Article 31 of the "Act concerning judges", a judge is required to notify the High Council, in writing, of any undertaking or work that might be held to be incompatible with their judicial duties. The Higher Council of the Judiciary informs the president of the Court and the judge concerned as to whether there is any incompatibility. The president of the Court must file a complaint of a disciplinary nature after being informed that a judge is involved in activities that might be deemed incompatible with their role.

22. In certain Member States, another entity may have jurisdiction to give a final ruling on questions relating to the external activities of magistrates. One may cite Sweden, for example, where this type of dispute is dealt with by a court with competence to rule on matters involving labour law (the "Labour Court"). In certain cases, the ombudsman may
provide an opinion concerning a judge's external activities where a constitutional requirement regarding a fair trial is concerned.

In other scenarios, a specific court is responsible for handling disputes concerning judges' external activities. In Greece, where this type of activity is, in principle, prohibited (by virtue of Article 89 of the Constitution), it is the responsibility of the Higher Judicial Council to give a ruling in the event of such a question arising.

Importantly, the German system has, in this area, the same characteristics as those outlined in paragraph 3.1. This is also the case in the Netherlands, which distributes the various competences in the same way as is described previously in paragraph 3.1.

4.2. Cases relating to judges' "external activities" that were submitted to the Supreme Administrative Court before ("historic decisions or decisions concerning principles") or during the period from 2012 to 2017:

23. During the period chosen for the transversal study running from 2012 to 2017, the supreme administrative Courts of eight out of the twenty-nine Member States that replied to the questionnaire had ruled on cases relating to judges' "external activities" (approximately 28%): the States in question were Belgium, Slovenia, Ireland, Italy, Spain, Portugal, Malta and Greece. However, it should be noted that in the response of Greece, details were provided under this heading of decisions of the High Council of the Administrative Courts that may be of interest but which were not decisions of the Supreme Administrative Court.

The cases described by the Supreme Courts of the above-mentioned Member States differ greatly regarding the decisions contested and the circumstances concerned. In particular a wide meaning was attributed to the term "external activities", which involved not only teaching activities that may be taken on by judges, but also to other public functions in addition to the judicial functions of judges (e.g. secondment to a ministry) or appointment as the sole member of a Court of enquiry appointed to carry out investigations concerning a certain problem or perform an activity as a member of another court (e.g. the United Nations Court of Appeal). It also included participation in a commercial activity through holding shares in a company or appointment as a company director or president of an Olympic committee.

24. In each case, questions are generally asked as to whether the activities envisaged or already pursued, as the case may be, are considered to be compatible with the holding of a judicial office and, with regard to this, whether they adversely affect the dignity of the office of judge, or the principle of independence and impartiality associated with judges.
Sometimes, this appraisal stems from the strict application of a statute which authorises, or does not authorise, the pursuit of the activities planned by a judge (see, for example *Case no. 550/08* referred to by Portugal: in order to prevent conflicts of interest, Portuguese law prohibits judges from, among other things, holding any other public or private position of a professional nature, apart from unremunerated teaching positions or positions involving scientific research, and extrajudicial functions, provided that these latter have been authorised by the Council).

Other appraisals are more empirical, and necessitate appraisal on a case-by-case basis based on careful examination of the "external activities" envisaged. By way of an illustration, in *case no. 280/2013* cited by Spain, the finding that holding the post of director of a corporation for the defence of justice was incompatible with the profession of judge was considered by the Chamber for Contentious Administrative Proceedings of the Supreme Court to constitute a breach of the fundamental law of association. The declaration of incompatibility between the profession of judge and the post of director of a company must be examined on a case-by-case basis. A similar case was cited by Ireland [*Haughey v Moriarty [1999] 3 IR 1 (High Court, 28th April 1998 and Supreme Court, 28th July 1998]*) in which the Supreme Court concluded, following a close examination of the circumstances, that a tribunal of inquiry consisting of a sole judge responsible for carrying out investigations concerning facts of public importance "was not administering justice" and that the judge concerned was not carrying out an executive or legislative function. The Court observed that there was nothing illegal or unconstitutional in such an appointment provided that in such a scenario the judge was not remunerated.

5. Review of decisions on dismissal of judges (e.g. as a consequence of disciplinary proceedings or criminal conviction but excluding other grounds such as incompatibility, illness, resignation, retirement)

25. Only one national report (Belgian) stated that there is no competent court in cases concerning review of decisions on dismissal of judges.

In Latvia and in Ireland decisions on dismissal of judges are made by the parliament. In Latvia such a decision does not qualify as an administrative act. In Ireland the question of reviewability of a decision to dismiss a judge has never arisen as no judge has been the subject of such a parliamentary resolution.

In most states the supreme jurisdictions are competent in cases concerning review of decisions on the dismissal of judges. Some reports indicate that the Supreme Administrative Court or the Council of State has competence in cases concerning administrative judges and the Supreme Court for ‘ordinary’ judges (Austria, Luxemburg, Poland).
There were also answers referring to only one competent court: for example in Croatia – the Constitutional Court, in Italy and France – the Council of State, in Denmark, Estonia, Lithuania, Spain and United Kingdom – the Supreme Court, in Czech Republic, Portugal and Serbia – the Supreme Administrative Court, in Romania – the High Court of Cassation and Justice, in Germany – the Service Court, in the Netherlands – the civil claim against the State before a civil court. In Sweden the Labour Court is competent apart from in some cases in which the Supreme Court or the Supreme Administrative Court has jurisdiction.

In Malta cases of judicial review of administrative decisions are decided by the ordinary Court, the Court of Appeal which is the court of last instance unless an issue of constitutional nature is raised, in which case the court of last instance is the Constitutional Court. Two cases concerning the dismissal of judges are described in detail in Question 6.

In Finland, according to the Constitution, judges have the right to remain in office. Therefore, a judge shall not be suspended from the office except by a judgement of a court of law.

A judge shall be suspended during an investigation and a criminal process in court if he or she is suspected of committing a crime. A decision on suspension from office is subject to ordinary appeal. An appeal lies against a decision by a district court to the court of appeal; against a decision by a court of appeal and the Labour Court to the Supreme Court; and against a decision by an administrative court, the Market Court and the Insurance Court to the Supreme Administrative Court. Against a decision by the Supreme Court and the Supreme Administrative Court appeal is sought back to the same court, where the case shall be considered in plenary.

Dismissal of a judge may result in a criminal sanction in the event of the commission of certain offences while in office. The courts consider charges for offences while in office brought against members of courts and officials at courts as follows:

- the Supreme Court if the case concerns a court of appeal justice;
- court of appeal if the case concerns a member of a district court or a member of an administrative court in the geographical area in question
- Helsinki court of appeal if the case concerns a member of the Market Court, the Insurance Court or the Labour Court.

In addition, the High Court of Impeachment deals with charges brought against a member of the Supreme Court and against a member of the Supreme Administrative Court for unlawful conduct in office. As a part of criminal conviction, the dismissal may be challenged together with the principal claim.

In Slovakia the President of the Slovak Republic following a proposal of the Judicial Council of the Slovak Republic shall recall a judge on the basis of a final condemning judgment for a willful criminal offence, or if he or she was lawfully convicted of a criminal offence and the
court did not decide in his or her case on probationary suspension of serving of the imprisonment sentence, on the basis of a decision by a disciplinary senate for an activity which is incompatible with the discharge of the function of judge, or if his or her eligibility for election to the National Council of the Slovak Republic has terminated. Such decisions (of the President and the proposal of the Judicial Council) may be reviewed on foot of a complaint by a natural person or legal person who pleads an infringement of their fundamental rights or freedoms, or human rights and fundamental freedoms.

In Slovenia the competent court differs depending on the proceedings at issue. In the event of the intentional commission by a judge of criminal activity constituting abuse of the judicial function or his or her conviction and sentence to imprisonment, the final court decision must be sent to the Judicial Council. The Judicial Council informs the National Assembly and proposes the dismissal of the judge (if the prison sentence exceeds 6 months or the judge is unfit to perform the judicial function due to the nature of the crime committed). In the disciplinary proceeding the disciplinary court is the Judicial Council but the decision of the Judicial Council can be challenged in an administrative dispute at the Supreme Court. The Supreme Court is also the court of last instance in case concerning the negative evaluation of judicial services by the Personnel Council. In such case the judicial function ceases when the Judicial Council validates/approves/confirms the negative evaluation. The decision of the Judicial Council may be challenged in an administrative dispute at the Supreme Court. Among 7 cases on dismissal of judges 1 concerned the situation when a judge’s judicial position ceased as a result of the disposition of the disciplinary penalty in a disciplinary proceeding and all other 6 concerned situation in which judicial office had been terminated as a consequence of the Judicial Council’s decision to accept/validate the negative evaluation of the judge’s judicial service.

In Cyprus, according to Article 157 of the Constitution, the Supreme Council of Judicature is exclusively competent for the dismissal and disciplinary matters of all judges of inferior courts (District Courts, Assizes and Courts of Specialised Jurisdiction such as Administrative Court, Family Courts, Industrial Disputes Court, Rent Control Court and Military Court). The Supreme Council of Judicature holds exclusive competence and its decisions are final.

Cyprus mentioned 2 cases concerning the dismissal of a judge. The first case was considered by the European Court of Human Rights (judgment of 31 October 2017, application no 147/07) which found that there was a violation of Article 6 § 1 of the European Convention on Human Rights. The case concerned disciplinary proceedings brought against Mr Kamenos following his appointment as judge and then President of the Industrial Disputes Court. In 2005 the Supreme Court received a complaint alleging misconduct on the part of Mr Kamenos in the exercise of his judicial functions. The Supreme Court framed charges of misconduct against Mr Kamenos and called him to appear before the Supreme Council of Judicature (“the SCJ”). Disciplinary proceedings were carried out before the SCJ, with a number of hearings taking place at which witnesses listed on the charge sheet against Mr
Kamenos were heard and cross-examined by his lawyer. Mr Kamenos then set out his defence case, testifying himself and calling 36 witnesses. During these proceedings, he submitted that the Supreme Court and the SCJ had the same composition, meaning that the same judges had examined the witness statements against him, had decided to refer the case to trial, had formulated the charges against him and, acting as prosecutors, had tried the case. He argued that this was contrary to the right to a fair trial. In September the SCJ ultimately found that the charges had been proved and removed Mr Kamenos from office. Relying in particular on Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights, Mr Kamenos alleged that the disciplinary proceedings against him had been unfair. He notably complained that he had been charged, tried and convicted by the same judges, in breach of the principle of impartiality.

In the second case the applicant, a citizen of the Republic of Cyprus, who had pending criminal cases against him at the Assize Court of Limassol, brought an action for the dismissal of the Attorney-General and the Chief Justice of the Supreme Court, alleging misconduct. The SCJ held in an ex-tempore judgment that the applicant had no locus standi to bring the action.

The Lithuanian report mentioned 2 cases on the dismissal of judges. In the first case the applicant requested an annulment of the findings of the Periodical judge assessment commission and a Presidential decree on foot of which the applicant had been dismissed from the judicial office. The Judicial Council (which was a third interested party to the case) submitted an appeal on points of law to the Supreme Court of Lithuania. The issue at stake was whether the courts of general competence had the jurisdiction to find that a judge had been wrongfully dismissed if the Constitutional Court had not decided that the Presidential decree was in breach of the Constitution. The Supreme Court of Lithuania noted that the Constitutional Court has sole jurisdiction to decide whether a Presidential decree is in accordance with the Constitution and/or the laws. Thus the courts of general competence did not have jurisdiction to find that the applicant was wrongfully dismissed if the Constitutional Court had not found that the Presidential decree was unconstitutional or in breach of higher ranking laws. The case was remitted to the Court of Appeal.

In the second case the applicant lodged a claim against a decision of the Judicial Council and a Presidential decree under which he had been dismissed from judicial office due to an act demeaning the judicial office. The applicant submitted an appeal on points of law to the Supreme Court of Lithuania. The issue at stake was whether the President of the Republic of Lithuania may dismiss a judge from their office without the commencement of disciplinary proceedings and provision of a decision by the Judge Court of Honour. Another issue at stake was whether the term "an act demeaning the judicial office" means only the behavior of the judge in performing his duties as a judge or whether it also encompasses behavior that is not related to performance of judicial duties. The Supreme Court of Lithuania found that the President had a discretionary right to start the procedure of dismissing a judge without there
being a disciplinary case started against them and a decision of the Judge Court of Honour taken. The Supreme Court noted that such a procedure was neither contrary to the Law on Courts nor the Constitution, as the Constitutional Court had declared the procedure to be in accordance with the Constitution. The Supreme Court further based its decision on jurisprudence of the Constitutional Court and noted that the term "an act demeaning the judicial office" as a basis to dismiss a judge encompasses not only the behavior of the judge in performing his duties as a judge but also their behavior that is not related to performance of judicial duties. The Supreme Court upheld the findings of the first and second instance courts.

In France there was 1 case concerning the disciplinary sanction of dismissal of a judge who had previously practiced as an advocate following her conviction by the courts for failure to pay debts towards a professional pension fund and for lack of the payment of fees to the Bar Association. Two questions were raised during the proceedings: first, should the court take into consideration facts from the period during which the judge was an advocate and, secondly: is the sanction of dismissal proportionate to those facts?

The Court stated that some of the facts were not known by the Minister of Justice before the nomination and could therefore be taken into account. It further considered that such facts constituted serious breaches of the requirements of dignity and honor and the duties of the judge and were likely to bring serious and lasting harm to the image of the judiciary.

In Bulgaria a judge, disciplinary penalties shall be imposed on any prosecutor or investigator, member of the Supreme Judicial Council, the administrative heads of the courts, prosecution and investigation authorities and their deputies for the commission of a disciplinary offence. A disciplinary offence shall be any culpable failure to perform the official duties or any impairing of the prestige of the judiciary.

A decision of the Supreme Judicial Council concerning a disciplinary penalty may be appealed by the person who is the subject of a disciplinary penalty or by the person who has submitted a proposal before the Supreme Administrative Court within 14 days of the notification or the delivery of the order. The decision of the three member sitting of the Supreme Administrative Court shall be subject to cassation appeal before the Supreme Administrative Court sitting with five members within 14 days of its notification. The five-member sitting shall hear the case within two months from submission of the cassation appeal.

For the period from 2012 to 2017, about 35 cases on magistrates' complaints concerning the imposition of disciplinary sanctions were instituted and examined. Due to the large number of cases, the specific case numbers could not be identified. Most of the disciplinary sanctions were imposed due to delays in the drafting of legal acts and breach of procedural deadlines. Secondly, a large group of cases concerned the imposition of a punishment for violating the
Code of Ethics for judges. On average, in about 70% of cases, complaints were dismissed and the Supreme Judicial Council’s decisions were accepted as lawful.

In Hungary a panel of the first instance service court may suspend a judge from office if the judge has been arrested or placed under house arrest or home detention, or placed under involuntary treatment in a mental institution, or if the judge has been indicted or his presence would prevent the establishment of the relevant facts of the case. The first instance service court shall suspend a judge from office if the judge has been indicted in criminal proceedings (except in the case of private prosecution or substitute private prosecution), if the judge’s presence at his/her post would prevent the establishment of the relevant facts of the case, and where such suspension is found to be justified in view of the gravity and nature of the breach of obligation. The affected judge and the body having initiated the proceedings may contest the suspension decision within eight days from the delivery of the decision by lodging an appeal with the second instance service court; the enforcement of the decision, however, shall not be suspended because of the appeal. The second instance service court shall pass a decision within eight days. There is no public access to these cases.

Portugal mentioned only 1 case concerning the dismissal of a judge. In case no. 131/13, the applicant challenged the disciplinary sanction of dismissal against him on the grounds that it violated the constitutional principles of impartiality and proportionality. The Supreme Court stated that the sanction of dismissal did not violate the principle of proportionality, whereas the conduct of the accused, which may also be considered a criminal offense, undermined the dignity and prestige of the office of a judge and reflected a personality unsuitable for the performance of the duties of a judge.

In Italy the Governing Assembly is the disciplinary tribunal for the judges; its decisions are considered to be administrative acts and may be challenged before an administrative judge (administrative courts of first instance and Consiglio di Stato as judge of appeal). In the last 5 years there have been 24 cases concerning dismissal of judges. The dismissal may take the form of a) the removal of the judge from the honorary service for the violation of the duties concerning his/her service, whereas b) the loss of the conditions required for the appointment (including the irreproachable conduct) is cause for the revocation of the appointment itself.

Summary

26. It can be observed that there is a significant variation in the law of Member States in relation to the review of decisions on the dismissal of judges. In 2 states decisions on the dismissal of judges are made by the parliament but it is not clear whether such decisions may be the subject of judicial control. One report stated that there is no competent court in this matter. All other reports mentioned one (or more) supreme (or specialized) court which deals with such cases.
Chapter two: Discipline of judges

6. Review of decisions on disciplinary measures (including preventive measures) concerning judges

27. Every report but one (Ireland) mentioned the competent national court to review decisions on disciplinary measures concerned judges.

As was the case in relation to question 5 the answers varied: there may be one (supreme or specialized) court which reviews disciplinary decisions (for example in Croatia – the Constitutional Court, in Estonia, Slovenia, Lithuania and United Kingdom – the Supreme Court, in Austria, Bulgaria, France and Czech Republic – the Supreme Administrative Court, in Cyprus – the Supreme Council of Judicature, in Germany – the Service Court, in Sweden – the Labour Court, in Romania – the High Court of Cassation and Justice) or more courts (in Finland – the Supreme Court or the Supreme Administrative Court, in Slovakia – the Judicial Council or the Constitutional Court).

In the Netherlands the Centrale Raad van Beroep issues a warning (highest administrative court in social cases), when a judge or heir is the party under consideration; in the case of suspension there is no judicial review before an administrative court, only civil claim against the State before a civil court, because the suspension will be imposed by High Court itself. In Hungary disciplinary cases are heard at first instance by the first instance service court. Appeals against the first instance decision are determined by the second instance service court. The situation is similar situation in Belgium where disciplinary litigation of judges is subject to disciplinary courts of appeal whose decisions are subject to the control of the Council of State.

In Ireland there is no provision for the disciplining of judges with the exception of the constitutional provision for the removal of a judge for stated misbehaviour or incapacity.

28. In one country, all disciplinary decisions are published (Latvia), and in another the public do not have access to these type of cases (Hungary).

29. 11 national reports mentioned recent case-law concerning disciplinary measures (Denmark, Luxemburg, Latvia, Spain, Greece, France, Poland, Serbia, Portugal, Malta and Italy). The number of cases referred to varies: from 2 cases in Spain and Luxemburg to 74 in Denmark. The Belgian report described 1 case, but it concerned a non-disciplinary measure imposed on an auditor at the Council of State by the Assistant Auditor General, which puts an end to the possibility of working from home and forces him to be present every working day to the Council of State. Some reports indicated that there has not yet been any disciplinary case before the yet (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland,
Germany, Lithuania, Romania, Slovenia, Slovakia, United Kingdom, Sweden, the Netherlands).

In Denmark the Special Court of Indictment and Revision processes complaints against judges and deputy judges. In cases of complaints against judges the Special Court of Indictment and Revision may provide criticism or issue a fine if the judge has behaved improperly or unseemly in his acts in office. In severe cases, the Special Court of Indictment and Revision may dismiss the judge. A judgment by the Special Court of Indictment and Revision may be appealed to the Supreme Court.

In recent years there have been 74 cases; the significant number of cases was caused by the introduction of access to appeal the rulings of the Special Court of Indictment and Revision to the Supreme Court. In none of the 74 cases did the Special Court of Indictment and Revision or the Supreme Court state that the judge had behaved improperly or unseemly in his acts in office. Many of the cases related to the result of the case from which the complaint stemmed rather than the behavior of the judge. The Special Court of Indictment and Revision is not authorised to hear complaints concerning the result of a material case. All of the 74 cases have either been affirmed by the Supreme Court or dismissed due to the late initiation of an appeal.

In Luxemburg (as was mentioned in the previous question) the competent court of last instance in disciplinary cases is the Supreme Administrative Court in respect of administrative judges and the Superior Court of Justice for ‘ordinary’ judges. Two cases were described cases which concerned a delay in clearing cases.

In Latvia disciplinary cases may be reviewed by a disciplinary court which exists within the Supreme Court. Among the 12 cases which were described, two seemed particularly interesting. In the first case the judge in question had in four cases failed to adopt a decision within the legal deadlines. In the second case the judge was held liable for gross violation of the Latvian Judges’ Code of Ethics.

In Spain the General Council of the Judiciary has exclusive competence on imposing the disciplinary sanctions on judges. The competence to hear appeals against these decisions belongs to the Administrative Chamber of the Supreme Court (Court of Cassation), the Supreme Court rules at first and last instance. The first of two described cases concerned undue delay in the judgment of case. The second case concerned negligence or inexcusable ignorance in the exercise of the profession of judge: alteration of an essential document in the case file and change of judgment without following the appropriate procedural steps.
In Greece disciplinary sanctions are imposed either by:

a) the Assembly of Supreme Courts if the acts committed by the judge are punishable by dismissal (the Assembly of the Council of State, the Assembly of the Court of Cassation or the Assembly of the Court of Auditors);

b) disciplinary councils composed solely of judges and competent to impose other disciplinary penalties.

With regard to the temporary revocation measure in cases in which the judge is accused of having committed a crime, the competence belongs to the Superior Council of the Administrative Jurisdiction. Between 2012 and 2017, the Superior Council issued 7 decisions. In no case have issues relating to the independence of the judiciary been raised. Five cases involved the same person who was accused of money laundering. Two cases concerned a person accused of fraud and false testimony.

In France the competent jurisdiction is the Council of State both for administrative and ‘ordinary’ judges. Among the 30 cases in recent years 3 were particularly interesting. The first case concerned a warning on the basis of facts which have already been the subject of disciplinary proceeding conducted against the same person. The second concerned a disciplinary penalty imposed in circumstances where a judge was unavailable on a date fixed for the hearing (due to professional constraints). In the third case the sanction of withdrawal of office and removal of office against the first vice-president of a court has been imposed. In that case there was a doubt as to whether judge being prosecuted must be prevented from viewing the documents relating to the disciplinary proceedings of another judge, even though the judges were prosecuted for partly identical offences and were heard during a single hearing.

In Poland the Supreme Administrative Court (the SAC) hears disciplinary cases of judges of administrative courts and court assessors:

1) in the first instance – in the panel of three judges;

2) in the second instance – in the panel of seven judges.

In recent years (2012-2017) the SAC as disciplinary court handed down a final and legally binding decision in 11 disciplinary cases – two of them concerned retired judges of the SAC. Among these 11 cases: 5 cases concerned road traffic offences; 3 cases concerned the backlog in preparing reasons for a judgment; 1 case concerned breach of the effectiveness of court proceedings and the replacement of reasons for a judgment (replacement in one adjudicated case of the reasons of the order which had already been published in the Central Database of Administrative Courts); 1 case concerned hearing of a case by a judge that should be disqualified from the adjudicating panel (a judge controlled the administrative decision that had been issued by the daughter-in-law of the judge concerned); 1 case concerned the unauthorised correction of the operative part of the judgment (the adjudicating panel came to the conclusion that the operative part of the
judgement had been wrongly worded. The judges involved decided to correct the wording of the operative part of the judgment replacing the words "dismisses the complaint..." by words "sets aside the challenged decision").

It should be noted that none of the reasons provided in the above referenced disciplinary judgements sets out deliberations concerning judicial independence and its protection from the perspective of concerned judge.

In the Republic of Serbia the Supreme Administrative Court is the court of last instance in disciplinary cases. In recent years there have been 6 disciplinary cases, but Vucinic v. High Judicial Council of 2015 was of special interest in the public, considering that it involved the institution of disciplinary proceedings for violating the provisions of the Law on Judges. A decision of the High Judicial Council found that the judge in question was responsible for giving comments in the media in a manner contrary to the law and to the court’s rules of procedure in relation to a court decision rendered in an unlawful proceeding in the case.

In Portugal the competent court in disciplinary cases is the Supreme Administrative Court. The report described 4 cases. In each of the cases the judges challenged the disciplinary sanctions imposed on them because of an alleged infringement of the rights of defense, mistake of fact, failure to state reasons, unlawfulness and disproportionality of the penalty as well as the failure to state reasons for the sanction order.

In Malta cases of judicial review of administrative decisions are adjudicated by the ordinary Court, the Court of Appeal, which is the court of last instance, unless an issue of constitutional nature is raised, in which case the court of last instance would be the Constitutional Court. In the first case the relevant judge requested the recusal of 2 members of the Commission for the Administration of Justice which was hearing the case of impeachment referred to the Commission by the then Prime Minister. The two Courts confirmed that there were no grounds for recusal and that the proceedings against the judge could continue as his rights would not be violated. In the second case the judge claimed that his right to a fair hearing before and independent and impartial tribunal as protected by Article 6 of the European Convention Act and Article 39 (2) and (3) of the Maltese Constitution had been violated when the Commission for the Administration of Justice decided to refer his case of impeachment to the House of Representatives. The two Courts confirmed that his rights as protected by law were not violated and no breach had occurred when his case was referred.

In Italy the Governing Assembly is the disciplinary tribunal for judges. Its decisions are considered to be administrative acts and may be challenged before an administrative judge (administrative courts of first instance and Consiglio di Stato as judge of appeal). In the last 5 years there were 7 cases, one of which is particularly interesting because the court considered the question of the relationship between disciplinary proceedings and a criminal trial. A sanction of loss of one year’s seniority had been applied to a judge on account of his
repeated and confidential relationships with the legal representative of a public institution which was the defendant in a case being heard by the court in the same period. An additional sanction of transfer to another court was also imposed. Disciplinary proceedings for his violation of the duty of confidentiality and a criminal trial for judicial corruption were conducted at the same time. The claimant contested the failure to suspend the disciplinary proceedings during the criminal trial. Relying on the jurisprudence of the Italian Corte di Cassazione, the Consiglio di Stato stated that the ascertainment of material facts is devolved to the penal judge who has the most penetrating instruction powers to determine the existence and contours of facts beyond any reasonable doubts. Since the penal judge was proceeding for the same historical facts, the disciplinary proceedings would have been suspended until the definition of the criminal trial and so it was illegitimate.

Summary

30. Every report but one mentioned a national court with competence to review decisions on disciplinary measures concerning judges. As in question 5 the answers varied: there may be one (supreme or specialized) or more courts which review disciplinary decisions.

11 national reports mentioned recent case-law concerning disciplinary measures. Only one report indicated that there had been any disciplinary case to date before the supreme jurisdiction. Some reports mentioned the commission of the following offences by judges: road traffic offences; backlog in preparing the judgment; unjustified change of judgment; money laundering.

7. Review of decisions to waive judicial immunity

31. The next part of the analysis focused on the review of decisions to waive judicial immunity. The first question within that topic asked which court of last instance is competent in such a situation.

32. In the case of 14 countries (Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Latvia, Luxemburg, Ireland, Latvia, Serbia, Sweden) there is no judicial review of the decisions on the waiver judicial immunity. However, the reasons why this is so vary.

In Austria, France, Germany and Finland judges do not enjoy judicial immunity. In Luxemburg, Ireland and in Sweden there is no legislation concerning the waiver of judicial immunity or judicial review in that matter. In the Czech Republic there is also no such review.
In the case of Ireland it may be noted that the common law principle that no civil action is maintainable against a judge in the exercise of his or her jurisdiction applies.

Latvia, Slovenia and Lithuania are examples of countries in which the authorities with the power to revoke a judge’s immunity are the national legislature or executive – National Assembly (Slovenia), Saeima (Latvia, Lithuania), National Office for the Judiciary (Hungary) or President of the Republic (Lithuania, Hungary).

The case of Hungary is worth mentioning as Hungary was the only respondent which declared that judges enjoy the same privilege of immunity as Members of Parliament. It can be suspended by a decision of the President of the Republic made upon the recommendation of the President of the National Office for the Judiciary. In addition the President is vested with powers to take, upon the recommendation of the President of the National Office for the Judiciary, the necessary measures in relation to a violation of the right of immunity. Against his acts in that matter there is no remedy.

In some countries the respective national councils of judiciary are involved (Cyprus - Supreme Council of Judicature; Spain - General Council of the Judiciary; Serbia – High Judicial Council). In Cyprus and Serbia the decisions of such councils may not be challenged.

In the case of Spain it has been clearly indicated that the decision of the General Council of the Judiciary is subject to judicial review in first and last instance by the Administrative Disputes Chamber of the Superior Courts of Justice.

In Latvia the parliament's decision to waive judicial immunity is not subject to judicial review by any court.

In the case of Lithuania where judges may not be held criminally liable or be detained, or have their liberty restricted otherwise, without the consent of the Seimas or, in the period between the sessions of the Seimas, without the consent of the President of the Republic of Lithuania, judicial review is the competence of the Constitutional Court. However it is not possible for an individual to apply directly to the Constitutional Court. Thus in such a case a judge must first initiate an individual case and the court in the individual case may refer a question regarding lawfulness of the decision in question.

As in Lithuania in Croatia and Slovakia the court of last instance competent in said situation is the Constitutional Court.

In Estonia where, according to constitutional law and legislation, criminal charges may be brought against a judge during his or her term of office only on a proposal of the Supreme Court and with the consent of the President (in case of liability of the Chief Justice and justices of the Supreme Court only on a proposal of the Chancellor of Justice, and with the consent of a majority of the members of the Parliament) it is doubtful that the waiver of
judicial immunity can itself be challenged because this has never been put to test before the Supreme Court.

A similar situation seems to occur in Slovenia where no case-law regarding this question has arisen to date.

2 respondents (Belgium and Netherlands) provided no answers to this question. It can be concluded that, in the case of these countries, judges do not enjoy immunity and therefore there is no judicial review in that matter.

The Danish response indicates that a decision of parliament to waive immunity of the members of parliament is not subject to judicial review. Nevertheless it is not clear whether judges also enjoy such immunity.

The Greek and Italian responses do not provide sufficient grounds for concluding that judicial immunity exists as a legal institute per se in those Member States.

In the countries in which there is a model of administrative judiciary separate from the ‘ordinary’ courts (Bulgaria, Poland and Portugal) the competent court of the last instance is the Supreme Administrative Court.

In the respondent countries where the administrative courts are part of a unified common courts system the competent court to review such decisions is the Supreme Court (United Kingdom – Supreme Court, Romania - High Court of Cassation and Justice). In Malta the last instance court is the Court of Appeal unless an issue of constitutional nature is raised. In such instances the Constitutional Court is competent.

In the case of Poland the Supreme Administrative Court exercises its competence as a disciplinary court as a court of first and last instance (although there exists internal appeal to an extended panel) and provides for an administrative judge to be held criminally liable if there is a reasonable suspicion that the judge has committed an offence.

Case law

33. The analysis of the answers to this part of the questionnaire shows that there is currently no well-established case law regarding the waiver of judicial immunity.

Among all respondents only Poland referred to one case in the last 5 years (Resolution of SAC-Disciplinary Court of 28 October 2013, Case No. I OW 227/13). The proceedings in that case have been initiated on foot of a motion of the public prosecutor for permission to hold a judge criminally liable but the judge himself filed for the issuance of such a resolution. As a consequence the court allowed the judge to be held criminally liable on his own motion.

In that case the judge concerned was accused of unintentionally, while driving a car, of causing an accident in which a passenger of a moped suffered a bodily injury amounting to a
violation of the safety rules for land traffic which is treated as a misdemeanour under the Polish Penal Code.

In the reasons given for its decision the SAC, as a disciplinary court did not deliver any explanation on the issue of judicial independence but explained that “immunity proceedings” are interlocutory proceedings, connected with the pretrial (criminal) proceedings in rem, determining the possibility of conducting criminal proceedings against a judge that is protected by immunity. The Court also noted that the proceedings concerning the criminal liability of a judge is not a disciplinary proceeding in addition to a criminal proceeding.

Summary

34. It is well known that rules on immunity serve the main purpose of protecting the judge from pressure exerted through unfounded accusations raised in order to influence his or her judgment. On the other hand judges are required to observe a very high standard of professional but also private behaviour.

It can be observed that there is a significant variation in the law of Member States in relation to the scope of review. Judicial immunity is not a common feature in respondent European countries. In those in which it exists, the immunity may be of a procedural or substantive nature.

In most of the European countries there has been no development of well-established law concerning the waiver of judicial immunity.

Chapter three: Recusal requests regarding judges

8. Review of a decision in which the impartiality of a judge is challenged

35. The next general question asked which court of last instance is competent in a situation in which a judge is challenged on a lack of impartiality.

In nearly all respondent states there are legal provisions regarding alleged lack of impartiality of the judge and recusal of a judge from involvement in the affected case.

1 respondent (Belgium) provided no answer. It can therefore be concluded that it is likely that in that country there is no specific legal provision on the matter. Also Lithuania indicated that the issue is not expressly regulated in legislation or in case law.

It must be noted that the answers of respondent countries are differentiated when it comes to details of the regulation of the issue in national law.
National provisions regarding what court has jurisdiction to decide at last instance on recusal of a judge and whether the possibility to challenge orders (decisions) exists, vary between respondent states.

In most states the supreme jurisdictions are competent as courts of last instance in cases concerning recusal of a judge on grounds of a lack of impartiality review of decisions on dismissal of judges. Some reports indicated that the Supreme Administrative Court or the Council of State is competent in such cases concerning administrative judges and the Supreme Court / Court of Cassation for ‘ordinary’ judges (Finland, France, Luxemburg).

There were also answers mentioning only one competent court: for example in the United Kingdom – the Supreme Court, in Bulgaria and Portugal – the Supreme Administrative Court, in Romania – the High Court of Cassation and Justice, in Germany – the Federal Administrative Court, in Malta – Constitutional Court, in the Netherlands – High Court (for judges) and Council of State (state councillors).

It must be noted that not all respondent countries mentioned legal provisions regulating circumstances which disqualify a judge from performing his/her office by hearing cases assigned to him/her.

In Denmark the judge himself must assess whether there are grounds for recusal in the case in question. An order made by a judge recusing himself or herself is final and is not subject to an appeal. The Appeals Permission Board may grant permission to appeal an order of a judge declining to recuse himself or herself if the order concerns issues of material importance to the progress of the case or issues of decisive importance to the party and there is cause in general to have the decision reviewed by the high court as the appellate court.

In Croatia the judge in question is excluded by a decision of the President of the relevant Court. The judge may not lodge an appeal against the decision of the President. In administrative disputes, an appeal may only be brought by a party against a concrete judgement.

According to national procedural law in Slovenia a party (as well as a judge him/herself) may request the recusal of a judge due to a lack of impartiality. No legal remedy is available in the event of the request being granted by the president of the relevant court. A decision of the president refusing the request cannot be challenged directly. However this may be a ground upon which the final judicial decision may be appealed. A court decision refusing to recuse a higher judge may be challenged before the Supreme Court.

According to the Latvian response, a participant in an administrative proceeding may, in cases in which a lack of impartiality is alleged, apply for recusal of a judge or the entire court panel in writing or orally. The court makes a decision regarding the recusal. This decision
may be appealed to the higher administrative court. A decision of the Department of Administrative Cases (of the Supreme Court) may not be appealed.

In Ireland decisions on challenges concerning the lack of impartiality of judges generally come before the courts by way of appeal or judicial review proceedings. This usually follows an unsuccessful application made in court for a judge to recuse himself or herself from hearing proceedings by reason of alleged bias.

In Cyprus the Supreme Court may examine allegations of impartiality on appeal against decisions of inferior courts.

In the Czech Republic there is a differentiated legal solution. The Supreme Administrative Court makes the final decision on objections concerning the impartiality of judges of the administrative departments of regional courts or judges of the Supreme Administrative Court. However in cases where the regional court (as an administrative court) must issue a decision within a period of days, the objection may be dismissed where a cassation complaint may be brought against the merits of the decision. It is therefore possible to conclude that the question of the legality of dismissal of the request on recusal can be proofed in course of hearing of the cassation as such.

In Spain the competence to make a decision on the recusal of a judge belongs normally to the same chamber to which the judge in question belongs, but without his / her presence. In the case of a first instance judge, the decision is subject to appeal before the court of appeal.

In Austria the Supreme Administrative Court is competent to review decisions concerning the alleged lack of impartiality of judges from Administrative Courts. A judge does not have an automatic right to refuse to hear a case. However, in cases where a judge lacks impartiality, he or she is obliged to notify the President. If an impartial judge refrains from notifying the President of his or her impartiality and makes a decision in the case, a procedural irregularity may arise, which may lead to the annulment of the decision by the Supreme Administrative Court. According to the Proceedings of Administrative Courts Act members of an Administrative Court, expert law judges and judicial officers shall in case of a conflict of interest notify the President and abstain from exercising their office.

In exercising their duties, administrative officers shall abstain from exercising their office and cause to have appointed a substitute:

1. in matters in which they themselves are involved, or one of their relatives (§ 36a) or one of the persons under their guardianship is involved;
2. in matters in which they were or are appointed representative of a party;
3. if there are any other important reasons resulting in doubts as to them being fully unbiased;
4. in an appeals proceeding if they were involved in issuing the ruling appealed against or the preliminary decision on appeal.
The reasons enumerated above in points 1-2 and 4 are so called “absolute” reasons of lack of impartiality whereas reasons indicated under point 3 constitute “relative” reasons of lack of impartiality.

In Latvia the national legislator has specified the grounds of recusal. According to the Latvian Administrative Procedure Law, a judge is not entitled to participate in the adjudication of a matter if he/she:

1) in the previous adjudication of the matter has participated in the proceedings as a participant in the administrative proceeding, witness, expert, interpreter or registrar of the court sitting;
2) is in kinship relations up to the third degree, or in affinity relations up to the second degree, with any participant in the administrative proceeding;
3) is in kinship relations up to the third degree, or affinity relations up to the second degree, with any judge who is in the panel of the court adjudicating the matter; or
4) has a direct or indirect personal interest in the outcome of the matter, or if there are other circumstances that cause well founded doubt as to his or her impartiality.

In Greece the request of the applicant for recusal is decided in the absence of the judge in question by the panel to which he or she belongs. The order/decision is not subject to appeal. Nevertheless the judgment of that court is subject to appeal and its examination will involve a consideration of the legality of the decision.

In Slovakia the administrative courts (also civil and criminal) have the power to make a decision in relation to the disqualification of a judge from an adjudicating panel whenever there are reasonable grounds to question his/her impartiality with respect to the case under consideration or to persons directly involved in the procedure concerned. The decision in that matter is made by the superior court sitting on the panel and may be challenged before the Constitutional court as a court of last resort.

In Estonia the question of impartiality may be raised in the course of court proceedings. In this case these arguments are dealt with first by the court itself and then, if necessary, by the court of higher instance. A court decision of first instance may be challenged first at the circuit court and further at the Supreme Court. It must be noted that separate disciplinary proceedings may be initiated against a judge on the grounds of alleged lack of impartiality. The decision of the disciplinary committee may be challenged at the Supreme Court.

According to the report of Finland, a recusal request is settled by the decision of the court which is competent in the main proceedings in question and can be subject to ordinary appeal. The Supreme Administrative Court is the highest court in administrative judicial matters, and the Supreme Court in civil and criminal matters.
In Sweden, the competent court is the court above the court of the judge who is the subject of the challenge (appeal court). Challenges directed at judges of the Supreme Courts are dealt with by colleagues in another division of the Court.

In Poland there are “absolute” reasons of lack of impartiality (i.e. legal relationship to a party, relationship by blood or by marriage).

According to the Law on Proceedings before Administrative Courts a judge shall be disqualified from performing his/her office by operation of the Act itself in cases:

1) in which he/she is a party to the case or remains in such a legal relationship to a party that the outcome of the case affects his/her rights or obligations;

2) of his/her spouse, persons related to him/her by blood or marriage, directly or collaterally, within the fourth degree of consanguinity (relationship by blood) or the second degree of affinity (relation by marriage);

3) of persons related to him/her by adoption, custody or guardianship;

4) in which he/she was or still is an agent of one of the parties;

5) in which he/she has rendered legal services for one of the parties or any other services relevant to the case;

6) in which he/she participated in the issuance of the challenged judicial decision and in cases concerning the validity of a legal act prepared with his/her participation or examined by him/her, as well as in cases in which he/she has acted as a public prosecutor;

6a) concerning a complaint against a decision or order ruling on the merits of the case made in extraordinary administrative proceedings if in earlier administrative court proceedings concerning the review of the legality of a decision or order made in ordinary administrative proceedings he/she participated in rendering a judgment or an order concluding the proceedings in the case;

7) in which he/she participated in resolving the case by public administration authorities.

Irrespective of those reasons the court shall disqualify the judge either at his/her own request or at the request of a party if there exists a circumstance of such a kind that would give rise to justified doubts as to his/her impartiality in the case. The suspected judge shall give an explanation concerning the circumstances raised in the motion. Notwithstanding the above, a judge should always notify to the court the existence of any grounds of his/her disqualification and refrain from participation in the case. The recusal of a judge is decided by the administrative court in which the case is heard. The party (but not the judge requesting for his/her disqualification) may lie an interlocutory appeal to the Supreme Administrative Court from an order dealing with dismissal of a motion for disqualification of a judge.
In Serbia and Romania the question of the lack of impartiality is dealt with in disciplinary proceedings. The last instance courts are either the Administrative Court and High Court of Cassation and Justice, as appropriate.

In Italy disciplinary proceedings against the judge in question may be instituted in each judicial body under the auspices of a permanent self-governed Council elected by the judges themselves. The Council of State is the last instance competent court in that matter.

The above 3 countries did not indicate whether the party to proceedings has the right to request the recusal of a judge due to lack of impartiality.

In Hungary there are specific regulations in relation to the recusal of judges. A biased judge must be excluded from from the proceedings and shall not proceed in the case. If the judge himself has reported bias or excluded himself from the proceedings, the president of the given court shall assign the case to another judicial panel or judge. In such cases no separate decision is needed on the issue of bias. If bias is not handled through administrative channels, another judicial panel of the same court acting at the same instance shall adopt a decision on the judge’s bias, without holding a formal hearing. Where all the judicial panels of a court are affected by a ground for exclusion, or a ground for exclusion applies to the entire court, the appellate court or, in case of a ground affecting the general (county level) court sitting as an appellate court or as an administrative and labour court, the regional court of appeal of jurisdiction, whereas in case of a ground affecting a regional court of appeal, the Curia shall have powers to pass a decision on the exclusion.

The decision on the exclusion is not subject to appeal. A complaint against a refusal of an exclusion may be lodged in an appeal filed against the judicial decision on-merits.

**Case-law**

36. In case of 15 respondent countries there was no case-law in last 5 years regarding a judge’s lack of impartiality (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Hungary, Lithuania, Luxemburg, Romania, Serbia, Slovenia, United Kingdom).

In Lithuania the absence of case-law it probably the outcome of a lack of national legislation regarding challenges against the alleged lack of impartiality of a judge.

The issue of the alleged lack of impartiality of a judge was the subject of case-law in following respondent countries: Austria, Finland, Germany, Greece, Ireland, Italy, Latvia, The Netherlands, Malta, Poland, Portugal, Slovakia, Sweden.

The number of cases varied: Greece (1), Portugal (2), Finland, Ireland, Malta, Sweden, Slovakia (3), Italy (8), France (10), The Netherlands (89), Germany (127), Austria (148), Poland (813).
Latvia indicated that, in general, the number of applications for recusal of a judge is high, but an overwhelming majority of such applications are rejected.

In Poland the number of cases handled by the SAC in relation to the provisions regarding recusal of a judge was high (813). As in the case of Latvia, most of the applications were rejected.

In Germany an objection relating to impartiality is in many cases raised by the parties before the Federal Administrative Court in order to claim that there was a procedural fault in the second instance decision. In some cases an objection in relation to impartiality is directed against the Federal Administrative Court itself. The reasons for such objections relate mainly to an allegation that the way in which a judge has conducted the proceedings so far indicates that he or she is prejudiced. Alternatively, it may be alleged that the judge is prejudiced due to his or her past involvement with the same or a similar matter as a judge or as a civil servant in the administration.

In the vast majority of cases such objections are not considered well-founded.

Germany provided an example of a case in which a judge of the Federal Administrative Court had been called as a legal expert by a parliamentary committee to evaluate draft legislation. After the legal norms had come into effect his impartiality was challenged by a party to the proceedings who claimed that his decision was predetermined by the legal opinions which he had expressed in the parliamentary hearing. The Federal Administrative Court - deciding this issue as a preliminary question without the rejected judge - held, that the claim was not well-founded and that prior involvement in a parliamentary hearing did not cause impartiality to the parties, especially if there was no direct connection to the parties in that hearing.

The first case highlighted by Sweden concerned a judge of the Supreme Administrative Court who, before becoming a judge, was head of the legislative department of the Ministry of finance. On appeal it was argued that the judge was not impartial as he had participated in the adoption of the legislation under which the case would be decided. The claim was rejected.

In a second case a public prosecutor was temporarily on leave from his ordinary work and worked as a judge in a court of appeal. The Supreme Court found that the court of appeal had not been impartial when deciding on a criminal case, as one of the three judges had strong connections with the authority of the prosecutors. The court also indicated that there had been a violation of judicial independence and the right to an impartial court as guaranteed by the constitution and the ECHR.

In Austria of the decisions of the Supreme Administrative Court concerned “relative” reasons. In general, according to Austrian case-law, remarks of a judge during a hearing indicating a lack of objectivity may be considered a “relative” reason if it raises a doubt as to
his impartiality. An example was provided of a case in which a decision of an Administrative Court was annulled due to comments made by the deciding judge. A further example of a "relative" reason for excluding a judge was a case in which the deciding judge asked the complainant ahead of the oral hearing whether he/she wanted to withdraw the complaint because a similar case had already been decided and the minimum penalty could not be imposed. It was said that this would mean that the complainant would have to bear the costs. A doubt as to impartiality had also arisen. In that case the Supreme Administrative Court annulled that decision.

Greece specified only one case. The Assembly of the Council of State ruled on a case concerning the constitutionality of a recent law on social security and retirement pensions. In that case the councilors found that one of the rapporteur judges who had, before the voting of the law by parliament, examined the project as member of the Central Commission for the Preparation of Laws, could not for this reason be part of the adjudicating panel.

The Netherlands provided a number of examples of case-law that indicated that well-established case law has been developed on the matter of impartiality in recent years.

One of the cases concerned a similar situation as highlighted in cases adjudicated by the Federal Administrative Court of Germany and the Supreme Administrative Court of Sweden. In the Dutch case the State Councillor was a member of the Full Council of State during the time at which advice was given on the disputed law. The court rejected the request on the grounds that in the main case there were no legal questions relating to the advice of the Council of State on the Higher education and Research Act.

The Council of State has developed in recent years detailed case-law on the subject concerning issues such as interweaving interests, jurisprudence of the state councillor, conduct of the state councillor during hearing, internal consultations and procedural decisions.

Across the range of case-law it is worth to mention the following findings of the Council of State concerning impartiality:

- The State Councillor can be familiar with the judge who issued the ruling against which a party has appealed because it is up to the appellant to demonstrate particular circumstances which justify an exception to the presumption that the State Councillor is impartial. The fact that the judge who issued the ruling in the past worked as an official at the Council of State and has been affiliated to the same court to which the State Councillor has also been affiliated do not constitute special circumstances leading to an exception to that presumption.
- Past membership of and role of the state councillor in a political party does not give rise to an objectively justified fear of bias.
- The fact that a judge is a member of the church and has a certain religious belief or background does not constitute a ground of challenge.
- The content of the justification of a previous ruling does not provide a starting point for the justified fear of bias of the State Councillor concerned.
- Criticism of earlier judgments or the manner in which the State Councillor has previously applied the law do not constitute special circumstances which justify an exception to the assumption that the State Councillor is deemed to be impartial by virtue of its appointment. It is part of the normal task of the State Councillor to assess the relevant facts in each case and to apply the relevant rules of law to those facts.
- The involvement of the State Councillor in previous affairs of an appellant (in which he has had negative experience) does not lead to the conclusion that he will not judge the pending case impartially.
- The treatment of the applicant during a hearing does not, as such, constitute a fact or circumstance that could give rise to the opinion that there is bias or that a fear of bias is justified.
- Statements made by the State Councillor at the hearing do not justify a decision that judicial impartiality may have been harmed.
- The fact that a State Councillor paid attention only to the statements of another party and not to the arguments of the appellant does not justify the exception on the assumption that the State Councillor is deemed to be impartial by virtue of its appointment.
- Refusal to allow filming during the hearing does not violate the openness of the court session.
- The fact that only the representative of the party has been given the opportunity to speak does not justify the opinion that the Council of State has led the session in a manner that shows bias, or justified the fear of bias.
- The limitation of speaking time given to the parties does constitute grounds for assuming that the judge leads the session in a manner that demonstrates bias.

It is worth mentioning in greater detail 2 cases highlighted by the response of Ireland. In the first case, the Supreme Court considered whether the trial judge erred in law in hearing and determining the three applications in circumstances where there was or could have been a perception of bias on his part due to his holding of interests in the shares of the first respondent company, which were not disclosed and were not known to the applicant. The Court held that the test to be applied when considering the issue of perceived bias was whether a reasonable person in possession of all relevant facts in all the circumstances of the case would have a reasonable apprehension that there would not be a fair trial from an impartial judge. The Court was of the view that a reasonable person would, in general, have a concern if a judge had shares himself or herself (not in a shares unit) in a company which was a party to an action being heard by that judge.

In such cases, a judge should generally recuse himself or herself from hearing proceedings. The Court noted that judicial impartiality “is the fundamental principle upon which the
administration of justice proceeds, upon which rests confidence in the judiciary, and upon which rests the rule of law.” The Supreme Court found that the responsibility lies with a judge, and not with the parties, to make inquiries and inform parties of any holdings in companies. As in this case the trial judge held the shares himself, as opposed to them being in a trust or other fund. The outcome of that case was the quashing of three judgments of the High Court and the remittal of the cases back for hearing by a different judge.

In the second case the issue at stake was whether the judge of the Court of Appeal should have recused herself on the grounds of objective bias. The judge in question had chaired and addressed a private conference run by the solicitors acting for the State Claims Agency, who were defending the appeal. The judge was pictured among members of the firm of solicitors and with the head of the State Claims Agency during the conference. The Court dismissed the appeal but stated that judges must be careful in their extra-judicial activities and must take care not to be put in situations which could lead to applications to recuse themselves. The court, in the view of the test mentioned in the first case highlighted above, found that the reasonable observer would come to the conclusion that the judge was attending and participating in and chairing a conference on an issue of public and legal interest in a topic of importance in the field of medical negligence litigation, and that such participation would be viewed by the reasonable observer as being appropriate and a helpful activity on the part of the judge in questioning describing the work of a working group during conference which she had chaired and concerns that had arisen in the course of such litigation.

Finland also belongs to the countries with developed case-law on the issue. As an example it is worth mentioning a case decided by the Supreme Administrative Court on the issue of alleged bias of a lay expert judge. The case concerned an application for placing a child under public custody which, according to Finnish law, must be heard in the regional administrative court in a chamber including one expert member (e.g. children’s psychiatrists working in public or private practice). In the case in question, the expert member of the court held public office in the same municipality which had made the custody application. However, the expert member had not personally taken care of the child in question or participated in the preparation of the application, nor was he supervising or working under the person who had submitted the application. The issue at stake in the Supreme Administrative Court was whether the expert member was biased to take part in the case. The SAC held that the expert member was not biased.

A case described in the response of Malta is also worth mentioning. In that case the claimant filed a claim against the Church for damages resulting from child abuse to which they were subjected whilst living in a Church home. The presiding judge was the President of a Foundation which managed a catholic radio station called “Radio Maria”. The presiding judge in question refused the request for recusal. Although the appellate court upheld the decision, the Constitutional Court took a different. The Court found that although there was no objective link between the Church and the Foundation which ran the radio station, there
was a perception that the two could have close links as a result of the fact that the program
director of the station was a priest who was directly answerable for his actions to the
Archbishop and, as a result, to the Church. This perception, though not attributable to the
presiding Judge who, as President of the Foundation, was separate and distinct from the
Program Director, was deemed to be sufficient for the request for recusal to be upheld.

That case confirms – as it has been stated in case-law of the Council of State of the
Netherlands – that the fact that a judge is a member of the church and has a certain religious
belief or background does not constitute as such a ground of challenge.

It is also a good example of the importance and significance of “relative” grounds for recusal.

**Summary**

37. It should be noted that among the respondent states there is no single model of
jurisdiction applicable in cases concerning a lack of impartiality. A party to proceedings does
not always have the right to file a request that a particular judge be recused. In addition,
although there are strong similarities among respondent states, there is no uniform
catalogue of “absolute” and “relative” reasons for recusal in respect of a lack of impartiality.

Regardless of the existence in certain states of national legislation, the tests developed by
supreme jurisdictions case-law may be helpful in the future, in particular for countries in
which the issue is currently regulated neither by legislation nor principles developed at
judicial level.

It can be concluded that in half of the respondent countries well-established case law has
developed in recent years on the matter, especially in the case-law of Austria, Germany,
Ireland, The Netherlands and Poland.

**Chapter four: Organisation of the justice system**

9. Review of decisions on allocation and transfer of cases within a court

38. Question 9 concerns the competence to decide disputes on the allocation and
transfer of cases within a court. Ireland did not provide any answer to this question.
Lithuania only reported that there is no statutory regulation of such issues.

The answers provided indicate that the system of distribution of cases and/or composition
of the panels are mostly determined by a decision made by the president of the court
(Slovenia, Latvia, Greece, Slovakia and France), sometimes taken with the involvement of the
respective self-governing body of judges (e. g. the Czech Republic). In some countries,
however, it is the self-governing body or the plenary of the court which is competent to decide such questions (Spain, Estonia and Poland). The cases are assigned or reassigned individually by the president of the court in Denmark, Croatia and Finland or by the registrar in Cyprus.

39. In the majority of respondent countries there is no remedy against the allocation or transfer of cases within the court (Belgium, Denmark, Luxembourg, Latvia, Cyprus, Czechia, Poland, Hungary, Romania, Sweden, Greece and France). In other countries remedies exist but no cases are reported (Croatia, Germany, Spain, United Kingdom, Slovakia, Netherlands, Estonia, Finland, Portugal).

Besides remedies, other mechanisms for reviewing of the decisions on the allocation or transfer of cases within a court are in place in four countries. In Latvia, a wrongful decision on this matter may result in disciplinary proceedings against the president of the relevant court. In Sweden, the ombudsperson may investigate whether there has been a violation of the law in connection with these issues. In Serbia, a judge may raise an objection against the allocation plan and the president of the superior court (or the full-court, if the Supreme Court is at stake) must make a decision on the issue. In Luxembourg, the higher court exercises the supervision on this matter.

Only few countries have provided examples of case-law concerning this question. In Slovenia, the Administrative Court decided in the case No. U 209/2006 that the transfer of a judge to another department of the same court did not require the consent of the judge in question. Austria reported on several cases concerning the application of § 20 of the Asylum Act providing certain rules on deciding cases of alleged violation of the right to sexual self-determination by a judge of their sex. France reported on a dispute involving a regulation limiting the appointment of the juge d’instruction to a period of 10 years (this case relates more to question No. 7 on dismissal of a judge). Bulgaria indicated that there are dozens of cases every year. However it seems that these cases may involve decisions involving competency disputes. The Maltese Constitutional Court dismissed a complaint in case No. 79/2010 (Cecil Pace vs The Prime Minister and the Attorney General) against the reassignment of related cases to a single judge of a court of first instance. The Italian Council of State decided in case No. 10/2017 that a resolution of the president of a court on the redistribution of pending civil cases may not be contested before the administrative courts. The parties to the proceedings may only appeal against the decision and claim a breach of procedural rules.

10. Review of decisions concerning the reorganisation of the judicial map and the organisation of courts
40. This part of the research is focused on remedies against interference in the judicial power in form of reorganisation of the judicial map in a particular country. There are no answers from Ireland, Bulgaria and Serbia.

The organisation of courts and its changes are set out in legislation in Denmark, Luxembourg, Sweden, Czech Republic, Slovakia and Finland. In Cyprus it is even regulated by the Constitution. In Belgium, Lithuania and Greece the issue is subject to regulation issued by executive bodies. Reorganisation may be undertaken by a decision of the Minister of Justice in Croatia, Spain, France and Estonia (in the latter case with consent of a self-governing body of judiciary). The judicial map may be changed by the decision of the President in Poland, whereas in Romania a decision of Judicial Council is required.

There are no possible remedies against such acts in Sweden, Finland and Poland.

Affected individuals may bring a complaint against reorganisation to the Constitutional Court in the Czech Republic, Slovakia, Lithuania, or in Italy. The Supreme Court is the competent court of last instance in Cyprus, Luxembourg, Spain, United Kingdom, Netherlands, Estonia, Hungary, Romania. The Supreme Administrative Court has jurisdiction in Austria and Portugal and the Council of State is responsible in Greece, France and Italy (with regard to acts of realisation of the reform). In Germany a special court, entitled Service Court has jurisdiction.

41. Only 5 countries reported on case-law relating to this question.

The Belgian Council of State rendered three decisions: Judgments No. 234971 and 224468 confirming that the Council of State has competence to review the legality of personal acts connected with reorganisation such as appointment of the judges or appointment of the presidents of the courts. In judgment No. 238661 the Council of State dealt with a complaint against a Royal Decree on repartition of cases between the courts of first instance.

The Greek Council of State has twice provided its opinion on the draft of regulation on the creation of the new court of appeal (avis No. 74/2010 and 20/2011). It also considered a complaint against this regulation (judgment No. 3973/2013).

The French Council of State has decided a couple of cases arising out of actions filed by the Syndicat de la magistrature (trade union of the French magistrates) against regulations of the Minister of Justice on the division of workload concerning remedies filed by foreigners placed in detention (decisions No. 354407 and 357178). It has also considered appeals from municipalities, unions of legal professionals and citizens against decrees amending seats and the courts (decision No. 322407 of 19 February 2010).

The Supreme Administrative Court of Portugal has considered a case concerning the reduction of the number judicial positions at the Administrative Tribunal in Lisbon (case No. 885/08).
The Italian Council of State has rejected complaints against a legislative decree of the Government on measures connected with a project abolishing the first instance court in Lucera (judgment No. 3535/2016).

11. Review of decisions of other bodies, such as Councils for the Judiciary, concerning the functioning of the judiciary (and concerning judges, as far as they relate to the situations already listed above).

42. The question was answered by all respondent countries.

A Council for the Judiciary or similar body exists in Belgium (Conseil Supérieur de la Justice), Bulgaria (Supreme Judicial Council), Croatia (State Judicial Council), Cyprus (Supreme Council of Judicature), Czech Republic, Denmark (Court Administration), Estonia (Council for Administration of Courts), France (justice judiciaire: Conseil supérieur de la Magistrature; justice administrative: Conseil supérieur des tribunaux administratifs et des cours administratives d'appel et Commission supérieure du Conseil d’État), Greece (Conseil Supérieur), Hungary, Italy (assemblies elected by the judges themselves), Latvia (Council for the Judiciary), Lithuania (Judicial Council), Malta, the Netherlands (Council for the Judiciary), Poland (National Council of the Judiciary), Portugal, Romania (Superior Council of Magistrates), Serbia, Slovakia (Judicial Council), Slovenia (Judicial Council), Spain (Conseil Général du Pouvoir Judiciaire), Sweden and the United Kingdom.

43. Judicial review of decisions of these bodies is possible in a large number of respondent countries.

- In Bulgaria, decisions of the Supreme Judicial Council on the appointment, promotion and transfer of judges and the imposition of disciplinary sanctions may be appealed to the Supreme Administrative Court. However, decisions that do not directly concern magistrates may not be appealed to the Supreme Administrative Court.
- In Croatia, decisions of the State Judicial Council on the appointment, dismissal and disciplinary responsibility of a judge may be challenged before the Constitutional Court. Decisions of this Council on the transfer of a judge may be challenged before the administrative court with appeal to the High Administrative Court. Decisions of the Council on the individual evaluation of a judge may be challenged before a special chamber of the Supreme Court.
- In Cyprus, decisions of the Supreme Council of Judicature may only be reviewed by the Supreme Council itself.
- In Denmark, matters of constitutional and administrative law are tried by the city courts, the high courts and the Supreme Court as no specific constitutional court or administrative courts exist in Denmark.
- In Estonia, decisions of the Council for Administration of Courts may be challenged before the administrative court whose judgments may be appealed to the circuit court. Decisions of the circuit court may be further appealed to the Supreme Court.

- In France, decisions of the Conseil supérieur de la Magistrature may be challenged before the Conseil d’État. Decisions of the Conseil supérieur des tribunaux administratifs et des cours administratives d’appel and of the Commission Supérieure du Conseil d’État may be challenged before the Conseil d’État.

- In Italy, decisions of the aforementioned assemblies may be opposed by the relevant judge before an administrative court of first instance and then in front of the Consiglio di Stato as a judge of appeal.

- In Malta, as cases of judicial review of administrative decisions are decided upon by the ordinary Court, the Court of Appeal, as the court of last instance, unless an issue of a constitutional nature is raised. In such a case the court of last instance would be the Constitutional Court.

- In the Netherlands, judges may lodge an appeal with the Centrale Raad van Beroep (highest administrative court in social cases). State Councillors may only issue a civil claim against the State before a civil court alleging that an unlawful act has been taken against them.

- In Poland, the decision of the National Council of the Judiciary concerning the appointment of a judge (positive or negative for the candidate) may be challenged by a candidate before the Supreme Court. However, such a challenge involves an examination of the procedure of adopting the resolution by the National Council of the Judiciary only.

- In Portugal, competence lies with the Supreme Administrative Court.

- In Romania, decisions issued by the Superior Council of Magistrates may, as with any administrative act, be challenged. The court of last instance is the High Court of Cassation and Justice (Administrative Division).

- In Serbia, the Administrative Court is competent in cases regarding decisions on the election of judges and decisions on the termination of the judicial office at the Constitutional Court.

- In Slovakia, decisions of the Judicial Council may be reviewed if natural or legal persons allege an infringement of their fundamental rights or freedoms.

- In Slovenia, decisions of the Judicial Council may be challenged before the Supreme Court (decision by senate, composed of five Supreme Court judges).

- In Spain, the jurisdiction to hear appeals against decisions of the Conseil Général du Pouvoir Judiciaire belongs to the Chamber of Administrative Litigation of the Supreme Court (Court of Cassation) in first and last resort.

- In Sweden, the labour court may perform a judicial review of these decisions.

- In the United Kingdom such decisions are reviewed by the Supreme Court.

44. 4 respondent countries have indicated that there have been relevant cases in relation to the issue between 2012 and 2017 or earlier (landmark cases). However, those respondent
countries have not supplied specific information about these cases, either because the cases have already been described in the context of earlier questions or remain classified, such as cases on labor relations.

In some other respondent countries judicial review of decisions of bodies such as Councils for the Judiciary is not possible.

- In Belgium, the Conseil Supérieur de la Justice is not considered to be an administrative body, except when its decisions concern public contracts or members of its staff (excluding magistrates).
- In the Czech Republic, there is no judicial review of decisions of the Council for the Judiciary.
- In Greece, it is not possible to lodge an appeal against the decisions of the Conseil Supérieur.
- In Latvia, it is not possible to appeal decisions of the Council for the Judiciary at the moment, but amendments to the law "On Judiciary" are in preparation that provide for specific rights to appeal its decisions.
- In Lithuania, decisions of the Judicial Council concerning the dismissal of judges are not of themselves subject to appeal as they are only advisory and not compulsory for the President of the Republic.
- In Hungary, there is no legal remedy in such cases.

45. In some of the respondent countries a Council for the Judiciary or similar body does not exist. This is the case in Austria, Finland, Germany, Ireland and Luxembourg.

However, in Finland, the Chancellor of Justice and the Parliamentary Ombudsman oversee the legality of public administration in general.

In Germany, in some Federal States and at a Federal Level judges are elected by an election committee. Their decisions may be challenged before the administrative courts.

In Luxembourg, the creation of a Higher Council for the Judiciary is announced for the near future. In Ireland, draft legislation is currently before Parliament which would establish a Judicial Council.

Chapter five: Other

12. Other relevant situation(s) at risk
46. This question was answered by 18 respondent countries. Out of these, 13 Member States could not identify additional situations which could give rise to a risk to judicial independence.

47. 5 respondent countries have referred to other situations.

Germany, in a more general way, mentions any kind of order or undue influence by the judicial Administration that is aimed at the treatment or decision of a single case. However, there have been no cases on this matter.

Luxembourg notes that according to the Constitution, the Grand Duke appoints magistrates under the countersignature of the Minister of Justice who assumes political responsibility. Although the appearance of a link of dependence with the executive power could be raised, the reality is that for many decades, the tenants of the executive power have always and without exception followed the required opinions of the Courts.

Ireland and Portugal draw attention to issues of judicial remuneration and pension entitlements.

In Ireland, in one case (*O’Byrne v Minister for Finance [1959] I.R. 1*) the widow of a deceased judge contended that income tax deductions were reductions of judicial remuneration contrary to Article 35.5 of the Constitution of Ireland that states that “[t]he remuneration of a judge shall not be reduced during his continuance in office.” The Supreme Court was of the view that the purpose of Article 35.5 of the Constitution was to safeguard the independence of the judiciary from pressure or interference by the Executive. The Court found that this objective was achieved as long as the tax was not used to discriminate against judges. To require a judge to pay income tax on the same basis as other citizens could not be said to constitute an attack on judicial independence.

- In another case (*McMenamin v Ireland [1996] 3 I.R. 100*) a judge of the District Court who was due to retire claimed that the failure of the Parliament to revise superannuation benefits payable to judges in light of changed mortality tables and interest rates constituted a breach of Article 35.5 of the Constitution. The Supreme Court held that the failure of the Parliament to revise the applicable judicial pension provisions in light of the dramatically changed circumstances constituted a constitutional injustice having regard to the judicial remuneration provisions of Article 35 of the Constitution. The Court was of the view that the situation required to be regulated by the legislature.

In Portugal two appeals have been lodged seeking the annulment of administrative acts under Law No. 75/2014, which established a reduction in salaries for inter alia magistrates. The appellants contended that this measure violated the principle of the independence of judges set out in Article 203 of the Constitution of the Republic of Portugal, and enshrined in Article 19(1), second subparagraph, of the Treaty of the European Union and Article 47 of the Charter of Fundamental Rights of the European Union. In the first case (no. 438/14) the
appeal was dismissed by a judgment that was confirmed by a judgment of the Plenary Assembly of the Section. In the second case (no. 67/15) the Supreme Administrative Court made a reference for a preliminary ruling to the Court of Justice of the European Union. The Court of Justice (judgment of 27 February 2018, Case C-64/16) ruled that the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas (Court of Auditors, Portugal).

Greece describes some specific cases.

In one case (judgment no. 5203/1987) a judge who, of his own will had been seconded to the Presidency of the Republic, resigned before his secondment came to an end, but the President did not accept his resignation. The Council of State ruled that it would be contrary to judicial independence to force the judge to remain in this service despite his express wishes.

In another case (judgment no. 354/1992) a judge resigned from his post and then he wanted to join the Bar. The Board of Directors of the latter refused him registration. The Council of State held that the possibility for a judge to be able to leave service when and for whatever reason seems right for him and then work as a lawyer, strengthens his independence. The legislative provision in the Lawyer’s Code which did not allow him to register with the Bar was considered contrary to the principle of judicial independence guaranteed by the Constitution.

Finally, in two cases (judgments nos. 2649/2017 and 3312/2017) appeals were lodged by unions of magistrates against a presidential decree implementing the obligation of magistrates to provide an annual declaration of assets. Although the obligation to file a declaration of assets was found to be in conformity with the constitution, the provision which stated that these declarations would be controlled by an authority presided over by a prosecutor at the Court of Cassation and comprising fourteen members from the administration, the Financial Markets Authority and the Central Bank, was considered contrary to the principle of independence of the judiciary. According to the Council of State, this principle demands that the authority should be composed mainly of judges and members of the three supreme courts and should be presided over by a judge.

The Hague, 15 May 2018